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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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THE AUTHORS GUILD, et al.,

Plaintiffs,

v. 05 Civ. 8136

GOOGLE, INC.,

Defendant.

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February 18, 2010
10:10 a.m.

Before:

HON. DENNY CHIN

District Judge

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ALSO PRESENT:

SUPPORTERS:
LATEEF MTIMA, Howard University
JANET CULLUM, Cooley Godward Kronish, LLP, on behalf of Sony
MARC MAURER, National Federation of the Blind
PAUL N. COURANT, University of Michigan Library
JOHN B. MORRIS, JR., Center for Democracy & Technology

OBJECTORS:
SARAH CANZONERI
SCOTT E. GANT
THOMAS C. RUBIN, Microsoft
DAVID NIMMER, Irell & Manella, LLP, for Amazon
RON LAZEBNIK, Lincoln Square Legal Services, Inc. (Fordham University), for Science Fiction & Fantasy Writers of America, American Society for Journalists and Authors
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ANDREW C. DEVORE, for Arlo Guthrie, Julia Wright, Catherine Ryan Hyde, and Eugene Linden
PAUL S. ROTHSTEIN, for Darlene Marshall
VERONICA MULLALLY, Lovells, for VG Wort
NORMAN W. MARDEN, Office of Atty. General for Commonwealth of Pennsylvania
LYNN CHU, Writers' Representatives LLC & Richard A. Epstein
STUART BERNSTEIN

(In open court)

THE COURT: All right. Before the Court is plaintiffs' motion to approve the settlement as fair and reasonable.

Voluminous materials have been submitted, and we are working our way through them. There is a lot of repetition. Some of the submissions even quote some of the other submissions. I'm reading them twice.

To end the suspense, I am not going to rule today.

There is just too much to digest. And however I come out, I want to write an opinion that explains my reasoning.

I have an open mind. I'm going to listen carefully. I may ask a few questions. There are recurring themes. Let's try not to be repetitious. Let's try to do this in an efficient manner.

And I think what I'd like to do is hear from nonparty supporters of the settlement first, then objectors and others who are opposed. I'm going to limit this to the entities and individuals listed in my two orders, although we did add one person who apparently did submit a timely request, just didn't make it to my chambers in time. Then I will hear from the United States and then the parties.

And before we start, were there any housekeeping matters?

No. All right. Then let's start with those who I understand to be supporting the proposed amended settlement, and they are, as I understand it: Lateef Mtima, M-T-I-M-A, from Howard University; Janet Cullum from Sony Electronics; Marc Maurer, M-A-U-R-E-R, from the National Federation of the Blind; Paul Courant, C-O-U-R-A-N-T, from the University of Michigan Library; and John Morris, from the Center for Democracy and Technology. So we'll go in that order. And please speak at the podium. We have an overflow room downstairs, which I understand is filled to capacity, and so we

need to speak into the microphone so that they can hear.

Mr. Mtima?

MR. MTIMA: Good morning, your Honor.

THE COURT: Good morning.

MR. MTIMA: May it please the Court. I'm Lateef Mtima. I'm the director of the Institute for Intellectual Property and Social Justice. I'm also a professor of law at the Howard University School of Law. I'd like to thank the Court for this opportunity to address the issues before the Court and hopefully assist in placing the proper emphasis upon the copyright social utility obligations that are at stake in this dispute.

THE COURT: I know I gave you a limited amount of time, but slow down a little. Our court reporter has to keep up with you.

MR. MTIMA: Thank you, your Honor.

THE COURT: Thank you.

MR. MTIMA: Today education is perhaps the most important function of state and local governments. Compulsory school attendance and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, as is the very foundation of good citizenship. It is the principal instrument in awakening the child to cultural values and in helping her to

adjust normally to her environment. In these days it is doubtful that any child may reasonably be expected to succeed in life if she is denied the opportunity of an education. Such an opportunity, when made available, must be made available on equal terms.

The significance of these concerns to the issues currently before the Court are, of course, clear as universal access to books will help level the playing field of access to information, knowledge, and education. But what may come as something of a surprise is that these statements were neither made in connection with mass digitization of text, nor were they made by an educator, an academic, or even a social scientist. These words were written by Chief Justice Earl Warren in the landmark opinion of Brown v. Board of Education in 1954. The fact that these words resonate with the present issue remind us as to the primary purpose of the copyright law.

The first American copyright law enacted in 1790 was entitled An Act for the Encouragement of Learning. To the extent, however, that significant segments of our population lack equal access to copyrighted works, they are unable to learn from and build upon these works and, in turn, make their own contribution to American culture.

The development of digital information technology offers great promise for the goals of the copyright law as well as the aspirations enunciated in the Brown case, but while

technology has dramatically increased the availability of literature and art for some Americans, the poor, the elderly, the physically challenged, and many minorities stranded on the wrong side of a growing digital divide have instead witnessed the return to the separate and decidedly unequal society of the preBrown era.

Whereas virtually all commentators agree that mass digitization of books is a necessary step towards satisfaction of copyright social utility, objections have been raised to the Google initiative. Two important objections are that: first, it undermines the author permission function of the copyright law; and second, the benefits it seeks to achieve are best left to government.

The first objection distorts the constitutional balance between author incentives and the public interest. Unlike European systems, American copyright law is not based upon natural rights but, rather, its positive social law, and author property interests are neither inviable or even paramount. Instead, it is the interest of society in developing a thriving vibrant culture that takes priority. As the Supreme Court noted in the Sony case, the monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special benefit. Private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the arts. The

sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived to the public from the labors of authors.

This brings us now to the second objection -- that the balance should be achieved by Congress. First, this argument overlooks that the courts can and have addressed this kind of new technological use copyright problem in the past, in a variety of cases, such as the Whitehall (ph) Music case, the cable cases, Fort Knight, Teleprompter, and others. Second, it also ignores that there is precedent for private initiatives, such as the royalty collection societies created with the advent of the sound recordings and which have flourished for over a hundred years. Finally, however, it is the fact that many governmental and even scholarly institutions have been slow to recognize the digital divide as a problem of copyright social utility that brings us to where we are today. Now that the meaningful mechanism for bridging this divide has been presented to the private sector, further delay is unfair to the digitally disenfranchised who have been overlooked for almost a quarter of a century.

Now we recognize that the proposed settlement will not cure all of the deficiencies of the digital divide, but to those who say that this will provide only trivial improvement, we humbly suggest that they may be unfamiliar with what the disenfranchised can do with only a little. Give a slave pig

intestines and she will make chitlins. Seek to provide Frederick Douglass with a few books and he will provide our nation with insight into its very character. And literally, toss peanuts to George Washington Carver and he will produce scientific marvels from which we can benefit for generations.

I'd like to close with this thought. Be it the heartland of the Midwest, the rural South, or the urban inner city, equal access to libraries makes the difference, and having myself traveled that path from 1960s Harlem to some of our nation's elite institutions of higher learning, I have witnessed that difference firsthand. Copyright is intended to be an engine of cultural development, not a brake on it. In drafting the copyright clause, our Constitution's framers penned a broad directive of social utility, one amenable not only to legislative and judicial interpretation, but also to private initiative and an adaptation to the changing reality of our evolving national culture. We have an opportunity to take an important step on behalf of copyright in the digital information age, and it is one that we cannot afford to miss.

Once again, we thank the Court for this opportunity to appear before it. Thank you, your Honor.

THE COURT: Thank you. Janet Cullum from Sony.

MS. CULLUM: Good morning, your Honor. Janet Cullum, Cooley Godward Kronish, appearing this morning for amicus curiae Sony Electronics Inc.

Sony very much appreciates the opportunity afforded by the Court this morning to appear at the fairness hearing. Sony is a leader in the market for e-books and e-book reader devices and, from that unique vantage point, submits that the proposed amended settlement agreement will bring substantial benefits to those marketplaces.

First and foremost, the settlement will make available to the consumers a vast quantity of books, including many that would otherwise likely never become available in digital format. Through the offering of the online searchable database, countless consumers --

THE COURT: Some of the competitors, other competitors, are very much against the settlement. And why is Sony different? Sony is likewise a competitor in the e-books market.

MS. CULLUM: It is a competitor in the e-book market, your Honor, but Sony supports the settlement here because Sony sees that it brings many benefits to that marketplace. In particular --

THE COURT: The others are arguing that Google will be given a significant competitive advantage. Sony doesn't see that?

MS. CULLUM: Sony does not see it that way, your Honor. Importantly, the arrangement that the amended settlement agreement structures between Google and the rights

holders is entirely nonexclusive, so Sony sees an opportunity for other potential distributors of electronic books to negotiate with rights holders individually or via the registry, and the amendments which eliminate the most favored nations clause in particular, from Sony's perspective, ensures that there will be robust competition in that marketplace for distribution of digital works.

Sony also sees that the proposed amended settlement will foster competition in that marketplace in other ways. For example, the establishment of the Book Rights Registry is likely to substantially reduce the transaction costs that potential distributors face today when they want to distribute digital content. So it does that in three ways. First of all, there's the database of rights holders information which will be publicly available, which will facilitate the ability to identify those who -- those who hold rights and who can be therefore approached for negotiation, either individually or via the Book Rights Registry. Secondly, the registry is expressly tasked with the job of searching for the rights holders for the unclaimed works that have previously been difficult to identify, and the registry of course offers a financial incentive for those rights holders to come forward and self-identify. In that way, your Honor, the pool of unclaimed works out there would be substantially reduced, and those two factors will, in Sony's view, remove what has

today -- what is today a significant --
THE COURT: What about as to the so-called orphan books rights holders? Those who don't come forward, Google would have control over them? Is that not so, or does Sony see that it would also have access?
MS. CULLUM: Well, Sony sees that the settlement will shrink that pool of, you know, works out there that are not claimed and, therefore, bring into the marketplace a larger volume of content for distribution as a result of the ability to identify rights holders.
THE COURT: So Sony believes that this will result in identifying many of these rights holders and then there will be a much smaller pool left of those who don't come forward, and do you agree or disagree that as to that pool, that Google would control that pool --
MS. CULLUM: Well --
THE COURT: -- those rights?
MS. CULLUM: Well, the agreement, the way the settlement is structured doesn't create any barrier to any other competitor going out and creating their own competing digital library and --
THE COURT: Well, what I'm reading -- and I'm sure I'll hear from Google on this -- is that those other competitors would have to invite a lawsuit and then have a settlement to achieve the same result.

MS. CULLUM: Well, certainly the path to that result is made much clearer by what will happen in this case, which could provide a very helpful precedent, but it may, as a commercial and competitive matter, your Honor, become a much less significant issue, if indeed the settlement works the result Sony believes it will work, in identifying many, many more of the rights holders and removing those -- that existing barrier to people going out and distributing content. They can't -- they simply can't -- it's either impossible or economically impractical to identify the rights holders.

THE COURT: Thank you.

MS. CULLUM: Your Honor, let me make just two other points, if I -- the Court would indulge me?

THE COURT: I know I took some of your time, but two quick points. Go ahead.

MS. CULLUM: Two quick. One, we just want to note that the settlement expressly contemplates, in addition to the models that are implemented immediately, as a future revenue model, the ability of Google to offer digital downloads of certain copyrighted text. Google may offer those in the ePub format, which, as your Honor may know, is an open e-book standard supported by Sony. To the extent that Google does so, then those e-books would be readable on devices from a variety of manufacturers who choose to incorporate support for that in their device, and the benefit of that is that consumers won't

be tied to purchasing books that can only be read on one proprietary device. So consumers will be able to have a broader selection of books that they can read on a very large variety of devices.

And finally, the Books Rights Registry, as I noted, is an entirely nonexclusive arrangement, so Sony looks forward to the opportunity to compete vigorously in that market, sees that there will be, as a result of having the vast quantity of materials available to consumers, coupled with the ability to search, a lot of demand driven for e-books. That in turn will guide demand for e-book readers, that will fuel competition. Sony's history as a leader in the electronics industry shows that when there's content out there, consumers want devices to access and enjoy it. That drives competition, fuels innovation to get better devices at more affordable prices, and that in turn then drives them back for more books.

THE COURT: I got it. I understand. Thank you.

MS. CULLUM: Thank you very much, your Honor.

THE COURT: Okay. Thanks. We'll hear from Marc Maurer.

MR. MAURER: Thank you, your Honor. I am Marc Maurer. I am the president of the National Federation of the Blind. The organization came into being 70 years ago, and it is composed of more than 50,000 members from throughout the United States. Our goal is to --

THE COURT: Many of whom are here this morning, apparently.
MR. MAURER: It's important to us, your Honor.
THE COURT: Yes.
MR. MAURER: Our goal is to create a climate in which the blind may be integrated within society on the basis of equality with the sighted.
The National Federation of the Blind strongly supports the proposed settlement in this case. We have heard arguments suggesting that problems exist with the proposal. However, we also understand that within a specified time after the proposal becomes final, the books covered by it are to be available to the blind in a useable format. Estimates of the number of these books vary, but we are led to believe that 10 million is not unreasonable to expect.
Blind people spend enormous amounts of time and energy hunting for ways to get at books. A few commercial establishments exist that provide recorded information that the blind and sighted can buy, mostly recent bestsellers, often abridged. Three substantial specialized libraries for the blind have been created in the United States: The Library of Congress; National Library Service for the Blind and Physically Handicapped, which began producing books in Braille and audio formats in the early 1930s; Bookshare, which has recently begun to collect electronic copies of files that have been created

for blind college students and recording for the blind and dyslexic, which began recording college texts in the 1940s. The total number of unduplicated titles available from these libraries is under a million. No other substantial sources of reading matter exists for the blind in the United States. Audible tells us it has 60,000, but Google offers 10 million.

The excitement of the potential to be able to get access to this much information is almost palpable. Digital books are quickly becoming the norm. This should be good news for the blind. Digital information can easily be presented in auditory large print or refreshable Braille formats. However, despite the simplicity of building accessibility provisions into digital management products, many of the manufacturers of the technology have refused to consider doing so. On the other hand, Google will give us access to 10 million books. In the process of doing this, Google will help to make the point that access to information for all is achievable and desirable.

A number of universities have established programs to offer students and professors digital books which are often cheaper than those produced in print. Similar proposals have been made about elementary and secondary schools. The Apple iPhone, the Apple iPad, and the Apple iTunes U applications have auditory systems built into them that the blind can use. But some publishers have declared that the books loaded on such devices will not be allowed to be hearable. The blind have

access to the machines but not the content.
We believe that access to the storehouse of ideas -- books -- is essential for participation in a free society. The ability to think, to write, to invent, and to create opportunity expands in the presence of the writings of others. If our talents are to be used, we must be able to read.
We thank you, your Honor, for inviting us to be here. I do have print copies of my remarks in case they're needed --
THE COURT: All right. Thank you. My deputy will come get it. He's right behind you. Okay. Thank you.
Paul Courant, University of Michigan.
MR. MAURER: Thank you, your Honor, for the opportunity to speak today. It gives me great pleasure to be here. My name is Paul Courant. I'm the university librarian and dean of libraries at the University of Michigan, where I am also professor of economics and professor of public policy.
Like many academics, I'm a member of the author class, and like most members of the author class, the bulk of what I've written is now out of print, hard to find, and never sold all that well in the first place.
In my opinion, these facts about the market for old academic books are quite relevant to the antitrust issues that have been raised here, but I'm here today not as an economist but as a librarian.
I also want to note that I've discussed my remarks

today with the librarians in the rest of the Big Ten, the University of Chicago and Stanford University, and those librarians are in substantial agreement with what I have to say and asked me to convey that to you.

The Google scans are vital to the preservation of works held in our academic libraries. The University of Michigan alone has spent hundreds of millions of dollars over the years collecting and caring for the nearly 8 million volumes in its collections. That investment has -- is multiplied several fold, dozens fold, by research universities nationwide. Many of our books are falling apart due to a combination of age, use, and pulp paper that contains acids that destroy the paper over time. When you pick up an old book and it turns into corn flakes, it was printed on pulp paper. Before Google's library project, there had been many digitization efforts undertaken by research libraries, but their collected output came to tens of thousands of books a year. Google is digitizing tens of thousands of books a week. Without reliable access to the scholarly record, we cannot know what has been known, what has proved fruitful and fruitless in the past. The broad social benefit that derives from the progress of science and the useful arts depend on the ability to find, use, and reuse the scholarly record. Provision of the scholarly record for current and future generations is the primary mission of these research libraries. Copies of the

Google scans are returned to participating libraries who keep them individually and in several consortia, notably the HathiTrust, which is a collaboration of about two dozen research libraries. The scans thus provide part of the solution to a grand challenge, that of preservation by research libraries of millions of fragile works that constitute essential parts of the record of scholarship and of human thought and accomplishment. Google has scanned over 12 million volumes, but there are many, many millions more to be done.

Preservation is vital, but it does not provide a legal or institutional framework to support the efficient use of digitized works. Without the settlement agreement, there is no lawful mechanism for Google's or any other's scans of copyrighted works to be used except as sources of indexes and snippets and as backups against the day when print copies become deteriorated or otherwise unusable.

The settlement agreement, in contrast, would make the record of scholarship assembled by the nation's great research libraries broadly available to the public and to scholarly communities themselves. The millions of printed works collected by the University of Michigan Library are currently only available to be read in Ann Arbor. Anyone can search the digitized text, but we cannot legally allow the works to be read. That is, you can find bibliographic records, including page numbers, for all the instances of a string of text that

occur in the digital collection, but to read the works, you must come to a library that owns them or acquire access to a physical copy in some other way. This is an important point because it is often confused in public debate about this settlement.

The alternative to the settlement is not a utopia of universal digital access. Rather, it is the status quo under which most of the works of the 20th Century simply cannot be legally read in digital form and physical and institutional proximity to great collections is the only effective means of access. I note that this status quo actually provides a competitive advantage to institutions such as Michigan that have the richest library collections, but it is in the nature of our commitment to scholarship and its benefits to the public that we are happy to forgo that advantage.

Under the settlement agreement, much of Michigan's collection will become available to readers in academic institutions around the country. Public libraries, residents unaffiliated with any library or academic institution, and academic institutions that could not hope to acquire collections of the kind held by great universities will have a large swath of scholarship at their fingertips, extensively searchable at low cost and purchasable over the internet. And here, the comments made by the gentleman from Howard and also the American Federation for the Blind echo the main point of

what I want to make on this -- on broad public access.

Finally. So, it comes down to this, in my view. We have in our library collections the keys to understanding and reshaping the world. For reasons of history, technology, and law, we are unable to use those resources to provide the maximum possible benefit, using the most powerful technologies to the world beyond the university's walls. The settlement greatly increases the ability of our university and others to share broadly the extraordinary resource embodied in the record of scholarship that we hold and in turn the benefit from the resources that have been collected and developed by others. It's a great bargain in the best sense of the word.

Thank you very much, your Honor.

THE COURT: Thank you.

Next we'll hear from Mr. Morris of the Center for Democracy & Technology.

MR. MORRIS: Good morning, your Honor. May it please the Court. My name is John Morris, and I represent the Center for Democracy & Technology.

CDT strongly supports the settlement and thinks it should be approved. The book search service will considerably increase the public's access to millions of books containing much of the world's written knowledge and ideas. Because it will provide a significant public benefit, we urge the Court to approve the settlement.

But the settlement also raises very serious privacy concerns, and we believe that the Court must address those concerns as part of the settlement approval. The settlement is a result of negotiations between private parties about their copyright dispute. Privacy was not on the negotiating table and thus is not part of the proposed settlement. Nonetheless, protecting the public's interest in reader privacy must factor into the Court's consideration of the settlement.

Under the terms of the settlement, Google will take on a unique role in our society -- that of a comprehensive library for research and browsing through books. By transforming reader interactions with books and with the library, the settlement could transform the library from a historic haven for reader privacy into a sweeping new source of data collection and tracking.

Libraries have a long history of protecting reader privacy and safeguarding the right to read anonymously. They are -- librarians are fiercely protective of patrons' rights. The American Library Association's Code of Ethics says, "We protect each library user's right to privacy and confidentiality with respect to information sought or received and resources consulted, borrowed, acquired, or transmitted." And moreover, almost every state in the country protects library users' privacy.

