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Chambers of Sonia Sotomayor
U.S. District Judge

United States Courthouse
New York, NY 10007

(212) 385-7406

8/19/97

Mike

Enclosed are the opinions and suggested
repts re Spth Court. He had a very quiet
life in N.Y.

John

D18

THE NEW YORK TIMES 8/14/97

Freelancers Lose Test Case On Electronic Publishing

By STEVE LOHR

A Federal judge ruled yesterday that publishers could reproduce articles by freelance writers in some electronic media without their permission or paying them extra.

The ruling came in a lawsuit, filed in 1993 by a group of writers, that was widely viewed as an early test of the economic rights of freelancers and copyright law in the new realm of electronic publishing. The plaintiffs challenged the right of six publishers, including The New York Times Company and Time Warner Inc., to reproduce newspaper or magazine articles on CD-ROM's or in electronic data bases — without seeking the permission of the freelance writers and without paying them beyond what they were paid for the original articles.

An important issue, under the Copyright Act of 1976, is whether the reproduction is the same as the original publication or amounts to a slightly revised version of the original. If either is the case, the publishers have reproduction rights. That, for example, is the copyright interpretation that permits publishers to put archive versions of newspapers and magazines on microfilm.

Judge Sonia Sotomayor of the Federal District Court in Manhattan ruled that for CD-ROM's and certain electronic data bases, publishers could reproduce without permission. But since the suit was filed, the biggest arena of electronic publishing has become the World Wide Web. In their Web versions, newspapers and magazines often include articles and pictures not found in their original publications and sometimes even video and audio.

Given the rise of the Internet and the increasing importance of electronic publishing, representatives for both the defendants and the plaintiffs predicted that the court ruling yesterday would not be the end of the conflict between publishers and freelancers.

"The judge ruled that CD-ROM's and some kinds of data bases are the functional equivalent of microfilm," said Bruce P. Keller, a partner at Debevoise & Plimpton, the law firm representing the defendants. "But it is not a sweeping decision that determines copyright in all forms of elec-

tronic media."

The lead plaintiff, Jonathan Tasini, the president of the National Writers Union, termed the judge's decision "murky, wrong and somewhat contradictory." But he noted that in her ruling, the judge acknowledged that copyright law might not have kept pace with today's technology and its implications.

"The court does not take lightly that its holding deprives plaintiffs of certain important economic benefits associated with their creations," Judge Sotomayor wrote.

But, she added, "the plaintiffs' real complaint lies in the fact that modern technology has created a situation in which revision rights are much more valuable than intended at the time that the specific terms of the Copyright Act were being negotiated."

Congress, she noted, "is of course free to revise that provision to achieve a more equitable result."

Mr. Tasini said he was considering an appeal of the ruling. In addition, he said the writers' union, an affiliate of the United Automobile Workers, had been talking to members of Congress about trying to bring copyright law into the Internet era.

"The judge is essentially saying, 'Don't beef to me — take it to Congress,'" Mr. Tasini said.

In the last couple of years, publishers have also moved to strengthen their control of copyright in cyberspace. Beginning in 1995, most major newspaper and magazine publishers began requiring freelancers to sign so-called all-rights contracts, giving the publishers reproduction rights for all forms of electronic media, including Web sites.

"Even if we won the case today," Mr. Tasini said, "we would still be fighting these all-rights contracts."

Besides The New York Times Company and Time Warner, the defendants in the case were Newsday, which is owned by the Times Mirror Company; Mead Data, a unit of the Dutch-British conglomerate Reed Elsevier P.L.C., which runs Nexis, a data service that provides the archives of many news organizations via computer, and University Microfilms, a division of Bell & Howell that for many years has provided the archives of The New York Times and many other newspapers on microfilm.

THE NEW YORK

COMPANY EARNINGS

For periods shown, in parentheses, the first one to five letters before the comma are the company's stock ticker symbol, N after the comma indicates stock is listed on the New York Stock Exchange, A the American Stock Exchange, NNM Nasdaq National Market System, NSC Nasdaq Small Capitalization, and ECM Emerging Company Marketplace.

Agway Inc.

Yr to June 30	1997	1996
Revenue	1,670,700,000	1,660,000,000
Net inc	10,700,000	12,700,000

American HomePatient Inc.

2nd qtr to Jun 30	1997	1996
Revenue	94,788,000	62,418,000
Net inc	4,902,000	3,541,000
Share earns	.33	.27
Shares outst	14,965,000	13,307,000

ATCO Ltd.

2nd qtr to Jun 30	1997	1996
Revenue	433,900,000	416,900,000
Net inc	17,400,000	12,500,000
Share earns	.57	.41

Results are in Canadian dollars.

ATS Automation Tooling Systems

1st qtr to Jun 28	1997	1996
Revenue	81,498,000	58,515,000
Net inc	6,229,000	4,648,000
Share earns	.24	.19
Shares outst	25,506,270	23,956,774

ATS Automation Tooling Systems is listed on the Toronto Stock Exchange with the ticker symbol ATA.

Results are in Canadian dollars.

Belmont Homes Inc.

2nd qtr to Jun 30	1997	1996
Sales	70,500,000	61,681,000
Net inc	63,323,000	3,539,000
Share earns	.35	.07
Shares outst	9,482,000	9,537,000

b-Included a \$1.5 million pretax gain for proceeds from the life insurance policy of former chief executive John J. Kennedy.

Bolden Ltd.

2nd qtr to Jun 30	1997	1996
Revenue	304,061,000	333,742,000
Net inc	20,580,000	12,357,000
Share earns	.21	.19

Bolden is listed on the Toronto Stock Exchange with the ticker symbol BOL.

Results are in Canadian dollars.

CAE Inc.

1st qtr to Jun 30	1997	1996
Sales	186,933,000	221,512,000
Net inc	7,926,000	13,163,000
Share earns	.07	.10
Shares outst	110,083,000	109,372,000

CAE is listed on the Toronto Stock Exchange with the ticker symbol CAE.

Results are in Canadian dollars.

Canadian Fracmaster Ltd.

2nd qtr to Jun 30	1997	1996
Revenue	98,600,000	80,200,000
Net inc	8,000,000	4,500,000
Share earns	.19	.19

Results are in Canadian dollars.

Canam Manac Group Inc.

2nd qtr to Jun 30	1997	1996
Sales	180,824,000	143,800,000
Net inc	1,526,000	1,800,000
Share earns	.04	.04

Results are in Canadian dollars.

Cargill Inc.

Year to May 31	1997	1996
Sales	56,000,000,000	56,000,000,000
Net inc	814,000,000	902,000,000

Cedar Fair L.P. (FUN,N)

2nd qtr to Jun 29	1997	1996
Revenue	79,237,000	79,770,000
Net inc	14,417,000	19,370,000
Share earns	.62	.62
Shares outst	23,101,000	23,050,000

Share earnings and shares outstanding are in units.

CFM Majestic Inc.

3rd qtr to Jun 30	1997
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WALL STREET JOURNAL 8/14/97 89

LAW

Judge Rules Against Free-Lancers In Lawsuit Over Electronic Rights

By FRANCES A. McMORRIS

Staff Reporter of THE WALL STREET JOURNAL

NEW YORK — Publishers won a huge victory in the battle for electronic rights when a federal judge ruled that they can put free-lance articles they publish on-line and onto CD-ROMs without getting permission from the writers.

In throwing out a closely watched suit brought by free-lance writers, U.S. District Court Judge Sonia Sotomayor said the publishers, including New York Times Co., have the right under the federal copyright act to electronically reproduce free-lancers' work.

Media companies in recent years have started requiring free-lancers to relinquish their rights to the electronic versions of their work. When the New York Times did so in 1995, it provoked a fierce outcry from writers groups and several famous authors, including Erica Jong, Garrison Keillor and J. Anthony Lukas, among others.

"We are getting pummeled by greedy publishers who don't want to give us our fair share of the profits," said Jonathan Tasini, the lead plaintiff and president of the National Writers Union.

Yesterday's decision "deprives writers of a valuable property right that once enabled them to make a living," said their lawyer, Emily Bass of New York. Her partner, Michael Gaynor, called the judge's decision "an Alice-in-Wonderland type interpretation" of the federal copyright laws. The lawyers said they haven't yet decided whether to appeal or take their case to Congress.

In the suit, six writers alleged copyright infringement and asked the court to block the electronic publication of their works and for unspecified damages. In addition to the New York Times, the defendants included Time Warner Inc.'s Sports Illustrated; Times Mirror Co.'s Newsday Inc.; Reed-Elsevier PLC, which runs the Lexis/Nexis database; and University MI-

crofilms Inc. The Atlantic Monthly settled its portion of the case last year.

George Freeman, assistant general counsel for the New York Times, said the decision means "electronic reproduction of free-lance articles such as in Lexis will be treated no differently than those articles on spools of microfilm."

The judge, in her ruling, said that "authors are no longer at risk of losing all rights in their articles merely because they surrender a small subdivision of those rights."

In fact, she said the writers were exaggerating the repercussions of her decision. She cited several types of "exploitation" by publishers that wouldn't be allowed under copyright law, including turning a free-lance article into "a full length book" or creating "television or film versions of individual free-lance contributions."

Nevertheless, the judge noted that Congress, when it last revised the federal copyright law in 1976, "could not have fully anticipated the ways in which modern technology would create such lucrative markets" for reproducing published work. Congress, she added, is free to revise the law to "achieve a more equitable result."

ALBANK FINANCIAL CORP.

Albank Financial Corp. said it agreed to provide \$55 million in discounted mortgage loans as part of a consent decree with the Justice Department that resolves the federal agency's allegations that Albank engaged in unfair lending practices. The Albany, N.Y., bank denied allegations that it violated any fair lending or equal credit opportunity laws, while acknowledging that it had instructed mortgage vendors not to sell its loans from certain locations in Westchester County, N.Y., and Connecticut. Albank said that although those areas contained large concentrations of minorities, the bank either "did not realize" or "did not focus" on that fact when purchasing loans. Albank said its lending decisions were based primarily on credit quality considerations, adding that the agreement won't result in any charges to earnings.

Is It a Mi Trucks, V To Lose?

Continued

the age when vehicle." Mr. Wining and restoration Mich., acknowledged the image appeal and calls it evolution crisis." He adds: sports-car stage. I to be red."

Jay Houghton, the automotive co Kearney Inc., says near-mythical status perfect for yuppies want to telegraph status for the outdoors. The says, evokes a fantasy from the urban West."

But with so much road, the image is so thin, Mr. Houghton will sweep back from predicts. He argues giant sport-utility are a fashion statement fuel-efficient compact the minivans of the tide of economic mand.

Even the widespread safety won't necessarily loyal, says Christopher aging director of Nex consulting firm. "In cars are even safer than truck," he says.

Auto makers caution for remaining Ford is cashing in on newest sport-utility selling Ford Expedition Navigator. These just trade-up option for owners, providing more room than many drives. And Ford plus sport-utility in a couple meantime, is gearing Dodge Durango this sport-utility than its kee.

These new models of ever-more-luxurious

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Los Angeles Times
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Thursday, August 14, 1997

Business; Financial Desk

NATION / WORLD

**PUBLISHING Freelancers Lose Bid in Electronic-Rights Suit
Newsday**

Publishers won the first round in their fight with freelance writers when a federal judge ruled that existing copyright law allows newspapers and magazines to archive freelance stories electronically without paying additional fees to the authors. Ruling in the closely watched case, U.S. District Judge Sonia Sotomayor in New York said that while "modern developments" have changed the financial landscape in publishing, copyright laws written more than three decades ago still give publishers a broad right to re-create their publications in electronic form. She called it "a right then perceived to have only limited economic value, but a right that time and technology have since made precious." Sotomayor said writers seeking new protections should look to Congress. The lawsuit was filed in 1993 by eight writers, including John Tasini, president of the National Writers Union, against the New York Times, Newsday, Time Inc. and the Atlantic Monthly. Also named as defendants were Mead Data Central Corp., publisher of the widely used Lexis-Nexis database, and University Microfilms, which produces CD-ROM versions of the publications. The ruling did not specifically address electronic publishing on the Internet. Tasini called the ruling "murky" and said the writers group is considering an appeal and whether to ask Congress to rewrite the law. Even before Sotomayor's ruling, the lawsuit was considered a pivotal development in the conflict between writers and publishers as each side tries to define ownership rights in the expanding world of electronic media. Since the suit's filing, most major newspapers and magazines have begun using contracts requiring writers to relinquish their electronic rights as a condition of having the article appear in print.

----- INDEX REFERENCES -----

KEY WORDS: PUBLISHING INDUSTRY; FREE LANCE EMPLOYMENT; WRITERS;
COPYRIGHT; ELECTRONIC PUBLISHING; COURT RULINGS; PROPERTY
RIGHTS

NEWS SUBJECT: Marketing; Business Stories (MRK BZZ)

NEWS CATEGORY: COLUMN; BRIEF; WIRE

INDUSTRY: Information & On-Line Services (IAS)
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Newsday
Copyright Newsday Inc., 1997

Thursday, August 14, 1997

BUSINESS

Writers Lose Decision On Electronic Publishing

By Rita Ciolli. STAFF WRITER

'I am not disheartened. There is a long war out there with the publishers and this was only a skirmish.' John Tasini, National Writers Union

Publishers won the first round yesterday in their fight with free-lance writers when a federal judge ruled that existing copyright law allows newspapers and magazines to electronically archive free-lance stories without paying additional fees to the authors.

Ruling in the closely watched case, U.S. District Court Judge Sonia Sotomayor of the Southern District said that while "modern developments" have changed the financial landscape in publishing, copyright laws written more than three decades ago still gave publishers a broad right to recreate their publications in electronic form.

She called it "a right then perceived to have only limited economic value, but a right that time and technology have since made precious."

Sotomayor said that writers seeking new protections should look to Congress.

"As a practical matter, the ruling doesn't change much," said Bruce Keller, a Manhattan lawyer who represented the publishers, including Newsday and The New York Times. "Publishing on microfilm or the electronic equivalents of microfilm is perfect lawful," he said.

The lawsuit was filed in 1993 by eight writers, including John Tasini, president of the National Writers Union, against Newsday, the Times, Time Inc. and the Atlantic Monthly. Also named as defendants were Mead Data Central, publisher of the widely used Lexis-Nexis database, and University Microfilms, which produces CD-ROM versions of the publications.

Yesterday's ruling did not specifically address electronic publishing on the Internet.

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8/14/97 NWSDAY A57

PAGE 2

(Publication page references are not available for this document.)

"We would have liked to have won this case but I am not disheartened," Tasini said. "There is a long war out there with the publishers and this was only a skirmish." He called the ruling "murky" and said the writers group was considering an appeal as well as asking Congress to rewrite the law.

Even before Sotomayor's ruling, the lawsuit was considered a pivotal development in the conflict between writers and publishers as each tries to define ownership rights in the expanding world of electronic media.

Prior to the suit, most discussions between writers and editors never addressed the issue of rights and usually didn't involve a written contract. Since the suit's filing, most major newspapers and magazines, trying to retain control of the reuse of materials, began introducing contracts requiring writers to relinquish their electronic rights as a condition of having the article appear in print.

"Most articles now are done under a written contract and whether they cover or don't cover compensation for electronic rights is spelled out," said Dan Carlinsky, vice president for contracts for the American Society of Journalists and Authors. However, many newspapers still take work from free-lancers on breaking stories when there is little time for the formality of contracts. Those situations are now covered by yesterday's ruling.

----- INDEX REFERENCES -----

KEY WORDS: FEDERAL; JUDGE; DECISION; WRITERS; PUBLISHING; LAW; QUOTE;
GOVERNMENT: Federal Government (FDL)
EDITION: ALL EDITIONS

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

----- x,
**JONATHAN TASINI, MARY KAY BLAKELY,
BARBARA GARSON, MARGOT MIFFLIN,
SONIA JAFFE ROBBINS, and DAVID S.
WHITFORD**

Plaintiffs,

93 Civ. 8678 (SS)

-against-

**THE NEW YORK TIMES CO., NEWSDAY INC.,
TIME INC., THE ATLANTIC MONTHLY CO.,
MEAD DATA CENTRAL CORP., and
UNIVERSITY MICROFILMS INC.,**

Defendants.

