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IN THE SUPREME COURT OF THE UNITED STATES

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NEW YORK TIMES COMPANY, :
INC., ET AL., :
Petitioners :
v. : No. 00-201
JONATHAN TASINI ET AL. :
- - - - -X

Washington, D.C.
Wednesday, March 28, 2001

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:04 a.m.

APPEARANCES:
LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts; on
behalf of the Petitioners.
LAURENCE GOLD, ESQ., Washington, D.C.; on behalf of the
Respondents.

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CHIEF JUSTICE REHNQUIST: We'll hear argument now on number 00-201, the New York Times Company versus Jonathan Tasini.

Mr. Tribe.

ORAL ARGUMENT OF LAURENCE H. TRIBE

ON BEHALF OF THE PETITIONERS

MR. TRIBE: Mr. Chief Justice and may it please the Court:

The parties on both courts below agree on at least two things, first, that section 201(c) represents a compromise that assures freelance authors that they may control and exploit their individual contributions to collective works like newspapers and magazines in new anthologies and serializations and screenplays and other derivative works unless they've expressly transferred that right.

The parties are also agreed as are both courts below that 201(c) assures the publication of collective works that the publisher of such collective works has the aggregate right to publish any article in the collective work both in publishing the collective work itself of course, but also in publishing that article, quote, as part of any revision of that collective work, again unless

1 there has been an express transfer of the right.

2 Now the principal impetus for this measure was a
3 rather strong wish to undo several quite notorious rulings
4 like that of the Southern District of New York in the
5 Geisel case in 1968 which of course involved the legendary
6 Dr. Seuss and denied him the right to stop the
7 unauthorized distribution of toy dolls that were derived
8 from cartoons that he had published decades earlier.

9 There is no hint at all in the history of this
10 measure and I think no hint in the way it's written that
11 microfilm, for example, which had been in use for some 40
12 years at the time this measure was passed and which people
13 used to make copies of individual articles more often than
14 to make copies of entire cumbersome periodicals was seen
15 by anyone as a problem to be addressed or solved by
16 201(c).

17 QUESTION: When you say people used to make
18 copies you mean the ultimate user?

19 MR. TRIBE: The ultimate end user.

20 QUESTION: Yes, but the person who produced the
21 microfilm or the microfiche produced the entire work. It
22 produced the article as part of the entire work, not to be
23 shown. When a person went to the machine he would only
24 look to the article that he was interested in.

25 MR. TRIBE: As do we, Justice Scalia, in Nexis

1 and in the CD-ROMs, the entire text with the exception of
2 certain graphics that cannot be handled by ASCII is put
3 in.

4 QUESTION: When you would look at a newspaper on
5 microfilm you would get the whole page. You would probably
6 want to single out a particular article but it was the
7 whole page that appeared to you.

8 MR. TRIBE: That's right and in this case you
9 basically conduct a search under the algorithms that are
10 used by Nexis, conduct a search of the entire periodical
11 whether you call for a particular topic --

12 QUESTION: But it's not all in one piece, is it.

13 MR. TRIBE: Well it's in virtual -- it's in --
14 it's certainly not -- it's not a newspaper that we're used
15 to. You can't drink your coffee to it or wrap your fish,
16 in it but that really is a red herring, if I may say so.

17 QUESTION: Well, but I suppose that it has
18 removed the photographs and the ads. It's been
19 disaggregated and what you see are the individual articles
20 from a particular --

21 MR. TRIBE: At any one time, but with a very
22 simple prompt of about 15 characters you can get the
23 entire periodical.

24 QUESTION: But at least in let's talk about the
25 Nexis for a minute. You don't see ads and the photographs

1 and all that. But you can pull out an entire article that
2 had appeared in the Times.

3 MR. TRIBE: You certainly can. That's why we're
4 --

5 QUESTION: Now, I assume that the publisher can
6 enter a contract with an independent author to cover the
7 subsequent use in database material and --

8 MR. TRIBE: Yes, and for decades --

9 QUESTION: Probably the publisher does that
10 today --

11 MR. TRIBE: Sometimes. What's happened, Justice
12 O'Connor, it appears that for at least 20 years people
13 have assumed because no one complained of this practice
14 that the standard contract was not limited to the print
15 medium. Now as of 1995, for example, the New York times
16 made clear they would not make contracts with people for
17 print only.

18 QUESTION: I notice, though, that the head of
19 the copyright division has at least written a letter that
20 looks like she thinks the court below was absolutely
21 right.

22 MR. TRIBE: That's right. On the basis of a
23 display argument that is disclaimed by the Tasini
24 respondents that wasn't made below and that doesn't make
25 sense under the statute, because quite clearly if we are

1 involved in reproduction and distribution display is
2 covered in the intersection of those.

3 It's not, I think, a serious argument. You
4 notice the solicitor general did not decide to come into
5 this case. But you're right about the register of
6 copyright. However that --

7 QUESTION: Mr. Tribe, does that view of the
8 register of copyright relate at all to one effort that was
9 made in the 76 act and to give the independent artisan,
10 the artist, the author more muscle vis-a-vis the publisher
11 or the patron than before?

12 MR. TRIBE: It's an interesting theory, Justice
13 Ginsberg, but I've tried to imagine how by carving this
14 pie into two pieces one could give the older, the other,
15 more muscle.

16 QUESTION: One could pay that's --

17 MR. TRIBE: Well, in 1995, I was saying a minute
18 ago, the New York Times said we're not going to run
19 articles print only. It would be kind of pointless now
20 when almost everything has to go onto the Internet or be
21 preserved in some other way other than print and they said
22 that our contract will automatically cover print and
23 electronic rights. And what's interesting is that the
24 royalties didn't change a cent after that.