In their submissions, both the plaintiffs and Google

urge this Court to ignore privacy, essentially arguing that privacy issues are not related to the copyright claims at issue here. That argument does explain why the settlement is almost entirely silent on privacy, but it does not begin to address the fact that, in addition to evaluating the rights of the party, this Court must also assess whether the settlement is in the public interest. In trying to rebut the claims of objectors who raise privacy concerns, the parties ignore the separate public interest analysis this Court must undertake. We believe that the Court --

THE COURT: What is the privacy concern? Why don't you articulate that for me. And what could be done to address that concern?

MR. MORRIS: Certainly. Today, if I walked into the New York Public Library, I don't have to identify myself. I go to a book, I pull the book off the stack, I look at it, I gain information, and I can walk out of the library. Nobody has any clue I was there. Nobody tracked me. No one knows that I went and looked at a book on a controversial subject about sexuality or whatever. And so readers have that ability, and they've always had that ability, to go to the library and get information anonymously. This settlement will transform user interactions with libraries. There will be Google book stations in libraries even, and people will ultimately start accessing libraries from their home. That's a tremendous

benefit for our society, but it also creates the risk that Google will be able to track and monitor what they -- what books they go to and then convert that information into the advertising and behavioral advertising profiles that Google runs in the other parts of its business.

And so what we would ask this Court to do is to impose collateral terms on the settlement; not to change the terms of settlement, not the copyright terms of settlement, but to essentially require Google to honor certain provisions -- certain privacy provisions. CDC's brief proposes -- sets out 11 specific terms that we think that the Court should incorporate into an order approving the settlement. And we think that this Court has the authority, in fact the duty, to do just that.

As the circuit in the Masters, Mates & Pilots Pension cases made clear, the Court has to protect the public interest in reviewing its settlement. In that case, the Second Circuit said, "Where the rights of third parties are affected, their interests too must be considered." And the Court continued, "Where the rights of one who is not a party to the settlement are at stake, the fairness of settlement to the settling parties is not enough to earn the judicial stamp of approval."

The parties would have you focus only on their rights and their claims as they raised in this case. But my hypothetical shows the fallacy of this approach. I mean, if

there was a litigation before the Court about the disposition of toxic waste and the parties agree to go dump the untreated waste into a local river, the courts certainly wouldn't approve that because it would be contrary to the public interest. Obviously the harm here is not as, you know, theatrical as that, but the lesson for the Court should be the same, that there is a harm that will flow from this settlement in terms of privacy, and the Court has an obligation to do something about that. As the Massachusetts District Court did in the New England Carpenters Health case, this Court can add or change provisions of the settlement in order to protect the parties. And again, we don't seek changes to the provisions but we seek -- we urge the Court to add provisions. And as I said, as we set out 11 concrete proposals that we would ask the Court to look at.

We appreciate the Court's attention to these privacy issues. The settlement offers extraordinary benefits to our society, but it is up to the Court to ensure that the settlement also does not lead to significant privacy harms. Thank you.

THE COURT: Thank you.

All right. That completes the list of individuals or entities that wanted to speak in favor of the settlement. Now we'll turn to speakers in opposition. I'll list the first four. Sarah Canzoneri; Scott Gant; Thomas Rubin from

Microsoft; David Nimmer for Amazon.

Let's start with Ms. Canzoneri.

MS. CANZONERI: Good morning, your Honor.

Let me first explain, I'm here representing only myself. I am actually a member of the District of Columbia bar. But I have some years ago gone away from the path of being -- spending my time as a lawyer into a world of children and art and books and children's books. So I'm also a member of the Book Guild, the Children's Book Guild of Washington, DC.

The way I got -- I first heard about the Google settlement --

THE COURT: Are you a member of the class?

MS. CANZONERI: Yes, yes. The way I first heard about the settlement, though, was when one of the officers of the Book Guild asked if someone could explain what the settlement was about and what it meant to other members of the guild, and I hadn't done much committee work that year and I had -- was one of the very few lawyers in the guild so I took on the job. And when we first looked at it, it seemed wonderful to us. I mean, it looked really good. We were very entranced by the idea of this great Google library in the sky that would make books available to children, or make books available to many, many people.

Our one concern, which we -- which some of us filed as objections in the -- to the first settlement was that this was

going to be a big library with no children's room, and in fact we asked that Google provide free access licenses for public schools as well as for public libraries. The thing is, the more I've talked to people, the more I've learned about the settlement over the months, I've finally become convinced that, first of all, it's not going to be a great -- a great library, it's going to be a great store, and the settlement agreement is really deeply unfair to authors and illustrators.

This isn't a typical class action, and I think that makes it very difficult for so many writers to understand. I cannot tell you how many I've talked to who either don't have notice or don't have a clue what the settlement is about. You know, it isn't like when Cuisinart sent me a notice and says, "You know, we violated the antitrust laws and so we're going to send you a new cap for your food processor." In most class actions, it's fairly clear that the remedy you're being offered is equivalent to the damage that was alleged, and it makes a lot of sense -- and it makes sense not to opt out. But in this case, when you boil down the notice, if you can really understand the settlement agreement, which I'm not sure anybody here does, what it comes down to is that the class members are essentially being told, "Well, maybe Google infringed on your copyright and maybe Google will do it in the future, and so why don't you stay in this class and essentially give Google all sorts of rights to your intellectual property." And I think

that -- I've got to keep track of my notes here.

I think too that a big problem here, besides the fact that authors simply can't follow the notice, can't understand the notice, in that kind of situation, one would expect that the class counsel have a very heavy responsibility to -- have a very heavy responsibility to take care of the interests of the absent class members. However, the case of children's book authors and illustrators is a particularly egregious example of where class counsel have not fulfilled their interests.

Illustrators were included in the settlement -- children's book illustrators -- right from the beginning. I mean literally, the -- I'm sure if you -- one of the earlier speakers could tell you that in fact the University of Michigan actually has a special collection of pop-up books. So it's not all scholarly stuff. But then, somewhere between the original settlement agreement and the amended settlement agreement, the illustrators who don't write their own books, that is, illustrators, which is many, many, are dropped out of the settlement completely because they --

THE COURT: Is your objection that the illustrators are not part of the class?

MS. CANZONERI: My objection --

THE COURT: I mean, I think I'm getting mixed signals.

MS. CANZONERI: Okay. I'm saying --

THE COURT: You're objecting because illustrators are

not part of the class. It sounds like you like the settlement.

MS. CANZONERI: No, I don't like the settlement. And what I --

THE COURT: If you don't like the settlement, why is it a problem if the illustrators are not in it?

MS. CANZONERI: I guess I would say the illustrators right now -- I mean, I'd say the illustrators were a member of the class and I'd say that if one assumed, as presumably class counsel do, that the settlement provides benefits, it would seem to me that it shows poor representation to then, for no apparent reason, drop a group of class members out of the settlement.

Furthermore, the writers are still -- the children's book authors are still members of the class, and they are also injured by the fact that the -- by the fact that the illustrators are dropped out. Because what this would mean -- what this means is that any time their books are displayed on Google books, they will be displayed without the illustrations, and of course in many children's books, but particularly picture books, showing them without the illustrations makes the books essentially meaningless and no one's going to want to buy them.

THE COURT: I think that makes sense. If you keep the illustrators out, then, in essence, you're keeping children's books out.

MS. CANZONERI: Yes.
THE COURT: Younger children, in any event.
MS. CANZONERI: Yeah. I mean, to give you -- I guess to give you a very graphic example, I don't know if you know The True Story of the Three Little Pigs, but a key page is this one. I mean, a key page --
THE COURT: It's been a while.
MS. CANZONERI: Anyway, a key page, if you've ever read the book to any child, as you know, if you get to the page where you see this -- the story is obviously told from the wolf's point of view. "THIS IS THE REAL STORY." If you go to look at this book on Google Books and search for this, the phrase, "THIS IS THE REAL STORY," you won't find it because the page is written entirely with illustrative letters, and that's kind of an example of how perfectly ridiculous it is.
Then to add insult to injury, the notice that was sent out, the supplementary notice, was so confusing that even the class counsel don't seem to be able to understand it. And I'd like to give you, at this point, copies of a series of internet -- I mean, a series of e-mails that were exchanged between Diana Kimpton, who is a British children's book author, who I know has also filed an objection --
THE COURT: Do you have copies for everyone?
MS. CANZONERI: I think I do. Yeah. Anyway --
THE COURT: Well, your time is up.

MS. CANZONERI: Oh, okay.
THE COURT: In fact, if you hand them to one of the lawyers, they will make sure that I get a set and that all of the parties get sets.
MS. CANZONERI: Okay. Can I --
THE COURT: Why don't you finish up.
MS. CANZONERI: Can I finish up?
THE COURT: Finish up quickly. What I don't understand is, what I'm hearing is, you object because the illustrators are not part of the settlement. To me that sounds like you want to be a part of the settlement, children's book authors and illustrators. And if that's the case, then aren't you really arguing for the settlement?
MS. CANZONERI: No. We don't --
THE COURT: Tell me why you object to the settlement. You have one minute.
MS. CANZONERI: Okay. I object to the settlement -- ultimately I object to the settlement because this isn't the way to build a great library. If you were going to build a great library, you'd be thinking carefully about the patrons. That's why you'd have a kids' room, that's why you'd have a room for college students and scholars, that's why you would make it as -- why you wouldn't charge admission. You wouldn't be spending your time trying to worry about copyright infringement. This isn't going to be a great library. And

furthermore, what -- and in the process, what is happening is the authors and illustrators, the people who are members of the class, who are poorly, poorly informed, are being asked to give up, in exchange for very little benefit to them or to the public, an enormous number of -- an enormous amount of their own rights and their intellectual property. So I don't think -- I sympathize with the gentleman from Howard. I mean, I often tell my students about how the bookmobile that came to my one-room school when I was a child was our library. I understand very much, and we want --

THE COURT: I understand. Thank you.

MS. CANZONERI: It will not work.

THE COURT: Thank you.

MS. CANZONERI: Okay. Thank you.

THE COURT: Scott Gant?

MR. GANT: Good morning, your Honor. May I proceed?

THE COURT: Yes. Go ahead.

MR. GANT: The settling parties would like you to believe --

THE COURT: Just tell me, are you a class member?

MR. GANT: I am. I'm a member of the author subclass, your Honor, and I'll describe that in a little more detail in a moment.

The settling parties would like you to believe that action by an Article III court through approval of the proposed

settlement provides the only hope for moving millions of existing books into the digital age. Settling parties would also like you to believe that opponents of the settlement are motivated either by their own commercial interests or by a quest for perfection in the settlement at the expense of the good. Neither of these assertions is true, however.

As you may know, your Honor, I've made two submissions in this case as an objector and as a member of the author subclass. I'm a partner at a law firm in Washington, DC, where my practice focuses on class actions, which I've represented for years both plaintiffs as lead counsel, as well as defendants. My practice focuses on antitrust as well as constitutional law, and I also am an adjunct professor at Georgetown Law School, where I teach constitutional law.

I have also written on Rule 23 and advised numerous clients on it over the years.

THE COURT: Why do you object to the settlement?

MR. GANT: I object to the settlement for two principal reasons, your Honor, and those are the reasons why I'm standing here on my own behalf, having spent more than 200 hours of my own time.

The first is, I'm convinced that approval of the proposed settlement would trample the rights of absent putative class members, in particular their due process rights. I'm also convinced that approval of the proposed settlement is

inconsistent with the rule of law. The settling parties seek to misuse the class action device to approve what is predominantly a commercial transaction, which is acknowledged by Google in its own SEC filings, which they made after the settlement was executed in the end of 2008. The proposed settlement would reshape the competitive landscape by judicial decree while running roughshod over Rule 23 and due process considerations underlying Rule 23, as well as Article III of the Constitution, and the rules enabling acts 28 USC 2072, which requires that rules of procedure not be used to abridge or modify substantive rights. Those are the two overarching reasons why I have stepped up as an individual author.

Obviously, your Honor, given my background and experience, the unique perspective I have, being a class action lawyer as well as an author of a book and numerous inserts, I had the perspective with this combined experience to understand the significant problems, and without knowing what any other objectors would do, I determined that even though it took me dozens of hours to process and analyze this settlement agreement, which few individual authors would do, I needed to do that essentially as a pro bono case.

THE COURT: You're just telling me about yourself. You've told me twice now about the 200 hours. Anything else you want to tell me about the substance, the objection, why you're here?

MR. GANT: Yes. I'd like to focus for a few moments about notice issues, which is one piece of action which has not been briefed by any of the objectors because it's new information that the parties filed last week.

Notice is critical here for two reasons. One, there's no information before us. Second is that as your Honor is aware, it is a linchpin for a class action because constitutionally sufficient notice is a precondition for binding absent class members to a case to which they were not parties.

The information that the settling parties recently filed confirms what I and many others have already believed, which is that the notice programs, both the original notice program as well as the supplemental notice program, did not come even close to meeting the requirements of Rule 23 and due process.

To give you just a few examples, your Honor, the filings as well as the declaration of Mr. Clancy at paragraph 11 talk about the number of unique books that have been identified, and that number is 174 million. I didn't see anything in the filings that estimated the number of class members, but I think a conservative estimate is that there are tens of millions of absent class members in this case. Even if we take at face value the information that's been submitted by the settling parties through their briefs and their

declarations, they send direct notice to only a little over 1 million people, and there have been only approximately 1 million visitors to the Google website. This obviously leaves millions of absent class members who received neither direct notice or visited the website. It is clear from the filings that the parties have relied principally on publication notice and relied on third parties to disseminate information about the settlement. That is not satisfactory in an ordinary class action case. We know that, as many parties have already made clear today, this is far from an ordinary class action. Unlike most cases where someone who doesn't opt out of the case is no worse off than if the case had not been brought at all, in this case absent class members will have some of their intellectual property rights taken and conveyed to a third party and, moreover, that absent class member will become part of an ongoing commercial transaction. Those two features are unusual in this case, and they require not only the ordinary notice requirements and other due process considerations but a heightened standard here. In this case, the settling parties haven't even met the ordinary standards, let alone what should be the heightened standards applied in this case.

Your Honor, based on the information you have in front of you regarding notice, I think you can and should conclude that the notice requirements of Rule 23 and due process have not been satisfied and need go no further, but if you conclude

that this is even a close call about whether the notice requirements have been satisfied here because we have nothing more than untested assertions from the settling parties about the nature and extent of the notice program, I would urge you to strongly consider either allowing adversarial discovery with respect to the notice program or appoint a special master to make independent inquiry and investigation about the efficacy of the notice program, because you need to look no further than myself and other objectors who are sitting here who are easily identifiable who never received notice. Kinsella Declaration paragraph 71 says that one of the settling parties, Simon & Schuster, which is my publisher, provided a list of all their authors to the settling parties so that they could provide notice. I never received notice. Neither did dozens and dozens of other authors and literary agents.

THE COURT: You're here, though, right?

MR. GANT: I am. I am.

THE COURT: Why don't you finish up.

MR. GANT: I am, your Honor, but I'm in an unusual situation. The issue is not me, and that's why I am participating in this case. I could have opted out. There's no question about that. But I decided to participate because I know that there are millions of other people who either are unaware of or don't understand this propose settlement.

THE COURT: I mean, that's a fair point, actually.

You could have opted out but you didn't, because you want to participate?

MR. GANT: Because I want to protect the rights of the absent class members and because I genuinely believe with every fiber of my being that the rule of law is at issue here.

THE COURT: All right. Okay. I understand. Thank you. I have your two submissions as well.

MR. GANT: Thank you.

(Continued on next page)

THE COURT: Mr. Rubin from Microsoft.

MR. RUBIN: Good morning, your Honor. Tom Rubin. I'm chief counsel for intellectual property strategy at Microsoft.

THE COURT: Good morning.

MR. RUBIN: Good morning. Your Honor, the settlement before the court is radical. Its scope is broader and its reach greater, and its alteration of rights more profound than any that has come before it. If approved, Google will be able to exploit for its own commercial ends virtually every copyrighted book published since 1923, not just to market books, but to power and entrench its already dominant search engine.

The issues raised are many, including copyright, constitutional, class action, contract, privacy, international and antitrust concerns. Despite these stakes, the parties claim that the only inquiry for this court is whether the terms of the settlement are fair, adequate and reasonable. The settlement not only fails that test but much more.

I will focus on just three of the fundamental issues that the parties ignore or misstate in their attempt to hide the true nature of this deal.

I will begin with the constitutional issue: Only Congress, not private parties, can revise and rebuild the rights and remedies available to copyright owners. The Constitution states this in Article I, Section 8. The Supreme

Court has explained it in Sony and in Eldrid. The parties' position has been flatly rejected by the Copyright Office, by members of Congress and by the Department of Justice. Only the legislative branch has the authority to make these fundamental changes to copyright, and Microsoft and many of the other objectors have actively supported those efforts. That is the right way to create a digital library that truly benefits all.

Next, a copyright in class action issue: The parties' briefs repeatedly misstate the scope of the underlying lawsuit in an attempt to justify the settlement. This case has always been about Google displaying snippets, not more. The complaints reflect that, and as we cited in several places in our brief, the parties' prior statements demonstrate that. Perhaps most telling is the parties' joint FAQ which they drafted and posted which states quote --

THE COURT: Well, you know, in the plaintiffs 171-page supplemental memorandum there is a list on page 33, a list of paragraphs, quotes from the complaint where Google argues that it's not just about snippets, it is about copying entire books. How do you respond to that?

MR. RUBIN: The underlying act was copying the entirety of the books. The displays that were at issue, your Honor and the only displays at issue were the snippets. What is happening in the settlement, of course, is what's being displayed and being authorized, and the class is being roped

into a scheme that allows the display of the entirety of works, and that was never at issue. Indeed, as all the quotes that we put in our brief demonstrate, and as the parties' prior statements demonstrate, that never could have been the subject of a lawsuit because it would clearly have been infringement.

THE COURT: That would have been clear infringement. OK. Third point?

MR. RUBIN: Third point is critically the antitrust issues, which have been investigated by the Department of Justice and found to be significant.

The amended settlement continues to give Google exclusive access to the entire corpus of unclaimed works. Yet Google still asserts, as it did on page 35 of its brief, that "the registry is not prevented from licensing the entire corpus of unclaimed works." That is grossly misleading.

The registry cannot license any unclaimed works at all. Rather, the parties deliberately structured the deal so that only Google can utilize unclaimed books, including to improve its already dominant search engine.

As to the scope of the unclaimed works at issue, the parties' submission show that it is enormous. In the Clancy declaration at paragraph 11 we learn that 173 million out of 174 million unique works --

THE COURT: I just heard that point.

MR. RUBIN: -- remain unclaimed.

THE COURT: I understand it. I understand.
MR. RUBIN: And what's the impact of handing those works to Google?
THE COURT: Let me ask you this. You were here when we heard from Sony?
MR. RUBIN: Yes, your Honor.
THE COURT: Well, how do you respond to Sony? Sony thinks this is going to be good for competition.
MR. RUBIN: This does not in any way facilitate competition, your Honor. It can't possibly be good for competition when the vast, vast majority of the works are controlled and in the hands of an already dominant player.
So, the Department of Justice has spelled out very clearly in its filing -- and I defer to them and to other antitrust experts the problems in the markets, its impact in the market for books and in the market for search. The problem here is that giving Google the exclusive access to this very valuable corpus will further its domination in search.
These works are extremely valuable to a search engine, and the uses of the works are extremely significant. I was referring to paragraph 24 of the Authors Guild declaration which makes very clear that the greater the number of works that are available, the exponentially more valuable the database becomes. So, the existence of this vast exclusive corpus to Google will have a significantly negative impact on

competition in the search market, your Honor.

Not only that, the deal was structured in an effort to solidify Google's exclusivity and its dominance. Google inserted terms in the deal that provide it with unfettered and uncompensated nondisplay uses. Provisions like Section 3.9 and 7.2(d) give Google the right to foreclose rival search engines from conducting research or crawling and returning search results, a practice that ironically provides the foundation for Google's enormously profitable search business. This would also result in the sacrifice of profits and harm class members by denying them the chance for increased sales by making their works discoverable via other search engines.

