

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

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**In re LITERARY WORKS IN  
(GBD)  
ELECTRONIC DATABASES  
COPYRIGHT LITIGATION**

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**Master Docket No. M-21-90  
(MDL # 1379)**

**DECLARATION OF IRVIN MUCHNICK IN SUPPORT OF OBJECTIONS  
TO SETTLEMENT**

I, Irvin Muchnick, under penalty of perjury, declare as follows:

1. In my declaration of April 26, 2005, I stated that it was impossible for a widely published class member such as myself to document the full record of the infringements of his copyrighted works by the defendants. In the current declaration I state my further belief that without detailed information from defendants and even third parties, no one could fully explain all the various content and business relationships between and among all the publishers and database companies involved in these infringements. From my extensive reading of public sources, such as newspapers, magazines, and Internet sources, over the course of the last decade or more, I am informed that there have been too many changes of ownership and contractual arrangements among the pertinent entities, as well as too many evolving technologies and configurations of infringing products, and of the licensing of disputed content (“Subject Works”), for any individual to be able to track. The only comprehensive information on this subject could be obtained by formal discovery. This point is important because the settlement parties represent that they are solving a complex and longstanding industry-

wide problem, but in my view they are doing no such thing.

2. Attached as Exhibit A is a complete original set of the class notice package for this settlement, including the claim form and instructions, which I received via postal mail.

3. Attached as Exhibit B is the complete list of publications at the settlement claim website, <http://www.copyrightclassaction.com>. According to my rough count, there are 26,000 publications from the United States and many foreign countries. (Reviewing just the letter “B,” I was able to identify publications apparently based in Australia, Canada, China, France, Great Britain, India, Ireland, Lebanon, Malaysia, the Philippines, and Thailand.)

4. The following history of my experience since 1994 – as an official of the National Writers Union (“NWU”), as a litigation consultant, and as a concerned infringed freelance author – bears on consideration of the settlement with respect to, at a minimum, defendants Thomson, Dialog, and ProQuest. This history also relates, at a minimum, to two newer online magazine and newspaper article retrieval services, HighBeam and FindArticles, which are not defendants but which appear to license their content from defendants Thomson and ProQuest, as well as, perhaps, from other defendants and participating publishers. These facts, in turn, relate to two areas of my and other class members’ objections. One is the size of the settlement fund and of the Category A, B, and C awards, which we believe to be inadequate in the face of clear evidence of years of systematic and willful infringement. The other area is the settlement agreement’s release of future claims and the related grant of rights by class members who fail to ask that their Subject Works be removed from the defendant databases (hereafter “License by

Acquiescence”). We believe the License by Acquiescence to be improper and beyond the power of the class representatives to authorize for absent class members.

5. In 1994 and 1995, as the organizer of an NWU campaign and then as the NWU’s assistant director and director of licensing (the background of which is developed in my prior declaration), I had numerous contacts with Information Access Company (“IAC”) and its current owner, defendant Thomson Corporation. I am informed that in the fall of 1994 IAC was sold by its former owner, Ziff-Davis, to Thomson for \$465 million. Attached as Exhibit C is a printout of a news article about this acquisition. These contacts included telephone conversations and emails I exchanged with Christine M. Gordon (“Gordon”), then director of copyright and licensing at IAC. Gordon currently holds the title of senior vice president of copyright and licensing at Gale Group, a division of Thomson, and is named as the responsible company official in the “Important Notice to Freelancers” posted at the Thomson website, a printout of which is attached as Exhibit D. In addition, these contacts included letters drafted by me for Jonathan Tasini, then president of the NWU, to Robert Howells (“Howells”), then president of IAC, and to W. Michael Brown, then president of Thomson Corporation, and to Jerrell W. Shelton, then president and chief executive officer of the Thomson Business Information division. Finally, these contacts included faxes from me to Sally Roberts Han of the IAC copyright and licensing department, and to Howells’ successor as president of IAC, Morris Goldstein. A set of true and correct copies of NWU correspondence with Thomson and Thomson divisions from this period is attached as Exhibit E. Except for the 1994 emails from Gordon, I do not possess copies of Thomson’s side of this correspondence, but they should be in the possession of Thomson and of associational plaintiff NWU. In addition,

attached as Exhibit F is a complete printout of the postings at my web log, or “blog,” with summaries of these exchanges and an interpretive narrative.

