

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

**In re LITERARY WORKS IN
ELECTRONIC DATABASES
COPYRIGHT LITIGATION**

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

**OBJECTIONS TO PROPOSED CLASS SETTLEMENT BY CLASS MEMBERS
IRVIN MUCHNICK, CHARLES SCHWARTZ, ABRAHAM ZALEZNIK, JACK
SANDS, TOD PITOCK, JUDITH STACEY AND JUDITH TROTSKY**

Objections to Class Certification.

1. At least a portion of the proposed class lacked adequate representation in the negotiation of the settlement. The class proposed for certification includes owners of unregistered copyrights (Category C). This is an enlargement of the originally alleged classes in the three consolidated class actions. Each of those actions alleged a class, or classes, of the owners of registered copyrights only. There have been no separate representatives, or counsel, representing the owners of unregistered copyrights. The proposed settlement places the owners of unregistered copyrights in conflict with the owners of registered copyrights, most dramatically by the provision for reduction of Category C awards in the event of insufficient settlement funds to cover all claims. All of the individual named plaintiffs described their status as holders of registered copyrights in alleging the suitability as class representatives. All of them hold A and B claims, many of them holding a large number of such claims. Even if they hold some Category C claims their interests are dominated by their A and B claims under the settlement.

2. The negotiation of the proposed settlement was conducted predominately by, and dominated by, employees or officers of the Associational Plaintiffs. These plaintiffs alleged their representational capacity to be solely related to obtaining injunctive and declaratory relief. They are unqualified to serve as class representatives for damage claims or related negotiations, due to lack of typicality. Fed.R.Civ.Pro. 23(a)(3). Association plaintiffs in general are restricted to representing their members. Therefore, in the negotiation of the proposed settlement all class members lacked adequate representation. Associational Plaintiffs have interests that diverge from the interests of individual class member to maximize their recovery for infringements by the defendants. In 2000, the year these actions started, the National Writers Union stated: “But our first choice is not to engage in a legal war that ties everyone up in court and creates an all-out war over rights. Such draconian actions serve only to create conflict and instability in the industry.” (Paula J. Hane, “Freelance Authors Turn Up the Heat,” *Information Today NewsBreaks*, August 21, 2000.) The mediator describes the persons who participated actively in the mediation. All of these people are representatives of the Associational Plaintiffs, with the exception of plaintiff James Gleick. (Declaration of Kenneth R. Feinberg In Opposition to Motion to Vacate Preliminary Approval etc., ¶ 9.) James Gleick was an officer of one of the Associational Plaintiffs during at least a portion of the period these actions have been pending. (Consolidated Amended Class Action Complaint, ¶ 16.) The ASJA promotes its ability to put its members into contact with editors and publishers, to facilitate the members obtaining work assignments. (<http://www.asja.org/benefits/>) This would certainly be jeopardized by pursuing substantial monetary damages against publishers.

3. The settlement proposed by the named plaintiffs abandons a portion of the class and does so in a deceptive and confusing manner. This action demonstrates that the class representatives are not adequate for failure to faithfully represent the class that they undertook to represent. The proposed settlement class includes all owners of literary copyrights. The Settlement Agreement, including its six identified exhibits, does not reflect that any subset of the class is excluded from the settlement compensation. However, the Notice of Class Action Settlement, and the claim form, advise the class that works in “scientific and research-oriented medical journals” (Notice, Sect. I.B.1, p.2.) (Claim Form, as available on settlement website.) are not included in the settlement. Placing these exclusions outside the settlement agreement permits the conclusion, from review of the Settlement Agreement, that those subject to these exclusions are within the class and will have released all claims by the settlement. Plaintiffs misled the Court about the definition of the class when they sought preliminary approval of the settlement. They described the settlement class as “all persons who own a copyright under the United States copyright laws in an English language literary work that, at any time after August 14, 1997, was reproduced ... by any Defense Group member, without the person’s authorization.” (Memorandum of Law In Support of Plaintiffs’ Motion For Preliminary Settlement Approval, p. 4.) Further, the form of order for preliminary approval submitted by the plaintiffs, which was executed by the Court, contains a definition of the class which clearly **includes** these scientific or research-oriented medical works that the Notice and Claim Form tell class members are excluded. (Order For Preliminary Settlement Approval, ¶ 7, p. 2.) That form of order is an exhibit to the Settlement Agreement. (Settlement Agreement, Ex. C.) Finally, the form of Notice (which includes the form of Claim Form) is, pursuant to the Settlement Agreement, subject