One last word on the competition issues, your Honor: Google asserts that the objections of Microsoft, Amazon, Yahoo and the Internet archive -- all of whom have invested heavily in scanning books -- are just sour grapes. Google failed to tell the court the one key fact that explains why those competing efforts were less successful. Those efforts scanned only books that were in the public domain and for books under a copyright, books for which the owners expressly granted permission. That process of seeking permission was painstaking and it was costly but it was the right approach.

Google by comparison took a shortcut by copying anything and everything regardless of copyright status. They're like a trucking company that instructs its drivers to

go 90 miles an hour. It's not surprising that competing companies that obey the speed limit can't keep up.

Google's response to that is that others should have been reckless and sped too. But as the Department of Justice explained, that approach would be "poor public policy and not something the antitrust laws require a competitor to do."

For all these reasons, your Honor -- constitutional, copyright, class action, antitrust, among many others -- the proposed settlement is, as the Department of Justice has stated, a bridge too far.

Thank you, your Honor.

THE COURT: Thank you. All right. The next four are Ron Lazebnik speaking on behalf of Science Fiction Authors and Journalists. Then we will have professor Pamela Samuelson then Cindy Cohn, C-O-H-N, on behalf of Privacy Authors and Publishers. And then Yasuhiro Saito on behalf of the Japan P.E.N. Club.

Mr. Lazebnik?

MR. NIMMER: Your Honor, I am David Nimmer appearing on behalf of Amazon.com, part of the first four that your Honor called.

THE COURT: Oh, I'm sorry, I skipped you. Go ahead. You are here now.

MR. NIMMER: Thank you, your Honor. The complaint in this case is for copyright infringement. Under the Copyright

Act it is unlawful for anyone to make and sell protected works without the permission of a copyright owner. The parties to this case concede that proposition, as they also concede that it is unlawful for this court to enter an order that contains terms in derogation of law. And get those same parties promulgate a settlement agreement that would authorize Google to make and sell tens of thousands of copyrighted works without the permission of any copyright owner, and indeed to do so in unlimited numbers, in hundreds of thousands or millions of copies, however many the market can bear.

Now, how do the parties defend that facial illegality of their settlement agreement? The supplemental memorandum at pages 42 through 43 confronts the issue and says that the settlement "is consistent with this prior permission regime of the Copyright Act because by virtue of the final order approving the settlement each member of the class will be deemed to have authorized Google to engage in carefully negotiated and particularly circumscribed activities."

Your Honor, there is not a shred of support in the memorandum for that proposition. And I might also note that "particularly circumscribed activities" is code word for full scale commercial exploitation with essentially no limits whatsoever. But the main flaw in that proposition, your Honor, is that it is logically incoherent.

The settlement agreement on its face is unlawful

because it acts in violation of copyright law. The settling parties say, no, the court may enter the settlement agreement, there is permission to do so. Where does that permission come from? It comes, in the parties' estimation, from the settlement agreement itself.

In other words, the parties are saying the settlement agreement is lawful because the settlement agreement says that the settlement agreement is lawful. Well, that is complete sophistry, your Honor, and it turns copyright law on its head.

The parties look at the general purpose of copyright protection as contained in the Constitution and conclude that their settlement is congruent with that point of view. But that's not the way our system works.

Ever since May 31, 1790 it has been the Congress of the United States that has supplied the public policy under copyright law, and Congress since that first copyright act in the intervening 220 years has returned to that domain on enumerable occasions to say what the law is.

The United States Supreme Court stated in 1932, and reiterated this same language in 2006, which we quote: "The owner of the copyright, if he pleases, may refrain from licensing and content himself with simply exercising the right to exclude others from using his property."

In other words, the law of the United States is a copyright owner may sit back, do nothing and enjoy his property

rights untrammeled by others exploiting his works without permission. And yet that unbroken tradition would be set at naught by the parties if this court were to execute the settlement that they seek by which the parties are deemed to have authorized Google to exploit their work. It turns copyright law on its head and cannot be --

THE COURT: You are saying copyright owners can just sit back and do nothing.

MR. NIMMER: Under the law they can, but under the settlement agreement they cannot.

THE COURT: Under the settlement agreement if they sit back and do nothing they lose their rights.

MR. NIMMER: That's right. That's exactly right.

THE COURT: I think the parties would argue that they are being given notice that this might happen and they can come forward, and further notice will be made to try and find them.

MR. NIMMER: Assuming the notice provisions have been met -- which many other speakers are addressing -- that is not sufficient. The Supreme Court did not say a party who does not object, having received notice, loses the right to exploit their work. The Supreme Court said that a copyright owner may content himself with the right to exclude others from using his property by simply sitting back. That has been unbroken authority in construing the words of Congress. For that reason, your Honor, the settlement agreement is fundamentally

at odds with copyright law.
In addition to that, your Honor, I would like to make a separate point concerning the identical factual predicate, if I may.
The Second Circuit has ruled that a settlement agreement may contain releases that go beyond the scope of the four corners of the complaint as long as they invoke the identical factual predicate of the complaint. Are the two identical?
THE COURT: There seems to be a difference in the language between those Second Circuit cases and the Fire Fighters case. I mean the parties are relying on Fire Fighters, objectors, and the government are relying on this identical factual predicate language. How I do reconcile that?
MR. NIMMER: Good, I would like to address that. The first thing I would like to say, echoing Mr. Gant's proposition is, it was only the last week that the parties brought the Fire Fighters case to our attention. We have not had the opportunity to brief it. We would respectfully ask the court for permission to file a supplemental memorandum addressing the 50 or so cases.
THE COURT: I think I have enough paper already.
MR. NIMMER: That one additional piece of paper, your Honor, may prove crucial.
I would like to say the following about Fire Fighters.

Under Williams v. Bucavic, a Sixth Circuit case from 1983, within the Fire Fighters realm of cases, it was ruled explicitly that a settlement agreement may not under Title VII -- which was the subject of Fire Fighters -- go ahead and prospectively release a defendant from discrimination. The settlement agreement cannot say you have discriminated in the past, we're now going to come to an agreement and, by the way, you may discriminate in the future. That is absolutely contrary to discrimination law.

And the same proposition applies here: It is absolutely against copyright law to say, Google, you have infringed in the past; because of that there will be a settlement and, by the way, that settlement will allow you to infringe in the future.

The factual predicate of the complaint concerns scanning and snippet display. The excerpts to which your Honor drew Mr. Rubin's attention on page 33 of the complaint are all consistent with scanning and snippet display. That is the predicate of the complaint.

By contrast, the predicate of the settlement is unlimited commercial exploitation, print on demand, file download, consumer subscription and any other display to which the unclaimed works --

THE COURT: There could have been no argument that that was fair use and, therefore, it wasn't part of the case.

MR. NIMMER: Absolutely not. Google has never threatened to engage in unlicensed print-on-demand consumer subscription, because if it did so it would boot its possible fair use defense out the window, not to mention that it would be the largest criminal copyright violator in the history of the Republic to have taken ten million books and exploited them without permission. For both those reasons Google has never made that claim and never would make the claim.

And the plaintiffs, who are master of their complaint, never put into the complaint, even after negotiating the settlement, that Google is threatening to engage in unlicensed print-on-demand, consumer subscriptions and the like.

For both of those reasons, your Honor -- I would be delighted to answer anymore questions the court has, but I would submit that under two basic principles of copyright law -- the permission required in advance, and the identical factual predicate as interpreted by Second Circuit law -- there is no basis on which to approve the proposed amended settlement.

THE COURT: Thank you.

MR. NIMMER: Thank you very much.

THE COURT: Now we will hear from Mr. Lazebnik.

MR. LAZEBNIK: Good morning, your Honor. My name is Ronald Lazebnik, and I am here on behalf of class members Science Fiction & Fantasy Writers of America, the American

Society for Journalists and Authors, and the amicus National Writers Union.

Members of these organizations are typically authors who unlike the Authors Guild do not receive substantial advances from large publishers for their books but still rely on their writing as their primary source of income.

These writers have been very active in developing the growing and increasingly competitive markets for electronic rights which reduce or eliminate the need for publishers as intermediaries between writers and readers. This is the belief of the organizations that this proposed settlement -- a lawsuit that was undertaken to defend writers in these new markets -- has morphed into a business plan that harms them and endangers their rights.

We have many objections to the settlement. We would like to highlight for your Honor just one of the ways we think this settlement is unfair and unreasonable to authors.

The statistics related to the settlement provided by the parties last week are a little hard to analyze given that some of them don't include headers of what the data is, but from what we can tell there is cause for concern.

As your Honor has heard, 1.1 million books have already been claimed. What is interesting though is that these 1.1 million books have been claimed by only 44,000 -- approximately 44,000 different people. Clearly, the ratio

indicates that the majority of the books being claimed right now are by publishers and not authors. What is more disconcerting, however, to my clients is that 620,000 of these books are considered out of print under the terms of the settlement. This means that the majority of the books being claimed for the proposed new electronic distribution system under the settlement are being claimed by publishers who no longer support the hard copy version of these books. This fact pattern demonstrates the exact reason why we believe the settlement is unfair and unreasonable to authors. It is allowing publishers to lay claim to rights and revenues that belong with authors.

The typical author has not forgotten about her out-of-print books. She may have excerpts on her website from which she earns money through advertising. She may sell printed remainder copies through her website or at readings. She may sell e-book downloads, or she may have licensed e-book editions of her book. These sources of incremental revenue may be critical to her ability to support a living from her writing.

As noted by many objectors in their submissions, including the United States, and even the Authors Guild website, the majority of publishing contracts of books at issue for this settlement probably do not include provisions related to electronic rights of books. After all, if you go back 20

years there was no reason for such a right to be considered most of the time.

As such, authors are the sole rights holders for e-books and other electronic distribution mechanisms for most of the millions of books subject to this proposed settlement. The settlement agreement, however, unnecessarily allows not only Google to profit from the electronic distribution rights of authors but also the publishers who have no claim to this right in the first place.

For books published before 1987, many of which in all likelihood do not have any provisions related to electronic rights, after Google takes its cut of profits the remaining profits get split between the author and the publisher despite no provision for this in the original contracts.

For more recent book contracts, regardless of what was negotiated between the author and the publisher at the time, the publisher now will receive 50 percent of the revenue. These revenues for the publishers are not being taken out of Google's profit, your Honor, but rather out of the author's much needed income.

In short, the settlement unreasonably allows publishers to simply lay claim to any book and puts the burden on the author to initiate proceedings to prove that she is in fact the sole rights holder.

For the author of short stories or poetry her

situation may be even worse. She will receive at most a one-time fee for unlimited use in perpetuity even for a work that would normally command a separate fee for each appearance in each edition of an anthology. The publisher of an anthology in which one of her works appeared most likely, even if a publisher paid her for a limited time license for a single edition with the specified maximum print run, can authorize its display by Google regardless of her objections. That publisher and Google will receive all advertising revenue for the duration of her copyright. Her ability to generate revenue from licensing the electronic rights to her insert will have been effectively destroyed by its availability under the settlement.

The claims at issue in this case surrounded Google's desire to display snippets of books online yet somehow the potential resolution of this case involves Google --

THE COURT: I am hearing that point over and over again.

MR. LAZEBNIK: Your Honor --

THE COURT: Why don't you finish up.

MR. LAZEBNIK: Last sentence. Your Honor, this is simply an unfair and unjust resolution, and therefore we do not support this proposed agreement.

THE COURT: Thank you. Professor Samuelson?

MS. SAMUELSON: May it please the court, my name is

Pamela Samuelson. I am a professor of law at the University of California Berkeley, and I am a member of the Authors subclass.

I have written two letters objecting to the settlement on behalf of academic authors. Most of the books that will be regulated by the settlement agreement are out-of-print books that are from the collections of major research libraries such as the University of California, and most of these books were written by scholars for scholarly audiences.

Many scholars own copyright interest in their books and inserts at least for electronic distribution. Many of them also have clauses in their contracts that allow author reversion rights upon the book going out of print. Most of these books will be core parts of the institutional subscription database that will be licensed to universities such as my own.

In the past year I have spoken to many colleagues at U.S. Berkeley and elsewhere about the proposed settlement and have found many of my colleagues mystified about its complexity and details. But when I specifically asked them whether or not they would be willing to allow their out-of-print books to be made available on an open-access basis to a person, they have said yes.

In addition, academic authors, as my last letter indicated, tend to believe that orphan books should be available on open access basis too.

The Financial Times has estimated the number of orphaned books as being in the neighborhood of 2.8 to 5 million books, and they will be a core part of the institutional subscription database.

The plaintiff's memorandum on the objection characterizes open access advocacy as a prime example of "parochial self interest," at page 3. At page 23 they go on to say that the interests of open access advocates plainly are inimical to the class. And as if the word inimical wasn't strong enough by itself, the plaintiffs italicized the word inimical to just emphasize how inimical open access advocacy really is.

These statements to me illustrate that the Authors Guild in particular has not fairly represented the interests of academic authors who are members of the author subclass. It bears mentioning that none of us, I think -- academic authors would not have brought this lawsuit against Google because we tend to think that scanning books to make snippets is available is fair use.

I wish to point out that it's not just --

THE COURT: Scanning the entire book.

MS. SAMUELSON: Pardon me?

THE COURT: Scanning the entire book, you're making the entire book useful -- I mean available.

MS. SAMUELSON: Snippets, snippets available.

THE COURT: Snippets.

MS. SAMUELSON: Right. The issue that was in litigation. And if this case goes forward, I will be writing briefs in support of Google, not in support of the Authors Guild.

But it's not just me and the 150 people who signed my last letter who endorse open access. Your Honor should look at the letter from last August from the UC Academic Council, which on behalf of 16,000 faculty members at the University of California, endorsed open access and were concerned that open access -- concerns of academic authors would not be respected.

But in addition, the U.S. Copyright Office's report about orphaned works considered and rejected the escrow model akin to that that's adopt in the amended settlement agreement. The Copyright Office instead endorsed a free use model once orphan status had been determined.

Also, the legislation that has been before Congress has not been based on the escrow model but rather on the free use once orphan status has been established. And with all due respect, we think the orphan works is a public policy issue that should be decided by Congress.

It is far more consistent with the utilitarian principles of copyright law to allow orphan books to be made available once we know that they are in fact are orphaned. This is important to academic authors because what the parties

want to do is maximize revenues for the millions of orphaned books that will be in the institutional subscription database. This is why I have asked for some meaningful constraint on price hikes as part of the settlement agreement.

And I think there is a fundamental difference in perspective about what books are really about. So, for the plaintiffs in this case books are commodities to be exploited for maximum revenues. Books for academics are more like a slow form of social dialog. The books that we read are part of the conversation that we are picking up on. The books that we write are furthering that conversation.

And the set of objections that I made on behalf of the academic authors was not to be swatted down one by one but really were part of a whole, because the cultural ecology of knowledge I think will be impaired if the vision of the culture ecosystem of the settlement agreement is adopted instead of the one that has prevailed and should prevail in the future for the academic community.

And my last point that I wish to make, your Honor, is now while wearing a hat of a legal scholar. I taught copyright law for almost 30 years, and I worry very much about the precedent that would be set by approval of this particular settlement. Not all of the world's information is contained in books. There are other kinds of copyrighted works that are out there containing information. And I have been wondering for

some time who is next. Right?

If this settlement agreement is approved, I think it will encourage Google and possibly others to go out and scan lots of other materials and then say, hey, we could litigate about this but it would be expensive and ugly, so why don't we just reach a deal right now. And I think that would be unfortunate.

But beyond that, I think that approval of this settlement would encourage other class action lawsuits that would then seek to justify their efforts to remake the copyright law and the copyright rules of the road by saying, oh, Congress is too dysfunctional to take care of this, so let's do it through the class action settlement.

Thank you very much, your Honor.

THE COURT: All right. Thank you.

Why don't we do this. Why don't we take a ten-minute recess, and then we will continue until shortly before one, and then we will take a lunch break. We will take a ten-minute recess.

(Recess)

THE COURT: Please be seated.

All right. I think we're up to Cindy Cohn?

MS. COHN: Good morning your Honor. My name is Cindy Cohn, and I am the legal director of the Electronic Frontier Foundation. I am here today representing 28 privacy authors

and publishers, class members all, who assert that the failure of the class representatives in Google to maintain reader privacy will result in a chilling effect on their readers.

My clients objected to the settlement because they face a very concrete harm: Reduced readership and the corresponding harm to both their expressive and financial interests if this settlement is approved without amendment. In this I believe that the author's interest aligns very closely with the public interest that the gentleman from the Center for Democracy and Technology outlined already.

This court is being asked to approve the creation of a library bookstore combined that will have the unprecedented ability to track users' reading habits. It's going to track what you look for, what you pull from the stacks, and in return what books you read, what pages you read inside those books and even what you scribble in the margins. This is just how the technology is designed.

No library or bookstore ever before has had this kind of granular tracking ability, and they couldn't unless they hired somebody to follow you all the way around the stacks and then into your home.

The plaintiff's response to our objection is quite telling, I think. On pages 164 and 165 of their supplemental brief they say they agree with us. They say that information about reading habits and preferences are important, that it's

sensitive information, and they even say they support our efforts to increase reader privacy. They give no explanation for why they fail to include these important interests in the settlement.

THE COURT: When I order something on Amazon, suddenly I'm getting e-mail saying if you like that book, you'll like this one.

Is this different? Should I be concerned about these e-mails I'm getting from Amazon about what I'm buying?

MS. COHN: Well, it's up to you if you get concerned, but I would say two things:

First of all, the ability to track what you read after you have purchased the book with the Google product is granular and continued. So, once you buy a book from Amazon, Amazon doesn't know what you do with that book. They don't know if you read it, they don't know what you do with it.

Google's product, the way it's designed is going to know every page you read, what you reread, what you scribble in the margins. So the relationship continues.

THE COURT: How do you fix it, or is it not fixable?

MS. COHN: Well, I think there are a couple of things that are fixable, your Honor, and we talk about them in the brief. There are two main things that I think are most important to us, although we have a long list in our brief. The first one is to ensure that Google requires a warrant or a

court order before they turn this information over to law enforcement or to private parties in litigation. This is a fight that book stores and libraries have already fought all across the country for regular books, and we need to make sure that those same standards continue in the digital products.

Now, Google points out that the warrant requirement isn't the law across the country yet, and of course they're right. If it was the law across the country, we wouldn't need them to ensure that with these new different digital products it was maintained; they would just have to follow the law.

But, as your Honor knows, much of the reader privacy protected case law was developed because book stores and libraries stood up and required a warrant from the Tattered Cover case to the Kramer Books case that we discuss in the our papers, and all we are asking is for the court to require that Google take the same initial stance that a warrant or a court order is required, given that there is some uncertainty here.

Second -- and this is kind of more directed to your question about Amazon -- is that we are going to ask Google to mitigate the privacy part. We're going to ask you to ask Google to mitigate these privacy problems by not keeping the data for very long. We want them to delete the records that they have of this granular information about readers and readers' activities within 30 days. Google already deletes logs of users of their Google Health product in about two weeks

and even sooner for users of their location privacy. So, they know how to delete these logs.

Now, there are certain records they are going to have to maintain in order to gain you access to the books that you purchased. We're not talking about those. We are talking about the logs, the granular logs of your activity, which they can get rid of within 30 days.

So, those are two of the proposals that we have in our brief, and there are others there as well.

So, at this point there are things that we can do to mitigate the privacy problems for the way they have designed this problem.

THE COURT: And some of this I think is similar to what was raised by the Center for Democracy and Technology.

MS. COHN: Some of it is, your Honor. I think if you look at the list of things that we propose, our list and the list that the Center for Democracy and Technology proposed are quite similar, and I think that's very telling, that privacy advocates -- one of whom supports the settlement, the other of whom is representing authors who object to the settlement -- actually agree on the set of things that need to be done here in order to protect reader privacy.

I want to talk a little bit, if I may, about Google's responses, because they devoted four pages to responding to things that we raised in our brief, and I think a couple of

them deserve comment.

First of all, they claim that the amended settlement agreement itself is not state action. And I think that it's pretty obvious that that's beside the point.

