

No. 05-16964-JJ

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

JERRY GREENBERG, INDIVIDUALLY

Plaintiff-Appellee

IDAZ GREENBERG, INDIVIDUALLY

Plaintiff,

v.

NATIONAL GEOGRAPHIC SOCIETY, A DISTRICT OF COLUMBIA CORPORATION,
NATIONAL GEOGRAPHIC ENTERPRISES, INC., A CORPORATION,
MINDSCAPE, INC., A CALIFORNIA CORPORATION

Defendants-Appellants.

**On Rehearing En Banc on Appeal From The United States District
Court For The Southern District of Florida**

**EN BANC BRIEF OF AMERICAN ASSOCIATION OF LAW LIBRARIES,
AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF RESEARCH
LIBRARIES, MEDICAL LIBRARY ASSOCIATION, NATIONAL
ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT
COLLEGES, SOCIETY OF AMERICAN ARCHIVISTS, AND SPECIAL
LIBRARIES ASSOCIATION,
AS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLEE**

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

This brief *amici curiae* in support of Defendants-Appellants (collectively, “Appellants” or “NGS”) is submitted, with consent of the parties, by American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association, National Association of State Universities and Land-Grant Colleges, Society of American Archivists, and Special Libraries Association (“*Amici*”) to urge that the Court reverse the judgment below.

American Association of Law Libraries is a nonprofit educational organization with 5,000 members nationwide, serving the needs of lawyers, judges, and legislators, as well as law students and professors. **American Library Association** is a nonprofit educational organization of approximately 65,000 librarians, educators, information specialists, library trustees, and friends of libraries representing public, school, academic, state, and specialized libraries. **Association of Research Libraries** is a nonprofit association of 123 research libraries in North America, whose members include university libraries, public libraries, government and national libraries. **Medical Library Association** is a nonprofit, educational organization of 4,500 health sciences information professionals and institutions. **National Association of State Universities and Land-Grant Colleges** is an association of public research universities, land-grant institutions, and many state public university systems. Its 216 members enroll more than 3.6 million students,

award approximately a half-million degrees annually, and have an estimated 20 million alumni. **Society of American Archivists** provides services to and represents the professional interests of over 4,500 individual archivists and institutions as they work to identify, preserve, and ensure access to the nation's historical record. **Special Libraries Association** is a nonprofit organization for information professionals and their strategic partners, and serves over 12,000 members in the information profession, including corporate, academic and government specialists.

Amici represent the interests of institutions and professionals responsible for collecting and preserving historical, scholarly and other records and for making these materials available to researchers and the public at large. A significant part of their mission is to make available reliable, accessible, comprehensive repositories of back issues of newspapers, magazines, journals and other periodicals. In furtherance of that mission, they acquire licensed databases and digitized collective works and do, in fact, use the very CD-ROM product at issue in this case. *Amici* accordingly submit this brief to assist the Court's understanding of the issues at stake in this case.¹

STATEMENT OF ISSUE

Is Greenberg entitled to copyright protection for the subject works

¹ Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* or their counsel, made a monetary contribution to the preparation or submission of this brief.

subsequent to the U.S. Supreme Court's decision in *Tasini*?

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the past five years, *Amici* have recognized that the central issue in this appeal, i.e. the proper interpretation of Section 201(c) of the Copyright Act, 17 U.S.C. § 201(c) (2006), in light of the U.S. Supreme Court ruling in *The New York Times Co., Inc., v. Tasini*, 533 U.S. 483 (2001) ("*Tasini*") is a significant question of public importance in a digital age. As a result of their work and mission, *Amici* bring a special perspective and set of concerns to the consideration of this issue and have participated as *Amici* in prior appellate and Supreme Court reviews of the matter. In *Tasini*, two of the *Amici* filed in support of the freelance authors, contending, as the Supreme Court later held, that Section 201(c) did not exempt the New York Times from obtaining the consent of individual contributors when it reused third party copyrighted works in new databases. By contrast, in proceedings considering whether Section 201(c) confers upon NGS the privilege of reproducing and distributing the copyrighted works of freelance contributors as part of a CD-ROM product, *The Complete National Geographic* ("CNG"), *Amici* have supported NGS. See *Greenberg v. National Geographic Soc'y*, 244 F.3d 1267 (11th Cir. 2001), *cert. denied*, 534 U.S. 951 (2002) (*Greenberg I*), the vacated appeal in this proceeding and *Faulkner v. National Geographic Enters., Inc.*, 409 F.3d 26 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 833 (2005). *Amici* support for NGS' interpretation of Section

