IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE LITERARY WORKS IN ELECTRONIC DATABASES COPYRIGHT LITIGATION	))))	MDL No. 1379

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL SETTLEMENT APPROVAL

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Plaintiffs respectfully submit this memorandum of law in support of their motion, pursuant to Fed. R. Civ. P. 23(e), for final approval of the Settlement Agreement that the Court preliminarily approved on March 31, 2005, and the Amendment to the Settlement Agreement that the Court preliminarily approved on July 28, 2005. Plaintiffs also submit this memorandum of law in opposition to objections to the proposed settlement ("Settlement").

I. PRELIMINARY STATEMENT

This Settlement is the largest copyright class action settlement in history. It is the product of an intensive, comprehensive four year mediation conducted by Kenneth R. Feinberg, one of the nation's leading mediators, among the parties and the print publishing industry. It resolves a long-standing copyright dispute among freelance authors, the print publications for which they contributed literary works, and the electronic databases that digitally archived and sold those works. The relief afforded to the freelance authors is exceptional, as attested to by the Settlement's support by the three leading authors' rights trade associations and by the vast majority of Class Members who have made their views known.

The Settlement provides for a fund of up to $18 million to be distributed to Class Members. In exchange for this substantial class-wide relief, defendants and participating publishers will be released from all claims by Class Members that had been or could have been made in this action that are related to the unauthorized electronic copying of freelance works.

The Notice of Class Action Settlement ("Notice") and Supplemental Notice of Class Action Settlement ("Supplemental Notice") were distributed to 42,822 Class Members by claims administrator Garden City Group, Inc. ("GCG"). (Declaration of Patrick M. Passarella

("Passarella Decl.") ¶¶ 6-9.)[1] The Notice summarized the Settlement's terms and the claims made in this action. A summary notice (the "Summary Notice") was also published in 3 national newspapers, 70 regional and local newspapers, 7 national magazines, 21 Canadian newspapers and magazines, and 5 other international publications, to ensure the widest notice campaign reasonably possible. (Declaration of Wayne L. Pines ("Pines Decl.") ¶¶ 11-13, 15, 18, 26-27 & Exs. C, D, F.) The form of the Notice, Summary Notice, Canadian Notice and Supplemental Notice were approved by the Court and were distributed in accordance with notice procedures ordered by the Court.

The Plan of Allocation ("Plan") is equitable. The formula utilized to calculate Class Members' claims is based on such criteria as (1) whether the Class Member's infringed work was registered with the U.S. Copyright Office and, if so, whether it was registered in time to qualify the author for statutory damages under the Copyright Act; (2) the amount the print publication originally paid for the work; and (3) the date of original publication of the work. In short, the Plan provides an effective mechanism to calculate fairly and accurately all Class Member claims. The Plan treats the Class Representatives identically to the other Class Members.

Mr. Feinberg found that, "during the entire mediation period, arms-length negotiation characterized the negotiating positions of the parties." (Declaration of Kenneth R. Feinberg in Opposition to Motion to Vacate Preliminary Approval and Motion to Establish New Procedures for Final Approval and Award of Attorneys' Fees dated May 16, 2005 ("Feinberg Orig. Decl.") ¶ 8.) In fact, Mr. Feinberg observed that "this mediated comprehensive resolution of the above-captioned matter is a model of how arms-length negotiation can lead to a satisfactory solution for

[1] All Declarations cited herein are filed with this brief.

all parties.“ (*Id.* ¶ 14.) Mr. Feinberg's conclusions concerning the mediation process include the following:

- All sides exhibited great skill and determination during the mediation process, resulting in a comprehensive settlement of a very complex matter which Mr. Feinberg believes is the fairest resolution which could be obtained. (*Id.* ¶ 8.)
- All members of the defined class and all defendant companies were adequately represented during the lengthy course of mediation. (*Id.* ¶ 9.)
- All class members' interests were thoroughly explored, considered and resolved during the course of the mediation. (*Id.*)
- The comprehensive class settlement is fair, reasonable and adequate and adequately and fairly distinguishes between and among various claims which could have been asserted by class members. (*Id.* ¶ 13.)
- The comprehensive settlement achieves more than could have been obtained through continued litigation. (*Id.* ¶ 8.)

In all his years of mediating complex disputes, Mr. Feinberg's opinion is that the above-captioned matter proved to the longest, most difficult mediation in which he has been engaged. (*Id.*)

In light of the economic benefits provided by the Settlement and the substantial risk that the vast majority of the Class would receive nothing otherwise, the Settlement has received the overwhelming support of the freelance authors' community. In fact, only five objections were filed involving just twelve Class Members. As we establish below, all of the objections lack merit. Most are nothing more than Monday morning quarterbacking, and none presents an alternative scenario that would more fairly represent the best interests of the Class.

The Court should approve the Settlement as fair, adequate and reasonable, because it is procedurally fair, *e.g.*, it is the product of an intense arms' length mediation among experienced counsel; the terms of the Settlement are substantively fair; continued litigation would have confronted Class Members with perilous risk, and delay; the Class favors its approval; and the few objections asserted are without merit.

II. STATEMENT OF FACTS

A. Summary of Litigation

An overview of the case is set forth in the Memorandum of Law in Support of Plaintiffs' Motion For Preliminary Settlement Approval, filed on March 23, 2005.

B. The Mediation

On July 19, 2001, the Court held an initial scheduling conference and directed the parties to engage in mediation. Settlement discussions began in September 2001 and the parties retained Mr. Feinberg as mediator.

After an introductory meeting in November 2001, Mr. Feinberg commenced the mediation in January 2002. (Feinberg Orig. Decl. ¶ 6.) Mr. Feinberg and his partner, mediator Peter Woodin, oversaw the production of information by defendants as part of the mediation process. (Declaration Of Kenneth R. Feinberg In Support Of Motion For Final Approval Of Class Action Settlement Agreement dated September 19, 2005 ("Feinberg Supp. Decl.") ¶ 3.) The information requested by Class Counsel included information about payments to content providers, copies of license agreements, numerical summaries of works available on the databases, the percentage of freelance authors' works as compared to all works available on the databases and financial data with respect to gross revenues and expenses. (*Id.* ¶ 3.) After lengthy, often heated discussions among the parties and the mediators, the information that was available was provided to the plaintiffs. (*Id.*)

After Class Counsel and their expert, Dr. Jeffrey J. Leitzinger, had an opportunity to analyze, evaluate and review the information provided by the plaintiffs as well as from other sources, Mr. Feinberg assembled representatives from all parties to attend the opening mediation session where Class Counsel presented their opening position and defendants were able to respond. (Declaration of Jeffrey J. Leitzinger in Support of Final Settlement Approval ("Leitzinger Decl.") ¶¶ 6, 13.) That began the long arduous negotiations that spanned four years.

At various points during the mediation process, Mr. Feinberg concluded that the negotiations had broken down and the parties would have to return to the court room for resolution. (*Id.*) The mediation was characterized by the "divergent views" the parties held "on almost every issue." (Feinberg Orig. Decl. ¶ 7.) Nevertheless, the parties persevered in reviving the negotiations and after numerous lengthy and late night negotiations were able to reach a comprehensive settlement. (Feinberg Supp. Decl. ¶ 3.)

Mr. Feinberg states that "there is absolutely no question that the comprehensive settlement achieved by the parties was the result of lengthy, intense negotiations between and among very sophisticated parties knowledgeable about the subject matter and fully cognizant of any and all issues pertinent to reaching such a settlement." (*Id.* ¶ 4.) Moreover, he believes that "the mediation proved over a lengthy period of time to be a stunning success; a comprehensive resolution was achieved between and among sophisticated and knowledgeable parties and lawyers with full awareness of the role of the mediators." (*Id.* ¶ 5.)

Ultimately, the parties reached a proposed settlement of this class action, memorialized in the Settlement Agreement submitted herewith.

C. The Terms of the Settlement

1. The Parties

(a) The Defense Group

Defendants are (1) current and former commercial electronic database operators Reed Elsevier, Inc. (which operates LEXIS/NEXIS); The Thomson Corporation; The Dialog Corporation; The Gale Group, Inc.; West Publishing Corporation d/b/a West Group; Dow Jones & Company, Inc.; Dow Jones Reuters Business Interactive, LLC, d/b/a Factiva; EBSCO Industries, Inc.; Knight-Ridder, Inc.; Knight Ridder Digital; Mediastream, Inc.; NewsBank; and ProQuest Information and Learning Company; and (2) two newspaper publishers, The New York Times Company and The Copley Press, Inc. The database operators are referred to herein as the "Database Defendants."

Also, thirty-six newspaper and magazine publishers have agreed to participate in the settlement by contributing funding and information concerning their freelance authors' works ("Participating Publishers"). (Settlement Agreement ("S.A.") Ex. A.) The Participating Publishers and defendants are referred to collectively herein as the "Defense Group."

In addition, other publishers that supplied works to the Database Defendants and that elect to pay claims under the Plan of Allocation for Subject Works they first published, will be released from claims pertaining to those Subject Works. Those publishers are referred to herein as "Supplemental Participating Publishers."

(b) Plaintiffs and the Settlement Class

(1) The Settlement Class

The Class consists of all persons who own a copyright under the United States copyright laws in an English language literary work that, at any time after August 14, 1997, was copied in an electronic format by any Defense Group member, without the person's authorization. These works are referred to as the "Subject Works." A person is a Class Member even if his or her Subject Work was not registered with the U.S. Copyright Office, or was originally published outside the U.S., so long as the work was published in a country that is a member of a U.S. copyright treaty. (S.A. ¶ 1.f.)

(c) The Named Plaintiffs

The named plaintiffs are Derrick Bell, Lynn Brenner, Michael Castleman, Inc., E.L. Doctorow, Tom Dunkel, Andrea Dworkin, Jay Feldman, James Gleick, Ronald Hayman, Robert Lacey, Ruth Laney, Paula McDonald, P/K Associates, Inc., Letty Cottin Pogrebin, Gerald Posner, Miriam Raftery, Ronald M. Schwartz, Mary Sherman, Donald Spoto, the Jessica L. Treuhaft Trust, Constancia Romilly (as successor Trustee), Robin Vaughan, Robley Wilson and Marie Winn.

(d) The Associational Plaintiffs

The cases were also brought by three authors' rights groups: The Authors Guild, the National Writers Union and the American Society of Journalists and Authors (collectively, "Associational Plaintiffs").

2. The Settlement Fund and Plan of Allocation

Under the Settlement, the Defense Group and Supplemental Participating Publishers will pay a minimum of $10 million and up to $18 million to be applied to valid claims and Court-awarded fees and costs.

Settlement payments will be based on the following Plan of Allocation:

Category A Subject Works. For each Subject Work the Class Member registered with the U.S. Copyright Office (a) before any infringement after the Subject Work was first published, (b) within three months after first publication of the work, or (c) at any time prior to the licensing of the Subject Work by databases Amazon.com or Highbeam,[2] the person will receive:

- $1,500 for each of the first fifteen Subject Works written for any one publisher;
- $1,200 for each of the second fifteen Subject Works written for that publisher;
- $875 for each Subject Work written for that publisher after the first thirty.

Category B Subject Works. If the Class Member registered the Subject Work before December 31, 2002, but after any infringement of the work and more than three months after the first publication of the Subject Work, the person will receive, per each such Subject Work, the greater of $150 or 12.5% of the original sale price of the Subject Work.

