

1 THE HONORABLE JOHN C. COUGHENOUR

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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 JUSTIN GAWRONSKI and A.  
11 BRUGUIER, individually and on behalf of  
12 all others similarly situated,

13 Plaintiffs,

14 v.

15 AMAZON.COM, INC., a Delaware  
16 corporation, and AMAZON DIGITAL  
17 SERVICES, INC., a Delaware corporation,

18 Defendants.

19 No. 09-CV-01084-JCC

20 STIPULATION OF SETTLEMENT AND  
21 [PROPOSED] ORDER OF DISMISSAL

22 NOTE ON MOTION CALENDAR:  
23 September 25, 2009

24 This Stipulation of Settlement (“Stipulation”) is made and entered into between Plaintiffs  
25 Justin Gawronski and A. Bruguier (“Plaintiffs”) and Defendants Amazon.com, Inc. and Amazon  
26 Digital Services, Inc. (collectively, “Amazon”) (each, a “Party” and, together, the “Parties”), on  
the terms and conditions set forth below:

27 WHEREAS, Amazon has sold three models of an electronic reading device — the  
28 “Kindle,” sold beginning in November 2007, the “Kindle 2,” sold beginning in February 2009,  
29 and the “Kindle DX,” sold beginning in June 2009 (together, the “Devices” and each such  
30 device, a “Device”) — which allow users to download to, and store on, the Devices digital  
31 copies of electronic books and periodicals sold by Amazon from its retail selection within the  
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1    “Kindle Books,” “Kindle Magazines,” and “Kindle Newspapers” sections of its Kindle Store  
2    (“Works”);

3            WHEREAS, in June 2009, Amazon received notice and take down demands (“Notice”)  
4            alleging that certain Works that Amazon had made available for sale to users of the Devices —  
5            namely, certain editions of the novels *1984* and *Animal Farm* by the author George Orwell and a  
6            compilation containing those novels (together, the “Subject Works”) — were infringing;

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8            WHEREAS, upon receiving this Notice, Amazon, among other things (a) refunded all  
9            monies paid to it by users of the Devices for the Subject Works and (b) in fewer than 2,000  
10           instances, removed copies of the Subject Works from the Devices to which they had been  
11           downloaded by users;

12  
13           WHEREAS, notwithstanding Amazon’s refund of the monies paid by users of the  
14           Devices for the Subject Works, Plaintiffs contend that the removal thereof constituted a violation  
15           of the Terms of Service (“TOS”) subject to which users of the Devices purchased and  
16           downloaded copies of the Subject Works;

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18           WHEREAS, Plaintiffs allege that their annotations of the Subject Works are less useful to  
19           them without the copies of the Subject Works;

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21           WHEREAS, on July 31, 2009, Plaintiffs commenced this action against Amazon (the  
22           “Action”), seeking a declaratory judgment, and alleging violations of 18 U.S.C. § 1030 (the  
23           “Computer Fraud and Abuse Act”) and R.C.W. § 19.86.010, *et seq.* (the “Washington Consumer  
24           Protection Act”) and claims for trespass to chattels, conversion and breach of contract;

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26           WHEREAS, on September 3, 2009, Amazon contacted all users whose copies of the  
Subject Works had been deleted, offering each of them a choice between (1) delivery of a new

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1 copy of the Subject Work(s) previously purchased, at no charge, and (2) receipt of thirty dollars  
2 (\$30.00) in the form of a check or an Amazon gift card; and

3 WHEREAS, Plaintiffs, through their counsel, have conducted an investigation of the  
4 facts and analyzed the relevant legal issues and, although Plaintiffs and their counsel believe that  
5 the claims asserted in the Action have substantial merit, they also have examined the benefits to  
6 be obtained under the settlement set forth in this Stipulation, and have considered the risks, costs  
7 and delays associated with the continued prosecution of the Action and the likely appeals of any  
8 rulings in favor of either Plaintiffs or Amazon;

