U.S. COURT OF APPEALS
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05-16964

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JERRY GREENBERG,

Plaintiff-Appellee,

v.

NATIONAL GEOGRAPHIC SOCIETY, NATIONAL GEOGRAPHIC ENTERPRISES, INC., and MINDSCAPE, INC.

Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

EN BANC BRIEF OF AMICI CURIAE JSTOR ET AL., SUPPORTING THE REQUEST OF DEFENDANTS-APPELLANTS FOR RECONSIDERATION OF THE COURT'S PREVIOUS DECISION

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

None of the amici has any parent corporation and there is no publicly held corporation that owns 10% or more of the stock of any of the amici.

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

All *amici curiae* are non-profit organizations within the scholarly community. They include (1) learned societies that (a) publish peer-reviewed, scholarly journals that constitute collective works; (b) are digitizing or considering digitizing the back-runs of these journals; and (c) have members who not only contribute to scholarly journals but also rely on such journals for their research; (2) universities and/or their presses that are undertaking digitization projects involving scholarly journals; (3) electronic archives aggregating digitized versions of scholarly journals; (4) organizations that rely on digitized scholarly journals to ensure the long-term preservation of the journals and to facilitate access to them; (5) associations of the aforementioned organizations and of other constituents within the scholarly community, including colleges and universities; or (6) other organizations that value the long-term preservation of and access to scholarly journal literature in the ways made possible by the digital medium.

Counsel for *Amici Curiae* contacted the attorneys for the principal parties in this case to seek consent to file an amici brief. Counsel for *Amici Curiae* received consent from both Plaintiff-Appellee and Defendants-Appellants.

A. Identity of *Amici Curiae*

Incorporated in 1995, JSTOR is a 501(c)(3) not-for-profit organization that is best known as an electronic archive of the full back-run of digitized versions of

important scholarly journal literature, which it licenses from publishers and learned societies.[1] Consistent with its not-for-profit status as an *archive*, in the strict sense, JSTOR faithfully replicates, in digital format, the exact image of each page of journal back-issues, beginning with volume one, issue one. JSTOR adds an "optical character recognition" component to enable the page images to be full-text searchable. Because of these features, a JSTOR user anywhere in the world readily can access any of the more than 3.7 million articles from the best academic journals in nearly fifty disciplines. This includes Benjamin Franklin's article, published in 1752, about drawing electricity from a kite flown in stormy weather, as well as far more recent material. All of a journal's content appears in full context, including the intellectual material, advertisements, and the journal's own table of contents, and users can navigate through journal issues cover-to-cover. At present, JSTOR licenses discrete collections of the over 700 digitized journals in its archive to over 3,900 libraries, universities, foundations, government agencies,

[1] In building the archive, JSTOR's mission includes the following: to improve dramatically access to these scholarly journals; to help fill gaps in existing library collections of journal backfiles; to address preservation issues such as mutilated pages and long-term deterioration of paper copy; to reduce long-term capital and operating costs of libraries associated with the storage and care of journal collections; to assist scholarly associations and publishers in making the transition to electronic modes of publication; and to study the impact of providing electronic access on the use of these scholarly material.

and other non-commercial entities in over 120 countries. More information about JSTOR is available at www.jstor.org.

Founded in 1902, the American Anthropological Association (AAA) is the world's largest professional organization of scholars and practitioners in the field of anthropology. With 11,000 members, the Arlington, Virginia-based association includes archaeologists, cultural anthropologists, biological (or physical) anthropologists, linguists and applied anthropologists in universities and colleges, research institutions, government agencies, museums, corporations and non-profits throughout the world. AAA publishes nineteen peer-reviewed scholarly journals, both in print and online, and conducts the largest annual meeting of anthropologists in the world.

The American Association for the Advancement of Science, founded in 1848, is the publisher of the world's leading general scientific journal, *Science*. The association, with more than 136,000 members and subscribers, is the world's largest non-profit interdisciplinary science organization and works to advance science and serve society through programs in science education, science and policy, international cooperation and human rights. AAAS currently serves some 262 affiliated societies and academies of science, serving 10 million individuals. *Science* has the largest paid circulation of any peer-reviewed general science journal in the world, with an estimated total readership of one million.

The American Council of Learned Societies is a non-profit federation of 69 national scholarly organizations. The mission of the ACLS is the advancement of humanistic studies in all fields of learning in the humanities and the social sciences and the maintenance and strengthening of relations among the national societies devoted to such studies.

