



# The Copyright Registration Requirement and Federal Court Jurisdiction: A Legal Analysis of *Reed Elsevier, Inc. v. Muchnick*

**Brian T. Yeh**  
Legislative Attorney

**Lydia Grunstra**  
Law Clerk

November 30, 2009

Congressional Research Service

7-5700

[www.crs.gov](http://www.crs.gov)

R40944

## Summary

Although an author need not register his or her work with the U.S. Copyright Office to obtain copyright protection, registration is a statutory prerequisite to bringing suit for infringement of the copyright, as mandated by 17 U.S.C. §411(a). The question in *Reed Elsevier, Inc. v. Muchnick*, currently pending before the U.S. Supreme Court, is whether this section of the Copyright Act restricts the subject matter jurisdiction of the federal courts over copyright infringement actions.

The plaintiffs in *Reed Elsevier*, consisting of individual authors and trade groups representing authors, brought a class action lawsuit against several publishers when those publishers licensed the authors' articles for print publication but failed to secure an additional license to reproduce them electronically. The Supreme Court had earlier affirmed the plaintiffs' right to control electronic reproduction of their copyrighted works in its 2001 opinion *New York Times, Co. v. Tasini*. After this opinion, the district court in *Reed Elsevier* referred the parties to mediation. Following almost four years of negotiations, the parties reached an agreement that sorted the plaintiffs into three categories based, in part, on whether or not their copyrights had been registered. The settlement assigned a different damages formula to each category, with owners of registered copyrights receiving more than owners whose copyrights were unregistered.

Several freelance authors who fell within "Category C" (composed of unregistered copyrights) objected to the settlement agreement, arguing that the settlement was unfair and inadequate because they were paid too little. Proponents of the settlement responded that "Category C" claimants were treated fairly because, as owners of unregistered copyrights, they would normally be barred from bringing infringement suits at all under 17 U.S.C. §411(a). The district court granted final class certification and approved the settlement in September of 2005. The objectors appealed the district court's decision to the U.S. Court of Appeals for the Second Circuit. Before oral argument, the Second Circuit asked the parties to address whether the district court had subject matter jurisdiction over claims concerning the infringement of unregistered copyrights, or whether §411(a) restricted the court's jurisdiction.

Both the authors and publishers argued that §411(a) is not jurisdictional in nature. However, a divided panel of the Second Circuit disagreed, holding that the requirement of copyright registration prior to an infringement suit is jurisdictional and therefore, because many of the plaintiff's copyrights were unregistered, the district court lacked the power to certify the class. The publishers appealed the appellate court's decision, and the Supreme Court granted certiorari on March 2, 2009. Oral argument was heard in *Reed Elsevier* on October 7, 2009. The outcome of this case will not only affect the particular settlement at issue, but may well have broader implications for authors, publishers, and the general public.

## **Contents**

Background .....	1
The District Court’s Opinion .....	2
The Second Circuit’s Opinion .....	3
Arguments Before the U.S. Supreme Court .....	4
Significance of Supreme Court’s Decision.....	7

## **Contacts**

Author Contact Information .....	8
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## Background

Copyright is the exclusive right to reproduce, distribute, perform, display, and otherwise exploit an “original work of authorship,” such as certain literary, dramatic, musical, or other artistic works.<sup>1</sup> Copyright protection is secured automatically when the work is created, or “fixed in any tangible medium of expression.”<sup>2</sup> Although an author need not register his or her work with the U.S. Copyright Office to obtain copyright protection, registration does come with several advantages. For instance, registration is necessary before a plaintiff may file an infringement suit,<sup>3</sup> and if registration is made within three months after publication of a work, the court may award the plaintiff statutory damages and attorney’s fees rather than actual damages and profits alone.<sup>4</sup>

A copyright owner’s exclusive right to reproduce and distribute his or her work was the subject of litigation in a 2001 Supreme Court case, *New York Times Co. v. Tasini*.<sup>5</sup> In *Tasini*, six freelance authors who had contributed articles to several publications, including *The New York Times*, *Newsday*, and *Time*, sued when the publishers licensed rights to copy and sell the articles to electronic databases such as Lexis/Nexis. The publishers argued that, because their magazines and newspapers were collective works composed of the authors’ individual articles, section 201(c) of the Copyright Act permitted them to reproduce and distribute the articles as part of a “revision” of those collective works.<sup>6</sup> The Supreme Court disagreed. It held that the Copyright Act does not permit publishers to reproduce freelance works electronically when they lack specific authorization to do so, effectively requiring publishers to obtain a separate license from the author if they wish to electronically reproduce written works.<sup>7</sup>

