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Catherine O'Hagan Wolfe
Clerk of the Court
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York City, New York 10007

Re: *In re: Literary Works in Electronic Databases Copyright Litigation* (05-5943-cv)

Dear Ms. Wolfe:

This is a letter brief pursuant to the court's order of May 25, 2010.

I. THE DEMONSTRATION OF UNFAIRNESS AND INADEQUATE
REPRESENTATION IS EXTREMELY STRONG AND HAS INCREASED
DURING APPEAL

A. The Parties Presented A Single Justification For the Category C Treatment.

Appellants objected to two parts of Category C which demonstrate unfairness and a failure of adequate representation for the C Category claims. These claims are estimated to be 99% of class members and claims. The first dramatic unfairness is the C-Reduction, which subjects C claimants to possible reduction of compensation, even to zero, as necessary to keep total payments within the settlement's \$11.8M ceiling. The second is the regressive payment schedule. Already much less than the Category B compensation, the Category C schedule is very regressive while the Category B schedule is a straight 12.5%.¹ The base for both B and C schedules is the price originally paid to the freelancer for the work. Three

¹ The C schedule presents another unfair anomaly. While B compensation is, above the very lowest paid articles, a straight 12.5 percent, C compensation regresses in four steps which themselves produce inexplicable unfairness. Instead of a percentage, C claims for articles originally paid between \$500 to over \$5000 are paid in just four flat amounts: \$25, \$40, \$50 and \$60. So, as one example, an article originally paid \$500 receives compensation of 5%, while one paid \$999 receives 2.5%, and one paid \$1000 receives 4%. Professional freelancers live by selling many articles, so this difference could be very meaningful. A-345.

examples illustrate the regression: for an original payment of \$1000 the B claim receives 12.5% and the C claim receives 4%; for an original payment of \$2000 the B claim receives 12.5% and the C claim receives 2.5%, and; for an original payment of \$4000 the B claim receives 12.5% and the C claim receives 1.5%. A-345.

The parties justified C compensation in the district court proceedings, as well as on appeal, on a single ground. This is that owners of unregistered copyrights had no ability, because of the registration requirement of 17 U.S.C. 411(a), to pursue a claim. This Court recognized the parties' reliance on this justification. *In re: Literary Works in Electronic Databases Copyright Litigation*, 509 F.3d 116, 120 (2007), *rev'd*, *Reed Elsevier, Inc. v. Muchnick*, ___ U. S. ___, 130 S. Ct. 1237, 176 L.Ed. 2d 18 (2010). Examples of this justification include:

“And the fact is that virtually the entire category would likely get nothing if this action were litigated, because registration is a standing requirement for all copyright infringement actions. 17 U.S.C. § 411(a)” A 490.

“As to differential treatment in the Plan of Allocation, less favorable treatment of Category C Claims is appropriate. Unregistered works do not even confer standing to bring a lawsuit, let alone give rise to statutory damages. Thus, even if this action were pursued to a favorable verdict and affirmed on appeal, Category C claimants would end up with nothing, as opposed to the cash payments they can claim now under the Settlement.” A 1447

“With respect to the plan of allocation, less favorable treatment for Category C claims is appropriate. Unregistered works arguably would not even confer standing to bring a lawsuit at all, let alone give rise to statutory damages. Thus, if this action had been pursued to a favorable verdict and affirmed on appeal, Category C claimants could well have ended up with nothing, as opposed to the cash payments they can now claim under the Settlement. *See* 17 U.S.C. § 411(a)”

Corrected Brief for Plaintiffs-Appellees, p. 35; See also, Corrected Brief for Defendants-Appellees, 24-26.

These statements were not true. Repeated from the beginning to the end of consideration of this settlement, and the objections, these statements failed to disclose the most dramatic evidence of unfair treatment for and inadequate representation of, the class members with claims covered by Category C. The parties almost succeeded in avoiding the revelation of this falsity because objectors failed to understand it until this court raised the jurisdiction issue.