25 I think it's a kind of belief in magic that

1 leads some people to think that if there's an inequity of
2 bargaining power it will be solved by creating two estates
3 rather than one. In fact, in the mid 1980s it's
4 interesting that the respondents went to Congress, the
5 National Writers Union went to Congress and tried to get a
6 measure much more modest than this one, a measure that
7 would say that when there is a demonstrable inequity in
8 bargaining power, an unconscionable arrangement, and when
9 that's shown by individualized proof there could be a
10 transfer of rights.

11 Here they want a wholesale, global transfer
12 which I don't think is necessarily going to change
13 anything for the future but could have very serious impact
14 on existing writings whose authors and heirs and assigns
15 are going to be extremely difficult to locate.

16 QUESTION: So far as the future is concerned,
17 Mr. Tribe, we're just talking about money, aren't we. I
18 mean the people can negotiate one way or the other,
19 however --

20 MR. TRIBE: That's right and all I'm saying is
21 there is not any particular reason to think the deals will
22 come out very differently.

23 QUESTION: But at least people evidently think
24 it will. They're expending a fair amount of money.

25 MR. TRIBE: Well, I think, Justice Scalia, that

1 they think quite rightly that they can get a lot of money
2 to settle a case in which, if we were to lose, we and many
3 other publishers around the country would have no choice
4 but to engage in defensive deletions of a lot of material
5 that could otherwise expose us to massive statutory
6 damages under the copyright laws. That's why a number of
7 Pulitzer Prize winning historians have said they're afraid
8 of what it will do to their research. That's why the
9 American Library Association which is an amicus on their
10 side has conceded that it's awfully difficult to find
11 these people and there may be an adverse impact. Even the
12 register of copyright in the letter to which you referred,
13 Justice O'Connor said there may be an impact on
14 scholarship and research. And I think that's an
15 understatement.

16 QUESTION: Well, for one thing, this is a three
17 year statute of limitations which will --

18 MR. TRIBE: I don't know that that will help a
19 lot, Justice Ginsburg and the reason is that keeping
20 something on Nexis or in CD-ROMs that you have in
21 circulation after it has been determined to be infringing
22 and letting people potentially have access to it, which
23 the download might be an infringement, would be a new act.
24 So I don't think the statute of limitations will solve the
25 problem.

1 QUESTION: It's hard for me to see that that's
2 going to be the effect in the real world because after all
3 these authors have an interest in exposure, it's just like
4 a lot of people now no longer have to be artists for hire
5 are that anyway, because they will give the copyright to
6 the patron, they want people to get to know who they are.

7 MR. TRIBE: I think that's the irony, Justice
8 Ginsberg. I think the erasures of a lot of these things
9 will not be in the interest of the people whose work may
10 be erased but someone who wrote an article in 1980 and
11 maybe was 60 years old at the time and maybe isn't around
12 at the moment, there are a lot of people like that. We
13 don't know how many. We don't know how many articles, but
14 the U.S. News and World Report has already decided in
15 anticipation because there's no -- they think no analytic
16 difference between microfilm and some of these products,
17 certainly the GPO CD-ROM which is a photographic copy is
18 not different, they've stopped putting their work on
19 microfilm.

20 The line drawing problem here, if I may say, is
21 one of several reasons why recalibrating the balance that
22 Congress struck is a particularly inappropriate job for
23 the Court.

24 QUESTION: Mr. Tribe, can I pursue this damages
25 question. I mean, as far as ripping out everything that's

1 on the systems already, that certainly need not be done by
2 court decree.

3 MR. TRIBE: No, certainly.

4 QUESTION: A court can say, you know, taking
5 equity into account we're not going to issue such an
6 injunction so the question would be your clients would be
7 compelled to erase all of this stuff because of the
8 damages they would have to pay. What would the damages be
9 if, as you say, it was worthless.

10 MR. TRIBE: Well under --

11 QUESTION: If it was worthless, the damages
12 would be negligible.

13 MR. TRIBE: You would think that, but under 504
14 damages are not measured by the harm to the person who
15 sues. There is a provision that says that they can take
16 the -- get the benefit of the presumption that all of our
17 gross income was attributable to their contribution and
18 the theory of that would I suppose be that they don't need
19 a theory because the statute says it, but the theory would
20 be that all of the work we put in electronic form would
21 not have been worth anything if it looked like Swiss
22 cheese with stuff missing.

23 QUESTION: Rebuttable or irrebuttable?

24 MR. TRIBE: It's rebuttable. But they can also
25 elect statutory damages which can go up to \$30,000 a

1 violation and some courts accept the Nimmer theory of
2 multiple violations per infringement. It would be more
3 even, if not, it could be --

4 QUESTION: The statutory violation applies only
5 to willful violations.

6 MR. TRIBE: No, it's more if it's willful. But
7 there is a statutory provision in any event and it would
8 become willful.

9 QUESTION: What's the nonwillful amount?

10 MR. TRIBE: I think it's a sliding scale,
11 Justice Scalia, and I think there is discretion to set it.
12 And it can be very low, I think as low as \$250 and as high
13 as over 10,000, but I have to say I don't remember for
14 sure.

15 But the point is there are something like
16 100,000 freelance articles just on Nexis. There are
17 18,000 journals on Nexis. You don't have to multiply
18 100,000 or 50,000 or 20,000 by a very large number to know
19 that a good business judgment for a lot of these companies
20 is going to be who wants the litigation, and you couldn't
21 put together class actions to solve the problem easily,
22 given Amchem and Ortiz because of the incredible
23 variability of the contracts of the -- some of them, for
24 example, will have registered the copyright in the article
25 within three years of its publication and then be eligible

1 for statutory damages, others won't. They'll be
2 plaintiff-specific defenses, statutes of limitations and
3 laches. You mentioned the statute of limitations, Justice
4 Ginsberg.