9 WHEREAS, based on current circumstances, Plaintiffs believe they would not likely be  
10 able to certify classes under Rule 23(b)(3) because of Amazon's offer to fully reimburse affected  
11 consumers for all Subject Works previously removed by Amazon from Devices and to restore  
12 notes and annotations;

13 WHEREAS Amazon's undertakings below, the benefits of which will apply not just to  
14 Plaintiffs, but also will extend to other users of the Devices, provide substantially all the relief  
15 Plaintiffs could have obtained had they pursued class certification pursuant to Federal Rule of  
16 Civil Procedure 23(b)(2);

17 WHEREAS each of the Parties and counsel believes, after fully investigating the facts  
18 and analyzing the legal issues, in consideration of all the circumstances and after arms' length  
19 settlement negotiations between counsel, that its interests are best served by entering into the  
20 settlement set forth in this Stipulation;

21 NOW, THEREFORE, it is agreed by the undersigned on behalf of Plaintiffs and Amazon  
22 that all Claims (as defined below) of Plaintiffs against Amazon be settled, compromised and  
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1 released, and that the Action be dismissed with prejudice, without costs to any Party (except as  
2 provided below), on the following terms and conditions:

3 1. For copies of Works purchased pursuant to TOS granting “the non-exclusive right to  
4 keep a permanent copy” of each purchased Work and to “view, use and display [such Works] an  
5 unlimited number of times, solely on the [Devices] . . . and solely for [the purchasers’] personal,  
6 non-commercial use,” Amazon will not remotely delete or modify such Works from Devices  
7 purchased and being used in the United States unless (a) the user consents to such deletion or  
8 modification; (b) the user requests a refund for the Work or otherwise fails to pay for the Work  
9 (e.g., if a credit or debit card issuer declines to remit payment); (c) a judicial or regulatory order  
10 requires such deletion or modification; or (d) deletion or modification is reasonably necessary to  
11 protect the consumer or the operation of a Device or network through which the Device  
12 communicates (e.g., to remove harmful code embedded within a copy of a Work downloaded to  
13 a Device). This paragraph does not apply to (a) applications (whether developed or offered by  
14 Amazon or by third parties), software or other code; (b) transient content such as blogs; or (c)  
15 content that the publisher intends to be updated and replaced with newer content as newer  
16 content becomes available. With respect to newspaper and magazine subscriptions, nothing in  
17 this paragraph prohibits the current operational practice pursuant to which older issues are  
18 automatically deleted from the Device to make room for newer issues, absent affirmative action  
19 by the Device user to save older issues.

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22 2. Nothing in the preceding paragraph is intended to preclude any consumer from bringing  
23 any claim based on any future act or omission by Amazon.

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1 3. As Amazon offered on September 3, 2009 to users of Devices who purchased a copy of a  
2 Subject Work, and from whose Devices Amazon removed the Subject Work, such users may  
3 elect to receive the previously purchased Subject Work, at no charge, or, alternatively, to receive  
4 a check or an Amazon gift card in the amount of thirty dollars (\$30.00). Those who elect to  
5 receive the previously purchased Subject Work will have any and all annotations or notes made  
6 prior to removal of the Subject Work restored automatically.  
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8 4. Amazon will pay Plaintiffs' counsel a fee of \$150,000, subject to the understanding that  
9 KamberEdelson LLC will donate its portion of that fee to a charitable organization that promotes  
10 literacy, children's issues, secondary or post-secondary education, health, or job placement.  
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12 5. Other than as set forth herein, Amazon shall not be liable for any fees or expenses of  
13 Plaintiffs or Plaintiffs' counsel in connection with the Action.  
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15 6. Plaintiffs agree that, to the fullest extent permitted by law, neither this Stipulation nor the  
16 fact of it, nor any act performed, nor any statements made publicly or otherwise in responding to  
17 concerns raised by Plaintiffs or other users, nor any document negotiated or executed pursuant to  
18 or in furtherance of it, is or may be deemed to be or may be used as an admission or concession  
19 of, or evidence of any liability or violation of any law by Amazon in any court, administrative  
agency or other tribunal.  
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21 7. As of the date on which the Action is finally dismissed with prejudice and without further  
22 action, Plaintiffs, by entry of the Order of Dismissal with Prejudice, fully, completely and  
23 generally forever, to the fullest extent permitted by law, release Amazon and all of its  
24 subsidiaries, affiliates and joint ventures, and each and all of its and their agents, employees,  
25 representatives, predecessors, successors, assigns, shareholders, officers, directors, distributors,  
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**STIPULATION OF SETTLEMENT AND  
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1 customers, attorneys, insurers, heirs, executors and administrators, from any and all claims,  
2 rights, demands, obligations, agreements, contracts, representations, promises, liens, accounts,  
3 debts, liabilities, expenses, damages, costs, interest, attorney's fees, judgments, orders, and  
4 causes of action of every kind and nature, whether known or unknown, suspected or  
5 unsuspected, existing or claimed to exist, legal or equitable, including, but not limited to, all  
6 claims for damages and any other form of relief (each a "Claim") arising out of the facts,  
7 circumstances and claims alleged in the Action (collectively, the "Released Claims").

