

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: REED ELSEVIER, INC., ET AL., Petitioners, v. IRVIN
MUCHNICK, ET AL.
CASE NO: No. 08-103
PLACE: Washington, D.C.
DATE: Wednesday, October 7, 2009
PAGES: 1-57

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 REED ELSEVIER, INC., ET AL. :

4 Petitioners :

5 v. : No. 08-103

6 IRVIN MUCHNICK, ET AL. :

7 - - - - - x

8 Washington, D.C.

9 Wednesday, October 7, 2009

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 11:07 a.m.

14 APPEARANCES:

15 CHARLES S. SIMS, ESQ., New York, N.Y.; on behalf of
16 the Petitioners.

17 GINGER ANDERS, ESQ., Assistant to the Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the United States, as amicus curiae, supporting the
20 Petitioners.

21 DEBORAH JONES MERRITT, ESQ., Columbus, Ohio; as amicus
22 curiae in support of the judgment below. Appointed
23 by this Court.

24

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P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 08-103, Elsevier v. Muchnick. Mr. Sims.

ORAL ARGUMENT OF CHARLES S. SIMS

ON BEHALF OF THE PETITIONERS

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

The Second Circuit's decision vacating for lack of jurisdiction a settlement agreement that compensated authors for all their arguably infringed works in the face of Congress's direction that Federal district courts shall have jurisdiction over any civil action arising under copyright is wrong for three reasons: First, even -- first, the decision is incorrect under the unanimous holding three years ago in Arbaugh that, where Congress affords unqualified subject matter jurisdiction, other statutory provisions argued to be jurisdictional that do not clearly restrict that jurisdiction won't be deemed to do so.

CHIEF JUSTICE ROBERTS: This is a lot harder case than Arbaugh, though. Arbaugh involved the definition of an employer and then the scope of the statute. This one says no suit shall be instituted.

1 MR. SIMS: Well, Arbaugh relied heavily on
2 the Zipes case, and the Zipes involved a statutory
3 threshold condition much like the one here. You
4 couldn't bring a Title VII action unless you filed a
5 particular kind of piece of paper with the EEOC. And
6 Zipes and Arbaugh both held that those statutory
7 conditions or essential ingredients were not
8 jurisdictional, and the Court relied, heavily I think,
9 on the fact that jurisdiction was separately provided
10 for and the provisions at issue weren't.

11 The second point I want to make is that,
12 even putting the clear statement rule of Arbaugh to one
13 side, statutory text, structure, purpose, and history
14 all point to classifying 411(a) as mandatory but not
15 jurisdictional.

16 CHIEF JUSTICE ROBERTS: I think you are
17 right that Arbaugh at least set forth a clear statement
18 rule, but I think that's significant only going forward.
19 I don't know that Congress, when it passed this
20 provision, could have been aware of the clear statement
21 rule that Arbaugh articulated.

22 MR. SIMS: Well, but the Court did apply --
23 reiterate and apply the Arbaugh rule in the Rockwell
24 case with respect to a provision that had predated
25 Arbaugh, and nothing in Arbaugh said that.

1 But in any event, our second point is that
2 if you look at the traditional indicia of not only text
3 but also structure, history, and purpose, this provision
4 should be ranked as mandatory but not jurisdictional.

5 And the third point I want to get to --

6 JUSTICE GINSBURG: Do you agree with the --
7 with the government that it's mandatory for the district
8 court but prohibited to the court of appeals? I think
9 the government has this hybrid with -- because of the
10 public purposes served by registration, not only can but
11 the district court should raise the failure to register
12 on its own, but then the government says once you have a
13 final judgment in district court, it's no longer open
14 for the court of appeals to raise it on its own.

15 Do you agree with that, or do you say it's
16 for the defendants to raise, and if they don't raise it,
17 too bad?

18 MR. SIMS: Justice Ginsburg, we certainly
19 agree with the government with respect to the court of
20 appeals. With respect to the district court, on the one
21 hand, my clients don't -- are satisfied with the
22 government's position. On the other hand, as Justice
23 Scalia's decision, I think, in Day v. McDonough pointed
24 out, the traditional default rule really is that
25 defenses are up to defendants to raise.

1 In this particular kind of situation where
2 there is no reason at all, I think, to suspect that
3 defense counsel will not raise 411 whenever -- none of
4 the cases that Ms. Merritt raises, for example, involved
5 situations of waiver, where the issues weren't raised
6 until the court of appeals -- I think that the Court can
7 rely, frankly, on defendants and on the ability of
8 district judges to nudge defense counsel when they --
9 when they need nudging.

10 But if the Court felt that the provision was
11 important enough so that it wanted to impose on district
12 courts the obligation of strict policing, I think it
13 could. But as I say, I have been practicing copyright
14 law for 25 years; I've never seen a defendant who either
15 missed a defense or chose not to raise it.

16 The third point I want to raise if there is
17 time is simply that, even if 411(a) were deemed
18 jurisdictional at the outset of our case with respect to
19 its language which talks about instituting, nothing in
20 either its text or purpose suggests that Congress meant
21 to deprive district courts of their usual power to
22 settle cases with respect to approving settlement
23 agreements.

24 In this case, because the plaintiffs
25 complied with 411(a) at the front door by alleging

1 properly that they had complied with the obligation, we
2 think the district court had jurisdiction to send the
3 parties to mediation and then necessarily to approve the
4 agreement they returned with three years later.

5 Now, with respect to --

6 JUSTICE SCALIA: Can -- can I ask you -- one
7 of the points made by the amicus is that, if I recall it
8 correctly, that what -- what Congress had in mind in
9 phrasing it this way was to enable -- enable the party
10 who had not gone to the Copyright Office to go after
11 dismissal on jurisdictional grounds, and the implication
12 is that if it were not held to be jurisdictional, there
13 would be a merits dismissal because of the failure to
14 have gone to the Copyright Office first. And therefore
15 would not -- the plaintiff would not be able to come
16 back to the court.

17 MR. SIMS: I don't understand the amicus to
18 be making that argument. If Your Honor is referring
19 to --

20 JUSTICE SCALIA: I know. Oh, I know.

21 MR. SIMS: -- the third -- the third
22 sentence of 411(a), I think that's the principal
23 argument she makes as to why this satisfies Arbaugh, and
24 we think, quite to the contrary, the third sentence of
25 411(a) --

1 JUSTICE SCALIA: No, I didn't -- I didn't
2 think it related to the third sentence. I -- I thought
3 she said the whole purpose of Congress was to make sure
4 that you'd be able to come back, that your failure to go
5 to the Copyright Office initially would not result in a
6 merits dismissal so that you could not later go back and
7 then rebring the suit. If it was jurisdictional, just a
8 jurisdictional dismissal, the jurisdiction could be
9 cured by going to the Copyright Office and your suit
10 could then proceed.

11 MR. SIMS: Your Honor, I think that the --
12 because of the way 411(a) is phrased, dismissals under
13 411(a), whether we are correct that it's not
14 jurisdictional or whether they are correct that it is, I
15 think ordinarily --

16 JUSTICE SCALIA: You'd be --

17 MR. SIMS: -- it's without prejudice and --

18 JUSTICE SCALIA: You'd be able to come back
19 anyway?

20 MR. SIMS: Absolutely.

21 JUSTICE SCALIA: That's what sort of I
22 thought.

23 MR. SIMS: I think that's the nature of
24 this requirement.

25 JUSTICE SCALIA: That's what I thought you'd

1 say.

2 MR. SIMS: Yes.

3 JUSTICE SCALIA: Yes.

4 (Laughter.)

