

Proposed Settlement fall far short of resolving its numerous deficiencies.¹ In fact, instead of curing the Original Proposed Settlement's defects, the New Proposed Settlement exacerbates some already-existing problems while creating additional ones.

Because the New Proposed Settlement fails in several important respects to satisfy the requirements of Rule 23, and also fails to safeguard the due process rights of absent class members, I continue to urge the Court to reject the proposal of the settling parties, and to deny the request for certification of the proposed settlement class and sub-classes.

Submitted with this Supplemental Objection is a Notice of Intent to Appear at the Fairness Hearing, currently scheduled for February 18, 2010.

DISCUSSION OF THE NEW PROPOSED SETTLEMENT

Below I discuss several problems with the New Proposed Settlement which, along with those discussed in my Objection, are grounds for rejecting the proposal of the settling parties, and for denying the request for certification of the proposed settlement class and sub-classes.

1. Notice Issues

As explained in my Objection, the efforts to notify absent putative class members about the Original Proposed Settlement did not conform to the requirements of Rule 23 and due process. *See* Exhibit A at 13-24. The supplemental notice program undertaken in connection with the New Proposed Settlement not only failed to remedy the shortcomings in the initial notice program,² but compounded already significant notice problems.

¹ For purposes of this Supplemental Objection, I will refer to the prior version of the proposed settlement as the "Original Proposed Settlement," and the current version as the "New Proposed Settlement."

² As the Supplemental Notice itself observes, it was "not designed to replace the original Notice." Therefore, receipt of the Supplemental Notice by an absent putative class member would not remedy the failure to have provided individual notice to that person during the Original Notice Program.

The settling parties proposed to the Court that they send a Supplemental Notice by email or postal mail to “all persons who provided contact information on the official settlement website or on a Claim Form, who opted out of the original Settlement Agreement, or who filed an objection, amicus position or other statement with the Court.” See Proposed Order Granting Preliminary Approval of Amended Settlement Agreement (Dkt. 772) at ¶ 20.³ The settling parties acknowledge “[t]he notice program for the original settlement was broader [than for the New Proposed Settlement] and included an extensive publication campaign as well as more broadly disseminated direct notice.”⁴

The settling parties attempt to justify circumscribed notice efforts regarding the New Proposed Settlement because “the core terms . . . are the same” as in the Original Proposed Settlement, and because the amendments “do not *materially* impair” the rights of absent putative class members and “in *many* respects confer enhanced benefits” on absent putative class members.⁵ This rationale for a Supplemental Notice Program even less comprehensive than the Original Notice Program does not withstand scrutiny.

Even if we indulge the dubious claim that in the context of this agreement there are “core” terms (presumably distinguished from “non-core” terms, which one would imagine the settling parties consider relatively unimportant), the assertion that no “core” terms have been amended is demonstrably false. The proposed amendments – which apparently took at least two

³ For purposes of this Supplemental Objection, I will refer to the notice program concerning the Original Proposed Settlement as the “Original Notice Program,” and the notice program concerning the New Proposed Settlement as the “Supplemental Notice Program.”

⁴ Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Approval of Amended Settlement Agreement (Dkt. 769) at 25.

⁵ Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Approval of Amended Settlement Agreement (Dkt. 769) at 25 (emphasis added); see also *id.* at 1 (claiming that amendments to the Original Proposed Settlement “generally benefit” members of the putative class).

months to negotiate – include substantial alterations to the definitions of “Book”⁶ and “Insert”⁷ (which the settling parties called “important terms” in the Original Notice),⁸ modifications to the description of how Google will determine whether a Book is “Commercially Available,”⁹ and numerous other substantive changes which affect the meaning and operation of the New Proposed Settlement (including several discussed below).

Truncated notice of the *actual* proposed settlement terms also cannot be justified here on the grounds that all differences between the Original Proposed Settlement and the New Proposed Settlement are solely beneficial to every absent putative class member. Such a claim could not be supported factually – and the settling parties do not appear to even make it. Instead, the settling parties contend the changes do not “materially” impair the rights of absent putative class members, and that “in *many* respects confer enhanced benefits” on absent putative class members. Thus, even if Rule 23 and the Due Process Clause permit relaxed supplemental notice in rare cases where amendments to a settlement agreement are limited to unquestionably beneficial changes, this is not such a case.¹⁰ Moreover, given the extraordinary nature of this proposed settlement – including its breadth, its predominantly commercial nature, the compelled transfer to Google and others of intellectual property rights owned by class members, and the contemplated release of Google and others from liability for future conduct which would otherwise constitute copyright infringement – in this case, *all* putative class members are entitled

⁶ See Amended Settlement Agreement § 1.19.