5 It seems to me that of course that is not a
6 reason to read the statute incorrectly but I think --

7 QUESTION: I think if we go back to that for
8 just one second, because I'd like to go about to where
9 Justice O'Connor, I think, started. The part that I'm
10 having difficulty understanding and I don't actually
11 understand this is what precisely, precisely say in the
12 case of Nexis was the event that you think the other side
13 is saying changed the work from a revised work to a new
14 work. In particular I'm thinking, say, at ten in the
15 morning on May 11th, 2001, the Washington Post has a piece
16 of paper, it's called the Washington Post. And then in a
17 analogous form that piece of paper is in its computer.
18 And then something happens. That is, there's a transfer
19 of that information over to Nexis and what, I'd like you
20 to focus right on that, because what you -- I want to know
21 what event in that series of events on that morning we're
22 talking about as being the copying, the unlawful copying.

23 MR. TRIBE: That moves beyond revision.

24 QUESTION: Yes, in their view in your opinion.

25 MR. TRIBE: I assure you, Justice Breyer, I'd

1 love to know at least as much as you would and I hope Mr.
2 Gold will enlighten us, because --

3 QUESTION: All right. Well, then, let me give
4 you a little bit further -- imagine what it might be. It
5 might be this. It might be that there is a person in the
6 Washington Post who pushes a button called send, and at
7 that point what is sent is not the electronic and analog
8 of the Washington Post several pages, but rather a few
9 articles from the Post and then a little later in the day
10 a few more are sent. And then a little later a few more
11 are sent, and when they arrive in Nexis, they are nowhere
12 stored in a form that is in any sense analogous to that
13 page or several pages in the Washington Post, but rather
14 is in a large computer where they are mixed with hunting
15 fishing journal and everything else.

16 MR. TRIBE: Justice Breyer, the record is
17 completely unambiguous that nothing like that happens.
18 What happens is that the computer text itself, the very
19 same computer text that goes to the printing office so
20 that the New York Times then arrives at your front desk.

21 QUESTION: -- example is the Post.

22 MR. TRIBE: Well the Post, that's fine. I'll
23 take the Washington Post, Washington Post, Washington
24 Star, we can pick our paper. The Washington Post, they
25 all follow the same protocol. There is a computer text and

1 that text is ASCII readable. That means it can be put in
2 computer form and one version -- one copy, it's not even a
3 version, the identical thing goes to the printing facility
4 and --

5 QUESTION: With an identification code for this
6 day's edition of the Washington Post. Is that the
7 identification code?

8 MR. TRIBE: Yes absolute -- the identification
9 code --

10 QUESTION: So that when you pull it up what you
11 get is the whole Washington Post.

12 MR. TRIBE: If you ask for the Washington Post.

13 QUESTION: Ah, you have to go out of your way to
14 ask for -- have it recompiled.

15 MR. TRIBE: I wanted to first describe what
16 happens when it gets there and then I'll try to say what
17 happens at the other end when someone --

18 QUESTION: I want to know what's sent.

19 MR. TRIBE: What is sent is computer data, whole
20 Washington Post and it's put before it goes there they add
21 advertisements and some other graphics. And then it goes
22 to the assembly room and then it's delivered and put on
23 newsstands. That edition of the ads and the graphics
24 which are not ASCII --

25 QUESTION: Forget about the ads and the

1 graphics.

2 MR. TRIBE: That edition is not made in the
3 version that goes to Nexis. Nexis processes that unitary
4 computer data. It goes instantaneously, not in driblets,
5 and it doesn't go article by article.

6 QUESTION: So I could look to the opinion of the
7 district court to find that because it might very
8 technically turn on whether the transmission to Nexis is
9 the transmission at one instant of time of the electronic
10 analog, and I chose the Post purposely because it's not
11 involved in some other aspects of the case, the -- it
12 might turn on whether that whole electronic analog of the
13 entire paper is transmitted instantly at one instance over
14 to Nexis where later on they use electronic scissors and
15 cut it up or whether article by article at different times
16 it's transmitted so that there is no cutting up.

17 MR. TRIBE: There's not a shred of evidence, not
18 a whisper that suggest that they're first disassembling
19 the paper into articles and then whisking it over. It is
20 true that the computer text registers each article and
21 identifies it just as it identifies pages and there is a
22 file for each article. But a file is really a conceptual
23 thing here. It's not that they have a little file and
24 they have the article stuffed in it. And the result of
25 all this is that the technology shouldn't obscure what's

1 happening. What's happening is that something that is as
2 close to the Washington Post for that day as it could be
3 given this medium appears in the Nexis computer.

4 QUESTION: Well, Mr. Tribe, despite how it is
5 transmitted, if the whole thing goes immediately, then at
6 Nexis is it disaggregated and stored in a way that one
7 finds as individual articles.

8 MR. TRIBE: No, Justice O'Connor. What happens
9 is --

10 QUESTION: That's odd, because when I've used
11 something like that I've gone to an author's name or a
12 subject matter and tried to retrieve an individual
13 article, not the whole newspaper.

14 MR. TRIBE: No, of course not. Although some
15 people want the whole newspaper and you can get it by
16 saying date, paren, 3/28/2001. But let me answer your
17 question --

18 QUESTION: Well, I think it's fair to say that
19 Nexis at least strips out the ads, strips out the graphics
20 and the photos.