5 MR. SIMS: With respect to the Arbaugh --

6 JUSTICE KENNEDY: Would -- if the statute of
7 limitations had run, could you still come back?

8 MR. SIMS: The problem in this case, and
9 really the reason why the settlement agreement has
10 turned out the way it did is, there is no effective --

11 JUSTICE KENNEDY: I mean, not -- not
12 necessarily in this case, but in -- but in a typical
13 case.

14 MR. SIMS: There is no effective statute of
15 limitations in these cases, Your Honor.

16 JUSTICE KENNEDY: I said in a typical case.

17 MR. SIMS: Well --

18 JUSTICE KENNEDY: Or is it just LEXIS?

19 MR. SIMS: In -- in a case where the
20 infringement is the existence of something on the Web --

21 JUSTICE KENNEDY: Yes.

22 MR. SIMS: -- then there is no statute of
23 limitations effectively, because the argument would be
24 that the making available is an infringement.

25 We don't think that the last sentence of

1 411(a) satisfies Arbaugh or indeed is -- is any evidence
2 toward this being jurisdictional. The last sentence was
3 inserted, as the history makes perfectly clear, to solve
4 the problem created by the Vacheron decision that the
5 Second Circuit had decided in 1958. And in that case,
6 what justice -- Judge Hand had done, and other courts
7 have done it, too, is to say it is -- district courts
8 cannot review the Register's action in denying
9 registration, and that has to be done in a separate
10 mandamus action, at that point in Washington, D.C.

11 And so the lesson simply is Congress's way
12 of saying very clearly: We want to get rid of that
13 rigamarole and we want to allow all this to be done
14 efficiently. But the statement that this could be done
15 even if the Register didn't show up is not at all any
16 statement, much less a clear statement, that this was
17 intended to be jurisdictional. Now --

18 JUSTICE GINSBURG: Mr. Sims, it has been
19 pointed out that you have taken inconsistent positions.
20 That is, back in the district court before there was a
21 settlement, you urged before the district court that
22 411(a) was a jurisdictional bar and that that precluded
23 certifying a class that included the non-registered
24 copyright holders. You did make that argument in the
25 district court, and now you are saying -- you are

1 confessing error, that was wrong?

2 MR. SIMS: Your Honor, I don't think it's
3 fair to say that we made that argument. We did -- we
4 did issue -- we did say that sentence in one or two
5 places, and the argument --

6 JUSTICE GINSBURG: But you argued it.

7 MR. SIMS: But I think it's -- I think it's
8 different, because the issue in the district court was
9 the fairness, reasonableness, and adequacy of the
10 settlement, and there was an attack on the different
11 valuation for unregistered claims. In that context we
12 relied on 411(a). The argument would have been exactly
13 the same had we said, as we should have, that 411(a) is
14 mandatory but not jurisdictional. We were guilty of
15 exactly the loose language that this Court was guilty of
16 in Robinson and Smith, as it pointed out in Eberhart or
17 Kontrick.

18 JUSTICE SCALIA: And -- and --

19 MR. SIMS: But as -- but as the Court's
20 decision in that case said, there was no need to
21 overrule Robinson or Smith because really what was going
22 on there was the Court had been saying the rule was
23 mandatory, and the additional language that was
24 jurisdictional was loose language.

25 Our argument never focused on the ranking of

1 411(a). It was always rooted in the existence of the
2 rule which did justify, and on the merits of the appeal
3 back in the Second Circuit we will again argue did
4 justify, a different valuation of the claims.

5 JUSTICE SCALIA: Well, you shouldn't use
6 loose language, especially when it's the same loose
7 language, supposedly, that seems to have been used by
8 all the courts of appeals and all the district courts.

9 MR. SIMS: Not all the courts --

10 JUSTICE SCALIA: For years and years.

11 MR. SIMS: Your Honor, the first court of
12 appeals which said that 411(a) -- said, not held -- was
13 jurisdictional was in 1990. That's well after the 1976
14 Act, and the original Act had been -- I mean, the 1909
15 Act, which it was patterned after, had been nearly
16 100 years earlier. There was no court of appeals that
17 ever said that the 1909 Act was jurisdictional, and when
18 this Court had that case in the Washingtonian case in
19 the 1930s, there was no reference to it being
20 jurisdictional by either the majority or the dissent.
21 And I think Washingtonian is particularly interesting
22 because there the district court had originally held
23 that it was jurisdictional and then sua sponte recanted
24 a few days later and issued another position. And
25 that's in the record of this Court in Washingtonian, and

1 it was pointed out by Professor Ben Kaplan in the report
2 to the Register and to Congress in connection with the
3 1976 Act.

4 So the issue was raised for people to think
5 about if anybody had. But Congress did not in 1976 or
6 at any time earlier say that this was intended to be
7 jurisdictional or was jurisdictional.

8 So if -- if passing the Arbaugh argument with
9 respect to text, structure, history and purpose - the
10 structure I think is particularly telling, because in
11 this case the provision of jurisdiction is in Title 28,
12 the provision of registration is in the Copyright Act.
13 They've been separate for --

14 JUSTICE GINSBURG: But still it's a statute
15 and didn't this Court say in Bowles that a statutory
16 qualification on the right to sue is generally
17 jurisdictional?

18 MR. SIMS: I don't think the Court said
19 that. I think that the Court said that in Bowles with
20 respect to time limits for appeal. I think Bowles is
21 quite clearly limited to time limits for appeal, and the
22 Court's decision rested on -- heavily on stare decisis.
23 With respect to that narrow --

24 JUSTICE GINSBURG: Yes, but I thought they
25 made a distinction. They tried to distinguish the other

1 cases, the one -- I forgot -- the one involving Criminal
2 Rule 33, on the ground, well, that's a court rule, but
3 when Congress makes the qualification, then it's
4 jurisdictional.

5 MR. SIMS: But this doesn't involve a time
6 limit. This involves, as Arbaugh and Zipes did,
7 ingredients of the claim, preconditions to the claim,
8 threshold steps with respect to the claim, and I think
9 there is no reason for the Arbaugh approach not to
10 apply. But in any event the structure is telling here;
11 the language is telling as well.

12 CHIEF JUSTICE ROBERTS: Well, if you are
13 talking about the language, what about John R. Sand &
14 Gravel? That said -- we held it was jurisdictional when
15 the statute said: "Suit shall be barred." The
16 language here is "No suit shall be instituted." That
17 sounds pretty close.

18 MR. SIMS: I think not, Chief Justice
19 Roberts. The language here has been used in copyright
20 statutes in 1831, as our reply brief points out, and
21 includes the language for statutes of limitation and for
22 copyright notice. And all of those have always been
23 deemed mandatory. None of them have been deemed
24 jurisdictional.

25 Again, section 507 of the Copyright Act, the

1 statute of limitations provision here, has almost
2 exactly the same language as in 411. John R. Sand, I
3 think, the Court treated as in Bowles, which is --

4 CHIEF JUSTICE ROBERTS: No, that was -- that
5 was a statute of limitations provision, right? It shall
6 be barred after 6 years?

7 MR. SIMS: Well, John R. Sand involved a
8 special situation of suits against the government and
9 considerations of sovereign immunity, and I think the
10 decisions --

11 JUSTICE GINSBURG: I thought the Court said
12 it was mandatory. I don't remember whether they used
13 the word "jurisdictional."

14 MR. SIMS: Well, I do think John R. Sand
15 held that provision was jurisdictional, but I think the
16 decision went off on -- on stare decisis and the fact
17 that the Court had, with respect to the Tucker Act and
18 matters of suits against the government, taken a
19 different position.

20 Those, I think, are really the only
21 carve-outs -- statutory time limits for appeal and
22 suits against the government -- from the general Arbaugh
23 rule.

24 So here Congress has used this language
25 repeatedly. This Court's own forms for copyright

1 infringement, which were first promulgated in the 1930s,
2 have patterned our argument and are contrary to the
3 amicuses'. They have always treated the registration
4 provision of the model complaint differently from the
5 jurisdictional provisions. Those are in separate
6 sections, not next to each other even.

