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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 reply letter brief pursuant to the court's order of May 25, 2010.

The Foreign Works

The treatment of *foreign works* is not a ground of the appeal. It is plain evidence that the parties failed their obligation to show that the settlement was fair and reasonable. Not only did they not meet that burden, but by never once mentioning that Category C contained works for which there was no requirement of registration, they falsely described the C Category and concealed the existence of the *foreign works* subgroup. The proponents of a settlement have the burden and duty to show that it is fair. *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir.1995) (Citing, *inter alia*, *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983)). *See also*, Manual for Complex Litigation, Fourth Ed., Federal Judicial Center, § 21.631; Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d § 1797.1 (2005). "Proponents of class action settlements bear the burden of developing a record demonstrating that the settlement **distribution is fair, reasonable and adequate.**" *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) (emphasis added)

Now they try to justify the treatment of foreign works with assertions that border on the ridiculous. Defendants say we are "conspicuously silent" about Section 412(2) which precludes eligibility for statutory damages and attorneys fees. Defendants Letter Brief, p. 3. We are silent because it is irrelevant. The *foreign works* are indistinguishable from works registered too late to be eligible for those recoveries. That is Category B, and it receives

much more favorable compensation, not to mention being without risk of reduction. That they say now there are factors which justify that treatment simply highlights their failure to present those factors, and supporting evidence, in the district court, when it would be revealed that the *foreign works* are not subject to the main justification for Category C. Their settlement approval obligation does not depend upon the appearance of an objector to bring to light all possible elements of unfairness. Plaintiffs assert that *foreign works* are a small part of the potential Category C claims. That is no justification for failing to disclose their existence, and there is nothing to support it in the record. To the contrary, the record discloses that many thousands of foreign publications are covered.

C-Reduction

The C-Reduction is not relevant only if it is triggered. It is most relevant for examination of the negotiation process by which the settlement is reached. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("The District Court determines a settlement's fairness by examining the negotiating process leading to the settlement as well as the settlement's substantive terms.")(Citing *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983)) The new information that total claims are \$8.9 million, \$2.9 million below the C-Reduction trigger of \$11.8 million, is welcome, but it does not tell us why the negotiation placed the entire risk on the unregistered works. They already received much lower compensation. Despite repeated depiction of the unregistered as lucky to be included at all, the record reveals that the settlement would not exist unless the unregistered were included. They are the key to the settlement.

The parties emphasize the mediation as central to evaluating this settlement. Defendants thought it so important that they submitted their mediation brief below. A1574-1652. It unequivocally describes how central the unregistered works are to any settlement. Only a "global" settlement, which is one including the unregistered works, was acceptable. A1598, 1599 n.12. This powerful negotiation leverage was of no benefit to the unregistered. Despite the recent attempts to suggest that all class members had some registered and some unregistered copyrights, at the district court they repeatedly insisted, with proof, that the vast majority of class members had **no** registered copyrights. A1446 ("only a tiny percentage of freelancers register their works), A1550, A1553, A1643-1649.

The new claims data raises an important question. Previously the figure of \$10.7 million was deemed unreliable because it did not take into account that some claims viewed as deficient were subject to being cured, thus raising that figure. Letter of Michael J. Boni to Roseann MacKechne, July 7, 2006. This process could, they said, raise the total above the \$11.8 million Reduction trigger. That process was to be followed by a defense review of claims which could lower the total. Now we are advised that, although the defense review has still not occurred, the total has mysteriously declined by nearly \$2 million. How has this happened, and more important, did it involve anything which undercuts their assertion that the Reduction could never occur?

