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April 24, 2009

By Hand

Honorable Denny Chin
United States District Judge
Southern District of New York
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, New York 10007-1312

Re: *The Authors Guild, Inc., et al. v. Google, Inc.*, No. 05 Civ. 8136 (S.D.N.Y.) (DC)

Dear Judge Chin:

We have been recently retained to represent authors and their heirs and assigns, including The Palladin Group for John Steinbeck and Thomas Myles Steinbeck, Catherine Ryan Hyde, The Philip K. Dick Testamentary Trust, Arlo Guthrie, Michael W. Perry, Eugene Linden, and James Rasenberger (collectively the "Subject Authors"), in the above-referenced matter. We write on behalf of the Subject Authors to request a four-month extension of the May 5, 2009, deadline for opting out and objecting to the proposed settlement preliminarily approved on November 14, 2008, and a corresponding extension of the final settlement/fairness hearing now scheduled for June 11, 2009, or a scheduling conference at the Court's convenience. The Subject Authors have made no prior request for an adjournment in this matter.¹

The scope of the proposed settlement is unprecedented. For authors who do not opt out, the settlement if approved would impose a complex scheme for the wholesale allocation of rights and remedies, and compensation for exploitation of those rights, in the digital world. And it would cement that scheme in perpetuity in an area of commerce that has seen explosive

¹ Pursuant to the Court's Individual Practice 1.E(4), on the morning of Tuesday, April 21, we sought the consent of the named parties to this request in anticipation of submitting this request to the Court that day. In response, counsel for the parties requested that we delay submitting the request to allow them time to confer regarding their response. We agreed to that delay, and have engaged in good-faith communications with counsel since. We now understand through counsel that the parties may be willing to agree to an extension of time, but as we understand it significantly less time than we believe is essential to address substantial concerns of the type outlined in this letter. We have so advised counsel for the parties and – in order to bring this issue to the Court's attention as promptly as possible and avoid potential prejudice to this application due to additional delay – accordingly submit this request for the Court's consideration.

growth in just the last five years, and that may well prove to be the most important and valuable channel for the distribution and exploitation of creative works. Even assuming perfect notice of the settlement – an assumption that, for reasons we discuss below, is not well founded – the two months’ notice afforded to authors is woefully inadequate to digest the extraordinarily complex Settlement Agreement (the “Agreement”), attempt to gauge its potential present and long-term future implications in a vital marketplace, and make a reasoned judgment about whether to opt out, object, or appear at the fairness hearing.

This is not a typical class action settlement, in which parties decide whether value offered in settlement is sufficient to compensate them for a past injury – it is a decision about perpetual future rights. For at least the following three reasons, authors need and frankly deserve a relatively brief period of additional time in order to try to understand their rights: *First*, two months’ time is insufficient to understand the implications of a settlement of this scope; *Second*, substantial defects in notice of the settlement undermine authors’ ability to assess their rights; and, *Third*, more time is required simply to understand the complex terms of the Agreement.

The Notice Provides Insufficient Time for Authors to Assess Their Rights

The proposed settlement is enormously complex and wide-ranging in scope and its determination of future rights. The Agreement is 334 pages long, including 134 pages of dense text and 200 pages of equally dense “attachments” that are essential to a meaningful understanding of the Agreement. If approved, it would bind nearly every copyright owner of every book currently under copyright ever published almost anywhere in the world.

Yet, for its impressive complexity and breadth, the world-wide class notice program only began in January and, even by terms of the Order Granting Preliminary Approval filed November 17, 2008 (the “Order”), was not completed until February 27. *See also* http://news.cnet.com/8301-1023_3-10162155-93.html (last visited Apr. 16, 2009) (noting that as of February 11 there was “still some more notice to be provided”). Moreover, our preliminary investigation suggests that notice to at least one well-known author was dated April 8, 2009. The program at best thus gives authors and other rights holders March and April of this year – and perhaps far less in some cases – to attempt to assess the potential implications of the settlement, make a reasoned judgment about whether to participate and, if so, whether to pursue objections to terms that affect their fundamental rights. While this period may be sufficient for a “typical class action,” it is not for this settlement, which is truly unprecedented in its scope, complexity, and effort to bind rightsholders conclusively to future exploitations of their digital rights.

Substantial Defects In Notice Undermine Authors’ Ability to Assess Their Rights

Substantial defects in the official Notice in this case strongly support the need to allow authors additional time to understand their rights. *First*, to satisfy Rule 23, “individual notice” must be provided to all class members “who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). Yet our investigation indicates that individual notice has not been provided to at least some authors who are readily identifiable, suggesting that the parties may not have satisfied this fundamental obligation. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (“individual notice to identifiable class members is not a discretionary consideration . . .

It is, rather, an unambiguous requirement”). While our investigation is admittedly preliminary, more time is required to develop this evidence to determine whether “individual notice” has been provided in compliance with Rule 23.