6. In 1994 and 1995, after complaints IAC received from the NWU, IAC “blocked” subsequent full-text delivery, via certain IAC products, of the works of the authors in the NWU’s “Operation Magazine Index” campaign, including my own. This was explained in my prior declaration. Specifically, investigations by the NWU revealed that complaining authors’ works were no longer available at an IAC product called InfoTrac, which could be accessed at many public library computer terminals.

7 However, I subsequently discovered that IAC, whose name, I am informed, was changed to Gale Group after its purchase by Thomson, went right on infringing my works by other means. My prior declaration explained infringements at HighBeam and FindArticles; these infringements were accompanied by statements that the content was provided by Gale Group. Subsequent to the filing of my prior declaration, my *Washington Monthly* article, “The (THWACK!) Deregulation of (THUMP!) Pro Wrestling,” was removed by HighBeam and FindArticles. Attached as Exhibit G are printouts of the web pages of searches at HighBeam and FindArticles showing that the article is no longer available there. The significance of this with respect to the objections to the settlement is explained below.

8. I also discovered that infringements of my *Washington Monthly* article continued over the years at LexisNexis. Attached as Exhibit H is a printout of the *Washington Monthly* article that was delivered to me via email attachment by the LexisNexis server at the Doe Library, University of California, Berkeley, on May 18, 2005. The printout states that the article was supplied by an IAC/Gale Group/Thomson

product (meaning a service of providing content) called ASAP.

9. From the perspective of class members such as myself, one aspect of this history, in particular, raises serious questions with respect to willfulness, a key factor in assessing damages. At the bottom of Exhibit H is the note that the “load-date” of the *Washington Monthly* article was August 11, 1995. Assuming this date is when the content was placed at the disposal of LexisNexis, it means my article has been available on that database for the last 10 years. Moreover, the “load-date” was during the very month when I was exchanging faxes about the NWU’s copyright complaints with IAC president Goldstein. See Exhibit E, referenced *supra*.

10. The correspondence in Exhibit E also exposes a number of false and/or misleading statements by Thomson. Perhaps most striking was Thomson’s contention that it did not have the ability to provide publisher-licensors with transaction-based data about orders of individual articles. The NWU obtained and shared with IAC president Goldstein a 1994 IAC royalty statement to *Harper’s* magazine, which refuted that contention. The persistent and non-trivial nature of these false and misleading statements contributes to the pattern of willful action by the database defendants to continue their infringement unabated.

11. As explained in my prior declaration, from 1997 to 2000 I was a consultant to the plaintiffs’ attorneys in *Ryan v. CARL*, a copyright class action against the UnCover article delivery service. From 1995 to 1997 UnCover and its affiliate, the CARL Corporation, were owned by Knight Ridder Information, Inc., also owner and operator of the Dialog family of databases. In 1997 Knight Ridder Information was purchased by a British company, M.A.I.D., which, I am informed by public sources,

renamed the combined new entity Dialog Corporation plc. In 1999 Dialog Corporation plc was purchased by Thomson. Attached as Exhibit I is a printout of a news article about this acquisition.

12. Over the course of two and a half years the *Ryan* plaintiffs and attorneys filed a motion for a preliminary injunction (within weeks of the filing of the complaint); a motion for a temporary restraining order (after adversarial discovery produced evidence of willfulness and misrepresentations to the court by the defendants); a motion for summary adjudication on the copyright issue (which was granted by the court in the fall of 1998); and a motion for class certification (which was granted by the court in 1999). The settlement was reached in the spring of 2000 almost literally on the eve of a hearing of the defendants' interlocutory appeal of the summary judgment. The settlement was for a total of \$7.25 million. None of that reverted to the defendant. An unclaimed portion was donated to an organization working with authors. The settlement allowed for the possibility for class members entitled to statutory damages to receive up to \$30,000, by establishing a pool for such claims. The claims rate was such that qualified claimants did receive \$30,000 per article. The settlement also covered unregistered copyright holders as well as those who had registrations, but were not eligible for statutory damages. A separate pool was established for these class members. Those awards far exceeded what is available in this settlement. I received \$750 for the infringement of one, unregistered, article. As a result of litigation to find out about the handling of settlement proceeds, which I describe in my previous declaration, I received from class counsel in that case a document which I was told described the settlement results. A true copy is attached hereto as Ex. OO.

