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		ADJUDICATION. Document filed by Digital Humanities Scholars and Law Professors.(Siavoshy, Babak) (Entered: 08/03/2012)
08/03/2012	1052	BRIEF re: 1051 MOTION to File Amicus Brief <i>IN PARTIAL SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION.</i> . Document filed by Digital Humanities Scholars and Law Professors.(Siavoshy, Babak) (Entered: 08/03/2012)
08/03/2012	1053	DECLARATION of Joanne Zack in Support re: 1049 MOTION for Summary Judgment <i>Plaintiffs' Notice of Motion for Partial Summary Judgment (Public Version)</i> .. Document filed by Jim Bouton, Joseph Goulden, Betty Miles, The Authors Guild. (Attachments: # 1 Exhibit 1-22, # 2 Exhibit 23, part 1, # 3 Exhibit 23, part 2, # 4 Exhibit 24-32, # 5 Exhibit 33-35, # 6 Exhibit 36-37, # 7 Exhibit 38-41, # 8 Exhibit 42, part 1, # 9 Exhibit 42, part 2-43)(Zack, Joanne) (Entered: 08/03/2012)
08/03/2012	1054	RULE 56.1 STATEMENT. Document filed by Jim Bouton, Joseph Goulden, Betty Miles, The Authors Guild. (Zack, Joanne) (Entered: 08/03/2012)
08/03/2012	1055	BRIEF re: 1051 MOTION to File Amicus Brief <i>IN PARTIAL SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION. (CORRECTED)</i> . Document filed by Digital Humanities Scholars and Law Professors.(Siavoshy, Babak) (Entered: 08/03/2012)
08/09/2012	1056	MEMORANDUM OF LAW in Opposition re: 1051 MOTION to File Amicus Brief <i>IN PARTIAL SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION.</i> , 1047 MOTION for Leave to File Amici Curiae Brief <i>in Support of Defendant's Motion for Summary Judgment. Plaintiffs' Memorandum in Opposition to Motions for Leave to File Amicus Brief.</i> Document filed by Jim Bouton, Joseph Goulden, Betty Miles, The Authors Guild. (Boni, Michael) (Entered: 08/09/2012)
08/14/2012	1057	TRUE COPY ORDER ofUSCA USCA Case Number 12-2402. Petitioner, through counsel, moves, pursuant to Federal Rule of Civil Procedure 23(f), for leave to appeal the District Court's order granting Respondents' motion for class certification. Upon due consideration, it is hereby ORDERED that the petition is GRANTED. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified: 08/14/2012. New Case No. 12-3200. (nd) Modified on 8/28/2012 (nd). (Entered: 08/14/2012)
08/14/2012		Appeal Fee Due: for 1057 USCA Order granting leave to appeal. \$455.00 Appeal fee due by 8/28/2012. (nd) (Entered: 08/14/2012)
08/14/2012	1058	REPLY to Response to Motion re: 1047 MOTION for Leave to File Amici Curiae Brief <i>in Support of Defendant's Motion for Summary Judgment.</i> . Document filed by America Library Association, Association of Research Libraries, Association of College and Research Libraries, Electronic Frontier Foundation et al.. (Band, Jonathan) (Entered: 08/14/2012)
08/15/2012	1059	REPLY MEMORANDUM OF LAW in Support re: 1051 MOTION to File Amicus

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		Brief <i>IN PARTIAL SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION..</i> Document filed by Digital Humanities Scholars and Law Professors. (Siavoshy, Babak) (Entered: 08/15/2012)
08/15/2012	1060	ORDER granting 1047 Motion for Leave to File Document; granting 1051 Motion to File Amicus Brief. It is hereby ordered as follows: (1) The motions for leave to file amici curiae briefs are granted, and the proposed briefs are accepted for filing. (2) Plaintiffs shall respond to the amici curiae briefs by September 17, 2012 in a memorandum of law not to exceed 40 pages. (3) The amici curiae may not file replies. (4) The parties' oppositions to the cross-motions for summary judgment shall be filed by August 24, 2012. (5) The parties' replies in support of the cross-motions for summary judgment shall be filed by September 17, 2012. (6) Oral argument on the motions for summary judgment shall proceed on October 9, 2012 at 10 AM.. (Signed by Judge Denny Chin on 8/15/2012) (jfe) (Entered: 08/15/2012)
08/15/2012		Set/Reset Deadlines: (Responses due by 9/17/2012), Set/Reset Hearings:(Oral Argument set for 10/9/2012 at 10:00 AM before Judge Denny Chin.) (jfe) (Entered: 08/15/2012)
08/15/2012		Set/Reset Deadlines as to 1049 MOTION for Summary Judgment <i>Plaintiffs' Notice of Motion for Partial Summary Judgment (Public Version)..</i> , 1031 MOTION for Summary Judgment <i>Notice of Defendant Google Inc.'s Motion for Summary Judgment or in the Alternative Summary Adjudication..</i> Responses due by 8/24/2012 (jfe) (Entered: 08/15/2012)
08/17/2012	1061	ORDER: It is hereby ordered as follows: (1) By October 24, 2012, the parties shall file their oppositions to the cross-motions for summary judgment. (2) By November 19, 2012, plaintiffs shall file their opposition to the amici curiae briefs, in a memorandum of law not to exceed 40 pages. (3) By November 19, 2012, the parties shall file their replies in support of the cross-motions for summary judgment. (4) Oral argument on the motions for summary judgment shall proceed on December 4, 2012 at 2PM., (Responses due by 11/19/2012., Replies due by 11/19/2012.), (Oral Argument set for 12/4/2012 at 02:00 PM before Judge Denny Chin.) (Signed by Judge Denny Chin on 8/17/2012) (lmb) (Entered: 08/17/2012)
08/28/2012		USCA Appeal Fees received \$ 455.00 receipt number 465401046514 on 08/16/2012 re: 1057 USCA Order granting leave to appeal pursuant to FRAP 23(f). (nd) (Entered: 08/28/2012)
08/29/2012	1062	ORDER: The Court is in receipt of a letter from defendant Google, Inc. ("Google"), dated August 17, 2012, requesting that the Court stay all proceedings in this case pending review by the Second Circuit of this Court's May 31, 2012 Order granting class certification (the "Class Certification Order"). Plaintiffs have not responded to Google's letter. For the following reasons, the application is denied as further set forth in this order. (Signed by Judge Denny Chin on 8/28/2012) (lmb) (Entered: 08/29/2012)