Appearances:

**BURSTEIN & BASS
330 Madison Ave., 11th Floor
New York, New York 10017
212/297-3383**

**Emily M. Bass
Attorney for Plaintiffs**

**DEBEVOISE & PLIMPTON
875 Third Ave.
New York, New York 10022
212/909-6000**

**Bruce P. Keller
Lorin L. Reisner
Thomas H. Prochnow
Attorneys for Defendants**

OPINION AND ORDER

In this action, the Court is called upon to determine whether publishers are entitled to place the contents of their periodicals into electronic data bases and onto CD-ROMs without first securing the permission of the freelance writers whose contributions are included in those periodicals. According to the Complaint, filed by a group of freelance journalists, this practice infringes the copyright that each writer holds in his or her individual articles. The defendant publishers and electronic service providers respond by invoking the "revision" privilege of the "collective works" provision of the Copyright Act of 1976, 17 U.S.C. § 201(c). Defendants maintain that they have not improperly exploited plaintiffs' individual contributions, but that they have permissibly reproduced plaintiffs' articles as part of electronic revisions of the newspapers and magazines in which those articles first appeared. For the reasons to be discussed, the Court agrees with defendants, and grants summary judgment in their favor.

BACKGROUND

Plaintiffs are six freelance writers who have sold articles for publication in a variety of popular newspapers and magazines, including *The New York Times*, *Newsday*, and *Sports Illustrated*. The first two of these periodicals, published respectively by defendants The New York Times Company and Newsday, Inc., are daily newspapers widely circulated to subscribers and newsstands. *Sports Illustrated*, published by the defendant Time, Inc. ("Time"), is a weekly magazine featuring articles and commentary

of particular interest to sports enthusiasts. In addition to circulating hard copy versions of their periodicals, the defendant publishers sell the contents of their publications to the remaining defendants -- University Microfilms Inc. (now called UMI Company ("UMI")) and The MEAD Corporation (now called LEXIS/NEXIS ("MEAD")) -- for inclusion in assorted electronic data bases.¹

MEAD owns and operates NEXIS, an on-line, electronic, computer assisted text retrieval system in which articles from a number of leading newspapers, newsletters, magazines, and wire services -- including *The New York Times*, *Newsday*, and *Sports Illustrated* -- are displayed or printed in response to search requests from subscribers. (Pl.s' Mot. Summ. J. Ex. 49 at M01464.) UMI produces and distributes two CD-ROM products identified by plaintiffs in their Amended Complaint. One of these products, "The New York Times OnDisc," operates in much the same manner as NEXIS, and is made up of the articles appearing in each issue of *The New York Times*. The remaining CD-ROM, "General Periodicals OnDisc," provides a full image-based reproduction of *The New York Times Book Review* and *Sunday Magazine*.

Plaintiffs move for summary judgment on their claims of copyright infringement contending that the electronic reproductions of their articles are improper under the Copyright Act. Defendants Time and Newsday move for summary judgment on the ground that plaintiffs entered into contracts authorizing these publishers to sell

¹ Plaintiffs have settled their claims against the defendant Atlantic Monthly.

plaintiffs' articles to the electronic defendants. All of the defendants argue that, even in the absence of such agreements, dismissal of this action is warranted because the publisher defendants properly exercised their right, under the Copyright Act, to produce revised versions of their publications.

A. The Parties' Relationship

The six plaintiffs claim that defendants infringed their copyrights in a total of 21 articles sold for publication between 1990 and 1993. Twelve of these articles, written by plaintiffs Tasini, Mifflin, and Blakely, appeared in *The New York Times*. Another eight of the articles, by plaintiffs Tasini, Garson, Whitford, and Robbins, were featured in *Newsday*. The remaining article, a piece entitled "Glory Amid Grief" by plaintiff Whitford, appeared in an issue of *Sports Illustrated*. All of the plaintiffs wrote their articles on a freelance basis, and not as employees of the defendant publishers.

1. *The New York Times*

As of the time this action was commenced, freelance assignments for *The New York Times* were typically undertaken pursuant to verbal agreements reached between the newspaper and the contributing journalists. A New York Times editor and a selected freelance writer ordinarily agreed upon such matters as the topic and length of a particular piece, the deadline for submission, and the fee to be paid. (Keller Dec. Ex. B7.) These discussions seldom extended into negotiations over rights in the commissioned articles. Indeed, there were no such negotiations between The New York Times and any of the plaintiffs, all of whom submitted their articles for publication by

The New York Times without any written agreements.² *Id.*

2. *Newsday*

Prior to this action, Newsday solicited its freelance contributions in much the same manner as did The New York Times. Freelance assignments for Newsday were most often undertaken pursuant to discussions between editors and writers and without any written agreements. (Keller Dec. Ex. B2.) However, the checks with which Newsday paid freelance writers for their contributions, including those checks sent to plaintiffs following the publication of their articles, included the following endorsement:

Signature required. Check void if this endorsement altered.
This check accepted as full payment for first-time publication rights (or all rights, if agreement is for all rights) to material described on face of check in all editions published by *Newsday* and for the right to include such material in electronic library archives.

(Pl.s' Mot. Summ. J. Ex. 47.) Plaintiff Tasini crossed out this notation prior to cashing those checks paying him for his two disputed submissions to Newsday. Those plaintiffs who wrote the remaining six *Newsday* articles cashed their checks with the notation intact.

3. *Sports Illustrated*

Only plaintiff Whitford submitted an article for publication in *Sports Illustrated*. The relationship between Time and Whitford was decidedly more formal

² The New York Times has recently adopted a policy pursuant to which the paper accepts articles by freelance writers only on the express written condition that the author surrender all rights in his or her creation. (Pl.s' Mot. Summ. J. Ex. 43.)

than the arrangements routinely entered into between freelance writers and *Newsday* or *The New York Times*. Whitford and *Sports Illustrated* entered into a written contract specifying the content and length of the purchased article, the date due, and the fee to be paid by the magazine. The contract also provided *Sports Illustrated* "the following rights":

- (a) the exclusive right first to publish the Story in the Magazine;
- (b) the non-exclusive right to license the republication of the Story whether in translation, digest, or abridgement form or otherwise in other publications, provided that the Magazine shall pay to you fifty percent (50%) of all net proceeds it receives for such republication; and
- (c) the right to republish the Story or any portions thereof in or in connection with the Magazine or in other publications published by The Time Inc. Magazine Company, its parent, subsidiaries or affiliates, provided that you shall be paid the then prevailing rates of the publication in which the Story is republished.

(Keller Dec. Ex. C7.) Plaintiff Whitford claims that he did not intend, by this language, to grant Time electronic rights in his article. (Pl.s' Mot. Summ. J. Ex. 14.)

B. The Technological Reproductions

Beginning in the early 1980s, the defendant publishers entered into a series of agreements pursuant to which they sold the contents of their periodicals to the electronic defendants. NEXIS has carried the articles appearing in *Sports Illustrated* since 1982, *The New York Times* since 1983, and *Newsday* since 1988. (Keller Dec. Ex. B5 at ¶¶ 3,4,8.) UMI has distributed "The New York Times OnDisc" since 1992, and *The New York Times Magazine* and *Book Review* have been available on the image-based

CD-ROM since 1990. (Keller Dec. Ex. B6 at ¶¶ 3, 8.)

1. NEXIS

The defendant publishers deliver or electronically transmit to NEXIS the full text of all of the articles appearing in each daily or weekly edition of their periodicals. The publishers provide NEXIS with a complete copy of computer text files which the publishers use during the process of producing the hard copy versions of their periodicals. Coded instructions as to page lay out added to these files permit typesetters working for the publishers to produce "mechanicals" -- which resemble full pages as they will appear at publication -- copies of which are transmitted to printing facilities for mass production. NEXIS does not use the electronic files to create "mechanicals" or to emulate the physical lay out of each periodical issue: such things as photographs, advertisements, and the column format of the newspapers are lost. NEXIS instead uses the electronic files to input the contents of each article on-line along with such information as the author's name, and the publication and page in which each article appeared. The articles appearing in *The New York Times* and *Newsday* are available within twenty-four hours after they first appear in print, and the articles from an issue of *Sports Illustrated* appear on-line within forty-five days of the initial hard copy publication.

Customers enter NEXIS by using a telecommunications package that enables them to access NEXIS' mainframe computers. Once on-line, customers enter "libraries" consisting of the articles from particular publications, or groups of

publications. Customers can then conduct a "Boolean search" by inputting desired search terms and connectors from which the system generates a number of "hits." These "hits," the articles in the library corresponding to the selected search terms, can be reviewed either individually or within a citation list. A citation list identifies each article by the publication in which it appeared, by number of words, and by author. When a particular article is selected for full-text review, the entire content of the article appears on screen with a heading providing the same basic information reported within a citation list. Although articles are reviewed individually, it is possible for a user to input a search that will generate all of the articles -- and only those articles -- appearing in a particular periodical on a particular day.

2. The New York Times OnDisc

"The New York Times OnDisc," the text only CD-ROM product, is created from the same data furnished by The New York Times to NEXIS. Indeed, at the end of each month, pursuant to a three-way agreement among The New York Times, NEXIS and UMI, NEXIS provides UMI with magnetic tapes containing this information. UMI then transfers the content of these tapes to CD-ROM discs and codes the included articles to facilitate Boolean searching.

Not surprisingly, given that the two systems share data, the text-based CD-ROM operates much like NEXIS. Users enter search terms prompting the system to access all corresponding articles. These articles are displayed with headings indicating the author, and the date and page of *The New York Times* issue in which the articles

appeared. As with NEXIS, an article selected for review appears alone; there are no photographs or captions or columns of text. Moreover, a search typically retrieves articles which were published on different dates, though it is possible to conduct a search that will retrieve all of the articles making up a single issue of *The New York Times*.

3. General Periodicals OnDisc

"General Periodicals OnDisc," an image-based CD-ROM product, does not carry full issues of *The New York Times*, but only the *Sunday Magazine* and *Book Review*. It includes numerous other periodicals, as well, although none of those involved in this litigation. The image-based system differs from the other technologies presently at issue in that it is created by digital scanning. Articles are not inputted into the system individually, but the entire *Sunday Magazine* and *Book Review* are photographed producing complete images of these periodicals. Articles appear precisely as they do in print, complete with photographs, captions, and advertisements.

"General Periodicals OnDisc" does not employ Boolean searching. Image based discs are sold alongside text-based discs, which are searchable, and which provide abstracts of articles. By searching these abstracts, users can identify articles that are of interest to them. Users can then return to the image-based system in order to retrieve those articles. Drawing upon this interplay between discs, plaintiffs propose that the image-based CD-ROMs are better characterized as part-text/part-image based CD-ROMs.

C. The Parties' Dispute

All of the parties recognize that the defendant publications constitute

"collective works" under the terms of the Copyright Act of 1976. A collective work is one "in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." 17 U.S.C. § 101. The rights which exist in such works are delineated in 17 U.S.C. § 201(c):

Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

Plaintiffs maintain that the publisher defendants have exceeded their narrow "privileges" under this provision by selling plaintiffs' articles for reproduction by the electronic defendants. In particular, plaintiffs complain that the disputed technologies do not revise the publisher defendants' collective works, but instead exploit plaintiffs' individual articles.³

³ Plaintiffs complain that the electronic reproductions of their articles, on NEXIS and on disc, directly infringe their copyrights. They seek to hold defendants contributorily liable only to the extent that defendants have cooperated with one another in creating these allegedly infringing works. Plaintiffs do not advance the distinct claim that defendants are contributorily liable for potential copyright infringement by users of the disputed electronic services. (12/10/96 Tr. at 34 ("This is not a case in which we have accused the defendants . . . of manufacturing or distributing machines or equipment that can be used by third parties in an infringing way.")) To prevail with such a claim, which would be governed by Sony Corp. v. Universal City Studios, 464 U.S. 420, 442 (1984), defendants would merely have to demonstrate that the disputed technologies can be put to "substantial noninfringing uses." See generally Ariel B. Taitz, Removing Road Blocks Along The Information Superhighway: Facilitating The Dissemination Of New

Defendants Time and Newsday argue that they are not limited to those privileges set out at the conclusion of Section 201(c), because plaintiffs have "expressly transferred" the electronic rights in their articles. Newsday relies upon the check legends authorizing the publisher to include plaintiffs' articles "in electronic library archives." Time relies upon the "right first to publish" secured in its written contract with plaintiff Whitford. Plaintiffs insist that neither of these provisions contemplate the sort of electronic reproductions presently at issue.

Even without an express transfer of rights, all of the defendants maintain that the practice of electronically reproducing plaintiffs' articles is authorized under Section 201(c) of the Copyright Act. Defendants argue that the disputed technologies merely generate "revisions of [the defendant publishers'] collective work[s]," and therefore do not usurp plaintiffs' rights in their individual articles. 17 U.S.C. § 201(c). Plaintiffs counter that Section 201(c) was not intended to permit electronic revisions of collective works, and that, in any event, the technologies presently at issue are incapable of creating such revisions.

Technology By Changing The Law Of Contributory Copyright Infringement, 64 Geo. Wash. L. Rev. 133 (1995) (proposing "non-trivial infringing use doctrine" as alternative approach to claims of contributory infringement).

DISCUSSION

I. INTRODUCTION

Summary judgment is required when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "The moving party has the initial burden of 'informing the district court of the basis for its motion' and identifying the matter 'it believes demonstrate[s] the absence of a genuine issue of material fact.'" Liebovitz v. Paramount Pictures Corp., 1996 WL 733015, * 3 (S.D.N.Y. Dec. 18, 1996) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Once the movant satisfies its initial burden, the nonmoving party must identify "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). In assessing the parties' competing claims, the Court must resolve any factual ambiguities in favor of the nonmovant. See McNeil v. Aguilos, 831 F. Supp. 1079, 1082 (S.D.N.Y. 1993). It is within this framework that the Court must finally determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).

Where there are cross motions for summary judgment, as there are here, "the standard is the same as that for individual motions for summary judgment and the court must consider each motion independent of the other Simply because the parties have cross-moved, and therefore have implicitly agreed that no material issues of fact exist, does not mean that the court must join in that agreement and grant judgment as

a matter of law for one side or the other." Aviall, Inc. v. Ryder System, Inc., 913 F. Supp. 826, 828 (S.D.N.Y. 1996) (citing Heublein, Inc. v. United States, 996 F.2d 1455, 1461 (2d Cir. 1993)), aff'd, 110 F.3d 892 (2d Cir. 1997).

II. THE ALLEGED TRANSFER OF RIGHTS PURSUANT TO CONTRACT

Two of the publisher defendants, *Newsday* and *Time*, claim that plaintiffs "expressly transferred" electronic rights in their articles, and that it is therefore unnecessary to determine whether the electronic data bases produce revisions of these defendants' collective works. The Court disagrees.

A. *Newsday*

According to Section 204(a) of the 1976 Act, "[a] transfer of copyright ownership . . . is not valid unless an instrument or conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent." 17 U.S.C. § 204(a). "[A] writing memorializing the assignment of copyright interests 'doesn't have to be the Magna Carta; a one-line pro forma statement will do.' However, the terms of any writing purporting to transfer copyright interests, even a one-line pro forma statement, must be clear." Papa's June Music, Inc. v. McLean, 921 F. Supp. 1154, 1158-1159 (S.D.N.Y. 1996) (citing Effects Associates, Inc. v. Cohen, 908 F.2d 555, 557 (9th Cir. 1990)).

The only writing that *Newsday* points to in support of the transfer of electronic rights appears on the back of the checks it issued to plaintiffs in payment for

their articles. In particular, the publisher relies upon the language providing that Newsday has the "right to include [plaintiffs' articles] in electronic library archives." By the time Newsday sent plaintiffs' articles to NEXIS, however, plaintiffs had not yet received or cashed these checks. Plaintiffs therefore contend that any transfer of rights that might have been effected by the check legends occurred too late to excuse defendants' alleged infringement. See R&R Recreation Products, Inc. v. Joan Cook Inc., 1992 WL 88171, * 4 (S.D.N.Y. 1992) ("R&R's assignment of the cat and mouse copyright to DMV does not preclude suit by R&R for infringement occurring prior to the assignment.").

Newsday responds by arguing that a "note or memorandum" of transfer can serve to validate a prior oral agreement. See Eden Toys, Inc. v. Florelee Undergarment Co., Inc., 697 F.2d 27, 36 (2d Cir. 1982) ("the 'note or memorandum of the transfer' need not be made at the time when the license is initiated; the requirement is satisfied by the copyright owner's later execution of a writing which confirms the agreement."); see also Imperial Residential Design, Inc. v. Palms Development Group, Inc., 70 F.3d 96, 99 (11th Cir. 1995) ("a copyright owner's later execution of a writing which confirms an earlier oral agreement validates the transfer ab initio."). Newsday is correct as to the law, but finds no support in the facts.