Shortly after the Court decided *Tasini*, three preexisting class action infringement suits, which had been suspended pending the decision, were activated and consolidated in the U.S. District Court for the Southern District of New York. A fourth, nearly identical action was coordinated with that consolidated action. Together, these claims comprise the litigation discussed in this report.<sup>8</sup>

Like *Tasini*, *Reed Elsevier v. Muchnick* is a class action lawsuit. Class actions allow one or more named plaintiffs to sue on behalf of a larger group of people when joining all members of the group would be impracticable; the members of the group raise similar claims, which present common issues of law or fact; and the named plaintiffs fairly and adequately protect the interests of other class members.<sup>9</sup> Litigation may proceed only after the court has certified the class,<sup>10</sup> and

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<sup>1</sup> See 17 U.S.C. §106; see also U.S. Copyright Office: Copyright Basics, at <http://www.copyright.gov/circs/circ1.pdf>, and CRS Report RS22801, *General Overview of U.S. Copyright Law*, by Brian T. Yeh.

<sup>2</sup> 17 U.S.C. §102(a).

<sup>3</sup> See 17 U.S.C. §411(a).

<sup>4</sup> See 17 U.S.C. §412.

<sup>5</sup> 533 U.S. 483 (2001). For more information on this decision, see CRS Report RS20964, *New York Times Co. v. Tasini: The U.S. Supreme Court Affirms "Authorial" Rights in Copyright*, by Robin Jeweler.

<sup>6</sup> *Id.* at 484.

<sup>7</sup> See *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

<sup>8</sup> See *Muchnick v. Thomson Corp.* (In re Literary Works in Electronic Databases Copyright Litigation), 509 F.3d 116, 118 (2d Cir. 2007).

<sup>9</sup> Fed. R. Civ. P. 23(a).

even settlement or voluntary dismissal of the suit requires the court's approval.<sup>11</sup> Any class member may object to a settlement proposal, but, once made, the objection may only be withdrawn with the court's permission.<sup>12</sup>

## The District Court's Opinion

The plaintiffs in *Reed Elsevier* consist of individual authors and trade groups representing authors who produced written works for certain publishers on a freelance basis.<sup>13</sup> The publishers had licensed the articles from the freelance authors for print publication but later reproduced the articles in their electronic databases without compensating or otherwise obtaining the consent of the authors. Based on their copyrights in the freelance works, the plaintiffs brought suit against the publishers and the electronic database services for copyright infringement.<sup>14</sup>

After the *Tasini* decision had affirmed the plaintiffs' right to control electronic reproduction of their works, the district court referred the parties to mediation.<sup>15</sup> In 2005, after three years of negotiations, the parties reached an agreement that sorted plaintiffs' claims into three groups for compensation purposes.<sup>16</sup> Category A claims concerned copyrights that were eligible for statutory damages and attorney's fees under the Copyright Act.<sup>17</sup> Category B claims concerned copyrights that qualified for actual damages only.<sup>18</sup> Category C claims, by far the most numerous, largely involved copyrights that were unregistered, and therefore their owners were precluded from bringing individual suits for damages of any sort.<sup>19</sup>

The settlement assigned a damages formula to each type of claim. Category A claimants received a flat fee. Category B claimants received the greater of either a flat fee or a percentage of the original price of the work. Category C claimants also received the greater of either a flat fee or a percentage of the original price of the work. However, if the cost of all claims (plus the cost of notice, administration, and attorney's fees) exceeded \$18 million, then the amount paid to Category C claimants was reduced—potentially to zero—before the claims of Category A and B claimants were affected. This feature was called the “C-reduction.”<sup>20</sup> In return for financial compensation, the plaintiffs agreed to release all past, present, and future claims against the defendants related to their articles' appearance in electronic databases.<sup>21</sup>

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<sup>10</sup> Fed. R. Civ. P. 23(c)(1)(A).

<sup>11</sup> Fed. R. Civ. P. 23(e).