201(c) is rooted in the view that the CNG is precisely the kind of revision that *Tasini* recognized and Section 201(c) allows.

Since *Greenberg I* was decided before *Tasini*, this Court had to anticipate the ruling of the Supreme Court and lacked the Supreme Court's explication of the principles undergirding Section 201(c).² With the benefit of *Tasini*, *Amici* respectfully submit that this Court should reverse *Greenberg I*.³ In essence, the contributions in CNG are perceptibly reproduced and distributed as part of the original collective works, or revisions thereof, in which they first appeared. *Greenberg I* wrongly found CNG impermissible under Section 201(c), because the Court concluded it was a new work, combining digital facsimiles of entire collective works (scanned pages or the "replica" portion of the CNG) with software that enables users to search and perceive them with the aid of a machine or device. *See Greenberg*, 244 F.3d at 1273 n.12. This reasoning ignored the facts that the images reproduced in digital form and distributed in the CNG are identical to the original works and are the same type that would be displayed in analog microfilm collections that *Tasini* observed are permissible. *Tasini*, 533 U.S. at 501-02.

² By contrast, in *Faulkner*, the Second Circuit had such benefit and properly determined that *Tasini* mandated the opposite result from *Greenberg I*.

³ The *Amici* believe the panel ruling vacated by order of this Court, correctly applied *Tasini* to the facts of this case. Nevertheless, to the extent that the prior panel rule of this Court poses any obstacles, this en banc panel can rectify the error of *Greenberg I*. *See Passmore Swann v. S. Health Partners, Inc.*, 388 F.3d 834, 837 (11th Cir. 2004).

As a practical matter, unless this Court follows *Tasini* and reverses *Greenberg I*, the ruling will have a profound adverse impact on libraries, educators and archives and their patrons and students for years to come. Carried to its logical conclusion, *Greenberg I* raises the specter of Section 201(c) being frozen in time, exclusively applying to older, non-digital technology to the detriment of research, scholarship and learning, inhibiting dissemination of collective works via digital and electronic media. Digital versions of analog works are already in widespread use and are essential to *Amici's* strategy to preserve and provide access to their collections. If not reversed, *Greenberg I* will prevent the evolution of such useful technologies.

ARGUMENT

A fundamental goal of copyright law is to promote “broad public availability of literature, music, and the other arts” through a system of private reward to authors. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). At base, *Tasini* instructed that the copyright system should reward individual authors if commercial electronic database publishers, without additional permission, reuse articles from previously published collective works to create entirely different collective works and sell articles on an individual basis. *Tasini* properly protected the author’s private reward pursuant to the balance that Congress struck in enacting Section 201(c).⁴ The

⁴ See H.R. REP. NO. 94-1476, at 122-23 (1976), *reprinted in* 5 U.S.C.C.A.N. 5659, 5738 (1976) (under 201(c) a publishing company could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it).

instant case, by contrast, is ultimately about the other side of that balance: the ability of collective work owners to use new technologies to more broadly distribute collective works to the public. Although *Greenberg I* and *Tasini* both address whether publishers are entitled under Section 201(c) to reproduce freelance contributions in certain electronic contexts, there are critical factual differences that make the actions of Appellants in publishing CNG permissible under Section 201(c), while the actions of the New York Times were not. Unless this Court reverses *Greenberg I*, that decision will continue to have a profound, adverse impact on the public availability of copyrighted works and the development of new media collections.