to approval by counsel for the defendants. (Settlement Agreement, ¶ 8, p. 22.) The situation strongly suggests that the plaintiffs and defendants colluded to obtain a class definition that would include the scientific and medical works, and thus they would be subject to the settlement releases, but to advise the class that no claims could be made for such works, and to mislead the Court from being aware of this arrangement.

4. The proposed settlement contains so many fundamental, clear defects, under well-established law regarding the management of class actions, that it demonstrates that class counsel are inadequate, thus rendering the class representatives inadequate. As part of this objection, inadequacy is further demonstrated by the failure of the class counsel to vigorously pursue the action, including the failure to require defendants to answer the complaints; the failure to move for class certification; the failure to seek injunctive relief for owners of registered copyrights in the face of continued, willful infringement by the defendants and the apparent failure to conduct **any** adversarial discovery.

Unfair and Unreasonable Settlement Provisions.

5. The provisions in the Notice and the Claim Form which instruct that claims can not be made for works published in scientific and academic journals is an abandonment of a portion of the alleged class, as more thoroughly described in Objection 3, supra. This is manifestly unfair and unreasonable. Moreover, the exclusion is unreasonable for its defining the exclusion by the publication in which the work was published, as opposed to the subject matter of the work. This provision contributes to the appearance of collusion on the face of the settlement.

6. The proposed settlement contains a provision pursuant to which, in the event the settlement fund is insufficient to pay all claims, the awards for Category C Subject Works

can be reduced, to zero, while the awards for Category A and B remain undiminished. (§ 4.f., p. 15-16.) (hereafter “Category C Reduction”) This provision is clearly to the benefit of holders of A and B claims, and detrimental to the holders of C claims. All of the named plaintiffs brought their actions, and the consolidated complaint, only on behalf of the owners of registered copyrights. One constituent part of the C Category consists of copyright owners who have never registered their claim to copyright for their work. In all likelihood this portion far exceeds, measured in number of works, or in numbers of copyright owners, the other constituent part of the C Category, which is copyright owners who registered after December 31, 2002. (§ 4.b., p. 14.)¹ Class members holding Category C claims were not adequately represented as there was no separate representation for them by a representative holding a claim typical for that group, and who did not suffer from a conflict of interest. Some of the named, individual, plaintiffs may hold Category C claims but they all hold such A and B claims as to place them in a conflict of interest with respect to representing the interests of the C claimants. The Category C Reduction is manifestly prejudicial and unfair to holders of C claims. Plaintiffs have advised the Court that it is justified because the “risk (of a reduction of C awards) is in fact exceedingly remote.” (Plaintiffs’ Memorandum In Opposition to Non-Party Irvin Muchnick’s Motion to Vacate the Preliminary Settlement Approval, p. 14.) Even if this is a factually justified estimate, the fact remains that the risk falls entirely on the C Category. Whatever the risk it should be shared pro-rata among all groups which might be affected. If it is truly a remote risk, the Category A and B claimants

¹ There is a confusing ambiguity in the definition of the three categories. It is not clear whether a copyright owner who registered their work “in time to be eligible for statutory damages under 17 U.S.C. § 412 (2),” but after December 31, 2002, has a claim under Category A or C. This ambiguity renders the settlement, and the Notice, unfair and unreasonable.

have no reason to resist prorata approach. Moreover, the unfairness of the Category C reduction is amplified by the fact that its operation would result in C claimants losing all compensation for past infringement, in order to preserve from any reduction the compensation to As and Bs for future exploitation of their works. The Category C claimants required a sub-class with separate, adequate representation and separate counsel. The failure of the plaintiffs and their counsel to provide for this when negotiation of the these provisions arose results in, and demonstrates, a lack of adequate representation for the class. It further demonstrates collusion on the face of the settlement.