<sup>12</sup> Fed. R. Civ. P. 23(e)(5).

<sup>13</sup> *See In re Literary Works in Electronic Databases Copyright Litigation*, 509 F.3d at 118-19.

<sup>14</sup> *Id.* at 119.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 120.

<sup>17</sup> *See id.* (citing 17 U.S.C. §412).

<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> *Id.*

<sup>21</sup> *See* Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 8, *Reed Elsevier, Inc. v. Muchnick*, No. 08-103, (U.S. argued Oct. 7, 2009).

Having reached an agreement, the plaintiffs and defendants moved the district court for class certification and settlement approval. Objectors opposed the motion on the ground that the settlement was inadequate and unfair to Category C claimants because they were paid little and singled out for reduction if the total claims exceeded \$18 million. Objectors also maintained that the disparate treatment of Category C claimants illustrated that the named plaintiffs, who each possessed at least some registered copyrights, did not adequately represent those absent class members who possessed only unregistered copyrights. The defendants responded that Category C claimants were adequately represented and treated fairly because they would otherwise have been unable to bring actions for infringement at all under 17 U.S.C. §411(a) because their copyrights were unregistered.<sup>22</sup>

After prolonged proceedings, the district court granted final class certification and final settlement approval in September 2005. Objectors appealed, again challenging the settlement's fairness and the adequacy of the named plaintiffs' representation.<sup>23</sup>

## The Second Circuit's Opinion

Before hearing oral argument, the Second Circuit Court of Appeals "became concerned that the District Court and the parties had passed over a nettlesome jurisdictional question" and *sua sponte* ordered the parties to address "whether the District Court had subject matter jurisdiction over claims concerning the infringement of unregistered copyrights."<sup>24</sup> Due to their mutual interest in achieving class certification and settlement approval at this stage, both plaintiffs and defendants argued that the Copyright Act's registration requirement is not jurisdictional in nature.<sup>25</sup> They contended that, if a plaintiff brings a single claim based on a registered copyright, the district court acquires jurisdiction over any and all related copyright claims, even if those other claims arise from unregistered copyrights. They also argued that jurisdiction in this case was proper because the named plaintiffs' works were registered.<sup>26</sup>

A divided panel of the Second Circuit disagreed. The majority opinion first observed that Congress provides federal courts with only limited subject matter jurisdiction.<sup>27</sup> District courts derive their jurisdiction in copyright actions from two sections of Title 28 of the U.S. Code, §1331 and § 1338. The first is a general grant of original jurisdiction over civil actions arising under federal law, and the second provides courts with a more specific grant of original jurisdiction over copyright infringement cases. However, the appellate court asserted that Congress has supplemented these basic jurisdictional grants with a separate statutory section—§411(a) of the Copyright Act (17 U.S.C. §411(a)), which "limits a district court's subject matter jurisdiction to claims arising from *registered* copyrights only."<sup>28</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 122.

<sup>26</sup> *Id.* at 123.

<sup>27</sup> *Id.* at 121.

<sup>28</sup> *Id.* at 122 (emphasis added).

Relying on its opinions in *Well-Made Toy Mfg. Corp. v. Goffa Intl. Corp.*<sup>29</sup> and *Morris v. Bus. Concepts, Inc.*<sup>30</sup> and distinguishing the Supreme Court's ruling in *Eberhart v. United States*,<sup>31</sup> the appellate court held that the requirement of copyright registration prior to an infringement suit is jurisdictional<sup>32</sup> and that the phrase "copyright claim" referred to each claim within a purported class.<sup>33</sup> Thus, because many of the plaintiffs' copyrights were unregistered, the Second Circuit held that the district court lacked the authority to certify the class. It also held that this "jurisdictional defect" precluded supplemental jurisdiction<sup>34</sup> under 28 U.S.C. §1367(a) as well.<sup>35</sup>

Judge Walker dissented, arguing that, although the Second Circuit had labeled §411(a) as jurisdictional in the past, the Supreme Court's ruling in *Eberhart*, which encouraged lower courts to "more carefully distinguish between true jurisdictional bars and claim-processing rules that may be waived," merited a re-evaluation of the copyright registration requirement.<sup>36</sup> Categorizing §411(a) as an "enforcement mechanism" rather than a "rights-creating statute"<sup>37</sup> and relying on Second Circuit precedent that "not all members of a settlement-only class need to possess a valid cause of action under the applicable law,"<sup>38</sup> he concluded that "the fact that some of the otherwise presumably valid copyrights have not been registered is an insufficient basis for undoing this class-action settlement."<sup>39</sup>