Google needs federal court approval to build these products. And your inquiry today is whether the settlement is fair, reasonable and adequate to the class and to the public. So, you are the state in that state action. And this court can and should take into consideration whether the settlement upholds the privacy and constitutional free speech protections applicable to books offline, especially here where those constitutional interests of readers have a direct effect on the authors' interests to maximizing readership of their copyrighted works. This is something that should have been on the plaintiff's list, given their stated goals of increasing readership of copyrighted works. This failure to put this on the list is a real problem, and I think they fundamentally admit that when they say that they agree with us that this is important.

Google next analogizes this court to a municipal government approving a building permit. I don't want to spend too much time on that because I think it's so fundamentally inconsistent.

THE COURT: You are out of time anyway.

MS. COHN: All right. Let me just say one more thing.

Google has said that we should just trust them, that they're going to put together just a killer privacy policy that's going to just protect everybody, and it will be enforceable by the FTC.

We maintain that the remote possibility that even if Google is able to do a strong privacy policy, they haven't yet. They have issued a privacy policy, and it doesn't include these things that we are talking about.

And an FTC enforcement possibly somewhere in the future is a far cry from a truly enforceable commitment overseen by this court and not unilaterally changeable by Google, which is what a privacy policy would do.

THE COURT: OK. Thank you. Thank you.

Mr. Saito?

MR. SAITO: Yes, Yasuhiro Saito. I am here on behalf of the Japan P.E.N. Club. Japan P.E.N. Club is the most prominent writers organization in Japan. Its members include most of Japan's nationally renowned authors as well as all its Nobel literature prize winners.

Now, why is Japan P.E.N. Club here? We are here because the Japanese writers, we the writers in Japan, are still very much concerned about this settlement. That's despite the amended agreement's attempt to limit the number of foreign writers included in this settlement.

In this connection I would like to point out that the

Japan P.E.N. Club considers this matter to be so vital that it has sent its representative, the chairman of its Freedom of Expression Committee, from Japan for the sole purpose of attending this hearing, and he is present here today.

Now, I would like to focus on three areas of concern, all seen from the perspective of Japanese writers: Number one, long-term practical impact; number two, threat to our fundamental values; and, number three, the current and continued harm.

Now, the long-term practical impact, this settlement if approved will have a long-term practical impact on the writers in Japan twofold, both direct and indirect.

The direct impact, there is a direct impact on Japanese writers because despite the amended agreement of them to limit the number of foreign writers, a large number of Japanese writers still remain within the settlement.

Now, as to the indirect impact, the problem is this settlement will give Google an enormous advantage, a footstep to forcing an arrangement on the writers and the publisher in Japan and worldwide. Now, how many foreign writers and publishers can realistically refuse if Google came to them and said we are the biggest search engine and at this point to digital books in the world and are already established as de facto standard in the English speaking countries? That's the type of issues Japanese writers and publishers will have to

face if this settlement is approved.

Now, the second point, threat of fundamental values: This settlement poses a major threat to some of the basic fundamental values we share as writers worldwide, such as the freedom of expression and participation in cultural diversity. Diversity publishing culture worldwide, how we generate, distribute and sustain the written words is something we value highly. That diversity is directly threatened that the uniform regime contemplated by this settlement. This settlement creates a single point of control for all the digital works in the settlement. That in itself poses a potential threat to the freedom of expression. All this is particularly troublesome here because Google and the settlement proponents have not engaged in any meaningful discussion and dialog with the writers in Japan or elsewhere in the world in forming the current scheme.

Now, the current and the continued harm: I would like to point out that this settlement through its approval process itself has already caused a significant disruption and harm to the writers in Japan. An enormous number of writers and publishers in Japan have had to expend a great amount of time and in many cases money in order to figure out and react to the proposed settlement agreement. This harm has been exacerbated by Google's continuing failure to provide Japanese translation of the settlement agreement to this day.

Finally, in terms of the continuing harm, we cannot ignore the fact that Google appears to be continuing with the scanning of works by Japanese writers whether they are covered by the settlement or not. Approval of this current settlement will only provide further encouragement to Google in continuing this wrongdoing.

Now, finally I would like to close by pointing out that in the context of a fairness hearing it's extraordinary to see the large number of objectors present in this courtroom. However, I submit that we are still getting a very diluted view of the magnitude of the extent that exists worldwide through this settlement.

There are countless writers worldwide, especially outside the English-speaking world, who do not have the time, money or the language skill to appear and raise their voices in this courtroom.

It would be a great injustice indeed if this court chooses to accept this settlement based on the loudest voices in this courtroom, coming from those who stand to gain the most, without the process that can hear and reflect the voices of those writers worldwide.

THE COURT: Thank you.

All right. The next four are Irene Pakuscher, on behalf of Germany; Michael Guzman from AT&T; Cynthia Arato from the New Zealand Society of Authors; and Daniel Fetterman from

Consumer Watchdog. Yes. Ms. Pakuscher?

MS. PAKUSCHER: Good morning, your Honor. My name is Dr. Irene Pakuscher. I am the head of the division of Copyright and Publishing Law at the Bundesministerium der Justiz, the Federal Ministry of Justice of Germany. On behalf of the government of the Federal Republic of Germany, I would like to thank you for the opportunity to express the German concerns with regard to the amended settlement.

THE COURT: Well, thank you for coming all the way from Germany.

MS. PAKUSCHER: Thank you. It's my pleasure to be here.

THE COURT: All right.

MS. PAKUSCHER: This government attaches the greatest importance to the outcome of this action. The plaintiffs -- i.e. the Authors' Guild and the Association of American Publishers -- contend they have eliminated the serious legal obstacles by making a number of amendments. My government does not question the sincerity and good intentions behind these modifications. In this context, Germany would like to underline that it strenuously supports the creation of digital libraries. In fact, Germany and its fellow European nations have taken affirmative steps to create a European digital library (the so called "Europeana"). And Germany itself is in the process of setting up the so-called "Deutsche Digitale

Bibliothek" (the German Digital Library or "DDB").
THE COURT: You are going to have to give the spelling to our reporter later.
MS. PAKUSCHER: I would be delighted to do that.
Europeana and DDB are governmentally supported efforts to preserve the European and national cultural heritage while fully respecting existing copyrights and international copyright treaties. I will now address the most prevalent concerns. Please note that the observations submitted in writing continue to apply.
First: The second amended agreement still impacts German authors' and publishers' rights.
Plaintiffs and Google intended to exclude international authors and publishers other than those from the United States.
THE COURT: But the problem is it includes books registered with the U.S. Copyright Office, and many foreign authors, including from France and Japan, register with the U.S. Copyright Office. So, therefore many foreign authors are indeed covered.
MS. PAKUSCHER: Indeed. And the reason why many German books have been registered with the Copyright Office is because of the history of copyright legislation in this country, because until 1978 it was necessary to register with the Copyright Office in order to avoid the loss of U.S.

protection.

As a consequence, as you said, a significant number of German authors remain in the author subclass and an equally significant number of rights holders likely do not know it.

Until only a few weeks ago the information on registrations dating before 1978 was available only on old fashioned file cards in the Copyright Office in Washington D.C. The search options provided by Google only weeks ago are not sufficient for several reasons, among others because the quality of the database is poor and because there is no link between the database of the copyright entries and the digitized books.

In order to give reasonable and sufficient notice, Google should be required to supply a comprehensive database without requiring an author to choose between updating or opting out.

Now, even though German authors and publishers are a significant percentage of the class, they have not been represented in the settlement negotiations. In that context it should be noted that German authors and publishers are generally not permitted membership in the Authors Guild or in the Association of American Publishers. Therefore, it is reasonable to conclude that both associations do not represent the best interests of German authors and publishers.

THE COURT: Well, is there something that you would

have wanted had you been represented? I mean I understand the point, and the French authors made the same point. The Japanese as well. They are not represented. If you had been represented, is there something that you would have asked for that you didn't get? Is there some way of fixing it? Or is it simply that you weren't represented and didn't have a chance to be heard?

MS. PAKUSCHER: I think the main point, your Honor, is that German authors and publishers were not represented. For instance, with regard to the legislative framework for collecting societies in Europe, European law provides that collecting societies have to admit members coming from other European nations, and that's precisely because if you want a proper representation you need to be involved in the process and not only be presented with the final result and have a chance to express your opinion on that.

THE COURT: All right.

MS. PAKUSCHER: Therefore, given the deficiencies in representation, the settlement should be limited to U.S. authors and publishers.

Another reason why the German federal government opposes the amended settlement is that it will provide Google with an exclusive license to use orphan works. That has been addressed repeatedly this morning already. Competing digital libraries in Germany and throughout the world do not enjoy the

rights to orphan works. And just let me add that a de facto compulsory license system as provided for by the settlement would require legislative action in Germany equivalent to congressional action over here.

Finally, the proposed settlement is contrary both to the Berne Convention and the World Copyright Treaty, the WCT.

The Berne Convention prohibits any formality as a precondition for enforcing a copyright interest. And the proposed amended settlement still creates a de facto registration requirement.

Furthermore, both the WTC and the Berne Convention are based on the notions that authors enjoy exclusive rights that must be licensed. Therefore, the settlement should be changed to an opt-in basis in order to reflect this essential structural approach of international copyright law.

Allow me to quote Registrar of Copyrights, Marybeth Peters, who has testified before Congress. She said "Compulsory licenses in the context of copyright law in the United States have traditionally been the domain of Congress."

In the view of the government of the Federal Republic of Germany, courts and class actions settlements are not the proper province for creating a copyright statutory framework to bind future generations and impact the future of digital libraries. My government hopes that this is also the prevailing view in the United States of America.

Thank you, your Honor.
THE COURT: All right. Thank you.
Next we will hear from Mr. Guzman of AT&T.
MR. GUZMAN: Good morning, your Honor. Michael Guzman representing the AT and T Corp.
THE COURT: Really afternoon.
MR. GUZMAN: I guess we are.
THE COURT: The clock in the back is not working.
MR. GUZMAN: AT&T is a class member, a competitor and a customer. AT&T is a class member of the author subclass because it owns rights to thousands of U.S. works registered prior to January 5, 2009. AT&T is a competitor in numerous ways including with its yellow pages.com, which is a yellow pages search directory online. AT&T also buys and sells substantial amounts of online advertising, so in that sense AT&T is a customer of Google.
Google suggests in footnote 1 of its brief in support of final approval that comments of objectors like AT&T should be discounted because we're principally competitors rather than class members or customers. Well, there is no question about our status as I have described it, but the position we have articulated in our papers is consistent with all of our various roles and relationships vis-a-vis the parties.
As a class member AT&T has individual agreements to distribute its works. As a competitor AT&T seeks individual

agreements that respect existing copyright law when it acquires rights to distribute content. And as a customer AT&T has a strong interest in maintaining a robust market for searchable works for local search and for search generally.

Now, there were numerous grounds in our objection, and I would like to just address one today in the brief time that I have. I want to focus on the fact that the amended settlement would confer an unjustified monopoly in searchable works to Google.

Google's market power will arise directly from the amended settlement rather than any superior business acumen. Google will not achieve control over pre-2009 works by persuading rights holders to sign up for its offerings voluntary. Google's power, rather, results from violating copyright laws on a large scale basis and then striking a clever settlement with the named plaintiffs.

Now, the parties' papers make much of the fact of their claim that the settlement does not erect any additional barriers to entry. But competitors don't have access to the body of works that Google would get as a result of their unwillingness to compete, but rather competitors are precluded by copyright law. Copyright law requires securing rights individually on an individual basis. There is no public interest exception to the copyright law, nor is there one to the antitrust laws:

As a provider of Internet access, AT&T has an interest in robust competition among Internet search providers. The market for searchable and digital works is expanding and developing rapidly, and we strongly believe that disapproval of the settlement in its current form will best foster competition in the market.

Unless your Honor has any questions, thank you very much for your consideration.

THE COURT: Thank you. Thank you for your views.

Cynthia Arato?

MR. ARATO: Good morning, your Honor. I am Cynthia Arato of Macht Shapiro Arato & Isserles, and I appear today on behalf of publishing and authors rights associations from Germany, Austria, Italy, Switzerland, Sweden and New Zealand, as well as certain rights holders from those foreign countries. Our clients filed objections to both the original proposed settlement agreement and the amended agreement, some as class members, and those objections are at docket entries number 167 and 868.

We believe that this court should reject the amended settlement agreement for each of the reasons set forth in our prior objections and in the submissions of other objectors and the United States statements of interest. But I will addressed today only one topic: The arguments which the plaintiffs recently raised, claiming that the Berne Convention and TRIPS

have no bearing on the amended settlement agreement.

Plaintiff's arguments overlook the framework within which our country's treaty obligations are enforced and respected. They misstate the governing principles, and they should be rejected along with the amended agreement.

First, the plaintiffs suggest that this court should feel free to ignore our country's treaty obligation under both Byrnes and TRIPS because those treaties are not self-executing. That is true, but it is entirely beside the point.

No one is suggesting that a claim for violating Berne or TRIPS could be brought directly in this court, but that does not lessen the serious problems which the agreement raises under these treaties, and that does not mean that the United States won't be called to task over the ASA should it be approved. And we don't believe it means that this court should turn a blind eye to Berne or TRIPS.

Our initial set of objections demonstrated that courts can and do look to these treaties for guidance in copyright cases, carrying international implications. This court certainly should do the same here in a Rule 23 fairness hearing regarding a sweeping and precedent-setting settlement that would impact rights holders from around the world.

THE COURT: Tell me what the treaties say that you believe are problematic for this settlement?

MS. ARATO: The treaties require that exclusive rights

of copyright holders be honored. And there have been many people already today explaining how the settlement usurps those. The treaty also prohibits formalities from being imposed on foreign citizens. It prohibits the favoring of United States citizens over foreign citizens, and TRIPS in particular prohibits favoring one foreign nation over another.

THE COURT: And how does the settlement agreement here favor U.S. citizens over foreign nationals?

MS. ARATO: In our original set of objections we explained how the definition of commercial availability --

(Continued on next page)

THE COURT: I may have read it, I may have not. I don't recall. But tell me what the problem is.

MS. ARATO: One of the problems favoring US citizens over foreign citizens originally was the definition of commercial availability, which only looked through -- to channel the trade in customary channels of trade in the United States. That's been changed somewhat in the amended settlement agreement, but the amended settlement agreement now only looks to customary channels of trade in the United States, the UK, Canada, and Australia. So that's one example.

Given the serious challenges to the amended settlement agreement that have been raised to date by nonUS stake holders, including a somewhat uncommon step of the governments of France and Germany filing objections in this Court, there's a real risk that, should the Court approve the settlement, members of the World Trade Organization will initiate settlement proceedings against the US government before the WTO. And if the US were to lose such proceedings, which is a very real possibility, as the amended agreement currently stands, our trading partners would be entitled to impose trade sanctions against the United States, which would harm other United States companies having no connection to the settlement at all, unless the United States remedies the violation. At a minimum, approval of the agreement would place severe diplomatic stress on the United States, as Marybeth Peters, the Register of

Copyrights, has already recognized.

For these reasons, we believe plaintiffs are simply wrong in concluding that treaties have no bearing on this Court's evaluation of whether the agreement is fair, reasonable, or adequate.

The plaintiffs also have suggested that this Court need not concern itself with Berne's prohibition against formality because that prohibition applies only to conditions that would, if not followed, lead to an entire loss of a copyright. That's simply not correct. Section 5.1 of Berne expressly mandates that both the enjoyment and the exercise of copyrights shall not be subject to any formality, and it's well recognized that that prohibition extends to formalities that burden the enforcement or exercise of copyrights, which is exactly what the ASA does.

To give you just one example, the plaintiffs suggest that filing the claim forms here or determining whether to opt out is not burdensome because other courts have stated that claim forms can require individual rights holders to examine their own personal records. But those cases involve issues of class members owning one or two insurance policies against an insurance company, who's a defendant in a class action case, or setting forth the economic loss from the Exxon Valdez oil spill in Alaska with respect to Eskimo fishermen.

Here, in order to evaluate your rights under the

settlement agreement and submit a claim form, publishers and authors need to examine every single book they've ever published from 1922 on, so you're asking class members to understand their rights in this agreement for their entire business operation for over a century. I don't think you can compare those two.

The plaintiffs next claim that the agreement won't contravene the prohibition against formalities because that prohibition applies only to copyright-specific measures and not to rules of general application. In other words, they claim that because the burdens that the agreement would impose on foreign rights holders would flow directly from this Court's use of Rule 23 of the federal rules, those burdens are immunized from Berne. Plaintiffs' position is based on one Law Review article, which itself provides one example of the kind of rule of general application here in the United States that could be exempt from Berne -- the requirement that all plaintiffs who file lawsuits pay a court filing fee. From that one noncontroversial example, plaintiffs would have this Court believe that Berne has no relevance to its approval of this worldwide settlement that would turn copyright law on its head for millions of foreign rights holders. That is yet another bridge too far.

If approved, the agreement is virtually certain to become the most controversial class settlement ever to emanate

from the United States, and it won't be because of Rule 23; it will be because the agreement would dramatically impair foreign rights holders' substantive copyrights.

As Google itself has explained, judicial approval of the agreement would result in licenses being granted to Google by the judiciary on behalf of absent class members. Regardless of the procedural posture from which that emanates, that is surely a copyright-specific result, and in this setting, the position that Rule 23 would insulate the agreement from international challenge is misplaced.

THE COURT: I think you're out of time.

MS. ARATO: Thank you.

THE COURT: Daniel Fetterman.

MR. FETTERMAN: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. FETTERMAN: My name is Daniel Fetterman, and I have the privilege today of representing an amicus curiae, The Consumer Watchdog, and Consumer Watchdog very much appreciates this opportunity to highlight a few significant points that it believes may assist the Court in deciding whether or not to approve the proposed settlement.

Google suggests in its papers that the views of many of the objectors that the Court has already heard from this morning are entitled to less weight than the views of its supporters because the objectors are its competitors, such as

Amazon, or that they have particular individual agendas. Consumer Watchdog disagrees. These objections are not merely the straw arguments of Google competitors; rather, the concerns are real and have been well articulated in many of the arguments the Court has already heard. Consumer Watchdog is neither a competitor of Google nor does it have any agenda other than protecting the public interest. Consumer Watchdog is a nationally recognized nonpartisan, nonprofit organization. As such, it's here today to provide the Court with independent views, and with no stake in the outcome of this litigation, Consumer Watchdog has --

THE COURT: Tell me what the concerns are.

MR. FETTERMAN: I will. The objections include --

THE COURT: Tell me now.

MR. FETTERMAN: -- that --

THE COURT: We've got to move this along.

MR. FETTERMAN: I understand.

THE COURT: Speakers come up and they spend so much time telling me who they are and what they do. I want to hear about the settlement, please.

MR. FETTERMAN: We'll rely on our papers, but let me just point out the two concerns that we'd like to address.

THE COURT: Yes.

MR. FETTERMAN: First, Google and its supporters argue that the settlement should be approved because it's in the

public interest in that it will enhance the public's access to books by making certain difficult-to-access works readily available for beneficial purposes, and while that argument has superficial appeal, it does not provide a basis, Judge, to approve a settlement that fundamentally alters the rights and remedies under copyright law. Our position is, Judge, is that only Congress should do that. As the United States Supreme Court made clear in the Sony case, Congress -- "Congress has both constitutional authority and the institutional ability to fully assess the very competing interests that are inevitably implicated by changes to the copyright laws." And the parties, as your Honor has heard, are attempting to alter the balance between the public's access to books and the authors' exclusive rights in such works.

And given the significant interests and concerns at issue, as the Court has heard today, it's our position, Judge, that this Court should not fundamentally change the copyright landscape by blessing the product of closed-door negotiations between parties to a private suit. Rather, where, as here, fundamental issues of copyright law are at issue, like how to handle the orphan books, the public deserves to have these issues resolved through a public debate in which the interests of all competitors can be considered and balanced by Congress. Consumer Watchdog firmly believes that the public interest would be best served if the fundamental changes that are

contemplated by the settlement were made by Congress and not through a class action settlement that favors one competitor.

And I think the rest of my remarks have been covered by other speakers, your Honor. I will rely on our papers.

THE COURT: All right. Thank you.

Okay. The next four are Marc Rotenberg of the Electronic Privacy Information Center; Gary Reback for the Open Book Alliance; Hadrian Katz for the Internet Archive; and Andrew Devore for a number of class members.