13. When the United States District Court for the Northern District of California ruled in favor of authors on interpretation of Section 201(c) of the Copyright Act, the legal community debated whether that interpretation, which applied to *Ryan* defendant UnCover, a fax delivery service, also would apply to electronic database companies, such as the defendants in this case. The reason was that in 1997 the United States District for the Southern District of New York had ruled against authors on this issue in *Tasini v. Times*. However, when the Second Circuit Court of Appeals reversed the district court ruling in *Tasini*, the interest of plaintiffs' attorneys in copyright class actions on behalf of authors surged. It was at that point that I began serious discussions with Hosie Frost Large & McArthur to consult for what in August 2000 became *Posner v. Gale Group*, the first of the copyright class actions that were later consolidated in this case. Copyright class action activity was obviously slowed when the United States Supreme Court subsequently agreed to hear the defendant-publishers' *Tasini* appeal, but there was no doubt about the applicability of Section 201(c) across the board following the Supreme Court's June 2001 ruling in favor of the plaintiff-authors.

14. As noted in my prior declaration, UnCover was not the only product owned and operated by Knight Ridder Information and Dialog plc that infringed my works. In 1999, at the very time when *Ryan v. CARL* was being settled after the plaintiffs won court rulings for summary judgment and class certification, Dialog launched its first web-based pay-per-view product, DialogSelect Open Access, and that product infringed my *Washington Monthly* article, as well as other works of mine. Attached as Exhibit J is a printout of the *Washington Monthly* article as ordered from DialogSelect Open Access on April 28, 2005, which states that the source of the content was IAC/Gale

Group/Thomson. Thus it appears that changes in ownership of infringing entities, and of entities defending copyright litigation, has not deterred continuing willful infringements and even has widened the range of those infringements.

15. Infringements of my *Washington Monthly* article at DialogSelect Open Access, like those at HighBeam and FindArticles, ceased after the filing of my prior declaration. Attached as Exhibit K is a printout of my web search at DialogSelect Open Access confirming this on July 12, 2005.

16. My ongoing daily investigations show that, in contrast with the “blocks” of the *Washington Monthly* article at HighBeam, FindArticles, and DialogSelect Open Access, the article continues to be infringed by another defendant, LexisNexis. See paragraph 8, *supra*. The reasons for the differences in the practices of settlement defendants are not readily apparent. Why did DialogSelect Open Access, a product owned and operated by Thomson, block this article while other Thomson products still do not? Why did HighBeam and FindArticles, which represent themselves as licensees of Thomson, block this article while Thomson’s own ASAP, supplying defendant LexisNexis, still does not? Though neither LexisNexis, HighBeam, nor FindArticles has permission to reuse my *Washington Monthly* article, HighBeam and FindArticles decided to stop infringing this work while LexisNexis did not. Why? These questions highlight the extraordinary and prejudicial levels of confusion surrounding crucial choices that I and other class members must make on whether to remain in the class or opt out.

17. Further, that confusion goes beyond the inconsistent responses of individual defendants, and units of defendants, when confronted with evidence of ongoing infringements. It also extends to conflicting public statements by the plaintiff



