12-3200-cv

United States Court of Appeals

for the

Second Circuit

THE AUTHORS GUILD, INC.,

Associational Plaintiff,

BETTY MILES, JOSEPH GOULDEN and JIM BOUTON,
Individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

– v. –

GOOGLE, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK, NO. 05-CV-8136 (CHIN, J.)

BRIEF OF *AMICI CURIAE* ACADEMIC AUTHORS IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL
[Full list of *Amici* is in Appendix A]

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

INTEREST OF AMICI

Amici Curiae are academic authors who oppose the plaintiffs' legal position in this case on the merits and who want the Google Books project to continue to provide public access to snippets from our books and from those of other academic authors because this promotes the progress of science in keeping with the constitutional purpose of copyright law. *Amici* include numerous academic authors who believe ourselves to be members of the class that was certified below.[1] We write to urge this Court to reverse the lower court's ruling certifying the class because of the irreconcilable conflict that exists between the interests of the three individual plaintiffs who claim to represent all authors of books scanned as part of the Google Library Project and the actual interests of academic authors on whose behalf they claim to speak and whose works, we believe, make up a majority of the works at issue in this case.[2]

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[1] This brief is filed pursuant to Fed. R. App. P. 29(a) with the consent of all parties. Pursuant to Fed. R. App. P. 29(c)(5) and Rule 29.1 of the Local Rules of the United States Court of Appeals for the Second Circuit, *Amici* hereby state that none of the parties to this case nor their counsel authored this brief in whole or in part; no party or any party's counsel contributed money intended to fund preparing or submitting the brief; and no one else other than *Amici* and their counsel contributed money that was intended to fund preparing or submitting this brief.

Defendant-Appellant Google has consented to this filing, and Plaintiff-Appellees stated that they do not object except "to the extent it purports to be filed on behalf of all academic authors." While the signatories to this letter cannot, of course, speak for all 1.756 million post-secondary academics, but only for themselves, we nonetheless believe that the views we express in this brief are typical of the views of academic authors more generally.

[2] Although we are not prepared at this time to intervene in this lawsuit, we want the Court to understand that the plaintiffs' claims are antagonistic to our interests.

SUMMARY OF ARGUMENT

Class certification was improperly granted below because the District Court failed to conduct a rigorous analysis of the adequacy of representation factor, as Rule 23(a)(4) requires. The three individual plaintiffs who claim to be class representatives are not academics and do not share the commitment to broad access to knowledge that predominates among academics. Although the District Court, in rejecting the proposed Google Books settlement last year, recognized that the class representatives and their lawyers had not adequately represented the interests of academic authors when negotiating the proposed settlement, the court brushed aside concerns about adequacy of representation when the case went back into litigation, despite an academic author submission that challenged class certification because of inadequacies in the plaintiffs' representation of academic author interests. These concerns should have been taken seriously because academic authors make up a substantial proportion of the class that the District Court certified; most of the books that Google scanned from major research library collections were written by academics. Academic authors overall greatly outnumber generalist authors such as the named plaintiffs.

Academic authors desire broad public access to their works such as that which the Google Books project provides. Although the District Court held that the plaintiffs had inadequately represented the interests of academic authors in relation

to the proposed settlement, it failed to recognize that pursuit of this litigation would be even more adverse to the interests of academic authors than the proposed settlement was. That settlement would at least have expanded public access to knowledge, whereas this litigation seeks to enjoin the Google Book Search operations and shut down access to works of class members even though academic authors would generally favor greater public access to their works. Because of this, the interests of academic authors cannot be adequately accommodated in this litigation by opting out of the class, as the District Court assumed. Indeed, the only way for the interests of academic authors to be vindicated in this litigation, given the positions that the plaintiffs have taken thus far, is for Google to prevail on its fair use defense and for the named plaintiffs to lose.