Mr. Rotenberg?

MR. ROTENBERG: Thank you, your Honor. Very briefly, I'm also a professor of law at Georgetown and testified before Congress on emerging privacy and civil liberties issues. And while I agree with the organizations that have said to you that there are substantial privacy concerns raised in the revised settlement that are not adequately addressed, I disagree with these organizations that that problem can be cured by change in the settlement terms for reasons I'm about to set out and as are described in our brief.

Objectors to the settlement have focused on the concern that Google has essentially untethered the books stored in the libraries from the copyright interests they believe that the authors claim. But they have also untethered the privacy obligations that otherwise attach to the access and use of this information that public libraries are currently subject to. We

have in this country a system of privacy protection established in 48 state laws that provide very strong protection for reader confidentiality, and libraries are obligated to safeguard the collection of information, to limit its disclosure, to oppose requests from government unless a warrant is obtained, and in many circumstances to delete user information when they no longer need it to protect the property interests of the institution. The practices in the library profession emphasize and underscore the need to safeguard the confidentiality of their patrons' access to this information, and critically, your Honor, at this moment in time, when new technologies are being introduced to promote access to electronic information, there is a movement under way within the libraries to introduce technologies that promote access while safeguarding patron privacy.

This settlement, your Honor, turns every one of these safeguards on its head. Google effectively eviscerates the privacy protections that otherwise exist in state privacy law by substituting a provision that says simply, in 66F, will not transfer personally identifiable information to the registry, without ever saying what the PII is, and without any other limitations on what Google may or may not do with the information it collects. It removes all obligations that would otherwise exist for a library to safeguard information about those people who seek access to knowledge.

And where the effort today in the technical community is to support techniques that enable access and minimize privacy risks, Google moves in the opposite direction and does so radically. This settlement mandates user authentication, watermarking, tracking techniques, and data collection that have never previously existed in any electronic library. A person under this settlement who goes into any library or university in this country and tries to download, through the proposed user subscription model, some information that he or she seeks to examine, will get a piece of paper with a watermark that will uniquely identify that person's access to knowledge. There is simply no precedent to track people in this fashion who are simply exploring their right of intellectual freedom.

As I said, your Honor, there are some who believe that privacy defects in the settlement can be cured through additional terms. That was my view at the outset. I frequently go before Congress and recommend ways in which statutes can be developed to safeguard privacy interests and enable some other important commercial or social benefit. But I don't see how that can be done here. I don't see how it's possible to transfer this much information to a company that already knows more about internet users than any other company in the world, that for its business model relies on the commercial extraction of that information and has designed a

system to track access to this new digital library and believe that privacy safeguards could be adequate. And so it's for this reason, your Honor, that I urge you to reject the settlement.

And I would also point out that in the remarks of Professor Samuelson, she noted that under the open access model, as opposed to the escrow model, there could be greater public access to this new digital library. I think that statement is true, but the corollary is also true. There would be less invasion of personal privacy under the open access model than under the escrow model proposed today. Thank you.

THE COURT: All right. You're saying any digital library must have protections.

MR. ROTENBERG: But it must be in the design of the technology, which is why the legal terms will not be sufficient.

THE COURT: Okay. I understand. Thank you.

MR. ROTENBERG: Thank you.

THE COURT: Yes?

MR. REBACK: Good afternoon, your Honor. Gary Reback on behalf of the Open Book Alliance. Among the members of the Open Book Alliance is the New York Library Association, which is the umbrella library association for all the libraries in this city and this state.

THE COURT: Yes.

MR. REBACK: Let me quickly clear up a point of confusion from your Honor's earlier question. Sony is not a competitor with Google. Sony makes reader devices. There are 25 other companies that make reader devices. We've got plenty of competition there. The level we're concerned about is the people who supply the books to those who make the reader devices. We've got one supplier, according to the settlement, for 170 million books. That's our source of concern.

Now basically the parties here argue that their deal benefits humankind and if Google didn't do it, nobody would, therefore, you ought to let them do it. And from an antitrust perspective, they say that there's no violation because what Google is doing increases output, nobody's worse off because of that, and Google's actions are unilateral under the agreement and they are not conspiratorial. I think that fails on the facts, the law, and from the perspective of sound economics.

I'm going to make three really quick points. First, the parties keep pointing the Court to the settlement document and only the settlement document when they contend that Google's actions are unilateral. But the conspiracy here is much broader. The conspiracy that the antitrust division is concerned about goes far beyond that single finely manicured document. For example, the secret side deals expressly permitted under Section 17.9 of the settlement are part and parcel of this arrangement, yet we don't know the terms of

them. We've asked that they be produced to the Court, but the parties won't do it. And while this particular document might not expressly reduce output, the circumstances in which that document was created certainly does. And I'm going to describe that in a second. But my point is that the conspiracy goes well beyond the document, and the Court's inquiry on the antitrust law needs to go beyond the document. Just as the Court did in Broadcast Music, it didn't just look at the document, it took cognizance of the fact that there was a consent decree in existence, for example.

The key factual issues here involve how we got to the deal that's been proposed, not what the parties chose to write into the deal.

Now second, in terms of law and economics, the parties' effort to look only at output to determine antitrust legality is just wrong, and it would be very bad public policy. No case that I know of says you look only at output. Reducing output is one way a conspiracy might hurt consumers. For example, if the conspirators made hard goods, by reducing output, they'd save money on each shoe that they didn't produce, and the artificial scarcity would drive up prices. But here, your Honor, we're dealing with digital goods. The marginal cost of manufacturing the next unit is literally zero. So reducing output isn't the way you go about an antitrust conspiracy. Instead, what you do is you fix a price point and

then you retard and inhibit competition to make sure competition didn't drive down the price point.

Limiting antitrust concerns to restricted output would be a huge step by this Court, and I would respectfully ask that the Court not take that step, at least not without consulting the economists in the antitrust division, because it would have enormous ramifications for the future of antitrust enforcement.

Last point. You can see on the facts before you how an antitrust conspiracy works in the digital age. We didn't end up with a single seller for those 174 million books just by chance. We didn't end up there through some pro-competitive initiative by Google. We got there through concealment and through misdirection. When Google started -- announced its program to scan books, there were a whole host of competitors scanning books -- some not-for-profits, some commercial competitors. And the plaintiff publishers, particularly the AAP, feted those competitors, honored them, extolled them, encouraged them, and deliberately misled them.

Now some of this is in our brief. I won't repeat that. But just two quick factual points. Microsoft announced a service to compete with Google on December 5th, 2006, but unlike Google, Microsoft said that they would respect copyright claims. The very next day the AAP invited Microsoft to speak at its convention the following March, 2007. Here's what the written invitation said: "Our guys have been burned by Google

and will welcome you with open arms." Microsoft came, gave the speech in March 2007. It was an important speech, reported on the front page of Financial Times.

THE COURT: I don't find this terribly helpful. Let's finish up.

MR. REBACK: I beg pardon?

THE COURT: I don't find this terribly helpful. Let's finish up.

MR. REBACK: Very well, your Honor. My point here is that competitors stopped scanning books and left the market not having ever received the same offer that Google got and having been told exactly the opposite. That's why we have one competitor in the market. The result is, problems in search, problems in digital books. We ask, therefore, that the settlement not be approved.

THE COURT: Thank you.

Mr. Katz?

MR. KATZ: May it please the Court. I suggest that the Court could impose one condition on approving the settlement and realize all the benefits of the massive wonderful library in the sky and better access for the handicapped and educational institutions and children's books and all that. You get all the benefits. And you solve virtually all the problems. You solve all the class problems. You solve all the Berne Convention problems. You solve most,

if not all, the antitrust problems, though some of those may linger. Privacy would still be an issue. You can accomplish all this with one condition, and that is that the settlement be approved only if it's limited to those who willingly participate in it, or, colloquially, that it become an opt-in as opposed to an opt-out class action.

Now there's virtually nothing in the parties' submissions about why they want the opt-in class action -- why they want the opt-out class action. The plaintiffs say nothing --

THE COURT: About why they want?

MR. KATZ: Why they don't want an opt-in class action. The plaintiffs say nothing about the subject at all. They simply talk about all the benefits that will accrue from some kind of settlement.

THE COURT: I can surmise.

MR. KATZ: Yeah. Well, Google, however -- every now and then it leaks out. In footnote 8 of the Google submission, the last one, they say that they implemented every suggestion the United States made in its September submission, with one exception, which is the parties declined to change the default rule for authorized display of opt -- out-of-print works from opt-out to opt-in because that would eviscerate the purposes of the ASA. Google comes out and says that what this is about is the orphans. They want the other 173 million and they can't

get them without the opt-out type class action.

Then a couple pages later, page 8 of the Google submission, they say this. They talk about how they're going to kind of develop a marketplace here, and they say the opt-out feature of the settlement is of vital importance because that feature makes it possible for the plaintiffs and Google to establish a market for out-of-print books that would -- otherwise simply could not exist in light of the prohibitive transaction costs of identifying and locating individual rights holders of these largely older out-of-print books. In other words, they know very well they can't find the rights holders, and the reason they want this settlement is because it gives them the rights to use works of people who don't want their works used.

Now if the Court were to go ahead and impose the opt-in requirement, what would happen? Suddenly, the notice, which they now claim is great -- well, if it's great, they've got no problem. Everybody will get the notice, everybody will like the settlement, they'll all opt in. So they'll lose nothing. But I suspect what we'd see in an opt-in class action is dramatically better notice because the incentive will be there. They'll want people to know about it, they'll want people to understand what a great deal this is, and they'll want people to opt in, so you solve the notice problem. You get all the benefits because they say, lots of people will want

to be involved in this and this agreement's good for everybody, the authors say it's good for everybody, the publishers say it's good for everybody, so you'll get all the benefits. And with the Book Rights Registry limited to those who willingly participate, this would be a place that the other competing companies could go and try and license the same rights and since they've already willingly agreed to give them to Google, there's no reason why they shouldn't willingly agree to take some additional money by also licensing them to others.

So the Court could enter this one condition. It's a straightforward condition. But it's possible -- it's possible that the defendant in this case won't like it, and the reason the defendant in this case won't like it is because what they want are the 173 million orphan works, and that's what's unfair, because this settlement, in its current forms, would give Google the right, till well into the 22nd Century -- this is an agreement which goes 75 years after the death of the youngest author in the pool, so to the minimum of the 22nd Century, they would have a right, which no one else in the world would have, a right to digitize works with impunity, without any risk of statutory liability, for something like 150 years. This, it occurs to me, violates not only class law, not only the Berne Convention, this violates the rule against perpetuities. No class action has ever provided those kinds of rights. And the Court can't possibly concede that an illegal

copyright infringement committed by Google, legalized by the settlement agreement, in the year 2121, is actually encompassed by the same issues raised by the complaint filed in the recent past. It can't possibly be the case.

I want to note just a couple of other things, which the Court has raised and I don't think which have been addressed additionally. One is the Firefighters case. The parties like to quote this long passage in the Firefighters case about all the things a court can do in approving a settlement. And then they don't read you the immediately following language. So after the language they quote, after the part they really like, here's what follows: "That is not to say that the parties may agree to take action that conflicts with or violates the statute upon which the complaint was based." In other words, you can't settle a claim for copyright infringement by authorizing the miscreant to continue infringing copyrights for a hundred years into the future. And that's exactly what this settlement sets out to do.

And my final comment concerns the privacy issues here because I can't help but notice, as one obsessed with reading the technological press, that nothing has been said about Google Buzz, which must, it seems to me, raise some question as to just how sensitive to privacy issues Google may be.

Thank you, your Honor.

THE COURT: Thank you.

Mr. Devore?

MR. DEVORE: Good afternoon, your Honor. Andrew Devore, Devore, DeMarco, on behalf of objecting authors Arlo Guthrie, Catherine Ryan Hyde, Julia Wright, and Eugene Linden.

Your Honor, we'll rely on our papers, but I want to focus today on the failure of the named plaintiffs authors to fairly and adequately represent author interests as required by Rule 23 and the due process clause in three critical respects.

First, this agreement impermissibly releases claims unrelated to copyright infringement and as to unalleged future conduct. The only allegation in any complaint in this action was copyright infringement, yet this agreement would release, quote, "each and every claim of every rights holder that has been or could have been asserted in the action against Google, any Google releasee, including all claims of copyright infringement, trademark infringement, or moral rights violation that arises out of the use of authors' works."

Your Honor, just one example relating to authors' trademark interests plainly demonstrates how incredibly overbroad that release is. Catherine Ryan Hyde wrote the book Pay It Forward. A movie was made of the same name, and she also has a nonprofit organization called The Pay It Forward Foundation. There's no provision in this agreement for controlling or preventing the use of that trademark, for example, in Google's AdWords program. There's no compensation

for any such use, and this overbroad release would strip authors of any right to challenge such use. Moreover, the named author plaintiffs did not even appear to have such interests. And therefore, they lack the, quote, incentive to maximize recovery necessary as a matter of law to adequately represent the thousands of absent class members that do.

Illustrated by this example alone, this settlement cannot satisfy the national Firefighters standard. Leave aside the identical factual predicate standard, because I think the contention that it satisfies that standard is absurd. This release plainly is not within the scope of the case made by the pleadings. This is purely a copyright case. There was no trademark claim. No member of the author subclass advocated for the interests of the many absent class members who hold such rights.

This release also does not further the objectives of the law upon which the complaint was based. Stripping authors of valuable trademark rights, not contemplated in any complaint, not represented by any plaintiff, cannot possibly further the purposes of the Copyright Act.

The parties' contention that this is just another standard "anticipatory release" as in the Uhl and Alvarado cases is not only false but misleading. The incredibly broad release here would bar any claim as to an untold number of undisclosed and unknown uses in an extremely lucrative market

that is yet in its infancy. This is a far cry from the concrete facts and clear future rights at issue in those cases.

Second, your Honor, this agreement unfairly strips authors of control over and compensation for nondisplay uses of their works. This, I submit, your Honor, is the elephant in the living room with regard to this case and what the case is really about for Google. Google admits that this vast database of books is of enormous value for search and its continued dominance in the search market.

Google engineer Dan Clancy has said, "Google's core business is search and find, so obviously what helps improve Google's search engine is good for Google." Yet this agreement would give Google unfettered, perpetual rights to exploit and profit from nondisplay uses of authors' works.

Your Honor, we don't even know what those uses are. They're undisclosed, they're unknown, they're unexamined in discovery by any party, by the Court, or by any author that the settlement agreement would be imposed on around the world. The example I just gave for uncompensated nondisplay use of trademarks is just one illustration of this point. Yet this agreement would deprive authors of any meaningful right to control or receive any compensation for all such uses and force them to release any claim relating to those uses.

THE COURT: I'm not quite sure what that means, undisplayed use.

MR. DEVORE: Nondisplay use. It's a great question, your Honor. It's not clear in the agreement. I think it's effectively hidden in the agreement. Nondisplay use, for example, may include the use of a trademark in Google's AdWords program. What happens is they sell ad words, purchasers buy them, and those are the sponsored links that you see at the top of the search when the search results are returned. But it might also include --

THE COURT: If you type in "Pay It Forward," that will trigger some sponsored links.

MR. DEVORE: That's right, your Honor, and actually those sponsored links are web-based movie sales companies, so it's already happening with regard to Catherine Ryan Hyde's trademark. But it also might include, your Honor, grabbing the contents of the book -- for example, a how-to book -- and taking those contents and putting them forward as a separate book published by Google that has exactly the same contents but isn't by the author nor the author's work. It might also include improving the search algorithms. It might also include improving long tail searches, which are the discrete and unusual searches that many people make using search engines and that are determined to be of enormous value to search and to Google's effective dominance in the search market. Those are just some examples that come to mind.

THE COURT: Why don't you finish up.

MR. DEVORE: Your Honor, the last point is the agreement is demonstrably unfair to insert authors in at least four critical respects. It is woefully -- it provides them, first, woefully inadequate one-time compensation; second, while book authors get advertising for -- against -- advertising against display uses of their books, insert authors do not; third, while book authors can exclude their works from any one or all of display uses as well as revenue models, insert authors can remove their books from all but not less than all such uses; and four, insert authors cannot exclude their works from sales by Google if the author of the corresponding book approves those sales.

Here again, the named plaintiff authors appear simply not to have had valuable inserts, and again, could not have adequately represented the interests of class members who do as a matter of law.

Moreover, your Honor, these gross disparities demonstrate a fundamental conflict between insert and book authors that I submit can only be remedied by the creation of a subclass to adequately represent the interests of insert authors.

Your Honor, taken together, these issues demonstrate that the named author plaintiffs have not fairly and adequately represented the interests of authors in this case, and for that reason and the other reasons set forth in our papers, this

settlement should not be approved.

Thank you, your Honor.

THE COURT: Thank you.

Okay. Let's do maybe two more. Mr. Paul Rothstein and Veronica Mullally.

MR. ROTHSTEIN: Good afternoon, your Honor. I'm here on behalf of the author Darlene Marshall. And I'm just here to echo the sentiments that this should be an opt-in settlement that was expressed by Mr. Katz. It was -- it's going to also be expressed by Mr. Epstein. And I would like to --

THE COURT: It's in a lot of the papers, expressed by the government, others, yes.

MR. ROTHSTEIN: Yes, by the government also. And I would like just for the Court to consider this -- I stand on my papers and all the other timely filed objections -- to look at the Fair Labor Standards Act. There was recently a massive settlement on behalf of employees of Wal-Mart. And what happened in that case was, those employees lost their time, their property, because they weren't paid in accordance with wage and hour. That was the allegation. Wal-Mart came in with a settlement. Under the Fair Labor Standards Act, that was a property taking that was improper. The case was resolved, and the Fair Labor Standards Act mandates an opt-in settlement.

In this case, we have a situation where the claims on behalf of the plaintiffs, and everyone in this courtroom that's

objecting, is that there was an unauthorized taking. Google is a big company. Google has many legal representatives. They knew when they were engaging in this potential unlawful conduct what they were doing. So I'm just indicating that the Court should consider the Fair Labor Standards Act as an appropriate analogy and this should be opt-in.

THE COURT: I don't know that it's an appropriate analogy because that is done by collective action. It's not an opt-out situation under the federal Fair Labor Standards Act. But I understand the point.

MR. ROTHSTEIN: Thank you.

THE COURT: Okay. Veronica Mullally.

MS. MULLALLY: Good afternoon, your Honor. Veronica Mullally from Lovells on behalf of VG Wort.

I'm not going to reiterate all the articulate arguments on why this settlement shouldn't be approved. I'm going to talk about why it's unfair to my client. VG Wort is the only reprographic rights organization in Germany. It represents the worldwide copyrights of 400,000 authors and 10,000 publishers, and it's so important --

THE COURT: I'm not sure I know what reprographic rights are.

MS. MULLALLY: That's why I had to read my notes. It's the written copyright of the authors.

THE COURT: Is it different from copyrights? In

Germany is it called reprographic rights?

MS. MULLALLY: Apparently. And this is so important to VG Wort, this hearing and this -- disputing this settlement approval, that the CEO of VG Wort, Dr. Robert Staats, has attended here today. And when Dr. Robert Staats came to me, he said, "You know, I don't understand what's going on here." Albeit he's a German lawyer, but he has a PhD in copyright law, and he doesn't understand how American lawyers for private parties can just take away the rights of the people he represents, and they don't get notice and they don't even get a German translation of the settlement agreement. And you've heard lawyers here today, US lawyers, English-speaking lawyers, who say they don't understand this settlement agreement. Well, it's a lot harder for people whose first language isn't English to understand the nuances of this settlement, and VG Wort can't even work out who is a member of this class and who isn't. They represent 400,000 authors, many of whom have written more than one book, and they haven't been supplied with a list that is searchable, machine searchable. Are they expected to go through book by book by book and expend all their resources and their time? I mean, surely Google is picking the books it wants to scan. Aren't they aware of the books that they want to put on this digital registry? Can't they send out a list and say, "We want your rights"?