B. Category C Includes Claims for *Foreign Works* for Which Registration Is Not Required.

This court's request for briefing on jurisdiction, and even then belatedly, led appellants to understand the most fundamental falsehood of the Category C justification. As

this court noted in its ruling on jurisdiction, the settlement class includes so-called *foreign works*, and these are not subject to any requirement of registration before institution of an action. *Id.* at 121 fn1. These works are “unregistered” so they are by definition in Category C. (A 345, ¶ 4.c.)² The sole justification for the treatment of Category C does not apply to them. There was never a reason to subject them to the C-Reduction, the lower compensation or the regressive compensation.

The class includes all copyright owners qualifying for U.S. copyright protection under an international treaty. (A 335-336, ¶ 1.f.) The list of publications included in the settlement includes a great many English language newspapers, magazines and other publications that are published in foreign countries.³ A tiny sample includes: Aberdeen Evening Express (Scotland); Addis Tribune (Ethiopia); African Eye News Service (South Africa); Agence France Presse English Wire (France); Asahi Evening News (Japan); Asia Computer Weekly (Singapore); Buenos Aires Economico (Brazil); China Daily (China); Daily Champion (Nigeria); Daily Telegraph (London, England); Daily Yomiuri/The Yomiuri Shimbun (Japan); Guardian Messenger (Australia); Ha’aretz (Israel); Helsingin Sanomat (Finland); The Independent (Ireland); Indian Express (India); Le Monde Interactif (France); Moscow Times (Russia) ; Napi Gazdasag (Hungary); Narodnaya Gazeta (Belarus); New Zealand Herald; New Zealand Infotech Weekly; The Ottawa Citizen (Canada); The Prague Post (Czech Republic); Russian Observer (Russia); Saigon Times Daily (Vietnam); Santiago Times (Chile); Southern News (Australia); The Times (England), and; Taipei Times (Taiwan). Perusal of the tens of thousands of publications listed on the settlement website suggests that every newspaper and magazine in the English speaking countries of the world is included. There is no information in the record about the potential size of the three groups with C claims: unregistered U.S. works, U.S. works registered after 2002, and *foreign works*.

While all C claimants are inadequately represented, the owners of *foreign works* copyrights receive the most brutally unfair treatment. Claims for U.S. works registered too late for statutory damages, but before 2003, are B claims. (A 345, ¶ 4.b.) Claims for *foreign works* are C claims, even though there is no requirement that they register. Their position is indistinguishable, in terms of a right to sue, from the B claims. *La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1206 (10th Cir. 2005).

When considering the treatment of foreign authors the unconstitutional requirement that a class member had to actually appear in New York City in order to object takes on

² Category A is for works registered with the U.S. Copyright Office and eligible for statutory damages. Category B is also for works registered with the Office. Category C is “all other subject works.” A-345. This is the category that picks up the *foreign works* which have no obligation to register. The settlement encompasses works, in a number unknown, that were published outside the U.S.

³ The list of publications is Exhibit B to the Decl. of Irvin Muchnick, Docket No. 86. It is not in the Joint Appendix because it is hundreds of pages. It can be viewed on the Internet at <http://cert.gardencitygroup.com/edb/fs/publications>. It is the list named “Original.”

added significance. Brief of Appellants-Objectors, p. 53. The settlement releases not just claims for infringement under U.S. law, but claims under foreign law. (A 338, ¶ 1.n) The record contains an admission that the owners of foreign *works* copyrights, all of whom are placed in Category C, are not adequately represented by class counsel. The notice states:

ATTENTION FOREIGN AUTHORS:

If you own a copyright in a Subject Work published in a country outside the United States, you are advised to seek advice from an attorney familiar with the laws of that country to determine whether your interests would be better served by remaining in the Class and participating in this settlement or excluding yourself from the Class. (Bold emphasis in the original; underlining added)

A 752. The parties' justification for the treatment of C claims was based on untrue representations to the district court and this court.