The American Historical Association is the oldest and largest professional historical organization in the United States, bringing together nearly 5,000 institutions and more than 15,000 individuals, including college and university faculty, public historians, independent scholars, archivists, librarians, and secondary school teachers. Organized in 1884 and chartered by the United States Congress in 1884, its establishment coincided with the professionalization of history as a discipline in the United States. AHA publishes the *American Historical Review*, founded in 1894, and *Perspectives.*

The American Mathematical Society was founded in 1888 to further the interests of mathematical research and scholarship. As a non-profit society, the AMS carries out its mission by publishing scholarly journals, books, and databases, as well as holding meetings and providing outreach services to the community of mathematical scientists. The Society has over 28,000 individual members and maintains offices in Providence, RI, Ann Arbor, MI, and Washington, D.C.

The American Philological Association, founded in 1869, is the principal learned society in North America for the study of ancient Greek and Roman languages, literatures, and civilizations. While the majority of its members are university and college Classics professors, members also include scholars in other disciplines, primary and secondary school teachers, and interested lay people. For over a century this community has relied on the Association to produce several series of scholarly books and texts; the journal, *Transactions of the American Philological Association*; and an annual meeting in conjunction with the Archaeological Institute of America.

The American Physiological Society has been fostering basic and applied scientific information, including biomedical knowledge, since its founding in 1887. With approximately 11,000 members, the Society sponsors meetings on its own and in conjunction with other societies that attract as many 14,000 scientists and exhibitors. The Society also is a major publisher of books and journals, including the *American Journal of Physiology,* the *Journal of Applied Physiology, Physiological Genomics,* the *Journal of Neurophysiology,* and *Physiological Reviews.* All of the journals currently are available online with the assistance of HighWire Press. The Society, in conjunction with the International Union of Physiological Sciences, also publishes a trends-type journal, entitled *Physiology (*formerly known as *News in Physiological Sciences*). The Society recently

launched a project to post all the content of its journals, back to 1898, online for use by scientists worldwide. The Society has an extensive education program and was recognized for its commitment to developing the next generation of scientist when it received a Presidential Award for Excellence in Science, Mathematics and Engineering Mentoring (PAESMEM) in 2004.

The American Political Science Association, established in 1903, is the major professional society for individuals engaged in the study of politics and government. APSA is the one organization that brings together political scientists from all fields of inquiry, regions, and occupational endeavors. With 15,000 members from over 80 countries, APSA is the largest political science society in the world. This comprehensiveness is reflected in the APSA's annual meeting, educational projects, and publications, including the *American Political Science Review*, *Perspectives on Politics*, and *PS: Political Science and Politics*.

The American Psychological Association, a 501(c)(3) non-profit organization established in 1892, has over 150,000 members. Its purpose is to advance psychology as a means of promoting health, education and human welfare. APA publishes numerous scholarly books each year and also publishes 45 scholarly journals. In addition, APA provides five electronic databases that house scholarly psychological materials that are used for research by students and scholars.

The American Sociological Association is the major professional association of sociologists in the United States. Founded in 1905, it is a non-profit membership association of over 14,000 members, including most sociologists holding doctoral degrees from accredited universities. It publishes ten scholarly journals with wide international circulation.

The American Theological Library Association is a not-for-profit, 501(c)(3) professional association established in 1946. ATLA has more than 800 individual, institutional, and affiliate members providing programs, products, and services in support of theological and religious studies libraries and librarians. ATLA's ecumenical membership represents many religious traditions and denominations. ATLA publishes the *ATLA Newsletter*, the *Summary of Proceedings*, the *Theology Cataloging Bulletin*, and the *Annual Report*. The *ATLA Religion Database* currently indexes 673 journal titles and 250-400 polygraphs each year.

The Association of American Universities is an association of 62 leading research universities, 60 in the U.S. and 2 in Canada. The association is organized to promote effective national and institutional policies supporting research and scholarship, graduate and professional education, undergraduate education, and public service in research universities. AAU was founded in 1900 by fourteen universities offering the Ph.D. degree; its member universities are represented in the association by the presidents and chancellors of those institutions.

Founded in 2001, BioOne's non-profit mission is to work collectively to preserve cost-effective access to high-quality scientific literature focused on the biological, ecological, and environmental sciences published by not-for-profit organizations. The product of an innovative collaboration between scientific societies, libraries, academe, and the private sector, BioOne provides a uniquely valuable aggregation of the full-texts of 140 high-impact bioscience research journals from 101 publishers. Most of BioOne's titles are published by small societies and other not-for-profit organizational publishers, many of which are available electronically only through the aggregation.