21 MR. TRIBE: Nexis doesn't strip out the ads.

22 QUESTION: Well, somebody is doing it because
23 what you get --

24 MR. TRIBE: The ads are just not added.

25 QUESTION: What you get is the article.

1 MR. TRIBE: First of all, you get the whole
2 thing in the GPO CD-ROM. Secondly, Nexis doesn't subtract
3 the ads, they're just not added by the Washington Post,
4 although I'm not sure that that matters. Third --

5 QUESTION: They're not added but they are in the
6 original version.

7 MR. TRIBE: That's right. That's why this is a
8 revision. We're not claiming it's the same thing but it
9 is awfully close and if this isn't a revision, it's hard
10 to know what would be. The point I want to make is that
11 with -- once the computer has all of the digital
12 information, it indexes it according to key words and
13 among those words are the date and an author and the data
14 is sort of scattered to the magnetic --

15 QUESTION: Isn't that the point, Mr. Tribe, at
16 which there is no longer any functional difference between
17 the way Nexis stores and the Nexis subscriber calls up on
18 the one hand and simply a freestanding reprint of the
19 article which anybody can walk into a store and buy on the
20 other hand.

21 MR. TRIBE: There are several important
22 differences, Justice Souter. One, the search inside Nexis
23 is always of whole periodicals, and that's undisputed, two
24 --

25 QUESTION: I don't understand what you mean. If

1 I want an article by Smith, I understand that I can search
2 for an article by Smith not for the entire New York Times
3 or Washington Post in which Smith's article occurred.

4 MR. TRIBE: I understand Justice Souter but it
5 is undisputed that the way they do it, it's more
6 efficient, is that they will take the intersection of all
7 of the indices you want and they will search the entire
8 periodical by periodical to find the article. They don't
9 -- it's not after all a thinking machine. It's a dumb
10 operation, but more important, you're not charged for the
11 article the way you would be at a copy service. You're
12 charged for search time and that's the time for searching
13 entire periodicals. Also --

14 QUESTION: Okay. And if I want to get the
15 article cheap I identify the article very specifically so
16 that the search time will be less rather than more and the
17 functional effect is that I buy the article.

18 MR. TRIBE: When you get it, you get it as part
19 of the revision and that's --

20 QUESTION: Well, no, but I don't. If I get --
21 maybe you're telling me something in fact that I shouldn't
22 dispute, but if I want Smith's article, what comes out of
23 the machine is Smith's article not the entire edition of
24 the Post.

25 MR. TRIBE: I understand Justice Souter, but if

1 you'll permit me, let me say why I nonetheless think
2 you're getting it as part of the revised periodical, and
3 the reason is this, it's very important, so please let me
4 stress it. If it were the case that the only way you
5 could comply with 201(c) was that when you asked for an
6 article you get, whether you want it or not, the whole
7 periodical in which the article appears, that would
8 satisfy the concern you're expressing.

9 But if that was the only way you could do it,
10 the statute would be incoherent because it says that you
11 may reproduce and distribute the contribution as part of a
12 revision or you may distribute the revision itself or a
13 later element in the series, and if it were the case that
14 you have to get the whole thing, then we would have erased
15 from the statute the key compromised words --

16 QUESTION: I will accept that but it may then
17 simply be that the price of coherence, as you put it, is a
18 limitation on the right of the periodical or of the
19 collection and a corresponding recognition of the right of
20 the author. That may be what coherence demands.

21 MR. TRIBE: Well, but wouldn't that be for
22 Congress, Justice Souter? That is, Congress said --

23 QUESTION: If that is a necessary -- if that is
24 the only way to avoid for practical purposes reading the
25 author's copyright protection right out of the statute

1 then I would suppose that's what Congress necessarily has
2 provided.

3 MR. TRIBE: But Justice Souter, to say that it
4 reads that protection out of the statute is hard to square
5 with the fact that these authors in undisputed testimony
6 themselves said that when they tried to syndicate their
7 work or serialize it or sell it in some way there was
8 never any evidence that its appearance in this archival
9 context on Nexis or the CD-ROMs ever made the slightest
10 difference. They can fully exploit their individual work,
11 the argument is that we should be able since Congress said
12 so to reproduce and distribute not just a revision of the
13 composite work, but the article as part of that revision,
14 and that cannot mean --

15 QUESTION: Well, because you played -- the idea
16 is you played their song beyond their permission. Tell
17 me, Mr. Tribe, why if it is wrong to think of what's going
18 on here if you put it in very simple terms as taking the
19 article that the Post has received, to put it in the Post,
20 and just putting it in a much, much larger journal? When
21 you give it to Nexis, isn't that what happens?

22 MR. TRIBE: No. No, Justice Ginsberg, it's when
23 you bind the book and put it on a library shelf you could
24 say it's part of a huge book. The fact is that this is a
25 huge database and the Second Circuit's suggestion that we

1 are treating that whole database as the revision is
2 completely wrong. We've said all along that the revision
3 is simply the digitized version of the periodical. That
4 digitized version is one that contains --

5 QUESTION: That doesn't exist -- that does not
6 exist separately, it does not exist by itself, it's part
7 of this big mass of data.

8 MR. TRIBE: That's the nature of the medium.
9 Nothing exist separately.

10 QUESTION: You're inventing a revision that has
11 no real world existence. You're saying there's just this
12 part of the data which is scattered all through I don't
13 know how they scatter on the disk or wherever --

14 MR. TRIBE: But Justice Scalia, Congress was
15 well aware -- they talked about disks, they talked about
16 any medium, they talked about machines having to read the
17 stuff, they knew about the computer, 1978 wasn't that long
18 ago. This law was written to make sense in the computer
19 context.