Category C Subject Works. For all other Subject Works (including Subject Works that were never registered), the Class Member will receive, per Subject Work:

- $60 for each Subject Work originally sold for $3,000 or more;
- $50 for each Subject Work originally sold for $2,000 to $2,999;
- $40 for each Subject Work originally sold for $1,000 to $1,999;
- $25 for each Subject Work originally sold for $250 to $999;
- The greater of $5 or 10% of the original price of the Subject Work for works that originally sold for $249 or less.

Reduced Payments for Older Subject Works. For Subject Works created before January 1, 1995, payments in **Categories B and C** above will be reduced based on the years in which the Subject Work was created, as follows:

[2] This provision regarding Highbeam and Amazon.com arose from the events giving rise to the Amendment to the Settlement Agreement, which events are described in Plaintiffs' Motion For Preliminary Approval of Settlement Agreement as Amended, dated July 25, 2005. The Court granted that motion on July 28, 2005.

- Subject Works created in 1985-1994: a 5% reduction for each year beginning in 1994 and continuing through 1985, so that payments for Subject Works created in 1994 will be reduced by 5%; payments for Subject Works created in 1993 will be reduced by 10%, and so on until works created in 1985 (payments reduced by 50%).

- Subject Works created in or before 1985: Payments reduced by 50%.

Under no circumstances, however, will any reduction for older works reduce a settlement payment to less than $5. (S.A. ¶ 4.)

Rights With Respect to Continued Electronic Use. Settlement payments represent compensation both for past infringement and for the continued non-exclusive right to electronic use of the Subject Works by the Defense Group and/or Supplemental Participating Publishers. Class Members may choose not to grant future electronic rights. If they choose not to grant future electronic rights for a particular work, they will receive 65% of the total settlement payment for that work. The Defense Group and Supplemental Participating Publishers are responsible for removing from their databases all Subject Works that Class Members request not to remain on or be restored to the databases.[3]

Other Provisions. If the sum of valid claims, fees and costs is less than $10 million, the difference between that sum and $10 million will be distributed pro rata among the claimants. (S.A. ¶ 3.a.)

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[3] If a Class member already signed a written agreement with a print publication granting electronic rights to the person's unregistered Subject Works (falling into Category C described above), the person has already granted a license for future use of those works. Such Class members no longer have the option of withholding electronic rights, and are eligible to receive just 65% of the total settlement payment.

The Settlement Agreement provides for an allocation procedure in the event valid claims, fees and costs exceed $18 million. (*S.A.* ¶ 4.f.) However, there is virtually no possibility the claims will actually reach $18 million.[4]

3. **Claims Procedure**

The claims procedure was designed fairly and equitably to the Class Members. Claims can be prepared and submitted either online or in paper form. (S.A. Ex. B (Claims Administration Memorandum) ¶ 1.a.) Although information concerning claimed Subject Works is required, *i.e.*, so that defendants and publishers can verify claims, documentation is not required, and Class Members need not recount every one of their Subject Works by date, title, or amount paid for original publication. (*Id.* ¶¶ 2-3.) It is defendants' and the publishers' burden to disprove the validity of claims, not vice-versa. (*Id.* ¶ 4.)

4. **Costs of Notice and Claims Administration**

All costs associated with the notice program and claims administration will be paid from the $18 million fund. The publication notice program was very comprehensive and far-reaching. (*See supra* at 1-2.) The retail value of the program is over $2.6 million (Pines Decl. ¶ 29), and yet defendants received only a $1 million credit against their funding obligations. (S.A. ¶ 8.)

5. **Releases**

The Defense Group and Supplemental Participating Publishers, and their respective affiliates, predecessors, successors, directors, officers, employees, agents, representatives and

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[4] As of September 12, 2005, the Claims Administrator has received 1,220 claims representing 64,544 literary works, yielding a total of approximately $3.2 million under the Plan of Allocation. (*See* Passarella Decl. ¶ 17; Declaration of A. J. De Bartolomeo ("De Bartolomeo Decl.") ¶ 40.) That comes to an average of $31,373 per day for the 102 days of the Claims Period through September 12. In order to reach $18 million, claims for the remaining 18 days of the Claims Period would have to increase more than 15 times the average value to date, to a value of $477,000 per day. (*See* De Bartolomeo Decl. ¶ 40.)

assigns, will be released from claims, past, present and future, that were or could have been asserted in this litigation based on the Subject Works, including but not limited to all copyright infringement claims and claims based on the electronic reproduction, distribution, display, sale, or adaptation of the Subject Works to or by a member of the Defense Group or a Supplemental Participating Publisher.

D. Settlement Notice

Rule 23(e) of the Federal Rules of Civil Procedure states that "notice of the proposed dismissal or compromise shall be given to all members of the class in such manner ***as the court directs***." Fed. R. Civ. P. 23(e) (emphasis added); *see also* 4 *Newberg on Class Actions* § 11.53 ("The nature and extent of Rule 23(e) class notice of a proposed settlement are left to the discretion of the trial court judge."). The Notice was disseminated in accordance with the Court's Orders of March 31, 2005 and July 28, 2005. (Passarella Decl. ¶¶ 5-10.)

It is well settled that "[a]lthough no rigid standards govern the contents of notice to class members, the notice must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings.'" *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982); *accord Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 396 F.3d 96, 113-14 (2d Cir.), *cert. denied*, 161 L. Ed. 2d 1080, 125 S. Ct. 2277 (2005). Indeed, "[n]umerous decisions, no doubt recognizing that notices to class members can practicably contain only a limited amount of information have approved 'very general descriptions of the proposed settlement.'" *Weinberger*, 698 F.2d at 70.

The Notice here provided the requisite information to absent Class Members, including the following: a summary of the litigation and claims asserted in the action (§ I.A), identification of the parties (§ I.B), a description of the Settlement's terms. (§§ II.A-D), pertinent information about the Plan of Allocation (§ II.A), the releases (§ II.D), a description of absent Class Member rights to object to the Settlement (§ V.), or opt out of these proceedings (§ IV.), and instructions on how absent Class Members could receive more information about the Settlement, including calling a toll free number, contacting the Claims Administrator or Lead Counsel, or by visiting the official Settlement website established by Court Order (§ VI.).

III. ARGUMENT

A. Standards

"A court may approve a class action settlement if it is fair, adequate and reasonable, and not a product of collusion." *Wal-Mart*, 396 F.2d at 116; *accord Joel A. v. Guiliani*, 218 F.3d 132, 138 (2d Cir. 2000); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001); *Weinberger*, 698 F.2d at 72. "The District Court determines a settlement's fairness by examining the negotiating process leading up to the settlement as well as the settlement's substantive terms." *D'Amato*, 236 F.3d at 85; *see also Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983) ("The trial judge determines fairness, reasonableness and adequacy of a proposed settlement by considering (1) the substantive terms of the settlement compared to the likely result at trial, a (2) the negotiating process, examined in light of the experience of counsel, the vigor with which the case was prosecuted and the coercion that may have marred the negotiations themselves.") (internal citations omitted); *Snapp v. Topps Co.*, No. 93-CV-0347, 1997 WL 1068687, at *2 (E.D.N.Y. Feb. 12, 1997); *In re Int'l Murex Techs. Corp. Sec. Litig.*, No. 93-CV-336, 1996 WL 1088899, at *3 (E.D.N.Y. Dec. 4, 1996); *Slomovics v. All For A Dollar, Inc.*, 906 F. Supp. 146, 149 (E.D.N.Y. 1995).

The Second Circuit recognizes a "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart*, 396 F.3d at 116 (quoting *In re PaineWebber*

Ltd. P'ships Litig., 147 F.3d 132, 138 (2d Cir. 1998); *accord Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 360 (S.D.N.Y. 2002); *In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347, 351 (E.D.N.Y. 2000); *In re Medical X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 WL 661515, at *3 (E.D.N.Y. Aug. 7, 1998); *see also In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280 (S.D.N.Y. 1999) ("'Federal courts look with great favor upon the voluntary resolution of litigation through settlement. . . . This rule has particular force regarding class action lawsuits.'") (quoting *Air Line Stewards & Stewardesses Ass'n v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1166 (7th Cir. 1980)); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985) ("There is little doubt that the law favors settlements, particularly of class action suits.") (citations omitted), *aff'd*, 798 F.2d 35 (2d Cir. 1986); 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions*, § 11:41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy.").[5]

"The decision to grant or deny [Rule 23(e)] approval lies within the discretion of the trial court . . . ." *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 473 (S.D.N.Y. 1998) (citing *In re Ivan Boesky Sec. Litig.*, 948 F.2d 1358, 1368 (2d Cir. 1991)). This discretion "should be exercised in light of the general policy favoring settlement." *Thompson v.*

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[5] Courts, in general, favor settlement because it saves the parties the expense of trial and promotes judicial economy. *Chatelain v. Prudential Bache Sec.*, 805 F. Supp. 209, 212 (S.D.N.Y. 1992) ("In general, courts look upon the settlement of lawsuits with favor because it promotes the interests of litigants by saving them the expense of trial, and it promotes the interests of the judicial system by reducing the burdensome strain upon it.") (citing *Newman v. Stein*, 464 F.2d 689 (2d Cir.), *cert. denied*, 409 U.S. 1039 (1972)); 3 *Newberg on Class Actions* § 9:56 & n.1 ("In all complex litigation, including class litigation, the resolution of controversies by means of settlement among the parties is favored. . . . Settlement is generally received favorably by the judiciary. . . . There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation.") (citing *Weinberger*, 698 F.2d at 73; A. H. Degaris, *The Role of United States District Court Judges in the Settlement of Disputes*, 176 F.R.D. 601 (1998)).

Metropolitan Life Ins. Co., 216 F.R.D. 55, 61 (S.D.N.Y. 2003) (citing *Weinberger*, 698 F.2d at 73); *Sheppard v. Consol. Edison Co. of New York, Inc.*, No. 94-CV-0403, 2002 WL 2003206, at *3 (E.D.N.Y. Aug. 1, 2002) (same). Aware of this discretion, the Second Circuit has held that "[i]f the court approves [a] settlement based upon well-reasoned conclusions, arrived at after [a] comprehensive consideration of [the] relevant factors, [the] settlement is entitled to deference upon review." *Warner Communications*, 798 F.2d at 37 (citation omitted).

B. <u>The Settlement Agreement Is Procedurally Fair.</u>

In reviewing the negotiating process, "courts have demanded that the compromise be the result of arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests." *Weinberger*, 698 F.2d at 74 (citing *Detroit v. Grinnell Corp.*, 495 F.2d 448, 463-66 (2d Cir.1974)); *see also Trief v. Dun & Bradstreet Corp.*, 840 F. Supp. 277, 280-81 (S.D.N.Y. 1993) (same).

There is a strong initial presumption of fairness when the above factors are met. *Wal-Mart*, 396 F.3d at 116; *Thompson*, 216 F.R.D. at 61 ("A strong presumption of fairness attaches to proposed settlements that have been negotiated at arms-length."); *In re Sterling Foster & Co., Inc., Sec. Litig.*, 238 F. Supp. 2d 480, 484 (E.D.N.Y. 2002) (same); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 146 (E.D.N.Y. 2000) (same); 4 *Newberg on Class Actions* § 11:41. Because the Settlement is a product of heated arm's-length negotiation and is proposed by experienced and effective plaintiffs' counsel, its fairness should be presumed.