team itself. For example, after preliminary approval of the settlement the associational plaintiffs set up a website, <http://www.freelancerights.com>, which included an “FAQ/QUERIES” page. Attached as Exhibit L is a printout of that page on July 9, 2005. The page includes two separate questions about whether HighBeam is covered by the settlement release. In both cases the answer, in part, is: “Highbeam.com is not a party to the Settlement and nothing in this litigation or the Settlement permits highbeam.com to infringe freelance works.” Moreover, associational plaintiff NWU is engaged in a public campaign against infringements by FindArticles. Attached as Exhibit M is a printout of the page at the NWU website announcing the FindArticles campaign on March 2, 2005. In a similar vein mediator Kenneth Feinberg asserted that the settlement release “simply does the obvious” and that “alleged infringers who are not formal parties to the settlement are not released.” (Declaration Of Kenneth R. Feinberg In Opposition To Motion To Vacate Preliminary Approval And Motion To Establish New Procedures For Final Approval And Award Of Attorneys’ Fees, paragraph 11.) The settlement agreement’s release language, however, includes, among other terms, the defendants’ “licensees,” which both HighBeam and FindArticles clearly seem to be. Thus, in the event that class members choose to sue HighBeam and FindArticles, as I and others have contemplated, we face the likelihood that these defendants will invoke the settlement release language as a defense. Additionally, class members simply lack basic information as to whether they must opt out in order to retain their ability to sue those two entities, or whether they can do so while remaining within the settlement.

18. Plaintiffs’ counsel’s fee application refers to work on “a partial settlement with the New York Times in connection with its Restoration Request website”

(Application Of Class Counsel For Award Of Fees, Reimbursement Of Costs And Service Awards To The Class Representatives (“fee application”), p. 4). Attached as Exhibit N is a printout of the referenced Restoration Request web page. I myself never submitted a “restoration request” for my own articles first published in *The New York Times*. Yet infringement of those works has continued. Attached as Exhibit O is a printout of my *New York Times Magazine* article, “Joe Montana: State of the Art,” as ordered through LexisNexis on May 18, 2005. Attached as Exhibit P is a printout of my *New York Times Magazine* article, “Rich Makes His Pitch,” as ordered through LexisNexis on May 18, 2005. Attached as Exhibit Q is a printout of my *New York Times Magazine* article, “Joe Montana: State of the Art,” as ordered through ProQuest, via the *New York Times* website archive, on May 18, 2005. Attached as Exhibit R is a printout of my *New York Times Magazine* article, “Rich Makes His Pitch,” as ordered through ProQuest, via the *New York Times* website archive, on May 18, 2005.

19. The fee application further refers to work on a “standstill agreement” with defendant ProQuest (p. 5). Yet infringements of my works by ProQuest have continued. See Exhibits Q and R, referenced *supra*. Attached as Exhibit S is a printout of my *Washington Monthly* article, as delivered to me via email attachment by the ProQuest server at the Doe Library, University of California, Berkeley, on May 18, 2005.

20. Before reading about a “standstill agreement” with ProQuest in the fee application, I was not aware of it. I then searched the website of associational plaintiff Authors Guild and found that it had archived references to the *New York Times* “Restoration Request” settlement; however, I could find no parallel references in the archive to a “standstill agreement” with ProQuest.

21. Attached as Exhibit T is a printout of my *San Francisco Chronicle* article “The Chancellor’s Big Test,” as ordered from LexisNexis on May 18, 2005. Attached as Exhibit U is a printout of my *San Francisco Chronicle* article, “A Fool for Justice,” as ordered from LexisNexis on May 18, 2005. Attached as Exhibit V is a printout showing that these *San Francisco Chronicle* articles are also available from DialogSelect Open Access. Attached as Exhibit W is a printout of my *San Francisco Chronicle* article, “The Chancellor’s Big Test,” as delivered by the server of another article retrieval service, NewsBank, at the Berkeley Public Library on May 18, 2005. Attached as Exhibit X is a printout of my *San Francisco Chronicle* article, “A Fool for Justice,” as delivered by the NewsBank server at the Berkeley Public Library on May 18, 2005.

22. Attached as Exhibit Y is a printout of a 1994 article from *Online*, a trade magazine, entitled, “IAC unveils new document delivery service with full-text access.” This describes the development of IAC’s InfoTrac at the time of it was receiving its first sets of complaints from the associational plaintiff NWU.

23. Attached as Exhibit Z is a printout of a 1996 article from *Folio*, a trade magazine, entitled “K-III pays freelancers for electronic distribution.” This describes an agreement by K-III Magazines to “distribute \$30,000 in retroactive pay for articles that had been obtained through Information Access Company’s database in 1993.”

