

No. 08-103

IN THE
Supreme Court of the United States

REED ELSEVIER INC., ET AL.,

Petitioners,

v.

IRVIN MUCHNICK, ET AL.,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

**SUPPLEMENTAL BRIEF FOR THE
MUCHNICK RESPONDENTS**

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SUPPLEMENTAL BRIEF FOR THE MUCHNICK RESPONDENTS

Our opening brief explains how supplemental jurisdiction under 28 U.S.C. § 1367 can provide a basis for adjudicating claims involving unregistered copyrights in U.S. works. Muchnick Resp. Br. 36-44. In response, the amicus curiae appointed by this Court argues that the availability of supplemental jurisdiction “fall[s] outside the Court’s limited grant of certiorari.” Brief of Court-Appointed Amicus Curiae at 66. She is incorrect. The availability of jurisdiction under Section 1367(a) falls squarely within the Question Presented. Moreover, the argument was pressed and passed on below. Accordingly, this Court should decide the issue and remand for further proceedings along the lines we describe below.¹

1. a. This Court granted certiorari on the question whether 17 U.S.C. § 411(a) “restrict[s] the subject matter jurisdiction of the federal courts over copyright infringement actions.” *Reed Elsevier, Inc. v. Muchnick*, 129 S. Ct. 1523, 1523 (2009). As the history of this litigation shows, one answer to that question turns on the interplay between Section 411(a) and Section 1367(a). One might respond to

¹ The Muchnick respondents are filing this Supplemental Brief because the briefing schedule set by this Court at the parties’ suggestion was designed so that we would file our brief within two weeks of the petitioners’. While this gave us ample opportunity to respond to petitioners’ arguments, it did not provide us with an opportunity to respond to the arguments made by the Court-appointed amicus.

the Court's question as the court of appeals did: Section 411(a) "restrict[s] the subject matter jurisdiction of the federal courts" because it "denies," Pet. App. 26a, district courts the jurisdiction that Section 1367(a) could otherwise confer. Or one might answer the question the way that we and the Pogrebin respondents urge this Court to do: even assuming that Section 411(a) restricts the original jurisdiction conferred on district courts by 28 U.S.C. §§ 1331 and 1338(a) to claims involving registered works,² Section 411(a) does not "restrict" the *supplemental* subject matter jurisdiction of the federal courts conferred by Section 1367(a). *See* Muchnick Resp. Br. 36-44; Pogrebin Resp. Br. 18-22.

b. The consolidated complaint in this case expressly invoked supplemental jurisdiction under 28 U.S.C. § 1367. J.A. 82. So it is hardly surprising that in its order requiring briefing on the jurisdictional issue, the court of appeals cited *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), a case concerning the construction of Section 1367. *See* Pet. App. 47a. The parties briefed and argued the issue, asserting that jurisdiction was available under Section 1367(a). *See* Def. C.A. Letter Br. 4 (Feb. 12, 2007); Letter from Counsel for the

² It is a misnomer to say that Section 411(a) is the source of district courts' subject-matter jurisdiction over a copyright claim. Their jurisdiction comes from the general federal-question jurisdictional statute and the copyright-specific jurisdictional statute, and the question is whether Section 411(a) limits that jurisdiction.

Plaintiffs-Appellees 1 (Feb. 15, 2007) (joining in the defendant-appellees' argument).

c. The court of appeals' decision reinforces the conclusion that the Question Presented fairly contains the issue of supplemental jurisdiction. The court of appeals recognized that "the supplemental jurisdiction statute might provide an alternative source of jurisdiction" to original jurisdiction. Pet. App. 25a. In the end, the court of appeals concluded that supplemental jurisdiction was unavailable in language that parallels this Court's question: Section 1367(a), it explained, "excepts from its reach those cases in which another federal statute denies jurisdiction." Pet. App. 26a. The court of appeals then concluded that while it was "[t]rue" that "section 411(a) does not refer to § 1367(a)," Pet. App. 27a, it nonetheless constituted a statute "expressly provid[ing] otherwise," 28 U.S.C. § 1367(a), with respect to the presumptive availability of supplemental jurisdiction. Pet. App. 27a.

In light of this litigation history, the most sensible reading of this Court's Question Presented encompasses the issue of whether Section 411(a) cuts off supplemental jurisdiction. For the reasons set out in the Muchnick and Pogrebin respondents' briefs, Section 411(a) does not.

2. This Court's appointed amicus curiae also argues briefly that supplemental jurisdiction is unavailable in this case because this litigation involves "thousands of unrelated controversies," rather than a set of related claims. Brief of Court-Appointed Amicus Curiae at 68. We disagree. *See* Muchnick Resp. Br. 37-39 (outlining the related nature of the claims). But because the court of appeals held as a categorical

matter that the claims involving unregistered U.S. works could *never* be adjudicated pursuant to a court's supplemental jurisdiction, Pet. App. 26a-27a, the courts below never addressed the factbound question whether the specific claims involving unregistered works at issue here are sufficiently related to the claims advanced by the named plaintiffs to make supplemental jurisdiction appropriate. Accordingly, this Court should not address that question in the first instance. Rather, it should direct the lower courts to address that issue on remand.

3. While the Court's "limited grant of certiorari," Brief of Court-Appointed Amicus Curiae at 66, fairly encompasses the question whether supplemental jurisdiction is potentially available, it does not extend to the question whether, under the facts of this case, the district court should have permitted the named plaintiffs to represent a class including holders of unregistered copyrights in U.S. and foreign works. As the briefs of the Court-appointed amicus curiae (Br. 8-10, 60-61) and amici curiae Computer & Communications Industry Association and NetCoalition (Br. 8-10) set out, and as the Muchnick respondents argued below (Br. 8-9, 45-46), the proposed settlement in this case raises serious questions of fairness and the adequacy of representation with respect to the claims assigned to Category C.

This Court has recognized that on occasion it may be appropriate for courts to address dispositive Rule 23 issues before turning to complex jurisdictional questions. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 612 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (citing *Amchem*). If this Court

holds, as we urge, that even if Section 411(a) does not permit the exercise of original jurisdiction over claims involving unregistered U.S. works, Section 1367(a) permits the exercise of supplemental jurisdiction over such claims in conjunction with the adjudication of claims involving registered works, it might be appropriate on remand for the courts below first to address the Rule 23 question whether the named plaintiffs will adequately represent the interests of the class members before determining the scope of their supplemental jurisdiction.

CONCLUSION

For the foregoing reasons and the reasons stated in the Muchnick respondents' opening brief, the judgment of the court of appeals should be reversed and the case should be remanded for the court of appeals to address the fairness of the proposed settlement.

Respectfully submitted,

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