1. <u>The Settlement Is a Product Of Arm's-Length Negotiation.</u>

The Settlement was negotiated during a period of over four years by experienced counsel. Plaintiffs' counsel have substantial experience in prosecuting and resolving class actions and other complex litigation. The negotiations took place at arm's length, were adversarial, often times contentious, and were mediated by Kenneth R. Feinberg, one of the nation's most prominent and respected mediators.[6] The settlement terms were not reached before plaintiffs' counsel thoroughly investigated and researched the relevant facts and law, including reviewing substantial amounts of discovery produced by defendants. Plaintiffs also retained an economist expert who prepared a damages report for plaintiffs, a copyright expert, who consulted with plaintiffs on relevant areas of cutting edge copyright issues, and a class certification expert, who assisted plaintiffs with respect to the novel issue of obtaining certification of a copyright class that includes authors of unregistered works. (Declaration of Michael J. Boni ("Boni Decl.") ¶ 2.)

Of particular significance is that the Class's interests were protected not only by the representative plaintiffs and Class Counsel, but also by the three leading authors rights groups, the Associational Plaintiffs. The Guild, NWU and ASJA had one objective and one objective alone: to advance the rights and interests of freelance authors. They were not paid a penny for their services on behalf of the Class. They served in the mediation as advisors to Class Counsel, and took part in the negotiations as active participants. (*See* Declaration of Paul Aiken ("Aiken Decl. ¶¶ 9-11"); Declaration of Jim Morrison ("Morrison Decl." ¶¶ 7-9).) The additional layer of protection of the Class's interests by non-profit authors' associations removes any doubt whatever that the Settlement was not collusive.

Even without the participation of the Associational Plaintiffs, this Settlement was anything but collusive. Mr. Feinberg states that "there was absolutely no evidence of collusion during the entire mediation process..." (Feinberg Orig. Decl. ¶ 8.) Moreover, Mr. Feinberg's

[6] Among other distinctions, Mr. Feinberg was appointed by the United States Department of Justice to serve as the Special Master administering the September 11 Victim Compensation Fund.

descriptions of the mediation process as "the most difficult, time consuming and protracted" he has ever had where "all class member interests were thoroughly explored, considered and resolved," and the release negotiated was "carefully crafted, hard fought," establishes that there was no collusion. (*Id.* ¶¶ 7-10, 12.) Mr. Feinberg's declarations provide direct and compelling evidence that the Settlement is the result of procedural fairness.

2. <u>Approval of the Settlement Is Recommended by Experienced Plaintiffs' Counsel.</u>

(a) <u>Experienced Class Counsel Effectively Represented the Class.</u>

The experience of Class Counsel assisted them in achieving exceptionally favorable results for the Class. Class Counsel's significant experience, is set forth in their fee petition, and is not refuted by any objector.

(b) <u>Class Counsel Reached Settlement Only After Sufficient Investigation and Discovery to Make an Informed Decision.</u>

The determination to settle was only reached by Class Counsel, the Associational Plaintiffs and the class representatives after exhaustive investigation of the relevant factual and legal issues, mediation discovery, and extensive mediation. *See infra.*, pp. 23-30.

C. <u>The Terms of the Settlement Agreement Are Fair, Adequate and Reasonable.</u>

When evaluating the substantive fairness of a class action settlement, *i.e.*, whether the provisions of a settlement agreement are fair, adequate and reasonable, Second Circuit courts consider the following nine factors ("*Grinnell* Factors"):

(1) the complexity, expense and likely duration of the litigation;

(2) the reaction of the class to the settlement;

(3) the stage of the proceedings and the amount of discovery completed;

(4) the risks of establishing liability;

(5) the risks of establishing damages;

(6) the risks of maintaining the class action through the trial;

(7) the ability of the defendants to withstand a greater judgment;

(8) the range of reasonableness of the settlement fund in light of the best possible recovery; and

(9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Wal-Mart, 396 F.3d at 117 (citing *Grinnell*, 495 F.2d at 463). "All nine factors need not be satisfied, rather, the court should consider the totality of these factors in light of the particular circumstances." *Thompson*, 216 F.R.D. at 61 (citing *D'Amato*, 236 F.3d at 86).

The level of analysis given to determining whether the terms of a proposed class action settlement are substantively fair is inherently a "limited" one. *Weinberger*, 698 F.2d at 74. In this regard, the Supreme Court has noted that, in order to conduct such an analysis, a trial judge must "apprise [] himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968). In commenting on the referenced Supreme Court language, the Second Circuit has held that " 'all' cannot really mean 'all.' The Supreme Court could not have intended that, in order to avoid a trial, the judge must in effect conduct one." *Weinberger*, 698 F.2d at 74; *see also Maley*, 186 F. Supp. 2d at 361 ("'It is not necessary in order to determine whether an agreement of settlement and compromise shall be approved that the court try the case which is before it for settlement . . .Such procedure would emasculate the very purpose for which settlements are made.'") (quoting *Grinnell*, 495 F.2d at 462); *In re Holocaust Victim*, 105 F. Supp. 2d at 149 n.1 (court stating that

"I do not and need not 'decide the merits of the case or resolve [the] unsettled legal questions' it presents.") (quoting *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981)).

1. **<u>The Complexity, Expense and Likely Duration of the Litigation</u>**

The *Tasini* decision resolved a significant liability issue in favor of plaintiffs. It held that the non-image-based electronic reproduction of freelance works is not a "revision" of a collective work under Section 201(c) of the Copyright Act, and therefore defendants may not assert that statutory provision as a defense in this case. *New York Times Company, Inc. v. Tasini*, 533 U.S. 483, 493 (2001). *Tasini*, however, did not even address let alone dispense with a vast array of other complex issues facing plaintiffs here in a litigation context. *See Wal-Mart*, 396 F.3d at 118-19 (although government's successful prosecution of key liability issue "improved plaintiffs' likelihood of success," court nevertheless found case complex in light of defenses with respect to damages element).

Defendants have aggressively argued, for example, (1) that the Class must be limited to authors who registered their works in the U.S. Copyright Office; (2) no class would be certified in this case because of asserted numerous individual issues (*e.g.*, the calculation of damages for each class member is an individual issue that predominates over common issues); (3) the databases do not distinguish between "freelance works" and works for hire, and such information is in the possession of the many thousand content providers, if at all; (4) identification of the infringed works is unmanageable; and (5) determining damages would be extremely complex. "[F]ocused and diligent labor was required because of the novelty and difficulty of the legal questions involved . . . ." *In re Copley Pharmaceutical, Inc., "Albuterol" Prod. Liab. Litig.*, 1 F. Supp. 2d. 1407, 1413 (D. Wyo. 1998).

Defendants vigorously attacked plaintiffs' damage analysis and argued that the value of printed freelance work is very low, the electronic market for resale of freelance works is small, and defendants' profits have been minimal. For example, defendants have argued, (i) there is no benchmark against which to gauge the value of the freelance-authored content on the databases; (ii) authors command greater value for their works depending on their relative notoriety, rendering it difficult to fix actual damages "per freelance work"; (iii) works written in a period over a quarter of a century long (from 1978-2005) are eligible, and it would be difficult to determine actual damages in light of the age of the work; (iv) since *Tasini*, publishers have imposed form contracts on freelance authors, requiring grants of electronic rights for no additional consideration; and (v) mass deletions of freelance content by some databases after *Tasini* was not met with a reduction of subscriptions or lower subscription rates. (Boni Decl. ¶ 3.)

From the inception of the case and throughout the mediation sessions spanning over four years, Class Counsel have had to wage formidable battle after formidable battle with Defense Counsel on virtually every legal and factual issue in the case. (*Id.* ¶ 4.)

In light of these complex issues, the Settlement achieved is nothing short of extraordinary. Its magnitude and level of complexity is staggering. Moreover, unlike securities, antitrust and consumer class actions, for which templates have been forged over decades and thousands of cases (and for which fees of a third of the recovery are commonplace), this is just one of only a few copyright class actions ever brought, and the parties have had to litigate the many novel, complex issues in this case out of whole cloth. The fact that this case was pursued as a class action – with the risk that the Class would not be certified, increased the complexity of this case significantly.

Further, plaintiffs would have had to overcome significant barriers at trial, on post-trial motion practice and on appeal to establish liability and damages on their copyright infringement claims. Assuming a victory for plaintiffs, they would likely have had to wait, at the very least, until much later when their favorable judgment would be affirmed and a petition of *certiorari* was denied by the Supreme Court.

The fact that this matter was exceedingly complex, would be expensive to pursue and would likely not be resolved for years even in light of a plaintiff victory at trial provides ample support for approval of the Settlement. *See Maley*, 186 F. Supp. 2d at 362 (approval granted where "[d]elay, not just at the trial stage but through post-trial motions and the appellate process, would cause Class Members to wait for years for any recovery, further reducing its value"); *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262, 2002 WL 31663577, at *22 (S.D.N.Y. Nov. 26, 2002) (approval granted where "[s]ettlement at this juncture results in a substantial and tangible present recovery, without the attendant risk of appeal and delay of trial and post-trial proceedings"); *Slomovics*, 906 F. Supp. at 149 (approval granted where "[t]he potential for this litigation to result in great expense and to continue for a long time suggest[s] that settlement is in the best interests of the Class").

2. <u>The Reaction of the Class to the Settlement</u>

"'If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.'" *Wal-Mart*, 396 F.3d at 118 (quoting 4 *Newberg on Class Actions* § 11.41, at 108); *see also id.* § 11.41 ("With respect to objections to [a] settlement, a certain number of objections are to be expected in a class action with an extensive notice campaign and a potentially large number of class members."); *D'Amato*, 236 F.3d at 86 (where only 18 objections were received in a class action where 27,883 notices were sent [approximately 0.06%], the Second Circuit held that "[t]he District Court properly concluded that this small number of objections weighed in favor of the settlement").

In the present case, 42,822 Settlement Notices were sent to the Class. Only 5 objections, on behalf of 12 Class Members, were received. Accordingly, less than 0.03% of the Class Members who were sent individual notice raised objections. This exceedingly low number of objections (roughly half of the magnitude deemed "small" in *D'Amato*) evidences the adequacy of the Settlement and militates in favor of approval. *See Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1313 (3d Cir. 1993) (characterizing as an "infinitesimal number" the less than 30 of approximately 1.1 million class members who objected); *Thompson*, 216 F.R.D. at 62 (court approved settlement where less than 0.05% of class members objected to settlement); *see also NASDAQ Market-Makers*, 187 F.R.D. at 479 (citing *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-119 (3d Cir. 1990) (approval warranted even where 10% of class objected), and *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979) (approval warranted even where 16% of class objected)).

In contrast to the tiny number of objectors, support from the Class for the Settlement has been dramatic. (*See* De Bartolomeo Decl. ¶¶ 19-32, Ex. A.) The following are a few examples:

> *"Personally, I am extremely pleased that some people have gone to the time and trouble of bringing this action that I can now be a part of from across the seas. I don't feel so alone and stamped on and also there is no threat of nasty comeback for me as I get my dues. Good for them, I say."*
>
> Susan Wallace

> *"This settlement will be very helpful to my family for several reasons, mainly dealing with my fiscal considerations as we've had a number of hardships over the past few years ... All of this has hurt us financially in many ways, and this settlement will go a long way towards relieving some of the worries that plague us."*
>
> Jeff Seidel

"While I intend to use the $18,500 to literally pay my federal and state income taxes this year, and am in fact, counting on it to do so, the larger rewards of this claim, indeed the suit as a whole, go far beyond being able to write a check, but speak to a genuine sense of wrongs, if not wholly righted, then at least acknowledged."