⁷ See Amended Settlement Agreement § 1.75.

⁸ See Notice of Class Action Settlement, Settlement Agreement, Attachment I, at 6.

⁹ See Amended Settlement Agreement § 3.2(d)(i).

¹⁰ This case shares little in common with the few district court cases cited by the settling parties as support for the notion that truncated supplemental notice is adequate here. See Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Approval of Amended Settlement Agreement (Dkt. 769) at 25-26.

to be notified about *all* changes to the Original Proposed Settlement, so each can decide for himself or herself how those changes might affect the decision whether to opt out or become subject to the terms of the New Proposed Settlement.¹¹ In this case, Rule 23 and due process requirements do not permit otherwise.

2. The Proposed “Unclaimed Works Fiduciary” and “Unclaimed Funds”

The New Proposed Settlement contemplates the appointment of an “independent fiduciary” with responsibility to “represent the interests of Rightsholders of unclaimed Books and Inserts with respect to exploitation of their works.” Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Approval of Amended Settlement Agreement (Dkt. 769) at 9; *see* Amended Settlement Agreement § 6.2(b)(iii).

As explained in my Objection, owners of orphan works have materially distinct interests from other members of the author sub-class, and they should have had their own class

¹¹ In this case, even receipt of the Original Notice was insufficient for an absent putative class member to understand the nature of the proposed settlement and its implications. As University of Chicago law professor Richard Epstein recently observed: “Any mortal who reads the Google settlement, as I have, will be defeated by its obscurity and complexity.” Richard A. Epstein, *Google-itis: Beware of Class Action Settlements*, Financial Times (Jan. 4, 2010); *see also* Statement of Marybeth Peters, Hearing on Competition and Commerce in Digital Books: The Proposed Google Book Settlement (Sept. 10, 2009) (attached hereto as Exhibit B) (observing that, for the United States Copyright Office, “absorb[ing] the many terms and conditions of the settlement” was “a process that took several months due to the length and complexity of the documents”). My experience is similar to Professor Epstein, the Copyright Office, and others who have focused attention on this proposed settlement. Despite being an attorney with considerable background in class actions and complex litigation, it took me at least 15 hours to read and understand even the basic provisions and structure of the proposed settlement. It is simply implausible that more than a handful of authors without a legal background could understand the settlement, *let alone appreciate its implications for their own rights and interests*, without spending considerable time and/or without hiring an attorney. It should be no surprise that relatively few non-corporate putative class members have submitted detailed objections concerning the legality of the proposed settlement. If one or more authors had hired me to prepare the Objection I submitted to the Court in August 2009, the cost for my time spent on this matter would have been over \$100,000. Even providing basic counseling to an author about the proposed settlement and its implications for a given author would cost that author thousands of dollars in attorney’s fees.

representatives and counsel. *See* Exhibit A at 31-35.¹² Revision of the settlement agreement to include an “Unclaimed Works Fiduciary” appears to be an acknowledgement of the distinct interests of owners of orphan works.¹³ It does nothing, however, to rectify the problem that owners of orphan works were not adequately represented during settlement negotiations, which were undertaken by class representatives who are not owners of orphan works, and by the same counsel representing owners of non-orphan works. *Ex post* representation by a “Fiduciary” after a settlement becomes final and binding cannot cure inadequate representation leading up to that point, or the failure to satisfy the requirements of Rule 23 during litigation and the settlement process.

Moreover, notwithstanding the addition of a Fiduciary, the New Proposed Settlement still permits “unclaimed funds” to be used for administrative costs of the Registry related to locating owners of unclaimed works, and provides for distribution of those funds to third-party organizations after ten years. *See* Amended Settlement Agreement § 6.3. As noted in my Objection, provisions permitting the allocation to third-parties of revenues owed to a class member which go unclaimed for a period of time are likely to have a disproportionately adverse affect on owners of orphan works. *See* Exhibit A at 33. The provisions concerning “unclaimed

¹² I maintain my view that the proposed settlement affects the rights of *at least* four groups of authors, each with distinct interests, and each requiring representation by separate counsel. *See* Exhibit A at 31-35. Other objectors have made compelling arguments which suggest that separate sub-classes might be required to represent the interests of non-U.S. putative class members.