## Arguments Before the U.S. Supreme Court

The U.S. Supreme Court granted certiorari to review the case on the following question: "Does 17 U.S.C. §411(a) restrict the subject matter jurisdiction of the federal courts over copyright infringement actions?"<sup>40</sup>

17 U.S.C. §411(a) reads as follows:

[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and

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<sup>29</sup> 354 F. 3d 112 (2d Cir. 2003).

<sup>30</sup> 259 F.3d 65 (2d Cir. 2001).

<sup>31</sup> 546 U.S. 12 (2005).

<sup>32</sup> *In re Literary Works in Electronic Databases Copyright Litigation*, 509 F.3d at 121.

<sup>33</sup> *Id.* at 125.

<sup>34</sup> Supplemental jurisdiction is "a court's jurisdiction to hear and determine a claim over which it would not otherwise have jurisdiction, because the claim arises from the same transaction or occurrence as another claim that is properly before the court." BLACK'S LAW DICTIONARY (8<sup>th</sup> ed. 2004).

<sup>35</sup> *In re Literary Works in Electronic Databases Copyright Litigation*, 509 F.3d at 127.

<sup>36</sup> *Id.* at 128 (Walker, J., dissenting).

<sup>37</sup> *Id.* at 130.

<sup>38</sup> *Id.* at 128 (referencing *Lerner v. Fleet Bank*, 318 F.3d 113, 125-26 (2d Cir.2003) (holding that, in a RICO class action suit, the district court could exercise supplemental jurisdiction over plaintiffs' state-law claims despite the fact that certain members of the plaintiff class lacked RICO standing)).

<sup>39</sup> *Id.*

<sup>40</sup> *Reed Elsevier, Inc. v. Muchnick*, 129 S.Ct. 1523 (2009).

registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.

Petitioners in the case (Reed Elsevier et al.) argued that the §411(a) registration requirement is a mandatory prerequisite to suit, not a restriction on the court's jurisdiction.<sup>41</sup> Drawing on the text, structure, legislative history, and purpose of the statute,<sup>42</sup> they argued that Congress never intended the registration requirement to be jurisdictional and that circuit courts interpreting it thus had failed to implement the "bright line" test articulated in *Arbaugh v. Y&H Corp.*<sup>43</sup> Even if §411(a) is jurisdictional, petitioners argued that the restriction applies only to instituting actions, not settling them, because jurisdiction over an action generally extends to approving settlements that release claims the court lacked authority to try.<sup>44</sup> They warned that, if the Second Circuit's "drive-by"<sup>45</sup> jurisdictional characterization of 411(a) were allowed to stand, it would thwart "the ability of parties to reach negotiated resolutions of their disputes involving unregistered works" and leave "the nation's electronic databases and archives ... permanently depleted."<sup>46</sup>

Respondents (Pogrebin et al. and Irvin Muchnick et al.) advanced similar arguments, stating that §411(a) is not a bar to jurisdiction but rather a claim-processing rule, a prerequisite to suit that could be enforced or waived by the defendants.<sup>47</sup> As support, respondents cited several circuit court opinions in which the jurisdiction requirement was waived or relaxed and therefore treated "in a manner fundamentally inconsistent with its being subject matter jurisdiction."<sup>48</sup> They also argued that, even if the district court had lacked original subject matter jurisdiction over the case, it had supplemental jurisdiction because the claims of the Category-C authors with unregistered copyrights arose out of the same case or controversy as the claims of the Category-A and B authors whose copyrights were registered.<sup>49</sup>

The United States, as amicus curiae, also supported vacatur of the Second Circuit's judgment. Like petitioners, the U.S. argued that §411(a) does not limit a federal courts' subject matter jurisdiction, but rather serves as a mandatory prerequisite to suit that should be strictly enforced when raised by a party.<sup>50</sup> The U.S. argued that, while district courts should ordinarily enforce

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<sup>41</sup> See Brief for Petitioners at 15, *Reed Elsevier, Inc. v. Muchnick*, No. 08-103, (U.S. argued Oct. 7, 2009).