I. The *Tasini* Ruling

A. The Works *Tasini* Found Infringing

In *Tasini*, the Court was faced with three different electronic database products and held that none of them complied with the requirements of Section 201(c). *Tasini*, 533 U.S. at 520. One product was the NEXIS online database in which millions of articles in electronic file format from thousands of periodicals had been reproduced and made available online to users, in effect on an individual basis. *See id.* at 499-500. The other two were CD-ROM products. One, known as “GPO,” was image-based. It showed each article exactly as it appeared on the printed page, *but the CD-ROM contained articles from approximately 200 publications or sections of*

publications. Id. at 491. The other CD-ROM product contained only the New York Times, *but it did not have the original formatting or accompanying images from the original publication. Id.* at 500. Both of the CD-ROM products in *Tasini* displayed the articles *in such a way that they were not linked to other articles appearing in the original print publications* and the user who wished to see other pages of the original collective work could not simply “flip” to them. A new search was required. *Id.* at 491 n.2. These traits destroyed the claim that the reproductions and distributions of the articles therein were “as part of” qualifying collective works. *Id.* at 504.

In deciding that these products were not permissible under Section 201(c), the Supreme Court’s focus was on the freelance articles “as presented to, and perceptible by, the user” of the commercial electronic databases before it. *Id.* at 499. The Court’s inquiry was “whether the database itself perceptibly presents the author’s contribution as part of” the collective work or revision thereof. *Id.* at 504. The products in *Tasini* presented freelance articles to users “clear of the context provided either by the original periodical editions or by any revision of those editions.” *Id.* at 499. The products did not perceptibly reproduce and distribute the freelance articles “as part of” the original periodicals or permissible revisions. *Id.* at 500. Significantly, the products offered users individual articles, not intact periodicals, and did not involve “a mere conversion of intact periodicals (or revisions of periodicals) from one medium to another” as happens with microfilm. *Id.* at 501-02.

B. The Works *Tasini* Described As Not Infringing

At the same time, the *Tasini* Court made clear it is permissible under Section 201(c) for the owner of a collective work copyright to reproduce an exact facsimile of the complete collective work, whether in paper or other forms, such as microfilm and microfiche. *See Tasini*, 533 U.S. at 501-02. This would be true even if multiple, exact reproductions were combined into a single package in which several entire issues of a series of collective works would be distributed as a unit (like traditional microfilm). *See id.* at 501. When one distributes the constituent works in this manner, one is both reproducing and distributing them “as part of” the original collective works, as provided for in Section 201(c), including all of the selection, coordination, and arrangement of the original collective works.

C. The CNG In Context Of *Tasini*

Fundamentally, the CNG is a mere conversion of intact print periodicals into the medium of CD-ROMs. All contributions alleged to be infringed appear in the CD-ROM versions *in the exact positions* in which they appeared in the original print version of the magazines. Photographs and articles are presented in the context of the full, original issues (including original advertising). In addition, a user of the CD-ROM can “flip” to other articles and pages in the digital facsimile of an issue in the same order in which those articles and pages were originally presented in the printed editions. Although there are over 100 years of issues reproduced on multiple discs,

National Geographic is the only periodical that appears in the CD-ROM version. A user encounters very few materials that have been added to the CD-ROMs that are not digital facsimiles of the original magazines or software⁵ that permits viewing and searching them for specific issues and articles. Added materials perceptible to users include a few short advertising videos, a start-up video montage that lasts for a few seconds, an introductory tutorial, a chronological table of contents, very short article summaries in lists of search results, and links to the NGS website.⁶

II. *Greenberg I* Was Wrongly Decided And Should Be Reversed

A. The Essential Flaws In *Greenberg I*

There are two essential flaws in *Greenberg I*. First, *the decision failed to reflect the relevant distinctions between the product at issue before it and those at issue in Tasini*. In *Tasini*, the freelance articles could be and were reproduced and distributed separately. In CNG, the freelance contributions are represented and distributed in original context “as part of” the original collective work or revision of the original collective work. The freelance contributions are not being made

⁵ There are minor variations among succeeding versions of the CNG; e.g., later versions of the CNG also apparently include software tools, such as tools to darken text for easier reading, to rotate images, bookmark pages, and similar capabilities.