¹³ Although the Unclaimed Works Fiduciary would have responsibility for all “unclaimed works,” whether or not they are “orphans,” it appears this amendment was made in response to many objections and concerns related to the rights of owners of “orphan works.” *See, e.g.,* Brad Stone & Miguel Helft, *Terms of Digital Book Deal With Google Revised*, New York Times (Nov. 14, 2009) (“The revisions to the settlement primarily address the handling of so-called orphan works, the millions of books whose rights holders are unknown or cannot be found. The changes call for the appointment of an independent fiduciary, or trustee, who will be solely responsible for the decisions regarding orphan works.”).

funds” not only raise serious Rule 23 problems, but may constitute a “taking” prohibited by the U.S. Constitution’s Fifth Amendment. *Cf.* Exhibit A at 13 n.25.

3. The Author-Publisher Dispute Resolution Procedures

My Objection explained that the Original Proposed Settlement failed to satisfy the requirements of Rule 23(e)(2) because it would complicate and/or frustrate existing contractual agreements between authors and publishers. *See* Exhibit A at 29-31. My Objection specifically explained that the Author-Publisher Procedures set out in Attachment A, purporting to “establish procedures for determining the[] respective rights” of authors and publishers, conflicts with the Rules Enabling Act, 28 U.S.C. 2072(b), and raises due process concerns, by seeking to superimpose the Author-Publisher Procedures over existing contractual relationships, thereby modifying or displacing existing contract rights of authors and/or publishers. *See* Exhibit A at 30-31.

My Objection also observed that even though the settling parties described the Author-Publisher Procedures as “an important part of the Settlement,” those Procedures failed to account for situations where an author or the author’s publisher opts out, *but the other does not*. *See* Exhibit A at 31.

Apparently acknowledging that the Author-Publisher Procedures cannot be made to apply to someone who opts out, the New Proposed Agreement modifies the Author-Publisher Procedures to state: “Nothing in these Author-Publisher Procedures shall create any rights in favor of, or impose any obligation upon or with respect to, anyone who opted out of the Amended Settlement Class.” *See* Amended Settlement Agreement, Attachment A, § 11.7. This amendment highlights at least two significant problems with the New Proposed Settlement – but does not resolve either.

First, this amendment reveals a material defect in the notice provided to (some) absent putative class members, which renders it inadequate. Those absent putative class members who received the Original Notice were told that the Author-Publisher Procedures are “an important part of the Settlement.” *See* Notice of Class Action Settlement, Settlement Agreement, Attachment I, at 7. However, absent putative class members were not informed that these Procedures *would not apply* unless both the author and publisher involved in a given relationship *both* become bound by the settlement – and absent putative class members were compelled to decide whether to opt out of the settlement without the benefit of this knowledge.¹⁴ As for the Supplemental Notice, it does not mention the issue, or even make reference to the new language in the Author-Publisher Procedures.

Second, this amendment to the Author-Publisher Procedures highlights a structural problem with the proposed settlement. While it is now clear the “important” Author-Publisher Procedures *do not apply at all* if either an author or the author’s publisher have opted out of the settlement, the New Proposed Settlement provides no alternative mechanism for resolving author-publisher disputes in situations where either an author or publisher are not participating in the settlement. This leaves an enormous gap in the operation of the proposed settlement – a gap about which absent putative class members have not been informed.

¹⁴ Absent putative class members were also compelled to decide whether to opt out of the settlement without knowing whether the Author-Publisher Procedures would in fact apply to them, because a given putative class member would not know what his or her counterparty had decided until after the deadline for his or her own decision.

4. Competition Issues

The settling parties have made several amendments to the Original Proposed Settlement which they identify as “addressing competition concerns.”¹⁵ While these amendments are improvements, they are far from sufficient to prevent the significant anticompetitive effects which would result from approval of the New Proposed Settlement.¹⁶

What these amendments fail to address is the fundamental fact that approval effectively would vest Google with certain exclusive rights over numerous works – rights which potential competitors have no prospect of obtaining in the marketplace. *See* Statement of Interest of the United States of America Regarding Proposed Class Settlement (Dkt. 720) at 23 (observing the proposed settlement would “grant Google de facto exclusive rights for the digital distribution of orphan works,” and “Google’s competitors are unlikely to be able to obtain comparable rights independently.”). This would put Google at a significant and enduring competitive advantage

¹⁵ *See* Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Approval of Amended Settlement Agreement (Dkt. 769) at 6-8.