24. Attached as Exhibit AA is a copy of a 1996 article from *Online*, entitled “A Conversation with IAC’s Mike Kinkead.” Mike Kinkead was IAC’s vice president for planning. In the article Kinkead describes his vision and strategy for the company, including a “paradigm shift” of online full-text access. Kinkead also states: “... I think that the authors that we’ve talked to see a publisher’s brand is very important – although

they also want to share in the revenue stream. We're going to see more cooperation between authors and publishers where the authors are sharing in some of the revenues."

25. Attached as Exhibit BB is a printout of a 1996 news release issued by IAC, entitled "Web access to InfoTrac SearchBank is a hit with users – 779,746 hits a day reported by Information Access Company." The item further states: "Explosive growth in Use of World's Largest On-Line Library Reference Service; Web and Internet Access Combined Totals Well Over 2 Million Hits Per Day." Dan Woods, vice president for marketing at IAC's Library Division, is quoted as saying, "As these figures reveal, system usage is going through the roof."

26. The copyright for my *Washington Monthly* article was registered in 1999. See Exhibit A of my prior declaration. On May 16, 2005, I submitted to the United States Copyright Office registration applications for the copyrights of my *New York Times Magazine* and *San Francisco Chronicle* articles. Attached as Exhibit CC is proof of receipt by the Copyright Office of the Express Mail package containing those applications. (The article "A Fool for Justice" actually was first published in *Lingua Franca* magazine under the title "It's That Guy Again.") Thus, on information and belief, it is conceivable that I could successfully sue *The Washington Monthly*, LexisNexis, Thomson, Dialog, ProQuest, HighBeam, and FindArticles (for infringements of my *Washington Monthly* article); *The New York Times*, LexisNexis, Thomson, Dialog, and ProQuest (for infringements of my *New York Times Magazine* articles); and the *San Francisco Chronicle*, LexisNexis, Thomson, Dialog, and NewsBank (for infringements of my *San Francisco Chronicle* articles). But countless contradictory statements and vague settlement release language impede an intelligent and informed determination of

whether my best move is to stay within the settlement, opt out, or both stay within the settlement *and* file separate actions against parties which were either released or not released. Further, should I choose the latter course, and even if the courts' interpretation of the settlement release ultimately favored me, my costs in pursuing separate litigation surely will have been made more burdensome by this lack of clarity. I do not believe such an outcome is what is intended by class action litigation.

27. Attached as Exhibit DD is a set of copies of trade press articles with history of the development of the electronic database industry:

\* *Online*, November 1988, "DIALOG's new era." This is about the purchase of Dialog by Knight-Ridder from Lockheed for \$353 million. The article includes this passage: "Dick Kollin, President, Telebase Development Corporation, which operates EasyNet, the megagateway service, foresees Knight-Ridder's general direction: 'I don't think anybody would ever pay 353 million dollars for a library service. Knight-Ridder is going to make a major bid to be the center of electronic information activity to a much larger audience.'"

\* *Online*, July 1991, "Online synergies: powerful combinations add up."

\* Knight-Ridder/Tribune News Service, August 18, 1993, "Dialog looking for new ways to attract info seekers as client base peaks."

\* *Searcher*, September 1994, "'Find-and-Fetch' services on the rise: UMI, IAC, and ISI announce new electronic document delivery."

\* *Searcher*, September 1995, "A day in the life of KRI." This article includes this passage: "... KRI has a real chance to become a hot new fastfood franchise

on the Information Superhighway.”

\* *Searcher*, September 1995, “A new day dawns: KRI acquires CARL.” In this article the president of CARL is quoted as calling libraries “fabulous retail outlets.”

\* *Searcher*, September 1996, “The future and KRI.” This article states: “Appropriate value vs. predictable pricing is a critical issue facing the industry.... Prices will combine measures of information received and time spent browsing. They may continue to offer a variety of plans based on ‘types of use’ – ‘episodic use,’ subscriptions for large customers, per-item cost, etc....”

\* *Information Today*, January 1997, “New president at KRII: Jeff Galt.” This article discusses, among other things, flat-fee subscription products and various revenue models for both the individual consumer and institutional markets.