Newsday concedes that there is no evidence of any prior agreements concerning electronic rights in plaintiffs' articles. (Def. Newsday's Res. Pl.s' Rule 3(g) stmt No. 25 ("DEFENDANTS' RESPONSE: Other than the check endorsement . . . there

is no evidence of any express agreement, written or oral, between any of the plaintiffs and Newsday with respect to the articles at issue.".) The most Newsday claims is that the check legends confirmed "its understanding" that there had been a transfer of electronic rights in plaintiffs' articles. (Def.s' Memo. Supp. Mot. Summ. J. at 14 n. 2.) This is not enough: the record reveals no basis for concluding that Newsday's purported "understanding" was shared by plaintiffs, all of whom deny that they ever intended to authorize the use of their articles on-line. Thus, Newsday cannot now rely upon its check legends to give retroactive effect to supposed unspoken agreements concerning electronic rights in plaintiffs' articles.

The check legends themselves, moreover, are ambiguous and cannot be taken to reflect an express transfer of electronic rights in plaintiffs' articles. See Playboy Enterprises, Inc. v. Dumas, 53 F.3d 549, 564 (2d Cir.) (finding that check legend providing for the "assignment . . . of all right, title, and interest" was ambiguous, and did not effectively transfer copyright in certain paintings), cert. denied, 116 S. Ct. 567 (1995); see also Papa's-June, 921 F. Supp. at 1159 ("neither the royalty checks nor the attached royalty statements mention a transfer of copyright ownership."); Museum Boutique Intercontinental, Ltd v. Picasso, 880 F. Supp. 153, 162 n. 11 (S.D.N.Y. 1995) ("the checks submitted by MBI, which do not contain any explanatory notations besides "Picasso royalties," are not convincing proof, to say the least, of the alleged oral agreement."). Plaintiffs argue persuasively that the most reasonable interpretation of "electronic library archives" does not encompass NEXIS. Plaintiffs provide affidavits

from experts who opine that an archive and a commercial data base contain different types of material and serve different purposes. (Pl.s' Mot. Summ. J. Ex. 17.); cf. American Geophysical Union v. Texaco Inc., 60 F.3d 913, 919, 921 (2d Cir. 1995) (photocopying of articles from scientific journal was characterized as "archival" where copies were kept in researcher's files for later reference and were not used for any "direct or immediate commercial advantage"). Plaintiffs also note, and Newsday admits, that Newsday maintains its own "electronic library archives," a computerized in-house storage system that serves no commercial purpose. (Pl.s' Mot. Summ. J. Ex. 35 at 26.) It is at least plausible -- and would have been reasonable for plaintiffs to conclude -- that Newsday was simply referring to such "archives" in its check legends. In any event, there is no evidence that plaintiffs understood, or should have understood, that the check legends implicated rights extending as far as NEXIS.

In short, there is no basis for holding that the Newsday check legends effected an unambiguous and timely transfer of any significant electronic rights in plaintiffs' articles.

B. *Sports Illustrated*

In support of its Motion for Summary Judgment, defendant Time invokes Section 10(a) of its contract with Whitford. Pursuant to this provision, Sports Illustrated acquired the right "first to publish" Whitford's article. Arguing that this language includes no "media-based limitation," Time contends that its "first publication" rights

must be interpreted to extend to NEXIS.⁴ See Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150, 154-55 (2d Cir.) (holding that the right to "exhibit" motion picture included the right to exhibit movie on television), cert. denied, 393 U.S. 826 (1968); see also Bourne v. Walt Disney Co., 68 F.3d 621, 629 (2d Cir. 1995) ("motion picture" rights did not "unambiguously exclude" videocassette rights), cert. denied, 116 S. Ct. 1890 (1996); L.C. Page & Co. v. Fox Film Corp., 83 F.2d 196, 199 (2d Cir. 1936) ("exclusive moving picture rights" included "talkies" as well as silent films); Rooney v. Columbia Pictures Indus., Inc., 538 F. Supp. 211 (S.D.N.Y.) (exhibit "by any present or future method or means" included videocassette rights), aff'd, 714 F.2d 117 (2d Cir. 1982), cert. denied, 460 U.S. 1084 (1983).

Time's reliance upon the Bartsch line of authority is misplaced. Bartsch and its progeny stand for the proposition that when contract terms are broad enough to cover a new technological use, "the burden of framing and negotiating an exception should fall on the grantor." Bartsch, 391 F.2d at 155. None of these cases, however, involved a contract (like the one before the Court) that imposed specific temporal

⁴ By focusing upon Section 10(a) of its contract with Whitford, Time conspicuously avoids directly relying upon Sections 10(b) and 10(c). (Def.s' Memo. Supp. Mot. Summ. J. at 38 ("It is undisputed that Sports Illustrated acquired the right "first to publish" Whitford's article, and that the agreement nowhere expressly delineated or limited the media in which such publication would be permissible. The issue, then, is to determine how to interpret the contract's scope in light of its silence on the issue of format.")) Each of these other provisions broadly authorizes Time to republish Whitford's story provided that the publisher compensates Whitford for the republication. Whitford also does not rely upon these provisions, and does not advance any contract claim against Time.

limitations such as "first publication rights." The right to publish an article "first" cannot reasonably be stretched into a right to be the first to publish an article in any and all mediums. Cf. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 564 (1985) ("The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, *and in what form* first to publish a work.") (emphasis added). Because Whitford's article was "first" published in print, the electronic republication of that article some 45 days later simply cannot have been "first."

III. COLLECTIVE WORKS UNDER THE COPYRIGHT ACT OF 1976

Because the Court cannot find that any of the plaintiffs expressly transferred electronic rights in their articles, the numerous arguments and voluminous record in this case devolve to whether the electronic defendants produced "revisions," authorized under Section 201(c) of the Copyright Act, of the publisher defendants' collective works. The issue is narrow, but its resolution is not simple: there is virtually no case law parsing the terms of Section 201(c), and certainly no precedent elucidating the relationship between that provision and modern electronic technologies. Further complicating matters, the Copyright Act of 1976 was crafted through a unique and lengthy process involving the input of numerous experts from assorted interest groups and industries. See Barbara Ringer, First Thoughts On The Copyright Act Of 1976, 22 N.Y.L. Sch. L. Rev. 477 (1977). As a result, the pertinent legislative history is notoriously impenetrable. See generally Jessica D. Litman, Copyright, Compromise, and

Legislative History, 72 Cornell L. Rev. 857 (1987).

Despite the numerous challenges, there are several considerations which allow a principled approach to analyzing Section 201(c). Most importantly, the provision cannot be understood in isolation, but must be considered alongside other sections of the Act.

A. **Collective Works And Derivative Works Under Section 103(b)**

"Both collective works and derivative works are based upon preexisting works that are in themselves capable of copyright." 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 3.02, at 3-8 (1996 ed.). A derivative work "transforms" one or more such preexisting works into a new creation. See 17 U.S.C. § 101. A collective work, on the other hand, consists of numerous original contributions which are not altered, but which are assembled into an original collective whole. Id. In both instances, the copyright law accounts for the fact that the larger work -- although it is entitled to copyright protection -- consists of independent original contributions which are themselves protected.

The 1976 Act addresses the competing copyright interests apparent in both derivative works and collective works in Section 103(b). Pursuant to this provision:

The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright

protection in the preexisting material.⁵

17 U.S.C. § 103(b). Section 103(b) does not represent an innovation under the 1976 Act, but is intended merely to clarify a point "commonly misunderstood" under Section 7 of the 1909 Act.⁶ H.R. Report No. 94-1476, at 57 (1976). Specifically, "copyright in a 'new version' covers only the material added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material." *Id.*

The "misunderstanding" regarding copyright protection in "new versions" and in "preexisting materials" developed largely in connection with derivative works, and grew out of the "new property rights" approach espoused, most prominently, by Judge Friendly of the Second Circuit. See *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir.) (holding that film producer retained rights in underlying story despite fact that

⁵ Collective works are "compilations" which are composed of protected "preexisting material." See Section IIIB3, *infra*. Accordingly, Section 103(b) speaks directly to the copyright status of collective works. See Nimmer, § 3.07[A][1], at 3-34.9 n. 1.

⁶ Section 7 of the 1909 Act provided as follows:

Compilations or abridgements, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright . . . but the publication of any such new works shall not effect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works.

17 U.S.C. § 7 (1976 ed.) (repealed by Copyright Act of 1976).

novelist, who authorized initial use of story, died before granting producer renewal rights), cert. denied, 431 U.S. 949 (1977). According to this view, "once a derivative work is created pursuant to a valid license to use the underlying material, a new property right springs into existence with respect to the entire derivative work, so that even if the license is thereafter terminated, the proprietor of the derivative work may nevertheless continue to use the material from the underlying work as contained in the derivative work." Nimmer, § 3.07[A][1], at 3-34.9. Numerous authorities on copyright law, including Professor Nimmer, assailed the reasoning in Rohauer, deriding the "new property rights" approach as "neither warranted by any express provision of the Copyright Act, nor by the rationale as to the scope of protection achieved in a derivative work." Id.

Prior to its holding in Rohauer, and contrary to the "new property rights" approach, the Second Circuit had upheld several claims of infringement based upon the unauthorized reuse -- by the owner of a valid copyright in a derivative work -- of the protected preexisting material. See, e.g., Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14 (2d Cir. 1976); G. Ricordi & Co. v. Paramount Pictures Inc., 189 F.2d 469 (2d Cir.) (prohibiting plaintiff, in declaratory judgment action, from making a motion picture version of an opera that had been created with the permission of the author of the underlying work), cert. denied, 342 U.S. 849 (1951); see also Russell v. Price, 612 F.2d 1123, 1128 (9th Cir. 1979) ("since exhibition of the film "Pygmalion" necessarily involves exhibition of parts of Shaw's play, which is still copyrighted, plaintiffs here may

prevent defendants from renting the film for exhibition without their authorization."), cert. denied, 446 U.S. 952 (1980). In Gilliam, for instance, the Court granted an injunction in favor of plaintiffs, the members of a British comedy troop, who claimed that the BBC infringed their copyright in certain scripts. Plaintiffs had authorized the BBC to broadcast television programs based upon these scripts, but took exception when the BBC subsequently sold the programs to the defendant, an American television network which edited the programs prior to airing them in the United States. In support of its decision to enjoin the defendant from airing those edited versions for a second time, the Second Circuit reasoned that, under Section 7 of the 1909 Act, "any ownership by BBC of the copyright in the recorded program would not affect the scope or ownership of the copyright in the underlying script." Gilliam, 538 F.2d at 20. The use of that script without plaintiffs' consent would therefore constitute infringement, "even with the permission of the proprietor of [a] derivative work [based upon that script]." Id.

Upholding a Ninth Circuit opinion which rejected Rohaeur in favor of the Second Circuit's earlier approach in Gilliam, the Supreme Court finally and firmly settled the "new property rights" controversy. See Stewart v. Abend, 495 U.S. 207 (1990). In Abend, the author of a fictional story agreed to assign the rights in his renewal copyright term to the owner of a movie version of that story, but died before the commencement of the renewal period. Because the assignment never occurred, the Court held that defendant infringed the copyright of the successor owner of the story by continuing to distribute the film during the renewal term of the preexisting work.

In reaching its result, the Abend Court rejected defendants' view, based on Rohaeur, that the "creation of the 'new,' i.e., derivative, work extinguishes any right the owner of rights in the preexisting work might have had to sue for infringement . . . " Id. at 222. Citing Nimmer, the Court concluded that such an approach runs counter to the terms of both Section 7 of the 1909 Act and Section 103(b) of the 1976 Act, each of which advances the same fundamental formula:

The aspects of a derivative work added by the derivative author are that author's property, but the element drawn from the pre-existing work remains on grant from the owner of the pre-existing work. So long as the pre-existing work remains out of the public domain, its use is infringing if one who employs the work does not have a valid license or assignment for use of the preexisting work. It is irrelevant whether the preexisting work is inseparably intertwined with the derivative work.

Abend, 495 U.S. at 223-24 (citations omitted). Thus, Section 103(b) of the 1976 Act -- like Section 7 of the 1909 Act before it -- stands as a rejection of the new property rights theory. Id.; see also Nimmer, § 3.07, at 3-34.9 n. 3. (describing Section 103(b) as "hardly consistent with the new property right theory"). Under Section 103(b), any unauthorized use of preexisting protected material by the creator of a derivative or a collective work infringes the copyright existing in that preexisting material.

B. Defendants' "Privileges" Under Section 201(c)

The first sentence of Section 201(c) -- providing that the "[c]opyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution" -- essentially

reiterates the substance of Section 103(b). If the provision ended with its first sentence, plaintiffs would prevail in this action. With no "new property right" in the articles making up their collective works, the publisher defendants would not be at liberty to reuse plaintiffs' individual contributions even in new versions of their own periodicals. See Abend, 495 U.S. 207; see also Gilliam, 538 F.2d 14. In its second sentence, however, Section 201(c) expands upon the baseline established in Section 103(b) by extending to the creators of collective works "only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." 17 U.S.C. § 201(c). The determinative issue here, then, is the precise scope of these "privileges."

1. Privileges As Transferrable Rights

Plaintiffs liken the "privileges" which Section 201(c) extends to "the owner of copyright in the collective work" to narrowly circumscribed nonexclusive licenses. Unlike assignments or exclusive licenses or most other conveyances under copyright law, such limited grants are not transferrable. See 17 U.S.C. § 101 (defining "transfer of copyright ownership"). Because the publisher defendants own the copyrights in their collective works, plaintiffs reason that the electronic defendants are guilty of infringement even in the event that they are creating revisions -- authorized by the publisher defendants -- of the disputed periodicals. (Pl.s' Memo. Supp. Mot. Summ. J. at 16; n. 15; Pl.s' Memo. Opp. Def.s' Cross-Mot. Summ. J. at 19-23.)

Plaintiffs arrive at their understanding of the term "privileges" by

juxtaposing Section 201(c) with Section 201(d). The first clause of the latter section provides that "[t]he ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law . . . " 17 U.S.C. § 201(d)(1). According to Section 201(d)(2):

Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

In plaintiffs' view, the fact that Section 201(d)(2) provides for the transfer of "rights" can only be taken to mean that the "privileges" identified in the preceding section of the Act are nontransferable. This approach distorts the relationship between Section 201(c) and Section 201(d).

Section 201(d)(2) does not speak only of "rights," but also of any "subdivision" of rights. The potential for such a subdivision of rights is created in the preceding section, 201(d)(1), which permits the transfer of copyright, "in whole or in part," either by conveyance or by "operation of law." This recognition of the potential for a partial transfer of copyright "by operation of law" follows from the fact that exactly such a transfer is effected in the preceding Section of the Act, Section 201(c), which extends certain enumerated "privileges" to publishers. In other words, the three provisions operate in tandem: Section 201(c) transfers plaintiffs' copyrights, "in part," to defendants -- a permissible exercise under Section 201(d)(1) -- and therefore, under

Section 201(d)(2), defendants are left with full authority over the "subdivision" of rights they acquire.

When Sections 201(c) and 201(d) are placed into historical context, the weakness in plaintiffs' position is all the more apparent. The 1976 Act, in significant part, amounts to a repudiation of the concept of copyright indivisibility, a principle pursuant to which the assorted rights comprising a copyright could not be assigned in parts, *i.e.*, subdivided. See Nimmer, § 10.01[A], at 10-5. Under this former regime, individual authors were at risk of inadvertently surrendering all rights in a contribution to a collective work either to the publisher of that work, or to the public. *Id.* Under Sections 201(c) and (d) of the 1976 Act, that threat is gone. Authors are no longer at risk of losing all rights in their articles merely because they surrender a small "subdivision" of those rights -- either by operation of Section 201(c) or by express transfer -- to the publishers of collective works.

The aim of Section 201(c) -- to avoid the "unfair[ness]" of indivisibility -- would not be further served by equating "privileges" with nonexclusive licenses. H.R. Report No. 94-1476, at 122 (1976). As explained, Congress was not responding to any perceived problem associated with the ability of publishers to enlist the help of outside entities to produce versions of their collective works, but rather to the risk that publishers of collective works might usurp all rights in individual articles. It simply would not have advanced its goal for Congress to have constrained publishers in their efforts to generate and distribute their permitted revisions and reproductions. Such an approach would not

prevent the exploitation of individual contributions, but would serve only to undermine the competing goal of ensuring that collective works be marketed and distributed to the public. See H.R. Rep. No. 94-1476, at 122 (1976) (characterizing the Section 201(c) privileges extended to publishers an "essential counterpart" to the basic presumption favoring authors).