¹⁶ One of the amendments intended to address competition concerns is a provision in the Proposed Final Judgment and Order of Dismissal, which states: “This Final Judgment and Order of Dismissal is not intended to and does not provide any antitrust immunities to any Persons or parties.” *See* Amended Settlement Agreement, Attachment L at ¶ 17; *see also* Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Approval of Amended Settlement Agreement (Dkt. 769) at 8. While the disclaimer of antitrust immunity is welcome, it raises further questions that warrant consideration by the Court. For instance, if the settlement were approved, but parts of the settlement or the arrangements for which it provides were later challenged successfully under the antitrust laws, how would that affect the validity of the rest of the settlement? Furthermore, if we indulge the fiction that all absent putative class members have received proper notice of the settlement, those who elect not to opt out will have done so after taking into account the proposal as a whole. Yet, if the New Proposed Settlement is approved, the commercial arrangements it would establish will be subject to credible antitrust lawsuits. If those commercial arrangements are subsequently altered as a result of government or private antitrust lawsuits, the comprehensive agreement to which absent class members became bound shall cease to exist, and class members may then wish to withdraw from the settlement. The uncertain future of the New Proposed Settlement, even after Rule 23 proceedings are complete, is yet another reason for the Court to reject it.

over any potential competitor for the distribution of the works covered by the settlement. *See id.* at 24-25.¹⁷

While the Rule 23 and due process considerations discussed above provide ample grounds for rejecting the New Proposed Settlement, the Court should decline the settling parties' invitation to remake the competitive landscape by judicial fiat under the guise of resolving a class action lawsuit.¹⁸ Changes of the nature sought here should result from competition in the marketplace or through the legislative process.¹⁹

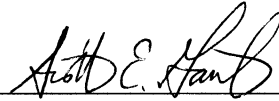
¹⁷ When examining competitive issues, the Court should also consider the impact the settlement might have on Google's power in other markets, such as Internet Search, in which Google already has a dominant position.

¹⁸ My Objection explained that not only Rule 23, but also Article III of the U.S. Constitution and Federal Rule of Civil Procedure 82, preclude the Court from approving the commercial component of the settlement. *See* Exhibit A at 11. In its September 2009 submission, the Department of Justice observed that, "[a]s a *theoretical* matter, a properly defined and adequately represented class of copyright holders *may* be able to settle a lawsuit over past conduct by licensing a broader range of conduct to obtain global 'copyright peace.'" *See* Statement of Interest of the United States of America Regarding Proposed Class Settlement (Dkt. 720) at 6 (emphasis added). The Department of Justice also observed that "[a]t least one federal court of appeals has approved a class action settlement with a forward-looking licensing component covering claims that had not yet accrued," citing *Uhl v. Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d 978 (7th Cir. 2002). *See id.* Even if the Department of Justice is correct about the theoretical outer bounds of Rule 23 and the authority of federal courts to approve class action settlements including "forward-looking" releases, *Uhl* – which involved the release of the Defendant's liability for conduct which was already planned at the time the lawsuit was filed, and was the subject of Plaintiffs' requests for relief – bears little resemblance to this case. *See Uhl*, 309 F.3d at 984-85 (discussing "ripeness" argument "raised at oral argument" by an objector). Moreover, *Uhl* itself does not appear to have been relied on or cited by any other federal court of appeals in support of the proposition identified by the Department of Justice, or by any district court outside of the Seventh Circuit, where *Uhl* is controlling law. If *Uhl* is the best authority supposedly supporting the release of future claims for future conduct proposed here, that fact itself demonstrates the unprecedented nature of this proposed settlement.

¹⁹ *See* Statement of Marybeth Peters, Hearing on Competition and Commerce in Digital Books: The Proposed Google Book Settlement (Sept. 10, 2009) (attached hereto as Exhibit B) ("In the view of the Copyright Office, the settlement proposed by the parties would encroach on responsibility for copyright policy that traditionally has been the domain of Congress We are greatly concerned by the parties' end run around legislative process and prerogatives.").

January 2010

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Scott E. Gant", written over a horizontal line.

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