**Bruce Jefferies**

From: Ann Mitcalfe [amitcalfe@hotmail.com]
Sent: Thursday, 3 September 2009 9:27 p.m.
To: bruce & marg jefferies

ORIGINAL OF THIS OBJECTION NOTICE ALSO FAXED TO YOU 9/29/22:30 3pages Thurs 3 Sept 2009

05-CV-8136

Th rsday 3 September 2009



e of the Clerk, J. Michael McMahon
District Court for the Southern District of New York
Pearl Street
York,
York 10007-1312
ed States of America

Fa no: 001 (212) 805 0389 Fax Machine 23:
BJ's Fax Log 8:29 pm 3 pages

Le Mr McMahon

Re Authors Guild v. Google Inc., No. 05 – CIV-8136 (DC)

te to object to the Proposed Settlement as a class member. The grounds for my objection are:

- Court has misapplied the Berne Convention
- Court has exceeded its jurisdiction
- Author Sub-Class not applicable to NZ authors
- Insufficient notice to satisfy notice requirements
- Inadequate compensation
- Overriding contractual relationships between author and publisher
- Unfair treatment of non US authors
- Unfair treatment of non US public
- Antitrust issue surrounding the significant market power Google would acquire through the ement



**Be ne Convention**

Th Berne Convention for the Protection of Literary and Artistic Works provides for reciprocity of ir ection. It does not provide for reciprocity of burden. Whether one agrees or disagrees with the e ement, clearly it does far more than afford protections to authors. It sets up what has been e red to as an international licensing regime requiring affirmative action and expense by authors to u erstand it first of all and then to take steps even if they wish to opt out. Those are not reciprocal or ections as envisaged by Berne and therefore it is not appropriate to use that treaty as a means to ex nd the settlement to non US authors. Non US authors should be removed from the author sub-cla s.

**Lack of Jurisdiction**

Gi en that Berne does not of itself bring New Zealand authors within the ambit of the settlement, it ha ws that the Court does not have jurisdiction over them. Any grant of copyright by a New Zealand co or must be subject to New Zealand law and the jurisdiction of the New Zealand courts. I therefore in est the jurisdiction of this Court and reserve all rights in that regard. Nothing in this letter should be onstrued as a submission to jurisdiction. However, given the constraints of the settlement ag ement and a non US rightsholder's effective inability to appear or present its case, should the Co t consider that it does have jurisdiction, the objection in this letter is provided for the record. Fu er, New Zealand is an independent sovereign state. New Zealand copyright law differs sig ficantly from United States copyright law, particularly with regard to the nature, duration and re nds for infringement of copyright. The settlement therefore seeks to override New Zealand

or ate class action settlement.

**Au nor Sub-Class**

Fe ral Rule of Civil Proced ire 23(a) provides that putative class representatives may pursue claims r ehalf of all putative cla s members only if the claims of the potential representative will fairly and uately protect the inte ests of the class. Fed. R. Civ. P. 23(a)(3) & (4).

e best of our knowledge, no NZ authors are members of the Authors Guild, and most NZ authors wo d not qualify for membership. The political, legal, financial, social and cultural context in which NZ au ors work is unique to this country. Questions relating to the tax status of non-US authors are not ad essed in the Proposed Settlement. Consequently, I consider that the inclusion of NZ authors in the or Sub-Class of the Proposed Settlement is invalid.

ver, various provisions of the settlement treat non US authors differently (and less ad ntageously). For example, books of New Zealand authors that have not been published in the US a most will not have been (cf: US authors) are deemed to be out of print. This has adverse c sequences not least of which is that the consent of a New Zealand author is not required before a ay Use is made of a book. In other words, US authors must be asked whether they wish to opt in d splay Uses whereas New Zealand authors must opt out. That is a significant difference. Similarly th author publisher procedures in Appendix A make significant distinctions between in and out of print bo ks.

ver, the benefits to authors in the US in having their books displayed to their home audience are n present for New Zealand authors since Google, fearful of the copyright infringement that would be c sioned by display in non US countries will not be displaying there. So, for a New Zealand author, nificant benefit of the settlement falls away.