20 QUESTION: It would have been thoroughly
21 feasible, would it not, to send over the Washington Post
22 with identification that would only refer to this edition
23 of the Washington Post.

24 MR. TRIBE: But the statute allows --

25 QUESTION: In which case you would have no

1 problem in the world, you have sent over the Washington
2 Post.

3 MR. TRIBE: No. The problem in the world we'd
4 have, Justice Scalia, is the world doesn't want only --
5 and Congress --

6 QUESTION: That may well be so pay for it then.
7 That just proves that it's better to do it the way you're
8 doing it, commercially better, but that doesn't prove you
9 should have to pay for it.

10 MR. TRIBE: I think we're paying for the
11 existing royalty and secondly, Congress said that we could
12 publish as part of that compromise that we could publish
13 the individual article as part of the revision. I'm
14 saying that carries this implication and it doesn't
15 destroy their copyright.

16 QUESTION: Suppose you had an old foggy editor
17 who didn't want to use any of new-fangled stuff so what he
18 does is he cuts out each article in a magazine, each
19 separate article and he sends it over to some separate
20 library, he sends over the whole thing but it's sent over
21 article by article and it is and knowingly to be -- to be
22 indexed in that library that he's sending it to by the
23 article, rather than by the Washington Post of the day,
24 would you say that somehow this is just a revision?

25 MR. TRIBE: Probably not. Probably not, because

1 I think --

2 QUESTION: I don't see why this is any
3 difference in substance.

4 MR. TRIBE: It differs in a lot of ways. We are
5 sending over the entire periodical and people can find --

6 QUESTION: My case, too. The whole thing's sent
7 over, but it's sent over article by article and it is
8 indexed by the article, in a whole mass of articles from
9 every magazine in the country, now would that be okay if
10 it was done in print? I don't see why --

11 MR. TRIBE: Would they be charged for the
12 articles or charged for the time it takes to search the
13 whole library.

14 QUESTION: Oh, you think that's the difference?

15 MR. TRIBE: I think it makes an important
16 difference. These things are also -- if you look at the
17 promotional materials they're promoted as complete
18 periodicals, hundreds of volumes of the most widely-read
19 periodicals. I think I should reserve the balance of --

20 QUESTION: Very well, Mr. Tribe.

21 Mr. Gold, we'll hear from you.

22 ORAL ARGUMENT OF LAURENCE GOLD

23 ON BEHALF OF RESPONDENTS

24 MR. GOLD: Mr. Chief Justice and may it please
25 the Court:

1 I'd like to begin by addressing the part of the
2 discussion that just concluded, Section 201(c) and its
3 cognate Sections 103 and the definition sections as has
4 been discussed distinguished between the author's
5 copyright in his individual contributed work, which he
6 retains when he contributes it to a collective work, and
7 the collective work copyright owners, this language
8 couldn't be more cumbersome, mainly the publishers'
9 copyright in the collective work as a whole. The statute
10 couldn't be clearer, we believe, in the proposition that
11 the collective works copyright owner has no copyright in
12 the individual article in these free-lance situations
13 where there is the separate author copyright.

14 It seems to us that the clearest lesson from
15 that is that if the publisher were in print terms to
16 publish reprints of individual articles and treat them
17 separately that would be an infringing action, the
18 publisher would be exploiting the article as an article
19 and without any authorization.

20 QUESTION: Suppose that the Times published
21 bound volumes of its paper but it had an index in the
22 front of it, maybe it does, with all of the authors names
23 and all of the subjects names and the other thing it did
24 was it had tabs so that you could easily find the index.
25 I take it that would be a permitted revision just because

1 it's in paper.

2 MR. GOLD: Well, if in paper terms, the Times
3 were to publish a version of what they electronically
4 provide to Nexis, article by article, by the way in file
5 -- each article in a file. But if they were to publish
6 that as a coherent whole, the reader's condensed May 1st
7 New York Times, I think there's a very strong argument
8 that that's a revised version of the paper.

9 QUESTION: Well, at some point it changes so
10 much that it's not --

11 QUESTION: What you're saying --

12 QUESTION: Electronically that's all this is, is
13 it not?

14 MR. GOLD: I'm saying that is a fair argument
15 but we're miles away from that fair argument.

16 QUESTION: No, but take Justice Kennedy's
17 precise example, it's not just the indexed New York times
18 of this date but the Times publishes a massive volumes,
19 all of the New York Times from 1950 to 1990 with an index
20 in it, would you consider that just a revision of the one
21 edition of the New York Times for which the Times had the
22 copyright.

23 MR. GOLD: I do not think that's --

24 QUESTION: I wouldn't think that either.

25 MR. GOLD: -- a revision.

1 QUESTION: It also could be a later collective
2 work in the same series.

3 MR. GOLD: The question here, though, at least
4 there is an argument that that's a revision and not an
5 exploitation of the copyrighted author's article as an
6 article, but my point, my beginning point is that as I
7 understand Mr. Tribe's argument, if the Times were to
8 publish an article as an article, saying this was part of
9 the New York Times and offer it on the market, make copies
10 and offer it to anyone who wants to buy it, that that
11 would be part of the publisher's 201(c) right.

12 At that point there's nothing, on that theory,
13 there is nothing left of the fact that the author is the
14 copyright holder in the article. We thought that was the
15 starting point, that the one thing that is plain is that
16 the collective work copyright holder cannot exploit the
17 article as an article, as a separate freestanding work.
18 And in the end what the Nexis system does is exploit
19 articles on an article by article basis. They're drawn
20 from hundreds of collective works.