Hilary de Vries

"I wholeheartedly and fervently support this settlement for a number of reasons ... First and foremost, my wife, Alisa, has been a cancer survivor twice in the past two years. During the time of her treatments and hospitalizations, we racked up large amounts of bills – bills that we could pay with a healthy settlement check ... After all we've been through, a delay at this point would be disastrous, as well as an enormous psychological blow."

Richard Scherr

"I feel the payment negotiated in this settlement is more than fair because it would never have been available without a class action case such as this one. As an individual, I could never have financed the prosecution of an individual case like this so my settlement would have been money lost and will continue in that vein until the settlement is approved."

Gary Taylor

"I am a mother of three daughters with child-rearing costs. This money would help tremendously to pay for their college ... This money is incredibly important to me. I am disgusted and aggravated by this objector to the settlement. It is absurd that someone wants all the parties involved to go back to the drawing board and try again after five years of negotiations that finally yielded a settlement. It took enormous effort and cooperation to reach this point ... I request that the court consider that this group of six objectors is by far outweighed by the hundreds of claimants who have applied for compensation and support the settlement's present terms. We have waited a long time for this. Please don't destroy the hard work that has been done here. We finally have all of the defendants that have agreed to the settlement and arriving at that was a tremendous feat."

Martha Russis

(De Bartolomeo Decl. Exs. B- K; *see also* Declaration of Paula McDonald.)

Further evidence of the favorable reaction of the Class is the support it is given by the three leading authors' rights groups: the Authors' Guild, the National Writers Union and the American Society of Journalists and Authors. These are organizations whose ***mission*** it is to promote the professional interests and to protect the rights of writers through advocacy and education. (*See* Aiken Decl. ¶ 3; Morrison Decl. ¶¶ 3-5, 13; Declaration Of Brett Harvey In Support of Plaintiffs' Motion For Final Settlement Approval ¶ 4). The Associational Plaintiffs strongly support the proposed Settlement. (*See* Aiken Decl., ¶¶ 6-11; Morrison Decl., ¶¶ 11-13.) Not one member of the Authors Guild's Council nor its membership has expressed any reservation about the value of the proposed Settlement. (*See* Aiken Decl. ¶ 13.)

The Associational Plaintiffs established a joint website that describes the Settlement and allows visitors to post questions about the Settlement. None of the thousands of visitors to the Associational Plaintiffs' joint website has voiced any criticism of the Settlement. (*See id.* ¶ 15.) Moreover, the response from the freelance community has been overwhelmingly positive. (*See* Morrison Decl. ¶¶ 10-12; De Bartolomeo Decl. ¶¶ 19-32.)

3. <u>The Stage of the Proceedings and the Amount of Discovery Completed</u>

While virtually all of the litigation took place in the context of a mediation proceeding, that proceeding lasted four years and virtually every relevant factual and legal issue was vigorously litigated before the mediators. In addition to debating the merits of the case and the many legal issues that defendants were prepared to raise, substantial information was exchanged on the potential damages that might be asserted. In the Fall of 2001, Plaintiffs' Co-Lead Counsel sought from defendants and other entities certain documents and information pertaining to damage analyses. Thereafter, there were numerous discussions during the mediation sessions concerning the information requested from defendants and other entities that attended the first mediation session. Co-Lead Counsel requested the assistance of Messrs. Feinberg and Woodin during this mediation process to assist in obtaining additional information from the defendants that was necessary for a meaningful evaluation on the damages issues. (Boni Decl. ¶ 5.)

Defendants provided pertinent information that gave Plaintiffs' Co-Lead Counsel the foundation needed to evaluate the damage claims that both registered and unregistered authors might advance. The Database Defendants produced information concerning royalty payments made to content providers, revenues received from subscribers and/or users, licensing terms, and articles that had been removed recently from databases. The content providers also provided information, including license fees, the number of articles per year, the percentage of articles that are freelance articles in each publication's database (to the extent that that could be estimated), and the expense and revenue for publication archives. (*Id.* ¶ 6.)

The specific categories of documents and other information requested and obtained from defendants in order to create a damage analysis included the following:

1. Spreadsheet summaries of payments made to content providers from 1995 to the present, as well as the number of works associated with the royalty payments.
2. A copy of license agreements with the ten largest (by dollar or volume) content providers for each database defendant.
3. The number of works available from each database between 1995 and the present, and the number of works removed or "masked" for the same period.
4. The number of works (within the database) that were viewed, copied, distributed, or sold by defendants during each year from 1995 to the present.
5. The percentage of works available from defendants, written by freelance authors, as compared to all works available on the databases from 1995 to the present.
6. Documents sufficient to show gross revenues from any source, as well as authorizing expenses associated with the database.

7. Characteristics of the database, including the type, number of records contained therein and interaction with other databases.

Co-Lead Counsel were, after much debate during the mediation, satisfied that defendants had supplied sufficient material information on a wide range of damage topics so as to perform a realistic evaluation of the claims. (*Id.* ¶ 7.)

In sum, Plaintiffs' Co-Lead Counsel entered into the Settlement only after they developed a thorough understanding of their case. *See Wal-Mart*, 396 F.3d at 118. The Court likewise has more than sufficient knowledge upon which to evaluate the fairness, adequacy and reasonableness of the Settlement Agreement. *See Maley*, 186 F. Supp. 2d at 363 ("To approve a settlement, . . . 'the Court need not find that the parties have engaged in extensive discovery.'") (quoting *In re American Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 425-26 (S.D.N.Y. 2001)); 4 *Newberg on Class Actions* § 11:45 (while, in order to approve a settlement, a court must have "sufficient evidence to enable [it] to analyze intelligently the contested questions of fact. . ., [it] need not possess evidence to decide the merits of the issue . . . .").

4. <u>The Risks of Establishing Liability</u>

While plaintiffs are confident that they would ultimately prevail, there is the risk that they would not establish liability on their claims. Contrary to certain objectors' misinformed assumption that once *Tasini* was decided the class action became a "slam dunk," plaintiffs still faced the risk that liability on a classwide basis would not be established. For one thing, the vast majority of works at issue were never registered with the U.S. Copyright Office, and thus could not have been included in the action. *See* 17 U.S.C. § 411(a) (stating that generally, copyright infringement action may not be brought unless preregistration or registration of copyright has been made; or application for registration has been properly made and refused, and notice of action and complaint are served on Register of Copyrights; *Morris v. Business Concepts, Inc.*, 283 F.3d 502 (2d Cir. 2002) (where plaintiff sued defendants for publishing article that had been written by plaintiff and previously licensed to magazine, Second Circuit held that the registration of copyright in a collective work does not constitute registration of copyright in a freelance article contained in the collective work, and precluded plaintiff from proceeding with suit for lack of standing). (*See* Morrison Decl. ¶ 9; Aiken Decl. ¶¶ 16-17.)

For another, even as to the works that were registered and therefore inarguably within the Court's jurisdiction, defendants advised plaintiffs during the mediation that other colorable defenses against liability existed, including the existence of oral and implied-in-fact licenses, and claim bars based on estoppel, acquiescence and laches. (Boni Decl. ¶ 8.) The decision in *Tasini* removed but one defense advanced by the defendants, *i.e.*, that the "revision" provision in Section 201(c) of the Copyright Act encompassed the electronic reproduction of freelance articles contained in collective works.

5. **<u>The Risks of Establishing Damages</u>**

Nor did *Tasini* resolve, or even address, the issue of damages. Plaintiffs faced a substantial uphill battle establishing damages. Again, the overwhelming majority of works at issue would have gone completely uncompensated because freelance authors typically did not register their works and thus lacked standing to bring an infringement action.

Plaintiffs' Co-Lead Counsel retained Dr. Jeffrey J. Leitzinger, a leading economist expert, who has been President of EconOne Research, Inc. since 1997. Dr. Leitzinger was retained to analyze the damages in this case. Dr. Leitzinger has been admitted as an expert economist to testify before numerous courts across the country on subjects such as relevant markets in competition, valuation, economic loss and damages, patent and intellectual property issues and the economics of regulated industries, among other testimony. Dr. Leitzinger has a Ph.D. and M.A. in economics from UCLA. (Boni. Decl. ¶ 9.) (*See* Declaration and *curriculum vitae* of Dr. Jeffrey J. Leitzinger ("Leitzinger Decl.").)

Dr. Leitzinger and Plaintiffs' Co-Lead Counsel interviewed defense counsel on their clients' document production at a mediation session held on March 5, 2002. Dr. Leitzinger and Plaintiffs' Co-Lead Counsel were able to question defense counsel concerning their document production including questions related to royalty payments by account, total payments to all providers and payments to top ten providers from 1997 to 2001. (Leitzinger Decl. ¶ 7; Boni Decl. ¶ 10.)

With this information, Dr. Leitzinger was able to provide a calculation of damages by three different methods:

1. Royalties generated from electronic sales of freelance articles;
2. The value of freelance articles vis-à-vis original payments to the authors; and
3. Profit margins earned on freelance articles.

(Leitzinger Decl. ¶ 8.)

The first method of assessing the freelance royalties estimated the freelance royalties as a percentage of total literary royalties paid. Dr. Leitzinger began with the total annual literary royalties that were based on figures provided by defendants. These total royalties were multiplied by the annual percentage of freelance articles, those not covered by electronic rights agreements to arrive at annual freelance royalties. Dr. Leitzinger also determined the maximum percentage of articles that were freelance articles over the entire time period; when multiplied by total literary royalties, and this yielded the maximum freelance royalty. (*Id.* ¶ 9.)

The second method of valuation of electronic rights involved estimating the original payment to freelance authors and then calculating damages under alternative assumed electronic royalty values (*e.g.*, 15% and 10%). Dr. Leitzinger began with a number of articles removed by defendants from their databases and estimated that a certain number of those were freelance articles (base case, 50%; alternative case, 25%). Dr. Leitzinger used databases as payments per word and per article to freelance authors to estimate a lower bound, a mean and a mode value for original payments to authors. Damages were then calculated as a royalty value based on that original payment. (*Id.* ¶¶ 10-11.)

The last method analyzed involved margins. This method calculated the damages based on defendants' estimated profit margin. The base case was an estimated 25% margin for defendants and an alternative case was a 50% margin. Dr. Leitzinger began with total literary royalties (as provided by defendants) that then were grossed up on actual and assumed royalty rate to arrive at total revenues. These total revenues were then multiplied by an estimated profit margin to arrive at total profits earned. (*Id.* ¶ 12.)

These three methodologies provided different measures of the damages range in the case. By combining alternative assumptions under the royalty and margin methods, the total measure of damages was concluded to be in the range of $35 million to $71 million for all defendants. Those numbers were provided to defendants in the mediation. Defendants heavily criticized the assumptions and argued that damages were actually far below those numbers. (*Id.* ¶ 13; Boni Decl. ¶ 11.)