7. The failure to provide separate representatives, and counsel, for the three categories established in the proposed settlement is unfair. This is particular true for holders of Category C Subject Works, which are seriously prejudiced by the possible reduction of their awards, and by the registration cutoff date of December 31, 2002. According to statements by the plaintiffs, and the mediator, the vast majority of class members will be covered primarily, or exclusively, by Category C. (Plaintiffs' Memorandum In Opposition to Non-Party Irvin Muchnick's Motion to Vacate the Preliminary Settlement Approval, p. 14; Declaration of Kenneth R. Feinberg In Opposition to Motion to Vacate Preliminary Approval etc., ¶ 10.) Given the conflict between Category C claimants and Category A & B Claimants, and given that the majority of Category C Claimants are owners of unregistered copyrights, a group not encompassed by the complaints filed by the named plaintiffs and therefore an expansion of the class instituted in the process of the negotiations, the failure to provide for separate representation for Category C, while agreeing to a settlement which places them at a disadvantage to As and Bs, contributes to the appearance of collusion on the face of the settlement.

8. The proposed settlement provides a definition of Category B Subject Works that is arbitrary and prejudicial to the rights of some class members. It cuts off eligibility for Category B, which generally includes copyright owners who have registered their copyright claim too late to qualify for statutory damages. The cutoff date is December 31, 2002. This date has no known significance to the class claims. The mediator states that this date was chosen to prevent class members from “gaming the system” by taking advantage of the announced settlement. (Declaration of Kenneth R. Feinberg In Opposition to Motion to Vacate Preliminary Approval etc., ¶ 11.) In view of the fact that the settlement was not announced until April 2005 the explanation makes no sense. The “gaming” that Mr. Feinberg mentions must be the idea that a C Category claimant would quickly register their work to qualify for the more generous B Category awards. However, that kind of gaming is not possible when the settlement is not known to the class. This cutoff is 2 years and 3 months before the settlement was disclosed. During that time there were undoubtedly class members registering their works, and thus qualifying for Category B but for the cutoff, for reasons entirely unrelated to the settlement. The Associational Plaintiffs frequently encourage their members, or authors in general, to register their works. This provision is both unfair to those who registered before the settlement was announced, and unreasonable. The agreement by plaintiffs and their counsel to this cutoff date results in, and demonstrates, a lack of adequate representation for the class.

9. **should this be in adequate rep???** The failure of the plaintiffs and their counsel to vigorously pursue the litigation results in, and demonstrates, a lack of adequate representation for the class. In a period of more than four years from initial filing of complaints the plaintiffs did not require the named defendants to answer the complaints, nor

did the plaintiffs undertake any of the other proceedings, such as discovery, constituting preparation for trial. They did nothing to obtain the certification of a class. Despite recognition that infringement by the defendants continued unabated during this time, the plaintiffs and their counsel did nothing to pursue the injunctive relief for which they prayed in the complaints. This failure to pursue the litigation, particularly after the 2001 *Tasini* decision of the Supreme Court affirmed the 1999 decision of the Second Circuit determining that defendants were infringing the rights of freelancers, disarmed the plaintiffs in the negotiations, and this grew more disabling as the length of time with no litigation grew longer. Plaintiffs state that agreement on the principal terms of the settlement was reached in April 2003. (Application of Class Counsel For Award of Fees, Reimbursement of Costs and Service Awards to the Class Representatives, p. 1.) This likely included the amount of the settlement fund. By failing to conclude the settlement for two more years the plaintiffs and counsel allowed the defendants two years of free use of the class members' Subject Works.