C. Two Post Briefing Decisions Reinforce Appellants' Fairness Arguments.

Two decisions that post date the briefing are worthy of note. The Seventh Circuit reversed approval of a class action settlement because, *inter alia*, there was no evidence or analysis to support a regressive compensation scheme. *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653-654 (7th Cir. 2006). In *Synfuel* the Seventh Circuit stated that due to the lack of evidence or analysis it could not determine how the district court determined the regressive compensation was fair. *Id.* The district court in *Synfuel* accepted the assertion of class counsel that the compensation schedule appropriately reflected certain legal contentions. There is an identical lack of evidence or analysis, and reliance of counsel's assertions, for the regressive Category C compensation.

In a 2007 decision, Judge Glasser of the Eastern District of New York coined the term "distributional fairness" to capture the inquiry that is central to this case. *Parker v. Time Warner Entertainment Co., L.P.*, 239 F.R.D. 318, 338 (E.D.N.Y. 2007). Relying on the same Third Circuit decision relied upon by appellants in the briefing, he noted that "distributional inequities may overcome any presumption that a settlement produced by competent attorneys is fair, since there are adequacy concerns with 'a settlement that offers considerably more value to one class of plaintiffs than to another,' in which case the representatives "may be trading the claims of the latter group away in order to enrich the former group.'" *Id.* at 337, quoting *In re General Motors Pick-up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 797 (3d Cir. 1995). Judge Glasser also relied upon, as do appellants, this Circuit's decision in *Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982). *Id.* at 338.

There are three manifestly unfair distributions in this settlement. The first is the distribution to Category C of all of the risk of a reduction of compensation if claims exceeded the settlement fund. As described in Appellants' Reply Brief, § IV, in the district court the parties justified assigning all the risk to Category C on the grounds that there was really no risk. Then the parties filed briefs in this court saying that claims had come in at \$10.76 million, only modestly below the \$11.8 million trigger for the C-Reduction. Then they withdrew those statements by filing corrected briefs. Counsel for plaintiffs then wrote a

letter to the Clerk of this Court to explain the necessity of filing the corrected briefs. He stated in substance that the \$10.76 million figure failed to include claims that appeared deficient, but which could be cured, so that the final tally might trigger the C-Reduction. Letter of Michael J. Boni to Roseann MacKechne, July 7, 2006. The representations of the parties to the district court, which apparently convinced it to disregard appellants' objections about the C-Reduction, have proven to be without justification. It is not, as the parties argue, a question of whether the C-Reduction will happen. The telling point is that several organizational plaintiffs who had no claims at all, and a number of named plaintiffs with a large number of A and B claims, agreed to place all the risk of a reduction on the group which, due to its size, posed a threat of reducing the A and B compensation.

The second manifestly unfair distribution is the regressive compensation scheme for Category C, already discussed. The third unfair distribution is the placement in Category C of *foreign works* to which the justification for the treatment of that Category does not apply.

II. THE *FIREFIGHTERS* ARGUMENT DESERVES ATTENTION

An argument might be advanced that a settlement providing the defendants and others with a license to class members' works can be upheld under the Supreme Court's ruling that a consent decree may, if meeting certain constraints, provide "broader relief than the court could have awarded after a trial." *Local Number 93, International Assoc. of Firefighters, etc. v. Cleveland*, 478 U.S. 501, 525. This argument can be readily dismissed for the present question because the *Firefighters* rule, in that case and all others applying it, has only been used to uphold "broader relief" against a defendant who has voluntarily consented to that relief. As described by the Court, approving such a consent decree is an exercise of a federal court's remedial authority. *Firefighters*, 478 U.S. at 526; *see also, e.g., United States v. Kerr-McGee Corp.*, 2008 WL 863975, at *6 (D. Colo. March 26, 2008) (awarding relief to remedy a violation of the Clean Air Act); *Jeff D. v. Kempthorne*, 365 F.3d 844, 846, 851-52 (9th Cir. 2004) (awarding relief to remedy constitutional and statutory violations for services to mentally disabled children); *Duran v. Carruthers*, 885 F.2d 1485 (10th Cir. 1989) (awarding relief to remedy unconstitutional prison conditions); *Kozlowski v. Coughlin*, 871 F.2d 241, 244-45 (2d Cir. 1989) (same); *Ayers v. Thompson*, 358 F.3d 356, 359 (5th Cir. 2004)