The risk of establishing damages was heightened by the state of the law. Copyright damages in the Second Circuit are governed by *Davis v. The Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001). There, the Second Circuit decided that "gross revenues" in section 504(b) of the

Copyright Act meant those "reasonably related" to the infringement, not unrelated revenues." *Id.* at 160. Because the allegedly infringing advertisement at issue pertained only to Gap label stores and eyewear, the court ruled that it was incumbent on the plaintiff to submit evidence at least limited to the gross revenues of Gap label stores and perhaps also limited to eyewear or accessories, stating as follows:

> [W]e think the term 'gross revenue' under the statute means gross revenue reasonably related to the infringement . . . Thus, if a publisher published an anthology of poetry which contained a poem covered by the plaintiff's copyright, we do not think that plaintiff's statutory burden would be discharged by submitting the publisher's gross revenue from its publication of hundreds of titles, including trade books, textbooks, cookbooks, etc. ***In our view, the owner's burden would require evidence of the revenues realized from the sale of the anthology containing the infringing poem.***

Davis, 246 F.3d at 160 (emphasis added). The court stated that the plaintiff could recover a reasonable royalty based on the "fair market value for a license," but that no award could be based on undue speculation. *Id.* at 166.

In order to prove damages, plaintiffs here would need to account for the fact that the Database Defendants licensed entire libraries of works, not individual articles. Plaintiffs would also have to account for the fact that not all of the defendants even made a profit. (Boni Decl. ¶ 12.) Plaintiffs would also need to determine which revenues of the defendants were attributable to the infringement of the freelance contributions to the archives. This requirement "is a rule of causation and 'it is necessary to attribute profits directly to the infringement, which in turn requires that the damages be direct rather than remote, and that an appropriate apportionment be made between revenue attributable to infringement and other revenue . . . .'" *Bruce v. Weekly World News, Inc.,* 150 F. Supp. 2d 313, 319 (D. Mass. 2001) (quoting 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 14.03 (1993) (footnotes omitted)), *aff'd in part, vacated in part on other* *grounds*, 310 F.3d 25 (1st Cir. 2002). To the extent there was any evidence of payment for the individual download of particular freelance articles, the payment tended to be of very small amounts, *i.e.*, a few dollars for a single download. This form of direct payment has become, if anything, much less common, as evidenced by the demise of Contentville, which built its online content delivery business on this model. (Boni Decl. ¶ 13.)

Further, in the mid-1990s, publishers began to require their freelance contributors to sign contracts granting all rights, or at least electronic rights to the publishers. Of significance to plaintiffs' damages analysis, the freelancers were not paid any additional compensation for these rights transfers. (Boni Decl. ¶ 14.) The fact that the electronic rights grants did not provide additional compensation to the freelance authors further heightens plaintiffs' risk of establishing damages.

Accordingly, this factor heavily weighs in favor of settlement approval. *See Slomovics*, 906 F. Supp. at 149-50 (settlement approval granted where "even if liability is established, plaintiffs will face the problems and complexities inherent in showing damages. . . .").

6. **<u>The Risks of Maintaining the Class Action Through Trial.</u>**

The risk that a motion for class certification would be denied is another factor favoring the Settlement. To the extent any class were to be certified in the present action, it would almost certainly be limited to authors of registered works, thereby excluding virtually all freelance authors, precisely the persons for whom this case was brought. *See Ryan v. CARL Corp.*, No. C-97-3873-FMS, 1999 U.S. Dist. LEXIS 366 (N.D. Cal. Jan. 14, 1999) (injunctive relief class limited to authors of registered works).

Even as to a narrowly-drawn registered works class, there is some risk it too would not be certified. Although plaintiffs are confident such a class would be certified, and believe the requirements of Rule 23(a) would plainly be satisfied (numerosity, commonality, typicality and adequacy), defendants advanced in the mediation colorable arguments that individual issues would predominate over common issues, and that the case, if litigated, would be unmanageable as a class action. *See* Fed. R. Civ. P. 23(b)(3). The amount of actual damages arguably would depend on such individual factors as the original price paid for the work, the degree to which it was accessed or displayed by database subscribers and customers and for how much, the level of notoriety of the author at the time of infringement, and how many times the work was otherwise infringed, *e.g.*, how many databases included the work. While plaintiffs believe that common methodologies exist to calculate actual damages on a classwide basis (*see supra*, pp. 27-28), there is a not insignificant risk that a class certification decision could turn on this predominance issue.

Further, defendants would offer evidence of the existence of express and implied licenses by freelancers for the electronic use of their works. The determination of whether authors granted such licenses would have to be made, of course, on an individual basis. While plaintiffs believe that this argument too would likely not prevail, it is by no means a frivolous argument. Class Counsel were sufficiently concerned about this issue at the outset of the case that they retained class action expert Samuel Issacharoff to be prepared to testify on class certification issues if required. (Declaration of Samuel Issacharoff in Support of Final Settlement Approval ("Issacharoff Decl.") ¶ 4; Boni Decl. ¶ 15.)

With respect to manageability, defendants advised plaintiffs in the mediation that, because their licensing agreements with the content providers included indemnification clauses, the database defendants would have impleaded the thousands upon thousands of indemnitor print publishers. Doing so would plainly call into question the manageability of this case as a class action. (Boni Decl. ¶ 16.)

This additional risk factor supports settlement approval. *See NASDAQ Market-Makers*, 187 F.R.D. at 476 (settlement approved where "there is no guarantee that this class would not be decertified before or during trial").

7. <u>The Ability of the Defendants to Withstand a Greater Judgment.</u>

Even though defendants may have the capacity to pay a judgment greater than that achieved in the Settlement, this does not warrant disapproval of the Settlement Agreement. In *D'Amato*, 236 F.3d at 86, objectors argued that a settlement concerning reparations to Holocaust victims should not be approved because the Austrian bank defendants could have withstood a greater judgment. In affirming the district court's approval of that settlement, the Second Circuit held:

> The District Court explicitly acknowledged that the defendants' ability to withstand a higher judgment weighed against the settlement, but explained that this factor, standing alone, does not suggest that the settlement is unfair. This conclusion cannot be considered an abuse of discretion, given that other *Grinnell* factors weigh heavily in favor of settlement.

Id. (citations omitted); *see also Sheppard*, 2002 WL 2003206 at *5 (court approved settlement even though defendant "concedes that it is able to withstand a greater judgment"); *NASDAQ Market-Makers*, 187 F.R.D. at 477-78 ("While it appears that Defendants, which include some of Wall Street's most successful firms, would be able to pay a very substantial judgment collectively, that fact does not militate against settlement.").

8. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery.

A class action "settlement may be approved if it is clear that it secures some adequate advantage for the class. The settlement does not have to be a brilliant one in order to secure judicial approval." 4 *Newberg on Class Actions*, at § 11:46. In *Grinnell*, 495 F.2d 448, the Second Circuit held that settlements that provide for only a small fraction of the claimed relief can be granted approval:

> The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.
>
> * * *
>
> In fact, there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.

Id. at 455 & n.2.

The Settlement confers much more than an "adequate advantage" on the Class. It provides a minimum fund of $10 million, and up to $18 million, in compensatory relief to the Class. Plaintiffs recovered between approximately 25% and 50% of the range of monetary damages highlighted by the expert during the mediation. (*See supra*, p. 28.)

In comparing the settlement recovery to what could have been possibly achieved for the Class through further litigation, it must be reiterated that the likely exclusion of unregistered works would reduce the actual damages by more than 99%. In that regard, the amount achieved by the settlement is very likely ***higher*** than what could have been achieved on behalf of a registered works class at trial.

9. **The Range of Reasonableness of the Settlement Fund in Comparison to a Possible Recovery in Light of the Attendant Risks of Litigation.**

Class action settlements should be approved when "[t]he unpredictability of a lengthy and complex trial, and the appellate process that would follow, with the risk of reversal, make the fairness of [a] substantial settlement readily apparent." *Maley*, 186 F. Supp. 2d at 366; *accord In re Holocaust Victim*, 105 F. Supp. 2d at 148 (court approves settlement when measuring adequacy and reasonableness of settlement "against the practical alternative to the settlement in the real world"). The Second Circuit in *Wal-Mart* stated: "There is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion – and the judge will not be reversed if the appellate court concludes that the settlement lies within that range." 396 F.3d at 119 (citing *Newman*, 464 F.2d at 693).

As described above, the Settlement offers substantial benefits to the Class Members *now* as opposed to the continued risk and delay offered by further litigation. The risks of further litigation are abundant, and are particularly acute for authors of unregistered works. A highly likely outcome of zero is what the vast majority of the Class would face. Finally, defendants made clear in the mediation that there would be no settlement that involved any more funds or any other payment structure (*e.g.*, a royalty scheme similar to ASCAP). (Feinberg Orig. Decl. ¶ 13.) Given the circumstances, there was no reason for Plaintiffs' Co-Lead Counsel to disbelieve them. The Settlement should thus be approved.

D. **The Class Certification Requirements Are Met.**

In connection with the final approval of a class action settlement under Rule 23(e), plaintiffs must show that the settlement class satisfies the class certification requirements of Rule 23. *See in re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 172-73

(S.D.N.Y. 2000) (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 616 (1997)), *aff'd sub nom. D'Amato*, 236 F.3d 78; *Toys "R" Us*, 191 F.R.D. at 351; *Sumitomo Copper Litig.*, 189 F.R.D. at 278.

Here, the numerosity requirement, Fed. R. Civ. P. 23(a)(1), is met. The proposed Class numbers in the tens of thousands. Many authors are members of the Associational Plaintiffs – The Authors Guild, the National Writers Union and the American Society of Journalists and Authors – whose memberships run in the thousands.

Common issues exist, thereby satisfying the commonality requirement of Rule 23(a)(2). As freelance authors, the Class Members all share the same interest in resolving such common questions as who owns the electronic rights to freelance works sold to print publications, whether defendants' common course of conduct infringed the copyrights of the Class Members, whether such infringement was willful, and the appropriate measurements of damages under the Copyright Act. These and related issues predominate over any issues affecting only individual Class Members, thereby satisfying the predominance requirement of Rule 23(b)(3).

The typicality and adequacy of representation requirements are met here as well. *See* Fed. R. Civ. P. 23(a)(3) and (4). The claims of the named plaintiffs are typical of those of the rest of the Class, and the named plaintiffs have no interests antagonistic to those of the rest of the Class. Moreover, the named plaintiffs have retained counsel who are highly experienced in class action and other complex litigation. The named plaintiffs and their counsel are adequate class representatives.

Furthermore, a class action is a superior means of fairly and efficiently resolving this dispute. *See* Fed. R. Civ. P. 23(b)(3)(A)-(D). There is little interest among Class Members in individually controlling the prosecution of separate actions, as per-author damages are generally too low to justify the cost of such litigation. Furthermore, it is appropriate to concentrate litigation of the claims in this forum, as many of the Defense Group members are headquartered in this District. *See* Fed. R. Civ. P. 23(b)(3)(C).[7]

Accordingly, certification of the Class in connection with final settlement approval is appropriate.