There is more to the new claims data which strengthens appellants' showing that the named plaintiffs have a conflict of interest in representing the unregistered copyrights

because of their financial interest in their registered claims. The parties gave appellants the following detail regarding the new total of \$8.9 million in claims.¹

Category A: 2,795 subject works, \$3,679,290.00

Category B: 5,246 subject works, \$817,430.72

Category C: 304414 subject works, \$4,405,213.95²

In 2006, appellees reported that 14 of the 20 named plaintiffs had 1,355 A claims. Brief for Plaintiffs-Appellees, p.35 n.12 (superseded by a “Corrected” Brief). Assuming that has not changed, those fourteen have 48% of the A claims, worth something close to 48% of \$3,679,290, or \$1,780,776. That is the amount of money they were protecting from reduction. In 2006 all 20 of the named plaintiffs were reported to have 3,698 C claims. Assuming that has not changed, that is 1.2% of all C claims, or something close 1.2% of \$4,405,214, or \$52,862. Had the risk of reduction applied to all Categories, and had a 10% reduction been required, they would have lost \$178,000. A 50% reduction to their C claims is only \$26,000. Their willingness to subject their C claims to the C-Reduction, while protecting their A claims, is understandable, but represents a plain conflict of interest.

The parties cite new authorities for the position that subclasses were not required. Two are challenges to certification for litigation. *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35-37 (2d Cir. 2009); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 449 (3d Cir.1977). These are inapposite, for reasons described in Combined Reply for Objectors-Appellants, p. 12-13. It is the settlement agreement that has created the conflict here; it was not inherent in the claims. Both of these decisions note the ability of the trial court to monitor the progress of the case and consider sub-classes if it became appropriate. *In re Flag Telecom*, at 37; *Bogosian*, at 449.

Defendants cite two decisions considering, and rejecting, the need for subclasses in the settlement context. *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 272-73 (3d Cir. 2009); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 532 (3d Cir. 2004). The challenge in *In re Ins. Brokerage* was rejected in part because the objectors failed to identify any “divergent or antagonistic interests between the three groups.” *In re Ins.* at 272-273. Further, the allocation had been “carefully devised.” *Id.* As reviewed *infra* with respect to the regressive C compensation, the record here is devoid of **any** explanation of how the C compensation, on its own or in comparison to the Bs, was devised. *In re Warfarin* is even less helpful to appellees. That decision found that nothing prejudiced the complaining subgroup, which stood to recover its total recognized loss. *In re Warfarin*, at 532. The court said the recovery of the complaining subgroup “did not change depending on the number of people in the class, thereby creating the problem of ‘splitting the settlement.’” *Id.* That is exactly the problem the C-Reduction creates.

Regressive C Compensation

Appellants did not describe C compensation as “regressive” below, but they did everything possible to show that there was absolutely no showing that it is fair. Shortly after

¹ Appellees provided this information and authorized its disclosure.

² This data on claims per category confirms that extremely few freelancers register their works.

preliminary approval they sought discovery, including any studies, estimates, or reports relevant to allocation. These were requested “for their relevance to the adequacy, reasonableness or fairness of the awards to the various categories.” A671. The request was denied. A705. Their objections state: “Class members do not have any of the information necessary to evaluate the adequacy of the total settlement, or the awards to the specified categories.” A739. They renewed a request for data on allocation shortly before the parties’ final presentation in support of the settlement. They noted that the request “will at least alert the plaintiffs to the factual issues which these objectors believe must be reviewed in connection with settlement approval.” A1234. They asked again for any support for the compensation categories. A1237. When the final presentation contained no basis or justification for C compensation appellants filed a supplemental objection saying: “There is no justification presented for the category amounts. ... So far as the final presentation shows, these amounts are arbitrary.” A1722.

As noted above, it is the proponents’ burden to show the reasonableness of the settlement. On its face, the C Category, compared to the B Category, raises the “regressive” question. One can accept the idea that the C Category (excluding *foreign works*) would receive less, in some amount, than the B Category. Why should C compensation be both substantially lower **and** a declining percentage of the price originally paid, while B compensation is a straight percentage?

The motivations for the C-Reduction and the C compensation are clear. The defendants have only a very modest interest in the C-Reduction. If claims, costs of administration and attorneys fees were less than \$10 million in total, that would be the extent of defendants’ exposure. (A340, ¶ 3.a.) To the small extent the Reduction depressed the number of C claims, it served that goal. The holders of A claims, who turned out to be almost 50% composed of named plaintiffs, had a strong interest in the Reduction. On the other hand, the defendants had a great interest in the regressive compensation for C claims. Since everyone knew the vast majority of claims were Cs, this was the main way for them to possibly escape with only a \$10 million dollar exposure instead of the \$18 million. In the face of these overlapping interests at the negotiation table, there was no one to protect the interests of the group that was the key to the entire settlement.