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09/17/2012	1063	ORDER ofUSCA (Certified Copy) USCA Case Number 12-3200. Appellant Google, Inc. has filed a motion to stay District Court proceedings pending appeal of the class certification order and appellees have filed a response stating that they consent to the stay, although not to the arguments put forward in the motion as to why Google expects to prevail on appeal. IT IS HEREBY ORDERED that the motion to stay proceedings pending appeal is GRANTED. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Issued As Order: 09/17/2012. Certified: 09/17/2012. (nd) (Entered: 09/17/2012)
04/07/2013	1064	NOTICE OF CHANGE OF ADDRESS by Cindy A. Cohn on behalf of Electronic Frontier Foundation et al.. New Address: Electronic Frontier Foundation, 815 Eddy Street, San Francisco, CA, USA 94109, 415-436-9333. (Cohn, Cindy) (Entered: 04/07/2013)
07/01/2013	1065	TRUE COPY ORDER ofUSCA USCA Case Number 12-3200-cv. For the reasons stated, we VACATE the June 11, 2012 order of the District Court certifying plaintiffs proposed class and REMAND the cause to the District Court for consideration of the fair use issues, without prejudice to any renewal of the motion for class certification before the District Court following its decision on the fair use defense. In the interest of judicial economy, any further appeal from the decisions of the District Court shall be assigned to this panel. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified: 07/1/2013. (nd) (Entered: 07/01/2013)
07/01/2013	1066	MANDATE ofUSCA (Certified Copy) USCA Case Number 12-3200-cv. Ordered, Adjudged and Decreed that the order of the District Court is VACATED and the case is REMANDED in accordance with the opinion of this Court. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Issued As Mandate: 07/01/2013. (nd) (Entered: 07/01/2013)
07/01/2013	1067	ORDER: By August 5, 2013, the parties shall file their oppositions to the cross-motions for summary judgment. The parties shall include any arguments in response to the amici curiae briefs in their memoranda in opposition to the cross-motions. The parties' memoranda of law shall not exceed 50 pages, including any response to the amici curiae briefs. By August 19, 2013, in memoranda of law not to exceed 10 pages, the parties shall file their replies in support of the cross-motions for summary judgment. Oral argument on the cross-motions for summary judgment will be heard on September 5, 2013 at 10:00 AM. Responses due by 8/5/2013. Replies due by 8/19/2013. Oral Argument set for 9/5/2013 at 10:00 AM before Judge Denny Chin. (Signed by Judge Denny Chin Sitting by Designation on 7/1/2013) (ft) Modified on 7/12/2013 (ft). (Entered: 07/01/2013)
07/08/2013	1068	ORDER: The briefing schedule for the parties' cross-motions for summary judgment is hereby modified as follows: (1) By August 26, 2013, the parties shall file their oppositions to the cross-motions for summary judgment. The parties shall include any arguments in response to the amici curiae briefs in their memoranda in opposition to the cross-motions. The parties' memoranda of law shall not exceed 50 pages, including any response to the amici curiae briefs. (2) By September 9, 2013, in memoranda of law not to exceed 20 pages, the parties shall file their replies in support of the cross-

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		<p>motions for summary judgment. (3) Oral argument on the cross-motions for summary judgment will be heard on September 23, 2013 at 2:30 PM. SO ORDERED. (Responses due by 8/26/2013, Replies due by 9/9/2013.), (Oral Argument set for 9/23/2013 at 02:30 PM before Judge Denny Chin.) (Signed by Judge Denny Chin Sitting by Designation on 7/8/2013) (rsh) (Entered: 07/09/2013)</p>
08/26/2013	1069	<p>ENDORSED LETTER addressed to Judge Denny Chin, from Michael J. Boni, dated 8/23/2013, re: on behalf of all parties, plaintiffs and Google, to request that the parties be able to file their respective, non-public sealed versions of their briefs on Tuesday, August 27, 2013. The deadline to file their summary judgment opposition briefs is a day earlier, and on that date (August 26) the parties will file electronically their public, redacted versions of the brief, and will also serve one another with their undredacted versions as well. ENDORSEMENT: Approved. SO ORDERED. (Brief due by 8/27/2013.) (Signed by Judge Denny Chin on 8/26/2013) (ja) (Entered: 08/26/2013)</p>
08/26/2013	1070	<p>MEMORANDUM OF LAW in Opposition re: 1031 MOTION for Summary Judgment <i>Notice of Defendant Google Inc.'s Motion for Summary Judgment or in the Alternative Summary Adjudication..</i> Document filed by Jim Bouton, Joseph Goulden, Betty Miles, The Authors Guild. (Boni, Michael) (Entered: 08/26/2013)</p>
08/26/2013	1071	<p>COUNTER STATEMENT TO 1043 Rule 56.1 Statement. Document filed by Jim Bouton, Joseph Goulden, Betty Miles, The Authors Guild. (Boni, Michael) (Entered: 08/26/2013)</p>
08/26/2013	1072	<p>MEMORANDUM OF LAW in Opposition re: 1049 MOTION for Summary Judgment <i>Plaintiffs' Notice of Motion for Partial Summary Judgment (Public Version).</i> Defendant Google Inc.'s <i>Opposition to Plaintiffs' Motion for Partial Summary Judgment.</i> Document filed by Google Inc.. (Gratz, Joseph) (Entered: 08/26/2013)</p>
08/26/2013	1073	<p>DECLARATION of of Michael J. Boni in Opposition re: 1031 MOTION for Summary Judgment <i>Notice of Defendant Google Inc.'s Motion for Summary Judgment or in the Alternative Summary Adjudication..</i> Document filed by Jim Bouton, Joseph Goulden, Betty Miles, The Authors Guild. (Attachments: # 1 Exhibit 1 (Part 1 of 3), # 2 Exhibit 1 (Part 2 of 3), # 3 Exhibit 1 (Part 3 of 3), # 4 Exhibit 2 (Part 1 of 3), # 5 Exhibit 2 (Part 2 of 3), # 6 Exhibit 2 (Part 3 of 3), # 7 Exhibit 3, # 8 Exhibit 4, # 9 Exhibit 5, # 10 Exhibit 6, # 11 Exhibit 7, # 12 Exhibit 8, # 13 Exhibit 9, # 14 Exhibit 10)(Boni, Michael) (Entered: 08/26/2013)</p>
08/26/2013	1074	<p>DECLARATION of Paul Aiken in Opposition re: 1031 MOTION for Summary Judgment <i>Notice of Defendant Google Inc.'s Motion for Summary Judgment or in the Alternative Summary Adjudication..</i> Document filed by Jim Bouton, Joseph Goulden, Betty Miles, The Authors Guild. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H) (Boni, Michael) (Entered: 08/26/2013)</p>
08/26/2013	1075	<p>DECLARATION of Joseph C. Gratz in Opposition re: 1049 MOTION for Summary Judgment <i>Plaintiffs' Notice of Motion for Partial Summary Judgment (Public</i></p>

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		<i>Version</i>).. Document filed by Google Inc.. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Exhibit 18, # 19 Exhibit 19, # 20 Exhibit 20)(Gratz, Joseph) (Entered: 08/26/2013)
08/26/2013	1076	DECLARATION of Scott Dougall in Opposition re: 1049 MOTION for Summary Judgment <i>Plaintiffs' Notice of Motion for Partial Summary Judgment (Public Version)</i> .. Document filed by Google Inc.. (Gratz, Joseph) (Entered: 08/26/2013)
08/26/2013	1077	COUNTER STATEMENT TO 1054 Rule 56.1 Statement. Document filed by Google Inc.. (Gratz, Joseph) (Entered: 08/26/2013)
08/26/2013	1078	AFFIDAVIT OF SERVICE of Google Inc.'s Responses and Objections to Plaintiffs' Statement of Undisputed Facts in Support of their Motion for Partial Summary Judgment (provisionally filed under seal) served on Michael J. Boni and Joanne E. Zack, Counsel for Plaintiffs on August 26, 2103. Document filed by Google Inc.. (Gratz, Joseph) (Entered: 08/26/2013)
08/27/2013	1079	SEALED DOCUMENT placed in vault.(mps) (Entered: 08/27/2013)
08/27/2013	1080	SEALED DOCUMENT placed in vault.(nm) (Entered: 08/27/2013)
08/29/2013	1081	ORDER: The Court is in receipt of a letter from plaintiffs' counsel, dated August 28, 2013, requesting a two-week extension of the schedule for briefing and argument of the parties' summary judgment motions. Defendant Google, Inc. opposes this request. The request is granted in part and denied in part, as follows: The deadline for plaintiffs to submit their reply brief is extended to Monday, September 16, 2013. The request for adjournment of oral argument is denied. The date of September 23, 2013 was set on July 8, 2013, more than five weeks ago. The Court will not adjourn oral argument because new counsel in this eight-year old litigation is unavailable on September 23rd because he will be attending a conference on copyright law. (Replies due by 9/16/2013.) (Signed by Judge Denny Chin, Sitting by Designation on 8/29/2013) (ja) (Entered: 08/29/2013)
09/04/2013	1082	NOTICE OF APPEARANCE by Edward Henry Rosenthal on behalf of The Authors Guild. (Rosenthal, Edward) (Entered: 09/04/2013)
09/04/2013	1083	NOTICE OF APPEARANCE by Jeremy Seth Goldman on behalf of The Authors Guild. (Goldman, Jeremy) (Entered: 09/04/2013)
09/09/2013	1084	REPLY MEMORANDUM OF LAW in Support re: 1031 MOTION for Summary Judgment <i>Notice of Defendant Google Inc.'s Motion for Summary Judgment or in the Alternative Summary Adjudication</i> .. Document filed by Google Inc.. (Gratz, Joseph) (Entered: 09/09/2013)
09/16/2013	1085	REPLY MEMORANDUM OF LAW in Support re: 1049 MOTION for Summary Judgment <i>Plaintiffs' Notice of Motion for Partial Summary Judgment (Public Version)</i> .. Document filed by Jim Bouton, Joseph Goulden, Betty Miles, The Authors Guild. (Boni, Michael) (Entered: 09/16/2013)