The term "privilege" is used in Section 201(c) to underscore that the creators of collective works have only limited rights in the individual contributions making up their collective works; the term does not indicate that the creators of collective works are limited in exercising those few rights, or "privileges," that they possess. Thus, to the extent that the electronic reproductions qualify as revisions under Section 201(c), the defendant publishers were entitled to authorize the electronic defendants to create those revisions.

2. Reproductions, Revisions, and Computer Technology

Plaintiffs advance several arguments in support of their view that the framers of Section 201(c) intended to limit the creators of collective works to revising and reproducing their works in the same medium in which those collective works initially appeared. For the reasons discussed, however, the Court finds nothing in the terminology of Section 201(c), the relevant legislative history, or the nature of revisions generally which supports such an approach.⁷

⁷ Plaintiffs undermine their arguments by struggling with the copyright implications of microfilm, a high resolution film which permits users to scroll through

a. Display Rights

Plaintiffs contend that the right to reproduce articles as part of a collective work, because it is unaccompanied by other key rights, necessarily precludes the use of computer technologies. Plaintiffs refer to Section 106 of the 1976 Act, which lists the five exclusive rights, *i.e.*, the "bundle" of rights, constituting a copyright. The "reproduction" privilege identified under Section 201(c), as plaintiffs note, invokes the first of these rights -- the right "to reproduce the copyrighted work in copies or phonorecords." *See* 17 U.S.C. § 106(1). Section 201(c) does not, however, implicate the distinct right, under Section 106, to "display the copyrighted work publicly." *Id.* at § 106(5). In plaintiffs' view, this absence of any express grant of "display" rights is fatal to defendants' position because a work cannot be reproduced electronically unless it is "displayed" on a computer screen.

By focusing upon the "display" rights that are not granted under Section 201(c), plaintiffs fail to account fully for the "reproduction" rights that are extended to the owners of copyright in collective works. Although "reproduction" is not defined separately under the Act, Section 106 reveals -- predictably enough -- that reproductions

entire issues of periodicals. (*Compare* 10/17/96 Tr. at 41 ("I believe that I have conceded this to opposing counsel previously, that I think it's possible that the right to make microfilm editions of a publication or a periodical is encompassed by the 201(c) privilege"), *with* 12/10/96 Tr. at 50 (deeming it "probably the correct interpretation of 201(c)" that "even an electronic equivalent of microfilm would be a violation").) Of course, if it is "possible" that Section 201(c) permits microfilm reproductions of collective works, it is impossible that Section 201(c) prohibits reproductions in a new medium.

result in "copies." As defendants emphasize, this is a term with a broad and forward looking definition:

'Copies' are material objects, other than phonorecords, in which a work is fixed by *any method now known or later developed*, and from which the work can be *perceived*, reproduced, or otherwise communicated, either directly or *with the aid of a machine or device* . . .

17 U.S.C. § 101 (emphasis added). Thus, the right to reproduce a work, which necessarily encompasses the right to create copies of that work, presupposes that such copies might be "perceived" from a computer terminal.⁸

Plaintiffs argue that the legislative history precludes the Court from reading "display" rights into Section 201(c). As plaintiffs point out, early draft versions of Section 201(c) extended the "privilege to publish" -- instead of the privilege to "reproduce" and "distribute" -- individual contributions in subsequent versions of a collective work. (Pl.s' Memo. Opp. Def.s' Mot. Summ. J. at 22, n. 37.) "'Publication' is the distribution of copies . . . of a work to the public." 17 U.S.C. § 101. More importantly, for plaintiffs' purposes, "publication" contemplates the public distribution of

⁸ In searching for a reason that microfilm reproductions of collective works might be permissible under Section 201(c), plaintiffs themselves suggest another approach to rejecting their display rights argument. (10/17/96 Tr. at 52 ("I would agree with your Honor that they have the right under 201(c) and 109(c) to take plaintiffs' work without their permission and put it in a microfilm.") Section 109(c) permits a person lawfully in possession of a copy of a protected work "to display that copy publicly." 17 U.S.C. § 109(c). Thus, if defendants have reproduced plaintiffs' articles in accord with the conditions set under Section 201(c), they would be entitled to display those copies pursuant to Section 109(c).

a work "for purposes of further distribution, public performance, or public *display* . . . "

Id. (emphasis added). The absence of the term "publish" from the final version of Section 201(c), according to plaintiffs, must therefore be taken to indicate the absence of any such display rights.

The problem with plaintiffs' argument is that it rests on the unfounded assumption that the replacement of the term "publish" in Section 201(c) necessarily amounted to a rejection not only of that term, but also of the rights it connotes. There is no hint in the pertinent legislative history, however, that Congress settled upon its "reproducing and distributing" language for purpose of diminishing the publication rights initially envisioned for the creators of collective works. To the contrary, it appears that the "reproducing and distributing" language -- a seeming paraphrase of the "distribution of copies" language the Act uses to define "publication" -- was meant to secure precisely those rights. Indeed, the House Report explicitly equates the privilege of "reproducing and distributing" a contribution as part of a "particular collective work" with the "privilege of *republishing* the contribution under certain limited circumstances." H.R. Report No. 94-1476, at 122 (1976) (emphasis added).

In sum, both the terms of the 1976 Act, and the pertinent legislative history, reveal a design to extend display rights, in "certain limited circumstances," to the creators of collective works. Thus, so long as defendants are operating within the scope of their privilege to "reproduce" and "distribute" plaintiffs' articles in "revised" versions of defendants' collective works, any incidental display of those individual contributions is

permissible.

b. The Updated Encyclopedia

Plaintiffs' narrow reading of defendants' reproduction and revision rights is informed not only by the absence of any "display" rights under Section 201(c), but also by the examples of revisions included in the pertinent legislative history. In particular, plaintiffs rely upon the following passage of the House Report accompanying Section 201(c):

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

H.R. Report No. 94-1476, at 122-23 (1976). To plaintiffs, the modest reach of the encyclopedia example suggests a narrow scope to the term revision, one not contemplating new technologies or significant alterations of format and organization.

For several reasons, plaintiffs are mistaken to approach the encyclopedia example as the outer boundary of permissible revision. Foremost, the language of Section 201(c) does not support the sort of media restriction that plaintiffs infer from the legislative history. Cf. Demarest v. Manspeaker, 498 U.S. 184, 190 (1991) ("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances."). Indeed, Section 201(c) contains no express limitation upon the medium in which a revision can be created. To the contrary, "any revision" of a

collective work is permissible, provided it is a revision of "that collective work."⁹

Plaintiffs attribute the absence of any express prohibition on electronic revisions to the fact that electronic data bases were not a part of the "Congressional consciousness" at the time that Section 201(c) was drafted. (Pl.s' Memo. Supp. Summ. J. at 41.) It is more accurate to say that Congress was aware of such technologies, but did not fully understand their implications. See Arthur R. Miller, Copyright Protection For Computer Programs, Databases, And Computer Generated Works: Is Anything New Since CONTU?, 106 Harv. L. Rev. 977, 979 (1993). Recognizing its ignorance in such matters, Congress expressly declined -- as of the time it passed the 1976 Act -- to settle the copyright implications of "automatic systems capable of storing, processing, retrieving, or transferring information . . ." 17 U.S.C. § 117 (repealed by Computer Software Protection Act, Pub. L. No. 96-517, 117, 94 Stat. 3028 (1980)). Congress determined that such developing computer technologies required continued investigation, and organized a study of the matter by the National Commission on New Technological Uses of Copyrighted Works (CONTU). H.R. Rep. No. 1476, 94th Cong., 2d Sess. 116 (1976). In 1980, after CONTU determined that the 1976 legislation would afford "the desired substantive legal protection for copyrighted works which exist in machine readable form," Congress repealed the original Section 117. Id. at 40. Plaintiffs invoke

⁹ As explained in Section IIIB3, *infra*, a collective work is defined not by the medium in which it appears, but by its original selection and organization of articles and other materials. See Feist Publications, Inc. v. Rural Telephone Service Company, Inc., 499 U.S. 340 (1991).

this history, particularly the initial reluctance of Congress to delve into the realm of computer technologies, as evidence that Section 201(c) was not intended to vest defendants with electronic rights in their collective works.

The legislative history that plaintiffs describe undercuts their argument more than it advances it. The fact that Congress initially saw the need to pass Section 117 is strong indication that, in the absence of such an explicit limitation, it is to be presumed that the terms of the 1976 Act encompass all variety of developing technologies. With the repeal of Section 117, this presumption is restored with respect to computers. Thus, there is no remaining reason to foreclose the possibility of an electronic "revision" of a collective work.

As defendants emphasize, the 1976 Act was plainly crafted with the goal of media neutrality in mind. See Register's Report on the General Revision of the U.S. Copyright Law, included in Nimmer at Volume 5, Appendix 14 at 14-8 ("technical advances have brought in new industries and new methods for the reproduction and dissemination of the . . . works that comprise the subject matter of copyright In many respects, the [1909 Act] is uncertain, inconsistent, or inadequate in its application to present-day conditions."); see also Copyright Law Revision: Hearing on H.R. 4347, 5680, 6831, 6835 Before Subcommittee No. 3 of the House Committee on the Judiciary, 89th Cong., 1st Sess. 57 (1965) (testimony of George D. Cary, Deputy Register of Copyrights: "We have tried to phrase the broad rights granted in such a way that they can be adapted as time goes on to each of new advancing media."). Key terms of the Act are

defined to accommodate developing technologies. See, e.g., 17 U.S.C. § 101 (defining "copies" in terms of "any method now known or later developed"; defining "literary works" as works "expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied."). Equally telling, none of the provisions of the Act limit copyright protection to existing technologies. The unusual exception of the original Section 117 only demonstrates that Congress took steps to ensure that its media neutral approach could effectively accommodate developing technologies before ultimately determining that the terms of the 1976 Act were fully equipped for the task.

In sum, it is unwarranted simply to assume -- on the basis of one example provided in the legislative history of Section 201(c) -- that Congress intended for the terms "reproduction" and "revision" to announce a radical departure from the media neutrality otherwise characterizing the Copyright Act of 1976.

c. A "Plain Reading" of the Term Revision

Throughout their pleadings, plaintiffs seemingly presume that a "revision," by its plain meaning, must be nearly identical to an original. Particularly in the context of the Copyright Act of 1976, this is not so obvious. Conceived as a "revision" of the 1909 Act, the 1976 Act thoroughly changed the face of copyright law in the United States. See Barbara Ringer, First Thoughts On The Copyright Act Of 1976, 22 N.Y.L. Sch. L. Rev. 477, 479 (1977).

At a bare minimum, the Copyright Act contemplates that a "revision" can alter a preexisting work by a sufficient degree to give rise to a new original creation. See 17 U.S.C. § 101. Indeed, a "derivative work," which is itself an "original work of authorship," can be created by means of "editorial revisions" to a preexisting work. Id. Thus, even the revised encyclopedia might differ from its predecessor edition by a "substantial, and not merely trivial" degree. See Eden Toys, Inc. v. Florelee Undergarment Co., Inc., 697 F.2d 27, 34 (2d Cir. 1982). If "editorial revisions" can transform a work to this extent, the broader "any revisions" language of Section 201(c) suggests the promise of even greater change.¹⁰

The structure and language of Section 201(c) confirm that the parameters of a permissible revision are broader than plaintiffs suppose. Section 201(c) authorizes publishers to "reproduce" an individual contribution "as part of . . . any revision" of the collective work in which it initially appeared. By allowing only "reproductions" of individual contributions, and not revisions of those contributions, Congress plainly

¹⁰ The Author's Guild of America, as amicus on plaintiffs' behalf, argues that plaintiffs' narrow reading of the term "revision" follows from the dictionary definition of that term: a definition which encompasses "new" and "up-to-date" versions of a prior work. (Memo. Author's Guild at 7 (citing Webster's Ninth New Collegiate Dictionary 1010 (1983).) This hardly advances plaintiffs' position. As explained, a derivative work is a "new" version of a preexisting work; although such a work "borrows substantially" from the work that preceded it, a derivative work is characterized by the fact that it is sufficiently unlike that preexisting work to be termed an original creation. See Eden Toys, 697 F.2d at 34. Moreover, derivative works are routinely created within a different medium than the works upon which they are based. See, e.g., Twin Peaks Productions, Inc. v. Publications International, Ltd., 996 F.2d 1366, 1373 (2d Cir. 1993) (classifying a book as a derivative version of the television program upon which it was based).

intended to prevent publishers from reshaping or altering the content of individual articles. With this limitation in place, Congress apparently was willing to permit publishers significant leeway, i.e., the leeway to create "any revision" of their collective works.

The legislative history is consistent with this construction of Section 201(c). An early draft version of the provision permitted publishers to reproduce an individual contribution to a collective work "as part of that particular collective work and any revisions of it." Harriet Pilpel, a prominent author representative, expressed the following concern related to this language:

I have but one question with reference to the wording, and that is with respect to the wording at the end of subsection (c): ' . . . and any revisions of it.' If that means 'any revision of the collective work' in terms of changing the contributions, or their order, or including different contributions, obviously the magazine writers and photographers would not object. But there is an implication, or at least an ambiguity, that somehow the owner of the collective work has a right to make revisions in the contributions to the collective work. This is not and should not be the law, and consequently I suggest that the wording at the end of subsection (c) be changed to make that absolutely clear.

1964 Revision Bill with Discussions and Comments, 89th Cong., 1st Sess., Copyright Law Revision, Part 5, at 9 (H. Comm. Print 1965). In other words, authors were comfortable permitting publishers broad discretion in revising their collective works, provided that individual articles would remain intact. Section 201(c) was modified to accommodate these narrow concerns, and it now clarifies that a publisher is not permitted

to revise an original contribution to a collective work, but is permitted to reproduce that contribution "as part of . . . any revision" of "that collective work" in which it initially appeared.

In sum, Section 201(c) does not impose any significant limitations upon publishers through the use of such terms as "privilege," "reproducing," or "any revision." A privilege is transferrable; a reproduction can occur in any medium; and "any revision" might include a major revision. The key limitation imposed upon publishers under Section 201(c) rests in the fact that publishers are permitted only to reproduce a particular plaintiff's article "as part of" a revised version of "that collective work" in which the article originally appeared.

3. Revising "That Collective Work"

Although the "any revision" language of Section 201(c) is broad, a new work must be recognizable as a version of a preexisting collective work if it is to be fairly characterized a revision of "that collective work." 17 U.S.C. § 201(c). Considering that defendants are prohibited from changing the content of plaintiffs' individual articles, this gives rise to something which, at first blush, might seem puzzling: how can a particular collective work, one made up entirely of separate contributions, be revised without making changes to those contributions? The resolution of this question rests in the fact that collective works, even to the extent that they consist entirely of individual original contributions, possess distinguishing original characteristics of their own -- i.e., they are greater than the sum of their parts. It is therefore possible to revise a collective work by

changing the original whole of that work without altering the content of the individual contributions to that work.¹¹

In order to identify the original characteristics of a collective work, it is useful to recognize that collective works are a form of compilation. "A compilation is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101. "Many compilations consist of nothing but raw data -- i.e., wholly factual information not accompanied by any original written expression." Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 345 (1991). Collective works are a unique form of compilation only because they are not made up of facts, but of "separate and independent works" protected as the original contributions of individual authors. 17 U.S.C. § 101.

Because it is a "bedrock principle of copyright" that no author may possess a copyright in facts, the Supreme Court has struggled to identify those aspects of factual compilations that might reflect the original contribution of the copyright holders in such works. See Feist, 499 U.S. 340. Ultimately, the Feist Court determined that "[t]he only

¹¹ Many of the original contributions included in the defendant publishers' periodicals qualify as "works made for hire." 17 U.S.C. § 201(b). These pieces are written by employees of the defendant publishers, and the publishers therefore obtain full rights in those articles, including the right to alter those articles. Id. Because defendants do not argue that any of plaintiffs' articles qualify as works made for hire, the analysis here focuses only on those rights that the publisher defendants acquire over the articles appearing in their publications simply on the basis of the distinct copyright protection they hold in their collective works.

conceivable expression is the manner in which the compiler has selected and arranged the facts." Id. at 349. Because the creator of a collective work, like the creator of any compilation, has no rights in the component parts of his or her work, this same formulation applies. In other words, the creators of collective works are entitled to rights in those works only to the extent that they have demonstrated creativity in selecting and arranging preexisting materials into an original collective whole. See H.R. Report No. 94-1476, at 122 (explaining that publishers' "exclusive rights" extend "to the elements of compilation and editing that went into the collective work as a whole . . . "). It is this original contribution which gives a collective work its unique character, i.e., which makes it identifiable as "that collective work."