8. Plaintiffs acknowledge that they have read, considered and understand the provisions  
9 and significance of Section 1542 of the California Civil Code, and any and all provisions, rights  
10 and benefits of any United States federal, state or territorial law, rule or regulation or principle of  
11 common law that is similar, equivalent or identical to Section 1542, which presently provides as  
12 follows:

13 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS  
14 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT  
15 TO EXIST IN HIS OR HER FAVOR AT THE TIME OF  
16 EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM  
17 OR HER MUST HAVE MATERIALLY AFFECTED HIS OR  
18 HER SETTLEMENT WITH THE DEBTOR

19 Plaintiffs expressly waive any and all rights they have or may have under Section 1542 of the  
20 California Civil Code as now worded or hereafter amended, or such similar, equivalent or  
21 identical provisions, rights or benefits. In connection with this waiver, Plaintiffs acknowledge  
22 being aware that they may hereafter discover Claims presently unknown or unsuspected facts in  
23 addition to or different from those which they now know or believe to be true with respect to the  
24 Released Claims and that they expressly waive and fully, finally and forever release any known  
25 or unknown, suspected or unsuspected, contingent or non-contingent Released Claim.

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1 9. The Parties agree that the United States District Court for the Western District of  
2 Washington shall have exclusive jurisdiction over them for all purposes relating to the  
3 implementation and effectuation of this Stipulation and all provisions thereof. Any and all  
4 disputes, requests or petitions regarding or arising out of the enforcement, construction,  
5 administration or interpretation of the Stipulation must be made, if at all, to that Court by means  
6 of commencing an action seeking enforcement of the terms of this Stipulation. The Court shall  
7 retain jurisdiction to resolve disputes arising under this Stipulation until January 1, 2011.

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9 10. This Stipulation contains the entire agreement among the Parties and supersedes any prior  
10 agreements or understandings between them. It shall be construed as if drafted by all the Parties.

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12 11. Having obtained the express permission and consent of their respective clients, the  
13 undersigned counsel hereby consent to the terms and conditions set forth above by signing  
14 below. The undersigned signatories represent that they are fully authorized to execute and enter  
15 into the terms and conditions of this Stipulation on behalf of the respective persons or entities for  
16 whom they have signed it.

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18 12. The terms and conditions of this Stipulation shall be construed and enforced in  
19 accordance with, and governed by, the laws of the State of Washington, without regard to any  
20 applicable choice of law or conflicts rules.

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1 DATED: September 25, 2009.  
2

3 KAMBER EDELSON, LLC  
4

5 /s Michael J. Aschenbrener  
6 Michael J. Aschenbrener  
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36 *Amazon Digital Services, Inc.*

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## **ORDER**

Having reviewed the parties' stipulation of settlement, The Court hereby GRANTS dismissal of this action with prejudice.

## IT IS SO ORDERED.

Dated this \_\_\_\_\_ day of September, 2009.

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The Honorable John C. Coughenour  
United States District Judge

Presented by:

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