For this reason, there is a fundamental conflict between the interests of the named class representatives and the interests of academic authors. Academic authors typically benefit from Google Books, both because it makes their books more accessible to the public than ever before and because they use Google Books in conducting their own research. Google's fair use defense is more persuasive to academic authors than the plaintiffs' theory of infringement. The plaintiffs' request for an injunction to stop Google from making the Book Search corpus available would be harmful to academic author interests.

In short, a "win" in this case for the class representatives would be a "loss" for academic authors. It is precisely this kind of conflict that courts have long recognized should prevent class certification due to inadequate representation. The District Court failed to adequately address this fundamental conflict in its certification order, though it was well aware of the conflict through submissions and objections received from the settlement fairness hearing through to the hearings on the most recent class certification motions. Because of that failure, the order certifying the class should be reversed.

ARGUMENT

I. The Trial Court Should Have Conducted a Meaningful Inquiry into Whether the Named Plaintiffs Are Adequately Representing the Interests of Academic Authors.

Supreme Court and Second Circuit precedents require courts to conduct a "rigorous analysis" to determine that each element of the Rule 23 standards for class certification has been satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011); *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160-61 (1982); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 29 (2d Cir. 2006). One of those standards is adequacy of representation by the class representatives. Determinations about adequacy and other factors "can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement . . . and is persuaded to rule, based on the relevant facts and the applicable legal standard that the

requirement is met." *In re IPO Sec. Litig.*, 471 F.3d at 41. Failure to engage in this kind of rigorous analysis constitutes an abuse of discretion.

Several submissions have brought to the District Court's attention the likelihood that academic authors constitute a substantial part of the class. *See* Letter from Pamela Samuelson, Professor of Law and Information, UC Berkeley to Judge Denny Chin (Feb. 13, 2012), *available at* http://www.law.berkeley.edu/files/Academic_authors_letter_to_Judge_Chin_021312_final.pdf ("[S]o many of the books that Google has scanned are academic works that are out-of-print and/or orphan works."); A95-A118 (Letter from Pamela Samuelson, Professor of Law and Information, UC Berkeley to Judge Denny Chin (Jan. 27, 2010) ECF No. 893) ("[Authors Guild members] are unrepresentative of the interests of academic authors whose books constitute most of the GBS corpus.");[3] Letter from the American Association of University Professors to Judge Denny Chin (Sept. 4, 2009) ECF No. 398; Letter from Pamela Samuelson, Professor of Law and Information, UC Berkeley to Judge Denny Chin (Sept. 3, 2009) ECF No. 336; Letter from University of California Faculty to Judge Denny Chin (Aug. 13, 2009) ECF No. 134. This substantiality is, moreover, evident given that the Google Library Project, which is the focus of this litigation, involved

[3] Several of the documents cited herein are included in the docket from the record below, but not in the parties' joint appendix. To aid the Court, we cite these documents in standard form followed by their CM/ECF docket number from the record of the case below, *Authors Guild v. Google, Inc.*, No. 05-8136 (DC) (S.D.N.Y. filed Sept. 20, 2005).

scanning of millions of books from the collections of major research libraries. Fourth Amd. Class Action Comp., at ¶3, ECF 985. One empirical study reports that scholarly works predominate in the collections of Google's library partners. *See* Brian Lavoie & Lorcan Dempsey, *Beyond 1923: Characteristics of Potentially In-Copyright Print Books in Library Collections*, D-LIB MAG., Nov./Dec. 2009, http://www.dlib.org/dlib/november09/lavoie/11lavoie.html (reporting that 93% of the collections of three major academic partners in the Google Books project are nonfiction and that 78% of those are aimed at a scholarly audience). This proposition is bolstered by the fact that in the United States, academics far outnumber generalist writers (such as the named plaintiffs in this case)[4] by a factor of more than ten to one. *See* BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, 2012-13 EDITION, Writers and Authors, Postsecondary Teachers (2012) (listing 145,900 writer and author jobs, as compared to 1,756,000 postsecondary jobs).[5]

[4] Representative Plaintiffs include Betty Miles, an author of children's and young adult fiction, Joseph Goulden, author of books such as *The Superlawyers*, and Jim Bouton, author of a baseball memoir. Fourth Amd. Class Action Comp., at ¶¶ 12, 15, 16, ECF 985.