Because compilations, and collective works, are characterized by the fact that they possess relatively little originality, defendants must walk a fine line in their efforts to revise their collective works. Defendants are not permitted to place plaintiffs' articles into "new anthologies" or "entirely different magazine[s] or other collective work[s]," but only into revisions of those collective works in which plaintiffs' articles first appeared. See H.R. Report No. 94-1476, at 122-23 (1976); see also Quinto v. Legal Times of Washington, Inc., 506 F. Supp. 554 (D.D.C. 1981) (holding that law school newspaper could not authorize a separate District of Columbia newspaper to reprint an article originally published by the law school). If defendants change the original selection and arrangement of their newspapers or magazines, however, they are at risk of creating new works, works no longer recognizable as versions of the periodicals that are

the source of their rights. Thus, in whatever ways they change their collective works, defendants must preserve some significant original aspect of those works -- whether an original selection or an original arrangement -- if they expect to satisfy the requirements of Section 201(c). Indeed, it is only if such a distinguishing original characteristic remains that the resulting creation can fairly be termed a revision of "that collective work" which preceded it.

C. Applying Section 201(c)

Even to the extent that they accept that an electronic revision of a collective work is a theoretical possibility, plaintiffs insist that the technologies presently at issue "deal in individual articles and not in collective works." (Pl.s' Mem. Supp. Mot. Summ. J. at 37.) For instance, searches retrieve the full content of individual articles, and not of entire issues. The electronic defendants add coding to individual articles in order to facilitate Boolean searching. Individual articles are stored as separate "files" within the system, where they exist alongside almost countless articles from numerous other publications. Moreover, for the convenience of users, articles are supplemented to make them useful on a stand alone basis; headers appear with each article identifying the author, and the publication and page in which the article appeared. In short, plaintiffs complain that defendants not only fail to preserve their collective works, they actively dismantle those works for purposes of electronically exploiting plaintiffs' individual

contributions.¹²

1. Aspects Of Defendants' Periodicals Preserved Electronically

In order to evaluate plaintiffs' contention that NEXIS and the disputed CD-ROMs "remove everything that constitutes the originality" of the publisher defendants' collective works, it is necessary first to identify the distinguishing original characteristics of those works. (10/17/96 Tr. at 38.) To the extent that defendants' publications reveal an original selection or arrangement of materials, the Court must then determine whether these characteristics are preserved electronically. This two step approach is closely analogous -- virtually identical -- to the analysis undertaken by those courts confronted with claims of copyright infringement brought by the creators of factual compilations. See, e.g., Feist, 499 U.S. 340; Lipton v. Nature Co., 71 F.3d 464 (2d Cir. 1995); CCC Information Services, Inc. v. MacLean Hunter Reports, Inc., 44 F.3d 61 (2d Cir. 1994),

¹² Within this framework, plaintiffs struggle to explain their objections to "General Periodicals OnDisc," which carries photographic images of *The New York Times Sunday Magazine* and *Book Review*. Plaintiffs initially argued that these CD-ROMs do not carry full issues of *The New York Times*, but only discreet sections. The *Sunday Magazine* and *Book Review*, however, are self contained periodicals, i.e., collective works, and defendants are therefore entitled to reproduce them.

At a December 10, 1996 hearing, plaintiffs turned their attention to the abstracts accompanying the image based discs, arguing that these paragraph length synopses constitute unauthorized derivative versions of plaintiffs' articles. Defendants responded that plaintiffs had not raised this issue in any of their earlier submissions to the Court, and that defendants therefore had not had an opportunity to address the issue in discovery or in argument. The Court has since verified that defendants were correct, and therefore -- as indicated during the December hearing -- the Court will not consider whether the abstracts infringe plaintiffs' copyrights in their individual articles. (12/10/96 Tr. at 53.)

cert. denied, 116 S. Ct. 72 (1995); Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc., 945 F.2d 509 (2d Cir. 1991); Nester's Map & Guide, Corp. v. Hagstrom Map Co., 796 F.Supp. 729 (E.D.N.Y. 1992).

In the compilation infringement context, courts begin by determining whether the plaintiff's compilation exhibits sufficient originality to merit protection; if there is sufficient originality in either selection or arrangement, it is necessary to determine whether these original elements have been copied into the allegedly infringing work. Id.; see also Skinder-Strauss Associates v. Massachusetts Continuing Legal Education, Inc., 914 F. Supp. 665, 672 (D. Mass. 1995) ("If a party demonstrates that its compilation is sufficiently original to be copyrightable, he must further show copyright infringement . . . 'The plaintiff must . . . prove that the copying of copyrighted material was so extensive that it rendered the offending and copyrighted works substantially similar' as a matter of law.") (quoting Lotus Development Corp. v. Borland Intern. Inc., 49 F.3d 807, 813 (1st Cir. 1995)). A finding that an allegedly infringing work copies original aspects of a protected compilation supports a finding of infringement. There is no infringement where a defendant copies only the component parts of a protected compilation.

In the circumstances of this case, the same analysis leads to opposite results. If the disputed periodicals manifest an original selection or arrangement of materials, and if that originality is preserved electronically, then the electronic reproductions can be deemed permissible revisions of the publisher defendants' collective

works. If, on the other hand, the electronic defendants do not preserve the originality of the disputed publications, but merely exploit the component parts of those works, then plaintiffs' rights in those component parts have been infringed. That this Court's revision analysis mirrors the Supreme Court's compilation infringement analysis reflects a common concern permeating both areas. Courts must ensure that the creators of factual compilations and collective works derive their rights solely from their original contributions, and that they not be permitted to usurp complete control over the component parts of their creations. See 17 U.S.C. § 103(b); see also Nimmer, 3.04[A], at 3-20-21 ("only that which is original with the copyright proprietor or his assignor may be protected by his copyright.").

In Feist, a telephone utility company claimed that the defendant publishers infringed its copyright in a local "white pages" by incorporating the phone numbers and addresses listed in that directory into a larger phone book covering a broader geographic region. Recognizing that the creator of a phone book cannot have any exclusive rights in the facts set forth in such a volume, the Court considered whether plaintiff had made any significant original contribution in creating its white pages. Though venturing that "the vast majority of compilations" would reflect sufficient originality in selection and in arrangement to merit protection, the Court concluded that "not every selection, coordination, or arrangement will pass muster." Feist, 499 U.S. at 358-59. Indeed, the plaintiffs' white pages were "entirely typical," merely providing an alphabetical listing of all of the phone numbers in a particular region. Id. at 362. Therefore, the Court held that

defendant did not commit copyright infringement by copying the factual information set forth in plaintiff's directory.

In other instances, as envisioned by the Court in Feist, the selection and arrangement of matter in assorted compilations has been sufficiently original to warrant copyright protection. See, e.g., Lipton, 71 F.3d 464; Eckes v. Card Price Update, 736 F.2d 859 (2d Cir. 1984); Key, 945 F.2d 509; CCC, 44 F.3d 61 (holding that computer data base provider infringed plaintiff's copyright in book of used car valuations by including same selection of vehicles and same price estimates in online system); Nester's Map & Guide Corp., 796 F.Supp. 729 (holding that publisher infringed plaintiff's copyright in a taxi driver's guide of New York City by producing competing guide copying plaintiff's selection and arrangement of street listings). In Lipton, for instance, the Second Circuit held that defendant infringed plaintiff's copyright in a book of venery -- a guide of "collective terms for identifying certain animal groups" -- by releasing a compilation consisting of those very terms that plaintiff had selected for inclusion in his book. 71 F.3d at 467. In Eckes, the Court held that defendants infringed plaintiffs' copyright in a baseball card price guide by publishing a competing price "update" which listed essentially the same 5,000 cards that plaintiff's guide designated as "premium." 736 F.2d at 861. These and other decisions highlight that "[t]he amount of creativity required for copyright protection of a compilation is decidedly small," and that the mere selection of information for publication can often times reflect sufficient originality to warrant copyright protection. Lipton, 71 F.3d at 470.

Although relatively little creativity is required to give rise to an original selection or arrangement of materials within a compilation or collective work, great care is required to preserve that original selection or arrangement in a subsequent work. In order to preserve an original selection of materials, for instance, a subsequent work must copy more than a "certain percentage" of those materials. See Worth v. Selchow & Richter Company, 827 F.2d 569, 573 (9th Cir. 1987) (holding that defendants' trivia game did not copy original selection of facts included in plaintiff's trivia encyclopedia where defendant copied only a fraction of those facts), cert. denied, 485 U.S. 977 (1988). As the Second Circuit has put it, the subsequent work cannot differ in selection by "more than a trivial degree" from the work that preceded it. See Kregos v. Associated Press, 937 F.2d 700, 710 (2d Cir. 1991) (holding that defendant did not infringe plaintiff's form of baseball pitching statistics by devising a competing form including 6 of the 9 categories of statistics identified by plaintiff); see also Lipton, 71 F.3d at 471 (finding that defendant's allegedly infringing work contained "essentially the same selection" as plaintiff's).

One of the defining original aspects of the publisher defendants' periodicals is the selection of articles included in those works. Indeed, newspapers and magazines are quite unlike phone books. Far more so even than books of terminology or baseball card guides, selecting materials to be included in a newspaper or magazine is a highly creative endeavor. *The New York Times* perhaps even represents the paradigm, the epitome of a publication in which selection alone reflects sufficient originality to merit

copyright protection. Identifying "all the news that's fit to print" is not nearly as mechanical (or noncontroversial) a task as gathering all of the phone numbers from a particular region. Indeed, recognizing matters of interest to readers is a highly subjective undertaking, one that different editors and different periodicals undoubtedly perform with varying degrees of success.

The defendant publishers' protected original selection of articles, a defining element of their periodicals, is preserved electronically. Articles appear in the disputed data bases solely because the defendant publishers earlier made the editorial determination that those articles would appeal to readers.¹³ As a result, the disputed technologies copy far more than a "certain percentage" of the articles selected by the publisher defendants. See Worth, 827 F.2d at 573; see also Kregos, 937 F.2d at 710. Those technologies copy all of the articles which are selected to appear in each daily or weekly issue of *The New York Times* or *Newsday* or *Sports Illustrated*.

Although they recognize that the complete content of all of the articles from each disputed periodical are available electronically, plaintiffs point out that those articles are stored alongside almost countless other articles that appeared in other issues of other periodicals. This immersion into a larger data base does not automatically mean,

¹³ In this regard, there is no intervening original selection of articles that might render NEXIS or UMI's CD-ROMs separate collective works. See H.R. Report No. 94-1476, at 122-23 (1976) ("the publisher could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work"). Plaintiffs have not, in any event, contended that NEXIS and the disputed CD-ROMs would qualify as such. (10/17/96 Tr. at 32.)

however, that the defendant publishers' protected original selection is lost. See CCC, 44 F.3d at 68 n. 8 ("The district court also believed that CCC did not infringe Red Book's original protected elements because CCC included Red Book's selection in a more extensive data base. We disagree."). Indeed, the electronic defendants avoid this risk by taking numerous steps to highlight the connection between plaintiffs' articles and the hard copy periodicals in which they first appeared. For instance, users access plaintiffs' articles through data bases consisting only of those articles printed in a particular identified periodical, or particular periodicals. More importantly, once an article is selected for review, that article is identified not only by author, but by the publication, issue, and page number in which it appeared. Thus, the electronic technologies not only copy the publisher defendants' complete original "selection" of articles, they tag those articles in such a way that the publisher defendants' original selection remains evident online.¹⁴

¹⁴ The fact that the electronic services repeatedly identify the publication from which each article was obtained undermines the persuasive force of an analogy plaintiffs call upon throughout their briefs. Plaintiffs compare the articles appearing in the data bases with car parts; just as a wrecked vehicle is disassembled to create value in its individual parts, plaintiffs contend that each of the defendant publications quickly lose their value as collective works and are therefore electronically disassembled to create value in the individual articles. Once in a data base, however, an article's association with a particular periodical plainly enhances the value of that article. Indeed, an article appearing in *Newsday* or *The New York Times* is instantly imbued with a certain degree of credibility that might not exist in the case of an article never published, or an article published in other periodicals. To the extent that the articles appearing in electronic form can be likened to car parts, then, it is not those parts that can be fitted into most makes and models, but those that are available only at a premium because they meet the design specifications for a particular model produced by a particular automobile manufacturer.

2. Aspects Of Defendants' Periodicals Not Preserved Electronically

According to plaintiffs, the electronic reproductions cannot reasonably be considered revisions of the publisher defendants' periodicals because significant elements of each disputed periodical are not preserved electronically. Put differently, plaintiffs object to the Court's approach because it focuses upon that which is retained electronically, as opposed to that which is lost. Most notably, aside from the image-based CD-ROM, the disputed technologies do not reproduce the photographs, captions, and page lay-out of the defendant publications. With these significant differences between the technological reproductions and the defendant publications, plaintiffs' position has a certain appeal. There is no avoiding that much of what is original about the disputed publications is not evident online or on disc. Ultimately, however, these changes to the defendant publishers' hard copy periodicals are of only peripheral concern to the "revision" analysis.

By its very nature, a "revision" is necessarily a changed version of the work that preceded it. As already explained, (Section IIIB2c, *supra*), Section 201(c) permits even major changes to collective works. The framers of that provision sought to avoid the exploitation of individual articles, and did not intend to prevent publishers from reworking their collective works in significant ways. In order to permit such reworking, while at the same time preventing changes to the substance of individual articles, Congress determined that publishers would have the leeway to preserve certain original aspects of their creations while discarding others. In the words of Section 201(c),

Congress determined that publishers would be permitted to create "any revision" of their collective works. The critical question for the Court, then, is not whether the electronic reproductions are different from the publisher defendants' collective works; it is inevitable that a revision will be different from the work upon which it is based. The question for the Court is whether the electronic reproductions retain enough of defendants' periodicals to be recognizable as versions of those periodicals.

Because a collective work typically possesses originality only in its selection and arrangement of materials, it is to be expected that, in a revised version of such a work, either the selection or arrangement will be changed or perhaps even lost. This is precisely what has happened here. Lacking the photographs and page lay out of the disputed periodicals, NEXIS and "The New York Times OnDisc" plainly fail to reproduce the original arrangement of materials included in the publisher defendants' periodicals. By retaining the publisher defendants' original selection of articles, however, the electronic defendants have managed to retain one of the few defining original elements of the publishers' collective works. In other words, NEXIS and UMI's CD-ROMs carry recognizable versions of the publisher defendants' newspapers and magazines. For the purposes of Section 201(c), then, defendants have succeeded at creating "any revision[s]" of those collective works.