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10/03/2013	1086	TRANSCRIPT of Proceedings re: ARGUMENT held on 9/23/2013 before Judge Denny Chin. Court Reporter/Transcriber: Thomas Murray, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 10/28/2013. Redacted Transcript Deadline set for 11/7/2013. Release of Transcript Restriction set for 1/4/2014.(Rodriguez, Somari) (Entered: 10/03/2013)
10/03/2013	1087	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a ARGUMENT proceeding held on 9/23/13 has been filed by the court reporter/transcriber in the above-captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days...(Rodriguez, Somari) (Entered: 10/03/2013)
11/14/2013	1088	OPINION re: #103753 1031 MOTION for Summary Judgment <i>Notice of Defendant Google Inc.'s Motion for Summary Judgment or in the Alternative Summary Adjudication</i> filed by Google Inc., 1049 MOTION for Summary Judgment <i>Plaintiffs' Notice of Motion for Partial Summary Judgment (Public Version)</i> filed by Betty Miles, The Authors Guild, Joseph Goulden, Jim Bouton. For the reasons set forth in this Opinion, plaintiffs' motion for partial summary judgment is denied and Google's motion for summary judgment is granted. Judgment will be entered in favor of Google dismissing the Complaint. Google shall submit a proposed judgment, on notice, within five business days hereof. (Signed by Judge Denny Chin on 11/14/2013) (tro) (Main Document 1088 replaced on 11/14/2013) (tro). Modified on 11/19/2013 (ca). (Entered: 11/14/2013)
11/27/2013	1089	JUDGMENT that, 1. Plaintiffs' Motion for Partial Summary Judgment is denied; 2. Defendant's Motion for Summary Judgment is granted; 3. Plaintiffs' claims are dismissed with prejudice; 4. Costs in this action are awarded to Defendant, as the prevailing party in this action; and 5. Any application for attorneys' must be made within 14 days after entry of judgment pursuant to Fed. R. Civ. P. 54(d)(2)(B)(i). (Signed by Circuit Judge Denny Chin on 11/27/13) (Attachments: # 1 Notice of Right to Appeal)(ml) (Entered: 11/27/2013)
11/27/2013		Terminate Transcript Deadlines (ml) (Entered: 11/27/2013)
12/06/2013	1090	FILING ERROR - DEFICIENT DOCKET ENTRY - FIRST MOTION for Attorney Fees. Document filed by Writers' Representatives LLC.(Chu, Lynn) Modified on 12/9/2013 (db). (Entered: 12/06/2013)
12/09/2013		***NOTE TO ATTORNEY TO RE-FILE DOCUMENT - DEFICIENT DOCKET ENTRY ERROR. Note to Attorney Lynn T. Chu to RE-FILE Document 1090 FIRST MOTION for Attorney Fees. ERROR(S): No Signature or s/. (db) (Entered: 12/09/2013)

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12/10/2013	1091	AMENDED JUDGMENT amending 1089 Judgment, that, 1. Plaintiffs' Motion for Partial Summary Judgment is denied; 2. Defendant's Motion for Summary Judgment is granted; 3. Plaintiffs' claims are dismissed with prejudice; 4. Costs in this action are awarded to Defendant, as the prevailing party in this action; and 5. Any application for attorneys' fees must be made within 14 days of the final resolution of all appeals or, if no appeal is taken, within 14 days after the expiration of time for filing a notice of appeal; 6. The Clerk of the Court shall close this case. (Signed by Judge Denny Chin on 12/10/13) (Attachments: # 1 Notice of Right to Appeal)(ml) (Entered: 12/11/2013)
12/23/2013	1092	NOTICE OF APPEAL from 1091 Amended Judgment,, 1089 Judgment,, Document filed by Association of American Publishers, Inc., Jim Bouton, Canadian Standard Association, Paul Dickson, John Wiley & Sons, Inc., Herbert Mitgang, Pearson Education, Inc., The Authors Guild, The McGraw-Hill Companies, Inc.. Filing fee \$ 505.00, receipt number 0208-9204161. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Rosenthal, Edward) (Entered: 12/23/2013)
12/23/2013		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 1092 Notice of Appeal,. (nd) (Entered: 12/23/2013)
12/23/2013		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files ONLY for 1092 Notice of Appeal, filed by The Authors Guild, Canadian Standard Association, Herbert Mitgang, Jim Bouton, John Wiley & Sons, Inc., Paul Dickson, Association of American Publishers, Inc., The McGraw-Hill Companies, Inc., Pearson Education, Inc. were transmitted to the U.S. Court of Appeals. (<i>APPELLANT'S COUNSEL IS RESPONSIBLE FOR THE PHYSICAL SUPPLEMENTAL INDEX FOR ANY AND ALL NON-ECF DOCUMENTS, ONCE THE CASE IS OPENED IN THE SECOND CIRCUIT</i>) (nd) (Entered: 12/23/2013)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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The Authors Guild, Inc., <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	Case No. 05 CV 8136-DC
	:	
vs.	:	OBJECTION OF AMAZON.COM,
	:	INC., TO PROPOSED
Google, Inc.	:	SETTLEMENT
	:	
Defendant.	:	<i>Filed Electronically</i>

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Counsel for Objector Amazon.com, Inc.

INTRODUCTION

Amazon.com, Inc. (“Amazon”) objects to the proposed settlement of this action and gives notice that it intends to appear at the fairness hearing currently scheduled to be held on October 7, 2009. Amazon is a member of the class by virtue of its ownership of a copyright duly registered with the United States Copyright Office. Amazon also brings a unique perspective to this Court because it has engaged in a book scanning project very similar to Google’s, with one major distinction: As to books still subject to copyright protection, Amazon has only scanned those for which it could obtain permission to do so from the copyright holder. Amazon’s scanning project has to date resulted in the lawful scanning of over 1 million English-language works and 3 million books in total.

The settlement proposed by the parties to this case should not be approved. It is unfair to authors, publishers, and others whose works would be the subject of a compulsory license for the life of the copyright in favor of Google and the newly created Book Rights Registry. It is anticompetitive and violates antitrust laws because it provides Google an effective monopoly in the scanning and exploitation of millions of works whose copyright holders cannot be located or choose not to involve themselves in this class action. It also creates a cartel of authors and publishers—the Books Rights Registry—operating with virtually no restrictions on its actions, with the potential to raise book prices and reduce output to the detriment of consumers and new authors or publishers who would compete with the cartel members. Indeed, the agreement is even arguably unlawful on its face because it constitutes price fixing by horizontal competitors—namely, the Rightsholders, who are agreeing collectively on a mechanism for setting the highest possible prices to be charged for their works. Finally, the proposed settlement improperly seeks to stretch the boundary of this Court’s power beyond its lawful limits, using the class action mechanism embodied in Rule 23 of the Federal Rules of Civil Procedure to create a massive and complex business arrangement of perpetual duration among class members, Google and the Registry. The settling parties propose to force this business arrangement upon class members by requiring, in contravention of controlling Second Circuit authority, that, as part of the settlement,

they release Google and others from claims of copyright infringement for future uses of copyrighted works, some of which are totally divorced from the current facts and connected to this case only under the guise of being an anticipated project of the business venture created by the Settlement Agreement.