[5] The survey of published authors on which Google relied in opposing class certification suggests that the class plaintiffs here may not even represent adequately the interests of non-academic authors. Dec. of Hal Poret in Support of Google's Opp. to Pltf's Mot. for Class Cert., at 6-12, ECF No. 1001 (showing that only a small minority of published authors object to Google's making snippets of their books available or think that snippet views are harmful to their interests).

The District Court's failure to investigate class composition and the risks of inadequate representation is surprising given that the very same court had ruled only just over a year before that the very same lawyers and named plaintiffs had inadequately represented the interests of academic authors, among others, when they negotiated a proposed settlement of the class action lawsuit brought against Google for scanning books from major research library collections. *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 679 (S.D.N.Y. 2011) ("[T]he class plaintiffs have not adequately represented the interests of at least certain class members."). The court cited inadequacy of representation as one of the major reasons why the proposed settlement had to be rejected. *Id*.

The court's decision quoted from an academic author submission that explained one of the key reasons for this inadequacy: " 'Academic authors, almost by definition, are committed to maximizing access to knowledge. The [Authors] Guild and the [Association of American Publishers], by contrast, are institutionally committed to maximizing profits.' (Samuelson Letter 3 (ECF No. 893))." *Id*. A footnote also observed that academic authors, unlike the named plaintiffs, thought that orphan works should be available on an open access basis. *Id*. at 679 n.16. The court further found that the named plaintiffs had inadequately represented the interests of authors of unclaimed works. *Id*. at 680.

Concerns about inadequacy of representation of the interests of academic authors were further brought to the District Court's attention during the pendency of the class certification motion through a letter submitted to the District Court. Letter from Pamela Samuelson to Judge Denny Chin (Feb. 13, 2012), *available at* http://www.law.berkeley.edu/files/Academic_authors_letter_to_Judge_Chin_021312_final.pdf.

Despite the strong likelihood that academic authors constitute a substantial portion of the class and despite the court's previous recognition that the named plaintiffs had inadequately represented the interests of academic authors, the District Court did not undertake any fact-finding about class composition. Rather, it assumed the Rule 23 standard would be satisfied if the plaintiffs "are interested enough to be forceful advocates and [if] there is reason to believe that a substantial portion of the class would agree with their representatives were they given a choice." *Authors Guild v. Google, Inc.*, 282 F.R.D. 384, 394 (S.D.N.Y. 2012). The court was, however, merely speculating that this was so and presumed that the relief requested by the representative plaintiffs—a massive award of statutory damages and an injunction to stop, among other things, Google from offering snippets from in-copyright books in response to search queries—would benefit the class if forcefully sought by the plaintiffs. The court further assumed that insofar as some class members had different interests than the named plaintiffs, they

"could request to be excluded from the class," presumably by opting out. *Id*. at 394, n.8. But the interests of academic authors cannot be satisfied by opting out of the class because academic authors will be harmed by the very injunctive relief that these plaintiffs seek.

This Court has previously remanded on the issue of class certification when the District Court certified a class based on "assumptions of fact rather than on findings of fact." *Parker v. Time Warner Entm't Co., L.P*., 331 F.3d 13, 21 (2d Cir. 2003). While *In re IPO Litigation* makes clear that the full extent of the factual inquiry is largely within the discretion of the district court, *In re IPO Litig.*, 471 F.3d at 41, that discretion can be abused, as it was in this case. Given the persistence and prior notice of academic authors' objections, the district court should have, at a minimum, made an inquiry into the nature of the works in the corpus and the types of authors who have interests in those works.