\* *Online*, March-April 1997, “A Conversation with KRI’s Jeffery S. Galt.” The company president is quoted as saying, “[T]he change in business model is one away from the ‘pay for the drink’ kind of approach.”

28. I am informed that this spring, even before the Court preliminarily approved the settlement, Thomson launched a new product called Goliath, a subscription-based article retrieval service, in what the trade magazine *Information Today* characterized as a “quiet rollout.” Attached as Exhibit EE is a printout of the article about this from *Information Today*’s NewsBreaks website. According to the article, Goliath subscriptions are priced at \$349.95 a month.

29. *Information Today* NewsBreaks also reported this spring that *The New York Times* was changing its business model for selling archived articles online.

According to this report, “New York Times Content Eases Toward Paid Subscription,” a printout of which is attached as Exhibit FF, *The Times*’ current arrangement of selling image copies of archived articles through ProQuest has yielded annual revenues of \$1 million. Thus it appears that the industry is poised to use the settlement to exploit new business models that will quickly dwarf a \$10-to-\$18-million settlement fund designed to recompense authors for many years of systematic infringement, which in turn has laid the foundation for these future revenue streams.

30. The above-cited events occurred in the context of the 2001 Supreme Court ruling in *Tasini v. New York Times*. Some of the important background of the fallout from this can be found in the following trade press articles, a set of copies of which is attached as Exhibit GG:

\* *Searcher*, January 2001, “Final Hours: Tasini Goes to the Supreme Court.”

\* *Information Today NewsBreaks*, August 14, 2001, “National Writers Union Reaches Agreement with Contentville; Freelance Writers Make Significant Progress in Royalty Compensation.”

\* *Information Today NewsBreaks*, August 21, 2001, “Freelance Writers Turn Up the Heat with More Lawsuits; Major Database Providers Under Siege.”

31. The above-cited developments also gave rise to widespread discussion within the information industry on how damages and/or royalties might be calculated. Attached as Exhibit II is the article “Newspaper Publishers in the Post-Tasini Era,” from the March 2002 issue of *Searcher*.

32. Attached as Exhibit JJ is evidence of the ongoing infringement of a

Category C Subject Work of objector Judith Stacey, as referenced in her accompanying declaration. This is a printout of a LexisNexis search showing the availability of the full text of her 2001 article, “Family Values Forever.” This work was first published in *The Nation*, a publication listed in Exhibit B, referenced *supra*.

33. I can confirm that objector Jack Sands is a class member with a Category A claim because I assisted him in filing his claim in *Ryan v. CARL*. That claim was for an excerpt of his book *Coming Apart at the Seams*, which was first published in *Journal of Business Strategy*, a publication listed in Exhibit B, referenced *supra*. According to Mr. Sands’ Copyright Office registration, TX-3-510-486, the date of publication was February 28, 1993, and the date of registration was March 15, 1993.

34. Objector Abraham Zaleznik also was a *Ryan* claimant and I can confirm that he is a class member in this case and likely has multiple claims in more than one category. Attached as Exhibit KK are four sheets of notes. The first two sheets are a printout of a partial and crude search under Mr. Zaleznik’s name at LexisNexis; it shows the availability of three articles of his, which were first published in *Harvard Business Review*, and it suggests that the complete search would show additional works of his. The last two sheets of this exhibit show both a partial listing of published articles of Mr. Zaleznik’s, as culled from his online curriculum vitae, and a list of several of his copyright registrations that are pertinent to his class status.

35. The mediator in this case has stated that the December 31, 2002, cutoff date for Category B claims was designed “to prevent anybody from ‘gaming the system’ by taking advantage of the announced settlement.” Declaration of Kenneth R. Feinberg in Opposition to Motion to Vacate Preliminary Approval and Motion to Establish New



Procedures for Final Approval and Award of Attorneys' Fees, paragraph 11. I do not understand this rationale, for the settlement was not announced until March of 2005. However, there *is* good reason to suspect some of the class representatives of “gaming the system.” Attached as Exhibit LL are printouts of all the copyright registrations of plaintiffs Ruth Laney (“Laney”) and Miriam Raftery (“Raftery”), as captured by me from the Copyright Office database. On September 5, 2000 – weeks after the class actions were filed – Laney registered copyrights for approximately 45 old works, dating from 1999 to as far back as 1989. In a similar flurry of Copyright Office paperwork in September 2000, Raftery registered literally hundreds of old works. These registrations had the ultimate effect of elevating to Category B what would otherwise have been Category C claims – an effect made possible by the fact that they beat a December 31, 2002, deadline that was unbeknownst to absent class members until this year.