To hese reasons and others I submit:

- n US authors should have been separately represented as their interests are substantially different
- FAQ and other publicity should have explained better the impact of the settlement on non US rs
- ectively non US authors are not affected in the same way as US authors and are a separate class eed they should be included at all (as I have said, in my view, NZ authors should not be bound by th settlement)

**In ufficient Notice**

not believe that sufficient notice has been provided to individual authors, and in particular to e living outside of the United States also affected by the Class Settlement. The Settlement is f tively a commercial licensing agreement which has not been negotiated through the normal r ess of negotiation and consent, and is being imposed on class-members. This imposition is felt n e strongly by absent class-members whose work is not commercially available in the US. h egal requirement is for individual notice to be sent to all class members whose names and ad esses may be ascertained through reasonable effort. It is clear from media reports that millions of wr ers, including hundreds of New Zealand writers, have not received individual notice of the Pr osed Settlement and that the notice programme in New Zealand was based on the publication of th Summary Notice which is insufficient.

re is also evidence to show that the Summary Notice caused some confusion in New Zealand with n y class members under the impression that it only applied to books published in the US – clearly c he case. Insufficient effort was made to ensure that class members outside the US had a clear ur erstanding of the implications of the Proposed Settlement.

**I dequate Compensation**

e that the compensation to class members is inadequate and unfair. By way of comparison, I r rstand that if Google had been found to have infringed copyright, the minimum statutory damage aw d would have been US$750 per infringement. I note that the efficacy of such penalties in d uraging copyright infringement has recently been reiterated by Congress with respect to music. A e US$60 seems too low, particularly in the case of one-off payments for historical infringements. tive future use payment percentages are too low also. It is of further concern that there are ad ntially high, uncontrollable "costs" which might be deducted from authors' revenues prior to d bution.

**rriding contractual relationships between author and publisher**

Proposed Settlement effectively overrides the contractual relationships between authors and shers, and insufficient clarification is provided should one wish to opt in and the other opt out. I

ıer, the author publisher p·ocedure does not appear to adequately cater for situations where
ş s for or e jurisdiction are held by the publisher and for another by the author. This again appears
o ıse from a lack of understanding of and interest in the impact of the settlement on overseas
ıt ·ors. For example, what happens where a New Zealand author has granted New Zealand rights to
h· ɔublisher but has retained or had reverted to them the non NZ rights? The situation is entirely
ır ·ear and again this suggests that NZ authors must either be removed from the class or the
.e ement disapproved and returned to the parties for amendment.
a ·o note with concern the lack of provision for representation of non US authors and publishers on
the ɔroposed Book Rights Registry.

**ja· ·air treatment of non US public**
H alleged benefits of the Proposed Settlement to the general public apply only in the US. The NZ
ɔt ·ic will gain nothing from the Proposed Settlement.

**· · trust is sues surrounding the significant market power Google would acquire through the**
**:F ·ement**
· ·ieve th· t the sheer sco·e of Google's market power removes the potential for competition. The
·ı ·rtunity for authors to sell electronic rights to anyone else is remote and raises many antitrust
·ˇ ·s.
· ·ddition, I believe that the requirement for class-members to decide whether they wish to be part
ıf e Settlement or not before the Court hearing does not give authors opportunity to make a fully
·r·.med decision. I consider this to be the case whether objecting with respect to my own literary
ıg s; those which I administer as literary heir; as well as those which I administer as agent, for
·ıt ·ors as well as for publishers - a current total of 70 books affected and "claimed" at
·v .googlebooksettlement as at 22 August 2009.

·t·.ge the Court to reject the Proposed Settlement on the grounds as detailed above.

**Pl·.·se provide written receipt of this objection**

'c .s truly

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