The Botanical Society of America is a not-for-profit membership society that promotes botany. With approximately 3,000 members, the BSA is one of the world's largest societies devoted to the study of plants and allied organisms, Its scope encompasses all areas of plant biology, including development, physiology, reproductive biology, evolution, phycology, genetics, mycology, ecology, systematics, molecular biology, and paleobotany. The BSA publishes *The American Journal of Botany*.

The Center for Research Libraries is a non-profit consortium of North American universities, colleges, and independent research libraries that promotes the preservation of resources for advanced research and teaching in the humanities, sciences, and social sciences. It acquires and preserves traditional and digital

resources, such as journals, newspapers, government documents, archives, and dissertations and makes them available to member institutions through interlibrary loan and electronic delivery.

The College Art Association, founded in 1911, is a non-profit membership organization representing 14,000 artists, art historians, scholars, curators, collectors, educators, art publishers and other visual arts professionals who, by vocation or avocation, are concerned about and are committed to the practice of art, teaching and research about the visual arts and humanities. Another 2,000 university art and art history departments, museums, libraries and professional and commercial organizations are institutional members of CAA.

The Council on Library and Information Resources is an independent, non-profit organization dedicated to improving the management of information for research, teaching, and learning. CLIR works to expand access to information, however recorded and preserved, as a public good.

Duke University Press is the scholarly publishing arm of Duke University and is considered a department of the university. It publishes approximately 115 books per year and over 30 journals, primarily in the humanities and social sciences.

The Ecological Society of America is a scientific, non-profit, 10,000-member organization founded in 1915. Through reports, journals, membership

research, and expert testimony to Congress, ESA seeks to promote the responsible application of ecological data and principles to the solution of environmental problems. ESA publishes four scientific, peer-reviewed journals: *Ecology, Ecological Applications, Ecological Monographs*, and *Frontiers in Ecology and the Environment.*

EDUCAUSE is a non-profit association whose mission is to advance higher education by promoting the intelligent use of information technology. Membership is open to institutions of higher education, corporations serving the higher education information technology market, and other related associations and organizations. EDUCAUSE programs include professional development activities, print and electronic publications, strategic policy initiatives, research, awards for leadership and exemplary practices, and a wealth of online information services. The current membership comprises nearly 2,100 colleges, universities, and education organizations, including more than 200 corporations, and more than 16,500 active member representatives.

Ithaka is a not-for-profit organization with a mission to accelerate the productive uses of information technologies for the benefit of higher education worldwide. Ithaka's activities include Portico, a major initiative dedicated to preserving scholarly literature published in electronic form so that these fragile materials remain accessible to future scholars, researchers and students, and Aluka,

an international, collaborative initiative dedicated to building an online digital library of scholarly resources from and about Africa that is engaged, among other things, in creating an extensive archive of historical materials related to the fight against apartheid and colonialism in Southern Africa. Ithaka also provides the higher education community with research and strategic advice regarding the ways in which technology is impacting higher education, including the transition from print to electronic media and its implications for scholarly research and publishing.

The Johns Hopkins University Press, founded in 1878 as a division of the Johns Hopkins University, publishes about 140 scholarly, educational, and general interest books per year. The Press also publishes and distributes 60 academic journals. In collaboration with the Sheridan Libraries at Johns Hopkins, the Press operates an electronic journals database Project MUSE. MUSE is an online collection of full-text, peer-reviewed journals in the humanities and social sciences. The journals in Project MUSE are published by respected not-for-profit publishers, scholarly societies, and university presses.

The Leland Stanford Junior University ("Stanford University") is a leading academic research institution, which includes Stanford University Press ("SUP") and HighWire Press. In existence for over 75 years, SUP is one of the nation's leading publishers of scholarly books. HighWire Press, the largest repository of

free, full-text science articles, produces on-line versions of peer-reviewed journal articles, which are fully searchable.

The Mathematical Association of America is the largest professional society focusing on undergraduate mathematics education. Founded in 1915, it has approximately 27,000 members, including college and university professors; high school teachers; graduate and undergraduate students; pure and applied mathematicians; computer scientists; statisticians; and many others in academia, government, business, and industry. The MAA publishes three print journals, *The American Mathematical Monthly*, *The College Mathematics Journal*, and *Mathematics Magazine*, and two online journals, *The Journal of Online Mathematics and its Applications* and *Convergence*, as well as magazines and books.