The License

The granting of a license to use a copyright by virtue of a class action settlement, even a non-exclusive license, has never occurred, or even been considered. With the exception of a couple of inverse condemnation decisions, no class action settlement has ever purported to grant defendants, or others, the right to use a class member’s property without the class member affirmatively authorizing the use. The condemnation cases did not consider any assertion that such a grant was legally improper. Appellants have presented reasons why inverse condemnation may be a very limited and particular situation in which such a grant might be proper. Combined Reply, p. 21-23.

Appellants contend that the license is not legally allowed. It exceeds the authority of Rule 23. It is not a release of “future claims.” It is not based on the “identical factual predicate” of past infringements. It violates the statutory design and explicit assignment of rights in the Copyright Act. It also violates a long standing judicial policy against waivers or releases, even among private parties, of federal statutory rights. Appellants believe this Court should be informed of the *Firefighters* based arguments, but that decision does not provide a basis to sustain the license.

Defendants present a quote about this settlement by the Register of Copyrights, Marybeth Peters. They slightly miscited it. They are quoting her prepared testimony. It is found at *Competition and Commerce in Digital Books: Hearing before the H. Comm. on the Judiciary*, 111th Cong., page 72 (2009)(This is page 7 of Ms. Peters’ prepared testimony and they quote footnote 10 on that page. The entire report is found at http://judiciary.house.gov/hearings/printers/111th/111-31_51994.PDF).

Ms. Peters’ characterization of the present settlement is in error. She says the license in the present case would only “speak to” the reproduction, display and distribution of copyrighted articles in electronic databases. *Id.* at p.72. In fact, the license has no restrictions about the type of use. Most likely Ms. Peters was informed only of the original settlement and not of the Amendment. There is language in the original settlement which suggests the limitations that she believes apply. This is found in ¶ 13.b. of the original agreement. (A359) Paragraph 13.b. allows reproduction, display, distribution, sale, and adaptation, so long as it is done digitally, but restricts this use to the original infringers. (A-359, ¶ 13.b.) However, the Amendment eliminated any restriction, particularly by its open-ended right of sub-licensing. (A1102, ¶ 2.) The large number of parties receiving the license receive unlimited sub-licensing rights, so that the ultimate uses authorized are virtually any type of infringement, by anyone in the world, so long as the use is digital. With the internet and digital readers (Kindle etc.) that is no limitation.

To close we respond to the assertion that the Supreme Court, in *Tasini*, contemplated this settlement as a solution to maintaining the freelance works of newspapers like the New York Times in databases. Nothing in *Tasini* guides publishers and authors to expect they could resolve the issue of continued use of infringed works by a world-wide class action settlement. *New York Times Co. v. Tasini*, 533 U.S. 483, 505-506 (2001). To the contrary, the *Tasini* opinion suggests different models of addressing the problem, drawn from both domestic and foreign experience, and no mention is made of class actions. *Id.*

In any event, this enormous settlement, originating in the problem of freelance works from U.S. publications, has grown into something far vaster. As appellants previously described, the class definition is every person in the world who owns the copyright to an English language work that appears in a database, after 1997, without the owners’ permission. See, Brief For Objectors-Appellants, p. 5-8. This doesn’t mean they were put in the database after that date, but only that they have been present in the database after that

date. There is no limit to periodicals – the list of publications includes books, such as 35 encyclopedias. The list of 26,000 publications does not limit the scope of the class.

When the defendants describe how the license is simply giving the publishers the non-exclusive license they believe they are entitled to under various theories, it is applicable, if at all, only to major U.S. periodicals. To extrapolate that to the thousands of overseas publications, not to mention the hundreds or thousands of books in the list, without a shred of support in the record, is an argument which collapses under its own weight.

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