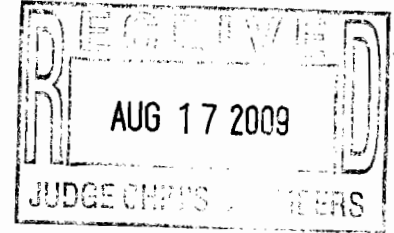
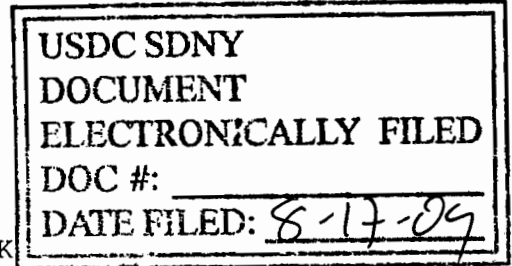


1 JEROME M. GARCHIK, CA.SB# 50562
ATTORNEY AT LAW
2 703 MARKET ST., STE. 801
SAN FRANCISCO CA. 94103
3 Tel: 415-495-8527
Fax: 415-495-8529
4 e-mail: jchikesq@gmail.com



5 Attorney for
IAN FRANCKENSTEIN,
6 Class Member and Rights
Owner of Author Kay Boyle



7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF NEW YORK

10
11 The Authors Guild Inc., Assn. of)
American Publishers, Inc., et al.,)
12)
Plaintiffs and Putative)
13 Class Representatives,)
14 vs.)
GOOGLE, INC.)
15 Defendant.)
16)

CASE NO. 05 CV 8136-DC

OBJECTION TO PROPOSED CLASS
ACTION SETTLEMENT ON BEHALF
OF AUTHOR'S RIGHTS CLASS
MEMBER IAN FRANCKENSTEIN

Hrg. Date: Oct. 7, 2009
Judge D. Chin

The Author's Guild et al v. Google Inc.

Doc. 135

17 I. INTRODUCTION & SUMMARY OF OBJECTIONS

18 Objector IAN FRANCKENSTEIN is a putative author class member and
19 owner of copyrights to about 50 principal published books and
20 hundreds of articles/inserts, authored by his well known late
21 mother, KAY BOYLE. He is a resident of Marin County California.
22 Many of these works are out of print but definitely not "orphans."
23 On his behalf, through Counsel, Objections are hereby asserted
24 regarding the proposed Book Rights Registry, its proposed
25 governance, its autonomy from Google Inc, the Authors Guild
26 and the Association of American Publishers, Inc., and the
27 transparency of the Registry's operations and procedures.

28
OBJECTIONS OF AUTHOR CLASS MEMBER IAN FRANCKENSTEIN

1 II. OBJECTOR'S STATUS AND STANDING TO OBJECT

2 IAN FRANCKENSTEIN is the son and heir to the copyrights of author
3 KAY BOYLE, a very well known author of about 50 principal works and
4 hundreds of short stories, articles, poetry and essays during the
5 period from the mid 1920s through her death in 1992. He resides in
6 Marin County, California. A copy of a signed designation of California
7 Attorney Jerome M. Garchik to file these objections was served on
8 Michael Boni, counsel for the author class by mail on July 23, 2009.

9 The Google Book data base which is the subject of this action shows
10 on advanced search: 549 book entries for Kay Boyle, Author, plus an
11 additional 77 inserts, in addition to a final unpublished manuscript
12 entry.

13 Attorney Garchik is a 1971 graduate cum laude of Harvard Law School
14 and since 1972 has been admitted to practice in the California state
15 and federal courts, and since 1981 to the Supreme Court.

16 III. BACKGROUND OF THE PROPOSED BOOK RIGHTS REGISTRY

17 The proposed Book Rights Registry has its origin in dicta of
18 Justice Ginsburg in New York Times Co. v. Tasini (2001) 533 U.S. 483, 505:

19 "The parties (Authors and Publishers) may enter into an agreement
20 allowing continued electronic reproduction of the Authors' works;
21 they, and if necessary the courts and Congress, may draw on
22 numerous models for distributing copyrighted works and reim-
23 bursing authors for their distribution. See, e.g. 17 USC §118(b);
24 Broadcast Music Inc. v. Columbia Broadcasting System, Inc. (1979)
25 441 US 1, 4-6, 10-12 (recounting history of blanket music
26 licensing regimes and consent decrees governing their operation)"
27 Id.

28 The "regimes" cited by Justice Ginsburg reference ASCAP, founded
in 1914 (www.ascap.com) and BMI founded in 1939. (www.bmi.com). These
"registries each have over 350,000 rights holding "members". In the
most recent reported years, each collected over \$850 million in
royalties, and paid about 90% of that to rights holders. Each one had
annual operating budgets/overhead of about 10% or over \$85 million!

