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June 23, 2010

BY HAND

Catherine O'Hagan Wolfe, Clerk
U.S. Court of Appeals for the Second Circuit
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007

Re: Letter Brief for Defendants-Appellees – *In re Literary Works in Electronic Databases Copyright Litigation*, 05-5943-cv

Dear Ms. Wolfe:

By Order dated May 25, 2010, the Court directed the parties to file letter briefs addressing any supplemental authority and arguments that counsel wish to bring to the Court's attention. Please provide the panel with this response to the June 7 submission of the appellants ("objectors").

Overview. More than five years after the district court's final judgment approving the parties' settlement and after a detour to the Supreme Court, this appeal is still unresolved, the authors are waiting to be paid, and the publishers and databases are waiting to get on with their businesses, including plugging the archival gaps occasioned by *New York Times Co. v. Tasini*, 533 U.S. 483 (2001). Yet what is most notable about the supplemental brief that ten objectors (out of tens of thousands of class members) have filed is how lacking it is in pertinent new authorities. While objectors have taken the opportunity to smuggle in new arguments not asserted in the district court and therefore waived, they do not cite a single relevant authority after 2007, and are largely content to repeat arguments previously made and refuted at length. Although we respond as necessary below to objectors' latest bite at the apple, we urge the Court to focus as well on the appellees' prior briefs, because they contain, at fuller length and greater detail, responses to each of the unwaived points objectors make, and demonstrate that there is no basis to overturn the district court's approval of the settlement as reasonable, adequate, and both procedurally and substantively fair.

The Settlement Agreement is fair and representation was adequate. Despite their claims, objectors have demonstrated neither that the settlement is unfair and inade-

quate nor that the three supposed defects identified in their brief “increased during the appeal.”

What objectors call the “C reduction” remains a figment of their imagination. Nothing in the supplemental brief belies the fact that there has been (and will be) no C reduction. As objectors have been repeatedly advised, the claims submitted by class members total to a sum well *under* the level that would have led to any reduction in any claims.¹ Objectors still have not cited a single case to support their argument that the Settlement Agreement can be deemed unfair by virtue of a contingent provision ensuring that the settlement amount would not exceed what the defendants agreed to pay, which will have no impact on any class members because the condition precedent to its application never materialized. Nor have they offered anything to gainsay either the parties’ informed assessment (now vindicated by the claims administrator) that C claims would be paid in full, or the district court’s judgment that the risk of any such reduction was so “speculative” and “hypothetical,” and the justification (if the risk had eventuated) so reasonable, that the provision attacked was both reasonable and fair. *See generally* Defendants’ Br. 24-26.

Equally meritless is the contention that the “compensation scheme” for C claims is “regressive” and “manifestly unfair” because it is not based on a “straight percent” of the compensation originally paid by the publishers to the freelancers for those articles. Objectors’ Letter Br. (hereafter Letter Br.) 1 n.1, 5. At the threshold, that contention was never raised in the district court, and is therefore waived.² *E.g., Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 124 n.29 (2d Cir. 2005). On its merits, the argument is flawed because its premise is incorrect. There is nothing “regressive” about the Settlement Agreement schedule, which designates ascending ranges of payment that publishers paid for freelance articles and affords higher compensation under the settlement for each higher payment band. A345 ¶ 4(c). No case objectors cite, or that we have found, would deem such payments regressive or provide any basis for displacing the district court’s judgment. No case precludes using ranges keyed to settlement payments in lieu of uniform percentages. Given the long span in which subject works

¹ The claim categories are defined at Defendants’ Br. 13. We are advised by the claims administrator that the face value of all claims submitted (which occurred after the record closed) is roughly \$8.9 million. Even when attorneys’ fees (\$4.4 million) and notice and administration costs (\$1.8 million) are considered, that leaves the total settlement amount at least \$2.9 under the \$18 million ceiling and conclusively precludes any C reduction. Moreover, the Settlement Agreement affords publishers and the databases an opportunity to challenge claims, so the face value of submitted claims may overstate the value of those claims. A350-51 ¶ 6(a).