The National Coalition for History is a 501(c)(3) non-profit organization consisting of over seventy historical and archival organizations throughout the United States. For over 25 years the organization has served as the voice of historians and archivists on Capitol Hill and has represented the interests of history and archival preservation inside and outside government. The organization publishes a weekly electronic newsletter, with a circulation of approximately 60,000; the organization also serves as a clearinghouse for information about

history and archives to journalists and conducts educational programs targeted to its members and other constituencies it serves.

The National Council on Public History (NCPH) is an international membership association of individuals and institutions dedicated to making the past useful in the present and to encouraging collaboration between historians and their publics. Its work begins in the belief that historical understanding is of essential value in society. NCPH publishes *The Public Historian* and is headquartered on the campus of Indiana University Purdue University Indianapolis.

NFAIS (The National Federation of Advanced Information Services) is a non-profit organization for all those who create, aggregate, organize and otherwise facilitate access to information across all subject disciplines. Founded in 1958, the organization provides educational forums and publishes on matters of interest to its members and related communities. Members include not-for-profit organizations, commercial enterprises, academic institutions, and government agencies that provide electronic information services and related technologies for the research community and the general public.

The National Humanities Alliance is a 501(c)(4) non-profit advocacy coalition founded in 1981 to advance national policy in humanities education, research, and public programs. It is supported by 89 member associations and is

the only organization that represents the broad U.S. humanities community as a whole. Members include scholarly and professional associations; associations of libraries, museums, historical societies, state humanities councils, university presses, and higher education institutions; independent and university-based humanities centers, and other organizations concerned with federal policies affecting humanities activities.

The Organization of American Historians, a non-profit 501(c)(3) organization, is the largest learned society devoted to the study of American history. Since its founding in 1907 as the Mississippi Valley Historical Association, the OAH promotes excellence in the scholarship, teaching, and presentation of American history, and encourages wide discussion of historical questions and equitable treatment of all practitioners of history. The OAH serves a membership of 11,000 college and university professors, high school teachers, students, archivists, public historians, and institutional subscribers such as libraries, museums, and history societies, as well as individual and institutional foreign members.

B. Interests of *Amici Curiae*

The availability, preservation, and dissemination of prior research are essential for scholarly advancement. *Amici Curiae*'s interest is to preserve the enormous improvements in the availability, preservation, and dissemination of

scholarly works that have been made possible by digital technology. *Amici Curiae*'s interest can be accommodated in a manner consistent with 17 U.S.C. § 201(c) as interpreted by *New York Times v. Tasini,* 533 U.S. 483 (2001), through digital scanning of collective works such as scholarly journals in ways that reproduce them in full context.

As explained in detail *infra* at section II, through the use of digital technology of the kind at issue in this case, the *amici curiae* have transformed the process of conducting research using scholarly journals. No longer are researchers subject to the vagaries of print materials that are often impossible to identify as relevant sources, difficult to obtain once identified, and often damaged or incomplete once found. Digital technology produces faithful reproductions of collective works, preserving and making them available to the scholarly community. Authorized users can access such works at virtually any time from virtually any location regardless of the holdings at the researcher's local libraries. In addition, as explained *infra* at section II.A.2, digital technology makes possible improved searching capabilities and provides increased access for disabled researchers such as those with physical or visual impairments.

These benefits are made possible by technology consistent with Section 201(c) of the Copyright Act and *Tasini*—benefits which increase the availability

and dissemination of scholarly and artistic work, thereby serving one of the main purposes of copyright law.

STATEMENT OF THE ISSUES

Whether this Court should reconsider its previous decision in light of the Supreme Court's decision in *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), and find that *The Complete National Geographic* is a privileged revision under Section 201(c).

SUMMARY OF THE ARGUMENT

The unprecedented benefits made possible by the use of digital technologies, namely electronic preservation, discovery, and distribution of collective works, are consistent not only with Section 201(c) of the Copyright Act and *Tasini*, but also with one of the main purposes of copyright law as enshrined in Article I, Section 8, Clause 8 of the Constitution—to "promote the progress of science" by encouraging the dissemination of scholarly and artistic works. The scholarly community, including organizations such as JSTOR and the other *amici*, depends on digital media to ensure the long-term preservation of and access to important scholarly material. In turn, it depends on Section 201(c) of the Copyright Act to enable digital preservation and access.

