

June 23, 2010

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

Re: Letter Brief of Plaintiffs-Appellees in *In re: Literary Works in Electronic
Databases Copyright Litigation* (05-cv-5943)

Dear Ms. Wolfe:

This appeal arises from a district court order granting final approval of a class action settlement ("Settlement"). The Settlement was approved in September 2005, and thousands of freelance authors have been waiting five years to share nearly \$10 million in settlement benefits. Objectors-Appellants ("objectors") have been afforded ample opportunity, in the district court and this Court, to advance their objections. Their arguments were fully briefed and presented at oral argument before this Court on March 7, 2007. The only relevant event that has transpired between then and now was the Supreme Court's decision, which did not discuss in any respect the merits of the appeal.

In its Order of May 25, 2010, this Court granted leave for objectors to "present any relevant authority, and arguments in light of that authority, that was not advanced in the prior briefing." In violation of that Order, and ignoring settled law that issues raised for the first time on appeal are waived, objectors raise *issues* for the first time, as opposed to new *authorities* and arguments in support of those authorities.

Objectors' argument that foreign works should be in Category B of the Plan of Allocation, not C, is a prime example. At p. 2 of their letter brief, objectors admit that this objection was never raised before now. Accordingly, it was not considered by the district court, and is waived as a matter of law. Even if it were to be considered now, the objection is meritless for the reasons set forth below.

In addition, instead of citing authorities not previously advanced, objectors repeat their claim that the authors of Category C works were treated unfairly because of the "ratchet down" provision. They do so without telling the Court that the parties have advised them there will be no ratchet down because the maximum value of the claims made, together with all costs and fees, is almost \$3 million *under* the \$18 million cap.

Objectors' reliance on *Firefighters* is misplaced; that case provides a test for approving settlements that provide broader relief to the class than the court could have ordered after trial. Objectors never before raised this issue and have therefore waived it, and in any event the argument fails for the reasons set forth below. If anything, *Firefighters* supports appellees, not objectors. As for objectors' repeated argument against the Settlement's authorization of continued use of the subject works, such argument fails for the reasons stated below and in the Corrected Brief for Plaintiffs-Appellees, filed July 7, 2006 ("Plaintiffs' Br.").

Objectors assert that the Supreme Court decision should somehow inform the question of whether the district court abused its discretion by granting final settlement approval five years ago. As discussed below, the fairness of the Settlement, and the review of the district court's decision granting final settlement approval, must be based on the facts and circumstances existing as of the time the Settlement was negotiated and court-approved.

In reality, there is no new authority that warrants overturning the district court's grant of final approval, and there are no arguments of objectors, old or new, that merit a finding that the district court abused its discretion. The class was fairly and adequately represented by (1) named plaintiffs who own and claimed far more unregistered works than registered works, (2) class counsel who insisted that any settlement must be fair, reasonable and adequate with respect to the authors of unregistered as well as registered works, (3) three authors rights organizations that spent many hundreds of hours in negotiations with no expectation of any reimbursement, to protect freelance authors' interests, knowing the overwhelming majority of freelance works are unregistered, and (4) the services of mediator Kenneth Feinberg, who oversaw the arm's-length 3½-year mediation that resulted in the Settlement. *See* Plaintiffs' Br. at 9-10, 34-37; Declaration of Kenneth R. Feinberg (A 1687-91); *see generally* Declaration of Samuel Issacharoff (A 1692-1703).

All Class Members and Claims Are Treated Fairly.

Objectors' challenge to the adequacy of representation by plaintiffs and class counsel is without factual or legal basis. Adequacy of representation analyses focus on uncovering "conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Any such conflict "must be fundamental" in order to render class treatment impermissible under Rule 23. *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35-37 (2d Cir. 2009) (internal quotation omitted) (affirming certification of a class over an adequacy of representation objection even though proving some class members' claims might require disproving other class members' claims).

Objectors argue that certain absent class members have been unfairly represented, such as authors of unregistered works, and foreign authors. This Court, however, has stated that "a subset of a class" does not "lack adequate representation when the lead plaintiffs of that class possess the claims of that subset." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 111 (2d Cir. 2005) (construing *Joel A. v. Giuliani*, 218 F.3d 132 (2d Cir. 2000)). That is the case here. Like the members of the class, the representative plaintiffs are freelance authors who

possess and assert copyright claims for registered and unregistered works (see Plaintiffs' Br. at 34-35), including two British writers, Ronald Hayman and Robert Lacey, who only asserted Berne Convention standing. (A 107, 148, 167.) The representative plaintiffs and absent class members share a common interest in establishing liability for the unauthorized electronic use of their freelance works, and in maximizing the settlement amount not only as a whole but as to each tier in the Plan of Allocation.