² *See generally* A728, A1247, A1378, and A1721.

were written, the huge number of claims likely to be made, and the strong likelihood that records of how much was paid for commissioned articles many decades ago would not exist (in either the authors' or the publishers' files), the parties deemed it far more practicable to base the calculations on larger bands (as to which recollection would be surer) than on straight percentages, and far more likely to deter false claiming and unnecessary disputes.³

The final basis claimed to "demonstrate unfairness and a failure of adequate representation" is the placement of foreign works in Category C. Objectors, all of whom live in the U.S. and none of whom have foreign works, waived that argument by never presenting it below. *See Allianz and Wal-Mart, supra*. Nor may they raise the issue, since it has no impact on them. *See Devlin v. Scardelletti*, 536 U.S. 1, 9 (2002) (objector appealing from class action approval "will only be allowed to appeal that aspect of the District Court's order that affects him"); *AAL High Yield Bond Fund v. Deloitte & Touche LLP*, 361 F.3d 1305, 1310 (11th Cir. 2004). But even if the argument were not waived and affected objectors, the argument is wrong.

Although infringement claims for foreign works may be asserted without registration (Copyright Act § 411(a)), another provision of the Copyright Act as to which objectors are conspicuously silent, § 412(2), precludes statutory damages and attorneys fees for all unregistered published works, domestic and foreign (with exceptions immaterial here). *Football Ass'n Premier League Ltd. v. YouTube, Inc.*, 633 F. Supp. 2d 159 (S.D.N.Y. 2009). A number of other considerations as well led to the judgment, during four years of intense negotiation, that unregistered foreign works should appropriately be compensated equally with unregistered domestic works. Neither domestic nor foreign authors of unregistered works had expended the time or effort to register. Difficulties of proof of payment in prior years would have been magnified for the foreign works. Valuing foreign works as B claims would have been unfair to US authors who seemed similarly situated. There was also good reason to believe that the economic value of such works, generally speaking, was if anything considerably less than the value of domestic works. Unregistered works were compensated in amounts many times more than likely actual damages. Those judgments were reasonable, and no mark of unfairness or inadequate representation.

Nor, respectfully, are the concerns over adequate representation of class members holding primarily C claims, as expressed in the dissent of Judge Walker, a basis for

³ For example, freelancers who wrote book reviews for *The Albany Times-Union* and the *Berkshire Eagle*, and those papers themselves, are unlikely to have records of freelance payments made in the 1980s, but far more likely to know that the going rate for book reviews that year was under \$250, or between \$250 and \$999 (but not over \$1,000).

reversing the district court. *In re Literary Works in Elec. Databases Copyright Litig.*, 509 F.3d 116, 136 n.5 (2d Cir. 2007) (Walker, J., dissenting). Unlike *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997), which condemned certification where class members were conflicted, the named plaintiffs' interests are the same as, and not in conflict with, those of class members generally. The named plaintiffs, like *all* authors, have claims for unregistered works because that is what all authors create. The *Literary Works* class is comprised of authors who wrote for similarly situated publications, and were treated the same way by the defendants and publishers. The class is simply authors, *all* of whom wrote unregistered works (of whom a few register some subset, generally small, of their works). There is no evidence or reason to believe that the named plaintiffs, as a group, had different incentives. *See* Defendants' Br. 20-23. The complaints made plain from the outset that the named plaintiffs had not registered all their works, and that the two foreign plaintiffs listed no registered works at all. *See* Defendants' Br. 21 n.4.⁴

Any concern about adequate representation here, moreover, was eliminated by the structural protection afforded by the participation of three not-for-profit authors organizations. They did not stand to gain financially and had every interest in maximizing the recoveries available to authors generally for all works, regardless of registration. Their members are authors generally (most of whom do not register most of their works).

A further structural assurance of fairness and adequate representation is that, unlike most class action settlements, this one offered to compensate the assertedly disadvantaged class members (all authors of unregistered works) not at a discounted value of their claims, but at many times any realistic actual damages. The actual damages from articles in the databases were fractions of pennies, as confirmed by dividing any given publisher's annual royalties by the number of articles contributed by that publisher to the electronic archives. *See* Defendants' Br. 11; *see also* A1616-24. That accomplishment eviscerates objectors' claim that unregistered works were "sold out," and is inconsistent with any finding of inadequate representation or structural unfairness.

⁴ Moreover, while it postdated district court approval and is not of record, the claims administrator's review of claims submitted established that (a) one named plaintiff submitted only C claims, (b) many named plaintiffs submitted more C claims than A and B claims, (c) the named plaintiffs collectively submitted more than five times as many C claims as A and B claims, (d) five named plaintiffs submitted C claims whose value exceeded the value of their A and B claims, and (e) as the final proof that C claims were not disadvantaged, fully half of the overall claimed amount results from C claims.