In possibly the only class action decision in which *Firefighters* was relied upon to justify a settlement provision, it was addressed to approving a settlement provision creating and funding an assistance program to support projects and services for Vietnam veterans and their families. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179, 185 (2d Cir. 1987). A class action settlement providing a defendant with rights, or "relief," from the members of a plaintiff class, which the defendant could never have obtained in litigation, is a far different question. It runs counter to the rule that "Absent plaintiff class members are not subject to coercive or punitive remedies." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985).

A *Firefighters* based argument has been made to justify a license to class member copyrights granted by a class action settlement in *Google*, and may possibly be made by the parties here. That is one reason it is worth note. However, it is also instructive to review the

limitations that must be met for a consent decree to meet the *Firefighters* rule. Each of them eliminates the license here from qualification under that rule even if it did apply to relief being granted against members of a plaintiff class. The first prong of the *Firefighters* test is that the “consent decree must spring from and serve to resolve a dispute within the court’s subject-matter jurisdiction.” *Id.* The settlement here addresses a dispute within the court’s subject-matter jurisdiction. The license, however, addresses future infringements which are not within the court’s jurisdiction because they have not occurred.

The second limitation of *Firefighters* is that the consent decree must come within the general scope of the case made by the pleadings. *Id.* The license fails this limitation. The Consolidated Complaint describes that defendants are databases which, after obtaining the class members’ works from newspapers or magazines, are infringing the copyrights by selling and distributing the works. A 104, ¶ 3, ¶¶ 39-53.⁴ Nothing suggests a scope of dispute which encompasses a license to continue using the works until the expiration of the copyright, in any manner whatsoever, and including an endless right to license uses, of any kind, to unknown third parties. That is exactly the right provided by the License. See, *infra*, at pages 4-5.

The final *Firefighters* limitation is that the consent decree “must further the objectives of the law upon which the complaint was based.” *Id.* The Court further clarified that a decree could not conflict with, or violate, the statute upon which the complaint is based. *Id.* at 526. In this case, that “law upon which the complaint was based” is the Copyright Act, 17 U.S.C. §§ 101-810, a primary objective of which is to encourage creation by granting to authors the exclusive right to their works for a period of time.⁵ To be sure, the Copyright Clause of the Constitution, U.S. Const., art. I, § 8, cl. 8., and the Copyright Act seek to further the free flow of information and advance the First Amendment’s interest in dissemination of expression. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545 (1985) (“copyright is intended to increase and not to impede the harvest of knowledge”); accord *Stewart v. Abend*, 495 U.S. 207, 228 (1990) (“[T]he Act creates a balance between the artist’s right to control the work during the term of the copyright protection and the public’s need for access to creative works.”). But they do so in a precise way, defined by Congress, in the form of the Copyright Act’s specific delineation of exclusive rights to authors and the many restrictions thereon. *Harper & Row*, 471 U.S. at 546-47 & nn.1-2 (discussing the Act’s grant of “a bundle of exclusive rights” to the copyright owner and the accompanying restrictions). To allow a class representative to grant a license in a class member’s copyright, without even any requirement that the class member knows this is happening, violates the exclusive right of the class member to be the sole source of authorization for copying, distribution or display. 17 U.S.C. § 106(1), (3) & (5).

⁴ No answer or other responsive pleading was ever filed.

⁵ See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994) (“The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public.”); *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006) (“a copyright holder possesses ‘the right to exclude others from using his property’” (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932))).