In fact, objectors do not really challenge adequacy of representation so much as the fairness of the Settlement's terms. As this Court explained in *Wal-Mart*, 396 F.3d at 113, where an adequacy of representation challenge is grounded in the notion that the class recovery was somehow deficient, that argument is "more appropriately cast as a challenge to the Settlement's fairness than as a due process claim."

Furthermore, in challenging the settlement compensation structure in this case, objectors fail to note that a class action settlement can include a plan of allocation that ties the compensation for claims to the relative strength of those claims. See Plaintiffs' Br. at 36; *Parker v. Time Warner Entm't Co., L.P.*, 239 F.R.D. 318, 337-39 (E.D.N.Y. 2007) (differential compensation is permissible "according to the strengths and weaknesses of the various claims possessed by Class Members") (quoting *In re Worldcom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 343 (S.D.N.Y. 2005)); see also *Friedman v. Union Bank of Switz.*, 413 F.3d 183, 186 (2d Cir. 2001) (same, citing cases); *In re Agent Orange Prods. Liab. Litig.*, 818 F.2d 179, 181 (2d Cir. 1987) (district courts "enjoy broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably").¹ The Settlement's Plan of Allocation does precisely that.

Objectors' argument that the allocation plan is unfair because Category C claims are "regressive" is a red herring. No authority defines the type of allocation plan here as "regressive." Using the objectors' definition of "regressive," Category A could be said to be "regressive" as well, inasmuch as there is one payment (\$1,500) per work regardless of the original sale price of the work (so that an author who was originally paid \$3,000 for a work receives only a 50% return while an author who was paid \$1,500 for a work receives a 100% return), but that does not render the Category A tier any more objectionable than it does the

¹ The decision in *In re: Insurance Brokerage Antitrust Litigation*, 579 F.3d 241 (3d Cir. 2009), is also instructive. In *Insurance Brokerage*, the Third Circuit affirmed the district court's decision not to certify subclasses in approving an allocation plan that divided the settlement award based on the type of insurance each class member had purchased. As in this case, class members were eligible for payment in more than one tier of the plan. The Third Circuit held that the fact that class members recovered for the purchase of more than one type of insurance "illustrates that the Plan of Allocation did not create de facto subclasses among class members but merely created a structure for ensuring that reimbursement is tied to the extent of damages incurred on certain policies of insurance. This method for distributing the fund, in which individuals and entities may have claims that span several of the allocation groups, did not produce a divergence of interests among the class members." *Id.* at 270-273.

Category C tier. Objectors, of course, do not challenge this Category A compensation structure, because that would undermine their (baseless) argument that the Plan of Allocation unduly favors Category A works.

At the final fairness hearing, the parties defended and objectors challenged the allocation plan at length. The district court heard objectors' arguments, and determined based on a full record that the plan is fair to the class. (A 1739-1820.) That objectors may believe they have a better plan is no basis to find that the district court abused its discretion in approving the present Plan of Allocation. Objectors' reliance on *Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646 (7th Cir. 2006), to advance their "regression" argument, is unavailing. The class members' awards in *Synfuel* were absolutely capped at four pre-paid Letter Express packages or \$30, regardless of how many times the class member had been subject to the allegedly unlawful charges at issue. 463 F.3d. at 649-50. Here, in contrast, the authors' Category C (as well as A and B) claims are compensated per work, with no cap based on the number of works claimed.

The other cases cited by objectors are also highly distinguishable, and the comparison between the facts in those cases and the facts here underscores the fairness of the Settlement. In *Plummer v. Chemical Bank*, 668 F.2d 654 (2d Cir. 1982), the settlement of an employment discrimination class action was disapproved because it provided that the named plaintiffs would be promoted and receive back pay, but made no provision for promotion or back pay for the absent class members. *Id.* at 656. No such differentiation in treatment exists in the Settlement here, where claims are treated the same whether possessed by the representative plaintiffs or by absent class members.

In *Parker v. Time Warner Entertainment Co.*, 239 F.R.D. 318 (E.D.N.Y. 2007), the settlement compensation plan "arbitrarily distinguish[ed] between similarly situated plaintiffs," with distinctions in compensation made not on the "merits of [class members'] claims," but instead on whether the class members "are current or former [cable] subscribers [of defendant Time Warner], and whether they live in or outside an area currently serviced by Time Warner." *Id.* at 340. No such arbitrary distinctions exist in the Plan of Allocation here.