Amazon recognizes the surface appeal of the proposed settlement: Digitization of books creates tremendous opportunities for public benefit, and the digitization of so-called “orphan works” that this settlement allows would enhance those benefits. Indeed, Amazon has long supported efforts to pass copyright reform legislation that would make it easier for booksellers and the public to gain access to these books.

Digitization of books, however, is far from the first technological advance requiring harmonization of the potential public benefits with existing copyright law. As detailed below, in each such instance in the past, that task has been performed by the United States Congress. Class actions, though a common vehicle to challenge the infringement made possible by new technologies, have never until this case been used to set out nationwide the rules and regulations by which use of those new technologies would be determined to be lawful or unlawful. The reasons for this history seem obvious, especially when juxtaposed against the public policy issues raised by the current settlement: Class actions can resolve disputes between parties and can clarify the law for others, but they cannot make changes to the rules in a way that applies evenhandedly to the entire universe of copyright holders and potential users of the new technologies. Nor is a court holding a hearing on the fairness of a class action settlement equipped to balance and make the adjustments necessary to accommodate the many public interests at stake when a new technology emerges that offers both the promise of public benefit and the danger of abuse of both copyright holders and consumers.

FACTUAL BACKGROUND

Amazon was founded in 1994. It started as an online seller of books. While Amazon has since diversified to sell a wide range of consumer products, sales of media products accounted for 58 percent of Amazon’s net sales in 2008. Prior to January 5, 2009, Amazon duly submitted

to the United States Copyright Office an application, deposit, and fee to register the work: *DVD On Demand: A CustomFlix® Guide to Profitably Distributing Your Film with Inventory-Free Fulfillment* by Darren Giles.

Beginning in 2002, Amazon commenced a book-scanning program in order to enhance the quality of services it offered to customers who use its web-based bookstore. Amazon initially started its program by scanning only the front and back covers and small excerpts of books. It then made those parts available for viewing by customers on the web pages of Amazon.com where the books were displayed for sale. Amazon called this program “Look Inside the Book.” In 2003, Amazon dramatically expanded this program, now called “Search Inside.” It approached publishers for permission to scan the entire contents of books and then to display to customers up to 20 percent of those books in response to specific customer queries. Today, Amazon has 3 million unique titles scanned and available worldwide to customers who wish to search inside those books and display the text surrounding the words they have queried. Amazon estimates that its book detail pages are viewed tens, if not hundreds, of millions of times each week. Amazon has been able to accomplish this level of scanning and electronic availability even though it has scanned only books in the public domain and books for which it has obtained permission from the copyright owner. Amazon does not scan or display on its website in-copyright works for which no rightsholder can be located (referred to as “orphan works”).

Google first announced its book scanning project in October 2004. According to published reports, this program has two components. Google’s “Partner Program” allows authors or publishers to sign up with Google and provide copies of their books to Google for electronic display on the Google website. According to Google, that program now has over 20,000 publisher participants, with published reports suggesting that about 1 million books have been scanned, made fully searchable and available to be previewed on Google’s website as a result of this program.¹ (“Previewing” refers to the capability of searching the text of a book and

¹ See Posting of David Drummond, *New chapter for Google Book Search*, to The Official Google Blog, <http://googleblog.blogspot.com/2008/10/new-chapter-for-google-book-search.html>

then displaying the text surrounding the word for which the user has searched.) Plaintiffs did not challenge the Google “Partner Program” in their complaint.

Beginning in late 2004, Google also entered into a series of “Digitization Agreements” with various public and university libraries to create digital archives of the libraries’ collection of books. The Authors Guild, Inc., et al.’s Second Amended Complaint ¶¶ 4, 47. Those agreements allow Google “to reproduce and retain for its own commercial use a digital copy of the libraries’ archives.” *Id.* ¶ 4. They also require Google to provide each library with a digital copy of what Google had scanned from that library’s collection. Declaration of David Nimmer in Support of Objection of Amazon.com, Inc. (“Nimmer Decl.”), Exs. A & B (Digitization Agreement between Google and the University of Michigan, and Amendment). Google never sought to obtain permission from copyright owners to copy, use or display works included in the library collections and thus made no effort to exclude “orphan works” from its digitization program.

According to Google, it has now scanned seven million books. *See* Posting of Drummond, *New chapter for Google Book Search*, <http://googleblog.blogspot.com/2008/10/new-chapter-for-google-book-search.html>. Of the in-copyright works that Google has digitized, only those that are in its partner program are available for previewing on Google’s website. *Id.* Google displays only “snippets” of in-copyright books scanned without copyright holder permission (*i.e.*, in response to a user query, Google displays portions of the affected work that contain the queried language, plus a few surrounding lines on either side). Google also has announced that it expects to scan in the future millions more books of which it has not yet made digital copies. *Id.*

In their Second Amended Complaint (“SAC”), filed several days after the parties announced the tentative settlement, plaintiffs allege that Google’s unauthorized digitization and

(Oct. 28, 2008, 7:14 AM and 7:55 AM); *see also* Juan Carlos Perez, *In Google Book Settlement, Business Trumps Ideals*, PC World, Oct. 30, 2008, *available at*: http://www.pcworld.com/businesscenter/article/153085/in_google_book_settlement_business_trumps_ideals.html.

display of their works constitutes copyright infringement. Plaintiffs assert that by engaging in these acts “Google has derived, and intends to continue to derive, revenue from this program by attracting more viewers and advertisers to its website.” SAC ¶ 7; *see id.* ¶¶ 49, 63. Nowhere in their complaint do plaintiffs accuse Google of selling printed or electronic copies of their books or even of having a plan to do so.

In October 2008, the parties announced that they had reached a settlement subject to certain conditions, among them court approval. The settlement is not so much a release of claims for past conduct as an agreement on behalf of a class of millions of authors and publishers, both known and unknown, to engage in a complex business arrangement with Google for the perpetual exploitation of millions of copyrighted works. The settlement releases Google both for its past infringement and *for future infringement* in exchange for an upfront payment and an agreement by Google to pay 63 percent of the revenues Google earns from future exploitation of the copyrighted works. Settlement Agreement dated October 28, 2008 (“Proposed Settlement”) §§ 2.1, 10.1, 10.2. Many of the contemplated uses of those works are things that Google has not yet done, *e.g.*, sales of subscriptions to an electronic book database and sale of online access to books. *See, e.g., id.* §§ 4.1, 4.2. The settlement also releases non-parties, including specifically the libraries that made, or in the future choose to make, their collections available to Google to be digitized. *See id.* §§ 10.1, 10.2.

The Proposed Settlement creates a new entity, called the Books Rights Registry (the “Registry”), consisting of the entire “Author Sub-Class” and “Publisher Sub-Class.” *See id.* § 6.1, *see also id.* §§ 1.14, 1.120. The Proposed Settlement charges the Registry, acting as a cartel for its members, and Google with responsibility for determining the prices to be charged institutions who purchase subscriptions to the digitized collection and provides that, under Registry and Rightsholder oversight, Google will use a Google “Pricing Algorithm” to set prices for consumers who purchase books. *Id.* §§ 4.1, 4.2. Those provisions explicitly provide that Google’s task will be to “find the optimal . . . price for each Book and, accordingly, to maximize revenue for each Rightsholder.” *Id.* § 4.2(b)(i)(2).

The Registry is also charged with negotiating collectively on behalf of the entire class to allow Google to pursue “new revenue models” such as “Print on Demand,” “Custom Publishing,” “PDF download,” “Consumer Subscription Models,” and the provision of “Summaries, Abstracts and/or Compilation” of books. *Id.* § 4.7. The Registry has no ability to enter into similar business arrangements with entities besides Google except in two limited circumstances: (1) if an individual author or publisher explicitly gives it permission to do so, *see id.* § 6.2(b)(iii), Attach. I § 8.B; or (2) if Google fails within five years to implement a consumer book purchasing program and fails to begin selling institutional subscriptions, the Registry can negotiate substitute arrangements with third parties.² *Id.* §§ 3.7(c), 1.34.