7 CHIEF JUSTICE ROBERTS: We have forms for
8 copyright infringement actions?

9 MR. SIMS: You do. The Federal Rule --
10 (Laughter.)

11 CHIEF JUSTICE ROBERTS: Live and learn.

12 MR. SIMS: And because they haven't changed
13 very much in 70 years, you probably haven't spent much
14 time with them.

15 JUSTICE GINSBURG: It's Form 19.

16 MR. SIMS: Yes. It was originally Form 17.
17 We have gone through the history. But I think there is
18 really only one change, and in every respect it is
19 identical to what it was in 1938. And, again, as I say,
20 it separates out the registration provision from the
21 jurisdictional provision.

22 If Congress had wanted to make registration
23 jurisdictional, it would have been extraordinarily easy
24 to do so. All they would have had to add at the
25 beginning of 411(a) is "notwithstanding anything in 1338

1 and 1331."

2 We have -- we have included in our brief as
3 an appendix about 60-odd Federal statutes, which carved
4 out jurisdiction otherwise provided by 1331 or other
5 provisions, and 411(a) looks nothing like them. They
6 all look roughly like each other.

7 JUSTICE STEVENS: Can I ask a sort of a
8 basic question I've never understood about this case.
9 As I understand it, the end-of-the-line concern was the
10 fairness of the settlement, and particularly to people
11 who have copyrights that have never been registered. Am
12 I right, that that's what --

13 MR. SIMS: Well, not -- not quite. There
14 were -- there were 10 authors who objected, I mean, as
15 a group, and they wanted more money for unregistered
16 authors. There were, needless to say, tens of thousands
17 of other authors who didn't object, but it is true that
18 the objectors wanted -- thought that they had gotten a
19 bad deal.

20 JUSTICE STEVENS: But those were people who
21 owned some registered copyrights, but had other works
22 that were not -- had no registered copyrights. Is that
23 right?

24 MR. SIMS: I --

25 JUSTICE STEVENS: Were there any of those

1 people who had no -- no copyrights at all?

2 MR. SIMS: Well, they -- I don't know, Your
3 Honor, whether the objectors had any registered works.
4 I know that the named plaintiffs had more unregistered
5 works than registered works.

6 JUSTICE STEVENS: But they had some
7 registered works?

8 MR. SIMS: Yes.

9 JUSTICE STEVENS: You see, one of the -- one
10 of the risks involved here is whether people who had no
11 registered works are being adequately protected by this
12 Class C settlement.

13 MR. SIMS: Yes. This is not a situation --

14 JUSTICE STEVENS: And my -- just to get the
15 question on the table -- I don't want to take too much
16 of your time. I don't understand how it makes any
17 difference whether you say the rule is mandatory or the
18 rule is jurisdictional, in terms of the fairness of the
19 settlement, at the end of the line.

20 MR. SIMS: I don't think that has anything
21 to do with the fairness of the settlement. I think we
22 are here because the Second Circuit blew up the
23 settlement and said we can't settle this case, and the
24 only way it was settleable was to give the publishers
25 and the databases complete peace by clearing all off of

1 this off.

2 And so --

3 JUSTICE GINSBURG: And that -- that
4 certainly would be open. If you are correct that the
5 Second Circuit shouldn't have cut this off at the
6 threshold by saying it's jurisdictional, the question of
7 the fairness of the settlement is what you were
8 contending.

9 MR. SIMS: That is correct, Your Honor.

10 I would like to reserve the balance of my
11 time. But the -- the adequacy and fairness of the
12 settlement is back in the Second Circuit on remand.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Ms. Anders.

15 ORAL ARGUMENT OF GINGER ANDERS
16 ON BEHALF OF THE UNITED STATES
17 AS AMICUS CURIAE,
18 SUPPORTING THE PETITIONERS

19 MS. ANDERS: Mr. Chief Justice, and may it
20 please the Court:

21 Statutory prerequisites to suit like section
22 411(a) often fall into one of two distinct categories.
23 They are either jurisdictional and therefore unwaivable
24 or they are not jurisdictional and are fully waivable.
25 Section 411(a)'s registration requirement falls in the

1 middle of those two extremes.

2 It is not jurisdictional, but it should not
3 be fully waivable. The provision does not speak to the
4 power of the courts to decide cases, and therefore it
5 does not limit the court's jurisdiction to adjudicate
6 infringement suits.

7 But, because of this phrase and mandatory
8 language, the requirement should be strictly enforced
9 whenever the defendant asserts it, and because the
10 requirement serves important public interests that are
11 independent of the concerns of the parties to any
12 individual suit --

13 JUSTICE GINSBURG: So your position is that
14 the district court really should have dismissed this
15 case at the outset?

16 MS. ANDERS: I think that, in the ordinary
17 case, the district court should -- when -- when the
18 defendant waives the requirement, which would be the
19 rare case, when the defendant doesn't assert it. When
20 the defendant waives the requirement, the district court
21 should consider whether accepting that waiver would
22 undermine the public interest behind 411.

23 Now, in this particular case, it may not
24 have been an abuse of discretion for the district court
25 to consider those interests and decide that here it

1 would have been acceptable to accept the defendant's
2 waiver and permit the resolution to go forward because,
3 in this case, the periodicals that -- that are
4 involved, the works at issue were primarily already in
5 the possession of the Library of Congress, because they
6 had been registered as -- the periodicals themselves had
7 been registered.

8 So the Library's interest is not as strongly
9 implicated here. In addition, this is a case in which
10 there was going to be settlement, so the Court wasn't
11 going to need to adjudicate the copyright claims and
12 therefore the opportunity for the Register's views to be
13 taken into account was less important.

14 JUSTICE KENNEDY: Maybe this is the same
15 question. Are you representing the interest of the
16 Library of Congress?

17 MS. ANDERS: Yes, we are representing the
18 interest of the Library of Congress, Your Honor.

19 So I think in this case it may have been
20 appropriate for the district court to conclude that --
21 that it could let someone go forward, notwithstanding
22 the fact that some unregistered copyrights were
23 involved.

24 But after adjudication on the merits, the
25 defendant has waived the requirement, and it has not come

1 up. Section 411(a), like any other non-jurisdictional
2 rule, should be subject to the general principle that
3 issues that are not raised below should not be
4 considered for the first time on appeal, absent
5 extraordinary circumstances.

6 JUSTICE GINSBURG: You were candid, Ms.
7 Anders, to say that this is in a hybrid category, that
8 the government was taking an intermediate position. Do
9 you know of any other provision where the district court
10 has an obligation to raise the question on its own
11 motion that is yet not jurisdictional?

12 MS. ANDERS: I think this Court has
13 recognized that waiver doctrines in general are
14 discretionary, and so, particularly in the area of res
15 judicata, the Court has recognized in the *Plaut v.*
16 *Spendthrift Farm* and *Arizona v. California* that the
17 Court has some discretion to enforce res judicata on its
18 own motion. Precisely --

19 JUSTICE GINSBURG: Very, very limited. I
20 think *Arizona* didn't say just any time there's --
21 there's a preclusion plea, the court can raise it on its
22 own.

23 MS. ANDERS: That's correct. I think also
24 the plain error rule presupposes that there are some
25 errors that the district court has a responsibility to

1 correct on its own, even though neither party has
2 brought the error to its attention. So in other words,
3 the district court has the obligation to issue a legal
4 ruling that neither party asked for, and I think
5 that kind of regime is particularly appropriate here
6 because the public interest at issue, the Library's
7 interest and the interest in the public record of
8 copyright -- those don't depend on the defendant's
9 litigation decisions -- they shouldn't depend on the
10 defendant's particular strategic decisions within a
11 particular case.