ARGUMENT

I. The Rights Afforded Owners of Collective Works under Section 201(c) Protect *The Complete National Geographic*

A. Adoption of National Geographic's Argument

This Court in *Greenberg v. National Geographic Society*, 244 F.3d 1267 (11th Cir. 2001) (*Greenberg I*) held that "The Complete National Geographic," a CD-ROM collection of past issues of National Geographic Magazine, was not a privileged revision under Section 201(c). Three months after this Court issued its opinion, the Supreme Court decided *New York Times v. Tasini*, 533 U.S. 483, which concerned the scope of the Section 201(c) privilege.

In *Tasini*, the Supreme Court explained that Section 201(c) would permit a print collective work to be reproduced as an electronic collective work as long as the context and position of the contributions remained the same. After *Tasini*, thus, the focus in determining if a republication of a collective work in electronic form is permitted by Section 201(c) is how the works are "presented to, and perceptible by, the user." *Tasini*, 533 U.S. at 499. The National Geographic Society's brief persuasively has applied *Tasini* and Section 201(c) to this case, and *Amici Curiae* specifically adopt the legal reasoning in that section of National Geographic's brief.

The Complete National Geographic satisfies *Tasini* by presenting each article and photograph to the user in context—providing scanned images of each

page of the articles **exactly** as they appeared on the original work's pages, complete with photographs, captions, advertisements, and other surrounding materials, including all the content on adjacent pages as well. As National Geographic has explained, an electronic republication of a collective work is privileged under Section 201(c) regardless of whether (1) multiple collective works are placed together; (2) independently copyrightable material is added to the collective work; or (3) the owner of the collective work relies on the assistance of others to republish the collective work in electronic form and distribute it to the public.

Indeed, this was the conclusion of the Second Circuit in *Faulkner v. National Geographic Enterprises, Inc.*, 409 F.3d 26 (2d Cir. 2005), as well as this Court in its June, 2007 decision, *Greenberg v. National Geographic Society*, 488 F.3d 1331 (11th Cir. 2007) (*Greenberg II*). Both decisions correctly recognized that *Tasini* established a new framework for applying the Section 201(c) privilege.

B. The Legislative History

The legislative history of Section 201(c) further supports the decisions in *Faulkner* and *Greenberg II*. An early draft of Section 201(c) gave publishers the right to publish freelance contributions in the original periodicals or "a composite work like that of the publisher." *Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 88th

Cong., 1st Sess., Copyright Law Revision, Part 2 (H. Judiciary Comm. Print 1963), at 385. This language led Harriet Pilpel, an experienced literary property attorney who represented freelance authors, to worry that the section, as drafted, was "less favorable than the present law," presumably because it could allow *The Washington Post*, for example, to sell one of its freelance articles for later publication in *The New York Times*, arguably a "like" composite work. *See id.* at 151-52.

The Register of Copyrights responded to and attempted to balance the interests of authors and publishers by suggesting that the core privilege to which publishers were entitled should include the privilege of reproducing and distributing freelance contributions of "that collective work and any revisions of it." Copyright Law Revision, Part 5, at 9. After Pilpel pointed out that under this language, a publisher could revise individual contributions, as opposed to the collective work, *id.* at 152, the Register of Copyrights refashioned Section 201(c) to make clear that the "any revision" language authorized any changes to the "particular collective work" as a whole, but not to the individual contributions. *Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law; 1965 Revision Bill*, 89th Cong., 1st Sess., Copyright Law Revision, Part 6 (H. Judiciary Comm. Print 1965), at 69.

This final compromise, mediated by the Copyright Office, yielded the present language of Section 201(c). To clarify the balance finally struck between publishers and freelance authors, the House Report provided the following examples of what publishers could and could not do under Section 201(c):[2]

> Under the language of this clause a publishing company could reprint a contribution from one issue in a later issue of its magazine, and ***could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it***; the publisher could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work.

H.R. Rep. 94-1476, at 122-23 (1976) (emphasis added).

One cannot legitimately argue that Congress expected a 1990 revision of an encyclopedia to contain no new and independently copyrightable contributions that did not appear in the 1980 version. On the contrary, Congress knew that a 1990 revision of a 1980 encyclopedia would include independently copyrightable articles, photographs, or drawings related to events that occurred since publication of the 1980 version; otherwise, for example, information related to AIDS, the Challenger shuttle disaster, and the fall of the Berlin wall would not be included in the 1990 version. According to the legislative history, the inclusion of such "new copyrightable matter" should not prevent the publisher of the 1990 revision from using, without alteration, another author's contribution concerning William

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[2] Congress's amplification is quoted in *Tasini*, 533 U.S. at 496-97.