Other provisions of the Proposed Settlement set forth circumstances under which a Rightsholder may ask that his or her work not be digitized, used or displayed by Google and state that the authority of the Registry to negotiate on behalf of Rightsholders is non-exclusive, *i.e.*, Rightsholders retain the authority to engage in separate negotiations. *See id.* §§ 3.5, 2.4. Yet another provision of the Proposed Settlement addresses the certainty that many Rightsholders will not sign up with the Registry, either because they choose not to do so or because they cannot be found, and thus will not be entitled to share in the revenues the Registry receives, leaving substantial “unclaimed funds.” *Id.* § 6.3. That provision mandates that the Registry distribute “unclaimed funds” in such a way that Rightsholders who do sign up with the Registry will benefit from Google’s exploitation of works of those who do not sign up. *Id.*

² If Google enters into an agreement with the Registry that covers new revenue models, the settlement provides that Google is released from liability, including liability for copyright infringement, for actions taken pursuant to such an agreement. *Id.* § 10.1. Similarly, for third parties who copy or use copyrighted works in reliance on an agreement with the Registry negotiated following Google’s failure to pursue a business model, the settlement purports to provide a release of claims of infringement that could otherwise be brought by the copyright holder. *Id.* § 3.7(c). Both releases apply even though the rightsholder in such a situation never gave the Registry permission to negotiate on his or her behalf. *Id.*

ARGUMENT**I. The Proposed Settlement Should Be Rejected Because Congress, Not This Court, Is The Proper Body to Establish a Regime for the Digitization and Use of Works Whose Copyright Holders Cannot Be Found.****A. Class actions in copyright infringement cases have never been used to legislate changes in the law.**

Digitization presents an enormous opportunity for public good. The existence of large numbers of “orphan works” and works whose copyright holders choose to remain aloof from licensing poses a barrier to the full exploitation of this new technology. Amazon knows this as well as anyone, given that it has devoted massive resources over the past seven years to obtaining the rights to digitize books and then actually doing so. But, what the parties seek to do through the Proposed Settlement—using Rule 23 of the Federal Rules of Civil Procedure to impose a compulsory license on all Rightsholders who do not affirmatively opt out of the class and then applying that license to millions of “orphan works”—represents an unprecedented rewriting of copyright law through judicial action.

The problem posed by the advance of technology in this case is far from unique in the annals of copyright. Indeed, the history of copyright law is one of accommodation to technology. Not only was the world’s first copyright statute enacted as a consequence of the invention of the printing press, but successive advances in communications throughout the twentieth and twenty-first centuries have confronted the law time and again with challenges about how it will adapt. Myriad and distinct rules now govern, depending on whether the subject exploitation is webcasting of musical compositions, making a sound-alike version of a popular recording, cablecasting over-the-air television signals, and on and on. But, amidst all of these myriad rules, one thing stands out—the complexity that marks the various features of the law does not result from settlements of class action lawsuits; rather, it uniformly comes from Congressional intervention.

If class actions for copyright infringement arising from technological advances were new or rare, the absence of any examples of systemic change through settlements might be less telling. But, they are not. To the contrary, class actions have been numerous and varied, and

none of them has ended in an agreement that operates like a legislative initiative. Rather, whether settled or not, those class actions have addressed the dispute between the parties over the subject activity and, depending upon how they resolved it, the conduct has either proceeded or stopped.

One good example arises from the advent of the photocopying machine. In *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1 (S.D.N.Y. 1992), publishers brought a class action “on behalf of themselves and others similarly situated.” *Id.* at 1. The district court found that Texaco’s use of copying machines to copy journal articles constituted copyright infringement and awarded judgment to plaintiffs. *Id.* at 28. On appeal, a divided panel of the Second Circuit affirmed. 60 F.3d 913 (2d Cir. 1995).

The result of that successful class action was to resolve the pertinent legal doctrines in favor of the copyright owners. Following similar results in other suits against photocopying services, business practices in the United States adjusted to the now clarified legal rules. *See Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1547 (S.D.N.Y. 1991) (granting injunctive relief against copyshop chain); *Princeton Univ. Press v. Michigan Doc. Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996) (*en banc*) (holding that copyshop engaged in copyright infringement in producing coursepacks and remanding for issuance of tailored injunction, which would apply against present and future copyrighted works).

The history of photocopying litigation is as notable for what it did not accomplish. The plaintiffs in the litigation did not agree that Texaco and Kinko’s could continue to engage in their photocopying conduct, and increase its scope exponentially, in exchange for payment to the class members. Neither did the parties purport to bind to any such agreement a large class of rightsholders who may not even have known about the lawsuit. Instead, the class plaintiffs used the court system for its designated purpose—to obtain judicial redress of their grievance. Having prevailed, they thereafter enforced their rights, and affected businesses largely altered their practices lest they be held culpable again for copyright infringement.

Another example, involving a class action against digital taping, illustrates how the parties to a class action can advance copyright law to address the challenges posed by new technologies. In *Cahn v. Sony Corp.*, No. 90 Civ. 4537 (S.D.N.Y. filed July 9, 1990), veteran songwriter Sammy Cahn brought a class action “on behalf of all owners of copyrights in musical compositions. . . .” Nimmer Decl., Ex. C (Complaint in *Cahn v. Sony*) ¶ 10. The suit targeted the imminent sale of digital audio tape (“DAT”) recorders and blank cassettes, alleging that Sony has “inaugurat[ed] a new era in unauthorized home taping of copyrighted musical compositions. For the first time, a home taper will be able to make perfect copies of . . . compact discs.” *Id.* ¶ 1. The complaint in this class action prayed for injunctive relief against that impending technology. *Id.* ¶ B.

But matters never went that far. Instead, the parties resolved their dispute by settling the litigation and jointly agreeing to ask Congress to amend the Copyright Act. Congress passed the resulting bill on October 28, 1992. *See* Pub. L. No. 102-563, 106 Stat. 4237. The result was the Audio Home Recording Act of 1992, an act whose legislative history even recounts the role that the litigation played on the path towards formulating that legislation. H.R. Rep. 102-873, pt. 1, at 10 (1992) (noting that bills before Congress resulted from successful settlement negotiations among litigants).

The history of this litigation is again notable for what the parties did not do. In theory, the parties to *Cahn v. Sony* could have agreed to a settlement agreement that would have operated solely for the benefit of the named defendant, empowering Sony Corp. to be the only entity within the United States authorized to purvey DAT recorders, and channeling monopoly profits on that basis to the members of the plaintiff class. But, the parties did not choose that path. Due regard for the different roles assigned the legislature and the judiciary constrained them to present their overhaul of copyright laws to the only body empowered to bring them to fruition, namely the Congress of the United States.

purchase books and use book databases. As the sole representative of the Rightsholders, the Registry itself would create a danger to healthy competition, but the Proposed Settlement adds an additional dimension to that threat by anointing a sole distributor, Google, for “orphan works” and perhaps millions of other works. In stark contrast to the non-discriminatory dealing imposed by the consent decrees on ASCAP and BMI, the Proposed Settlement presents the imminent danger of installing Google as a monopolist through an arrangement that results in Google, and only Google, having access to a large percentage of the titles in existence. This danger arises directly from the Proposed Settlement—by compelling participation in a business arrangement with Google by all who do not affirmatively opt out, the Proposed Settlement itself is the mechanism for collective action by Rightsholders in selecting a distributor.