12 The Library's interest will always be in
13 having every work registered, and the public interest
14 and public record will be the same.

15 CHIEF JUSTICE ROBERTS: Is your discussion
16 of that, including in your response to Justice Ginsburg
17 and in your brief, do you think that that's within the
18 question presented, rephrased?

19 MS. ANDERS: I think it is fairly within the
20 question presented. It's the question of whether - the
21 question of whether the rule is jurisdictional or not, I
22 think, also encompasses the question of how the
23 rule should be enforced, assuming that it's
24 non-jurisdictional of what should happen in this case.

25 So I do think that the -- the

1 characterization of this rule as a mandatory or a
2 waivable rule is -- is within the question presented.
3 So I think that the regime we're proposing best gives
4 effect to the mandatory, but non-jurisdictional language
5 that Congress used in section 411(a).

6 And it also protects the public interest
7 that the requirement serves, which, again, the
8 compilation of a public record of copyrighted works in
9 the Copyright Office, which allows a robust licensing
10 system under the Copyright Act.

11 JUSTICE SCALIA: But how -- how would we get
12 to hold what -- what you say is the law? It seems, to
13 me, once we decide it's not jurisdictional and once we
14 agree with you, that it doesn't -- at least in this
15 case -- didn't have to be raised sua sponte by the
16 district court, that's the end of the case. And - and
17 so why do we have to engage in the further discussion,
18 well, ordinarily, the district court must raise it on
19 its own and -- you know, and, if it doesn't ordinarily
20 -- you know, the appellate court should.

21 Why do we have to get into that?

22 MS. ANDERS: I don't think that you have to
23 get into it, Justice Scalia, but I think --

24 JUSTICE SCALIA: Which means we shouldn't.

25 (Laughter.)

1 MS. ANDERS: Well, that may be the case, but
2 I think we are simply trying to -- trying to explain to
3 the Court what we think -- how the rule should be
4 applied in the district court in the -- in the ordinary
5 case and then in the rare case, this one, where the
6 defendant has waived, and permitting the settlement to
7 go forward wouldn't adversely affect the public
8 interests that are normally in force here.

9 CHIEF JUSTICE ROBERTS: Do you have an
10 example of the non-ordinary case? I mean, you seem to
11 say, either -- I guess it's not always after judgment
12 that it shouldn't be implemented, I guess. But when
13 wouldn't it be after judgment?

14 MS. ANDERS: I think that the -- that in
15 general, the requirement would be considered waived if
16 it's not raised before judgment. We can't think of a
17 case in which --

18 CHIEF JUSTICE ROBERTS: So it's more --

19 MS. ANDERS: -- the extraordinary
20 circumstance would be fulfilled.

21 CHIEF JUSTICE ROBERTS: So it's more or less
22 jurisdictional after judgment?

23 MS. ANDERS: No, I'm sorry. What I meant to
24 say was that I don't think that the rule could ever be
25 enforced, in the first instance, on appeal if it has

1 been waived below. I think the general civil rule for
2 non-jurisdictional requirements is that if it's not
3 raised before judgment, it's lost on appeal except in
4 extraordinary circumstances.

5 JUSTICE SCALIA: Well, that's normal, but
6 not invariable.

7 MS. ANDERS: Well, I think that's the
8 rule -- that's the rule that this Court has applied to
9 constitutional rights with the plain error rule, and
10 also with respect to structural constitutional rights
11 that might implicate other public interests, the general
12 rule is that if the requirement has not been raised
13 during the -- during the trial stages of the case, then
14 it can't be enforced for the first time on appeal.

15 JUSTICE SCALIA: Unless it is plain error.

16 MS. ANDERS: Unless it's plain error, and in
17 this -- in this situation, if the plain error standard
18 applied or something even more -- even more heightened
19 in the civil context, we can't think of a case in which
20 registration requirements --

21 JUSTICE SCALIA: It's pretty plain that the
22 things haven't been registered. I mean -- right? And
23 it's pretty plain that if they hadn't been registered,
24 the district court should not have proceeded with the
25 case. So I don't know why it wouldn't normally be plain

1 error in -- in the court of appeals.

2 MS. ANDERS: Well, I think those -- those
3 circumstances would be true in most cases in which the
4 -- for some reason, the requirement hadn't been reached
5 at the trial stage. So I don't think that the
6 extraordinary circumstance is present here that would
7 justify overturning the independent interest in judgment
8 that our legal system has, the finality of judgment, the
9 rights of the parties in relying on that judgment and
10 the judicial resources expended.

11 You know, I think in some ways we could
12 think of this requirement as sort of like a filing fee,
13 that it -- it serves interests beyond those of the
14 parties at the district court, and therefore you
15 wouldn't think of it as waivable at the instance of the
16 defendant. But --

17 CHIEF JUSTICE ROBERTS: There really are, in
18 our recent decisions, it seems to me, two different
19 lines of authority. There is the Bowles and the John R.
20 Sand and Gravel, which treats these sorts of things as
21 jurisdictional, and the Arbaugh line that doesn't. And
22 it does seem to me that the language here, "No suit
23 shall be instituted," sounds an awful lot like "Suit
24 shall be barred," or the other language in -- in Bowles.

25 MS. ANDERS: I think it's similar to a lot

1 of language that's used in statutes of limitations,
2 which are traditionally considered non-jurisdictional,
3 that no statute -- no suit shall be instituted.

4 I think what's important is that it speaks
5 in terms of the actions of the parties, because the
6 parties institute a suit, not the court. So it doesn't
7 speak in terms of the power of the court. And there's
8 no evidence, I don't think, that Congress intended to
9 withdraw the broad grant to jurisdiction in 1331 and
10 1338. I think Bowles and John R. Sand are cases in
11 which the Court's own precedents had previously treated
12 the rules at issue as jurisdictional, had accorded them
13 jurisdictional consequences. So those are cases in
14 which the Court relied on stare decisis, but I don't
15 think that we have any similar situation here. There's
16 no --

17 JUSTICE GINSBURG: What about the
18 congressional reaction to the Second Circuit's decision?
19 It provided that the -- there was to be no
20 jurisdictional bar in criminal matters. Didn't -- it
21 didn't affect jurisdiction in criminal matters, but it
22 didn't say anything about civil matters. So isn't that
23 some kind of implicit acceptance that in -- on the
24 civil -- in civil cases, it would be jurisdictional?

25 MS. ANDERS: I don't think so. I think, in

1 -- in enacting that, Congress had recognized that the
2 incentives for registration should stay in place in the
3 civil context, but that making an exception wouldn't --
4 wouldn't make a difference in the criminal context.

5 I think Congress still spoke of it as a --
6 as a non-jurisdictional requirement in the legislative
7 history. So I don't think that there is any indication
8 that Congress has ratified the Second Circuit's decision
9 here.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Ms. Anders.

12 Ms. Merritt.

13 ORAL ARGUMENT OF DEBORAH JONES MERRITT
14 AS AMICUS CURIAE IN SUPPORT
15 OF THE JUDGEMENT BELOW

16 MS. JONES MERRITT: Mr. Chief Justice, and
17 may it please the Court:

18 We will start with the statutory language as
19 the Court has been discussing for the last half-hour.

20 Section 411(a) appears on page 1 of the
21 Petitioner's brief. It uses, first, the mandatory word
22 "shall" in commanding that no action shall be
23 instituted.

