UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re: Literary Works in Electronic Databases Copyright Litigation

No. 05-5943-cv

DECLARATION IN SUPPORT OF MOTION TO STRIKE

Charles D. Chalmers, do declare:

1. I am counsel for the appellants.

2. In from October 2005 to March 2006 I engaged in extensive communications with Michael Boni, representing all plaintiffs, and Charles Sims, representing all defendants, regarding the content of the Appendix. They never said anything to me about presenting post-judgment information about class member claims to this Court.

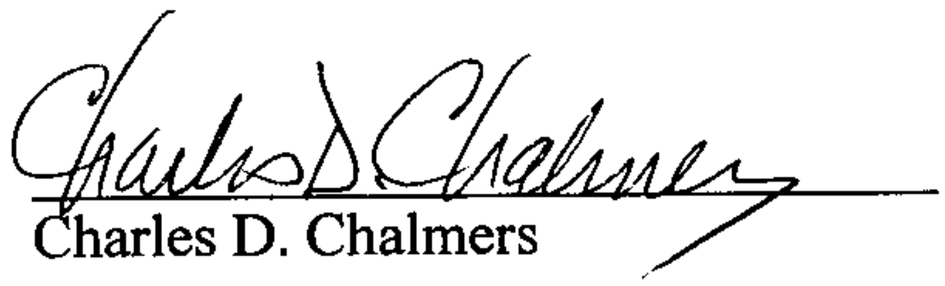
3. Attached as Exhibit A are the portions of the Combined Reply of Appellants which are meaningless when read against the corrected briefs of the appellees.

4. Attached as Exhibit B, which is sequentially paged for reference in the Memorandum, are true copies of correspondence (letters and emails) with counsel for appellees, and a letter from counsel for plaintiffs-appellees to the Clerk of the Court.

5. After I wrote to the Clerk urging that appellees corrected brief not be filed, I was called by Julius Crockwell, the deputy clerk responsible for this case, and told his supervisor had decided to file the briefs and that my remedy was to file a motion to strike. He said the reason was the Clerk's office did not think it should be responsible for determining what is a true "correction."

6. Before I learned that the factual statements in the appellees' briefs were wrong I proposed a stipulation to strike them. That is shown in Exhibit B, p. … I was concerned that the Court would actually think the issues were moot, even though I thought, and appellants argued in the Reply, that the figure demonstrated the error of the parties "certainty" that the C Reduction would not occur. But I dropped the proposal after I learned that the factual statements were an understatement of the filed claims, and the value of the claims by named plaintiffs. This information is very important to the appellants' position.

Executed at Fairfax, CA on August 1, 2006. I declare under penalty of perjury under the law of the United States that the foregoing is true and correct.



Charles D. Chalmers

Portions of Appellants' Combined Reply Brief Rendered Meaningless or Confusing By "Corrected" Briefs of the Appellees

Page 1, Intro.

In an attempt to avoid the implication of the C Reduction, they describe evidence outside the record. Even if it is considered, it confirms that they could not have had a reasonable belief that the C Reduction could never happen.

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III. Objection to Evidence Outside the Record.

The parties rely on evidence regarding actual claims filings. PB13 n7, 35 n12, 37 n15; DB21. Objectors object to this information as outside the record. Fed. R. App. Pro. 10. Objectors would stipulate to expanding the record with information about the claims if it were sufficiently complete and verified. No request was made by the appellees.

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Being told that six of them filed only C claims comes as a dramatic shock, suggesting there was always the potential for adequate representation for the owners of unregistered copyrights.

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A. The Claims Confirm the Conflict of Interest.

....
The value of their registered copyright claims creates the conflict under this settlement.

Page 8-9.

There are 20 named plaintiffs. Defendants suggest that less than all filed claims. ("All of the twenty plaintiffs who submitted any claims ...") DB21. Therefore, 20, or less, of the plaintiffs submitted 1,355 A claims, 115 B claims and 3,698 C claims. The value shows an actual conflict, not a potential or speculative one. The

A claims are worth between $875 to $1500 each, depending on how many of each plaintiff's articles were published by the same publisher. (A345, ¶ 4.a.) Using $1200 per claim as a middle number, the 1,355 A claims are worth $1,626,000. Since six plaintiffs filed only C claims (DB21), that $1.6 million is going to 14, or less, of the named plaintiffs. That's 15% of all filed claims. The total of all plaintiffs' C claims is $184,900. Clearly, those 14 plaintiffs are much more interested in their A claims than their C claims.

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The C Reduction creates the conflict. Examining two alternate claim reduction schemes shows it. To demonstrate, assume that total claims are $13.8, exceeding the $11.8 cap by $2 million. Also assume that 75% of total claim value are C claims, as a rough estimate based on 99% of the claims being unregistered. That makes C claims $10.35 million. Applying the C Reduction would reduce the C claims by $2 million, or 19%. ($2m divided by $10.35m) That's a $35,150 reduction of the plaintiffs' C claims. (19% x $185,000) Alternatively, applying a prorata reduction among A, B and C claims (it is prorata between A and B) the $2 million excess would require a 14.5% reduction of all claims. ($2m divided by $13.8m) That's a $232,000 reduction of the plaintiffs' A claims. (14.5% x $1.6m) For each of the 14 plaintiffs the difference is a $16,570 reduction under a straight prorata reduction, versus a $1,758 reduction under the C Reduction. This analysis doesn't change much if you assumed only 50% of the claim value was for C claims. In that event a 28% reduction of C claims is required. ($2m divided by $6.9m), That's $2,590 for each plaintiff under the C Reduction, versus the $16,570 under a straight prorata reduction. Those 14 plaintiffs will clearly risk the C Reduction to protect their A and B claims.

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Defendants say it would be "absurd" to question adequacy in light of actual claims of $10.76 million. PB13 n7. The hyperbole can not conceal that class representatives lacked any reasonable basis for certainty that the C Reduction would not occur. "[T]he risk is exceedingly remote." (A490) "[N]o basis in reality." (A611) "As a factual matter there is no chance …" (A1446) [I]t appears inconceivable …" (A1571)

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Objectors described how the Category C compensation structure was likely to limit defendants' liability by reducing, and suppressing, the value of C claims. AB35.

This is the point that respondents do not address. It has actually occurred, since the claims at $10.7 million leave $1.1 million that the defendants do not have to pay.

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First, the parties advise us that six named plaintiffs filed only Category C claims, suggesting that notwithstanding the allegations they did not have registered claims. Presumably they, or some of them, were candidates for that representation.

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It offered the possibility for, and we are told has achieved the reality of, reducing defendants' payout in the settlement. The class representatives, at least 14 of them, had little motivation to resist the defendants.