10. **combine with below.** The agreement by plaintiffs and their counsel to a provision by which class members will, by not stating a refusal, grant all Defense Group Members and Supplemental Participating Publishers (and the other parties covered by the release) a non-exclusive, irrevocable, license in perpetuity to use (see objections with regard to detailed settlement deficiencies), all of the class members' works covered by the settlement is unfair and unreasonable. Further, the plaintiffs and their counsel agreed by virtue of the proposed Notice, that no notice of this drastic and confiscatory provision will be given to the class. These provisions, separately and combined, are so manifestly unfair and unreasonable that they result in, and demonstrate, a lack of adequate representation for the class, and demonstrates collusion on the face of the settlement.

11. The “Participating Publishers” provisions of the proposed settlement amount to a right given to the named defendants, particularly to the Database Defendants, to offer to non-defendant publishers the opportunity to purchase a release from copyright liability to the class by agreeing to contribute to the settlement fund. This structure means that these Participating Publishers are gaining releases without the class gaining any additional compensation for the infringements by the Participating Publishers. Each of these Participating Publishers is liable, in their own right (as opposed to indemnities they might owe to database companies), for their infringements. Their providing a copy of Subject Works originating in their publication to each separate database is an infringement. This structure amounts to releasing valuable claims (valuable because the issue of liability for infringement is undisputed and only the question of damages, either statutory for owners of copyrights registered with three months or before infringement, or actual for other registered copyrights, is to be determined) without any consideration. This renders the settlement inadequate. It is unfair and unreasonable. The agreement by plaintiffs and their counsel to these provisions results in, and demonstrates, a lack of adequate representation for the class. It also demonstrates collusion on the face of the settlement.

12. The Settlement Agreement defines a Category A award as available if a class member “registered [their work] ... in time to be eligible for statutory damages under 17 U.S.C. § 412 (2)” (Settlement Agreement, § 4.a., page 14.) As pertinent here, that means in essence the registration must have an effective date before an infringement (including a series of infringements by the same infringer) started. The Notice contains a differently phrased definition of Category A, which has a much different meaning. It says Category A covers works “registered ... (a) before any infringement after the Subject Work was first

published, ...” (Notice of Class Action Settlement, § II.A.1., page 7, Exhibit A to Declaration of A. J. De Bartolomeo.) (emphasis added). The “**any**” means that if infringement by any infringer started before a class member’s registration they are limited to either a B or C category claim, even though under the Copyright Act, and under the Settlement Agreement, they would have the right to claim statutory damages and attorneys fees from an infringement that commenced after their registration.

13. The Settlement contains a provision which provides, in effect, that if any class member does not act to deny it, the Defense Group Members or the Supplemental Participating Publishers receive a license in perpetuity to all electronic rights in the class member’s subject works. (¶ 13.b., p. 28.) (License by Acquiescence)

b. Notwithstanding anything in paragraph 1.n. above, the releases shall be construed to provide, and this Settlement Agreement provides, that a subject work which class members do not elect to have removed or not restored under Paragraph 5 above may, under the authority provided by this Settlement and the releases and Orders provided in connection therewith, be electronically reproduced, distributed, displayed, licensed, sold, or adapted by (but only by) each Defense Group Member or Supplemental Participating Publisher that allegedly infringed the Subject Work. These rights are irrevocable, worldwide, and continuing, and may be fully transferred to and acquired by those successors and assigns that have purchased or otherwise acquired ownership or control (i) of any Defense Group Member or Supplemental Participating Publisher (or of any substantial segment of the business thereof), or (ii) of all or substantially all of the assets of any person, or with respect to any publication or publications.

This provision, and the requirement it states that class members act to protect their copyrights from further exploitation by defendants and others is not disclosed in the Notice. This provision is unfair and unreasonable. It also invalid because even adequate class representatives for a class seeking damages for past infringement and injunctive relief would not have the authority under Rule 23 to bind class members to a transfer of the copyrights.