1 Given that the Google Book scanned data base involves millions
2 of books and authors, in time, the Book Rights Registry may well
3 exceed ASCAP and BMI in numbers of rights holders, annual royalty
4 revenues and administrative budgets.

5 In the Settlement Agreement, the Registry is to be governed by
6 four each, author and publisher directors designated by the Authors
7 Guild and the Publishers Assn. The directors must sign the Agreement,
8 and are bound by its economic deal with Google- the 37%-63% split for
9 four years. Any better deal for the authors/publishers the Registry
10 may get with non-Google e-publishers will not bind Google, but if any
11 other e-publisher keeps more of the e-publishing dollar, then the
12 Registry must give Google the same deal.

13 While it is unclear if the Registry has yet been chartered under New
14 York not for profit laws, it has been announced that its CEO, Micheal
15 Healy has been hired, and he has made internet posted public plans
16 about the Registry's proposed author data base and operations. Further-
17 more, recently at a Seminar sponsored by the Guild and the Publishers
18 Assn. and by Publishers Weekly, it was revealed that the Registry will
19 have more than 8 directors, and will include foreign nationals too.
20 Still, many of the important amicus presentations to the Court cite
21 major concerns about the Registry, its vaguely defined governance,
22 and potentially huge presence in the world's intellectual marketplace.

23 For months, Counsel Garchik has communicated with Author Class
24 Attorney Boni seeking disclosures about the Registry status and gover-
25 nance, to no avail. Counsel has also expressed interest in serving as
26 an independent author side director, to Mr. Boni, to the Library
27 organizations, to Deputy Asst. A.G. Cavanagh, and to other
28 amicus and objecting parties who have appeared or written to the
Court regarding the Settlement.

1 IV. THE PROPOSED BOOK RIGHTS REGISTRY NEEDS MODIFICATIONS
2 AND SUPERVISION IN THE AREAS OF ITS GOVERNANCE,
3 ITS AUTONOMY FROM THE INTERESTED PARTIES AND
4 TRANSPARENCY OF ITS STRUCTURE AND FINANCES

5 A. Governance and Autonomy of the Book Rights Registry

6 Given the size and importance of the Book Rights Registry this
7 Court cannot avoid scrutinizing and supervising its proposed gover-
8 nance and ensuring it is de facto and de jure independent of the
9 Authors Guild, the Publishers Association, and of Google.

10 The parties' stated design for the Registry ensures instead,
11 their perpetual control over it. However, nothing in Rule 23 provides
12 that class certification and designation of class representation
13 enshrines the class representatives in perpetual control over a
14 cy pres non-profit created from the case settlement. On the contrary,
15 in a typical class action, cy pres funds not going to damaged plain-
16 tiff class members usually are donated to a related, existing non-
17 profit such as a consumer rights group, a health provider, or a
18 university.

19 While the Authors Guild boasts about 8,000 members, sufficient
20 to qualify it for the fiduciary responsibilities as lawsuit class
21 representative, that number is a very small fraction of the numbers
22 of rights holders whose royalties will be channeled for years to come
23 through the Registry. Assurances that the Registry will be governed
24 by New York State non-profit laws and regulations are not sufficient.

25 In Tasini, supra, Justice Ginsburg acknowledged the role of the
26 judiciary in supervising "licensing regimes" . BMI and ASCAP evolved
27 over 70 years under such judicial oversights. Id. These large and
28 powerful entities each have over 20 board members, reflecting a true
diversity of the international music world. www.ascap.com, www.bmi.com.

1 The Court should insist that membership in either the Authors
2 Guild or the Publishers Association is NOT required for a rights
3 holder to seek royalties from Google via the Registry. Moreover, the
4 Court should free the Registry from the one sided MFN clause and the
5 long term 37%-63% Google/Registry royalty split, and leave the issue
6 up to ad hoc negotiations on an author by author basis. Why should
7 authors Obama, or Hemmingway, for example, get the same royalty from
8 Google for e-publishing, as a more obscure , low interest author?