The Court finds further support for its holding in the language of those compilation infringement cases that have already informed so much of the analysis in this decision. In particular, a work that copies *either* the original selection or the original

arrangement of a protected compilation is "substantially similar" to that compilation for copyright purposes. See Key, 945 F.2d 514 ("If the Galore Directory is substantially similar to the 1989-90 Key directory with regard to that arrangement of categories *or* that selection of businesses, then a finding of infringement can be supported.") (emphasis added). In other words, where a compilation possesses both an original arrangement and an original selection, a substantial similarity persists even where the original arrangement is sacrificed. Id. Thus, because the electronic data bases preserve defendants' original selection of articles, those data bases are "substantially similar," as a matter of law, to defendants' periodicals.¹⁵

By invoking the "substantial similarity" test of the compilation infringement cases, the Court does not mean to declare a fixed rule by which a revision of a particular collective work is created any time an original selection or arrangement is preserved in a

¹⁵ "Substantial similarity," as a term of art, perhaps often times overstates the actual resemblance between two works. In particular, relatively little copying is required to render an allegedly infringing work "substantially similar" to a wholly original creation. See, e.g., Twin Peaks, 996 F.2d at 1372 ("the concept of similarity embraces not only global similarities in structure and sequence, but localized similarity in language."); Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539 (1985) (finding infringement where defendant published magazine article which excerpted only 300-400 words from President Ford's as yet unreleased memoirs). Substantial similarity, however, is a more exacting standard in the compilation and collective work context. See Key, 945 F.2d at 514. Indeed, substantial similarity depends upon the copying of "those elements, and only those elements, that provide copyrightability to the allegedly infringed compilation." Id. Thus, to a greater extent than in other areas of copyright law, a finding that a work shares a substantial similarity with a compilation or a collective work provides a fair, if imperfect, indicator that that work actually bears a significant resemblance to the work upon which it is based.

subsequent creation. In certain circumstances, it is possible that the resulting work might be so different in character from "that collective work" which preceded it that it cannot fairly be deemed a revision. The Court need not speculate or hypothesize as to this possibility, however, because the electronic reproductions do more than merely preserve a defining element of the publishers' collective works. Those technologies preserve that element within electronic systems which permit users to consult defendants' periodicals in new ways and with new efficiency, but for the same purposes that they might otherwise review the hard copy versions of those periodicals. Indeed, in the broadest sense, NEXIS and CD-ROMs serve the same basic function as newspapers and magazines; they are all sources of information on the assorted topics selected by those editors working for the publisher defendants.¹⁶

In sum, if NEXIS was produced without the permission of The New York Times or Newsday or Time, these publishers would have valid claims of copyright infringement against MEAD. If "General Periodicals OnDisc" or "The New York Times

¹⁶ Plaintiffs would likely contend that the Court mischaracterizes the "basic function" of a newspaper or magazine by failing to appreciate that hard copy newspapers and electronic data bases are put to very different uses. Plaintiffs propose that people read newspapers to get the day's news, whereas they consult data bases and CD-ROMs for research purposes. A newspaper does not cease to be a newspaper, however, in the event that it comes to be used primarily for research purposes. Once included in the stacks of a library, for instance, a complete issue of *The New York Times* is undoubtedly still an issue of *The New York Times* despite the fact that it would likely be consulted only for particular articles identified by researchers in periodical indices. In this sense, NEXIS and the CD-ROMs do not fail to reproduce versions of defendants' periodicals; they simply store those versions within something akin to an electronic research library.

OnDisc" was produced without the permission of The New York Times, that publisher would have a valid claim of infringement against UMI. In other words, absent a consideration such as fair use, the defendant publishers would be able to recover against the electronic defendants for creating unauthorized versions of their periodicals. See 17 U.S.C. § 107 (describing those circumstances in which the unauthorized creation of a substantially similar version of an original work is excused as "fair use"). The Court is unable to conclude that these electronic versions can be "substantially similar" to defendants' collective works for some purposes, without at least qualifying as "any revision[s]" of those works for present purposes. 17 U.S.C. § 201(c). This is particularly so in light of the fact that these technologies preserve this substantial similarity while retaining the basic character of the publisher defendants' periodicals.¹⁷

3. Section 201(c) And The Rights Of Authors

Plaintiffs are adamant that a ruling for defendants in this case leaves

¹⁷ Plaintiffs devote considerable attention to the arrangements entered into between the publisher defendants and the electronic defendants. For instance, plaintiffs emphasize that The New York Times, in one of its license agreements with MEAD, expressly prohibits NEXIS from producing "facsimile reproductions" of *The New York Times*. (Pl.s' Mot. Summ. J. Ex. 38 at M003642.) In its first contract with UMI, on the other hand, The New York Times grants UMI the exclusive right to reproduce full images of the newspaper and its sections. (Pl.s' Mot. Summ. J. Ex. 39 U007357.) Plaintiffs argue that such arrangements demonstrate that The New York Times recognizes that it is profiting from plaintiffs' individual articles through NEXIS, and from its larger periodical through "General Periodicals OnDisc." To the contrary, by selling different original aspects of *The New York Times* to different electronic providers -- article selection in the case of MEAD, and visual layout in the case of UMI -- the publisher is merely taking advantage of the fact that there is more than one way to revise a collective work.

freelance authors without any significant protection under the 1976 Act. This result, according to plaintiffs, cannot be reconciled with the fact that the passage of Section 201(c) -- and the dismantling of indivisibility -- represented an important victory for individual authors.

As an initial matter, plaintiffs exaggerate the repercussions of this decision. The electronic data bases retain a significant creative element of the publisher defendants' collective works. In numerous other conceivable circumstances, Section 201(c) would apply to prevent the exploitation, by publishers, of individual articles. The New York Times, for instance, cannot sell a freelance article to be included in *Sports Illustrated*. See Quinto, 506 F. Supp. 554; see also H.R. Report No. 94-1476, at 122-23 (1976) ("the publisher could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work). A magazine publisher cannot rework a featured article into a full length book. Cf. Oddo v. Ries, 743 F.2d 630, 633-34 (9th Cir. 1984) (explaining that magazine publisher did not acquire the exclusive right to rework plaintiff's published articles into book form). And publishers cannot create television or film versions of individual freelance contributions to their periodicals. Cf. Abend, 495 U.S. 207 (prohibiting film maker from creating movie version of story first published in a magazine without the permission of the author's successor in interest). Though these scenarios are perhaps overshadowed by the seeming omnipresence of NEXIS and CD-ROM technology, authors remain protected under Section 201(c).

The Court does not take lightly that its holding deprives plaintiffs of certain

important economic benefits associated with their creations. This does not result from any misapplication of Section 201(c), however, but from modern developments which have changed the financial landscape in publishing. In particular, on-line technologies and CD-ROMs did not begin to flourish commercially until the early to mid 1980s.¹⁸ Thus, when the Copyright Act was formulated, during the 1960s and early 1970s, the most immediate economic threat to freelance writers was not posed by computer technology, but by the sort of transactions described in the preceding paragraph -- e.g., the sale of articles between magazines, television adaptations of stories, etc. Congress responded with a provision targeted to prevent such exploitation. Publishers were left with the right to revise their collective works; a right then perceived to have only limited economic value, but a right that time and technology have since made precious.

In sum, plaintiffs insist that the framers of Section 201(c) never intended the windfall for publishers permitted under this Court's ruling. This may well be. If today's result was unintended, it is only because Congress could not have fully anticipated the ways in which modern technology would create such lucrative markets for revisions; it is not because Congress intended for the term revision to apply any less broadly than the Court applies it today. In other words, though plaintiffs contend mightily that the disputed electronic reproductions do not produce revisions of

¹⁸ See Sidney A. Rosenzweig, Don't Put My Article Online!: Extending Copyright's New-Use Doctrine To The Electronic Publishing Media And Beyond, 143 U. Pa. L. Rev. 899, 929 (1995).

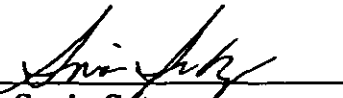
defendants' collective works, plaintiffs' real complaint lies in the fact that modern technology has created a situation in which revision rights are much more valuable than anticipated as of the time that the specific terms of the Copyright Act were being negotiated. If Congress agrees with plaintiffs that, in today's world of pricey electronic information systems, Section 201(c) no longer serves its intended purposes, Congress is of course free to revise that provision to achieve a more equitable result. Until and unless this happens, however, the courts must apply Section 201(c) according to its terms, and not on the basis of speculation as to how Congress might have done things differently had it known then what it knows now. See ABKCO Music, Inc. v. Stellar Records, Inc., 96 F.3d 60, 65 (2d Cir. 1996) ("what Congress may or may not do in the future to redefine [a copyright] term is not for us to speculate.").

CONCLUSION

For the reasons set forth above, defendants' motion for summary judgment is GRANTED. The Clerk of the Court is directed to enter judgment dismissing this action against the remaining defendants in accordance with this Opinion and Order.

SO ORDERED.

Dated: New York, New York
August 13, 1997



Sonia Sotomayor
U.S.D.J.

THE NEW REPUBLIC

The Scandal's Missing Man • Understanding Black Paranoia

Why Johnny Can't Read (or Add, or Sit Still in Class, or Take Notes)



How a little learning disability became
the ambitious student's best friend.

By Ruth Shalit



Why Johnny can't read, write or sit still.

DEFINING DISABILITY DOWN

By Ruth Shalit

In July of 1995, Jon Westling, the provost of Boston University, traveled to Australia to attend the Winter Conversazione on Culture and Society, a highbrow tête-à-tête for globetrotting pundits and savants. Westling, a protégé of former B.U. President John Silber, is an avowed conservative; and the subtitle of his speech, "The Culture Wars Go to School," seemed to portend the usual helping of red meat for the faithful. But instead of decrying deconstruction, or puncturing the pretensions of tenured radicals, Westling took aim at an unexpected target—the learning-disabled. He told the story of a shy yet assertive undergrad, "Somnolent Samantha," who had approached him one day after class and presented him with a letter from the Office of Disability Services. The letter explained that Samantha had a learning disability "in the area of auditory processing" and would require certain "accommodations," including time-and-a-half on quizzes, double time on the midterm, examinations administered in a room separate from all other students, copies of Westling's lecture notes, and a reserved seat at the front of the class. Samantha also notified Westling that she might doze off in class, and that he should fill her in on any material she missed while snoozing.

The somnolent undergrad, Westling contended, was not alone. A new, learning-disabled generation was coming of age in America, a generation "trained to the trelis of dependency on their special status and the accommodations that are made to it." Citing a Department of Education estimate that up to 20 percent of Americans may be learning-disabled, Westling mused on the evolutionary ramifications of such a diagnosis. "There may be as many as 50 million Americans," he observed. "What happened? Did America suffer some silent genetic catastrophe?"

Westling's speech, it turns out, was a prelude to action. Shortly after returning from Melbourne, the aggrieved provost took a cleaver to B.U.'s bloated Office of Learning Disabilities Support Services, a half-million dollar fiefdom whose policies had, in the words of *The New York Times*, earned B.U. a "national reputation" as a haven of support for the learning-impaired. He stepped up standards for documentation, and he issued a blanket prohibition on waivers of the school's math and foreign language requirements, contending that there was no

medical proof that students with learning disabilities are unable to learn these subjects. Henceforth, he declared, all requests for learning-disabled accommodations would be routed through his office. Westling then made a final announcement. In 1996, he said, he would become president of the university.

The learning-disability establishment was dumbfounded. "Here was someone coming in with no knowledge, taking the national model and destroying it," says Anne Schneider, the Park Avenue fund-raising doyenne who spearheaded the creation of B.U.'s program a decade ago, after her learning-disabled daughter Andrea nearly washed out of the university—due, Schneider says, to a lack of services. Schneider, whose personal fund-raising efforts have kept the office flush with cash, sees Westling's assault on her brainchild as analogous to "taking a seeing-eye dog away from a blind person." Janet Cabaley, mother of learning-disabled sophomore Michael, agrees: "These kids are the most vulnerable people on campus. Before, they were treated with humanity and decency and kindness. Now, they're hopeless and helpless."

Well, maybe not so helpless. Westling's putsch brought howls from disabled-rights advocates and from the media, which pounced upon the revelation that Somnolent Samantha was a fictitious composite—a "rhetorical trope," as Westling somewhat sheepishly admitted. And on July 15, 1996, ten students filed a lawsuit against Westling, claiming his unkind words and arduous new requirements amounted to illegal discrimination under the 1990 Americans With Disabilities Act. In their complaint, the students alleged that Westling's new standard for documentation—requiring applicants to submit an evaluation that is less than three years old and prepared by a physician or licensed psychologist—amounted to an "unduly burdensome prerequisite" that would screen out learning-disabled students from receiving their legally mandated accommodations. Also unlawful, the students contended, was Westling's prohibition on waivers of academic requirements. Finally, in their most enterprising claim, the students accused Westling of creating a "hostile learning environment" for the disabled, inflicting needless "emotional distress" and crushing their hopes of collective advancement. A ruling by Judge Patti B. Saris of Boston Federal District Court is expected by the end of August.

Recent rulings by other judges suggest that the learning-disabled students may well prevail in court. But even then the questions begged by Somnolent Samantha will remain. Westling and B.U.'s new guard insist that they have no animus against those with "genuine" learning impairments; they simply want to weed out the impostors. Yet, in holding up a trendy diagnosis to the bright light of public scrutiny, B.U. officials have raised issues that go to the core of a debate that has grown as civil rights law has expanded to cover not merely the halt, the lame and the blind, but the dysfunctional, the debilitated and the drowsy.

Should "learning-disabled" even be a protected category under federal law? What, exactly, is a learning disability? Are the B.U. plaintiffs at the vanguard of a new generation of civil rights warriors, as their supporters contend? Or is their lawsuit the *reductio ad absurdum* of identity politics and tort madness—Harrison Bergeron meets Perry Mason in *The Case of the Litigious Lollygaggers*?

The recent announcement by the Equal Employment Opportunity Commission that the Americans With Disabilities Act covers not only physically but mentally handicapped individuals has occasioned a flurry of hand-wringing editorials. Worried employers have painted a scary scenario of a law that will coddle murderous lunatics, endanger the welfare of unsuspecting customers and transform America's factories and foundries into dystopias of dementia. In some ways, however, it is the entrenchment of learning disability—a comparatively undersung, and seemingly more benign, "hidden impairment"—that poses the more subversive challenge to basic notions of fair play, professionalism and equal protection under the law.

No one would deny that an individual who is unfortunate enough to be afflicted with one of the classically defined mental disorders—schizophrenia, paranoia, manic depression, and so on—suffers from a clearly defined and clearly recognizable infirmity, one that is likely to impair significantly her educational achievements and career prospects. (Whether employers should be legally compelled to overlook these mental disabilities is another matter.) The diagnosis of a learning disability, in contrast, is a far more subjective matter. For many of the more recently discovered learning maladies—math disability, foreign-language disability, "dysrationalia"—there are no standard tests. To be sure, real and debilitating learning disabilities do exist. But there are no good scientific grounds to believe that some of the more exotic diagnoses have any basis in reality. Yet, thanks to the interlocking protections of three powerful federal disability laws, refusal to accommodate even the most dubious claims of learning impairment is now treated by the courts and by the federal government as the persecution of a protected minority class.

Modern disability law was inspired by the most humane of motives, to protect the disabled from prejudices that deprived them of equal opportunities in the workplace and in the classroom. From the outset, however,

this grand aspiration was framed in the fuzziest of terms. The statutory framework for modern disability law was established in the Rehabilitation Act of 1973, which mandated assistance measures for the disabled in federal facilities. Here is how Section 504 of the act defined a learning disability: "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written ... [which] may manifest itself in imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations." This remarkably broad definition is echoed in all subsequent disability laws, notably the 1975 Individuals With Disabilities Education Act, which mandated an array of services for disabled public school students, and the 1990 Americans With Disabilities Act, which extended the protections of the Rehabilitation Act into the private sector. All three laws are equally vague in their description of how people with disabilities must be treated. As the ADA puts it, in the case of any individual possessing a "disability" that results in "substantial impairment" of a "major life activity," schools and employers cannot "discriminate" and must provide "reasonable accommodation." The meaning of these legal appellations, as interpreted by the courts and the regulatory agencies, would turn out to be remarkably expansive.

There were *some* limits written into the disability laws. For instance, only "otherwise qualified" individuals are entitled to protection; accommodations are only mandated if they do not result in "undue hardship." But recently a number of rulings by federal courts and government enforcement agencies have revealed how flimsy these limits are.

Although compliance with federal disability law is not supposed to come at the expense of education or job performance standards, the Department of Education's Office of Civil Rights has delivered stinging rebukes to schools that refuse to exempt learning-disabled students from academic requirements. Last May, a student afflicted with dyscalculia—math disability—filed a complaint with the San Francisco Office for Civil Rights after her college declined to waive the math course required of all business majors in paralegal studies. Despite the college's earnest attempts to accommodate her impairment—the student would receive extensive tutoring and extra time on tests—OCR issued a finding of discrimination anyway, writing on May 30 that "[a]bsolute rules against any particular form of academic adjustment or accommodation are disfavored by the law." When the school asked if they could require learning-disabled students to at least *try* to pass a required course, OCR said no way, arguing that "it is discriminatory to require the student to consume his or her time and jeopardize his or her grade point average taking a particular mathematics course when the person qualified to administer and/or interpret the psychometric data has determined that the student, due to his or her disability, is highly unlikely to pass the course with any of the accommodations the institution can identify and/or deliver." OCR added that this rule should apply even to borderline

dyscalculics, that "substantial group of students for whom interpretation of psychometric measures provide no clear prediction of success in a particular mathematics course."

This is the new frontier, the learning disability as an opportunistic tautology. The fact that one displays a marked lack of aptitude for a particular intellectual discipline or profession establishes one's legal right to ensure at least a degree of success in that discipline or profession. That is not a fanciful conceit, but an adjudicated reality. Several judges have recently ventured the enterprising claim that any person who is not performing up to his or her abilities in a chosen endeavor suffers from a learning disability within the meaning of the ADA.