II. The Named Plaintiffs' Interests Are in Fundamental Conflict with Those of Academic Authors.

Federal Rule of Civil Procedure 23(a)(4) requires that representative plaintiffs fairly and adequately represent the interest of all class members. Adequacy "entails inquiry as to whether . . . plaintiff's interests are antagonistic to the interest of other members of the class." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp*., 222 F.3d 52, 60 (2d Cir. 2000). The Supreme Court in *Amchem*

Products Inc. v. Windsor explained that the focus of the inquiry is on uncovering "conflicts of interest between named parties and the class they seek to represent." 521 U.S. 591, 625 (1997). The conflict "must be 'fundamental' to violate Rule 23(a)(4)." *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 249 (2d Cir. 2011).

Fundamental conflicts exist where "class members' interests directly oppose those of the proposed representative." 1 MCLAUGHLIN ON CLASS ACTIONS § 4:30 (8th ed., Westlaw 2012); *see also Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000) ("a class cannot be certified when its members have opposing interests or when it consists of members who benefit from the same acts alleged to be harmful to other members of the class"); *Bieneman v. City of Chicago*, 864 F.2d 463, 465 (7th Cir.1988). The Supreme Court's decision in *Hansberry v. Lee*, 311 U.S. 32 (1940) has been characterized as "a classic example of the type of disqualifying conflict that can arise between representatives and some class members." WRIGHT & MILLER, 7A FED. PRAC. & PROC. CIV. § 1768 (3d ed., Westlaw 2012). In *Hansberry*, the plaintiffs sought to enforce a racially restrictive covenant on behalf of a class of landowners, although some of these landowners objected to the enforcement of the covenant (most notable were the objections raised by African American landowners included in the class). *Hansberry*, 311 U.S. at 33-45. Concluding that class representation was

inadequate, Justice Stone (writing for the Court) explained that "[b]ecause of the dual and potentially conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance, it is impossible to say, solely because they are parties to it, that any two of them are of the same class." *Id.* at 44-45.[6]

Like *Hansberry*, the conflict in this case is not conjectural or speculative, but very real to those academic authors who face the prospect of losing access to Google Books and to the benefits that flow from greater public access to their works that Google Books has made possible. In addition, like the land-owners in *Hansberry* who objected to being included in a class that sought to enforce racially-restrictive covenants, *Amici* disagree with plaintiffs' pursuit of this litigation both because of the immediate harm to their interests if the plaintiffs prevail and because we disagree in principle with litigation that seeks to restrict

[6] Justice Stone went on to explain: "It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. . . . It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Hansberry*, 311 U.S. at 44-45.

access to information and to reap a windfall from the defendant for uses that we consider beneficial.[7]

The plaintiffs have taken a position on the record about one conflict of interest between them and academic authors when they responded to an academic author objection to the proposed settlement in February 2010. The academic author objection asserted that orphan works should be available on an open access basis instead of being commercialized on restrictive proprietary terms through the end of the works' copyrights, as the proposed settlement would have done. Letter from Pamela Samuelson to Judge Denny Chin (Sept. 3, 2009) ECF No. 336; *see also* Letter from the American Association of University Professors to Judge Denny Chin (Sept. 4, 2009) ECF No. 398 ("The AAUP believes that open access to academic research and the ability to disseminate scholarly publications freely are essential to the academic enterprise."). The plaintiffs responded by saying that "[t]he interests of 'open access' advocates, many of who initially shared Google's expansive notions of fair use, plainly are *inimical* to the Class.' Pltf's Supp. Mem. Responding to Specific Objections 23, ECF No. 955 (emphasis in the original).

[7] In addition to injunctive relief, plaintiffs seek a statutory damage award in this case. Fourth Amd. Class Action Comp., at 14-15 ECF No. 985. A statutory damage award for an estimated 12 million in-copyright books that Google has scanned from research library collections could result in a minimum award of more than $9 billion. 17 U.S.C. § 504(c)(1) (2006) (setting the minimum statutory damage award for non-innocent infringement at $750 per work infringed).