Additionally, the Court lacks jurisdiction over absent class members for the purpose of subjecting them to an involuntary transfer of their rights, which is forbidden under the Copyright Act. The License by Acquiescence provision is an involuntary transfer of rights under a copyright and is forbidden by 17 U.S.C. § 201(e).

(e) Involuntary transfer. When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.

The License by Acquiescence feature of the settlement is a taking of property from class members without Due Process because the plaintiffs do not have the authority to bind the class members to such a provision. It should be noted that recently Google Inc. announced a project to put the world's literature on electronic media. Whether by Google or others, it is expected that increasingly publications will be made on, or available on, electronic media through the Internet. Thus, the "electronically" limitation would be a very small limitation, particularly since the rights granted under the License include the right to sub-license. Thus, the author of a book, if the book is a Subject Work under the settlement (for instance, an excerpt was published by a newspaper or magazine), who fails to timely deny this License by Acquiescence, can find their book available to the world, with the electronic provider earning revenue in some fashion (direct charge, advertising), without any compensation.

14. The settlement purports to dispose of the rights of foreign citizens under foreign law. This is beyond the jurisdiction of a United States court, but the attempt is a demonstration of collusion between plaintiffs and defendants.

15. The Release is too broad. (Settlement Agreement § 1.n.; page 7.) In addition to the defendants, it releases past and future parents [presumably meaning parent corporations], subsidiaries, affiliates (an undefined and vague term) and divisions, and further releases the “nominees,” and licensees of a broad definition of released parties. Included in the broad definition are entities who were in the past, or may be in the future, a parent, subsidiary, affiliate or division, or the licensees of any of these unidentified parties. The appropriateness of releasing so many entities that are not parties to this litigation, and could have been, or still be, separate infringers of the works, can not be justified. The idea of releasing parties who become a party’s subsidiary, affiliate, nominee or licensee sometime in the future is utterly indefensible.

Adequacy of Settlement.

16. Class members do not have any of the information necessary to evaluate the adequacy of the total settlement, or the awards for the specified categories. While the settlement is referred to as an \$18 million settlement fund, the amount allocated for compensation of claims for past infringement is only 65% or \$11.7 million. The other 35% is provided as compensation for a non-exclusive license to defendants (and others). This is not substantially higher than the settlement of \$7.25 million in *Ryan v. CARL*, a class action against a single defendant involving very similar copyright infringement issues. There have been estimates of damages by the National Writers Union during the litigation that call the settlement amount into question.

17. The adequacy of the settlement can not be, as a matter of law, justified by the opinion of a private, for-profit, mediator, and particularly a mediator who is to be compensated on a contingent basis for an approved settlement. A private, for-profit,

mediator, as opposed to a court official such as a judge or magistrate, or a volunteer, has an economic motivation to validate the settlement reached under their guidance.

18. The amount of the award for Category A Subject Works strongly suggests the inadequacy of the awards for that Category. This category is eligible for statutory damages. There is no issue of liability in this action, so these class members are entitled to statutory damages, with the only issue being the amount. Statutory damages range from \$750 to \$30,000 per infringement (meaning all individual infringements by a particular infringer). 17 U.S.C. 504(c)(1). If a plaintiff can show that the infringement was committed willfully the statutory damages can be increased to \$150,000. There is evidence of willful infringement here because at least some defendants have continued to maintain class member works on the databases following the *Tasini* ruling which eliminated any question that doing so was an infringement. The \$1500 award, which drops in stages to \$1200 and then \$875, is questionable low in the range between \$750 and \$30,000, especially since there is a prospect for a finding of willfulness. A report in the ASJA Newsletter just following the *Tasini* decision stated that defendants would start removing freelancer works from their databases. **(cite – the exhibit with motion to vacate)** The same report quotes a spokesperson for defendant New York Times as saying: “The reason we’re removing these articles is that we could be found guilty of willful infringement and the penalties for that are significant and, from our vantage point, in order to avoid that legal liability, this is a step we have to take.” There is evidence that at least some defendants did not remove the works from the databases. For the four years since then they have continued to infringe by maintaining the works on the databases, and continuing to earn money from the databases. This is willful conduct.