Even though ASCAP and BMI represent only members who affirmatively elected to join, both were compelled to submit to consent decrees that require them to license all similarly-situated users on a non-discriminatory basis. *See ASCAP Decree*, 2001 U.S. Dist. LEXIS 23707, at *10, *12-*14, *15; *BMI Decree*, 1966 U.S. Dist. LEXIS 10449, at *7-*8, *10, *11. The Proposed Settlement’s provisions work in the opposite manner. Section 6.2(b)(iii) provides that the Registry will be allowed “to the extent permitted by law, [to] license Rightsholders’ U.S. copyrights to third parties,” which, as interpreted by the Settlement Notice, means that the Registry would “represent the interests of the Rightsholders . . . including with companies other than Google (subject to the express approval of the Rightsholders of the Books involved in such other commercial arrangements),” Proposed Settlement Attach. I § 8.B (emphasis added); *see also* Proposed Settlement § 2.4 (authorizations to Google are non-exclusive, so individual Rightsholders may license others). For the “orphan works,” however, the Registry cannot license entities besides Google (because, by definition, the Registry cannot obtain an express authorization to do so from missing Rightsholders).¹⁸

¹⁸ By definition, the magnitude of this state of affairs is also impossible to quantify—but it is indisputably very large. A recent book published by Yale University Press estimates over 95% of books published in the twentieth century are under copyright protection yet commercially unavailable, and a “substantial proportion of that total is made up of orphan works.” James Boyle, *The Public Domain* 10 (2008).

The sale of books or subscriptions to a database of scanned works is conduct in which Google has not yet engaged and, because of criminal sanctions, likely would never engage without a clear license to do so. *See* 17 U.S.C. § 506(a) (defining copyright infringement as criminal offense when undertaken willfully and for commercial advantage). That conduct is thus not at issue in the litigation. Likewise, “new revenue models” and “future amendments” to the settlement are by definition not at issue in this litigation as they do not yet exist.²⁸

More egregiously still, the settling parties purport to limit relief against Google even when it operates outside the parameters of the business arrangement contemplated by the Proposed Settlement. A review of the dense language of the Settlement Agreement reveals that it extends to “Other Google Programs” (which may or may not yet be in existence); in effect, it creates a private copyright universe in which Rightsholders who do not opt out of the class have fewer rights following infringement by Google than they would have under copyright law against third parties, such as Amazon, who engage in exactly the same conduct. *See, e.g.*, Proposed Settlement § 3.5(c)(ii)(5). Of course, this conduct could not conceivably fall within the “identical factual predicate” of the ongoing litigation.²⁹ This benefit to Google from the

²⁸ Even Dan Clancy, Engineering Director for Google Book Search, acknowledges the breadth of the settlement’s releases compared to what Google could have achieved through litigation and final judgment. In an interview with the *Library Journal*, Clancy said:

The settlement was driven by what we felt was, in the end, better for everyone and better for users in particular. . . . This settlement is an opportunity to do what, I think, from a user perspective is far better. The snippets we’ve been showing are a far cry from what the user wants, and really the only solution was a partnership. We assume we would have gone through the courts and won. But once we won, we still would’ve had snippets.

Andrew Richard Albanese & Norman Oder, *Corner Office: Google’s Dan Clancy*, *Libr. J.*, May 1, 2009, at 26, 26, *available at* <http://www.libraryjournal.com/article/CA6652445.html>.

²⁹ This portion of the Settlement Agreement focuses on books licensed before 1992 with no explicit grant of electronic rights. Given that copyright subsists in works published since 1923, it affects seven decades of literary production, with correspondingly great effects. To appreciate that status, let us imagine that Google has already scanned *Lonesome Dove* and included it in the Google Books Program, that Technology X is invented in 2016, and that Google decides in 2020 to inaugurate widescale exploitation of books via that new technology, including *Lonesome Dove*. To the extent that author Larry McMurtry objects to that exploitation in 2021 (in the same way that previous litigation contested the scope of his grant of book rights to his publisher in *Lonesome Dove* at the dawn of the age of audio books), a dispute may develop between author and publisher. The Settlement Agreement goes out of its way to immunize Google from any liability for copyright infringement under those circumstances. Proposed

Dated: September 8, 2009

INTRODUCTION

“The final settlement is a complex license, involving a worldwide class of millions of copyright owners, and resembles a joint venture among publishers, authors, Google and the libraries that provide books to Google for scanning.”

-- Counsel for the Publisher Sub-Class¹

The purpose of class action is to resolve a legal dispute, not launch a “joint venture.”

Google and the three authors and five publishers who filed these actions ask the Court to conscript the vast majority of the world’s copyright owners in books into this “joint venture” that would create a monopoly in digital books. The proposed settlement is unrelated to the narrow legal dispute before the Court and, if approved, would constitute an unprecedented misuse of the judicial system. It invades the exclusive power over copyright that Article I of the Constitution grants to Congress and exceeds the Court’s authority under Rule 23 and Article III of the Constitution. The proposed settlement must be rejected.

The complaints that commenced these cases in 2005 challenged the Google Library Program, which scanned books from library shelves to make them electronically searchable on Google’s website in order to display *brief excerpts* in response to searches. The proposed settlement does not resolve this narrow issue, but rather confers on Google a new monopoly by authorizing Google (and Google alone) to engage in the wholesale *commercial* exploitation of *entire* copyrighted books. The broad uses granted Google include “Institutional Subscriptions,” “Consumer Purchases” and “New Revenue Models,” as well as “Non-Display Uses”

¹ Debevoise & Plimpton LLP, *Debevoise advises worldwide class of publishers and Association of American Publishers in landmark settlement with Google*, Nov. 25, 2008, available at http://www.debevoise.com/newseventspubs/news/RepresentationDetail.aspx?exp_id=a3dba5c6-7e25-4b70-a9c7-0156917fee0d. (Ex. A).

encompassing a wide array of valuable uses for which no compensation whatsoever will be paid to class members.²

Millions of copyright owners around the world who did *not* participate in and do not even know about this litigation – many of whose works Google has not even scanned – stand on the verge of having their copyrights infringed in ways exponentially greater than the conduct challenged in the complaints. A class action settlement is the wrong mechanism, this Court is the wrong venue, and monopolization is the wrong means to carry out the worthy goal of digitizing and increasing the accessibility of books. Indeed, Congress and numerous academic, non-profit and commercial providers are working towards that goal by way of legitimate legislative and contractual efforts.

Microsoft Corporation has substantial interests in this proceeding.³ It owns Microsoft Press, a large technical publisher, and is a member of both the Publisher Sub-Class and the Author Sub-Class defined in Section 1.142 of the proposed settlement agreement with thousands of copyrighted works covered by its terms. It also operates Bing, an Internet search engine that provides users with access to all types of digital information and would be harmed by the anti-competitive effects of the proposed settlement. Until May 2008, Microsoft operated a book digitization project like Google Books but with the clear distinction that Microsoft did not scan and display any copyrighted books without permission of the copyright owner. As explained last

² As one commentator explained: “It seems likely that the ‘nondisplay uses’ of Google’s scanned corpus of text *will end up being far more important than anything else in the agreement*. Imagine the kinds of things that data mining all the world’s books might let Google’s engineers build: automated translation, optical character recognition, voice recognition algorithms. And those are just the things we can think of today. Under the agreement, Google has unrestricted, royalty-free access to this corpus.” Fred von Lohmann, *Google Book Search Settlement: A Reader’s Guide*, Electronic Frontier Foundation Deep Links Blog, Oct. 31, 2008 (emphasis added), <http://www.eff.org/deeplinks/2008/10/google-books-settlement-readers-guide>. (Ex. B).

³ Microsoft intends to appear at the Fairness Hearing on October 7, 2009 to present the arguments made in these Objections.

year, Microsoft was and remains interested in search technology to improve access to digital books, an interest that would be substantially harmed by approval of the proposed settlement.⁴ Finally, as an owner, user and licensee of copyrighted works, including books, Microsoft has a strong interest in the copyright rules and business arrangements that govern such works.

No one can object to the laudable goal of creating universal and broadly accessible repositories of digital books. Numerous entities – public (including the U.S. Copyright Office and Library of Congress), non-profit (including the Internet Archive), educational (including leading universities) and commercial (including Google, Amazon, Yahoo and Microsoft) – have invested countless time and hundreds of millions of dollars in such efforts. Breakthroughs in digital technology and progress in copyright reform before Congress – efforts that Microsoft actively supports – have brought achievement of that goal closer than ever. These competitive and transparent efforts affirm the benefits of an open market, and the Constitutionally mandated legislative process ensures that the diverse interests of the many stakeholders are considered and balanced, accommodating copyright owners, online services, libraries and the public.