⁶ *Amici* submit that, as the Second Circuit held, for purposes of Section 201(c) these additional elements are merely incidental and of no significance to the status of the CNG as a qualifying reproduction. *Faulkner*, 409 F.3d at 30. They do not alter the essence of the digital facsimiles embodied in the CNG and have no intrinsic value to the user interested in collecting *National Geographic* magazines. They are of no greater significance than putting a new cover on a book or adding a table of finding aids to the head of a microfilm roll.

available on a piecemeal basis or being sold *à la carte* out of a database that combines multiple periodical titles. *Cf. Tasini*, 533 U.S. at 489, 499-500. The contributions are not stored and retrieved “separately within a vast domain of diverse texts,” *id.* at 503, and thus, the reproduction and distribution of the contributions in the context of digital facsimiles of the original periodicals do not effectively override the contributors’ exclusive right to control the individual reproduction and distribution of each contribution. *Cf. id.* at 503-04. In all material respects, the contributions are perceptibly reproduced as part of the digital facsimiles of the original *National Geographic* magazines. These CD-ROMs are therefore materially distinguishable from each of the products at issue in *Tasini*.

Second, *Greenberg I* erroneously suggested that it is impermissible under Section 201(c) for a collective work owner to combine into a single product the digitized text and images of a complete collective work with software that enables users to perceive and search the collective work with the aid of a computer. Under *Greenberg I*, the addition of search and access software to a product containing digitized periodicals creates a “new work” and is in effect *per se* impermissible under Section 201(c). While the court claimed in its opinion not to decide that issue, 244 F.3d at 1273 n.12, the software issue was the dominant element of its analysis. *See id.* at 1273. Under the *Greenberg I* reasoning, no publisher could ever rely on Section 201(c) to release a collection of its works in CD-ROM or digital format

because of the need for and use of supporting software. *Amici* believe this analysis to be a clear error that unless reversed will materially diminish public access to works in a digital age and reduce the dissemination of collective works reproduced and distributed with modern technology, all contrary to *Tasini*.

B. CNG Meets The Standard In Section 201(c)

In the CNG, the original collective works that are reproduced in digital facsimiles are not themselves changed by the conversion from paper to CD-ROM. In this regard, there is merely a transformation from analog to digital media. The necessity of using an additional “work,” i.e., another computer program, to view the unchanged collective works should be analytically irrelevant because under the Act, a copy of a work that is perceptible *without* a machine or device stands on equal footing with a copy that is perceptible *with* one.⁷ The CNG embodies digital fixations that are materially similar to the type of analog microfilm collections that the Supreme Court observed are permissible under Section 201(c):

Microforms typically contain continuous photographic reproductions of a periodical in the medium of miniaturized film. Accordingly, articles appear on the microforms, writ very small, in precisely the position in which the articles appeared in the newspaper. . . . True, the microfilm roll contains multiple

⁷ Copyright protection adheres to works of authorship “fixed in *any* tangible medium of expression, *now known or later developed*, from which they can be perceived, reproduced, or otherwise communicated, either directly or *with the aid of a machine or device*.” 17 U.S.C. § 102(a) (2006) (emphasis added). *See also* 17 U.S.C. § 101 (2006) (“copies” defined as material objects in which a work is fixed and from which the work can be perceived, etc. “either directly or *with the aid of a machine or device*.”) (emphasis added).

editions, and the microfilm user can adjust the machine lens to focus only on the Article, to the exclusion of surrounding material. Nonetheless, the user first encounters the Article in context. *Tasini*, 533 U.S. at 501.

The CNG freelance contributions are perceptible to the end users of this product “as part of” the original collective works, just as they are to the end-users of a roll of microfilm. The end-user encounters the software component of the product in effect only as part of the “machine or device” permitting the collective work to be viewed. It is functionally analogous to a lens, light, and the knobs on a microfilm viewer, while the software features are functionally equivalent to turning the pages or using a magnifying lens. The CNG freelance contributions are not perceptibly presented to the end user as matter that has been altered or added to the original collective works.