<sup>42</sup> See *id.* at 23-37.

<sup>43</sup> *Id.* at 40-45 (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006) ("If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. ... But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.")).

<sup>44</sup> See *id.* at 45-48.

<sup>45</sup> *Id.* at 40 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)).

<sup>46</sup> *Id.* at 3.

<sup>47</sup> See Brief for Respondents Pogrebin et al. in Support of Petitioners at 5, *Reed Elsevier, Inc. v. Muchnick*, No. 08-103, (U.S. argued Oct. 7, 2009); see also Brief for the Muchnick Respondents at 18-32, *Reed Elsevier, Inc. v. Muchnick*, No. 08-103, (U.S. argued Oct. 7, 2009).

<sup>48</sup> Brief for Respondents Pogrebin et al. at 5.

<sup>49</sup> See *id.* at 18-23; see also Brief for the Muchnick Respondents at 36-44.

<sup>50</sup> See Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 20-25, *Reed Elsevier, Inc. v.* (continued...)



§411(a) *sua sponte* even if the defendant did not move to dismiss on those grounds, once the case has reached the court of appeals, the district court has already expended significant resources, so insisting on a rigid application of §411(a) would waste judicial resources.<sup>51</sup> Therefore, according to the U.S., non-compliance with the registration requirement in this case provided no basis for vacating the district court's judgment.<sup>52</sup>

With both petitioners and respondents advocating the same outcome—that the Supreme Court overturn the Second Circuit's ruling—an unusual situation arose in which no party argued for the Court to affirm the judgment below. As a result, the Court appointed Professor Deborah Jones Merritt to serve as *amicus curiae* in support of the Second Circuit's judgment. According to Professor Merritt, not only does the plain language of §411(a) clearly restrict the subject-matter jurisdiction of federal courts,<sup>53</sup> but courts, legislators, and scholars have traditionally interpreted §411(a) as being jurisdictional.<sup>54</sup> Furthermore, she argued that §411(a) serves such vital public purposes as supporting a public record of copyright claims, shielding federal courts from burdensome litigation, protecting defendants from frivolous lawsuits, and supplying the Library of Congress collections.<sup>55</sup> Next, she argued that the integrity of the judicial process precludes the parties from waiving §411(a) because both parties invoked the jurisdictional bar before the district court to defend the fairness of their settlement, which rewarded the owners of registered copyrights at the expense of unregistered copyright owners.<sup>56</sup> Finally, Professor Merritt argued that neither a special rule for settlement nor the supplemental jurisdiction act cured this jurisdictional defect because (1) courts must have jurisdiction over class actions in order to terminate the claims of absent class members and (2) the many authors and databases involved in this lawsuit did not constitute a single case or controversy.<sup>57</sup>

The Computer and Communications Industry Association (CCIA) also provided an *amicus* brief in support of the Second Circuit's judgment. Echoing Professor Merritt's arguments, the CCIA cast the registration requirement as a necessary protection for Internet service providers, noting that, “[w]hen every blog and tweet might be protectable under copyright, the registration requirement dramatically reduces technology companies’ potential exposure to copyright infringement claims.”<sup>58</sup> CCIA argued that the Second Circuit's opinion was correctly decided<sup>59</sup> and that the petitioners’ writ of *certiorari* should be dismissed on two grounds. First, there was no case or controversy before the court because petitioners themselves argued in the lower courts

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Muchnick, No. 08-103, (U.S. argued Oct. 7, 2009).

<sup>51</sup> See *id.* at 25-31.

<sup>52</sup> See *id.* at 30.

<sup>53</sup> See Brief of Court-Appointed *Amicus Curiae* in Support of the Judgment Below at 17-26, *Reed Elsevier, Inc. v. Muchnick*, No. 08-103, (U.S. argued Oct. 7, 2009).

<sup>54</sup> See *id.* at 26-44.

<sup>55</sup> See *id.* at 44-57. 17 U.S.C. §407 requires copyright owners, within three months of publication, to deposit two copies of their work with the U.S. Copyright Office for inclusion in the Library of Congress. This requirement ensures that the nation's public library contains copies of every work published in the United States. 17 U.S.C. §407(a).

<sup>56</sup> See Brief of Court-Appointed *Amicus Curiae* at 57-65.