E. The Objections Are Meritless.

Out of the tens of thousands of Class Members, only five objections have been filed on behalf of just twelve purported Class Members. One is brought on behalf of nine Class Members by professional objector Charles Chalmers, whose website address is www.classobjector.com. The lead objector in this group is Irwin Muchnick. Muchnick has conceded that he was a consultant for one of the Co-Lead Counsel firms in the *Posner* action consolidated herein before the filing of that action. He could have come forward at any time in the five years of this litigation, and intervene, make contact with Plaintiffs' Co-Lead Counsel or the Associational Plaintiffs, or otherwise participate constructively in this matter, but for his own reasons he chose instead to do nothing but lie in wait.[8] The second is by Anita Bartholomew,

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[7] In a settlement context, the manageability issues under Rule 23(b)(3) need not be addressed. *Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial.").

[8] Muchnick maintains a web log ("blog") whose raison d'etre is to viciously attack the proposed settlement. As an illustration of his approach, on June 9, 2005, he wrote to Plaintiffs' Co-Lead Counsel purporting to ask questions, but actually mounting a whole new set of attacks on the settlement. Muchnick wrote that "[I] am posting our exchange on the comment page of your website (with the expectation that it will be duly forwarded to Judge Daniels) and on my own blog." On Muchnick's blog, he "call[s] for more objectors," refers to the Claims Administrator as the "[u]nsettlement claims administrator," and advises the Claims Administrator, "[u]nsettlement administrator: Don't worry your pretty little head." He also

footnote continued

whose objection was filed more than two weeks after the July 15, 2005 deadline, and should be stricken as untimely. The third is by Christopher Goodrich, who later joined the Chalmers group, and whose objections is subsumed in Chalmers's objections.[9]

The other two objections must be stricken because they were not filed by Class Members. Both Francis Hamit and Edward Roeder have opted out of the Class, and therefore lack standing to object because they have no interests at stake in the settlement. (*See infra*, pp. 53-54.)

As the Court well knows, Chalmers has advanced a staggering number of objections in the hopes at least one will succeed. None, however, has any merit. Ms. Bartholomew primarily challenges the propriety of a classwide release for continued use of Subject Works by defendants. Mr. Goodrich argues that the settlement is unfair to authors whose works fall into Category C. The latter two objections, also raised by Chalmers, will be addressed below, followed by a response to the rest of the objections.

1. **The Release of Claims for Continued Use of Subject Works Is Proper.**

Chalmers and Bartholomew contend it is inappropriate to allow defendants to continue to use Subject Works belonging to Class Members who do not opt out or exercise their takedown right. Chalmers additionally contends the notice inadequately informs Class Members with respect to this settlement term. Both contentions are baseless.

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harbors substantial personal animus toward the first-named plaintiff in the *Tasini* case, Jonathan Tasini.

[9] Goodrich submitted a one-page letter objection on August 24, 2005. It does not pertain to the Amendment to the Settlement, and therefore is untimely by over five weeks, as the deadline for objections to the Settlement on grounds other than the amendment was July 15, 2005.

(a) <u>The Settlement Term is Nothing More Than a Release of a Known Claim For Continuing Non-Exclusive Use.</u>

Chalmers has mischaracterized this settlement term as a "License by Acquiescence" or "License by Default." (Chalmers's July 14, 2005 Brief at 12; Chalmers's Sept. 12, 2005 Brief at 1.) In fact, it is nothing more than a release of known claims for the continued non-exclusive electronic use of the Subject Works. As the Notice and Settlement Agreement make clear, it is not a transfer of any property ownership rights. (S.A. ¶ 5.b; Notice Part II.A.5.) It is consistent with any other release of known future claims in a class action settlement.

Class actions bind absent class members to the terms of a final judgment or settlement, and class members' claims against defendants are extinguished as a matter of course with the use of broad releases. *See Wal-Mart*, 396 F.3d at 106 ("Broad class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country. Practically speaking, class action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability."); *Uhl v. Thoroughbred Technology & Telecommunications, Inc.*, 309 F.3d 978, 982, 985 (7th Cir. 2002) (broad releases are common in class settlements; fact "that each individual class member did not know the full extent of the burden she would suffer is unimportant".)

Because a cause of action is a property right, a judgment or settlement agreement will bind absent class members only if they are judged to have been adequately represented and other standards of due process have been satisfied. *Wal-Mart*, 396 F.3d at 109 ("Claims arising from a shared set of facts will not be precluded where class plaintiffs have not adequately represented the interests of class members."); 7B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1789 (2d ed. 1987). The question of whether plaintiffs here can release future claims against the Defense Group on behalf of Class Members is, therefore, properly considered in light of due process principles.

Rule 23 embodies the constitutional principles of due process. *See* 7B Wright & Miller, *supra*, § 1789, at 251 (Rule 23 "prerequisites [of notice and adequate representation] seem plainly intended to meet the standard established by the Supreme Court . . . to the effect that persons not parties to an action may be bound by a judgment whenever the procedure adopted 'fairly insures the protection of the interests of absent parties who are to be bound by it.'") (citations omitted) (quoting *Hansberry v. Lee*, 311 U.S. 32 (1940)). Furthermore, where representation and notice do satisfy due process, absent class members are bound even if a particular individual did not actually receive notice. *Id.* (citing *Johnson v. General Motors Corp.*, 598 F.2d 432 (5th Cir. 1979); *Hallman v. Pennsylvania Life Ins. Co.*, 536 F. Supp. 745, 749 (N.D. Ala. 1982); *Quigley v. Braniff Airways, Inc.*, 85 F.R.D. 74 (D. Tex. 1979)).

The opt-out right under Rule 23(b)(3) is a significant additional measure of due process protection in the settlement process. *See In re Joint E. & S. Dist. Asbestos Litig.*, 78 F.3d 764, 777-78 (2d Cir. 1996) (citing *In Re Joint Eastern & Southern District Asbestos Litigation*, 982 F.2d 721 (2d Cir. 1992), *as modified*, 993 F.2d 7 (2d Cir. 1993)); *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1563-64 (3d Cir.), *cert. denied.*, 513 U.S. 986 (1994); *Thompson v. Edward D. Jones & Co.*, 992 F.2d 187, 191-92 (8th Cir. 1993); 7B Wright & Miller, *supra*, § 1789.

Class Members here were sufficiently put on notice that if they do nothing they will be releasing claims for future use. Class Members were given notice via an extremely comprehensive publication notice program valued at over $2.6 million, and by individual notice to over 40,000 Class Members. The Notice clearly advised Class Members that they would be releasing all "claims of copyright infringement, past, present, *or **future***," against the Defense Group, Supplemental Participating Publishers, ***and licensees***." (Notice, Part II.D (emphasis added).) They were advised exactly what they needed to do if they did not want any of their claims released, whether for past infringement or future use: opt out (*id.*, Parts II.D, IV.). They were advised what they needed to do if they wanted to make a claim for past infringement under the Settlement while at the same time retain any claim for future use: simply check a box on the Claim Form (Claim Form, Claim Worksheet, item 7).

The objectors have gotten hung up on the term "license." Although plaintiffs have referred to this settlement term as a "non-exclusive license," it is in fact and in law nothing more than a release of a known claim for future use in exchange for the right to receive compensation. The Settlement Agreement states as follows with respect to this term:

> 5. Continuing Use of Subject Works.
>
> * * *
>
> It is considered by plaintiffs to constitute a non-exclusive license for future database use . . . and it is considered by the Defense Group to be a compromise and restatement of preexisting non-exclusive rights obtained through oral or implied-in-fact agreements and provision for the expenditures occasioned by takedown or incomplete restoration.

(S.A. ¶ 5.b.)

Regardless of what the deal term is called, it is perfectly lawful and appropriate. First, consistent with the law on non-exclusive licenses, the Settlement Agreement expressly provides that the continued use term "is not a transfer of ownership to the Subject Works." (S.A. ¶ 5.b.) *See* Goldstein, *Copyright*, Second Edition, 2005 Supplement at 4:66. A non-exclusive license is tantamount to a waiver to sue the party using the work. *See Graham v. James,* 144 F.3d 229, 236 (2d Cir. 1998) (copyright owner who grants non-exclusive license to use his copyrighted material waives his right to sue licensee for copyright infringement) (citing *Jacob Maxwell, Inc. v. Veeck*, 110 F.3d 749, 753 (11th Cir. 1997)); *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1338-39 (9th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); *see also* Keller & Cunard, *Copyright Law*, § 3:6.3, at 3-39 (Release No. 3, November 1993) ("[A] non-exclusive license does not involve a property right. Instead it is an authorization to exploit the copyright in a particular way, ***which implicitly includes a covenant . . . not to sue . . . .***") (emphasis added).

Accordingly, the grant of a non-exclusive license is legally indistinguishable in this context from a release of known future claims, which is undisputedly permitted. *See, e.g.*, *Williams v. Gen. Elec. Capital Auto Lease*, 159 F.3d 266, 274 (7th Cir. 1998) ("It is not at all uncommon for settlements to include a global release of all claims past, present, and future, that the parties might have brought against each other"), *cert. denied*, 527 U.S. 1035 (1999).

Second, the claims being released with respect to continuing use by defendants was undisputedly encompassed in plaintiffs' complaint, which sought both monetary and injunctive relief. (*See* Compl. ¶¶ 68-82 and Prayer for Relief.) Accordingly, this fact takes the release here out of the purview of *Amchem*, in which the Supreme Court rejected a release of claims for future asbestos injuries that class members did not have any way of knowing they would develop when they were called upon to decide whether to stay in or opt out of the class. *See* 521 U.S. 591. (*See* Issacharoff Decl. ¶¶ 12-15) Here, the continued use by defendants of the Subject Works was the basis for plaintiffs' injunctive relief claims, and the Notice made perfectly clear that the Class's works would continue to be used unless Class Members opted out or exercised their takedown right. Because this case – and the release – involve a finite, identifiable universe of works, every Class Member is capable of making a fully informed decision of whether to opt out or request the takedown of his or her works.[10]

Third, even assuming for sake of argument that the grant of a non-exclusive license is somehow seen differently from a standard release of one's right to sue, settlement approval would still be warranted. Chalmers and Bartholomew contend that Class Members who do not file claims cannot be deemed to have released future claims or granted a non-exclusive license for electronic use, but their position is unsupported by the case law. Courts have approved settlements that impose a burden upon the plaintiffs to affirmatively transfer property where adequate consideration was paid and due process was satisfied.

In *Alvarado v. Lindsey*, No. 99-5159, 2000 U.S. App. LEXIS 21259 (6th Cir. Aug. 15, 2000), the court affirmed the approval of a settlement that provided for what Chalmers would call an "easement by default." In *Alvarado*, owners of land adjacent to an airport brought a class action against the airport authority, seeking relief for noise and other pollution emanating from the airport. A settlement was reached and approved by the district court. Under the settlement, the airport authority paid approximately $22 million, to be distributed to those class members

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[10] Indeed, although not applicable here, it is not uncommon for courts to release claims that were ***not*** sued upon, and even claims that could never have been sued upon. *See, e.g., Wal Mart*, 396 F.3d at 107 ("The law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented . . . ."); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 261 F.3d 355, 366 (3d Cir. 2001) (holding that "a judgment pursuant to a class settlement can bar later claims based on the allegations underlying the claims in the settled class action . . . even though the precluded claim was not presented, and could not have been presented, in the class action itself) (citing *Grimes*, 17 F.3d at 1563; *In re Baldwin United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328, 336 (2d Cir. 1985); *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268 (9th Cir. 1992) (holding that federal court may release state law claims over which it lacks subject matter jurisdiction if state law claims arise from same nucleus of operative fact as claims over which court does have jurisdiction)); *Uhl*, 309 F.3d at 982, 984-85.

who submitted claims. The authority received an easement allowing it to use certain airspace in a lawful manner. The payments to those class members who filed claims represented compensation for both the release of past claims and the easement. *See id.* at *7-9. Thus, although class members who neither opted out nor filed claims received nothing, they were deemed to have granted the airport authority an easement for their property nonetheless.