If this Court wishes to take special cognizance of the CNG’s conversion to digital format, the addition of software elements should be viewed, at most, as creating a permissible “revision” under Section 201(c). *See Faulkner*, 409 F.3d at 28-30. If the “final” edition of a traditional print newspaper contained new copyrighted works such as photographs and text absent from the “early” edition, it would be a permissible “revision.” *See supra* note 3. Similarly, adding copyrightable matter that is not perceptible to end users as matter added to the collective work being viewed, but encountered as part of the “machine or device” enabling them to search and view the collective work, should be deemed to be a “revision” of the collective work, permissible under Section 201(c).

III. Failure To Reverse *Greenberg I* Would Have Profound Adverse Effects On The Library, Education And Archival Communities And Collective Work Users

There are other cogent reasons why *Greenberg* is not entitled to copyright protection post-*Tasini*. Failure of this Court to reverse *Greenberg I* in light of *Tasini* would have profound adverse implications affecting the scholarly needs of *Amici's* patrons and students and the preservation efforts and space requirements of the library,⁸ educational and archival communities. Under *Greenberg I*, as a practical matter, no collective work reproduced or distributed via CD-ROM, online technology, or other new technology requiring additional software to facilitate viewing or searching could ever qualify for the Section 201(c) privilege, even if the product met the statutory criteria in all other respects. Such products, which make it much easier to access information resources, and make possible the retrieval and use of data in powerful ways not possible with analog media, are of enormous scholarly and educational value. Even though nothing in Section 201(c) or *Tasini* deprives these users of such powerful tools, *Greenberg I* inhibits the dissemination of collective works via digital and electronic media.

If left undisturbed, the sweeping implication of *Greenberg I* would not only thwart the broader public availability of well-disseminated works like *National Geographic*, but also would frustrate access to more obscure, less accessible

⁸ In *Tasini*, the Court made note of some of the "Copyright Act's special authorizations for libraries." See 533 U.S. 503 at n.12.

magazines, newspapers, and scholarly journals. The strong public, educational and scholarly interest in these periodicals is evidenced by the increasing rate at which digital replicas of public domain works including collective work periodicals are available online at no cost.⁹ There is also substantial demand for access to digitized replicas of collective works that are still subject to copyright protection and only available with the authority of the collective work copyright owners.¹⁰ Collective works in a virtual environment of digital files could potentially be accessible to a broader segment of the population for learning and scholarship, but not if §201(c) digital and electronic media compilations of them are effectively *per se* impermissible.

Unless overruled, *Greenberg I* will also have an adverse impact on preservation efforts and space needs of libraries and archives. These are closely related to but distinct from access concerns. Cultural institutions serve the international community by building, protecting and preserving access to diverse

⁹ See, e.g., Library of Congress, The Nineteenth Century in Print: Periodicals, <http://memory.loc.gov/ammem/ndlpcoop/moahtml/snctitles.html> (last visited Oct. 17, 2007) (listing historic 19th century periodicals digitized by Cornell University Library and the Preservation Reformatting Division of the Library of Congress); Bruce Cole, The National Digital Newspaper Program, <http://www.oah.org/pubs/nl/2004may/cole.html> (last visited Oct. 4, 2007) (discussing Organization of American Historians and Library of Congress partnership to digitize microfilm of historic U.S. newspapers for Internet access).

¹⁰ See, e.g., JSTOR, Currently Available Journals, <http://www.jstor.org/about/alpha.content.html> (last visited Oct. 17, 2007) (providing access to digitized public domain and copyrighted scholarly journals).