The proposed settlement, on the other hand, pursues an illegitimate approach. Following closed-door negotiations that excluded millions of copyright owners and the very public that copyright law serves,⁵ Google and the plaintiffs seek to arrogate public policymaking to themselves, bypass Congress and the free market, and force a sweeping “joint venture” – built on copyrights owned by a largely absent class – via this Court’s order. The proposed settlement would usurp the role that Article I, Section 8 of the Constitution vests in Congress alone to alter

⁴ See generally Microsoft, *Book Search Winding Down*, Bing Search Blog, May 23, 2008, <http://www.bing.com/community/blogs/search/archive/2008/05/23/book-search-winding-down.aspx>. (Ex. C).

⁵ See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”).

the copyright laws in the face of new technologies, a role that Congress actively pursues in legislation to make orphan works more widely available, to enact copyright exceptions for libraries to further their mission, and to meet other changing needs.⁶

Four basic facts about the proposed settlement highlight problems that render it inappropriate to foist on millions who had no role in its negotiation yet would be bound by its terms:

First, the plaintiffs no longer seek redress only for past or continuing infringement – the proper bounds of a copyright lawsuit. Rather, the settling parties now seek this Court’s approval of a “joint venture” that would *authorize new future* infringements and expropriate and impair the exclusive rights of millions of absent class members for the *life* of their copyrights.

Second, the proposed settlement seeks to divvy up rights that would *never* be the subject of contested litigation. Unlike the infringement claims and fair use defense for displaying brief excerpts alleged in the pleadings, the wholesale uses of entire books that the proposed settlement would authorize are *unquestionably* infringing, as Google acknowledges.⁷ In other words, the class representatives bargained away millions of absent class members’ incontestable rights to prevent the reproduction, distribution, public display, public performance and other uses of their copyrighted books – rights that are not remotely in dispute in this case.

Third, each of the five Publisher Sub-Class representatives that negotiated the proposed settlement already has a commercial partnership with Google and its own side deal that contains terms that have not been disclosed to class members. These separate agreements are likely to be

⁶ See, e.g., Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008) (passed by Senate on Sept. 26, 2008).

⁷ See Andrew R. Albanese, *Deal or No Deal: What if the Google Settlement Fails?*, Publishers Weekly, May 25, 2009, available at <http://www.publishersweekly.com/article/CA6660295.html> (“Even if Google had prevailed with its fair use claim, [Google Engineer Dan] Clancy explains, that ruling would only have facilitated its book *scanning*. Its display still would have been limited to brief ‘snippets.’”) (emphasis in original). (Ex. D).

different and more advantageous than the proposed settlement negotiated for the absent class members. Unlike the class representatives, however, the millions of class members would become participants in Google Books by means of conscription, not volition.

Fourth, the Publisher Sub-Class representatives that negotiated the proposed settlement are widely expected to exclude their own books from its terms. The class representatives intend to walk away from the deal that they seek to impose on millions of absent copyright owners.

These facts and many others cited in objections filed with the Court demonstrate that the sweeping scope of the proposed settlement is improper and that the parties that negotiated it do not represent the diverse interests of the massive class.⁸

The settling parties seek to misuse Rule 23 to create their “joint venture” via an unprecedented “compulsory license for the benefit of one company,” as U.S. Register of Copyrights Marybeth Peters calls it.⁹ This would have profound anticompetitive effects.¹⁰ Potential customers of the proposed commercial venture, including libraries,¹¹ universities¹² and

⁸ As Publishers Weekly concluded: “[O]ur take is this: there is simply too much confusion and too little support for anyone to feel comfortable. ... [F]or all the good and bad scenarios raised by the deal, was it ever reasonable to think that such a revolutionary, unprecedented pact, negotiated in secret over three years by people with loose claims of representation, concerning a wide range of stakeholders, both foreign and domestic, involving murky issues of copyright and the rapidly unfolding digital future, could be pushed through as a class action settlement within a period of months, in the teeth of a historic media industry transition?” Andrew R. Albanese, *Unsettled: The PW Survey on the Google Book Settlement*, Publishers Weekly, Aug. 24, 2009, available at <http://www.publishersweekly.com/article/CA6685412.html>. (Ex. E).

⁹ Miguel Helft, *It’s Not Just Microsoft Balking at Google’s Book Plans*, New York Times BITS Blog, Apr. 4, 2009, <http://bits.blogs.nytimes.com/2009/04/04/its-not-just-microsoft-thats-balking-at-googles-book-plans/>. (Ex. F)

¹⁰ The U.S. Department of Justice has informed the Court of a pending antitrust investigation of the proposed settlement. See Order dated July 2, 2009 (Doc. No. 120). In light of that pending investigation, this brief does not address the legality of the proposed settlement under federal antitrust law, including its implications for Google’s already dominant position in search advertising and potential monopoly in the markets for digitized books and library subscription services.

¹¹ See, e.g., Library Association Comments (Doc. No. 100) at 6 (“there is no foreseeable threat to the control Google and the Registry have over this essential research facility”); Urban Libraries Council Comments (Doc. No. 158) at 4 (“The practical effect of the proposed settlement will be a monopolistic situation.”); Robert Darnton, *Google & the Future of Books*, The New York Review of Books, v. 56, n.2, Feb. 12, 2009, available at <http://www.nybooks.com/articles/22281> (“Google will enjoy what can only be called a monopoly – a monopoly of a new kind, not of railroads or steel but of access to information.”). (Ex. G).

consumer groups,¹³ criticize it for creating a concentrated market power, as do leading academics in the fields of intellectual property and competition.¹⁴ Even the parties that negotiated the proposed settlement acknowledge that it would forestall competition:

Richard Sarnoff, chairman of the Association of American Publishers, said that the structure of the registry will be “tough to replicate for [Google’s] competitors.”¹⁵

Michael J. Boni, the lead lawyer representing the Authors Guild, conceded that “Google will always have the advantage of having access to 100 percent of the orphan works.”¹⁶

Google and its chosen partners would receive immunity from the purported class for massive copyright infringement that no other entity could obtain.

Facilitating the digitization of books is a worthy goal, but the profound interests implicated here can only be resolved by Congress, not this Court.

ARGUMENT

I. THE PROPOSED SETTLEMENT USURPS CONGRESS’S EXCLUSIVE CONSTITUTIONAL ROLE TO DEFINE AND ALTER THE RIGHTS AND REMEDIES OF COPYRIGHT OWNERS

The proposed settlement goes well beyond the legitimate role of a copyright lawsuit –

....Continued

¹² See, e.g., Letter to J. Michael McMahon from Mary Croughan, et al. (University of California Faculty) of Aug. 13, 2009 (Doc. No. 134) at 3 (“there are at least three serious impediments to meaningful non-exclusivity of that license”).

¹³ See, e.g., Jef Pearlman, *Public Knowledge and the Google Book Search Settlement*, Public Knowledge Blog, May 1, 2009, <http://www.publicknowledge.org/node/2129> (Ex. H); Wendy Davis, *Consumers Not Considered In Google Book Search Settlement*, Consumer Watchdog, Apr. 7, 2009, <http://www.consumerwatchdog.org/corporateering/articles/?storyId=26151>. (Ex. I).

¹⁴ See, e.g., Pamela Samuelson, *Legally Speaking: The Dead Souls of the Google Booksearch Settlement*, O’Reilly Radar, Apr. 17, 2009, <http://radar.oreilly.com/2009/04/legally-speaking-the-dead-soul.html> (“The proposed settlement agreement would give Google a monopoly on the largest digital library of books in the world.”) (Ex. J); Elise Ackerman, *Google’s Book Club*, San Jose Mercury News, May 3, 2009 (quoting Randal C. Picker) (“Google will walk away from the settlement agreement with a huge competitive advantage”). (Ex. K).