Consider the lawsuit filed in 1993 by an aspiring attorney named Marilyn J. Bartlett. Bartlett graduated in 1991 from Vermont Law School, where she received generous accommodations of her reading disability and disability in "phonological processing." Nonetheless, Bartlett did not do well, graduating with a GPA of 2.92 and a class standing of 143 out of 153 students. She then went to work as a professor of education at Dowling College, where, according to court documents, she "receives accommodations at work for her reading problems in the form of a full-time work-study student who assists her in reading and writing tasks."

When it came time to take the bar exam, Bartlett petitioned the New York Board of Law Examiners for special arrangements. She wanted unlimited time for the test, access to food and drink, a private room and the use of an amanuensis to record her answers. Acting on the advice of its own expert, who reported that Bartlett's test data did not support a diagnosis of a reading disorder, the board refused Bartlett's demands. Three times, Bartlett attempted the exam without accommodation. After her third failure, she sued the board.

On July 3, 1997, Judge Sonia Sotomayor ruled in Bartlett's favor. Ordering the board to provide the accommodations Bartlett had requested, she also awarded Bartlett \$12,500 in compensatory damages. Judge Sotomayor did not challenge the board's contention that Bartlett was neither impaired nor disabled, at least not in the traditional sense. In an enterprising new twist, however, she declared that Bartlett's skills ought not to be compared to those of an "average person in the general population" but, rather, to an "average person with comparable training, skills and abilities"—i.e., to her fellow cohort of aspiring lawyers. An "essential question" in the case, said the judge, was whether the plaintiff would "have a substantial impairment in performing [the] job" of a practicing lawyer. The answer to this question was "yes," the judge found. And this answer—the fact that Bartlett would have a very hard time meeting the job requirements of a practicing lawyer—was, in the judge's opinion, precisely the reason why Bartlett had a protected right to become a practicing lawyer. Thus, Judge Sotomayor ruled that Bartlett's "inability to be accommodated on the bar

exam—and her accompanying impediment to becoming bar-admitted—exclude her from a 'class of jobs' under the ADA," and could not be permitted.

To drive home her point, Judge Sotomayor triumphantly cited Bartlett's performance during a courtroom demonstration of her reading skills. "Plaintiff read haltingly and laboriously, whispering and sounding out some words more than once under her breath before she spoke them aloud," the judge recalled. "She made one word identification error, reading the word 'indicted' as 'indicated.'"

It could, of course, be argued that the ability to read is an essential function of lawyering; that any law school graduate who cannot distinguish "indicated" from "indicted," who cannot perform cognitive tasks under time constraints, is incapable of performing the functions of a practicing lawyer and therefore, perhaps, should not be a practicing lawyer. But one would be arguing those things in the teeth of the law. Thanks to the Americans With Disabilities Act, the Individuals With Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973, Bartlett and her fellows among the learning-disabled are now eligible for a life-long buffet of perks, special breaks and procedural protections, a web of entitlement that extends from cradle to grave.

Jon Westling is a crusty chainsmoker with owlsh glasses and a stuffy, orotund manner, an easy figure to mock. But, as it turns out, his portrait of Soinnolent Samantha was hardly a wild flight of fancy. Before beginning his formal audit of LDSS's practices, Westling asked its director, Loring Brinckerhoff, whether the office had ever turned down a single request for special dispensation on the grounds that the student hadn't presented enough evidence. When Brinckerhoff answered no, Westling asked to see folders and accommodation letters for the twenty-eight students who had most recently requested and received adjustments to their academic program. Of these twenty-eight, Westling pronounced no fewer than twenty-seven to be insufficiently documented. And, indeed, copies of the students' files, exhumed during the discovery phase of the lawsuit and now available as courthouse exhibits, seem to provide some support for this harsh assessment.

For starters, some of the diagnosticians themselves appeared somewhat impaired. One evaluator wrote that "taking notes and underlying [sic] while reading" would help a student "maintain her attention." Another student, a female, was erroneously referred to as "Joe" by the evaluator who pronounced her to be learning-disabled. Even more troubling, though, was LDSS's seemingly reflexive acquiescence to students' wish lists. Michael Cahaley, one of the plaintiffs in the lawsuit, was, according to Westling's affidavit, described by his doctor as having "minimal" deficits: "this very intelligent youngster should do well in high school and college." Nonetheless, Cahaley had requested—and was granted—double time on all of his examinations. In

another case, the clinical psychologist who examined a student reported that his "skill deficits" were "not severe enough to be a learning disability"; but a learning specialist misread the report and recommended accommodation anyway, on the grounds that "the student was evaluated and found to have a learning disability."

Sometimes the evaluator's recommendations seemed just bizarre. In one case, a student's psychologist opined that a student who "appears to have subtle verbal processing difficulties" should not be "asked to recall very specific data or information." As Westling dryly observed in his affidavit, requests for "very specific data or information" constituted "an essential element of every course and academic program offered by Boston University."

At the trial, the student plaintiffs came off as something other than inspiring champions for disabled rights. Elizabeth Guckenberger, a third-year law student who was diagnosed as having "a visual and oral processing disability" while a freshman at Carleton College, admitted she had received every accommodation she had ever requested under the Westling regime, including extra time on exams, a reduced course load and priority registration in the law school section of her choice. Benjamin Freedman, a senior with dysgraphia ("really, really bad handwriting," he says), also got everything he wanted, including double time on exams, the option to be tested orally and the services of a professional note-taker.

Plaintiff Jordan Nodelman, who claimed he suffered from Attention Deficit Disorder (ADD), also had received every accommodation he ever requested, including the right to take all tests in a distraction-free environment with extra time. At trial, he admitted that his attention deficit waxed and waned. When "something's very important to me," he explained at trial, he "forc[ed] [him]self to concentrate." Nodelman had a 3.6 GPA, had made the Dean's List and had taken his tests untimed in every class except Zen Guitar.

Perhaps the least compelling plaintiff was sophomore

Scott Greeley, who testified that he suffers from an "audio-visual learning processing deficit." At B.U., Greeley had been provided with a note-taker, time-and-a-half on tests and an open-ended right to have any test question "clarified" by the instructor. But the perks didn't help much—as Greeley explained at trial, after the accommodations were provided his GPA improved to a less-than-stellar 1.9. Over the course of the trial, B.U. attorneys established that this shoddy showing was perhaps not wholly attributable to societal persecution of the disabled. Queried about his spotty attendance record in a science course for which he received

a "D" grade, Greeley explained that "part of my disability is that I need a structured schedule." "Would you say you missed over half the classes?" persisted the judge. "Probably around that, yes," replied the undergrad.

It would be comforting to think that B.U.'s "disabled" plaintiffs represent an exception to the norm, but this does not seem to be the case. Over the years, proposed reforms to disability law have been effectively vanquished by televised testimony from sobbing children in wheelchairs. Increasingly, however, individuals with grave physical handicaps comprise only a small portion of the people who claim special privilege under the federal disability laws. As Manhattan Institute fellow

**WHAT DOES YOUR
HEALTHY, NORMAL PERFECT
LITTLE DARLING NEED TO
GET AHEAD IN LIFE?**



**A SMALL DISABILITY TO
QUALIFY FOR SPECIAL AID!**

**AND WE CAN FIND JUST THE ONE
YOU ARE LOOKING FOR!**

CONTACT ADA RESEARCH INC. FOR COMPLETE DETAILS AND PROSPECTUS

DRAWING BY VINT LAWRENCE FOR THE NEW REPUBLIC

Walter Olson points out in *The Excuse Factory*, complaints by the traditionally disabled—the deaf, blind and paraplegic—have accounted for only a tiny share of ADA lawsuits. According to 1996 EEOC figures, only 8 percent of employment complaints have come from wheelchair users and a mere 6 percent from the deaf or blind, bringing the total for these traditional disabilities to a skimpy 14 percent.

The diagnosis of learning disability, by contrast, is experiencing something of a boom. In the space of only a few years, the number of children diagnosed with Attention Deficit Disorder, reading disability and math disability has swollen by hundreds of thousands. Of the 5.3 million handicapped children currently on

Individual Education Programs (specially tailored, often costly regimens of technology, therapy and one-on-one tutoring that public schools are mandated to provide to every child with a disability), the U.S. Department of Education estimates that just over half (51 percent) are learning-disabled. According to the authors of the book *Promoting Postsecondary Education for Students with Learning Disabilities*, up to 300,000 students currently enrolled in college have proclaimed that they are learning-disabled and need special accommodations.

The National Collegiate Athletic Association, meanwhile, is under intense legal pressure from the Justice Department to relax the initial eligibility standards that require student athletes to get a cumulative score of 700 on their SATs and to maintain at least a 2.0 grade point average in core courses. These standards are meant to offer a slight safeguard against the tendency of universities to enroll and graduate young men and women whose ability to pass a ball exceeds their ability to pass their courses. Not so fast, said Justice Department lawyer Christopher J. Kuczynski. In a March 1996 letter to the NCAA, Kuczynski warned that the association's academic standards may "have the affect [sic] of excluding students with disabilities from participation in college athletics." NCAA spokesman Kevin Lennon says the association is in the process of revising its policy "to accommodate students with learning disabilities."

The most common estimate cited by advocacy groups and frequently repeated in government documents is that between 15 and 20 percent of the general population have learning disabilities. Any hypochondriac can test himself: in a recent booklet, the American Council on Education supplies a checklist of symptoms for adults who suspect they may be learning-disabled. Some of us will be disturbed to recognize in the checklist possible symptoms of our own: according to the council, telltale signs of adult learning-disablement include "a short attention span," impulsivity, "difficulty telling or understanding jokes," "difficulty following a schedule, being on time, or meeting deadlines" and "trouble reading maps."

As the ranks of the learning-disabled swell, so too do the number of boutique diagnoses. Trouble with numbers could signal dyscalculia, a crippling ailment that prevents one from learning math. Lousy grammar may stem from the aforementioned dysgraphia, a disorder of written expression. Dozing in class is evidence of latent ADD, perhaps even ADHD (Attention Deficit/Hyperactivity Disorder). Many tykes also exhibit the telltale symptoms of ODD—Oppositional Defiant Disorder. According to the American Psychiatric Association, the defining feature of ODD is "a recurrent pattern of negativistic, defiant, disobedient, and hostile behavior ... characterized by the frequent occurrence of at least four of the following behaviors: losing temper, arguing with adults, actively defying or refusing to comply with the requests or rules of adults, deliberately doing things that

will annoy other people, blaming others for his or her own mistakes or misbehavior." Rates of up to 16 percent have been reported.

A tongue-tied toddler could have dysphasia, otherwise known as a "difficulty using spoken language to communicate." Boorish behavior may be a sign of dyssemia, defined as a "difficulty with signals [and] social cues." (According to the Interagency Commission on Learning Disabilities, social skills are a domain in which a learning disability can occur.) An even more sinister malady is dysrationalia, defined in an October 1993 issue of *The Journal of Learning Disabilities* as "a level of rationality, as demonstrated in thinking and behavior, that is significantly below the level of the individual's intellectual capacity." A checklist of childhood precursors include "premature closure, belief perseverance ... resistance to new ideas, dogmatism about beliefs, and lack of reflectiveness."

These neo-disabilities are likely to strike the non-specialist as an exercise in pathologizing childhood behavior, and the nonspecialist would be on to something. Increasingly, scholars and clinicians in the field of learning disability are speaking out against the dangers of promiscuous diagnosis of disablement. "In the space of twenty years, American psychiatry has gone from blaming Johnny's mother to blaming Johnny's brain," says Dr. Lawrence Diller, an assistant clinical professor of behavioral pediatrics at the University of California at San Francisco. The problem, says Dr. Diller, is that in a variant of the Lake Wobegone effect, "Bs and Cs have become unacceptable to the middle classes. Average is a pejorative." And yet, as he points out, "someone has got to be average."

Some scholars have even begun to question the notion that there is such a thing as a learning disability. In a recently published book, *Off Track*, one of its authors, Robert Sternberg, a Yale professor of psychology and education, presents a powerful case for why the concept of learning disability ought to be abandoned. Drawing on the latest research into the physiology of the human brain, Sternberg argues that there is no evidence to support the view that children who are labeled as learning-disabled have an immutable neurological disability in learning. From a medical standpoint, he writes, there is no scientific proof that children labeled as learning-disabled actually have a discernible biological ailment "in terms of the underlying cognitive abilities related to reading." Says Sternberg: "I'm not denying that there are dramatic disparities in the speed with which people learn.... But, most of the time, what you're talking about here is a garden-variety poor reader. You're talking about someone who happens to be not very good in math."

To be sure, there is no question that children who are intellectually normal, and sometimes even unusually bright, can have genuine, serious difficulties in learning how to read or to do math; and that educators should do everything in their power to put these students back on track developmentally. But as their clinics swarm with

hordes of pushy parents and catatonic collegians, all hankering for a diagnosis of intractable infirmity, a growing number of diagnosticians are crying foul. "The way the diagnoses [of Attention Deficit Disorder and learning disabilities] are being used right now, a backlash against the conditions is inevitable," says Diller. "We've created a paradox where the more problems you have, the better off you may be. That's a prescription for societal gridlock."

It's no puzzle, of course, why the learning-disability movement insists that learning disability is an immutable, brain-based disorder—a malady that is "fundamentally neurological in origin," according to the National Center for Learning Disabilities. For it is this understanding of learning disability that justifies its inclusion as a protected category under the ADA. If learning disability is an innate neurological defect that "artificially" lowers test performance, then it follows that learning-disabled individuals should be able to take tests under special conditions that will neutralize the effects of this handicap. In *Help Yourself: Advice for College-Bound Students With Learning Disabilities*, author Erica-lee Lewis stresses that asking for an untimed administration of your SATs "does NOT give you an unfair advantage; it just reduces the unfair disadvantage by providing you with equal access and opportunity. You deserve that and the law protects you against anything short of that fairness!"

There's just one tiny problem: the two major studies on the subject say that precisely the opposite is true. As Dr. Warren W. Willingham, a psychometrician with the Educational Testing Service, points out in his widely respected textbook *Testing Handicapped Students*, institutions have long relied on standardized tests because such tests, for all their faults, tend to be highly reliable in their estimation of how well a particular applicant will actually perform in college or on the job. The case of learning-disabled students, in contrast, "presents a very different picture," writes Willingham. When students diagnosed with learning disabilities were allowed to take the SAT on an untimed or extended-time basis, the "college grades of learning-disabled students were substantially overpredicted," suggesting that "providing longer amounts of time may raise scores beyond the level appropriate to compensate for the disability." The other study—by Marjorie Ragosta, one of ETS's own researchers—confirms Willingham's pessimistic diagnosis.

Both researchers raise a troubling question: whether, as Willingham puts it, "the nonstandard version of the SAT is seriously biased in favor of [learning-disabled] students." The concern is not just theoretical. There is reason to suspect that fast-track students, and their parents, have figured out that a little learning disability can be an advantageous thing—can make the difference, in a hypercompetitive setting, between getting into (and getting successfully out of) the right school. The privilege of taking the SAT on an untimed basis raises stu-

dents' scores by an average of 100 points, according to the College Board. In the last couple of years, testing agencies have been bombarded with requests from students who proclaim that they are learning-disabled and will therefore need additional time. According to Kevin Gonzales, a spokesman for the Educational Testing Service, 18,000 learning-disabled examinees received "special administration" for the SAT in 1991-92. By 1996-97, that number had more than doubled, to 40,000. Requests for accommodation on Advanced Placement exams, meanwhile, have quadrupled—in 1996, 2,244 learning-disabled eggheads took their A.P. tests untimed. To reap the benefits of this particularly useful perk, ETS requires only a letter of verification from a school special education director or a state-licensed psychologist or psychiatrist.

Certification and licensure exams—long, carefully standardized examinations that function as gatekeepers into the professions—are also under assault. In 1995, the National Board of Medical Examiners administered over 450 untimed Medical College Admissions Tests—a fivefold increase from 1990. Lawyers, too, are requesting special dispensation. This year, in New York alone, more than 400 aspiring attorneys have asked to take the bar exam untimed. "The requests have increased tremendously," says Nancy Carpenter, who heads up the New York Board of Legal Examiners. "ADD is becoming much more common. We have a lot of dysgraphia. Some dyscalculia.... Most applicants just say, 'unspecified learning disability.' They are all over the lot."