24 It does not contain a limitations period, as
25 statutes of limitations do. It simply says, "No action

1 shall be instituted." No waiver --

2 JUSTICE SCALIA: "Until." That's a
3 limitation period.

4 MS. JONES MERRITT: Until?

5 JUSTICE SCALIA: Until preregistration or
6 registration has been made.

7 MS. JONES MERRITT: That's correct, Justice
8 Scalia, and that makes --

9 JUSTICE SCALIA: That's our limitation
10 period.

11 MS. JONES MERRITT: That makes -- it's a --
12 it's a requirement that registration be made. It is
13 quite analogous, although stronger than the statute in
14 the Hallstrom case. The hybrid argument that the
15 Solicitor General was referring to is the Court's
16 decision in the Hallstrom case, which was a provision of
17 the environmental statutes -- it's common in several of
18 those statutes -- providing: No action may be commenced
19 until a notice is filed.

20 Our provision here is stronger. It says:
21 "No action shall be instituted," instead of "No action
22 may be commenced." Even if this case is not -- even if
23 this statute does not impose a jurisdictional limit,
24 which I will strongly argue that it does, it at the very
25 least imposes a mandatory command like the statute in

1 Hallstrom. And there is no reason in this case to
2 reverse the Second Circuit, even if this is a mandatory
3 provision.

4 As you will recall, in Hallstrom, the
5 parties had gone through 4 years of complicated
6 environmental litigation, went up through the court of
7 appeals. The court of appeals reversed, saying, you did
8 not comply with this notice provision. This Court held
9 that it did not need to decide whether that provision
10 was jurisdictional in the strictest sense of the term,
11 because it was at least mandatory. And the Court
12 reversed despite that time, sent the case back.

13 In fact, I believe, Mr. Chief Justice, you
14 asked about whether the mandatory issue would be within
15 the Court's grant of certiorari. The grant of
16 certiorari in Hallstrom referred to the jurisdictional
17 issue and the Court decided that rather than get to the
18 strict issue of jurisdiction, it would decide on a
19 mandatory fork.

20 But there is no reason, if we are -- if the
21 Court wants to avoid the jurisdictional issue and
22 endorse the mandatory hybrid one, the Second Circuit
23 should still be affirmed in this case. The parties
24 raised section 411(a) quite clearly to the district
25 court. They used this provision as their major defense

1 of both the substance of the settlement's fairness and
2 the representation. The representation was the major
3 issue that the objectors raised in the district court.

4 And so both parties, the plaintiffs and the
5 defendants, argued in their briefs -- and it's not
6 simply a few sentences; we've provided the parts of the
7 record in the appendix to our brief -- that the reason
8 that this settlement should be upheld was because of
9 this mandatory, they called it then, jurisdictional
10 provision. That was an essential argument that they
11 made to the district court and that they then repeated
12 to the Second Circuit in the merits briefs long before
13 the circuit said, then: Wait a minute; you are making a
14 curious argument here, that this is a jurisdictional
15 provision that upholds your settlement, but that we
16 still have the ability to look at this settlement if
17 it's jurisdictional.

18 I would like to return to the language of
19 section 411(a). As I have argued, it begins with this
20 mandatory language, "No action shall be maintained."

21 JUSTICE GINSBURG: In -- aren't there
22 statutes that have exhaustion requirements, or like the
23 EEOC filing requirement, that say, you can't sue until
24 you have gone to X administrative agency? And those are
25 not considered jurisdictional. That is --

1 MS. JONES MERRITT: That's correct. That's
2 correct, Justice Ginsburg. Many of those statutes refer
3 specifically to exhaustion. The Prison Litigation
4 Reform Act, for example, that some of the parties cite,
5 refers specifically to exhaustion of remedies after the
6 "no action" sort of language.

7 Every jurisdictional statute has its own
8 language and its own story. We could say they are like
9 Tolstoy's unhappy families; they are all different. And
10 in this case, the story of the Copyright Act and its
11 language is very distinctive, both in the public
12 purposes that it furthers and in the language that it
13 uses.

14 Again, on the statutory language, we have
15 the very mandatory language, "no action shall be
16 instituted." No modifiers; there's no provision for
17 waiver. The Solicitor General's assistant mentioned
18 that this statute is like fee waivers. It's not at all
19 like a fee waiver, because the statute for fee waivers
20 explicitly gives the district judge authority to waive
21 the fee in the case of an in forma pauperis plaintiff.
22 This statute contains no waiver for the parties. It
23 contains no discretion for the district judge.

24 And in the last word of -- the last sentence
25 of this very short three-sentence provision, Congress

1 referred explicitly to jurisdiction. And I would like
2 to look very closely at that word, because any plain
3 reading of this section will show -- shows that Congress
4 intended the entire provision to refer to the
5 jurisdiction of the court. Again --

6 JUSTICE GINSBURG: I thought that -- that
7 last sentence is just relating to the court can -- has
8 authority to decide this particular issue,
9 copyrightability, even though the Registrar has chosen
10 not to enter the suit. So the sentence simply says,
11 court, you have authority to decide this question.

12 MS. JONES MERRITT: That's the most
13 immediate reference, Justice Ginsburg, but the three
14 sentences work together. And if we look at the three
15 sentences -- they appear on the first page of the
16 Petitioner's brief. The first sentence creates two
17 categories of cases: those that the Court may decide
18 and those it may not. Let us say for now we are not
19 naming what that power is. We are simply saying two
20 categories of cases, one the court may decide, the other
21 one it may not.

22 The second sentence then adds a small group
23 of cases to this first category, the one that the court
24 may decide. As my opposing counsel mentioned, Congress
25 did that in response to a particular case, the Vacheron

1 case. Vacheron itself was built on a line of cases
2 holding that the previous section like 411(a) was a
3 jurisdictional limit.

4 The reason that courts could not consider a
5 -- an application for -- a petition for infringement --
6 complaint -- I'm sorry -- from a person who had not yet
7 gotten registration was because they construed
8 that predecessor as jurisdictional and therefore, they
9 had no jurisdiction to hear an infringement claim until
10 this person instituted a mandamus suit and got the
11 certificate from the Register.

12 CHIEF JUSTICE ROBERTS: I would have thought
13 that cut against you in the sense that in the same
14 paragraph Congress used the word "jurisdiction," but
15 they didn't use that in the provision that you are
16 arguing does deprive the court of jurisdiction.

17 MS. JONES MERRITT: No, Mr. Chief Justice,
18 because when Congress revised this statute in 1976, it
19 had before it 60 years already of courts construing its
20 language, "No action shall be maintained," which was the
21 previous 1909 language, as a jurisdictional limit.
22 There had not been any resistance to that notion.

23 Even courts as early as the 1920s in the
24 Lumiere case, the Second Circuit did not use the word
25 "jurisdiction," but it held that this provision was

1 unwaivable. What the parties want to do here, of
2 course, is to waive the provision.

3 So the language was working quite nicely for
4 Congress. "No action shall be maintained" - they
5 switched it to "instituted" to make very clear they
6 meant at the beginning of the action. There had been a
7 few parties who had argued during the early 20th century
8 that if they snuck in the door, they could remain inside
9 -- or I'm sorry, once they got inside, they could file
10 the -- get the certificate. And the courts had
11 rejected that, but Congress cleared up that particular
12 problem.

13 So Congress knows that its first sentence is
14 working quite well. Congress then adds this second
15 sentence to -- and these, of course, are people working
16 with the Copyright Office, experts in the area of
17 copyright law. Congress adds the second sentence which
18 adds the small category of cases to the ones that may
19 come before the court. And then in the final sentence,
20 Congress gives a clarification about that final group of
21 cases.

22 As Justice Ginsburg said, the -- Congress
23 made clear that when the Register decides not to appear
24 in these cases, the court may still go on and has the
25 power to decide these cases. Now --

1 CHIEF JUSTICE ROBERTS: It's not -- it's not
2 a very big deal to register your copyright.

3 MS. JONES MERRITT: It is not at all a big
4 deal, Your Honor. In fact, for freelance writers, one
5 may register an entire year's worth of works on a single
6 form for \$65.