Nor do the cites in Judge Walker's dissent establish inadequate representation here. Unlike *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1284 (7th Cir. 1985), there are no subclasses here and no reason to think that all plaintiffs do not have numerous C claims (since all writings are born unregistered). Here, as in *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 449 (3d Cir. 1977), which reversed an order denying class certification (and involved no settlement), "there is no basis to deny class certification on the basis of inadequacy of representation," since "the relationship of the representative parties' interests to those of the class are such that there [was] not likely to be divergence in viewpoint or goals in the conduct of the suit."

Much more apt, and refuting objectors' challenge, are such decisions as *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 272-73 (3d Cir. 2009) (no divergence of interests where many class members have multiple kinds of claims and "a unified interest in establishing the . . . Defendants' liability"); and *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 532 (3d Cir. 2004) (despite some differences, the named parties "all shared the same goal of establishing the liability of DuPont, suffered the same injury resulting from the overpayment for warfarin sodium, and sought essentially the same damages by way of compensation for overpayment").

The releases are well within the authority recognized in *Firefighters*. The Settlement Agreement's release provisions are not infirm under either *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), or Rule 23.

A. Approval of the Copyright Office. Last fall, the Register testified approvingly to Congress about the *Literary Works* settlement (which was the subject of a brief *amici curiae* filed by the Solicitor General supporting reversal when this case was in the Supreme Court). In testimony to the House Judiciary Committee, Register Marybeth Peters observed that the *Literary Works* settlement "speak[s] only to the activities originally at issue in the suit: the reproduction, display and distribution of copyrighted articles in electronic databases," does not "lock in licensing terms, including payment, for future kinds of activity," and does not permit "extensive future uses of copyrighted products that were not the subject of the original infringement action." *Competition and Commerce in Digital Books: Hearing before the H. Comm. on the Judiciary*, 111th Cong. 7 & n.10 (2009).

B. The releases are valid. What objectors call a "future use license" is simply the consequence of the complete releases obtained in exchange for a very substantial sum on which every author had the opportunity to draw. Defendants' Br. 13-14, 37-46.

Treating the defendants (which include publishers The New York Times Company and Union-Tribune Publishing Company, and databases who had licenses from those

and other publishers) as if they had no prior connection to the subject works, objectors erroneously assume that the parties could not agree to resolve their dispute by exchanging the defendants' promise to pay authors additional compensation for releases that effectively afford the publishers and their licensees continuing nonexclusive licenses to the works in suit. But the publishers – who are either defendants or parties to the settlement – were not strangers to the works covered by the Settlement Agreement; they *commissioned* and *paid for the right to publish those works*. The continued uses permitted by the settlement are the same uses that some of the publishers have staunchly maintained throughout this litigation and that were already authorized by virtue of their having *commissioned* and *paid for* nonexclusive rights to the subject works.

Each publisher had undisputed individualized licenses to every work it had published as of the settlement date, which are the only works it will be entitled to use after the settlement becomes effective. The publishers believed, based on numerous lines of authority, that the rights they originally purchased from freelance authors included the rights to maintain their back issues online and to license those back issues to platforms like LexisNexis (as they have been doing on a going-forward basis under modernized post-*Tasini* agreements). Their defenses relied on the dense facts of their relationships with class members and the works at issue, which led publishers to conclude that they possessed the nonexclusive rights to convey their complete contents for a wide variety of reasons: not only because of 17 U.S.C. § 201(c) (until the Supreme Court's decision in *Tasini*), but also because of oral licenses, implied licenses, or the equivalent as a result of waiver, estoppel, and acquiescence.⁵

The settlement here secured to the publishers and their licensees only what they could – and believed they *would* – have obtained at trial: confirmation of their existing electronic rights to the articles that the publishers had commissioned and purchased for inclusion in their publications regardless of platform. The settlement here does not implement structural changes to the industry or new business lines, but rather simply subjects freelance works written during the period of pre-*Tasini* uncertainty to precisely the arrangements which works written post-*Tasini* (under reformed, modernized agreements) are subject, nothing more.