ETS officials do not like to talk about the Willingham and Ragosta studies. Indeed, far from planning to toughen up its accommodations policy, the agency seems poised to eliminate its only check on spurious claims—the marking, or "flagging" of a score to indicate that an applicant took the test under nonstandard conditions. For years, the learning-disability industry has railed against the asterisk, arguing that it violates a student's right to keep his or her disability a secret. Now ETS seems prepared to agree. "We are taking a good, hard look at the whole issue of flagging," says ETS's newly appointed director of disability services, Loring Brinckerhoff. "I'm not prepared to say it's going to go away overnight.... My gut feeling is that it may well be a Section 504 violation." Yes, that's the same Loring Brinckerhoff who recently resigned under pressure by Jon Westling from his B.U. sinecure. "Isn't it ironic," muses Brinckerhoff. "I'm told by Boston University that I'm unqualified to do my job. Yet here I am—at the biggest testing agency in the world—determining accommodations for hundreds of thousands of people with disabilities."

Of course, a legally recognized disability means more than just extra time on tests—or even extra privileges in the classroom. Under the Individuals With Disabilities Education Act, a diagnosis of L.D. also qualifies a child for an Individual Education Program—a handcrafted educational program, replete with techno-goodies and other kinds of

specialized attention. The law, which states that "all children with disabilities" ought to have available to them "a free and appropriate public education," encourages parents to be bound not by what the school district can offer, but by what they think their child needs. It specifies that, in the event that the parents don't care for their child's IEP, the local school district must convene a "an impartial due process hearing"—a trial-like proceeding in which both parties have the right to be represented by a lawyer, the right to subpoena, confront and cross-examine witnesses, and the right to present evidence. If a school district loses the due process hearing, it must pay the parents' attorneys' fees. The result, says Raymond Bryant, director of special education for Maryland's Montgomery County public schools, has left school districts vulnerable to parental tactics bordering on extortion. "It used to be that kids didn't try hard enough, or didn't work hard enough," says Bryant. "Now, it's ADD or L.D. . . . They want their child to read half the material. They want him to do half the homework. They don't want him to take the same tests. But guess what? They want him to get the same grades!"

In prosperous, sun-dappled school districts around the country, exotic new learning disabilities are popping up, each requiring its own costly cure. In Orange County, where "executive function disorder" (difficulty initiating, organizing and planning behavior) reigns, parents have begun demanding that schools foot the bill for horseback riding lessons. "This is now supposed to be the way to help kids with EFD," says Peter Hartman, superintendent of the Saddleback Unified School District. "There's some stable in the area that they all go to." In Holliston, Massachusetts, parents of children with Attention Deficit/Hyperactivity Disorder banker for a trendy new treatment called "educational kinesthesiology," a sort of kiddie Pilates for angst-ridden tots. "Unfortunately, the treatment can only be done by a, quote, licensed educational kinesiologist," sighs Margaret Reed, special-ed administrator for Holliston Public Schools. "And it seems there's only one in the district. And she charges \$50 an hour."

Sometimes, it seems, the problem is less inattentive children than overattentive parents, many of whom are unwilling to believe their progeny is less than perfect. Consider the case of Michael F., whose plight was thrashed out at length at a 1996 hearing after his parents expressed discontent with his Individual Education Program. Michael, then a ninth grader, was thriving at his high school—earning As in honors courses and demonstrating "overall cognitive functioning in the very superior range (99th percentile)." He had also written a book, played in the school band and, according to the hearing officer, "successfully completed bar mitzvah training."

At the hearing, it emerged that Michael did all of this while fighting off the ravages of "attention deficit disorder, language-based specific learning disabilities, neuro-motor dysfunction, and tactile sensitivity." These

numerous handicaps had made Michael eligible for a generous dose of special-education services. Under the terms specified in his IEP, Michael received three and three-eighths hours a week of special tutoring; extra time on homework assignments and tests; "allowance of standing up, stretching and/or walking around in class"; "permission to chew gum or hard candy to help him concentrate and focus"; "seat assignments in close proximity to the teacher"; and "access to a tape recorder, transcripts of lectures, outlines and notes and/or a laptop computer if needed." Now Mr. and Mrs. F. wanted even more. Michael's low grade on his Honors Geometry midterm, they argued at the hearing, revealed evidence of a new, previously unsuspected disability "with the concepts of quadratic equations and the Pythagorean theorem." They blamed the school for numerous "procedural violation[s]," including "failure to pursue a math reevaluation of Michael" after he received a 65 on his midterm. Now, they said, their son would experience "substantial regression" over the summer, unless his high school saw fit to furnish him with "extended summer programming in the form of math tutoring."

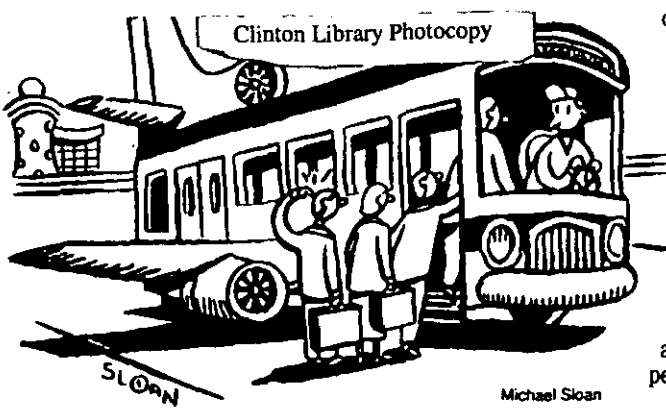
This, the hearing officer would not do. True, she wrote, Michael's poor showing on his geometry midterm might well be "related to his learning disability and/or ADD." On the other hand, she boldly ventured, it could also be that "math remains a subject where Michael will not receive As in an Honors track."

Ensnared in his pleasantly stuffy office, an Anglophile's fantasy of elephant ear plants and bas-relief cornucopias in carved wood, Jon Westling awaits the decision of Judge Patti B. Saris. He is resigned to the knowledge that, whatever is decided, the learning-disabled activists and their supporters will regard him as a villain. "This is a cause where the support and commitment verges almost on fanaticism," he says, puffing on one Marlboro Light, then another. "And whenever you have less than ideal science coupled with something close to fanaticism, you can move beyond appropriate use into areas of abuse."

The students say that, whatever the outcome, the litigation has salvaged their faltering self-esteem. Ben Freedman, a 21-year-old senior who has maintained a 3.6 GPA despite a reading and writing disability and dysgraphia, likens his crusade to the civil rights movement of the 1960s. "I don't want to compare myself to Dr. King, but there are great similarities," he says.

Anne Schneider, too, says she's achieved closure on the whole regrettable incident. To the true believers, it seems, there's an explanation for everything; and it's usually the same explanation. "I've been thinking about Jon Westling," she tells me one evening. "For all his bragging about his Rhodes scholarship, he didn't do the final paper. He's not a finisher." Schneider lets out a reflective sigh. "To tell the truth," she says, "I've always thought: learning disability." •

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Michael Sloan

miles, computer reservations through travel agents and ticket-and-luggage check-through to their destinations—though not all services are offered by every airline. The buses and vans themselves are usually owned and operated by traditional ground carriers like Greyhound Lines Inc., but often sport the airline's name and logo. Passengers "prefer traveling by jet," says DeeDee La Chance, a travel agent in San Jose, Calif. "If it involves a bus, they hesitate, they give me a funny look. But if it's the right price, they don't care."

operate air service from there to San Francisco. Budget travelers, however, applaud buses. John Waters, a recent seminary graduate, says the lowest fare he could find for the 50-minute flight to Louisville, Ky., from Chattanooga was \$245. But it costs only \$42 to take ValuJet's bus to Atlanta, and then hop aboard its flight to Louisville. Total traveling time: three hours. The price, an introductory fare, rises to \$62 on Aug. 21. Not all trips are seamless. Standing on the curb in Chattanooga, passengers waiting to board a ValuJet bus to the Atlanta airport are given a security check: They must show photo identification and answer the usual airport questions about luggage-tampering and strangers bearing packages. "We have to ask the same questions," explains the bus driver. "This is like a flying plane." Once they reach the airport, however, Federal Aviation Administration regulations require the passengers to identify their luggage again before it's loaded aboard the plane. And they have to pass through airport security again. The buses feeding ValuJet's Atlanta hub are helping the low-fare carrier extend its reach following a three-month shutdown last year by federal officials for safety reasons. (Last week parent ValuJet Inc. agreed to merge with AirWays Corp. and adopt the name AirTran. Please Turn to Page B8, Column 3)

LEGAL BEAT

l in Business: Hit a Homer

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during a game was awarded workers' compensation. The court agreed with the New Hampshire Compensation Appeals Board, which held that the team was part of the "cultural climate and almost institutionalized as an established part of company life." Given the level of "company encouragement and sponsorship" of the team, the court ruled, "injury was a risk created by the employment."



Edward Koren

So who's the best at this vital corporate activity? It's arguably Sikorsky Aircraft of Stratford, Conn., a unit of United Technologies Corp. The Sikorsky team, which features some second-generation players, is so good it earned its own exhibit in the Softball Hall of Fame in Oklahoma City. Wall Street's finest? Credit PaineWebber, which not only captured the New York City Financial Community championship last summer with a 16-1 record but is leading its division so far this year at 7-2. The most competitive? Well, the team from COMEX, a division of the National Mercantile Exchange, has had both its shortstop and its pitcher suspended this season for battling with umpires. The most fanatical? Perhaps Microsoft Corp., which each year holds a 16-hour softball marathon and has a field at its Redmond, Wash., headquarters. The roughest? Up for grabs. In softball leagues in Los Angeles, "There's sliding, diving, dislocating fingers, stitches, pushing, shoving," says David Please Turn to Page B9, Column 1

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Aspiring Lawyer With Dyslexia Gets Test Access

By FRANCES A. MCMORRIS
Staff Reporter of THE WALL STREET JOURNAL

Marilyn Bartlett has struggled for years to become a lawyer, failing the bar exam five times. But the 49-year-old college professor, who suffers from dyslexia and a tendency to write backwards, recently won an important legal victory for people with learning disabilities. A federal judge in New York ordered the New York State Board of Law Examiners to give her twice the normal amount of time to take the test and other special accommodations she sought under the Americans with Disabilities Act. "I really want to be able to practice law," says Ms. Bartlett, who plans to take the bar exam again next July. In a growing number of cases, boards that give tests used in licensing lawyers, doctors and other professionals are being asked — or forced — to give students with learning disabilities extra time, private exam rooms, personal readers and computers with spell-checking capabilities. But examiners and even some judges who have heard such cases say that accommodating people with learning disabilities on exams that set minimum competency standards for professionals can be tricky. They say they don't want to confer credentials on unqualified professionals, and they are concerned that a Please Turn to Page B5, Column 1

LAW

Dyslexic Aspiring Lawyer Gets Test Access

Continued From Page B1

lawyer with trouble reading or writing may be unqualified.

Even some who have won accommodations acknowledge that the issue is complicated. David Glass, who has reading and writing disabilities, passed the New York bar exam in 1995 after a judge ordered the board to give him double time. But when he was in private practice, he says, he didn't bill for the extra time it took him to read records or write letters. Although lawyers aren't required to disclose their disabilities to clients, he says he felt it wasn't ethical to charge for all of his time. Six months ago, he joined Southern Tier Legal Services in Bath, N.Y., where he is on a salary and his correspondence is checked by secretaries.

In the Bartlett case, the New York board, which receives scores of requests for accommodation each year from people with learning disabilities, had argued that a 1994 study it conducted found that reading, thinking and writing under tight time restrictions are important skills for competent lawyers. "One has to consider the effect of more time on the fairness of the exam," adds Richard Bartlett, a member of the New York State board who isn't related to Ms. Bartlett.

But U.S. District Judge Sonia Sotomayor said in her 131-page opinion that the ability to take tests under a time constraint and to read visually (as opposed to reading Braille) isn't essential to being a lawyer, pointing to the success of some blind lawyers.

Her ruling was also the first to conclude that test-taking is a major life activity as

defined by the 1990 law, which bars discrimination against people with physical and mental problems that impair their ability to perform such activities. As a result, some experts say the decision gives people with learning disabilities a new avenue to challenge the ground rules of a wide range of tests. "It has relevance for the SAT and licensing tests of all sorts," says Lance Liebman, who teaches employment law at Columbia University Law School.

In her ruling, the judge found that qualifications weren't an issue for Ms. Bartlett, who had worked satisfactorily as a law clerk in Manhattan until she was fired for not passing the bar exam. "While it is undoubtedly true that not every person is physically able to be a Yankees first baseman," the judge said, "it would be grossly unfair to impede whole classes of individuals . . . from participating in entire classes of customary professions such as the practice of law because they cannot read a professional examination like average law school [or other professional-school] graduates."

Failing to accommodate Ms. Bartlett, the judge said, would result in her being shut out of "thousands of jobs by hundreds of employers" in the legal profession. (Ms. Bartlett currently works as an associate professor of educational administration at Dowling College in Oakdale, N.Y., where students assist her in reading and writing.)

As in similar cases, a key question was whether Ms. Bartlett's impairment was serious enough that she needed spe-

cial treatment. Fearing that some who seek accommodations aren't really disabled, bar examiners in recent years have set stringent documentation requirements and have hired their own experts to determine who has a disability. Some of these experts, however, are "clinical psychologists who aren't trained in diagnosing learning disabilities" and who reject people who should be accommodated, says M. Kay Runyan, a learning-disability expert for the Law School Admissions Test.

In Ms. Bartlett's case, the judge chastised the board for relying on an expert who used a test designed primarily for children and an "allegedly arbitrary cutoff score." The judge said the board should have paid more attention to Ms. Bartlett's experts.

The board's Mr. Bartlett defends the expert, who he says is a leading researcher in learning disabilities whose conclusions are "very much in the mainstream." He says the board hasn't yet decided whether to appeal.

The board was ordered to pay Ms. Bartlett \$12,500 to compensate her for money she spent on review courses and test-registration fees. It was also ordered to give her four days — or twice the normal amount of time — to take the test again, as well as a computer, large-type questions and permission to circle multiple-choice answers in the test booklet.

A happy Ms. Bartlett recalls that Judge Sotomayor in her ruling pointed out how hard it is for people who value the power of the written word to identify with someone who can't read as easily. Ms. Bartlett says: "More often than not, I enjoy having people read to me. In that regard, sentences are very lyrical. . . . Words do sing; they just sing to me in a different way."

McDonald's Reports Modest 4% Gain In Earnings Due to Marketing Woes

By RICHARD GIBSON

Staff Reporter of THE WALL STREET JOURNAL

McDonald's Corp. reported a modest 4% increase in second-quarter profit, reflecting a failed U.S. marketing effort and an international performance below Wall Street expectations.

The fast-food giant said earnings totaled \$438.2 million, or 63 cents a share, compared with \$420.4 million, or 59 cents a share, in the year-earlier quarter. Revenue rose 6% to \$2.83 billion from \$2.67 billion. Systemwide sales, which include those of franchisees, increased 7% to \$8.47 billion from \$7.93 billion.

It was the lowest percentage increase in quarterly profits at McDonald's in more than five years.

"The quality wasn't real good," Nat-West Securities restaurant analyst Damon Brundage said of the results. "The only reason they made the [Street's 63-cent consensus estimate] is because their tax rate is down," he said, calculating that the

ings than U.S. restaurants, even though domestic outlets had higher overall sales. But Lehman Brothers analyst Mitchell J. Speiser said international's 15% operating earnings gain before currency adjustments was "the sixth quarter of growth below their targeted 20% levels. . . . If this continues, along with U.S. weakness, this is a double whammy" for the stock.

Shares of McDonald's closed at \$50.25, up 31.25 cents, after rising more than \$1 early in the day in New York Stock Exchange composite trading.

The company also revised restaurant expansion plans to the low end of previously announced numbers. While McDonald's initially had projected adding between 2,400 and 2,800 restaurants worldwide this year, Chairman and Chief Executive Officer Michael R. Quinlan said the new target is 2,400 stores, 80% of which will be built outside the U.S.

Michael Conley, executive vice presi-

Money-Market Assets Declined \$2.82 Billion During Latest Week

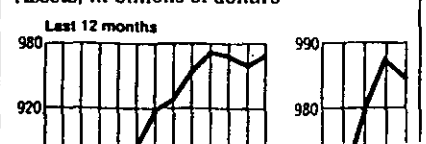
By a WALL STREET JOURNAL Staff Reporter

WASHINGTON — Money-market mutual-fund assets fell \$2.82 billion to \$984.46 billion for the week ended Wednesday, from a revised \$987.28 billion, the Investment Company Institute said.

Assets of 669 retail money-market mutual funds increased by \$399.8 million to

Money-Market Funds

Assets, in billions of dollars



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