Shakespeare or the American Civil War as originally published in its 1980 edition. Rather, this type of use was exactly what Congress envisioned when it explained that a publisher "could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it." H.R. Rep. 94-1476, at 122-23.

II. The Electronic Preservation and Distribution of Collective Works Promotes the Progress of Science and the Humanities to the Benefit of the Public

This case has significant implications for both the scholarly community and the public at large. Simply put, and as outlined below, scholarly research and preservation could be impeded substantially, at least in this circuit, if this Court fails to reverse its 2001 decision.

A. Digitized Journals Are Necessary for Accurate, Complete, and Efficient Research of Scholarly Material

The use of scholarly materials in the research process typically involves three components: identifying relevant material; obtaining access to it; and preserving it for use by successive generations. The following discussion illustrates the ways in which scholarly journals available in context as collective works in digital medium offer significant improvements over the print media and anticipates the consequences that would result should this Court not reverse *Greenberg I.*

1. Identifying Content in the Analog Environment

Identifying key material in the paper and microform medium can be challenging and often imprecise. For researchers fortunate enough to be located near a large library, this analog search process generally begins with a print or electronic indexing service, which contains listings of journal material and provides only brief descriptive information such as the title, author, and general subject matter of a work. The indices do not embody a "full-text" offering of the contents but rather rely on the categorization skills of the indexer. Consequently, using print, or even electronic, indexing services provides only a filtered view of the sources available to the researcher. Even a library with extensive holdings provides little help to a researcher if the library does not possess a specialized topical or subject index in the area being researched. Similarly, subject indices can suffer from editorial errors and omissions, such as the failure to include the appropriate subject words for categorization. Finally, for journals with long runs, the indices typically do not reach back to the beginning of the run. For example, they may cover material going back only as far as the 1970s. Material predating coverage of the index, therefore, remains largely inaccessible since the researcher is not able to ascertain its contents without an individual review of each journal.

2. Identifying Content in the Digital Environment

The availability of back issues of scholarly journals in digital media has transformed the process of identifying content. Full-text search capabilities mean that researchers no longer are restrained by the limited and subjectively applied vocabulary of indexers, but instead have an unfiltered view of available journal content. In addition, the ability to follow links between references within a digitized journal or links between different digitized journals greatly enhances the search and discovery process. Interdisciplinary research need no longer be stifled by indices limited to journals in only one area of study; using digital technology, researchers can now identify relevant material from various disciplines. Research never before thought feasible can now be conducted using digital technology's enhanced searching capabilities. For example, the dates when scholars assumed particular words had first came into common usage have been re-established as a result of these new search capabilities. *See, e.g.*, *How Software Got Its Name*, The Economist, June 3, 2000, at 80 (using JSTOR to push back the first known use of the word "software" to 1958).

3. Accessing Content in the Analog Environment

The researcher in the analog environment who has found index references to works of interest must also find each of those works in the library's stacks, and within the library's hours of operation. Of course, journals are subject to the

vulnerabilities of all physical library holdings—the material can be removed, stolen, defaced, mutilated, or misshelved. Space constraints and budget limitations may compromise a library's ability to obtain or maintain physical collections, or to make them easily accessible.[3] Not only are the more obscure, seldom used journals often removed from library buildings for storage in less costly off-site facilities; libraries increasingly are under pressure to move other journals to less expensive storage space. Often a researcher needs to wait for material to be borrowed from another institution through interlibrary loan.

Microform collections of journals, while more efficient users of space than their print counterparts, nonetheless require environmentally sound storage space as well as space for the viewing equipment, and therefore contribute to the space constraints experienced by most libraries. Further, because microform reproduction quality is often poor, and because many libraries cannot afford equipment upgrades, microform materials can be difficult to read. Obtaining legible photocopies of microform materials can be particularly challenging. For these reasons, and owing to difficulties inherent in using the equipment, most

[3] Indeed, one study concluded that scholarly journals consume 23 percent of a library's stack space. *See Library Space Use*, Dec. 22, 1993 (unpublished memorandum, on file with Denison University librarian's office), *cited in* Roger C. Schonfeld, *JSTOR: A History* 9 (2003).

researchers find the use of microform to be cumbersome and unappealing and to present significant obstacles to scholarship.