21 QUESTION: Mr. Gold, it would help me if you
22 would identify for me precisely when the infringement
23 occurs. Let me just take the very first step. Supposing
24 the New York Times sends an E-mail to Nexis and attaches
25 an exhibit and on that exhibit is an entire copy of all

1 the stories in the paper that day. Is that an
2 infringement?

3 MR. GOLD: I don't think that if you take a
4 particular view of what the revised work is at that stage
5 whether there is an infringement seems to me questionable,
6 but --

7 QUESTION: And the reason it would not be an
8 infringement is because translating it from the paper
9 media to the electronic media would be a revision? Is
10 that correct? Just as though you put it in Braille, that
11 would be a revision.

12 MR. GOLD: As long as a collective work, but
13 what is done here --

14 QUESTION: So that step isn't an infringement.
15 Now when does the infringement occur and by whom?

16 MR. GOLD: The -- it seems to us there are a
17 series of infringements, the first is --

18 QUESTION: Let's take the first one and by whom.

19 MR. GOLD: The first is that the articles are
20 coded, the article files are coded and then inserted into
21 an overall database of millions and from the latest
22 numbers, billions --

23 QUESTION: And then you're going to have to tell
24 me, why is that different from putting a photostat or a
25 microfiche of a New York Times in a particular place in a

1 big library?

2 MR. GOLD: Because you're not putting a
3 microfiche of the New York Times as a New York Times what
4 you're --

5 QUESTION: No, but you're putting a revision in.

6 MR. GOLD: No.

7 QUESTION: What you just said was a revision.

8 MR. GOLD: No, you're putting articles that were
9 part of the revision into an undifferentiated mess and in
10 that sense you're creating a quite different work. Those
11 articles --

12 QUESTION: I thought your complaint alleges
13 contributory infringement by the New York Times the minute
14 it sends it to me, data central. I thought that was the
15 allegation in your complaint, that that's a contributory
16 infringement because the New York Times knows what they're
17 going to do with it, they're going to disaggregate it and
18 have it available. Is that the allegation or not?

19 MR. GOLD: That's the allegation.

20 QUESTION: That's how I read it.

21 MR. GOLD: But my point was that it by putting
22 -- they're not sending an integrated New York Times to
23 Nexis, they're sending disaggregated articles which will
24 be further disaggregated.

25 QUESTION: But that -- even if they --

1 QUESTION: The other side disputes that. Mr.
2 Tribe says that's not it. We send exactly what we had,
3 but be that as it may. Is it not your allegation in the
4 complaint that whatever the New York Times sends is a
5 contributor infringement?

6 MR. GOLD: Yes.

7 QUESTION: Okay, now if that is so, why should
8 it make a difference whether the Times sends it in an
9 arguably aggregated form or an arguably disaggregated
10 form, isn't the real point from your -- from the
11 standpoint of your case that the newspaper is
12 participating in a process the end point of which is
13 disaggregation and access to disaggregated materials.

14 MR. GOLD: Yes.

15 QUESTION: And if that's the case then why isn't
16 it on your theory an infringement, no matter what the
17 format in which the Times or any newspaper sends the
18 material to Nexis?

19 MR. GOLD: My only point in making -- in stating
20 that the form of the transmission, namely in article
21 files, is that is part and parcel of what you've just
22 stated, namely an overall process, to create a set of
23 disaggregated article files.

24 QUESTION: Then I should think your answer to
25 Justice Stevens' question would be the infringement on the

1 part of the newspaper takes place at the moment of
2 transmission.

3 MR. GOLD: I think that in those terms that's
4 true and I thought I did answer it that way in the -- in
5 the sense that it is the nature of the -- the nature of
6 the disaggregation and assigning each article to an
7 article file which is part and parcel of this overall --

8 QUESTION: I'm still not clear of your answer of
9 Justice Stevens' question, when does the first
10 infringement take place? It sounds as if you're saying
11 the infringement takes place when the Times pushes the
12 button to remove all the ads and the graphics or when the
13 Times pushes the button to enable a searcher to pull up
14 the article by author and that seems very strange to me.
15 When is the first act of infringement? Forget about
16 contribution to the tort, when is the first infringing
17 act?

18 MR. GOLD: When you say forget about
19 contributing to, I'm just not clear on what you're asking.
20 The --

21 QUESTION: There's a tortfeasor and persons who
22 contribute to the tort. When is the tort first committed?
23 The tort of infringement.

24 MR. GOLD: This is, I guess, as I see it an act
25 that is the first step in a continuing process of

1 infringement. The Times --

2 QUESTION: When can I say, ah-ha, there's an
3 infringement.

4 MR. GOLD: It seems to me that in practical
5 terms the first act of infringement of any substance is
6 the putting of the article files as separate article files
7 on the Nexis database and making it available in this
8 system to be accessed, printed out, downloaded and so --

9 QUESTION: I understand that, but why, since the
10 newspaper knows that that is what is supposed to happen,
11 that in fact is what it called for in its contract with
12 Nexis, why doesn't the newspaper infringe at the moment
13 when it takes the first step in that process, which I
14 suppose would be the moment at which it presses the send
15 button to send the material to Nexis?

16 MR. GOLD: I don't think I've ever before been
17 faced with an embarrassment of riches where I'm being
18 asked to say how many multiple --

19 QUESTION: I'm not going to ask that, I'm asking
20 the opposite. That is, what is the process, and the
21 reason I find it important is it seems to me possible from
22 what your opponents have said that what happens at say the
23 Post or the Times is there is the analog electronically of
24 the front page. It doesn't have the pictures, it doesn't
25 have the graphs. I don't care about that for the moment.