While objectors also repeat their claim that the authors of Category C works were allegedly treated unfairly because of the Settlement's potential "ratchet down" provision, they do so after having been advised that there will be no ratchet down because the maximum value of all claims made, together with all costs and fees, is almost \$3 million *under* the \$18 million cap. This is as the parties and class counsel strongly predicted and advised the district court in 2005, after consultation with the three authors rights associations. In the highly unlikely event the cap had been reached, class counsel reasonably concluded that any reduction should affect the unregistered works before affecting the registered works, because of the difference in the strength of the claims for unregistered works and registered works. *See* Plaintiffs' Br. at 35-37; *see also id.* at 20 (district court finding objections "hypothetical" and "purely speculative").

The objection that foreign copyright owners were treated unfairly was never raised before, therefore not considered by the district court, and consequently waived as a matter of law. *Singleton v. Wulff*, 428 U.S. 106 (1976); *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132-33 (2d Cir. 2008). Even if it were to be considered now, the objection is baseless. Non-U.S. plaintiffs were represented in the settlement negotiations. Two of the representative plaintiffs in this case are citizens of the United Kingdom. Another British author gave a declaration filed with the district court highly endorsing the Settlement and its fairness to foreign authors, and stating that she was claiming 200 Category C works. *See Declaration of Susan Wallace* (A 1490-93).²

The *Firefighters* Test Is Satisfied.

Objectors rely for the first time on *Local Number 93, International Ass'n. of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986), a case that analyzes when courts can approve settlement relief that could not be obtained after a trial.

Objectors did not advance below an objection that the Settlement provides broader relief to the class than the district court could have ordered after a trial. Thus, objectors have waived their *Firefighters*-based argument. Even if they had not, the Settlement clearly passes muster under the test enunciated in *Firefighters*. The Settlement (1) “spring[s] from and serve[s] to resolve a dispute within the court’s subject-matter jurisdiction”; (2) comes “within the general scope of the case made by the pleadings” and (3) “further[s] the objectives of the law upon which the complaint was based.” *Id.* at 525.

As to the first *Firefighters* element, the Settlement springs from and resolves a dispute within the court’s subject matter jurisdiction. The Supreme Court held that “the District Court had jurisdiction to approve the settlement” of this case. *Reed Elsevier v. Muchnick*, 559 U.S. ___, 130 S. Ct. 1237, 1249 (2010).

As to the second *Firefighters* element, the Settlement comes within the general scope of the case made by the pleadings. In the Consolidated Amended Class Action Complaint (“Complaint”), plaintiffs alleged that (a) freelance authors licensed their works for publication to print publications but did not grant to those publications or to defendants the right to reproduce, display, sell, and/or distribute their work in electronic form, and (b) defendant electronic databases obtained plaintiffs’ works from the print publishers that first published their works and “systematically reproduced, displayed, sold and/or distributed these copyrighted works without

² Plaintiffs had a reasonable basis to include such works in Category C, including the fact that foreign authors, in contrast to United States authors who did register their works, did not pay a registration fee. *See Plaintiffs’ Br.* at 36 n.12. Objectors’ claims that counsel have “misled the court” and made untrue statements (at 2 and 10) are baseless. The Category C claimants overwhelmingly are owners of United States works subject to the registration requirement, and appellees never intended to mislead any court by focusing on this vast majority of Category C works in their briefs.

authorization from the copyright holders, and permitted others to do so, and thereby infringed the copyrights directly, vicariously and/or contributorily.” (A 104-05.) Counts I, II and III of the Complaint seek damages for copyright infringement, and Count IV seeks injunctive relief. The prayer for relief seeks both damages and an injunction “barring defendants from continued infringement of the copyrights of the Named Plaintiffs and the Class.” (A 119-23.)

The Settlement comprehensively resolves the issues raised by the pleadings. It compensates class members for past and continued electronic use of their copyrighted works by the defendant databases. The Settlement also permits class members to direct that their works be removed, or “taken down,” from the databases. If a take down right has been exercised for a work, the class member receives 65% of the settlement compensation for that work; 65% of the settlement compensation is thus for past electronic use and 35% is for continued electronic use of a work. Defendants and their licensees may continue to display the works of class members who have not opted out of the Settlement or exercised their take down right, thus ensuring the integrity of their electronic databases. The Settlement thus falls squarely within the general scope of the case made by the pleadings.