7 CHIEF JUSTICE ROBERTS: And -- but -- but
8 doesn't that mean that it would be odd to make
9 jurisdiction over an action for infringement hinge on
10 whether you've, you know, dotted an "i" and crossed a
11 "t"?

12 MS. JONES MERRITT: Not at all, Your Honor,
13 because again, the copyright statute has a different
14 history than other jurisdictional statutes. Before
15 1909, owners of copyright had to dot every "i" and cross
16 every "t" within a limited period of time. If they
17 didn't, they lost their entire ownership in the
18 copyright.

19 What Congress wanted to do in 1909 was to
20 give copyright owners a longer period of time to comply
21 with some of these formalities. But, it still wanted to
22 preserve the public interest that registration serves.

23 We haven't talked yet about the major public
24 interest that Congress had in mind here. It is
25 ironically the very problem that gave rise to this

1 lawsuit: trying to find the owners of copyrighted
2 works.

3 Before using a copyrighted work, any person
4 needs to find the owner to ask permission. The
5 electronic databases in this case have argued that they
6 are somehow special, that because they need to obtain
7 many permissions, they shouldn't have to do it.

8 Universities, libraries, archives obtain as
9 many or more permissions as electronic databases in
10 every year. For a large university like Harvard
11 University or the Ohio State University, we have to
12 obtain permissions for every article that is distributed
13 in a course pack to our students. If one of those
14 articles is a freelance work, written by Mr. Muchnick,
15 for example, we have to track him down and get his
16 permission to use that article.

17 So the registration system was Congress's
18 response to this problem of finding the owners of
19 copyright. In this --

20 JUSTICE GINSBURG: Isn't it true, though,
21 that -- that most copyright holders, most people who
22 write articles, freelance articles, even if it's only
23 \$65, it's not -- it's not worth it because they really
24 don't expect to get -- they don't even think anybody is
25 going to infringe, in the first place, and if they did

1 what damages could be -- just wouldn't be economically
2 worthwhile? So I think it's a fact that most copyrights
3 are not registered, isn't it?

4 MS. JONES MERRITT: The beauty, Your Honor,
5 though, of the solution that Congress adopted with the
6 registration, moving the registration to a
7 jurisdictional element rather than to an element of the
8 claim, as it was in the 19th century, is that the
9 copyright owner may do this any time. Copyright lasts,
10 of course, for the lifetime of the owner plus another
11 70 years after death. Sixty-nine years after my death,
12 my heirs could register my copyrights if they are
13 finding that somebody is now making a lot of money off
14 of my works. And they could then bring an infringement
15 suit against that person.

16 It's odd to think of a jurisdictional
17 restriction as being a looser element than a claim
18 element, but in the particular story of copyright, it
19 is. What Congress did was to say, we want people
20 to own copyrights immediately without complying with
21 formalities. And in 1976, Congress even extended that
22 to unpublished works, so I already have a copyright of
23 the notes I have in front of me and in the e-mails I
24 sent last night and so forth.

25 But Congress said, with this huge sea of

1 copyrighted works, before somebody can bring an
2 infringement action in the Federal court, we want them
3 to confer a public benefit. We want them to register
4 the copyright so that other people can find the owner
5 and request permission.

6 What will happen in this case under the
7 terms of this settlement is that the defendants who did
8 not take time to find the owners of these works, even
9 though the owners of these works were easier to find
10 than many of the very elusive owners of works that
11 archives and historical societies search for, they did
12 not find -- look for the owners because they thought it
13 would be too difficult.

14 This settlement now gives the defendants a
15 perpetual right to use all of those works without ever
16 identifying the owners, and without the owners ever
17 being identified on the national copyright register,
18 which is what Congress wanted.

19 If I want to create a competing database to
20 any of the defendants', I'd have to undertake the
21 arduous work of tracking down all the owners.

22 JUSTICE BREYER: Well, there's some that
23 can't be found. So if we take your position, there's
24 some that can't be found, we just can't create our
25 database.

1 MS. JONES MERRITT: Justice Breyer --

2 JUSTICE BREYER: I mean, that's -- that's
3 the problem that's underlying the fairness of this
4 thing.

5 MS. JONES MERRITT: I'm -- I'm --

6 JUSTICE BREYER: In terms of if we take your
7 approach, no matter how hard it is to find owners, you
8 are just out of luck. That is to say, there will not be
9 databases collected, because they cannot be complete
10 because we cannot find the owner. If we take the
11 position that it is sometimes waivable, that obstacle
12 disappears, and now it's a question of the fairness of
13 the situation.

14 MS. JONES MERRITT: Justice Breyer, that
15 concern exists for everybody, not just for electronic
16 databases. In fact, there is -- the copyright --

17 JUSTICE BREYER: That's right. I just
18 wonder why Congress would have ever wanted this kind of
19 provision to serve as that kind of obstacle in any area.

20 MS. JONES MERRITT: Because Congress wants
21 to protect the rights of copyright owners. Congress has
22 more than 200 years' experience balancing these two
23 interests. And, in fact, as we speak, Congress is
24 considering orphan works legislation to address that
25 specific issue. What Congress has -- and that

1 legislation would apply to all types of works,
2 electronic databases, national archives, historical
3 documentaries.

4 And what Congress is proposing in that
5 legislation is quite illustrative. Congress says that
6 if somebody makes a diligent search and cannot find the
7 owner, then the person may use the work --

8 JUSTICE BREYER: That's the underlying
9 fairness. I --

10 MS. JONES MERRITT: That's the underlying --

11 JUSTICE BREYER: There might be -- or maybe
12 they will win on that. I don't know what the merits of
13 that are. But certainly an absolute bar might sometimes
14 help some copyright owners, but many times it will hurt
15 them, because since they can't be found, they can't be
16 compensated. And if we set up a system and put some
17 money in it, so if they are ever found, they will be
18 compensated, that will help them.

19 So that's why I ask the question, why would
20 a Congress that wants to help copyright owners create
21 this kind of system? When all the things you are
22 talking about can be brought into play when we consider
23 the fairness of the system.

24 MS. JONES MERRITT: This is a -- the system
25 that Congress put in play is, Your Honor, one in which

1 copyright owners have an absolute right to control the
2 disposition of their works. That is the current system,
3 even without getting to the jurisdictional issue.
4 Congress may change that disposition, and that is within
5 Congress's control. What they have been trying to do is
6 to balance the interest of the copyright owner with the
7 interest of the public in using works. And that is the
8 perennial challenge in copyright law, how to balance
9 those two interests.

10 Section 411(a) is actually a vital cog as
11 part of that balance, because what section 411(a) does
12 is it says to the copyright owner: Don't worry about
13 all of this business of registering or anything else;
14 you have your copyright, and you will have it for your
15 life plus 70 years. If it ever becomes important to you
16 to bring a lawsuit, then you can register at that time,
17 come into court.

18 It's a deal that Congress has offered to
19 copyright owners in order to strike this particular
20 balance between the public interests and the private
21 interests.

22 JUSTICE GINSBURG: Do they -- if they are
23 just suing not for money but for an injunction, do they
24 have to register before bringing an injunction suit?

25 MS. JONES MERRITT: Yes, Your Honor, they

1 do. In order to bring any action for -- if the
2 injunction is based on an infringement. So we're -- if
3 the plaintiff brings an action for infringement and the
4 remedy they seek is an injunction, then the copyright
5 must be registered first.

6 There are some cases in the lower courts in
7 which we have a plaintiff who has a longstanding pattern
8 of infringements that a particular defendant has been
9 engaged in against that plaintiff. The Olan Mills case
10 is an example. A local photography studio was upset
11 because a photo duplicating shop kept copying their
12 copyrighted photographs. They brought an action for
13 infringement, had registered several of the photographs.
14 The court issued an injunction that covered future works
15 as well, but those were all works within the same
16 judicial controversy. So an injunction could reach
17 further than a single registered work as long as we are
18 talking about one single controversy.