This statement plainly shows that the plaintiffs have a contrary view to academic authors on this important point.[8]

Amici and the academic objectors to which the Supplemental Memorandum responded are by no means alone in their support of open access principles. A 2011 survey of academic authors, which asked about attitudes toward open access publishing, showed that over 75% of the more than 8,000 respondents indicated that it was " 'very important' or 'important' to be able to offer their work free online to a global audience." TBI COMM., INTECH PUB., AUTHOR ATTITUDES TOWARDS OPEN ACCESS PUBLISHING 7 (2011), http://www.intechopen.com/public_files/Intech_OA_Apr11.pdf. Indeed, support for open access is so strong that authors agree to this approach even when it might mean that the *author* rather than the *user* paid for accessibility. *Id*.; *see also* STUDY OF OPEN ACCESS PUBLISHING, HIGHLIGHTS FROM THE SOAP PROJECT SURVEY: WHAT SCIENTISTS THINK ABOUT OPEN ACCESS PUBLISHING 3 (2011), http://arxiv.org/ftp/arxiv/papers/1101/1101.5260.pdf (finding that 89% of nearly

[8] It is worth noting that the U.S. Copyright Office has taken the position that orphan works should be freely reusable. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS: A REPORT OF THE REGISTER OF COPYRIGHTS 127 (2006) (proposing a legislative amendment that would encourage the free use of true orphan works after a diligent search for their owners); *see also* Maria Pallante, *Keynote Address: Orphan Works & Mass Digitization: Obstacles & Opportunities*, 27 BERKELEY TECH. L.J. __ (forthcoming 2012), *available at* http://www.law.berkeley.edu/files/2012-04-12_Pallante_Orphan_Works_Speech-1(1).pdf ("We seem to have general agreement that in the case of a true orphan, where there is no copyright owner and therefore no beneficiary of the copyright term, it does not further the objectives of the copyright system to deny use of the work, sometimes for decades. In other words, it is not good policy to protect a copyright when there is no evidence of a copyright owner.").

40,000 published researchers thought that journals publishing articles on an open access basis were beneficial to their field).

While academic authors reap many benefits from making their works available on an open access basis, *see, e.g.*, Steve Lawrence, *Free Online Availability Substantially Increases a Paper's Impact*, 411 NATURE 521 (2000), one of the primary motivations for academic authors to publish works on an open access basis is their support for "[t]he principle of free access for all readers." ALMA SWAN & SHERIDAN BROWN, OPEN ACCESS SELF-ARCHIVING: AN AUTHOR STUDY 10 (2005), http://www.jisc.ac.uk/uploaded_documents/Open%20Access%20Self%20Archiving-an%20author%20study.pdf (noting that this principle is the most oft-cited reason by survey respondents for publishing with journals whose policies allow for open access).

However, the most fundamental conflict of interest that warrants decertification of the class concerns the merits of the plaintiffs' claims. Academic authors like *Amici* find Google's fair use defense more persuasive than the named plaintiffs' theory of infringement. Making digital copies of works to index their contents and to make small portions more accessible is a transformative use that supports a finding of fair use. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818-20 (9th Cir. 2003); *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006);

Authors Guild v. HathiTrust, No. 11-6351 (HB), 2012 WL 4808939, at *11-12 (S.D.N.Y. Oct. 10, 2012); *see also Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006). Most of the books in the Google Books corpus are non-fiction scholarly works which tends to favor fair use, especially when a use is transformative. *HathiTrust*, at *12. Although Google scanned the contents of whole books, this factor does not weigh against fair use if it was necessary to do so in order to make the transformative uses at issue. *Id*. at *12; *Arriba Soft* , 336 F.3d at 821. Because Google only displays a few short snippets of in-copyright works, there is unlikely to be any harm to the market for these works. *HathiTrust*, at *13-14 (finding unpersuasive the Authors Guild's arguments about harm to licensing markets); *see also Bill Graham Archives*, 448 F.3d at 614-15 (copyright holders cannot preempt transformative markets). Indeed, academic authors benefit from greater accessibility to their works made possible by Google Books.[9]