19. The compensation structure reflects a single infringement analysis, although there is ample evidence that there have been multiple infringements by different defendants. “Infringement” as used in this context means a single, or series, of infringing actions of the same work by a single defendant, or by two or more defendants jointly liable for the same infringement. Each separate database defendant that maintained a work on its database has been a separate infringer. Thus there have been multiple infringements. This is most easily considered in connection with the award of statutory damages, or Category A. It is inadequate for class members to receive compensation based on the infringement by a single defendant when multiple defendants have engaged in multiple infringements, and are being released by this action. This amounts to releases for extremely strong, if not virtually undisputed, claims being granted without any compensation.

Unfair Settlement Negotiations and Mediation Process.

20. The proposed settlement was negotiated by the Associational Plaintiffs, which do not qualify as class representatives for the claims for damages.

21. The settlement is the result of mediation. The mediator, or mediator’s firm, is apparently to be compensated on a partially contingent basis. (“Success fee,” see ¶ 1.b., p. 4.) This is a practice which is widely criticized for its potential to improperly bias the mediator or the mediation process. It is prohibited by some professional mediation group standards and some state and federal jurisdictions. Among other problems, it produces a process bias in favor of reaching a mediated settlement, as opposed to resolving the issues by court proceedings (motions or trial). There is an indication in the Settlement Agreement that the mediator has not been paid, by plaintiffs, for work performed in February and March 2002. (¶ 1.b., p. 4.) It appears, since payment for this work is provided for from settlement

proceeds, that the mediator's compensation, in addition to the "success fee," is contingent upon completion of a settlement. Moreover, the non-payment of these fees is striking in view of the mediator's statement that he **started** work as a mediator in January 2002. (Declaration of Kenneth R. Feinberg In Opposition to Motion to Vacate Preliminary Approval etc., ¶ 6.)

Unfair and Unreasonable Settlement Provisions.

22. The distinction between the Category A and Category B definitions is whether the copyright owner registered in time to be eligible for statutory damages. Registration within three months is one way to meet this requirement. 17 U.S.C. 412. The other way is to register before the commencement of infringement. There is no information available to class members to determine when infringement of their work commenced. This determination will apparently be made by the claims administrator, based on information provided by the Defense Group and Supplemental Participating Publishers. There is no way for the class member to confirm the accuracy of the administrators' determination.

Due Process Objections.

23. The requirement that a class member appear in person, or through counsel, at the Fairness Hearing, in order to state an objection to the settlement, which is stated in the Notice, is a denial of Due Process. The requirement contradicts the provisions of the Settlement Agreement itself, which only requires that objections be in writing and submitted by a specified date. (¶ 8.d., p. 24.) The provisions of the Settlement Agreement, regarding the filing of objections and appearance at the Fairness Hearing are in accord with regularly accepted practice under Rule 23.

24. The failure to provide the class with information justifying the adequacy, reasonableness and fairness of the total settlement amount, or of the allocation for the

specified categories of class members, prior to the date for opting out or objecting, is a denial of Due Process. This denial is aggravated by the fact that there is no information about the action reflected in the Court files, except the complaints. Further, named plaintiffs would not make available information to the objectors, and the Court refused to order it.

Notice Objections

25. The Notice of Class Action Settlement so completely fails to describe the License by Acquiescence feature of the settlement that it denies the class Due Process. The Notice misleadingly suggests that future use will be permitted only for works by claimants, in all three Categories, who accept the full award which includes 35% for future use. This is illustrated in the Notice at Section 5, p. 4-5.

24. The Notice advises that claims can not be made for subject works published in scientific or research-oriented medical journals, even though such works are included within the class definition and are listed in the database of publications on the settlement website.

Dated: July 14, 2005

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