19 In this case, we don't have an injunction;
20 we have damages, and we have thousands of different
21 controversies. As the Court knows, the class action
22 rules do not change the substantive law or the rules of
23 -- of jurisdiction. We have here thousands of different
24 controversies that have been aggregated for convenience
25 under rule 23(b)(3), but the court must have

1 jurisdiction over each of those controversies. Or if we
2 take the alternative route of Hallstrom, the hybrid
3 approach, and we say that this is a mandatory
4 requirement -- Congress has been quite clear about this
5 mandatory requirement, and that mandate must be
6 satisfied with respect to every controversy in this
7 class action.

8 JUSTICE STEVENS: May I ask -- I just hate
9 to reveal my ignorance on something like this, but I had
10 the same problem with your opponent. I really don't
11 understand why it makes any difference whether you call
12 a requirement mandatory or you call it jurisdictional in
13 terms of the fairness of settlement, all the
14 considerations you are discussing. It seems to me - as
15 a practical matter, it doesn't seem to make any
16 difference.

17 MS. JONES MERRITT: It depends on the brand
18 of "mandatory," Your Honor. There are in this case
19 three different proposals before the Court. I -- as
20 appointed amicus, I have argued that section 411(a) is
21 jurisdictional which I think the clear history and
22 language of the statute, which I will still come back
23 to --

24 JUSTICE STEVENS: But would you not make all
25 the arguments directed at the fairness of the

1 settlements and so forth if it were merely mandatory?

2 MS. JONES MERRITT: Yes, because then the
3 two versions of "mandatory" are -- the flavor of
4 "mandatory" that the Solicitor General urges is that the
5 district -- this is very mandatory, as in Hallstrom --
6 even if a party doesn't raise the issue, the district
7 court sua sponte should raise the issue on its own.

8 JUSTICE GINSBURG: With some wiggle room.
9 I think Ms. Anders answered that question. In this
10 situation, it would be appropriate for the district
11 judge to accept the waiver.

12 MS. JONES MERRITT: That was -- that was
13 what Ms. Anders argued. I disagree with that, because
14 the public interests that Congress has put forth here
15 would not be satisfied. The parties in this case argue
16 the same public interests that parties argue in every
17 copyright case. The plaintiffs in a copyright case
18 always argue that their interests should be protected
19 even if they haven't complied with Congress's mandates.
20 The defendants in a copyright case always argue that
21 allowing them to copy the plaintiff's works would give
22 the public greater access to those works. There are no
23 special public interests here.

24 In fact, the electronic databases in this
25 case have been superseded technologically.

1 JUSTICE GINSBURG: If we -- if we are
2 talking about the ordinary case, and someone sued for
3 infringement apart from this settlement in the context
4 that we are in, certainly is not going to raise that
5 question whether it's mandatory, optional or whatever.
6 What defendant who is sued for infringement wouldn't
7 say, Judge, I'm relying on 411(a); they haven't
8 registered their copyright; they can't sue me? I can't
9 imagine a defendant in an ordinary copyright case who
10 wouldn't raise it.

11 MS. JONES MERRITT: Actually there are quite
12 a number, Your Honor, just as there are defendants who
13 will waive statutes of limitations. There are times
14 when a defendant would rather have the resolution on the
15 merits, because that then would not allow the plaintiff
16 to come back into court and sue again. Or the
17 defendant -- the plaintiff in this case might have sued
18 -- that you are referring to -- might have sued for
19 infringement, and the defendant wants to make clear that
20 it has the right to use this work. That would then --
21 that would establish that principle with this plaintiff
22 with related works or with other works.

23 JUSTICE GINSBURG: Then let's switch to the
24 plaintiff. If the plaintiff is in it for money, for
25 real money, for damages, the plaintiff's going to

1 register because then the stakes are such that \$65 is
2 well worth it, if the plaintiff thinks it can get a
3 large infringement award.

4 MS. JONES MERRITT: The problem, Your Honor,
5 is that there are many naive people who believe that
6 famous movies and novels have infringed their freshman
7 college essays. There are cases exactly like that in
8 the courts. And in fact the case I cite in the brief is
9 one in which the author sued the university, claiming
10 that the Department of English obviously had released
11 his freshman essay to Hollywood, because this movie
12 built upon his freshman essay.

13 In those cases -- and this is another
14 distinction, Justice Stevens, between mandatory and
15 jurisdictional -- the defendant doesn't even have to
16 appear. The district court can sua sponte dismiss the
17 complaint for lack of jurisdiction. We cite I believe
18 seven or eight cases in the brief where exactly that
19 happened, including two different cases in the Fourth
20 Circuit --

21 JUSTICE BREYER: But they wouldn't waive it
22 then. I mean, the problem, I take it, realistically is
23 this: Let's take a group of people who want to make
24 databases. Now, they want to use copyrighted material.
25 There is a subset of people who have written it they

1 can't find, so they say here's what we will do. We will
2 take \$100 billion, and we will put it in a fund, and
3 like ASCAP, that fund can administer this money for the
4 benefit of anyone who turns up.

5 Now, maybe that's illegal under some law.
6 Maybe the class isn't right. Maybe they can't get
7 proper representation. Maybe it's inadequate, et
8 cetera. But what I don't fail to see -- what I fail to
9 see is how -- whether you could do that or not do it
10 has anything to do with registration, because we are
11 talking about the people who aren't here, all of whom,
12 if you ever bring suit when he's found, will register
13 the copyright. The only reason they haven't registered,
14 we don't know who they are. That's why. Maybe they
15 have registered, for all we know.

16 MS. JONES MERRITT: All of the people who
17 haven't registered yet, Your Honor, will not be able to
18 bring suit, because the class action will extinguish
19 their claims. That's the important --

20 JUSTICE BREYER: No, maybe they can't do
21 that because it would be an unfair result. But where is
22 it in this provision of law that's designed to stop that
23 ever from happening?

24 MS. JONES MERRITT: This provision, if we go
25 back to section --

1 JUSTICE BREYER: Maybe it won't, by the way.

2 MS. JONES MERRITT: Right.

3 JUSTICE BREYER: It depends on what the
4 terms of the settlement are. We could have a subclass
5 that allows a subset of those people to come into court.
6 No reason you couldn't. So I don't know whether or not
7 it's true that they won't register when they are found.

8 MS. JONES MERRITT: Justice Breyer, once
9 again, the Copyright Act itself already makes that
10 choice that no person may -- and I'm not talking yet
11 even about the jurisdictional provision -- no person may
12 use another's copyrighted work without their permission.

13 JUSTICE BREYER: So in 1909 Congress thought
14 all this through with the databases and so forth?

15 (Laughter.)

16 MS. JONES MERRITT: Oh, yes. The database
17 issue -- sometime -- sometimes -- in 1976, by the way,
18 Congress did because LEXIS and Westlaw existed before
19 1976. The -- but the databases are a red herring here.

20 Sometimes technology is different, and
21 sometimes it's not. The Library of Congress recently
22 did a project in which they sought 7,000 permissions for
23 a single project because they were digitizing the
24 letters of Hannah Arendt.

25 They sought those permissions. They -- if

1 they could not get permission, if they couldn't find the
2 author or if they didn't get an okay from the author,
3 they had to leave the work off of the Web site because
4 they are following copyright law.

5 They have a copy of the original work that
6 was given to them or that they purchased, and they may
7 display that, but, if they are going to make a copy of
8 the work, then they have to comply by copyright law.