4. Accessing Content in the Digital Environment

Through digitization, scholarly journals can be accessed with unprecedented efficiency. Using digital technology such as that offered by *amicus curiae* JSTOR, researchers can have access to a broad range of scholarly journals after the library closes for the night, over weekends, or holidays—or any other time. Materials can be available at one's fingertips not only from a library, but also from remote locations, such as dormitories and apartments. In addition, and in stark contrast to analog sources, journals are never "missing" or "checked out." Scarce and costly shelf space can be made available through the shifting of print versions of digitized journals to less expensive off-site locations, with no compromise in the ability of students to access the materials.

Through digitization, works are made available to those who otherwise would have no, or only limited, access to scholarly journals. For example, researchers at institutions with limited traditional holdings, such as community colleges, are able to use sources previously available only to those at universities with the largest collections. Researchers with disabilities can conduct research independently through the use of assistive technologies that work in conjunction with electronic scholarly journals. International scholars can more easily

participate in intellectual exchanges when they and their peers use digitally available scholarly works.

A few examples of user comments received by *amicus curiae* JSTOR illustrate these benefits and the importance of this case to the public. One student commented, ". . . I am a fifth-year graduate student, and your service has just saved me from making a two-hour round trip to the University library." Another stated, "I am an adult returning student who works 50+ hours a week, so having this database available all the time is a benefit that is invaluable. I will always love books and the smell and feel of them, but when researching things that are hard to find, your database has been of tremendous value to me." Yet another added, "When one is a single working parent, the ability to research and obtain material at 3 a.m. is a gift of incalculable worth." A professor praised JSTOR for "including articles that are not cool, but forgotten, left behind, and waiting to be rediscovered." Finally, a scholar in Namibia wrote, ". . . I cannot see how institutions such as ours can do without facilities such as JSTOR. There is simply no substitute for the . . . magnitude of the service. The individual [print back issues of] journals are too expensive, the postal services are too dicey, and the extra staff component [to manage print collections] too expensive for us in this part of the world. With JSTOR all these problems disappear—fantastic!" *See JSTOR*

User Comments, http://news.jstor.org/jstornews/newletter_topics/comments/, last reviewed October 11, 2007.

5. Preservation in the Analog Environment

Even if a desired journal can be found in a library, the material available in analog format may be in poor condition. Because of normal wear and tear and age, paper is vulnerable over time. In some journals, pages may have been defaced or removed (either intentionally or unintentionally).[4] For example, in many early journals, engraved illustrations—such as Audubon illustrations—have been removed to be framed as art. Content in some print journals has been destroyed by users who have disagreed with its contents or wanted to thwart other researchers' use of the journal. Regardless of the intent, the defacing and removal of portions of journals clearly reduces the value and usefulness of the journal for researchers. Moreover, because the materials are held in many disparate locations, without any central coordination, it is difficult if not impossible to know how many comprehensive copies actually exist, or even if a single comprehensive copy exists.

[4] Microform collections are subject to many of the same vulnerabilities as print versions. Libraries might not own the materials in microform, and those microform collections they do own similarly are subject to misshelving, theft, and damage.

6. Preservation in the Digital Environment

The availability of scholarly material in digital media means that researchers no longer depend solely on a tangible record, which easily can be damaged, lost, or otherwise made unavailable. Because digital versions of periodicals tend to come from centrally managed resources, their integrity can be maintained efficiently and reliably.[5] In the case of rare material, digitization can enable continuing access over time without compromising the integrity or the long-term preservation of the artifact copy.

B. The Scholarly Community Depends on Digital Media

For the reasons described above, electronic media rapidly have become the preferred method for accessing and preserving scholarly journals. As evidenced by the breadth of *amici* joining in this brief, support for continued access to digitized academic journals is interdisciplinary and widespread in the scholarly community.

To illustrate the value of these resources with usage statistics from but one provider of digitized versions of scholarly journals, in the *first half* of 2007 alone, JSTOR users accessed the archive 260 million times. A 2006 survey of over 4,100 American college and university faculty members found overwhelming agreement that, "Electronic research resources are invaluable research tools." *See* Odyssey

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[5] Indeed, delegating the tasks of digitizing and distributing scholarly journals to third parties is of critical importance to the owners of the journals who may not have the financial capacity, expertise, or economies of scale to undertake this effort on their own.

