September 23, 2009

Attorney General Eric Holder U.S. Department of Justice 950 Pennsylvania Ave. NW Washington, D.C. 20530

Dear Mr. Attorney General:

As the named respondent in the current Supreme Court case *Reed Elsevier v. Muchnick* (scheduled for oral argument on October 7), I address the expressed interests of the United States both in that case and in the Google Books settlement (hereinafter "Google"). My purpose is to advance the Government's appreciation that the two cases are best discussed, prospectively and in the public interest, as a package.

In *Reed Elsevier* (previously known as *In re Literary Works in Electronic Databases Copyright Litigation* – hereinafter "Freelance"), the Solicitor General has joined both the settlement parties (the defendants plus the plaintiffs) and the objectors in asking the Court to overturn a *sua sponte* ruling by the Second Circuit Court of Appeals that the federal courts have no jurisdiction over settlements of copyright disputes including works that were not registered. (I am a respondent-objector.)

In Google, the Antitrust Division and the United States Attorney for the Southern District of New York filed a Statement of Interest with Judge Denny Chin outlining concerns not only in the area of antitrust, but also with the proposed settlement's fidelity to Rule 23 (class action) and copyright law. The Government brief was the clear impetus for the parties' subsequent motion to postpone the fairness hearing.

The Google settlement parties have indicated to the District Court their intention to use the period before a November 6 scheduling conference to revise the proposed settlement – based both on the Statement of Interest and, more broadly, on the Government playing a facilitating role in the drafting of revisions. It is in that context that the Freelance respondent-objectors seek your good offices in broadening the scope of the negotiations in both cases. Such a step, we believe, not only would serve judicial efficiency; it also would improve public policy in the evolving copyright architecture of new technologies.

Google and Freelance are at different procedural stages. The two cases, however, have striking and compelling similarities. Most fundamentally, both are copyright class actions involving claims by authors of the unauthorized reuse of their works by new digital publishing products. Beyond that, both cases have controversial settlement mechanisms turning on the deployment of "opt out," rather than "opt in," definitions for the granting of future rights to the defendants. This flaw in the Google settlement was particularly and aptly identified in the Government's Statement of Interest

Finally, the two cases share a named plaintiff, the Authors Guild, and its counsel.¹

¹ In Freelance, the Authors Guild is a co-associational plaintiff. It is worth noting that in Google, the other two co-associational plaintiffs of Freelance – the National Writers Union and the American Society of Journalists and Authors – have filed objections essentially identical to those of the Freelance respondent-objectors over what we termed the settlement's "license by default" provisions.

The Government's Statement of Interest in Google called attention to links between the two cases at p. 25, in the discussion of "Potential Foreclosure of Competition in Digital Distribution." The brief cited the Order for Final Approval of Settlement and Final Judgment in Freelance, noting that it provided for "numerous companies beyond the named defendants [to be] allowed to obtain benefits of settlement." In this way, the Government supported the argument that the Google settlement was defective on antitrust grounds.

Respectfully, the Freelance respondent-objectors believe that there are much stronger links between the two cases, as noted above. Further, the ability of a spectrum of publishers to obtain the benefits of settlement is far from the most pertinent set of facts in Freelance. While the antitrust principles propounded in your Google brief are well judged, the real connections

between Google and Freelance revolve around Rule 23 and copyright. We are gratified that the Government's Statement of Interest in Google went out of its way to offer cogent analysis in all three areas.

In Freelance, the settlement granted benefits to "numerous companies" simply as a consequence of the pattern of infringement and the range of entities exposed by it. Google has a single defendant. Freelance has several named defendants, and the universe of infringements encompasses the systematic practices of an entire industry of periodical publishers and their electronic database licensees – collectively identified as the Defense Group. Thus, the sharing of the benefits of settlement was not a function of antitrust sensitivity; it was simply a way to describe the population of defendant-infringers (all of which, due to the unusual and complex nature of the settlement, also stood to "obtain benefits" therefrom).

Even so, the Freelance respondent-objectors are quick to point out that, with this passage, the Government has put its finger on the central solution tying together both cases: the need for comprehensive, industry-wide royalty systems. In their current forms, the Freelance settlement has the comprehensiveness but not the royalty system; Google has the royalty system but not the comprehensiveness.

During the public debate of Google, there has been a great deal of discussion of "compulsory licenses." The Freelance respondent-objectors are not opposed to such arrangements per se; the main concern on our end is that they not be promulgated for the exclusive benefit of private litigation parties, and it is questionable whether that goal can be achieved by the courts rather than by Congress. In her recent testimony before the House Judiciary Committee, Register of Copyrights Marybeth Peters spoke eloquently on this point, and it has become the nexus of the successful resolution of both Google and Freelance.

The Supreme Court review of Freelance is on other grounds. But certainly one possible outcome of *Reed Elsevier v. Muchnick* – the one desired by the respondent-objectors – is a remand to the Second Circuit for the express purpose of reviewing the merits. Another possible outcome, of course, is that the Supreme Court will affirm the Second Circuit on the jurisdiction question under review, thus killing the settlement. We may know which path we are on by December or January. In the event the case does return to the Second Circuit, a possible decision there on the compulsory license issue would fundamentally affect Google.

For these reasons, the Freelance respondent-objectors request that the Government use its facilitating role in the renegotiation of the Google settlement, first and foremost, as a platform for broadening those negotiations. They should include the Freelance respondent-objectors, to be sure, but not only us; *all* stakeholders in the emerging copyright landscape should have their

interests heard and incorporated. From a policy perspective, perhaps the most egregious lapse to date has been the disenfranchisement of librarians and information consumers in the rush to tailor litigation settlements. The resulting pastiche of proposed solutions is poorly integrated and has ill-served all parties.

We believe that the Government's constructive intervention in Google marks a hopeful turning point in this process. Coordination of the Google and Freelance settlements would be the next step.

Thank you for your attention to this proposal.

Sincerely,

s_ Irvin Muchnick

cc: <u>Department of Justice</u>

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All Google counsel of record

All Freelance counsel of record