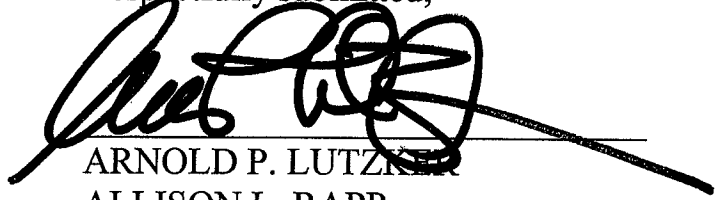
resources. The challenges of preserving collections have inspired libraries to use conservation to preserve the original artifact and reformatting strategies (microfilm, print facsimiles and digitization) to retain content, enhance access, and protect the original from excessive wear. Creating complete, digital facsimiles of collective works and combining the digital facsimiles with computer software that enables users to view and search the collective works on computers vastly improves both user access and long-term preservation capabilities.

Finally, *Amici* face ever-escalating demands on their physical space and economic resources. CD-ROM and online versions of newspapers, scholarly journals and magazines now – and eventually other products yet to evolve – can greatly reduce library space requirements. Thus, if this Court fails to take this opportunity to reject the reasoning of *Greenberg I*, such institutions would face potentially huge increases in costs of operation and maintenance. This would have the collateral harmful effect of reducing the amount of material and variety of sources easily available to patrons and students, a result contrary to the public goals of copyright law.

CONCLUSION

For the foregoing reasons, this Court should grant the appeal and reverse the decision of the district court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Arnold P. Lutzker', written over a horizontal line.

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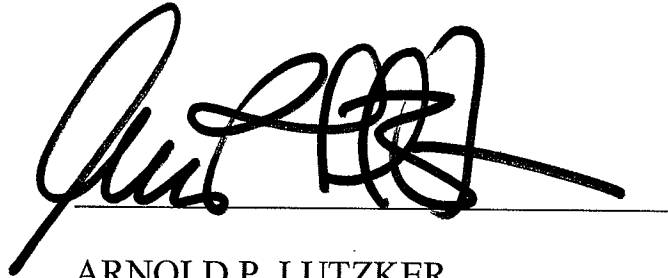
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedures 32(a)(7)(B) and Eleventh Circuit Rule 28-1, because the brief contains 3,297 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedures 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedures 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedures 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002, ver. 10.6804.6811 in 14 point Times New Roman font.

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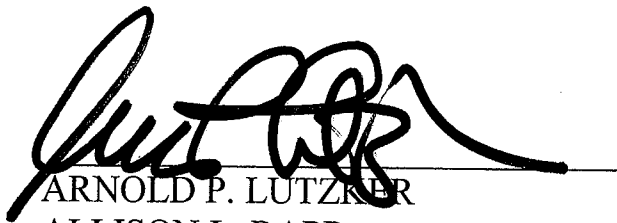
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CERTIFICATE OF INTERESTED PERSONS
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In accordance with Federal Rule of Appellate Procedure 26.1 and 11th Cir. R. 26.1-1 to 3, 28-1(b), and 29-2, *amici curiae* American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association, National Association of State Colleges and Land-Grant Universities, Society of American Archivists, and Special Libraries Association state that none has a parent corporation and no publicly traded corporation owns 10 percent or more of their stock.

Amici curiae American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association, National Association of State Universities and Land-Grant Colleges, Society of American Archivists, and Special Libraries Association further certify that they believe the certificate of interested persons contained in the Brief of Appellants is complete except for the addition of the following individuals: Arnold P. Lutzker, Allison Rapp, Jeannette Maurer Carmadella.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one true and correct copy of the foregoing Brief of *Amici Curiae* American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association, National Association of State Universities and Land-Grant Colleges, Society of American Archivists, and Special Libraries Association in Support of Defendant-Appellee was sent, postage pre-paid, via U.S. Mail this 18th day of October, 2007, to the following counsel:

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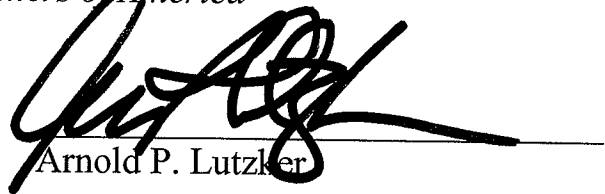
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