LLC, *Survey of Faculty Use of Electronic Resources* (2006) at Table 16.[6] Moreover, 76% of those surveyed were convinced they would, "become increasingly dependent on electronic research resources in the future." *Id.* at Table 7.

Beyond academic enthusiasm for electronic resources lies a stark reality for scholars and students: resources that are not available online, no longer, in effect, exist. Scholars express an increasing disinterest in print-format materials, with 62% agreeing strongly that "If my library cancelled the current issues of a print version of a journal but continued to make them available electronically, that would be fine with me." *Id.* at Table 11. And indeed, a decreasing share of faculty members (currently 41%) agrees strongly that "it will always be crucial for my college or university library to maintain hard-copy collections of journals." *Id.* at Table 21. Scholars are relying more and more on digital information, and observers have noted in the past few years that unwillingness to pursue research strategies that include print materials has increased dramatically. In fact, a 2003 survey of over 6,500 American college and university faculty members found that 65% agreed strongly with the following statement: "The process of locating information in academic journal literature is tedious and often hit-or-miss, and the

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[6] *Amici Curiae* only included the cited portions of the 2003 and 2006 Odyssey Surveys in the appendix due to the considerable size of the documents, but will make the entire documents available, on CD-ROM or otherwise, upon request.

information in academic journal literature is tedious and often hit-or-miss, and the act of physically searching through hard-copy collections is much too time-consuming and onerous. I would welcome access to new tools that improve my ability to locate and access journal literature." *See* Odyssey LLC, *Survey of Faculty Use of Electronic Resources* (2003) at Table 3. Even more dramatically, respondents felt that the statement "I often find using the library to be difficult and time consuming—I'd much rather be able to get the information I need from a computer in my office or home." matched their opinions 59% of the time–an increase in three years of 17 percentage points. *Id.* at Table 13. In short, it is becoming clear that information that cannot be made available online will no longer be used by researchers.[7]

CONCLUSION

The scholarly community depends on digital media for access to research, and organizations such as JSTOR and the other *amici* depend on Section 201(c) of the Copyright Act to provide that access. The unprecedented benefits made possible by the use of digital technologies are consistent not only with Section 201(c) of the Copyright Act and *Tasini*, but also with one of the main purposes of copyright law as enshrined in Article I, Section 8, Clause 8 of the Constitution—to

[7] An article in *The New York Times* recently reported similar findings. *See* Katie Hafner, *Old Search Engine, the Library, Tries to Fit Into a Google World*, N.Y. Times, June 21, 2004.

"promote the progress of science"[8] by encouraging the dissemination of scholarly and artistic works. The Eleventh Circuit should reconsider its previous decision in this case and find that Section 201(c) permits owners of collective works to distribute their works in digital formats that perceptibly reproduce the original works in their full context. To do otherwise would overturn the compromise Congress carefully made in enacting Section 201(c) and preclude realization of the benefits offered by new technologies, at great expense to the growth of knowledge and in contravention of the spirit and underpinnings of copyright law.

[signatures on page following]

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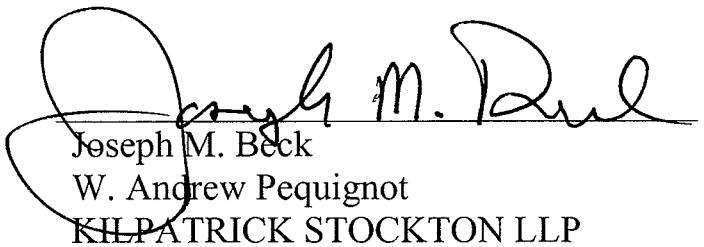
[8] At the time of the framing of the Constitution "science" was "used in the sense of general knowledge rather than the modern sense of physical or biological science." *See Williams & Wilkins Co. v. United States*, 172 U.S.P.Q. 670 (Ct. Cl. 1972), *dismissed*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd* 420 U.S. 376 (1975). Consistent with the Court's interpretation, *amici* use the term "science" to encompass the physical and social sciences as well as the humanities.

Dated: October 18, 2007

Respectfully submitted,



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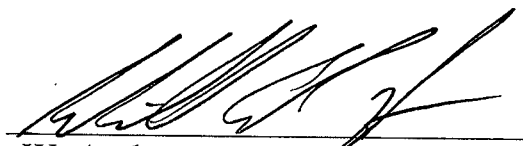

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