1 Assume you lose on that one. I have the electronic analog
2 which is close enough. And then what happens is somebody
3 pushes the send button and at one instance of time that
4 electronically is transmitted to Nexis where it's on a
5 chip. Now all that happens after that, where we have the
6 electronic analog on a chip, is some electronic signals
7 are added by Nexis to parts of the chip so that any user
8 of Nexis who wants to can call it up like any other thing,
9 article by article. Now I want to know is, is that what
10 happens?

11 MR. GOLD: My understanding of what happens is
12 that the Post creates a set of article files, each of
13 which are an electronic --

14 QUESTION: Creating an article file maybe that
15 on a chip there's the electronic analog or on a disk and
16 you add a few other signals.

17 MR. GOLD: Well --

18 QUESTION: Now the reason I'm asking this and
19 the reason I think it's important is because it seems to
20 me it might make an enormous difference if the only
21 infringing act is when a user comes in and calls up a
22 file, because at that point principles of fair use come
23 into play, and I think principles of fair use might make
24 an enormous difference to the end result and the reason to
25 get my whole question out because I might not have another

1 opportunity is I am disturbed very much by what I call, by
2 way of parody, their Chinese Cultural Revolution argument.
3 That is, we wipe out the history of the 20th Century and
4 that's an overstatement but it's not such an overstatement
5 when you think that most school children today will be
6 looking for information on machines and if it isn't in the
7 database library D.H. Lawrence, John P. Marguand or lesser
8 figures will simply disappear because it's two expensive
9 for them to locate each heir and to get the copyright
10 permission to put the article on the machine. All right,
11 I've got it all out now I'd like your response.

12 MR. GOLD: Do I get one sentence or two?

13 QUESTION: I'd like you to take as long as you'd
14 like and I won't interrupt further.

15 MR. GOLD: First of all the -- it is enormously
16 different, I would suggest, to breakdown and disaggregate
17 a collective and into component parts when the component
18 parts are the copyright property of someone else and to
19 take the first and necessary step for those component
20 parts to be exploited as individual freestanding works and
21 with the purpose of -- providing that they will be
22 exploited as freestanding works.

23 The -- every step from the first step taken by
24 the newspapers and breaking this down into article files
25 coding it, providing those article files to Nexis where

1 they are further coded and inputted, not necessarily in
2 sequence, is to create a system in which the article files
3 can be exploited as individual files, as individual
4 articles. This process is the print equivalent process of
5 printing each article as an individual article which can
6 be combined with any other of a billion articles in a new
7 compilation which has nothing to do with the original
8 collective work or any revised collective work or
9 published by itself, printed and published.

10 QUESTION: Mr. Gold, if you've had a chance to
11 finish your answer, why is that different from sending a
12 newspaper to a library with very detailed indexes, knowing
13 that the library will allow people to come in and make
14 individual copies of individual stories, individual
15 contributions to it.

16 MR. GOLD: Well if the library --

17 QUESTION: Has a very elaborate index system and
18 it's part of a huge library.

19 MR. GOLD: Yeah. Justice Stevens, all I can say
20 is if the library is part and parcel of copying individual
21 articles, that's a copyright infringement.

22 QUESTION: All it does is provide the
23 information that enables the person to pick and choose
24 what he wants.

25 MR. GOLD: Well, there are two different

1 questions that it seems to me you're raising. If the
2 library simply gives someone an index and a copy of the
3 paper and says --

4 QUESTION: And has a xerox machine where the guy
5 can go in and get the particular one he wants.

6 MR. GOLD: The question is whether the library
7 is implicated in providing the duplicating system. The
8 law could not be clearer on that. There are elaborate
9 provisions in the Copyright Act with regard to library
10 permitted or created copying for a price and don't forget
11 this is all commercialized. Nexis is not a free service.
12 It is a publishing service creating new copies of these
13 works for --

14 QUESTION: So just to be sure I understand, the
15 infringement occurs, I still want to know just when it
16 first -- the infringement occurs when the individual makes
17 a selection and then makes a copy of his particular
18 choice.

19 MR. GOLD: You mean in the library example you
20 are raising?

21 QUESTION: Is it not the same in the electronic
22 situation? There's no infringement and some individual
23 picks out a particular article that was both part of a
24 revision and part of original copyright by the author and
25 makes a copy of that without making a copy of the whole

1 revision.

2 MR. GOLD: Two things if I can, the copying of
3 the work onto the disk is one kind -- if we're correct, is
4 one kind of copyright infringement.

5 QUESTION: I thought you said earlier that if
6 the whole E-mail was copied in electronic form that would
7 be a revision, not an infringement. Are you changing your
8 view on the --

9 MR. GOLD: No, I'm sorry, I don't understand
10 what you're asking. If the -- we're discussing your
11 newspaper --

12 QUESTION: Correct.

13 MR. GOLD: -- library example. The only
14 infringement is if the library is actively engaged in
15 facilitating, allowing further --

16 QUESTION: Selling individual articles, yeah,
17 right.

18 MR. GOLD: Duplications for a price. In this
19 case, there are multiple infringements before that because
20 --

21 QUESTION: What's the first one before that.

22 MR. GOLD: The first one is the preparation of
23 the article files as separate article files for the
24 purpose of creating an overall compilation of separate
25 article files which are to be exploited as separate

1 article files.

2 QUESTION: Is that analytically different from
3 creating elaborate indices in a print library.

4 MR. GOLD: Yes, because it is part and parcel of
5 a process for printing, if you will, for reproducing and
6 distributing separate article files, separate articles as
7 such. If the news -- to go back to --

8 QUESTION: Well, its equivalent in the print
9 media, I guess, would be sending over a package of
10 separate articles which in combination were the Washington
11 Post of that day, but they're sent over as separate
12 articles and each one indexed in such a way as to
13 facilitate the obtaining of those articles without
14 obtaining the rest of the Washington Post.