As to the third *Firefighters* element, the Settlement furthers the objectives of the Copyright Act, upon which the complaint is based. The Supreme Court has instructed that the “limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”³ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *see also Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”).

The Settlement reflects this balance between private rights and public availability: it establishes the principle that the freelance authors control their copyrighted works, but also promotes the public accessibility of freelance articles in online databases. The Settlement thus substantially furthers the “interest of society in the untrammelled dissemination of ideas.” Foreward to B. Kaplan, *An Unhurried View of Copyright* vii-viii (1967), *quoted in Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 427, 431 n.12 (1984).

³ The Constitution gives Congress the power to “Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Constitution, art. I, § 8, cl. 8.

The Settlement promotes the objectives of the Copyright Act by enhancing the ability of freelance authors to take advantage of remedies that are available to them under that Act. The Register of Copyrights and some in Congress – as well as some copyright owners – have expressed concerns about the ability, resources and incentives of small copyright owners to vindicate their rights by bringing copyright infringement actions in federal court.⁴ Such individual suits are costly, and the monetary awards, even to the successful plaintiff, can be comparatively meager. Because the Settlement gives class members the right to claim damages, as well as the right to “take down” their works, it makes available to each class member remedies that are available to successful plaintiffs under the Copyright Act – damages and an injunction against further use. Freelance authors, however, need not bring their own suit to obtain these remedies.

The consistency of the Settlement with the policies underlying the copyright laws is further evident from the Supreme Court’s assurance in *Tasini* that “the parties (Authors and Publishers) may enter into an agreement allowing continued electronic reproduction of the Authors’ works; they, and if necessary the courts and Congress, may draw on numerous models for distributing copyrighted works and remunerating authors for their distribution.” *New York Times v. Tasini*, 533 U.S. 483, 505 (2001).

The Settlement terms and the procedural and substantive protections in Rule 23 satisfy the policy of the Copyright Act that permission must precede use. First, the notice and opt out procedure of Rule 23(b)(3) afforded class members an opportunity to opt out of the Settlement and thus preserve all rights to contest the databases’ use of their works. Second, a class action settlement requires judicial review and approval; courts must determine whether settlement notice plans are procedurally fair and whether the settlement terms are substantively fair, reasonable and adequate. With the approval of the Settlement after proper notice, absent class members are deemed to have approved the terms of the settlement and to have released their claims in exchange for the settlement benefits.⁵ Third, the Settlement itself permits authors to deny continuing use rights. (A 348, 1102.)

⁴ See *The “Orphan Works” Problem and Proposed Legislation: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Congress, 2d Sess. at 18 (Mar. 13, 2008) (statement of Marybeth Peters, Register of Copyrights) (Copyright Office “considering possible new enforcement issues related to small claims of copyright owners”); Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong., 2d Sess. § 5 (requiring Register of Copyrights to “conduct a study with respect to remedies for copyright infringement claims seeking small amounts of monetary relief, including consideration of alternatives to disputes currently heard in the United States district courts”); Orphan Works Act of 2008, H.R. 5889, 110th Cong., 2d Sess. § 6 (same); Orphan Works Act of 2006, H.R. 5439, 109th Cong., 2d Sess. § 4 (2006) (same).

⁵ Rule 23 embodies the constitutional principles of due process. See *Plaintiffs’ Br.* at 25.

Because the Copyright Act provides that “a nonexclusive license” is not a “transfer of copyright ownership,” 17 U.S.C. § 101 (defining the term “transfer of copyright ownership”), the Settlement does not involve any transfer of intellectual property rights from copyright owners to defendants, and every freelance author has the right to license his or her works to any willing licensee. This too furthers the objectives of the Copyright Act to allow copyright owners to control their works and also encourage broad public availability of copyrighted works.⁶

Known Future Claims May be Released.

The Settlement involves the release of known future claims for continued electronic display of freelance works in electronic databases, subject to “take down” rights in favor of the authors.⁷ Class actions can be settled with final approval orders providing for the release by class members of known future claims. *See* Plaintiffs’ Br. at 24-34. There is nothing unique about copyright class actions that prevents a settlement of known future claims. *Davis v. Blige*, 505 F.3d 90 (2d Cir. 2007), cited by objectors, is not to the contrary. *Davis* involved a question not at issue here: whether “one joint owner of a copyright can retroactively transfer his ownership by a written instrument, and thereby cut off the accrued rights of the other owner to sue for infringement.” *Id.* at 97. This Court held that the joint owner could not do so, noting that because each joint owner’s rights in a joint work are non-exclusive, “in order to convey exclusive rights all co-owners must agree to convey their shares of the same right.” *Id.* at 100.