9 I mentioned a moment ago that the databases
10 here have been superseded by technology, and that is
11 another way in which technology is not -- is not
12 different in this case. It is now possible for works to
13 be scanned in photographic form or PDF form and put into
14 electronic databases that are fully searchable, and
15 that does not violate copyright law.

16 If you compare, for example, law review
17 articles on LEXIS --

18 JUSTICE BREYER: But why doesn't it? Just
19 out of curiosity. You are making a copy?

20 MS. JONES MERRITT: Because it is -- it is
21 part of the original collection -- I'm sorry. If the --
22 if the author -- if the publisher of the collected work
23 consents to that. I am thinking of this case in The New
24 York Times --

25 JUSTICE BREYER: Well, you say it's somebody

1 who owns the copyright.

2 MS. JONES MERRITT: Yes. Who -- and who
3 owns --

4 JUSTICE BREYER: Yes. No. No. But what we
5 want to do is we want to have, in our database, all of
6 the material written about slavery, and, lo and behold,
7 there are 4,000 books that we can't trace. Who, now,
8 owns the copyright 100 years later? And there is no way
9 to get those into our database. Whether --

10 MS. JONES MERRITT: That's correct. That is
11 correct.

12 JUSTICE BREYER: All right. Now, that's a
13 sort of loss, and my same point, that maybe that's as it
14 should be, but it's rather surprising that this law is
15 the law that will answer that question.

16 MS. JONES MERRITT: This law relates to the
17 question, Your Honor, because this law relates to the
18 access to the court.

19 The way it relates to the question is that
20 what Congress was trying to do was to give people like
21 you and me information about those copyright owners, so
22 that we could find the owner of the book on slavery.

23 And, as a way to maintain that register,
24 which Congress started in 1790, it said to the authors
25 of copyrighted works, if you want to use our courts, the

1 judicial power of the United States, you need to confer
2 this benefit, so that Justice Breyer could find you, if
3 he wants to include your work in the database. And that
4 was the story that Congress did.

5 I would like to say just one more word about
6 the word "jurisdiction" in the third line of section
7 411(a), because we were interrupted there. The parties
8 have offered no convincing explanation for that word,
9 other than to show that Congress understood this whole
10 provision was jurisdictional.

11 It refers, most immediately, to
12 registrability, but that was not a new issue in 1976.
13 Courts have always decided registrability. And, as the
14 rules of civil procedure make clear to us, a party's
15 absence never deprives a court of subject matter
16 jurisdiction.

17 JUSTICE GINSBURG: So the rulemakers got it
18 wrong in Form 19, when they did not write 411(a) as
19 jurisdictional. They say -- copy the 1331, 1338. That
20 is jurisdiction. And then they put the certificate
21 requirement below the line -- below the jurisdictional
22 line.

23 So that was -- well, that was wrong, in your
24 judgment.

25 MS. JONES MERRITT: As the -- as the

1 Congress made -- I'm sorry, as the Court made clear, in
2 issuing those forms, they are advisory only, and they
3 are not -- they are not intended to give legal advice to
4 counsel about what the issues in the case are.

5 JUSTICE GINSBURG: I suppose, if you pick
6 up any copyright complaint, you will see the
7 jurisdictional allegation will say 1331, 1338, and
8 nothing about 411.

9 MS. JONES MERRITT: And that is quite
10 common, Your Honor, because, in many situations, what
11 Congress has done is given a general grant of
12 jurisdiction as in 1331 or 1338 and then pulled it back
13 for a subcategory of cases, which is what 411(a) does.

14 In those circumstances, not just in
15 copyright, but in all sorts of areas, the complaint will
16 plead jurisdiction under the general grant and then may
17 show that it satisfies the condition later.

18 This is -- we are not arguing that -- and
19 the Second Circuit has not argued that 411(a) is a
20 jurisdictional grant. It is a section that takes back
21 part of the jurisdictional grant in 1331 and 1338.

22 Congress has more than 200 years' experience
23 working with copyright law, as the questions today have
24 revealed -- I'm sorry.

25 CHIEF JUSTICE ROBERTS: Finish your

1 sentence.

2 MS. JONES MERRITT: As the questions today
3 have revealed, striking the balance between the public
4 and the private interest is a difficult one.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 MS. JONES MERRITT: Thank you very much.

7 CHIEF JUSTICE ROBERTS: Mr. Sims, you have
8 2 minutes remaining.

9 REBUTTAL ARGUMENT OF CHARLES S. SIMS

10 ON BEHALF OF THE PETITIONERS

11 MR. SIMS: Thank you, Your Honor.

12 I first want to correct the misimpression
13 given that the databases think that they are special.
14 The databases haven't thought they don't need to get
15 permission. They thought they had permission under
16 section 201(c), and this Court had the case and
17 decided -- two of you believed we were right, and more
18 of you believed we were wrong, but the databases took no
19 position that they had no obligation.

20 They got the rights by contract from the
21 publishers, with representations and warranties, and
22 that's why, when this case was instituted, they went to
23 mediation. They resolved this in a way. They got money
24 from the publishers, who were exposed under
25 representations and warranties.

1 The authors were represented by the three
2 major national freelance author groups in the country,
3 and this was a way, we thought, to address the problem
4 responsibly and without taking the court's time.

5 Now, Mr. Chief Justice Roberts, you've said
6 a couple of times that you wonder whether the language
7 here, "No action shall be instituted," doesn't sound
8 jurisdictional, and exactly to the contrary, the Court's
9 decision in *Jones v. Bock*, which, I think -- if I am
10 remembering -- you authored, but, in any event, that's
11 within a year or two, said that was boilerplate language
12 used all the time for statutes of limitations that are
13 not jurisdictional. And, indeed, that is correct.

14 In a footnote of our reply brief, we list
15 three times in the 19th century when that very language
16 was used for statutes of limitations. And, if you put
17 it into LEXIS or Westlaw, you will get a zillion
18 statutes with respect to -- exhaust -- non-
19 jurisdictional statutes.

20 So I think, quite to the contrary, that --
21 that is the language Congress uses when it wants
22 something to be not jurisdictional.

23 Now, Ms. Merritt began with the word
24 "shall" in 411(a). I want to be clear. This case was
25 instituted in compliance with 411(a). The named

1 plaintiffs registered their works and came into court,
2 and went to mediation, and the next thing the court
3 knew, it had a settlement agreement to review, and it
4 did review it under Rule 23.

5 She relies on the Hallstrom case, but, of
6 course, the Hallstrom case, which did avoid saying
7 whether it was mandatory or jurisdictional, involved the
8 enforcement of a mandatory -- at least mandatory rule,
9 on the application of a party, and that's what the Court
10 does, and that's why, to some extent, other than with
11 respect to settlement agreements, this case doesn't
12 matter a lot because the defendants will always be
13 raising this defense.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 MR. SIMS: Thank you.

16 CHIEF JUSTICE ROBERTS: Ms. Merritt, you were
17 appointed by this Court as an amicus to defend the
18 judgment below, and you have ably discharged that
19 responsibility. On behalf of the Court, thank you for
20 doing so.

21 The case is submitted.

22 (Whereupon, at 12:08 p.m., the case in the
23 above-entitled matter was submitted.)

24

25

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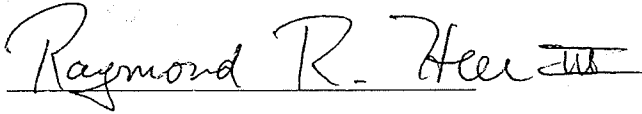
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of; REED ELSEVIER, INC., ET AL., Petitioners, v. IRVIN MUCHNICK, ET AL.; and that these attached pages constitute the original transcript of the proceedings for the records of the Court.

Handwritten signature of Raymond R. Heer in cursive script, with a horizontal line underneath the signature.

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