¹⁵ Timothy B. Lee, *Publisher speculates about Amazon/Google e-book “duopoly,”* Ars Technica, Feb. 23, 2009, available at <http://arstechnica.com/tech-policy/news/2009/02/publisher-speculates-about-amazongoogle-e-book-duopoly.ars>. (Ex. L).

¹⁶ Miguel Helft, *Google’s Plan for Out-of-Print Books Is Challenged*, New York Times, Apr. 4, 2009, available at http://www.nytimes.com/2009/04/04/technology/internet/04books.html?pagewanted=1&_r=2. (Ex. M).

resolving claims for infringement – and imposes a slew of provisions that would restructure the rights and remedies of absent copyright owners throughout the world. The proposed settlement would improperly: (1) require copyright owners to comply with formalities, including registration and notice, to preserve and enforce their copyrights against Google; (2) permit clearly infringing reproduction, distribution and other uses of copyrighted works without the owner’s affirmative consent; (3) force owners to allow Google and its partners to make far-reaching and lucrative “non-display” uses of copyrighted books; (4) impose a private arbitration system to resolve various copyright disputes; and (5) grant broad immunities not only to Google but to libraries, contractors and others not party to this litigation.

A class action cannot restructure copyright rights, remedies, immunities and defenses as the proposed settlement seeks to do. Such changes can only come from Congress, which alone has the “constitutional authority and institutional capability” to determine the rights and remedies of copyright. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984). Accordingly, the Court should reject the proposed settlement and instruct the parties to litigate or settle the claims actually raised in the complaints. A broader resolution must be left to Congress, where it can be publicly vetted – and, if appropriate, enacted – with the participation of all impacted stakeholders. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (reversing class certification and settlement in “litigation [that] defies customary judicial administration and calls for national legislation”) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997)).

A. The Constitution Vests Authority to Restructure Copyrights Exclusively in Congress, Not the Courts

The Constitution empowers Congress to “promote the progress of science ..., by securing for limited times to authors ... the exclusive right to their respective writings” U.S. Const., art. I, § 8. “[I]t is generally for Congress, not the courts, to decide how best to pursue the

Copyright Clause’s objectives.” *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003). “[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors ... to give the public appropriate access to their work product.” *Id.* at 205 (quoting *Sony Corp.*, 464 U.S. at 429). This role is particularly important in the face of new technology, as here. “Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.” *Sony Corp.*, 464 U.S. at 430-31 (footnotes and citations omitted).

Congress has worked hard on legislation to revise copyright law to meet the challenges of the digital age. Microsoft and scores of others (including the settling parties) are active participants in those deliberations. Many aspects of the proposed settlement, including its treatment of orphan and non-U.S. works and of libraries, run afoul of legislative efforts. While some of these provisions may have benefits as a policy matter, their inclusion in the proposed settlement amounts to an end run around Congress to further the parties’ private “joint venture.”

**B. Congress Has Resolved Similar Matters Many Times,
Including Those That First Arose in Class Action Litigation**

Congress has a long record of amending copyright law to respond to advances in technology, including enacting industry-specific mechanisms that recognize and reconstruct the rights of copyright owners. *See, e.g.*, 17 U.S.C. § 111 (compulsory license for retransmission of television signals by cable systems); § 112(e) (compulsory license for ephemeral reproduction of sound recordings by webcasters and other digital music services); § 114 (compulsory license for public performance of sound recordings by certain digital music services); § 115 (compulsory license for making phonorecords of musical compositions); § 116 (compulsory license for use of music by jukeboxes); § 118 (compulsory license for use of works by public television stations); §§ 119, 122 (compulsory license for retransmission of television signals by satellite carriers);

§ 1001 *et seq.* (resolving disputes over reproduction of copyrighted music by digital audio recording devices). Congress can do so here as well.

In *Cahn v. Sony Corp.*, No. 90 Civ. 4537 (S.D.N.Y. complaint filed July 9, 1990), music publishers filed a class action asserting copyright infringement claims against the manufacturer of digital audio tape recorders, which consumers could use to make digital copies of copyrighted musical works. At the urging of the litigating parties, Congress effectively resolved the case by enacting the Audio Home Recording Act of 1992 (“AHRA”).¹⁷ In contrast, the proposed settlement improperly seizes the legislative function of Congress by attempting to mimic the AHRA and compulsory license schemes. It provides immunity from copyright liability for the users of the copyrighted works;¹⁸ requires payment from some of those users to the copyright owners;¹⁹ creates a mechanism for collecting payments, making claims on those payments and distributing payments to copyright owners;²⁰ and includes procedures to resolve disputes about payments, claims and related matters.²¹

But these Congressional solutions differ in three fundamental ways from the “compulsory license” the proposed settlement would impose. Unlike the proposed settlement, legislated changes to copyright owners’ rights and remedies: (1) result from an open and transparent process; (2) balance and accommodate the legitimate concerns of all stakeholders;

¹⁷ 17 U.S.C. § 1001 *et seq.* Counsel for the Publisher Sub-Class represented the defendants in the *Cahn* litigation and were instrumental in transforming *that* class action litigation into Congressional legislation.

¹⁸ Compare Settlement Agreement (“SA”) Art. X (“Releases”) with 17 U.S.C. § 1008 (“Prohibition on Certain Infringement Actions”).

¹⁹ Compare SA Art. IV (“Economic Terms for Google’s Use of Books”) with 17 U.S.C. § 1004 (“Royalty payments”).

²⁰ Compare SA Art. VI (“Establishment and Charter of Registry”) with 17 U.S.C. §§ 1005-07 (“Deposit of royalty payments and deduction of expenses”; “Entitlement to royalty payments”; & “Procedures for distributing royalty payments”).

²¹ Compare SA Art. IX (“Dispute Resolution”) with 17 U.S.C. §§ 1009-10 (“Civil remedies” & “Determination of certain disputes”).

and (3) are available to *all* similarly situated entities, not just to a “joint venture” involving one company and its chosen partners. Congress has the “constitutional authority and institutional capability” to resolve the issues that the proposed settlement raises. *See Sony Corp.*, 464 U.S. at 431. Congress has done it before and can do it again.

C. The Proposed Settlement Would Interfere with Congress’s Resolution of Important Copyright Issues

The proposed settlement would alter and abridge class members’ substantive rights, including those to which Congress has devoted considerable attention in recent years. Some of the proposed settlement’s changes may be beneficial reforms that, *if enacted by Congress*, would improve the copyright system for the digital age. But they may *only* be enacted by Congress, not imposed through the misuse of a class action lawsuit.

Orphan Works. Congress and the Copyright Office have been studying the orphan works issue intensively for the past four years and received input from hundreds of interested parties, including Microsoft.²² In contrast to the parties’ closed-door discussions, the legislative process is extensive, transparent and public,²³ as the Copyright Office explained in its 2006 Report on Orphan Works:

The response from the public to this study was extraordinary. We received over 850 written comments, most of which were filed by individuals who have concerns about the use of orphan works. As you know, the roundtable discussions we held in Washington,

²² See Letter from Thomas C. Rubin, Microsoft, to U.S. Copyright Office of Mar. 25, 2005, *available at* <http://www.copyright.gov/orphan/comments/OW0695-Microsoft.pdf>; *Orphan Works: Proposals for a Legislative Solution: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (Apr. 6, 2006) (Testimony of Thomas Rubin), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=1847&wit_id=5223.

²³ See, e.g., *Oversight Hearing on the “Report on Orphan Works”: Hearing Before the House Subcomm. on Courts, the Internet, and Intellectual Property*, 109th Cong. (Mar. 8, 2006); *Orphan Works: Proposals for a Legislative Solution: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (Apr. 6, 2006); H.R. 5439, 109th Cong. (2006); *Hearing on Promoting the Use of Orphan Works: Balancing the Interests of Copyright Owners and Users: Hearing Before the House Subcomm. on Courts, the Internet, and Intellectual Property*, 110th Cong. (Mar. 13, 2008); H.R. 5889, 110th Cong. (2008); S. 2913, 110th Cong. (2008).