⁵ See generally A1625-1629. For example, freelance contributors who knew that the daily contents of the publications they regularly wrote for were delivered to and available on the defendant databases such as LexisNexis, Westlaw, Factiva, and Proquest, and continued to undertake to contribute freelance pieces on an ongoing basis, would likely be found to have impliedly licensed those contributions to those publications for distribution on those and comparable electronic platforms. See A1626-1629 (citing cases); *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555 (9th Cir. 1990); *Korman v. HBC Fla., Inc.*, 182 F.3d 1291, 1293 (11th Cir. 1999).

The defendants' brief cited cases establishing that a properly defined and adequately represented class of copyright holders may settle a lawsuit over past conduct by licensing the full range of conduct implicated by the complaint. *See* Defendants' Br. 39-45, citing *Uhl v. Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d 978, 982-85 (7th Cir. 2002). The settlement here is easily within that authority, considered under the framework of *Firefighters* (cited by the defense group in this Court and in the Supreme Court), which objectors now cite, and consistent with *Amchem*, 521 U.S. at 620, 628-29, and *Wal-Mart*, 396 F.3d at 107. Analysis under those frameworks makes plain that the releases in the *Literary Works* settlement, characterized by objectors as a license for future use, are appropriately tailored to the claims that were brought in the complaint.

First, the *Literary Works* settlement "resolves a dispute within the Court's subject matter jurisdiction," as the Supreme Court has now conclusively held. *Reed Elsevier v. Muchnick*, 559 U.S. ___, 130 S. Ct. 1237 (March 2, 2010). Second, the *Literary Works* settlement comes within "the general scope of the case made by the pleadings." The *Literary Works* settlement concerns only the very articles commissioned and paid for by the publishers, and the same articles and activities at issue in the complaint: the reproduction and distribution of those articles by electronic databases under license from the publishers which commissioned and published them in the first instance, and by those publishers themselves. The publishers were either named parties or, absent a settlement with their participation, would have been.

Third, the *Literary Works* settlement "furtheres the objectives of the law upon which the complaint was based." The Settlement Agreement here is entirely remedial, and what objectors call a "future use license" is simply the consequence of traditional releases as applied to works that the publishers had commissioned and licensed. Defendants' Br. 37-46. Forward-looking relief was expressly approved and invited by *Tasini*, 533 U.S. at 505 ("The parties (Authors and Publishers) may enter into an agreement allowing continued electronic reproduction of the Authors' works"). In exchange for additional payment for articles they commissioned and believed they had already purchased electronic rights for, publishers (and their licensees) simply confirmed the very non-exclusive rights to include all their contents in licensed electronic archives (and their own electronic archives) that the complaints put at issue, which the publishers long believed they had acquired and which they believed they would have confirmed in litigation. *Id.* The releases (and the "future uses" those releases expressly entail) allow the publications to continue the very activities at issue in the lawsuit: the licensing of their complete collective works to electronic databases (or their own public dissemination of their electronic archives).

By providing additional compensation to authors for their works (at sums considerably higher than the economic value of those works today), by enabling the restoration of the archives of the nation's newspapers and magazines on electronic platforms, and by leaving the authors free to make whatever additional deals they might choose to make for the wide range of future uses that technology may make practicable – or to deny future use rights altogether – the settlement here broadly advances the basic objectives of copyright law. The Register's testimony cited above, and the participation and approval of three leading authors organizations with no financial stake, stand foursquare against objectors' charge that the releases here are inconsistent with the interests underlying copyright law.

C. The releases are neither coercive nor punitive. Objectors' argument that *Firefighters* is distinguishable because the Agreement subjects class members to "coercive or punitive remedies" is wrong on the facts and the law. Compare Letter Br. 5-6 with Defendants' Br. 39-46. There is nothing coercive or punitive in provisions that resolve a dispute as to the extent of nonexclusive rights held (and licensable) by the publishers, when class members have a full and fair opportunity, after extensive and adequate notice, to either (a) opt out of the settlement altogether, or (b) remain in the settlement, receive compensation for past uses, and insist that their articles be taken down from existing archives and not added to new ones. *Firefighters* upheld court-approved consensual relief that might well adversely impact other (*i.e.*, non-minority) firefighters even though Congress had expressly prohibited courts from imposing such remedies. *Firefighters* did not narrowly cabin the "broader relief" it permitted by way of settlement to that which had no impact on named plaintiffs or others. Nor did the easement cases on which defendants rely (Defendants' Br. 44-45). To the contrary, those decisions hold that class action settlement agreements, like settlement agreements generally, are not infirm for being *agreements* in which each party gives something up in order to get something it wants more, thereby maximizing utility. The basic tradeoff in the *Literary Works* settlement made the authors *and* the publishers and their licensees better off than they would have been heading to an uncertain trial. Defendants' Br. 39-46.