In the end, the analysis under *Firefighters*, if applicable, leads to the same conclusion as the Second Circuit's governing "identical factual predicate" doctrine. This is unsurprising, as the latter doctrine closely parallels the *Firefighters*' scope-of-the-pleadings prong. See *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 108 (2d Cir. 2005) (a settlement may release claims alleged in the complaint and those which could have been alleged "by reason of or in connection with *any matter or fact set forth or referred to in the complaint*") (emphasis added; quotation and citations omitted). Thus, for the same reasons that the settlements license of broad rights to class members' copyrights cannot be said to "come within the general scope of the case made by the pleadings," *Firefighters*, 478 U.S. at 525 (quotation omitted), those same provisions cannot be said to release claims for conduct that arises out of the "identical factual predicate," or that "share[s] the same integral facts as," the conduct that gave rise to this suit. *Wal-Mart*, 396 F.3d at 106 (internal quotation omitted).

III. THE LICENSE OF CLASS MEMBER COPYRIGHTS CAN NOT BE JUSTIFIED AS A RELEASE OF "FUTURE CLAIMS"

A. Confusing a License With a Release Has Been Rejected.

The briefing extensively addressed the parties' arguments that the license is not a license, but a permissible release of "future claims." However, a subsequent decision of this Circuit directly rejects the idea of confusing a copyright license with a release. The decision recognizes that releases for past infringement and licenses for future use are two different things. *Davis v. Blige*, 505 F.3d 90, 102 (2d Cir. 2007).

We believe that reliance on cases involving settlements is misplaced. Licenses and assignments function differently from settlements and releases, and the use of the term "retroactive license" for "settlement" or "release" by the parties causes unnecessary confusion and potentially creates legal mischief.

Davis, at 102. The facts are different, but the question presented there that called for the distinction between a license and release is the same. A party in *Davis* was trying to equate a license to a release, by calling it a "retroactive license." Here we have parties trying to equate a license to a release, by calling it a "release of future claims." The parties chose to justify the license solely on the basis of the law of releases. Added to the arguments already presented, the *Davis* holding shows the lack of merit in their position.

B. Additional Authority Rejecting the Release of Future Claims.

The extensive briefing of a very similar issue in the pending *Google* class action settlement has brought appellants' attention to relevant decisions on the question of class action settlements releasing "future" claims. Relying on Third Circuit authority, a Pennsylvania district court denied approval to the settlement of an antitrust class action because, *inter alia*, "the release bars later claims for future conduct which was not the subject of the litigation" *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 572 (E.D. Pa. 2001). In explaining its decision the court stated:

The release is also too broad because it bars later claims based on future conduct. Although the law permits a release to bar future claims based on the past conduct of the defendant, [citation omitted], this release would bar later claims based not only on past conduct but also future conduct. ... [T]he legality of these practices under the antitrust laws was not litigated in the present suit. Because public policy prohibits a release from waiving claims for future violations of antitrust laws, and given that under the proposed release class members would be releasing unlitigated future claims, the releases are too broad. See *Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885, 896 n.27 (3d Cir. 1975) ("There is nothing in the public policy behind antitrust laws that prohibits general releases encompassing antitrust claims, provided that the release does not seek to waive damages from future violations of antitrust laws."); see also *Polsky v. Radio Shack*, 666 F.2d 824, 828 (3d Cir. 1981) (same).

Schwartz, at 578.