And I think Mr. Katz for the Internet Archives had it

right. The onus shouldn't be on the people whose rights are being appropriated here; it should be on Google, who wants to use their rights. And Google is a big rich company, and they have a lot more money to spend and a lot more resources than someone like VG Wort. They should be -- the onus should be on them to ask people, "Do you want your books in this registry, and here's the benefit, please sign off on the dotted line." It shouldn't be on the individual authors or groups like VG Wort to spend money and resources they don't have to try and figure out if they're in this group and if they have some rights that they need to protect.

And the other point I wanted to make was, VG Wort is not against -- they're not wishing to impede progress or access. They would be happy to be involved in a digital registry of books under the terms of our accepted copyright law, where you ask for permission before you just appropriate the rights.

And I said I'd be brief, and I am. Thank you.

THE COURT: Thank you.

Okay. Why don't we break for lunch. We will resume at 2:00.

THE CLERK: All rise.

(Luncheon recess)

A F T E R N O O N S E S S I O N

2:00 p.m.

THE COURT: All right. Please be seated. All right. I think we're up to Norman Marden on behalf of the Commonwealth of Pennsylvania, Lynn Chu, and then Stuart Bernstein.

MR. MARDEN: Good afternoon, your Honor. My name is Norman Marden, and I am representing the Commonwealth of Pennsylvania. We have one concern with the settlement as proposed, and it relates to the treatment of unclaimed property. The states have unclaimed property laws which are designed to preserve funds that are owed to the rightful owners, and the settlement as proposed wants to ignore this with regard to unclaimed funds. They try and characterize these funds as settlement funds, but it appears that they are more in the line of royalties going forward from the contractual agreement that is contemplated by the settlement.

THE COURT: Have these laws been applied to things like royalties, or do they apply to property that's found on the sidewalk?

MR. MARDEN: It does apply to found property.

THE COURT: Bank accounts that are abandoned, I guess.

OBJECTOR: Bank accounts, utilities, overpayments. And what they try to do is prevent a private escheat of personal property. They were regarded as one of the original consumer protection laws when they were first drafted.

The result is something that's less than fair to absent class members, because to understand unclaimed property laws any royalties owing to those individuals would be preserved by the states in their entirety for whenever they come forward.

As it is proposed, the funds would be cy-pres to charity at the ten year period which is five years longer than any state unclaimed property law requires because they would be turned over at five years at the latest. And I looked at almost every unclaimed property law in the country.

This results in authors and publishers and rights holders receiving no compensation for the commercial exploitation of their intellectual properties as contemplated by the settlement.

We discussed this with the parties prior to their promulgation of the amended settlement agreement, and we are confused as to why this wasn't changed, because it doesn't seem like it should be a material term to the agreement. Google certainly shouldn't have any interest in funds they have already paid to the rights registry. I can't contemplate a reason why publishers and authors would want to get rid of funds that would be owed to them.

THE COURT: Well, I think traditionally in class actions there has been this process whereby unclaimed funds or leftover funds are treated as cy-pres and usually donated to

charity.
MR. MARDEN: Yeah, this is --
THE COURT: I don't recall in other cases the State of New York coming forward and saying this should be covered by unclaimed property laws.
MR. MARDEN: I think that it's one of the options that your Honor has in dealing with unclaimed property. I believe there are four options, one of which is the cy-pres, another is disposal through state unclaimed property laws.
The difference between this and a common fund is that by virtue of the way that the class is defined we are only talking about registered works, which means there is some starting point. And Google is going to have to track the actual accesses and use and the royalties owing to each of these works through the course of their operation. So, if ad words are associated with a particular work, it's going to be credited to that work because otherwise it wouldn't be able to pay registered rights holders.
THE COURT: All right.
MR. MARDEN: So, this is different than unknown purchasers of a product who we have no idea of knowing who they are. It makes it a little bit easier.
They try to refer to BMI and ASCAP and how they handle the music industry. And there could be an allegory there, but BMI and ASCAP both comply with state unclaimed property laws

when they dispose of funds, you know, from checks that aren't cashed, etc.

THE COURT: They probably comply with the copyright laws too.

MR. MARDEN: Yes, that as well, your Honor. But it seems like the way that the settlement is crafted they didn't have to ask for permission for the rights in the first place; they secured the rights through the amended settlement agreement; and they don't care if they ever receive the funds to which they are entitled under that same agreement. And that certainly doesn't seem fair and adequate or reasonable, your Honor.

THE COURT: All right. Thank you.

MR. MARDEN: Thank you very much.

THE COURT: Lynn Chu?

MS. CHU: All right. I'm a principal in a literary agency, Writers' Reps. It's a rights holder. And I am appearing therefore on my own account as well as on account of Richard Epstein, who is the only remaining --

THE COURT: Are you a lawyer?

MS. CHU: Yes, I am.

THE COURT: OK.

MS. CHU: I have not really practiced, you know, in this forum at all.

THE COURT: OK.

MS. CHU: My topic is why this is a bad deal. It's kind of a large topic. I know bad deals because I'm a professional deal maker. I'm a literary agent with corporate, entertainment, securities and executive law background and over 30 years of publishing.

This is a complex corporate matter concerning a digital industry that the authors' reps were not up to. They fundamentally have no agency authority by virtue of this litigation to deal in the rights, interests and properties of others. These are business affairs that only individuals can judge for themselves. Authors have gotten the short end of the stick in a three-way negotiation between the publishing cartel and the richest company in the world, who in litigation alas has every right to fight as dog-eat-dog as it can, and obviously has.

This is a terrible contract adhesion that as a professional you instantly tell any client to run like the wind from. Massive costs and liabilities are handed to owners that only the publisher should bear. Had Google not been sued and just said come turn on your scan here, it would have been a thousand times easier, cheaper, fairer and more efficient than this apparatus. Individuals would have, using their hive mind, done the work of making Google be fair in the contract themselves.

The parties are well aware that what they are doing is

legislative because they have been quoted saying they are just bored waiting around for Congress to switch out dumb old copyright law that doesn't serve Silicon Valley. Getting permission, they say, is inconvenient to online publishers, so let's do the opposite, make owners pay for everything in this business and manipulate a court into legislating it.

A registry may not stand in the stead of all owners. This does nothing but create enormous costs that now all owners have to pay for. It aggregates and monetizes their data. With what privacy protection? Who knows. It breaks the connection between Google and owners to overwrite the protections of the common law that curb predatory corporate behavior. Google should be contracting direct. That way contracts will in fact be fair because owners know their own interests and will make sure of it or walk. This is not fair.

It goes without saying that this is price fixing. It's a massive market distortion. It is the product of collusion between the book publisher cartel and Google, a monopoly handing off to a monopsony within this litigation.

Publishers saw Google as their savior from the big enemy of the moment Amazon, so they fled to Google's embrace knowing that they could extract goodies Google would never miss because it was all going to come out of the authors. The registry is an interminable, unappointed, corporate special purpose entity whose sole purpose is busy work that need not

exist, to cost Google's contracts and claims department to right what is a terrible deal. To approve this would only send a message to all corporations: Go ahead, be unethical, cram any nasty demand down unsophisticated people's throats as you like, and if they sign it, they eat it, and we the court will even sign it for them.

There is just no such thing as a publishing license -- which this is -- that waives and releases, as Article X does, all copyright, trademark and joint morale, past, present and future against the publisher, no matter what the use of one's work. Well, surely there may be some contracts like that. As I said, overreaching contracts of adhesion are springing up like daisies everywhere now, preying on the desperate. But even the desperate --

THE COURT: Ms. Chu, Ms. Chu, that's enough. Thank you.

MS. CHU: Thanks.

THE COURT: OK.

Stuart Bernstein.

MR. BERNSTEIN: Thank you, your Honor, and thank you for putting me back on the list. I appear today as an opponent of the amended settlement agreement.

I'm a literary agent representing authors who have chosen to remain in the settlement as well as authors who have opted out. In previous written objections I've dealt with many

of the larger issues, and today I would like to just touch on a few of the settlement provisions that have not received adequate attention, although some of them have today, so I will try to just touch on them in different ways.

First and foremost among these is the diverse and sometimes opposing interests of members of the author subclass. The sentiment among most of my clients is the plaintiffs did not address their interests when they agreed to the settlement. That's because I work with a number of authors whose work has been excerpted or reprinted in other books hundreds and sometimes thousands of times. These inserts are their livelihood, in some cases representing 40 to 50 percent of their incomes. Online publication and accessibility of these inserts will reduce their value to zero.

Contrary to the statement in paragraph 41 of Paul Akin's declaration of February 11, 2010 on behalf of the Authors Guild, which was an oversimplification of what an insert is, each of these inserts requires a carefully negotiated license that restricts the length of term, the format of the publication, with particular restrictions on electronic rights, the number of copies of the publication covered by the fee paid, and a provision that the license expires when the book containing the insert goes out of print.

Many of these licenses are paper files created before computers were in common use. Finding and claiming each of

these inserts and then turning off display uses for them in the settlement is going to be -- no matter how much the parties claim to have simplified the process -- an onerous and never-ending administrative task requiring constant monitoring.

What the settlement calls inserts are known as permissions in the publishing business, because until this settlement permission was required from the copyright holder before publication could take place.

Not being asked for permission is what many of my clients find most objectionable about the settlement, which leads to my second point. To me it's the irony of ironies, that Google the leading search engine, is claiming that having to search for right holders to gain permission to publish their works is too difficult and cumbersome and would keep them from achieving their stated goal, the creation of a vast digital library. I can't think of another entity that is in a better position to track down rights holders in order to obtain their permission.

The parties to the settlement want to claim on the one hand that they have done a thorough job notifying members of the author subclass -- which I don't believe they have -- and on the other claim that finding rights holders is too difficult. Much of this controversy would have been avoided and a huge number of out-of-print books would be made available if the parties would have accepted the wisdom of the opt-in

model favored by the U.S. Justice Department.

In the weeks and months since the settlement was submitted myriad avenues for digital publication have opened up. While the parties have been negotiating this settlement, its chief benefit is daily being made irrelevant as technology and entrepreneurship make the digital market ever more accessible and inexpensive to individual authors. What may have seemed true months ago in regard to the necessity of the opt-out provision to create this new marketplace is just no longer true, and the settlement's gift to Google of exemption from the old rules becomes more and more anticompetitive with each new e-book start-up vying for the digital rights in books.

I would like to just touch on the nondisplay uses. They were touched on before, and very well I thought. But as a literary agent you try to put together a contract that your author can understand. Authors are often creative people. The author subclass is made up of many different people. The creative people, they don't necessarily understand everything about a contract. I spend lots of time explaining it to them. To try to explain this agreement, particularly things like nondisplay uses, I suggested that perhaps one day you won't have to display a book to read it, it can just be put into your brain, and that's a nondisplay use. We just can't imagine what those nondisplay uses are at this point, and I try to keep my authors from signing away things that they don't understand.

Which brings me to my final point: The settlement is just too complicated for most authors to understand, and many have thrown up their hands. All of my advice to my clients has come with caveats. I have been diligent in my research. I have participated in Web seminars, I have consulted the Authors Guild, I have attended panels, I read objections and briefs and declarations. I'm not a lawyer. I have done this --

THE COURT: Let me ask you this. Some of your clients are still in.

MR. BERNSTEIN: Yes.

THE COURT: And presumably they see some advantage to this.

MR. BERNSTEIN: Yes. There are a few of my clients -- there is a client I represent who has about a hundred out-of-print books, some of which have very little chance of being republished, and it represents a very inexpensive potential way for him to put these books back on the market. It's true for some people, yes. But Google already has a way for you to go to them and make a deal with them to do this.

THE COURT: The people who want it can find a way to do it, and the people who don't want it aren't forced to do it.

MR. BERNSTEIN: Right. And all you have to do is watch the trades, the blogs and the websites of publishing these days. It's all about e-books, it's all about one company coming up to buy digital rights. It's creating battles between

what they call the legacy publishers now and the electronic book publishers. But there are just so many inexpensive ways now to get your work published -- particularly if it's already in book form -- even through Google. We just don't need a coercive settlement that draws everybody into this.

THE COURT: All right.

MR. BERNSTEIN: Thank you.

THE COURT: OK. I think that completes our list of supporters and objectors, and next we will hear from the United States of America.

MR. CAVANAUGH: Good afternoon, your Honor, William Cavanaugh from the Justice Department.

THE COURT: Yes.

MR. CAVANAUGH: We want to thank the court for allowing us to participate in the proceedings and address the significant issues.

The United States recognizes and applauds the objectives of mass digitization. The benefits you have heard for the disabled, the disadvantaged and for society at large are real potential. Our concern is that this is not the appropriate vehicle to achieve those objectives.

There are two distinct components to this settlement. The first is settling claims for past infringement based on what was actually at issue in this litigation: Digitization for purposes of creating snippets. The settlement as to that,

including an opt-out settlement, would, to the United States -- subject to seeing the terms and conditions -- would appear to be an appropriate avenue of settlement for these parties to pursue. But grafted onto that settlement what we have before us today is a series of forward-looking commercial transactions -- as an earlier speaker noted, Google in its own 10K describes these as commercial transactions -- which bear no nexus to the underlying issue in this case of Google's fair use defense as to producing snippets of digitized works.

These forward looking business transactions are not designed to remedy the alleged harm created by those, and it produces benefits to Google that Google could not achieve in the marketplace because of the existence of orphan works.

Now, your Honor asked a question about the underlying subject matter of this case, and I would suggest to the court that you need go no further than look at the plaintiff's own motion for approval filed on February 11, pages 40 to 45, where they describe the issues in this case. They talk about what the liability issues were and what the damages issues were. It is strictly limited to indexing and display of snippets. And when they talk about damage issues, they talk about lost licensing fees from producing snippets. No mention of selling books. No mention of producing library subscriptions. It just was not within the scope of this litigation, your Honor.

And, frankly, had it been, the assessment of liability

and damages, I can assure you, would have been quite different, because Google would have no colorable defense to selling books without prior authorization of a copyright holder or producing full display text of works as part of a library subscription product.

The class representatives here, your Honor, have a relatively narrow focus and duty: To litigate the claims presented or settle the claims presented.

Millions of authors and publishers around the world did not hire these class representatives to serve as their literary agents for purposes of their broad digital rights.

The opt-out feature is unique to class actions. As a class representative I can negotiate on behalf of absent members unless they say no; and as proposed in this case I can allow third parties to use someone else's intellectual property unless they say no. That only exists in the class action context. It exists in no other realm of the law and certainly in no other commercial context.

The problem here is those rights are being extended beyond what is necessary to settle the underlying dispute in this case, and it results in essentially a misuse of Rule 23.

Now, these forward-looking business plans may or may not be a wonderful idea. As Judge Ginsberg said in Amchem, Establishing a nationwide compensation system for asbestos victims might well be a fair and efficient means of resolving

those disputes, but it was beyond what was appropriate in the context of Rule 23 as to future injured parties as a result of asbestos.

As the court noted in Amchem, there has to be fidelity to the Rules Enabling Act. You cannot use procedural rules to modify rights. And that's what's happening here.

In settling what is actually in dispute in this case -- scanning and snippeting -- there is no violation of the Rules Enabling Act, because the judgment that Google could obtain in that case would allow them, were they to prevail, to engage in activity. The plaintiff's rights could be extinguished by virtue of the judgment. Therefore, it's not the procedural rules that are modifying those rights.

But with these forward-looking business proposals that's precisely what is happening. Google could not extinguish the plaintiff's right to stop them from scanning books were they to win this case. All Google would gain the right to do would be to make fair use of these with respect to their snippeting.

So Rule 23 is what is actually being used to modify the rights of absent class members. This is where we get from cases such as TBK, Walmart, National Super Spuds, these limiting principles, and two of those cases speak to the identical factual predicate. Now that's a separate concept from adequacy of representation, as the Walmart part made

clear. They said these together -- they identified them as separate issues for the court to consider. But in the context of adequacy, the farther you get away from dealing with the issues in the underlying case, and dealing with things like forward-looking business proposals that have nothing to do with the underlying issues in the case, the adequacy of the representation have to be called into question because it becomes difficult to identify conflicts.

We don't know what these business models are really going to look like. They were not at issue in the underlying case. And it's taking the class representatives beyond their appropriate duties as a class representative.

Your Honor asked the question with respect to Fire Fighters, so let me address Fire Fighters. Regardless of whether the court analyzes this in the context of Walmart and the other cases I just mentioned, or Fire Fighters, the result is the same. These forward-looking business proposals as contemplated by the parties here are simply not appropriate.

Fire Fighters, your Honor, flows out of a consent decree context. It's rarely been used in the class action context, though I think on one or two occasions it has. What it dealt with there was the statutory authority under Title VII for a court to order certain relief in the context of a consent decree. But I would point out four things that make the Fire Fighter type of consent decree very different from what Google

and the plaintiffs propose here.

In each of the Fire Fighter cases, and in each of the cases plaintiffs cite in their brief in which the United States was a party, the conduct, the forward-looking conduct to which they reference, is purely remedial in nature to address the underlying harm which was the subject matter of the case. Selling of books, creating library subscription products, does not address the underlying harm here of Google's desire to create and produce snippets.

Second, as the Supreme Court noted in Fire Fighters, the defendant's actions in these instances with regard to these remedial actions are purely voluntary.

THE COURT: In those cases the future conduct is to help address the past discrimination.

MR. CAVANAUGH: That's absolutely right, Judge.

THE COURT: Hiring certain numbers or etc.

MR. CAVANAUGH: In Fire Fighters there was an agreement to hire a certain number of minority fire fighters. There is no benefit to the defendant in any of those cases. There is a benefit to the plaintiff in the remedial nature of the conduct, but at no time does the defendant gain a substantial commercial benefit.

THE COURT: Selling a book doesn't address the purported copyright infringement in using a snippet.

MR. CAVANAUGH: Exactly, your Honor. I would also

point out another significant difference, which is when a defendant agrees to undertake this remedial action in Fire Fighter cases, that conduct isn't protected by a release. The forward-looking conduct in this case, Google wants complete immunity. They are getting a forward-looking release. And we cite a number of cases -- and I know in the Amazon brief there is a number of district court cases where they cite where courts say typically releases as to future conduct are simply not permissible, unless you start -- and there is one narrow case they suggest which is the Yule case out of the Sixth Circuit where an easement was granted, but that was the same conduct that was at issue, and the easement is what was necessary to settle the underlying dispute having to do with slander to title, trespassing of title for laying cable optic lines.

And the three-part -- your Honor, if you look at the three-part test in Fire Fighters, it's clear that this deal does not meet it. As one of the prior speakers noted, one of the things you look at is does it -- is it within the general scope of the pleadings? The answer to that is no. Does it spring from the underlying dispute? The answer to that again is no. And, third, does this proposed remedial relief -- which in this case is not remedial -- is it consistent with the underlying law? The underlying law in this case is copyright law. These forward-looking business proposals essentially, as

prior speakers have noted, turn copyright law on its head because it eviscerates the requirement of prior approval from the copyright holder.

Now, speakers today have spoken of the social utility of copyright law, and we recognize that, but the two principles of the social utility of copyright and the right of an individual to have exclusive control are not antithetical to one another. They work together. It is the right to control one's work that creates the incentive to produce it. Just as under the patent law innovation is the purpose of the copyright law, that innovation is served by virtue of granting exclusive control to the patent holder. It's the same principle.

As we have said in our brief, your Honor, we believe as to these forward-looking business proposals, attempting to deal with the global problem of orphan works, is best left to Congress.

As you heard today, foreign sovereigns have issued with respect to this settlement, which may be issues the United States may have to deal with. It is Congress that should be able to address these issues.

As noted in I believe it's the Amazon brief by professor Nimmer, Congress has amended the Copyright Act some 62 times since 1978 in order to deal with emerging technologies and dynamic markets. E-books, mass digitization of works is a new field in which we are moving through.

If there is going to be a fundamental shift in the exclusive right of a copyright holder to require advanced permission, if we're going to establish compulsory licensing, that should be done by Congress, particularly in this instance, your Honor, when it is not necessary to settle the underlying dispute.

Now, Google has argued there is no harm here because the rights holder can always say no. But the point, your Honor, is that once you move out of what's necessary to settle this case and we move into this commercial realm, no obligation should be put on the rights holder.