[9] Google's fair use defense has found support with numerous legal commentators. *See, e.g.*, Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 9 J. MARSHALL REV. INTELL. PROP. L. 227, 237-60 (2009); Nari Na, *Testing the Boundaries of Copyright Protection: The Google Book Library Project and the Fair Use Doctrine*, 16 CORNELL J. L. & PUB. POL'Y 417, 434-45 (2006); Matthew Sag, *The Google Book Settlement and the Fair Use Counterfactual*, 55 N.Y.L. SCH. L. REV. 19, 23 (2010); Hannibal Travis, *Google Book Search and Fair Use: iTunes for Authors or Napster for Books?*, 61 U. MIAMI L. REV. 87, 91-94 (2006). *See also* Br. of Amici Curiae American Library Association, et al., 4–10 ECF No. 1048 (describing in great detail the enormous educational and public benefits of GBS and how those benefits tend to tilt the analysis in favor of fair use).

Amici are, in other words, not authors who "prefer to leave the alleged violation of their rights unremedied," as the District Court assumed. *Authors Guild v. Google, Inc.*, 282 F.R.D. 384, 394 (S.D.N.Y. 2012). There is, in our view, no infringement that requires the grant of injunctive or monetary relief. The only way that the named plaintiffs could adequately represent the interests of academic authors at this point would be by dropping this litigation.

The most recent evidence of a conflict between the interests of the plaintiffs in this case and the interests of academic authors is the fact that the plaintiffs' lawyers opposed the filing of an academic author amicus brief earlier this year to express a legal theory that directly contradicts the plaintiffs' position. Br. Digital Humanities and Law Scholars as Amici Curiae in Partial Support of Defendants' Mot. for Sum. Judg. or in the Alternative Sum. Adjud., ECF No. 1055; *see also* Plaintiffs' Mem.in Opp.to Mot. for Leave to File Amicus Briefs, ECF No. 1056. The District Court accepted the filing of this brief over plaintiffs' objection. Order dated Aug. 15, 2012, ECF. No. 1060. *Amici* in that brief observed that "[m]ass digitization, like that employed by Google, is a key enabler of socially valuable computational and statistical research (often called "data mining" or "text mining")," Br. Digital Humanities and Law Scholars, at 1 ECF No. 1055, which allows researchers to discover and use the non-copyrightable facts and ideas that are contained within the collection of copyrighted works themselves.

The brief argued that copying of copyrighted works undertaken in order to gain access to facts and ideas they contain is fair use, not copyright infringement. *Id.* The computational uses of the Google Books corpus that Google has pioneered have greatly enhanced public access to information and have promoted scholarship and research, all of which are favored uses under the first fair use factor, 17 U.S.C. § 107 (2006) (fair use "for purposes such as . . . scholarship, or research, is not an infringement"), while causing little (if any) harm to the market for the work. 17 U.S.C. § 107(4) (requiring the court to examine "the effect of the use upon the potential market for or value of the copyrighted work"). A virtually identical brief helped to persuade a District Court in the *Authors Guild v. HathiTrust* lawsuit to uphold the fair use defense of Google's library partners because of the nonexpressive uses the latter were making of copyrighted works in the digital corpus that the libraries got from Google. *Authors Guild v. HathiTrust*, No. 11-6351 (HB), 2012 WL 4808939, at *14 (S.D.N.Y. Oct. 10, 2012) (characterizing the uses being made by the libraries as "fall[ing] safely within the protection of fair use") and at *11, n.22 (citing approvingly to the Digital Humanities and Law Scholars brief).

CONCLUSION

In sum, a fundamental conflict of interests exists between the interests of the plaintiffs and the interests of academic authors. The former have not and cannot adequately represent the interests of the latter in this litigation. This Court should consequently reverse the District Court's decision to certify the class in this case.

Dated: November 16, 2012

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because this brief contains 4,494 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point font.

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ADDENDUM

APPENDIX A

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