36. Public estimates by the associational plaintiffs of damages suffered by class members as the result of database industry infringements have diverged dramatically from the \$10-to-\$18-million preliminary settlement fund. In 2001 associational plaintiff American Society of Journalists and Authors published an article stating that associational plaintiff NWU estimated damages of between \$2.5 billion and \$600 billion. See Declaration Of Charles D. Chalmers In Support Of Motion To Vacate Preliminary Approval, and Exhibit A thereto. Also in 2001, the trade association Text and Academic Authors published a newsletter article, citing NWU as the source, stating that damages were estimated at \$600 million. Attached as Exhibit MM is a printout of the article from the Text and Academic Authors website. I and other class members believe that the differences between \$10-to-\$18-million and \$2.5-to-\$600-billion, and between

\$2.5-to-\$600-billion and \$600 million, are non-trivial and should be reconciled and explained in detail in Court filings in support of the settlement.

37. The Plaintiffs have told the Court that “Muchnick ... could have come forward at any time during the five years of this litigation, and intervene or make contact [*sic*] with Plaintiffs’ Co-Lead Counsel or the Associational Plaintiffs, but he chose instead to lie in wait ...” Plaintiffs’ Memorandum in Opposition to Motion to Compel, p. 3, footnote 3. That assertion is outrageously false. In fact, I remained in constant and cordial contact with Hosie Frost Large & McArthur in general, and with Spencer Hosie (“Hosie”) personally, following the expiration of my consultant agreement with them in March 2001. At various points I passed along contacts by prospective clients; at another point Hosie invited me to his office to discuss collaborating on a book about another case of his (but later canceled the meeting). Attached as Exhibit NN is a set of true and correct copies of some of my email exchanges with Hosie. On June 25, 2001, after I informed him of the Supreme Court ruling in *Tasini*, Hosie wrote to me, “Good news; we are good to go.” On June 27, 2001, I wrote to Hosie that I expected “to be an interested spectator as more of this unfolds.” On June 29, 2001, Hosie wrote back, “Thanks. A very fine [*Tasini*] opinion, and the court cited the Posner amicus brief. We are off and running.” On January 11, 2002, Hosie wrote to me, “And, peculiar as it may seem, this case is about as straightforward as they come.” On May 9, 2002, Hosie wrote to me, “The settlement mediation is going no where, and we will have to try the case, which is my preference in any event.” I wrote back the same day, “I’m sure you’ll be advocating my view that the clock on willfulness should start ticking not with the Supreme Court decision last June but with the many ‘constructive notice’ letters sent years ago by authors and authors’

organizations.” Hosie wrote back 10 minutes later, “I do agree on willfulness. Our challenge will lie in crafting a prospective remedy that we can impose through the suit. No more all rights contracts.” On January 25, 2005, I wrote to Hosie: “Hi, hope all’s well with you and yours. Once a year, along with checking the groundhog’s shadow, I inquire as to whether there’s news in the consolidated class action mediation. The word on the cyberstreet is that a settlement is imminent. Then again, that’s been the word for years. Candidly, I’m troubled by the fact that it’s obvious the defendants have been using the passage of time to launch new infringing products and partnerships that effectively become ‘facts on the ground.’ This is the same dynamic that persisted with the Tasini case before it reached the Supreme Court, with The New York Times and other publishers using a standstill in litigation to coerce rather than negotiation prospective ‘solutions’ in the form of all-rights contracts. If you’re at liberty to offer any information or insights at this point, I’d appreciate it.” I received no response of any kind.

Executed this      <sup>th</sup> day of July, 2005, in Berkeley, California.

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Irvin Muchnick