As already noted, the "litigated" conduct in this case concerned only the practice of database defendants placing articles from unidentified (except for certain New York Times newspapers) print publications in their databases and making them available for profit.⁶ A-86, ¶¶ 9, 10; A-104, ¶ 3. The license of the settlement is granted to the defendants, with a full right to sub-license others, including the right to grant those receiving a sub-license the right to sub-license others. (A-348-349, ¶ 5.a. and b.; A-359, ¶ 13.b., as amended by A-1102, ¶ 2) So that part of the license is "releasing" claims for infringement for unknown future acts of infringement by unknown future sub-licensees and their unknown sub-licensees. However, the license is far more expansive than that. It is also granted to the "Defense Group" and to "Supplemental Participating Publishers." The Defense Group is the defendants and the "Participating Publishers." (A-337, ¶ 1.k.) An exhibit to the Settlement identifies 36 such Participating Publishers (A-381), but the provision allows other publishers to join that list following preliminary approval. (A-337, ¶ 1.k.) The record does not reflect if any more joined the list. The license is also granted to Supplemental Participating Publishers, but there is no identification of who they are, as they are to identified, and entitled to the license, by a complicated procedure which followed settlement approval. See, Opening Brief, pp. 10-11. The license would "release" any infringements by this large number of entities, many unknown, and anyone to which they granted a sub-license, all of whom are unknown.

The Opening Brief has already addressed the policy basis for refusing to allow the license, whether viewed as a license or release. Opening Brief, § IV.C.

⁶ Referring to the present action as "litigated" is an exaggeration. Nothing happened in this case besides the filing of complaints, negotiations and proceedings for approval of a settlement.

IV. THE SUPREME COURT HOLDING MAY ALLOW CLAIMS FOR INFRINGEMENT OF UNREGISTERED U.S. WORKS TO BE INCLUDED IN A CLASS ACTION

The decision of the Supreme Court has arguably made a substantial change in the law relevant to the rights of the class members here owning unregistered copyrights for U.S. works. 17 U.S.C. 411(a) does not present a jurisdictional barrier to those class members recovering by virtue of a class action settlement. *Reed Elsevier* at 130 S. Ct. at 1248, 176 L.Ed. 2d at 32. The Court describes § 411(a) as a “precondition.” *Reed Elsevier* at 130 S. Ct. at 1241, 176 L.Ed. 2d at 24. It expressly declined to determine if it is a “mandatory” precondition. *Reed Elsevier* at 130 S. Ct. at 1249, 176 L.Ed. 2d at 35.

Supreme Court decisions establish that the members of an alleged class do not have to satisfy all the statutory requirements that must be satisfied by a named plaintiff in order to institute suit. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8 (1975)(exhaustion under Title VII). § 411(a) is a non-jurisdictional, statutory, precondition to the institution of an action for infringement. This Circuit has held that not every member of a class must have personal standing. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-264 (2d Cir. 2006). All class members must have Article III standing. *Id.* However, as noted by Judge Walker in his dissent, the holders of unregistered copyright possess article III standing. *In re: Literary Works*, at 134.

The issue of whether §411(a) as a “precondition” must be satisfied by every member of a class certified for litigation is not before the court. However, it is now a possibility that § 411(a) will only be determined to apply to the named plaintiff instituting a class action. Appellants suggest that this can only mitigate in favor of a decision which insures the owners of unregistered copyrights in U.S. works adequate representation.

V. CONCLUSION

The Supreme Court has held that it is appropriate to consider Rule 23 class certification issues, which are dispositive of the appeal, before reaching challenges to jurisdiction. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 612 (1997). While not literally a jurisdiction issue, the question presented as to whether the district court has the authority to approve a settlement including a license of class member copyrights is of a similar nature. It is a question of first impression, both with respect to validity in light of the Copyright Act and with respect to whether such authority exists under the literal terms of Rule 23. See, Opening Brief, p. 45 et seq. The Supreme Court has cautioned that “Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load” of restructuring legal regimes in the absence of congressional action – however sensible that restructuring might be. *Amchem Prods.*, at 629.

Appellants raise this to suggest that the interests of justice may be best served by remanding this action to the district court on the fairness and adequacy issues which present an overwhelming justification for reversal of approval. Not least of the reasons for such an

approach is the complete absence of any independent consideration by the district court on these issues. Equally compelling is the fact that the district court was misled by the parties on two important aspects of the objections to the settlement. The parties' strong assurances that the C-Reduction was a remote possibility have proven unfounded. The parties' sole justification for the treatment of the vast majority of the class, encompassed in Category C, was simply untrue.

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