And, as you heard today from prior speakers, requiring publishers to go through 400,000 copyright holders' names to decide who is in, who is out, imposes significant commercial burden on them. But the United States' position, your Honor, is once you are outside the realm of settling something, what's actually at issue in a case, that should be left to Congress because you are starting to modify the rights of rights holders in a way that's not necessary under Rule 23. That's why, your Honor, we have suggested an opt-in approach as to these forward-looking business models.

Settling past infringement on an opt-out basis --

THE COURT: You think that an opt-in approach -- does that deal with the problem of going beyond the underlying case?

MR. CAVANAUGH: No, your Honor, because no release is

being granted by rights holders. You would have to have the rights holder come in and give you advanced permission to use his or her work. So, there is no future release being given. There would be a release given on an opt-out basis --

THE COURT: Well, there is. There is still future-looking conduct, but the person is saying I agree.

MR. CAVANAUGH: Yeah, I agree to it, so the purpose of the copyright laws --

THE COURT: Isn't that still beyond the case, I guess is my question.

MR. CAVANAUGH: Your Honor, it is, but I think the reason why it doesn't create a problem under Walmart or others is because there is no release being given by the absent class member as to that future conduct.

Now, what we have heard from the parties is that this won't work. Well, if this has as much promise as we have heard about today, why won't it work? Why won't people be flocking to this registry to register their works if this truly has as much promise as they want?

And I can also make a safe assumption here that if you establish a registry on an opt-in basis, Google's competitors will be happy to participate in that and start to fund this registry because it provides the opportunity to start to create a more level playing field.

Your Honor, there are other issues which we raise in

our brief with respect to conflicts between -- we have heard issues about, you know, are there side deals or aren't there deals.

THE COURT: I have read it a couple of times.

MR. CAVANAUGH: OK. Your Honor, let me just touch on something that we didn't deal with in our first brief, and this is that issue of attachment A, which the more we think about it really has some real significance here.

Essentially what has happened -- this is not simply an allocation of damages as between authors and publishers because of these forward-looking business proposals. Essentially what you are taking are, you are reformulating contractual rights -- and the class has done this -- when this class action isn't even about the respective contractual rights of authors and publishers. It's an attachment A to something.

I would ask the court to consider could authors and publishers even ever get a class action as to a dispute as to ownership of digital rights as between authors and publishers. I suspect the answer to that is that would be extremely difficult because of the individualized nature of those kinds of disputes.

Before the late 1980s there was no mention of digital rights in these contracts. A publisher might have gotten all rights, but that's only all rights that existed as of that time. Digital didn't even exist at that point. So, who owns

the rights?

This agreement, while I would concede is enormously efficient by simply saying, OK, we're going to split it up 65/35, 50/50, after a prior date, but it's something that I think the court has to give serious attention to because this isn't simply -- as I know the court has dealt with in prior class actions -- fine, we come up with a damage formula for the past allocation of damages. This is forward looking, and this is essentially rewriting people's contracts.

I will leave notice and orphan issues, your Honor. They are covered in our brief, and I don't want to overstay my welcome.

With respect to the antitrust issues, your Honor, our investigation is ongoing. We thought it was appropriate to tell the court that we had this investigation and that we had these concerns. We have identified the horizontal problem that we continue to see.

While we give the parties credit for taking some steps in trying to address some of our concerns in giving Google the right to renegotiate the profit split on commercially available books, they declined to do that for commercially unavailable works; and as to the commercially available works what we're hearing from the publishers is they're going to take those books out anyway. So, we may be left with a corpus of works that's all about commercially unavailable, and it will be

subject to this collectively negotiated profit split.

This isn't normally a problem in class actions, your Honor, because class actions don't tend to create these forward-looking business proposals where you have an entire industry -- the five or six major publishers -- come together and negotiate collectively as to a forward-looking business arrangement. I have never dealt with it in the past in settling antitrust cases because we are always dealing with the past.

This is looking forward and creating, what our concern is, essentially a pricing floor that will end up being used against Apple, Amazon and others.

We don't know as I speak today exactly what the competitive arm will be ultimately to consumers from this, but what we ask ourselves is: Was this reasonably necessary to achieve the procompetitive outcome? And the answer is no. Google is already doing individual negotiations with publishers as to commercially available works. We see no harm in giving Google the right to negotiate as to commercially unavailable works.

And as we lay out, your Honor, we think essentially this may well be a per se violation of the antitrust laws.

And this is not BMI. BMI, the parties were subject to a DOJ consent decree, and it involved a blanket license. But BMI and ASCAP actually had bilateral negotiations with the

rights holders, unlike what's being done here.

Finally, your Honor, as to the exclusivity, the exclusivity that Google will have as to orphan works is principally a function of this extension -- and I would contend improper extension of Rule 23 to these forward-looking business proposals.

That's where all the problems stem from, trying to -- and perhaps with all good intentions in the world -- to try to extend, to create these forward-looking business models in the context of Rule 23 in settling a case that involves snippets and nothing more.

And we continue to investigate the potential impact this will have on many markets, including the search market, your Honor, in which Google already has a relatively dominant position.

And there is no new product going to be introduced there. It is simply the availability of potentially, as we heard today, 173 million works, many of which may be orphans, will undoubtedly give them some real benefit in competing against others who, as they themselves concede, can't get access to these orphans in the way these folks are envisioning, unless the suggestion is that others go out and engage in unauthorized copyright infringement and try to do the type of deal that's being proposed here.

Unless the court has any questions, thank you.

THE COURT: I have nothing further. Thank you.
Have the parties discussed how they want to do this? Who wants to go first?
MR. BONI: We have, your Honor.
May it please the court, my name is Michael Boni, and I am one of the counsel for the author subclass. I am with the firm Boni & Zack in Philadelphia, and as a Philadelphian I feel a little bit like Rocky getting beaten around the head and face for the last 15 rounds, and I am hopeful in the last round I can come through. I am confident I can.
Your Honor, it's really tough to know where to start. I will just say as a matter of housekeeping --
THE COURT: I don't think we have time to cover all the issues.
MR. BONI: I don't think we will. I don't think we will.
THE COURT: You have to pick and choose.
MR. BONI: That's exactly what we intend to do, your Honor. There are some that are obvious and jump off the page, and then what I think we would like to do is have Google speak. And then if your Honor has any questions for us, or issues that your Honor would like to raise, we would be happy to answer those questions.
THE COURT: All right.
MR. BONI: I would like to start by addressing what

has appeared very clear to us as plaintiffs and the parties, the proponents to this settlement, as extreme reductionism in what it is we pled in our complaint and what this case is all about.

I think that a back-drop is necessary as to what occasioned this lawsuit. The publishers and the authors in 2004 and 2005 were gravely concerned and alarmed at Google's announcement set into motion of digitizing the world's books. It has the means to do it, it has the plans to do it, it had patented technology, and it began to copy millions of books. It gave digital copies to the libraries that permitted them to scan their books. We had no idea what would become of those copies. It was for copyright holders a nightmare that followed right on the heels of the debacle that happened to the music industry. We didn't know how it happened. All we knew is that we needed to file a complaint and seek injunctive relief. The authors also filed a complaint seeking monetary actual infringement relief, but primarily what we sought was injunctive relief.

Now, so much has been made of the narrowness of the case. It was Google's copying and showing snippets. In fact what our complaint alleges, as your Honor pointed out --

THE COURT: I didn't point anything out other than the references to the paragraphs in your submission. I wasn't necessarily adopting the position.

MR. BONI: Understood, your Honor. I do want to add though --
THE COURT: Let me ask you this. I mean on this point isn't it true that the case started off as a case about snippets, the use of snippets and whether that was fair use?
MR. BONI: Your Honor, that was the factual allegation that we placed into the complaint, but the answer is no, because what we did allege, and what is last in the bullet points --
THE COURT: The argument is that if Google had engaged in wholesale -- well, the copying and then wholesale displaying of the books, that would be such a clear violation that there wouldn't be a colorable defense, that that is well beyond, way beyond the fair use defense.
MR. BONI: Absolutely, your Honor.
THE COURT: How do you respond to that?
MR. BONI: We were concerned with what we didn't know. We certainly knew that Google -- well, we didn't know anything. Google is, you know, a five year old company at the time, and getting bigger and bigger by the day, but they said we're only showing snippets. I don't think any of us even heard the word snippets before they said it's a couple lines. We didn't know a month later what a snippet would be, and we certainly had no idea how much they would push the envelope with respect to fair use.

Is it clear to say that we're confident they wouldn't have put these books out on the market and gone into direct competition? Absolutely. I agree with whoever said that would be the most massive overt copyright infringement ever. I agree that would not have happened.

THE COURT: And now looking forward isn't that's what is contemplated?

MR. BONI: What's contemplated now is the most fair, equitable, reasonable resolution of the case in controversy with which we were confronted at the time we filed the complaint.

Now, we filed a complaint under notice pleading, and one of the things that we were careful to allege was that Google's acts have caused, and unless restrained, will continue to cause damages and irreparable injury to plaintiffs and the class through continued copyright infringement of books and inserts and through the effectuation of new and further infringements.

In other words, we just didn't know. And, frankly, we were alarmed and scared about what would happen to the future of authorship and publishing.

(Continued on next page)

MR. BONI: And to reduce, to -- this is a case about copying and snippets and copying and snippets, and if that circumscribes or that ought to circumscribe a settlement of this litigation to remedy just those claims, it's simply wrong. It's wrong as a matter of law. We are certainly entitled to put to bed and resolve all issues that arise out of those facts and circumstances to those --

THE COURT: Well, but the difference is, I mean, whenever you settle a case, the defendant wants a general release, but the difference is, you're getting a general release from absent participants from people who haven't shown up yet.

MR. BONI: Your Honor, that is --

THE COURT: People we don't even know if they've gotten notice of it.

MR. BONI: That's the paradigmatic 23(b)(3) class action. There is no difference here than any other class action that requires that notice be given and that you opt out and if you don't opt out, then you're deemed to be in the class. It's no different --

THE COURT: Do you agree that in general it would be against public policy to release future claims of discrimination?

MR. BONI: To release future claims -- oh, Title VII discrimination?

THE COURT: I am releasing you now from discriminating against me in the future. Do you agree that that would be against public policy?
MR. BONI: I don't want to say yes or no, your Honor. I believe that it might, under certain circumstances, in order to resolve a case --
THE COURT: Whether it's yes or no, is it substantially different from "I'm releasing you from future copyright infringement"?
MR. BONI: I think it's substantially different, your Honor. I think --
THE COURT: How so? Why? Why is that?
MR. BONI: In this case, what we have is effectively a release of known future claims based on authorizations granted on a purely nonexclusive basis. Doesn't involve any transfer of copyright ownership interests at all. A nonexclusive authorization is nothing more than a waiver of a right to sue. And what's a waiver of a right to sue? It's a release. It's a release of a claim. Now, it's a release --
THE COURT: Usually it's a release of claims based on what's happened in the past. I mean, you can certainly say you're going to waive future claims based on the prior conduct. Usually you don't have a release of claims based on future conduct. In most cases.
MR. BONI: There's no question, your Honor. And --

THE COURT: Why is this case different?
MR. BONI: Well, one is, we agree with the Court that this is not the usual case. But that doesn't mean it's not approvable. I agree completely, this is not the usual case. It's not an antitrust case in which price fixing was found and in which a percentage of the overcharge was doled out to class members to the cuts of the direct purchasers coming forward. That's a paradigmatic class action. It doesn't mean, however, that this case should not apply the same rules that are applied to all 23(b)(3) opt-out class action settlements. That means the case, under AMCAP (ph), has to be suitable for class certification. We believe that the requirements are amply met, including adequate -- I would say especially adequacy of representation. We believe that the nine-factor Grinnell test is amply met in this case. We believe that the Court need go no further --
THE COURT: Well, it's not useful to tell me that you believe that. I know you believe that. You haven't told me why you believe it.
MR. BONI: Well, fair enough, your Honor.
THE COURT: Yes.
MR. BONI: That can take us down a rabbit hole, but let me try to hit the highest notes. I know that a big issue today is whether this settlement is -- why shouldn't it be done on an opt-in versus an opt-out basis. Let's start with first

principles. Rule 23 is steeped in equity. That's what AMCAP says. It's an equity rule. It gives the Court broad powers to do what is fair, adequate, and reasonable and in the best interests of the class under the circumstances of the case. In this case, we determined, after weighing back and forth whether we should have a default in for out-of-print books or a default off. As some other people --

THE COURT: I think I agree with Mr. Katz and the government that if you give an opt-in, you would eliminate a lot of the objections.

MR. BONI: We would eliminate a lot of objections but we wouldn't have a settlement, and here's why. Number one, and most importantly for us, we will not -- we as class representatives --

THE COURT: Well, I would assume -- before I said I would surmise. But I would surmise that Google wants the orphan books and that's what this is about --

MR. BONI: I'd love to get into the orphan --

THE COURT: -- the orphan books that will remain unclaimed.

MR. BONI: Your Honor, I'll get into the orphan books in one second. That is a -- that is a myth. It's a phrase that has been used like a political football in this case.

THE COURT: I'm just using it --

MR. BONI: They're -- like every class action, there

are claimants and there are people who don't claim. There are people who do not avail themselves of the benefits of the class.

THE COURT: Would you agree in this case it's the people who won't come forward and claim, that they really make up the vast majority of the people?

MR. BONI: No, your Honor.

THE COURT: No?

MR. BONI: We don't agree with that. And the particular beauty of this case is that unlike other class actions, virtually every other class action, is that there is no deadline, not for the life of the rights holders' copyright, to tell us to "turn my book off." No matter when they learned of this or if they learned of it from day one and want to participate, they can say, "Turn my book off." For all the insert holder complainants, the inserts can be turned off.

And we disagree vehemently that it will come at high transactional costs or high work for them. The registry is in place, will be in place to assist all claimants in having their claims met. If they want their works off, they're turned off. No copyright use whatsoever, no cannibalization, none whatsoever.

THE COURT: What about the folks who don't come forward?

MR. BONI: The ones who don't come forward are going

to be looked for. Remember that we're only talking about those out-of-print works that are defaulted on, that will be displayed by default. And those people --

THE COURT: Isn't that the vast majority of the works are the out-of-print ones?

MR. BONI: Yeah, that will be displayed, but if so -- yes, because there are very few in-print works. There are a number, but there are very few, fewer in-print works that have been claimed than out-of-print books. Absolutely.

But let me say this. There have been to date 600 -- close to 620,000 books that are out of print that many in this room would call orphan works, that have come forward to be claimed by 40,000 authors. 40,000 authors. This was through the notice program only. This does not -- this has nothing to do with the efforts that will follow the core mission of the registry to find rights holders, and based on the experiences that we've seen with other licensing and collecting societies here in New York, the Authors Registry --

THE COURT: We're going to find the parents for a lot of these orphans.

MR. BONI: We're going to find a lot of parents for these orphans; there's no question. The success rate for the Authors Registry in New York is 85 percent.

THE COURT: What does that mean, 85 percent of the books?

MR. BONI: The Authors Registry -- I'll tell you what the word "reprographic" means. It means photocopying. That's what "reprographic" means. It is a -- these are licensing societies that have the right to license photocopy uses and collect revenues, and for books that are photocopied that are out of print, the success rate for these licensing societies defines the rights holders of those out-of-print books because there is many for them -- waiting for them. They come forward to get their money, at a very high rate. There are ways to find them. And then as time goes on and the word gets out, they then go to the registry. In the UK, the percentage is in the 90s. It's much higher. Much higher.

So yes, you're absolutely right, your Honor. The parents are going to be found. They're going to be found at very high rates. It will take time. It's why we have allocated the amendment 25 percent to help find these people, but they're going to come out. And that's going to benefit everybody. It's going to benefit the public. As the supporters of the settlement said, it's going to benefit the rights holders that we represent because it will be breathing new commercial life into those books.

Writers write -- particularly published writers write for two reasons. They want their books to be read, and they want compensation. And for those in the open access community, the settlement invites them to set their book prices at zero,

and if they want them out completely and given to Google into a common -- collective common license, creative common license, that's fine. To say that we're not fairly and adequately representing the academic author community is simply not fair. We're representing fairly and adequately every author because every author, and publishers as well -- counsel for -- same thing with publishers subclass. We are representing, by conferring equal treatment across the board, across the board, to all authors in the United States as the United States. The representative plaintiffs are more than adequate representatives for those who are in line to receive cash payments and who don't because they vote off. The representative plaintiffs have both books that have been scanned and haven't been scanned.

With respect to claiming and unclaiming, there isn't a single class action where, at the time you fashion a settlement, you have a class rep who's representing an unclaimed rights holder. It's logically impossible. You never know who's going to claim or not claim, but there are no differences. Adequacy of representation is a requirement under Rule 23(a)(4) that requires a fundamental conflict of interest between the representative plaintiff and the absent class member. A fundamental conflict of interest. In a recent Second Circuit case, they found that it did not rise to the level of a fundamental conflict of interest if the claims of

some class members, in order to win, would have to defeat the claims of other class members. We don't have anything close to a conflict of interest between representatives here and the absent class members.

Your Honor, there are many other issues. Unless your Honor has further questions, I'd like to hand it over to Google, and then all of us are available for issues to be discussed as you wish.

THE COURT: All right. Let's hear from Google, and we'll see if I have any other questions.

MS. DURIE: Thank you, your Honor, and good afternoon. Daralyn Durie, representing Google.

Your Honor asked whether it would be permissible to release claims for future discrimination. I would agree that the answer to that question, in all likelihood, is no. That's because discrimination is evil. The dissemination of copyrighted works is not. That is because the purpose of the Copyright Act is to encourage the production of copyrighted works.

THE COURT: Well, some would say the question is: Is copyright infringement evil?

MS. DURIE: Copyright infringement is evil to the extent that it is not compensated and that it harms the economic interests of rights holders.

THE COURT: And what about the people who want to sit

on their work and don't want to do anything with them?

MS. DURIE: Your Honor, the class of people at issue here is people who publish their works in the first instance -- authors who made an affirmative decision to put their works into the stream of commerce so that they could be read, which is, after all, why most authors write works in the first instance, so that they will be read, and to receive compensation for those works. That purpose is absolutely met by the settlement agreement in this case, and in fact, the opt-out nature of it which we've been discussing for works that are not commercially available is essential in order to fulfill that purpose. There is nothing about this settlement that risks injuring the economic interests of absent rights holders, which, again, is the purpose of the copyright statute that is at issue here. By definition, the works that are not commercially available and for which the default use will be the display uses are permitted, are works for which there is no other channel of distribution available. There is by definition no other way for the rights holders in these works to either allow people to read what they have written or to receive compensation for those uses. That's in part why the decision was made that rights holders could only benefit if their works were not commercially available by having display uses be turned on, because there was no way that could injure their economic interests.

But it's also important to understand, as Mr. Boni said, that without this opt-out regime for works that are not commercially available, there would be no settlement. This is an essential feature of the settlement. And it's not simply because Google wants to get access to this body of work. It's because there is no other way to create a market for these out-of-print works so that they can become available and so that their rights holders can be located.

The market for any given out-of-print work is presumptively small. That is, after all, why the work is out of print in the first place, because it was deemed that there was not much money to be made through distribution of this work. In fact, Google has scanned 2 million public domain works and has made those works freely available. Hundreds of thousands of those works have never been accessed at all. They can be searched for, but nobody's ever looked at them, even though they are available for free. Other works are much more popular. The problem is ex ante. There is no way to know which works are which -- which works in this corpus of out-of-print works are never going to be of interest to anyone and which works in this corpus of out-of-print works will be of interest to people such that people will be willing to pay money to access them. Because of that uncertainty, the transaction costs associated with going out, identifying rights holders, negotiating with rights holders on an individual

basis, and clearing rights with respect to those works is prohibitive. The way that we know that it's prohibitive is that no one has done it. The opportunity to have an opt-in regime --

THE COURT: And how do you respond to the argument that this is an issue that should be dealt with by Congress?

MS. DURIE: Congress certainly has the power to pass written works legislation, should it choose to do so. But there are plenty of issues that could be dealt with by Congress but nonetheless also fall within the domain of the courts. And this is one such issue.

We have presented to the Court a settlement agreement for the Court's approval under Rule 23. And if that settlement agreement passes muster under Rule 23, that is fair to the class members, there was adequate notice, there was adequate representation, then it is this Court's task to evaluate that settlement under Rule 23, without regard to what Congress might or might not do in the future.