Davis does not state that settlements cannot include non-exclusive authorizations for continued uses; it states only that “absent clear language to the contrary,” settlements are not “licenses for future use.” *Id.* at 102. Here, the Settlement and class notice clearly explain the continued electronic use authorization. *Davis* also reaffirms, as Plaintiffs-Appellees have argued, that a “non-exclusive license conveys no ownership interest.” *Id.* at 101.

⁶ The Settlement also satisfies the “identical factual predicate” doctrine. The doctrine has its genesis in *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981), where this Court rejected as unfair a class action settlement that included the release – for no consideration and without notice to the class – of claims neither possessed nor pleaded by the class representative. *Id.* at 11-14, 25. In direct contrast to *Super Spuds*, the representative plaintiffs here share the same claims as the class and have “common interests with other class members.” Further, unlike in *Super Spuds*, where the class notice did not explain the uncompensated release of certain claims, the class notice here clearly explained the terms of the Settlement with respect to compensation for both past and continued electronic uses and the take down right. *See* Plaintiffs’ Br. at 31-32.

⁷ The Settlement does not release or authorize the electronic use of any works “that have not, on or prior to the date of this [Settlement] Agreement, been reproduced, distributed, displayed or transmitted by any Defense Group member.” (A 338.) The Settlement thus only resolves claims with respect to works already infringed as of the date of the Settlement Agreement.

Schwartz v. Dallas Cowboys Football Club, Ltd., 157 F. Supp. 2d 561 (E.D. Pa. 2001), is also inapposite. There, the court disapproved a proposed settlement of an antitrust case challenging the bundling of football games on satellite television. The basis for the court's rejection was that the short duration of injunctive relief was inadequate; the merchandise discounts were inappropriate because they did nothing to ameliorate the antitrust violation at issue; compensation to the class was otherwise too low; the release to the class was overbroad because it included distribution through media other than satellite television (e.g., the Internet); and the release violated public policy by releasing claims for future antitrust violations. By contrast, the Settlement here includes an absolute take down right in favor of class members; the compensation is fair and reasonably calibrated to the strength of the claims asserted; no coupons or discounts are involved; the Settlement authorizes only continued electronic uses that were directly at issue in this copyright litigation (subject to the take down right of the authors); and the Settlement does not immunize future copyright infringement.

The Supreme Court Opinion

As a last argument, objectors appear to suggest that the Settlement should be reevaluated in light of the recent Supreme Court opinion. This argument has no validity. Parties settle cases by weighing risks as they exist at the time of settlement. Similarly, courts ruling on the fairness of class action settlements must determine whether the settlement is fair as of the time it was made, not in hindsight. Neither the parties nor the courts can predict the future, and rulings issued after a settlement has been reached cannot be used to argue that a settlement made at an earlier time was unfair because it did not predict those rulings. *See Isby v. Bayh*, 75 F.3d 1191, 1197 (7th Cir. 1996); *Florida Trailer & Equip. Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960); *cf. Ehrheart v. Verizon Wireless*, No. 08-4323, 2010 U.S. App. LEXIS 12174, *10 (3d Cir. June 15, 2010) (“[C]hanges in the law after settlement do not affect the validity of the agreement and do not provide a legitimate basis for rescinding the settlement.”).

Further, the representative plaintiffs and class counsel agreed to the Plan of Allocation not because they were concerned the Court might lack subject matter jurisdiction over unregistered works covered by section 411(a) in a *settlement* context, but rather because of the very real risk that in a *litigation* context the registration requirement would prevent the overwhelming majority of class members from being included in a litigation class and having their claims adjudicated on the merits. The Supreme Court opinion does not even discuss, let alone eliminate, that litigation risk. If this Settlement were undone, defendants would surely move to dismiss claims under section 411(a). Objectors simply ignore the fact that this substantial litigation risk still exists in the case, if this Settlement is not approved.

Conclusion

Nothing in the May 7, 2010 letter brief filed by objectors, nor in any previous briefing or argument by objectors, supports a finding that the district court abused its discretion when it granted final approval of the Settlement. The final judgment of the district court should be affirmed.

Respectfully yours,

/s/

Michael J. Boni

MJB/dp

cc: Counsel on enclosed service list
(via electronic mail)