In *Uhl,* the Seventh Circuit affirmed a settlement agreement providing for the release of plaintiffs' potential claims and binding all class members to a grant of easement in return for compensation. The settlement terms in *Uhl* contained no provision for class members to refuse the easement, *i.e.*, transfer of the right was mandatory. 309 F.3d at 982, 984-95. Here, in contrast, class members may choose to participate in the class, receive compensation for past infringement and still refuse to grant the waiver of claims relating to future use of the disputed property. (*See* Issacharoff Decl. ¶¶ 24-25)

(b) <u>The Class Was Adequately Notified With Respect to this Settlement Term.</u>

As for the objection that the Notice did not adequately disclose the Settlement's release of claims for future electronic use, such a contention is belied by the Notice itself, which states that released claims include all "claims of copyright infringement, past, present, ***or future***," against the Defense Group, Supplemental Participating Publishers, ***and licensees***." (Notice, Part II.D (emphasis added).) Moreover, Chalmers's contention that the Class was inadequately apprised of its right to disallow the future use of its Subject Works is utterly baseless. The Notice provides as follows:

> **<u>Rights With Respect to the Future Electronic Use of Your Subject Works.</u>**
>
> Valid claims will be awarded a single payment for the past infringement and for the future electronic use of the Subject Works. Plaintiffs consider that 65% of each Settlement Payment is

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> compensation for past infringement, and 35% is compensation for future electronic use by the Database Defendants and original publisher of the Subject Works. You may choose not to grant the rights to future use. If you do choose not to grant the right to future electronic use, your Subject Works will be removed from the databases, and you will receive 65% of the Settlement Payment.

(Notice, Part II.A.5.) The Claim Form set forth in detail exactly how a Class Member can exercise his or her takedown right. In addition, the Notice provides, in bold face and large print, **"IF, AFTER YOU HAVE READ THIS NOTICE, YOU HAVE QUESTIONS OR REQUIRE ASSISTANCE, PLEASE CONTACT THE AUTHORS GUILD AT WWW.AUTHORSGUILD.ORG; OR THE NATIONAL WRITERS UNION AT WWW.NWU.ORG; OR THE AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS AT WWW.ASJA.ORG."** It also states that "Any questions that you have concerning the matters contained in this Notice may also be directed in writing to any of the following Co-Lead Counsel for plaintiffs and the Class [listing counsel]."

Thus, the Notice states clearly that Class Members can refuse defendants the right to use their Subject Works in the future while still being able to participate in the Settlement, refers to the Claim Form for submitting claims, and offers three authors rights groups and three law firms to contact for further information or to answer questions.[11]

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[11] Chalmers raises the illogical scenario that Class Members who want to exercise their takedown right but **not** seek an award for past infringement for the same work were not given instructions on how to exercise their takedown right. This criticism borders on the absurd. Anyone who reads the Notice will know that it is the Claim Form through which Class Members communicate their desires to the claims administrator. If a claimant wants only to take down his or her works, and not receive an award for past infringement, they are of course free to do so, although it is inconceivable why anyone would do that.

(c) Conclusion Regarding this Objection

The Settlement provides payment to the Class in exchange for a release of known claims for past infringement, and additional payment in exchange for a release of known claims for future use. The Settlement would be fair and reasonable if all such known claims were released in exchange for one total payment, but plaintiffs insisted, after months of vigorous push back from the Defense Group, on affording the Class the right to deny future electronic use of its Subject Works. (Boni Decl.¶ 17.)

Because the term objected to is nothing more than a release of a known, identifiable claim that is and has always been an integral claim in this case, and because the Class's due process rights have been served by adequate notice of the release, this objection must be rejected.

2. The Plan of Allocation Is Fair and Reasonable.

Chalmers contends it is unreasonable for the Settlement to allow Category C claims to be reduced to zero in the event the amount of claims exceeds $18 million by an amount equal to or greater than the sum of all Category C claims (*i.e.*, so that Category A and B claims would be reduced only after reduction of the Category C claims).

As a factual matter, there is no chance there will be any reduction of claim amounts for any category of claims, and this objection therefore is moot. As shown above, claims to date establish that the Settlement fund will be right around the $10 million minimum. (*See supra*, p. 10 n. 3.) Both the Associational Plaintiffs and defendants had advised Class Counsel in the mediation that only a tiny percentage of freelancers register their works. (Morrison Decl. ¶ 9; Aiken Decl. ¶¶ 16-17; Defs. Brief at 9-10.) The Settlement was conceived with the make-up of the Class in mind. Plaintiffs knew that it was a virtual certainty that Category A and B claims would not consume the $18 million settlement fund, and no one who participated in the mediation was surprised when the claims reports to date confirmed that fact.

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 along 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.

It is proper to tailor plans of allocation to reflect the relative strengths and weaknesses of subsets of classes. As the court explained in *In re PaineWebber Limited Partnerships Litigation*, 171 F.R.D. 104 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997), "when real and cognizable differences exist between the 'likelihood of ultimate success' for different plaintiffs, 'it is appropriate to weigh "distribution of the settlement . . . in favor of plaintiffs whose claims comprise the set" that was more likely to succeed.'" *Id.* at 133; *see also In re Charter Communications, Inc., Sec. Litig.*, MDL No. 1506, 2005 U.S. Dist. LEXIS 14772, at *33 (E.D. Mo. June 30, 2005) ("[T]here is no rule that a settlement benefit all class members equally. Indeed, it is appropriate for interclass allocations to be based upon, among other things, the relative strengths and weaknesses of class members' individual claims . . . ."); *In re Gulf Oil/Cities Service Tender Offer Litig.*, 142 F.R.D. 588, 596 (S.D.N.Y. 1992) (". . . I find also that the allocation plan proposed by class counsel is reasonable. . . . Among the purchasers, most of the proceeds are allocated to those who . . . who have the strongest claim . . . .").

Thus, providing for the reduction of Category C Claims under certain circumstances, before reducing Category A and B Claims, is neither arbitrary nor unjustified. To the contrary, **not** treating the claims differently would be unfair to those authors, however few, who did register their works and who alone would have standing to sue and in some cases seek statutory damages.

It is significant that no one has objected to the amounts offered per work in each category of the Plan of Allocation. Because those are the amounts that will be paid to the claimants, this objection concerning Category C should be denied as moot.

3. <u>The Other Objections Also Lack Merit.</u>

(a) <u>Other Chalmers Objections</u>

Chalmers raises other meritless objections as well. First, he argues that the Settlement is somehow "collusive" on the ground that works in scientific or research-based medical journals are excluded from the definition of "Subject Works" eligible for claims under the Plan of Allocation, but included for purposes of the release. Chalmers insists the parties for some inexplicable reason conspired to compromise the rights of such authors. (Chalmers July 14, 2005 Brief at 6.) He is wrong. Claims based on works in scientific or research-based medical journals will not be released, and they were never intended to be released. (Boni Decl. ¶ 18.) To make it perfectly clear, however, the proposed final judgment will explicitly exclude such works from the release.

Second, Chalmers challenges the provision that a Subject Work must have been registered by December 31, 2002 to qualify for a Category B payment. Chalmers dismisses plaintiffs' explanation that the cutoff was to prevent Class Members from "gaming the system" by registering works in order to maximize their claims under the Plan of Allocation. Chalmers suggests that the cutoff date is arbitrary because the Settlement was not announced until several years after 2002. However, defendants were legitimately concerned that the thousands of members of the Associational Plaintiffs would learn of the Plan of Allocation when it was agreed to in early 2003. (Feinberg Orig. Decl. ¶ 11; Boni Decl. ¶ 19.)

Third, Chalmers argues the Associational Plaintiffs were inadequate class representatives. (Chalmers's July 14, 2005 Brief at 15.) In fact, the Associational Plaintiffs were not class representatives at all, and are not subject to scrutiny under Rule 23. And contrary to Chalmers' bald assertion that the Associational Plaintiffs were the "dominating force" in the negotiations, they in fact served merely as advisors to Class Counsel in the mediation. (Boni Decl. ¶ 20; Aiken Decl. ¶¶ 9-11.)

Fourth, Chalmers contends the named plaintiffs are inadequate class representatives on the ground that the level of motion practice and formal discovery in this case was lower than in other class actions. (Chalmers' July 14 Brief at 17.) However, this Court **ordered** the parties to mediation. During mediation, plaintiffs obtained a great deal of information from defendants and the parties litigated issues of liability and damages with vigor. (Boni Decl. ¶ 21; Aiken Decl. ¶¶ 9-11; Morrison Decl. ¶¶ 5-9.) The period of the mediation, which spanned over four years, is itself a testament to its adversarial nature. Had plaintiffs sought to "sell out" the Class, as Chalmers suggests, a settlement would have been reached years ago.

The Court obviously ordered mediation in the hopes the parties would settle. They did, and now Chalmers objects because plaintiffs did not insist on taking the case to trial. This objection flies in the face of the judicial policy favoring settlement. *See Wal-Mart*, 396 F.3d at 116-17 ("We are mindful of 'the strong judicial policy in favor of settlements, particularly in the class action context.' 'The compromise of complex litigation is encouraged by the courts and favored by public policy.'"). The ultimate test for adequacy of representation is not, as Chalmers erroneously contends, whether plaintiffs insist on litigating the case. *Id.* at 106-07.

Chalmers also contends that, because they all registered their works, plaintiffs are not adequate to represent those Class Members who did not register their works. This is an outlandish assertion. For one thing, no author **without** a registered work could have sued. *See* 17 U.S.C. § 411(a). For another, the claims of plaintiffs and all other Class Members, both those who registered their works and those who did not, arise from the same factual predicate – the conveyance of their works for electronic display in a form enabling the viewing of their works in isolation from the rest of the collective works in which their works were first published. Thus, the interest of plaintiffs and all other Class Members were aligned with respect to maximizing the amount defendants would pay in the Settlement. *See Wal-Mart*, 396 F.3d at 106-07 ("[P]laintiffs . . . [may] release claims that share the same integral facts as settled claims, provided that the released claims are adequately represented prior to settlement. Adequate representation of a particular claim is established mainly by showing an alignment of interests between class members . . . .").

As for the treatment of Category C claimants under the Plan of Allocation, as explained above, there is nothing unreasonable about designing the Plan of Allocation to reflect the relative strengths of the claims of subsets of the Class, especially given that unregistered authors would have no available avenue for relief in the courts. In addition, the issue is moot. Based on the claims to date, there will be no reduction at all in the scheduled payments to Category C claimants.

Fifth, Chalmers contends that Class Members cannot discover whether their own works have been made available by any of the Database Defendants, citing an author who supposedly stumbled across his book on a database operated by Amazon.com. (Chalmers Sept. 12, 2005 Brief at 5.) This assertion rests on a fundamental misreading of the Settlement Agreement, which states that "no claims shall be released with respect to works that have not, on or prior to the date of this Agreement, been reproduced, distributed, displayed or transmitted ***by any Defense Group member***." (S.A. ¶ 1.n.(v) (emphasis added).) As neither the author nor Chalmers claims that the book in question has ever been copied by any Defense Group member, the work gives rise to no claim and is subject to no release under the Settlement.