<sup>57</sup> See *id.* at 65-69.

<sup>58</sup> Brief for *Amici Curiae* Computer & Communications Industry Association and Netcoalition in Support of the Judgment Below at 3, *Reed Elsevier, Inc. v. Muchnick*, No. 08-103, (U.S. argued Oct. 7, 2009).

<sup>59</sup> See *id.* at 23-35.

that §411(a) was jurisdictional in nature.<sup>60</sup> Second, circuit courts were in agreement that §411(a) limits federal courts' subject matter jurisdiction; therefore, there was no circuit split, the traditional grounds on which the Supreme Court grants certiorari.<sup>61</sup> For these reasons, CCIA urged that the Supreme Court dismiss the petitioners' writ.

## Significance of Supreme Court's Decision

The Supreme Court heard oral argument in *Reed Elsevier* on October 7, 2009,<sup>62</sup> although it has not yet issued its opinion as of the writing of this report. The outcome of this case will not only affect the particular settlement at issue,<sup>63</sup> but may well have broader implications for authors, publishers, and the general public.

If the Supreme Court finds that §411(a) is jurisdictional, and therefore that the district court did not have the power to approve the authors' and publishers' settlement, detractors might argue that the lengthy settlement negotiations will have been for naught, judicial resources will have been wasted, and plaintiffs' articles will be removed from the defendants' databases and out of the public's reach.<sup>64</sup> Establishing §411(a) as a jurisdictional requirement may also impede parties' ability to settle out of court in future copyright infringement cases. Moreover, as the American Intellectual Property Law Association argued in an amicus brief, "requiring registration to protect previously published, yet unregistered works prior to reaching a private settlement of infringement claims creates a disincentive to both creation of new works and to their disclosure to the public, contrary to the primary purpose of U.S. copyright laws."<sup>65</sup>

Proponents of construing the registration requirement as jurisdictional might counter that it would serve the public interest and promote the purpose of federal copyright law by sustaining the collections of the Library of Congress, establishing a public record of copyrighted works, documenting the Register's views on the issue of copyrightability, and fostering a robust licensing system under the Copyright Act. A jurisdictional registration requirement, by serving "as the gatekeeper to the courthouse," might also limit frivolous lawsuits against Internet service providers and other technology companies and "ensure that only works worthy of a government-created limited monopoly can be the subject of federal litigation."<sup>66</sup>

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<sup>60</sup> See *id.* at 7-18.

<sup>61</sup> See *id.* at 18-23.

<sup>62</sup> Associate Justice Sonia Sotomayor recused herself from the case, leaving only eight of the nine justices to rule on the issue. This creates the potential for a 4-4 split, in which case the Second Circuit's holding would stand. Some observers have speculated that Justice Sotomayor's recusal stems from either her 1997 ruling in the *Tasini* case as a federal judge in the Southern District of New York, or her position on the Second Circuit when the court, in 2008, refused to grant an *en banc* rehearing of *In re Literary Works in Electronic Databases Copyright Litigation*. See *Eight Justice Court for Copyright Case*, SCOTUSBLOG, Sept. 4, 2009, at <http://www.scotusblog.com/wp/eight-judge-court-for-copyright-case>.

<sup>63</sup> However, if the Supreme Court upholds the Second Circuit's judgment (and thus nullifying the settlement), certain members of the class who had registered their copyrights prior to infringement or prior to the legal action may still be entitled to bring suit under the Copyright Act or to negotiate another settlement with the defendants.

<sup>64</sup> This would apply only to the articles at issue in the case, which were published between 1980 and 1995. Since 1995, publishers have required that freelance writers grant them electronic reproduction rights in their works up front.

<sup>65</sup> Brief of American Intellectual Property Law Association as Amicus Curiae in Support of Petitioners/Reversal at 32, *Reed Elsevier, Inc. v. Muchnick*, No. 08-103, (U.S. argued Oct. 7, 2009).

<sup>66</sup> Brief for Amici Curiae Computer & Communications Industry Association at 3-4.

The Supreme Court is expected to issue its decision in *Reed Elsevier* before the end of the Court's October 2009 term in late June or early July 2010.

## **Author Contact Information**

Brian T. Yeh  
Legislative Attorney  
byeh@crs.loc.gov, 7-5182

Lydia Grunstra  
Law Clerk