D. Neither *Schwartz* nor *Blige* helps objectors. Objectors' reliance on *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 572 (E.D. Pa. 2001), and *Davis v. Blige*, 505 F.3d 90, 102 (2d Cir. 2007), is misplaced. In *Schwartz*, satellite subscribers challenged an NFL policy limiting the satellite distribution of NFL broadcasts to a multi-game package. The district court refused settlement approval for numerous dispositive reasons, including that the settlement purported to release claims concerning broadcast, cable, and internet distribution, even though the case concerned only satellite distribution. *Schwartz* is not authority for refusing approval

here, but simply a standard application of the “same factual predicate” rule applied in such cases as *Wal-Mart, supra*, which is easily satisfied here. *See* Defendants’ Br. 39-42. The amended complaint raised the issue whether the publishers had nonexclusive rights to include class members’ freelance works when the full periodical publication was delivered electronically by the publisher itself or by electronic archives such as LexisNexis and Westlaw. The Settlement Agreement compromised that issue, affording authors new compensation in exchange for the authors’ release of the publishers and their licensees from all claims concerning the same use of the same works already at issue.

Objectors’ selective and un-contextual quotation of language from *Davis* is equally unavailing. Nothing in *Blige* purports to prevent parties to copyright cases generally (or copyright class actions) from compromising their claims by providing additional payments in exchange for releases of all claims (past or future) regarding the works in suit, where those releases clearly afford a continuing non-exclusive license for those works.

The Supreme Court’s holding has no further bearing on resolution of this appeal. Objectors concede that “whether §411(a) is a ‘precondition’ that must be satisfied by every member of a class certified for litigation is not before the court,” but nonetheless suggest that it bears on this Court’s review of the fairness, reasonableness, and adequacy of the settlement. Letter Br. 9. To the contrary, review of the settlement under Fed. R. Civ. P. 23(e) depends upon the parties’ assessment of risk at the time of settlement – not on the subsequent judicial resolution of the underlying disputed legal issues. *See, e.g., Ehrheart v. Verizon Wireless*, No. 08-4323, 2010 U.S. App. Lexis 12174, at *10 (3d Cir. June 15, 2010) (“changes in the law after settlement do not affect the validity of the agreement and do not provide a legitimate basis for rescinding the settlement”); *Isby v. Bayh*, 75 F.3d 1191, 1196-97 (7th Cir. 1996) (“in this limited review, we are mindful that the district courts have been admonished to ‘refrain from resolving the merits of the controversy or making a precise determination of the parties’ respective legal rights,’ a directive that applies to our own inquiry as well”). *See generally* 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 7:17 (5th ed. 2009). Nor did the Supreme Court leave the slightest suggestion that what it repeatedly called the registration “*requirement*” was so flimsy and ineffectual that class counsel could nonetheless litigate over objection thousands of claims for unregistered works so long as one named plaintiff registered one work before filing suit. *See generally Reed Elsevier v. Muchnick, supra*; *see also id.*, Brief for the United States as *amicus curiae* (repeatedly stressing that the registration requirement is mandatory).

* * * * *

For the foregoing reasons and all the reasons set forth in the defendants' principal brief, the judgment below should be affirmed, so that the settlement funds collected more than five years ago for the freelance authors who comprise the class may at long last be distributed in accordance with the settlement's terms.

Respectfully submitted,



Charles S. Sims
Counsel for Defendants-Appellees

cc: Michael Boni, Counsel for Plaintiffs-Appellees
Charles Chalmers, Counsel for Objectors-Appellants
All Counsel for Defendants-Appellees

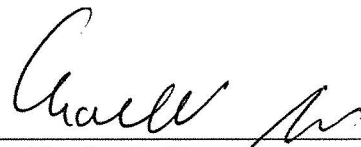
CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2010, I caused to be served, by FedEx Overnight Mail and electronic mail, a letter-brief for Defendants-Appellees dated June 23, 2010 upon:

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