Sixth, Chalmers objects on the ground that the Associational Plaintiffs have treated their members more favorably than other Class Members, by assisting them with their claims. (Chalmers's Sept. 12, 2005 Brief at 3-4.) This is an absolutely preposterous argument. First, as stated, it is Class Counsel and plaintiffs, not the Associational Plaintiffs, who are representing the Class in this Settlement. So long as the Class was given adequate notice, and adequate assistance with respect to the submission of their claims, Chalmers has no legitimate gripe if the Associations assist their membership. Further, the objectors are mistaken. The Associational Plaintiffs assisted anyone and everyone who contacted them for assistance. At their own expense they set up and operated a web site to assist Class Members, and fielded calls and requests for assistance without regard for whether the caller was a member of the Association. (Harvey Decl. ¶¶ 2-4.)

Seventh, Chalmers contends the Settlement is collusive on the ground that it has both a reverter provision and a provision whereby defendants agree not to oppose plaintiffs' fee petition up to a certain amount. (Chalmers July 14, 2005 Brief at 3-6.) Chalmers's argument is based on a false premise – that the settlement is fundamentally reversionary. Under the Settlement, the Defense Group and Supplemental Participating Publishers will pay $10 million no matter what the claims level. If claims and total Court-approved fees and expenses exceed that amount, the Defense Group and Participating Publishers will contribute whatever more is necessary to pay the sum, up to $18 million. Thus, there is no prospect here, unlike with a purely reversionary settlement, that plaintiffs' counsel will receive their fees and defendants will simply get the rest of their money back. (*See* Issacharoff Decl. ¶18-21)

Eighth, Chalmers asserts that the Settlement Agreement is tainted because of the format of the mediators' compensation. However, the parties to the mediation process are sophisticated and represented by experienced counsel, all of whom are satisfied with the fixed fee compensation arrangements with the mediator. There is absolutely no evidence presented that even suggests that the mediators' fee arrangement actually had any impact on the mediation process or result achieved for the Class. In fact, it had no such impact. (*See* Feinberg Orig. Decl., Feinberg Suppl. Decl.; Boni Decl. ¶ 22.) There never was any agreement for compensation of Mr. Feinberg based upon any particular outcome. (Feinberg Supp. Decl. ¶ 7.) And, in light of the number of parties, the complexities and the duration of the mediation as well as the spectacular result, the fixed fee is fair and reasonable for the services rendered to the parties. Further, no Class Member's claim will be reduced as a result of any of the expenses in the case, including the mediator's fee, because the claims will not reach the $18 million dollar cap. The reasons for the compensation arrangements with Mr. Feinberg are thus easily explained and justified. (Feinberg Suppl. Decl. ¶ 6.)

Ninth, Chalmers argues that the Amendment to the Settlement Agreement is unfair in that it moves Category B Claims to Category A if the copyrights in the underlying Subject Works were registered before the works were sublicensed and delivered to Amazon.com or Highbeam Research by a Database Defendant. As the Court knows, this amendment was negotiated after members of the Associational Plaintiffs reported that one of the Database Defendants had apparently sublicensed works to Amazon.com and Highbeam while the parties were still negotiating the Settlement Agreement. Chalmers's grievance is not with the reclassification of such claims per se. Rather, he complains it is unfair that sublicensees other than Amazon.com and Highbeam are not also included. Chalmers, however, has no evidence Subject Works were sublicensed to other entities during the period in question, just mere speculation that such sublicensing "must have" occurred.

Tenth, Chalmers objects to plaintiffs' fee petition on the ground that Co-Lead Counsel have not submitted detailed time records containing all of their time entries for this case. As discussed in Co-Lead Counsel's fee petition, the Court has discretion to award fees from a common fund under either the percentage or the lodestar method. *See Goldberger v. Integrated Resources, Inc.*, 209 F.3d. 43, 50 (2d. Cir. 2000). "What constitutes a reasonable fee is properly committed to the sound discretion of the district court, and will not be overturned absent an abuse of discretion, such as a mistake of law or a clearly erroneous factual finding." *Id.* at 47 (citation omitted). "Indeed 'abuse of discretion' – already one of the most deferential standards of review – takes on special significance when reviewing fee decisions." *Id.*

In their fee petition, Class Counsel demonstrate that the requested fee is reasonable under both methods. When awarding fees on a percentage basis and using the lodestar method as a cross-check, a court need not examine the underlying time entries and may rely only on aggregate time and lodestar figures. *See In re WorldCom, Inc. Sec. Litig.*, Master File No. 02 Civ. 3288 (DLC), 2004 U.S. Dist. LEXIS 22992, at *75 n.48 (S.D.N.Y. Nov. 12, 2004) (awarding class counsel fees requested on percentage basis and rejecting objector's argument that counsel's time records required scrutiny). Review of time records is all the more unnecessary where, as here, the requested fee exceeds the reported lodestar. *See Spann v. AOL Time Warner, Inc.*, No. 02 Civ. 8238 (DLC), 2005 U.S. Dist. LEXIS 10848, at *24 (S.D.N.Y.

June 7, 2005) ("There is no need to scrutinize the billing records of plaintiffs' counsel for unnecessarily duplicative or inefficient work, since plaintiffs' counsel's lodestar amount exceeds by several thousand dollars the amount of fees requested as part of the Settlement Agreement.").

(b) Other Bartholomew Objection

Bartholomew also contends that Class Members lacked sufficient information to make claims. Bartholomew first asserts she did not receive notice of the settlement other than through her membership in the American Society of Journalists and Authors ("ASJA"). (Bartholomew Aug. 2, 2005 Brief at 1.) In other words, the notice program worked, as the ASJA participated in the program.

Bartholomew also contends that the official website did not include the Settlement Agreement itself. However, the Notice apprises Class Members that they could obtain materials filed with the Court, which includes the Settlement Agreement, at the courthouse. (*See* Notice, Part VI.5.) Further, the Settlement Agreement was posted on the website, along with the Amendment to the Settlement Agreement, on August 11, 2005. (Boni Decl. ¶ 23.)

Furthermore, the website contains a List of Publications that licensed their content to one or more of the defendant databases, so that Class Members can determine whether the publications to which they sold first-publication rights are listed and thus included in the Settlement. In that way, claimants are provided with sufficient information to make claims.

4. Opt-Outs Hamit And Roeder Are Not Class Members and Lack Standing to Object.

Francis Hamit and Edward Roeder attempt to raise objections, but they have already excluded themselves from the Settlement. (Boni Decl. ¶ 24.) Accordingly, they have no standing to object, and their arguments are entitled to no consideration. *See In re Prudential Sec. Ltd. P'ships Litig.*, MDL No. 1005, 1995 U.S. Dist. LEXIS 22103, at *39-40 (S.D.N.Y. Nov. 20,

1995) ("[T]he Hutman objectors have each filed exclusion requests and lack standing to object here."). As Hamit has previously stated (*see* Hamit's Request For Leave Of Court To Appear And Oppose Proposed Settlement), he has already filed his own lawsuit asserting his copyright claims, *Hamit* v. *Cygnus Business Media, Inc.*, No. CV 05-3828RGK, pending in the United States District Court for the Central District of California. So has Roeder, who has brought a putative class action in another District against the publisher Tribune Company. The settlement here releases none of Hamit's or Roeder's individual claims, does not preclude them from pursuing those claims, and thus does not prejudice them as non-parties. *See Armco Inc. v. N. Atl. Ins. Co.*, No. 98 Civ. 6084 (AGS), 1999 U.S. Dist. LEXIS 3954, at *3 (S.D.N.Y. Mar. 29, 1999) ("A settlement that does not divest non-settling parties of their legal claims or prevent the assertion of those claims does not constitute legal prejudice to the non-settling parties."). The law clearly gives Hamit and Roeder the right to exclude themselves from the Class, so they can avoid being bound by the Settlement and pursue their individual claims, and they have availed themselves of that right. The law is also clear that, once they have done so, they have no right to object to the terms on which the Class is settling.

Furthermore, their objections fail on the merits. Hamit raises the same objection to the release of future claims challenged by Chalmers and Bartholomew, and his objection fails for the same reasons set forth above. Hamit also contends that the settlement consideration is too low. His argument fails on its own terms, however. Hamit comments that "[t]here is a price point, usually around a dollar a word or higher, where a freelance writer is happy to sign a contract conferring all rights, including electronic database rights, to a publisher." (July 14, 2005 Opposition to Class Action Settlement at 13.) Here, all Class Members have already sold, and received compensation for, first-publication rights for their Subject Works. One way to look at the Settlement and Plan of Allocation is that they offer Class Members additional compensation for the electronic rights (and past infringement of those rights): up to $1,500 per work under Category A; the greater of $150 or 12.5 percent of the original sale price of the work under Category B; and lower amounts for Category C.

These amounts can properly be evaluated in light of the one-dollar "price point" for all rights proposed by Hamit. As Class Members have already received payment for first publication rights, by definition the "price point" for the electronic rights alone and for past infringement is less than a dollar per word. The amounts available under the Plan of Allocation certainly go a substantial way toward meeting that hypothetical "price point," if not meeting it outright. Indeed, in light of all the risks of litigation, the Settlement would be found fair even if it offered far less. *See Grinnell*, 495 F.2d at 455 ("The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved."); *see also id*. at 455 n.2 ("In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.").

Roeder's objection fares no better. Roeder is the named plaintiff in another putative class action, asserting copyright claims against the Tribune Company based on its reproduction and display of its freelancers' works on its own electronic database. Roeder objects to the release here to the extent it releases claims against the Tribune Company, a Participating Publisher but a non-party to the Complaint. Roeder argues that the Settlement cannot release non-parties, but his position is contradicted by *Wal-Mart*.

In *Wal-Mart*, a class action brought by retailers alleging anti-competitive practices by Visa and MasterCard, an objector similarly objected to the release of non-party banks in the settlement. The Second Circuit overruled the objection, stating that "class action settlements have in the past released claims against non-parties where, as here, the claims against the non-party being released were based on the same underlying factual predicate as the claims asserted against the parties to the action being settled." 396 F.3d at 109 (internal quotation marks omitted). The court affirmed the district court's ruling that claims against the non-party banks could be released, particularly given that the banks contributed to the relief provided in the settlement. *See id.*

In a supplemental filing dated September 9, 2005 (and therefore untimely as an objection, in addition to being submitted by someone with no standing to object), Roeder attempts unsuccessfully to distinguish *Wal-Mart.* Roeder contends that this case was brought primarily against electronic databases, not original publishers, and that therefore his claims against the Tribune Company do not arise from the same factual predicate as the claims here. Roeder is mistaken, as he ignores (1) that this action was brought not only against electronic databases but also against two publishers, the Copley Press and the New York Times Company; and (2) the databases had indemnification agreements with the print publishers, who would have been impleaded in the litigation anyway. (Boni Decl. ¶ 16.) As the Court knows, the licensing of works by print publishers to the electronic databases is and has always been a core fact in this case, and neither the complaint nor the mediation ever involved just the subsequent display of those works by the databases. Thus, Roeder's claims do arise from the factual predicates alleged here.

IV. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court grant final approval to the Settlement Agreement.

Respectfully submitted,

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