15 MR. GOLD: Right, for a price, for sale. That is
16 precisely what I --

17 QUESTION: That's what my understanding of the
18 record is, they sell it -- send it over as a bundle. They
19 don't send it over in separate pieces.

20 QUESTION: That's what I wanted to know.

21 MR. GOLD: They send over a bundle of separate
22 pieces.

23 QUESTION: Well, all right, but suppose it's the
24 exact electronic analog of the morning paper. I mean, if
25 it's the exact electronic analog of the morning paper that

1 they send over, I know it's technical but this is a pretty
2 technical case and then it seems to me that it is not just
3 sending separate articles. If they send one at ten in the
4 morning and another at four in the afternoon it might be
5 quite different.

6 MR. GOLD: Justice Breyer, if to use Justice
7 Scalia's example, you send to the print shop every
8 separate article that appeared in the newspaper and said
9 print each one up as a separate article to be purveyed to
10 the public, given the structure of this act, that is
11 different from saying here is a collective whole, because
12 --

13 QUESTION: You have to establish that they are
14 sent over as separate articles. What constitutes the
15 sending over of them as separate articles? I thought it
16 was the fact that when they're sent over they are coded
17 and identified --

18 MR. GOLD: Right.

19 QUESTION: -- separately, not as simply one
20 unidentifiable part of the Washington Post of May 2nd.

21 MR. GOLD: Correct.

22 QUESTION: Each one has a code on it which
23 enables it to be treated as a separate article.

24 MR. GOLD: Right, and the only togetherness, if
25 you will, is that it's our understanding, and it is my

1 understanding of the record that after the paper is broken
2 down and these article files are created and coded, they
3 are transmitted or streamed as a set of distinguishable
4 article files but they are not a unit, an electronic unit
5 of the May 1st paper, they are a separate --

6 QUESTION: That would be quite useless for the
7 purposes for which they want it. They don't want the
8 Washington Post of May 2nd. They want the ability to get
9 individual articles.

10 MR. GOLD: Correct. This is a purpose of
11 commercial activity.

12 QUESTION: Mr. Gold, before you finish I would
13 like you to respond to Mr. Tribe's point that on your
14 theory the microfiche, it would be the same thing, equally
15 infringing.

16 MR. GOLD: We don't believe that the microfiche
17 is equally infringing?

18 QUESTION: Why not.

19 MR. GOLD: Because it is a reproduction of the
20 whole paper in integral form. Now, if to the extent that
21 the paper is shown rather than read, you have the whole
22 paper, you can read what you want, but it's a one to one
23 relationship between the number of copies that are made
24 and the number that are --

25 QUESTION: Isn't that a problem that with

1 computers we can -- you can simultaneously be a bundle and
2 a whole bunch of separate things, depends on which button
3 we decide to push whether you want the whole thing or just
4 one.

5 MR. GOLD: Well, that's why the fact that it is
6 -- that the system is one of articles which can be
7 exploited as articles or in any combination of articles
8 makes all the difference. It is not a set in any real
9 terms of the work.

10 QUESTION: Thank you Mr. Gold.

11 Mr. Tribe you have two minutes remaining.

12 REBUTTAL ARGUMENT OF LAURENCE H. TRIBE

13 ON BEHALF OF THE PETITIONERS

14 MR. TRIBE: Thank you, Mr. Chief Justice. Let me
15 first say very clearly it is not the case that these
16 newspapers disaggregate something and break it down to
17 facilitate copyright violation. It is disaggregated from
18 the word go, that is, when they put together the computer
19 text file that's going to go to the printer they do it
20 article by article because as it happens, that's what goes
21 into a newspaper. That exact text, and you'll see it
22 unmistakably in the record, is exactly what is sent.

23 QUESTION: No additional code on it?

24 MR. TRIBE: Well, sometimes indexing codes, but
25 not only for articles. You've got to be able to find this

1 stuff. You can't just wander around inside a computer.
2 And it is the readers guide to periodicals. That's what
3 we've got here. Whether it is in written form or in index
4 form, it's the same thing.

5 So point one, they don't deliberately
6 disaggregate. Point two, if you look at 349 A of the
7 joint appendix, that's one of many places, I just happened
8 to find this one, where they say they're not claiming any
9 contributory or vicarious liability with respect to
10 infringements by end users.

11 Their whole theory was putting this stuff in the
12 way that the 20th and 21st centuries has to do it is an
13 infringement. It's really a quite Luddite theory. Their
14 distinction with microfilm is that microfilm is a piece of
15 something, you can see it. Well, what about the CD-ROM,
16 then? You can't see it except with a machine. It just
17 looks like it might be Joan Baez singing, but it turns out
18 it's got volume upon volume of material.

19 There's nothing fancy that's done here to
20 facilitate violation. What they're doing is making entire
21 bunch of material available and I didn't hear an answer to
22 Justice Breyer's question. If we read the law the way
23 they propose to read it and I still don't know the exact
24 moment they think is an infringement and how analytically
25 it differs from Justice Stevens' library example, we're

1 going to have a serious problem with our kids doing
2 homework and with professors of history finding out what
3 happened in the middle of the 20th century. It seems to
4 me that before this Court takes a step like that it should
5 pause.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Tribe.
7 The case is submitted.

8 (Whereupon, at 11:04 a.m., the case in the
9 above-entitled matter was submitted.)

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