9 One suspects that the basis of Google's 37% share of e-book
10 sales is not based on any true cost analysis, but instead is based on
11 the fact that books are traditionally sold through bookstores on a
12 40% mark up over wholesale price. Recently, one leading e-publishing
13 site, Scribd, is paying rights holders 80% of e-sales, and even many
14 members of the Publishers Association have or will be seeking such
15 better deals directly with Google under its separate Partner Program
16 outside the purview of this Settlement! "Differences from Settlement
17 in Features and Revenue Models" were admitted by the Guild and the
18 Publishers Association at the recent Publishers Weekly Seminar, for
19 the Settlement and the Partner Program. They assert, "For Books in
20 Partner Program, Those Agreements Govern." (PW Seminar, Slide on Re-
21 lationship with Partner Program). This means that rights holders
22 represented by the AAP or the Guild may under the Partner Program get
23 a better economic deal than the Registry, but non members are stuck
24 with the 37%-63% split or worse, under the MFN clause! This is hardly
25 appropriate conduct for a certified class representative! This Court
26 should order a MFN clause in favor of the Registry and against Google,
27 that the mass of rights holder class members not in Partner Programs
28 be credited with the best deal Google gives any author in or outside

1 the settlement. Rule 23 requires no less.

2 Only if the Registry has de facto and de jure autonomy from the
3 class representatives and from Google can it bargain at arms length
4 over these matters, and remove a heavy burden of oversight from the
5 federal courts for years to come.

6 Specifically the Court, in addition to imposing an MFN clause in
7 favor of class member rights holders and against Google on the
8 future revenue split, should Order:

- 9 1. No more than 50% of Registry directors designated by
10 class representatives AG and AAP;
- 11 2. Balance of initial Registry directors to be designated
12 by the Court, after a screening process by the Court's
13 Cy Pres special master or appointed Trustee;
- 14 3. Annual elections of Registry directors by participating
15 rights holders, allowing for outside nominations and other
16 rights holder due process safeguards beginning 10/7/10.

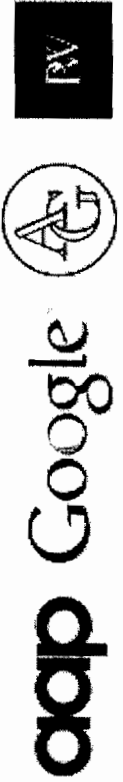
17 B. Transparency and Fiscal Integrity

18 The Authors Guild and AAP while successful litigants, can show
19 no proven track record of managing a fiscal agency such as the
20 Book Rights Registry. This Court should Order that the Registry
21 be bound to engage responsible outside auditors, that its officers
22 and directors be subject to equal standards of financial responsibility
23 and liability as officers of public corporations and that the Regis-
24 try's business be subject to the same public reporting and disclosure
25 standards as well. This, of course would include MFN compliance re-
26 ports to ensure Registry rights holders are treated the same as
27 Google Partner Program rights holders. Copy of PW/aap/AG/Google
28 slide "Relationship with Partner Program" is presented here:



Relationship With Partner Program

- Partner Program Based on Express Authorization
- Will Run in Parallel with Settlement Program
- Some Differences From Settlement in Features and Revenue Models
- For Books In Partner Program, Those Agreements Govern



1 Once again, reference to BMI and ASCAP and their extensive
2 web pages, www.bmi.com and www.ascap.com, should serve as models
3 of public access and disclosure for the Books Rights Registry.
4 There, recent annual reports are posted, as well as their organic
5 charters, and a constant up date of news and other features.

6 V. THIS COURT CANNOT AVOID INTERVENTION ON THE ISSUES OF
7 REGISTRY GOVERNANCE, AUTONOMY AND TRANSPARENCY IF
8 THE SETTLEMENT AGREEMENT AND STRUCTURE ARE TO SURVIVE
9 SCRUTINY FROM U.S AND EU COMPETITION REGULATORS

10 Scrutiny of the Settlement structure, focusing on the Registry
11 is underway in Washington and Brussels. The Library amicus groups have
12 publicly met with and written to the U.S. Justice Department, citing
13 the Registry's power and governance as issues of grave concern to
14 them as consumers of e-publishing products. However, the Agreement's
15 multi-year price fixing of Google-Registry split of revenues is per
16 se itself a violation of federal anti-trust laws. U.S.v.National
17 Assn.of Real Estate Bds.(1950) 339 U.S.485;Goldfarb v.Virginia State
18 Bar(1975) 421 U.S.773.

19 Therefore, this Court should Order approval of the proposed
20 settlement agreement contingent on the moving parties' adoption of
21 the governance, autonomy and transparency reforms cited above.

22 In as much at there will be a crowded courthouse on October 7th,
23 with a wide spectrum of views fairly presented, this Counsel does not
24 ask for permission to appear in person. However, we shall appear, if
25 the Court specifically requests it, and allows travel and hotel expenses
26 to be charged against the defendant.