But this settlement agreement provides a solution to the transaction costs that I alluded to a moment ago. The opt-in regime is just the status quo. We know it doesn't work because if it worked, someone would have done it already. Microsoft abandoned its scanning project. So have others. They couldn't figure out a way to make it commercially viable. In the absence of a settlement such as this, it's not as though

there's some other way to bring these works to light. This is the opportunity to do that, which is why the supporters have spoken so forcefully in favor of the settlement.

And again, the key point here is that no one has even argued that the economic interest of these absent rights holders are in any way negatively impacted by the settlement. It is almost logically impossible because to the extent that a work becomes commercially available, to the extent that the thriving market in e-books provides for some other means of electronic distribution of these works, the works then become commercially available, and at that point the default changes. And at that point the rights holder does have to opt affirmatively in in order for display uses and sales of their works to continue. The beauty of the settlement is that it allows works where there is no other means of distribution to accumulate money. That money can be used by the registry to go find these rights holders, and we know, as Mr. Boni said, that there is a track record of success in doing that. And there is a particular track record of success when not only is there money available to fund a research over a period of years, but there is money there sitting and waiting for the claimant and giving them an incentive to come forward. It's not just some letter that you get in the mail saying, "Sign here." It's something that comes and says, "There is money waiting for you," and that materially changes the dynamic.

Now some of the objectors and the Department of Justice have argued essentially that this Court lacks the power to approve this settlement, even to the extent that settlement is plainly good for class members, and that is wrong. The settlement is well within this Court's power to authorize, and indeed, it is this Court's task to evaluate the settlement under Rule 23. This does not turn copyright law on its head. To say that this turns copyright law on its head is to say that you cannot have copyright class actions. That's not true. The freelancers case demonstrates that it's not true, but more importantly, there's nothing unique about copyright law that causes copyright claims not to be subject to class action treatment. And the fact that there is some intellectual property interest at stake doesn't change the analysis either. We know that from the --

THE COURT: I don't think the argument is that you can't have class actions. The argument is that in this case, the settlement goes too far. It's not that it's copyright; it's just that the argument is that it goes too far in this particular case.

MS. DURIE: So then the question is why. And what is the principle that animates whether it goes too far. For that principle, I would suggest, your Honor, one does look to the Firefighters test in terms of the scope of the Court's power to afford future remedy. And the test as it is articulated is, is

this --

THE COURT: Well, as the government argued, in the Firefighters cases, the future remedy is to address past wrong, and this does seem to go beyond addressing past wrong.

MS. DURIE: So two responses to that, your Honor.

THE COURT: Yes.

MS. DURIE: First, what Firefighters says the test is, as opposed to the particular circumstance in which it was applied in that case, Firefighters says the test involves three things:

Is this a dispute that springs from and resolves a dispute within the Court's jurisdiction? Clearly it does.

Is this within the general scope of what was at issue in the case? I want to talk more about that.

And then finally, does it further the objectives of the Copyright Act? And I discussed how it does because it provides great economic benefit to the class members.

THE COURT: Both sides say the answer is clear.

MS. DURIE: In this case, though, to the extent that the inquiry is tethered to what Firefighters says the test is, rather than some general statement that the settlement goes too far, I think the answer does become much more clear. This is something that falls within the general scope of the case that was at issue. The plaintiffs had alleged that Google was digitizing entire copies of works, making portions of those

works available for free, and giving entire copies of those digital scans to libraries. Now let me be very clear. We firmly believe that constitutes fair use and is permissible under the copyright law. But the plaintiffs were very worried about the consequences of this conduct. They were worried that entire copies of their work would wind up on the internet.

THE COURT: If Google had been digitizing entire books and not just making portions available but making the entire portions available and indeed selling them, would that be something that Google would have tried to defend?

MS. DURIE: Selling the work, no. Making the entire work available, that is a more complicated question, in the following respect. We were giving an entire copy of the book to the library. Libraries operate under a different regime, and the uses to which they can put to it might be different from the uses to which Google could put to it. We were also -- although we were only making portions of the work available in response to a particular search at a given time, if you aggregate all of those searches, you might actually be able to construct an entire book even from the serial display of multiple portions.

And finally, from one of the objectors this morning, you heard the argument that with respect to non -- with respect to works that are not commercially available and whose rights holders cannot be found, it is in fact a fair use to make the

entirety of that work available. That was Professor Samuelson's argument and indeed her objection to the settlement. She thinks we should not be settling and that we should be advancing that theory in this argument. So she's a very respected copyright scholar. Clearly that argument exists.

THE COURT: She also said that there should be public access to everything in terms of the out-of-print work, and I gather you don't agree with her on that.

MS. DURIE: It's not that I agree or disagree. It's that the plaintiffs were correctly concerned about the consequences of what Google was doing. Even if we are absolutely right that what we were doing was protected by fair use, this is a function of the digital age. That is why the plaintiffs sought an injunction to stop the program in its entirety, and this is a dispute -- this is a settlement that resolves this dispute about the uses that can be put to this -- to these works. The plaintiffs were worried that copies of their works would be on the internet for free. The settlement of that claim is that they will receive compensation for those uses of their work. That is certainly a settlement that comes within the general scope of the pleadings and what was at issue in the case.

Now one other point that Mr. Boni alluded to but that I think is critically important here. Unlike virtually every

other class action settlement, the rights holders in this case retained the right to change their mind. They can pull their books from the program at any point in time in the future. The only irrevocable decision that's being made by rights holders now as a consequence of either opting into or opting out of the settlement is a decision about taking money in exchange for relinquishing a claim for past scanning and sort of issues about removing their work from the corpus permanently but nothing having to do with any of the commercial uses of their work. They can come forward a year from now, they can come forward two years from now, they can come forward five years from now and say, "I want this to stop." All that will have happened to them in the interim is if people have purchased their works, money will be sitting and waiting for them. That's it. It cannot possibly have taken away any other economic opportunity, and as a consequence, that absolutely furthers the purposes of the Copyright Act.

Now we have also heard a number of antitrust objections raised to the settlement -- some by Google's competitors and others by the Department of Justice. Let me start with the proposition that the Sherman Act is a consumer welfare statute. It is concerned with what is best for consumers. And here, this settlement is certainly in the best interests of consumers. In the absence of this settlement, there is no way to access these works. They are locked away.

With this settlement, there is a mechanism to access them. From the perspective of consumers, one way to get something is unquestionably better than no way to get it at all. It is a mirror image of the issue for the authors. One distribution channel is a lot better than none. There is no danger that Google -- no present danger that Google will somehow monopolize the market for e-books. Our current market share is zero. Amazon, Microsoft, other members of the Open Book Alliance are trying to preclude competition in that market, not to enhance it.

The settlement is completely nonexclusive. The question for this Court is whether the settlement erects barriers to entry for competitors. It doesn't. If anything, the settlement makes it easier for other people to compete. That's because once the registry is established, it will have the identity of the authors and competitors will be able to go, get the names of people who will have been located by the registry and make the --

THE COURT: What about the ones who can't be located? Is there a competitive advantage to that?

MS. DURIE: No, not a meaningful one, and for the following reason. Let me start by saying, the relevant question is not whether Google gains some competitive advantage by virtue of this. The relevant question is whether Google has engaged in some wrongful exclusionary act. The answer to that

question is no. There is nothing wrongful about Google's conduct here. There's nothing illegal. And that is the relevant question under Section 2.

But returning to your Honor's question, the answer thereto for all practical purposes is no. Several of the objectors seized on a statement in Mr. Clancy's declaration that Google has gathered 3.27 billion records about books and analyzed them to identifying more than 174 million unique works. This declaration was submitted in connection with providing evidence about the metadata that's available for books and the claiming process. But that number, 174 million, is not the number of books in the settlement. That is, if anything, the number of books in the world. The number of books at issue in this settlement is much, much smaller. Our estimates are there are about 42 million books in libraries in the United States. Roughly 20 percent of those, we estimate, are in the public domain. Around half of the books that are left are written in foreign languages. There are often many different versions of the same book. That can cut the number in half. Where you wind up with is fewer than 10 million works that are affected by the settlement in any way. Some portion of those works are in print, some portion of those works are out of print. When you do the math -- and these are estimates, these are Google's own internal estimates -- there's something in the neighborhood of 5 million out-of-print works implicated

by the settlement. And again, many books have been claimed already, and as this process goes forward, we expect more and more books to be claimed and the remaining number of unclaimed works to be smaller and smaller.

Now I want to return to the question of whether Google did anything exclusionary. The settlement is not erecting barriers to entry, as I said. That's partly because the registry will facilitate the licensing of books, but it's also because anyone can scan books and include them in search form. To the extent that competitors are complaining that Google will obtain an unfair advantage in search because when you search, you'll be able to return a book as a search result, the ability to do that is open to anyone. Scan the book, include them in your search results. There's -- that opportunity exists for everyone.

Now I said before that it's better to have one distribution channel than none. It's better for consumers; it's better for authors. That is unquestionably true. But the other key point here is that the future is unknown. What we're really hearing from objectors is speculative concern about what the impact of this might be in the future and hypothesizing that there could be -- bearing in mind, in a world where at present we have 0 percent market share in the e-book market -- some cause for concern, the Court doesn't need to reach that question. Speculative harms are not a sufficient basis to

reject a settlement.

Moreover, Google has affirmatively disclaimed any protections that it might have had under the trade doctrine (ph). And as a result, in the event that any speculative harms come to pass, in the event that Google were to become as large as Amazon is at present, at that juncture, either the Department of Justice or a private plaintiff would have the opportunity to step in and assert an antitrust claim that at that juncture might be right and might be predicated on actual facts.

Let me raise --

THE COURT: What about the search market?

MS. DURIE: Well, my point with respect to the search market, your Honor, is that if what we're talking about is the fact that Google will have the ability to include books in its search results, anyone can do that.

THE COURT: Okay. Why don't you finish up.

MS. DURIE: I will do that, your Honor. Three more -- three more brief points, and then I will turn the floor over to the plaintiffs.

First, an issue was raised with respect to the scope of releases and that they extend the trademark claims relating to our AdWords program. We do not interpret the scope of their releases that way, but to be very clear, in the event that there is any ambiguity, we are not seeking to release claims

relating to usage of trademarks in our AdWords program. A concern was raised with respect to privacy. And the core concerns seem to be that this would diminish the ability to read books in private. That is not true. This service will be available at public libraries. You can walk into your neighborhood library, you can sit down at a free access terminal, anonymously, you can search for and read a book. No one will have any way to know who you are. That enhances the ability to read books anonymously. It does not --

THE COURT: And if you want to look at it at home, then what?

MS. DURIE: Well, if you want to look at it at home, that may present an issue. Here's the rub. This is a tension between requirements for security that are insisted on in order not to have these works be sort of freely and broadly disseminated and concerns about privacy. This was a carefully negotiated agreement, trying to balance those competing considerations between people with interest in the outcome. We have a privacy policy in place. We have committed to maintaining privacy standards at least as high as what is in there now. That is enforceable through the FTC Act. But this represents a careful balance of these competing considerations.

The final point that I was going to make was with respect to foreign rights holders, and I was simply going to observe there that of course this case is about United States

copyright interests. It's about uses of works in the United States, and for that reason, it is entirely appropriate for a United States court to apply United States law, both substantive and procedural, in resolving the claims.

Unless your Honor has any further questions, I will cede the floor to the plaintiffs' attorneys.

THE COURT: I don't. Thank you.

MR. KELLER: Your Honor, I know that Mr. Boni was really feeling battered because he forget to indicate that I actually want to speak briefly on behalf of the publishers, so if you'll indulge me.

THE COURT: He didn't say that. I thought I was done, in fact, but go ahead.

MR. KELLER: I could see the look in your eye when I stood up. I apologize, but because we're running late, I will reduce all of my points to snippets.

THE COURT: Okay.

MR. KELLER: There are just four snippets.

THE COURT: All right.

MR. KELLER: The first is whether this is outside of the scope of the pleadings, and the answer is, it's not. And here's why. When the publishers sued, they sued for the initial act of scanning our books without permission, cover to cover. We were not so concerned about what uses were made. We didn't want any uses made. The initial copy itself was the act

of infringement. That's what we sued on. Now Google defended, using the snippet offense, because it had to, in this novel case, put its best fair use foot forward. But this case was never just about snippets, and you heard from Ms. Durie saying that. There are other ways that Google could have exploited those copies, still argued fair use, and we were worried about every single one of them.

Now you asked the question in response to the Justice Department's statement that somehow this settlement is outside the scope of the pleadings. I think you said something about the selling of a book, with money to the class, how does that remedy what's gone on here. The question is, it's a direct remedy, because once those scans are in Google's hands, we have the power to get them back if we win the case, get an injunction, and we can get return of the copies, and because we have the power to get them back, we also have, as included in that power, the power to condition future uses. That's black letter law. We cited a case from the Supreme Court for you in our supplemental memorandum. And there are many more cases that hold that to be so. So the notion that this is about snippets is an argument that people are using --

THE COURT: Of course they have some of these books already and they can keep them instead of being forced to give them back.

MR. KELLER: And because they're in their possession,

we have the right to condition how, if at all, they are allowed to use them, because we could have an injunction that prohibits any use. So it's a lesser included remedy that's authorized by the Copyright Act.

Let me also now turn briefly to the issue of Congress versus the court. Professor Nimmer was here earlier today and quoted the Sony case, as in his brief, about the difference between what Congress should do and what courts should do in copyright cases, but that quote is completely out of context. It comes from the Sony Betamax case, where the Supreme Court had before it one of the most difficult fair use cases -- until now -- whether or not home taping would turn millions of Americans into copyright infringers, and in that context, the court said, "We don't read the Copyright Act that way. We think this is fair use."

THE COURT: I was on the Cablevision case, and I didn't do so well in that case.

MR. KELLER: That's why I want you to pay real close attention to me now, Judge. I'm trying to help you out.

THE COURT: I'm listening.

MR. KELLER: The court, when it referred to Congress' authority to enact copyright legislation, which of course we know it's done over the years, was simply making the point that it had to decide the case before it. It was forced to decide, are these people infringers or not. And if you don't like the

result, if you read the Copyright Act a different way, the way we read it, it's up to Congress to change that equation, change the way that we see it. There is nothing in the Copyright Act that says you should not decide this case. You have to decide this case. It's a commercial dispute alleging copyright infringement. It's completely justiciable, and the only question is, at this point, does Rule 23 allow you to approve that settlement. And that test, as has been said earlier, completely an equitable analysis.

So before I get to why it meets Rule 23, I just want to respond a little bit further to the other point that lots of people have made in lots of different ways, which is that somehow we have turned copyright law on its head. We have not turned copyright law on its head, and here is the reason why. It is true that a copyright owner ordinarily enjoys the right to exclude completely anybody's use of their copyrighted works. But that's not any different from the property owner who has the right to exclude anybody from cutting across their lawn. That's trespassing, and you don't need to take any affirmative act. You have that right to exclude automatically. That is true. But there are lots of copyright -- excuse me -- lots of real property class actions that are settled that involve absent class members who never come forward, and the fact that this is a copyright case doesn't change the basic analysis. In fact, what I was listening to is that this copyright law is

some kind of supernatural law that gives extra-special powers to rights holders. It's not. It's a form of property. It's an intangible property right, but it is nonetheless a form of property. And Uhl and other class actions settle on behalf of absent class members. In fact, they settle on terms that are less fair than the ones here.

And let me jump to the last point, which is why this class action settlement clearly meets the Rule 23 standards. In most class actions, class members are given a binary choice: Are you in or are you out? That's it, full stop. And in most class actions we know that the redemption rate, the claiming rate is extraordinarily low, and that is why you've heard from others today that the orphan works issue is really just more of a myth than a reality, and we spent some time on that in our briefs and we will not spend time on it now, but they're absent nonclaiming class members. But in the ordinary class situation, once they're out -- obviously if they opt out, they're out. But once they're in, they're bound. And they're given a general release --

THE COURT: Here, they can go either way.

MR. KELLER: They can go either way at any time.

THE COURT: If they're out, they can come back in. If they're in, they can go back out.

MR. KELLER: Here's the beauty. It's a classic win-win. It indicates the copyright principle that we so

wanted to vindicate, which is that -- and it's the opposite of turning the copyright law on its head. It's the very purpose of copyright law. You can't copy our books. You can't use them. You can't keep them without our permission, or giving permission. And with respect to the absent class members, we kept the place for them. We kept the door open for them. They can come back years later and flip the switch the other way. It is true that the default for out-of-print books is that they get to be used by Google. That's so. That's a compromise, Judge, and we had to make a compromise because we want to get the deal done. But the question is, was that compromise, along with all the other benefits that we have in this class action, so unreasonable that the class action as a whole fails? And I submit that it's not so unreasonable.

In fact, I think this class action stacks up really well because I haven't seen any case cited by anybody where the options are as many varied and the settlement is so option-oriented as this one. Is it perfect? No. It's not perfect. Obviously. We spent a lot of time hearing today about how imperfect it is. But is it fair and adequate and reasonable? You bet it is, for the very reason that we had these considerations in mind and made sure that when we negotiated this deal, that absent class members were protected.

There's no fundamental conflict here. There's no reason to presume that anybody would vote any differently, but

if they do and if they ever come forward, they're protected. There's money kept for them. And they can say, "You know what, count me out," and they can do it later on. So I think it stacks up really well in terms of the options given to the absent class members when they finally show up. In fact, this is a classic settlement, a pure compromise, and I think the proof that it's a great compromise is that you've heard from many people today attacking the settlement, but most of those attacking, the ones in person today and the ones that are in writing, consistently rely on speculative arguments, including the antitrust concerns. If there was a violation of antitrust law, we would have heard about it already, Judge. They posit illusory conflicts. Nobody has identified a true conflict yet. They advance -- it's been said pejoratively earlier today, but there's no hiding it. There's no delicate way to say it. They advance private agendas, sometimes competitive agendas, and in some cases the criticisms cancel each other out. They're completely inconsistent. I don't want to pick on Professor Samuelson. I'm in awe of Professor Samuelson, as I am of Professor Nimmer, but Professor Samuelson comes up here and says she's all for open access and she's objecting to the settlement, not because it's unfair to the class, she says, academic authors having a different view, but really she's upset that Google didn't defend the fair use principle.

Professor Nimmer gets up here and he says, "Hey,

copyright owners, the default is, 'Don't touch my work.' Don't tell me about fair use. Count me out."

Professor Samuelson's academic authors, I think one of them was in the courtroom today, and that was from the University of Michigan, Professor Courant. He's an academic author. He obviously likes the settlement.

So they all have different perspectives. That just goes to show you how difficult this negotiation was. But it doesn't show that there's a fundamental conflict between any of the option-oriented choices we got for the class members, one versus the other. They're all treated the same.

And this has been said before, but I want to end on this. A class action is -- the standard is not perfection, and I'm not defending this as flawed. I'm saying it's a really good deal. But the standard is that it's got to be fair, reasonable, and adequate. This one is. It offers class members tremendous flexibility. It preserves the principle that we sued on, which is that we want to be able to control our rights and tell anybody who copies our books, either no or yes on these terms and conditions, and for that reason I think it passes the Rule 23 test with flying colors.

And I have no more snippets.

THE COURT: All right. Thank you.

Yes?

MR. BONI: This is purely housekeeping, your Honor.

THE COURT: Yes.
MR. BONI: Your Honor, if I may, I'd like to hand up a revised final judgment and order of dismissal, which attaches the list, as we said we would, of all of the opt-outs. That's routine. There were also a couple of dates that we put in.
And one final thing. We added a paragraph to alert the Court to the fact, as indicated in the notice providers' declaration, that notice was unable to be provided in three countries because of US trade relations problems: Cuba; North Korea; and Myanmar. And for that reason, we added a provision in the final judgment excluding those in those countries from the class.
THE COURT: All right. And how many opt-outs were there?
MR. BONI: There were 6,000 -- there were close -- 6,800? About 6,800.
THE COURT: Did anyone count up the number of objections that were submitted?
MR. BONI: We have in the range of 500.
THE COURT: Thank you.
Thanks to everyone. I will reserve decision. There is a lot to think about.
THE CLERK: All rise.
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