27 Dated: August 13, 2009

28 
 JEROME W. GARCHIK
 Attorney for Class Member
 Rights Holder IAN FRANCKENSTEIN

PROOF OF SERVICE BY MAIL - CCP 1013a, 2015.5

1 I declare that: and certify that:

2 I am (a resident of/employed in) the county of SAN FRANCISCO, California.

I am admitted to practice in the California Federal Courts.

3 I am over the age of eighteen years and not a party to the within cause; my (business/residence) address is:

4 703 MARKET STREET, STE. 801, SAN FRANCISCO, CALIFORNIA 94103

5 On August 13 2009 I served the within OBJECTIONS RE:GOOGLE BOOK

6 SETTLEMENT on the PARTIES

7 in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the

8 United States mail at SAN FRANCISCO, CALIFORNIA addressed as follows:

9 Mary Davis-K.Fiels
10 ACRL ALA
11 50 E.Huron Street
Chicago, Ill 60611

JAMES GRIMMELMANN
NEW YORK LAW SCHOOL
INST FOR INFORMATION LAW & POLICY
57 WORTH STREET
NEW YORK, NY 10013
FAX: 212-791-2144
Counsel as Amicus Curia

12 Charles Lowry
13 A R L
21 DuPont Circle, NW, Ste 800
Washington D.C. 20006

ANDREW C. DEVORE
99 Park Avenue, 16th Floor
New York, New York
10016
Counsel for Steinbeck Estate, Etc.

14 Wm.Cavanagh
15 Deputy Asst. Attorney General
950 Pennsylvania Ave., N.W.
16 Washington D.C. 20530-0001
Fax: 202-514-6543

R.Emmett McAuliffe
Riezman Berger
7700 Bonhomme Ave., 7th Fl.
St.Louis Missouri
FAX: 314-727-6458
Attorneys for The Media Exchange Co.

17 Rachel Schwartz
18 267 Edgecombe Ave, #217
New York New York 10031
19 Attorney for David Meininger

See additional list attached.

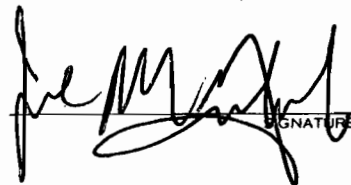
20 Jeffrey Pearlman, Esq.
21 Public Knowledge
1875 Connecticut Ave. N.W., Ste. 650
22 Washington, D.C. 20009
202 518-0020

23 I declare under penalty of perjury/~~that the foregoing is true and correct~~, and that this declaration was executed on

24 AUGUST 13 2009, at SAN FRANCISCO, California.

25 JEROME M. GARCHIK

26 (TYPE OR PRINT NAME)



(SIGNATURE)

Sanford P. Dumain
MILBERG LLP
One Pennsylvania Plaza
New York, NY 10119
Attorneys for Plaintiff Authors Guild

Bruce P. Keller
DEBEVOISE & PLIMPTON, LLP
919 Third Avenue
31st Floor
New York, NY 10022
Attorneys for Plaintiffs Publishers

Hadley Perkins Roeltgen
KOHN, SWIFT & GRAF, P.C.
One South Broad Street
Suite 2100
Philadelphia, PA 19107
Attorneys for Plaintiff Authors Guild

™

Daralyn Jeannine Durie
DURIE TANGRI LEMLEY ROBERTS & KENT, LLP
332 Pine Street
Suite 200
San Francisco, CA 94104
Attorneys for Defendant Google Inc.

Jeffrey A. Conciatori
QUINN EMANUEL URQUHART OLIVER & HEDGES LLP
51 Madison Avenue
22nd Floor
New York, NY 10010
Attorneys for Defendant Google Inc.

Laura Helen Gundersheim
BERNSTEIN LITOWITZ BERGER & GROSSMAN LLP
1285 Avenue of the Americas
New York, NY 10019
Attorneys for Plaintiff Authors Guild

Michael J. Boni
BONI & ZACK LLC
15 St. Asaphs Road
Bala Cynwyd, PA 19004
Attorneys for Plaintiff Authors Guild

Mikaëla A. McDermott (MM-6833)
Kornstein Veisz Wexler & Pollard LLP
757 Third Avenue
New York, NY 10017
(212) 418-8600
Attorneys for Amicus Curiae New York
Law School

Robert Jay Bernstein
THE LAW OFFICES OF ROBERT J. BERNSTEIN
488 Madison Avenue
9th Floor
New York, NY 10022
Attorneys for Defendant Google Inc.

Ronald Lee Raider
KILPATRICK STOCKTON, LLP
1100 Peachtree Street
Suite 2800
Atlanta, GA 30309
Attorneys for Defendant Google Inc.