Second, to the extent that authors have received the Notice, our investigation suggests that the Notice may be defective because it does not answer even the basic question of which works are covered by the settlement and, if covered, how those works fit into complex rights- and compensation-determinative classifications that did not exist before the advent of the settlement. In order to meet the requirements of Due Process, “[n]otice must ‘fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings[.]’” *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982). But instead of identifying their works, the Notice advises that authors “should” undertake Internet research to determine whether their works are in the Google Books Database (the “Database”). (See Notice, Question 5 at 6.) Assuming authors can find their works, they must further attempt to determine whether Google has classified those works as “Commercially Available” or not and “In-Print” or “Out-of-Print.” (See *Id.*, Question 9 at 11.) These classifications – literally unknowable on the face of the Notice – determine fundamentally how authors’ works may be exploited in the digital world and whether they will be compensated for those uses. (See *generally Id.*, Question 9 at 11-13 (outlining various uses that may be made of digitized books depending on their classification); Question 9 at 17-19 (outlining fee and revenue models based on uses in accordance with classifications).)

Compounding these substantial problems, *authors report that their efforts to answer these critical questions have been undermined – if not thwarted entirely – by serious flaws in the Database*. Authors with whom we have spoken report that they cannot easily access the Database, and even with access cannot determine the classifications of their works. For example, it took several days and multiple communications with the Database administrator for one author’s representative to secure the “verification code” required to access the Database. Once in the Database, authors report that information regarding their works was hard to find and often wrong. In particular, determination of the critical “Commercially Available” classification requires technological savvy many authors may not possess. The Database search results do not include the classifications. Instead, to determine whether a work is deemed “Commercially Available,” an author must first locate their work, then download deeper information regarding that work “as a spreadsheet,” then view the results in a third-party application on their own computer. More time is required for authors to have a meaningful opportunity to determine the classification of their works and analyze their rights depending on those classifications.

Third, to the extent that authors have both received notice and been able to determine the classifications of their works, the Notice still may be defective because authors report that it is unclear and filled with terms that are so ambiguous that they leave authors struggling to discern their meaning and their implications for their rights. Notice is only “adequate if it may be understood by the average class member.” *Wal-Mart Stores, Inc. v. VISA U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005). See also, Fed. R. Civ. P. 23(c)(2)(B) (notice must be clear, concise, and “in plain, easily understood language”). For example, the Notice defines the term “Non-Display Uses” to mean “uses that do not involve displaying any content from a Book to the public.” (Notice, Question 9(G).) To any author – and particularly one not

immersed in the latest developments in Internet marketing, ad sales, and data mining – this circular definition is meaningless. Even for a tech-savvy author, the definition sheds little light on such potentially determinative issues as whether Google would be permitted to sell a famous line as an advertising “keyword.” Nor does the Notice expressly disclose, as the Agreement does, the fact that under the Agreement authors would release Google from all potential trademark claims relating to such a use. (See Agreement § 10.1(f).) Moreover, while the Notice mentions Google’s rights to brief “Snippet Displays,” (see, e.g., Notice, Question 9(F)(3)), it fails to mention that Google may license those displays to appear on *third-party* websites. (See Agreement § 3.9.)

The Enormous Complexity of the Agreement Alone Justifies an Extension of Time

Finally, even authors who know of and have studied the Agreement need more time to decipher its complex terms and analyze its intricate structures for the administration of rights and remedies in the digital world. Indeed, as United States Register of Copyrights and noted copyright authority Marybeth Peters said as recently as March 13, 2009, at a conference at Columbia Law School: “*I’m still struggling to understand what the settlement really says. . . . There’s a lot of questions. There’s a lot of terms that seem ambiguous to me.*” (See <http://media.law.columbia.edu/kernochan/kernochangoogle090313tape1t.html> (last visited Apr. 20, 2009) (emphasis supplied).) Among the critical questions that remain unanswered and require more time to study and attempt to resolve, are the following:

- **“Non-Display Uses”:** The Agreement defines “Non-Display Uses” as “uses that do not display Expression from Digital Copies of Books or Inserts to the public.” (Agreement § 1.91.) The Notice confirms that authors “may only prevent Google from making Non-Display Uses” if they timely request complete removal of their work from the Database. (Notice, Question 9(G).) The Agreement further releases all trademark claims that an author may bring against Google. (Agreement § 10.1(f).) Read together, these terms seem to suggest that authors would have no recourse if Google used their names and works against their wishes in ways that violate the Lanham Act. Authors need more time to understand these provisions, and the ways in which the Agreement may affect their non-display copyright, trademark, and other rights.
- **Rights in “Inserts”:** Authors whose works are included as inserts in books have encountered great difficulty in determining the scope of their rights under the settlement. One critical concern is the implications of opting out: if an author of an insert wishes to exclude that work from Non-Display Uses, or opt-out of the settlement entirely, it is unclear whether they have any right to do so if the rightsholder in the book containing the insert does not also opt out of the settlement. (See *Id.* §§ 3.3(b), 3.5(b)(i).)²

² The Agreement is particularly confounding as to the treatment of unregistered works contained within digitized books. The Agreement seems to furnish no method by which authors of such unregistered components can exclude them from either display or non-display uses in books that remain in the Database, potentially impinging significantly on such authors’ rights. Further confounding this

- **Dispute Resolution Between Authors and Publishers:** Due to the unprecedented scope of the settlement and the wide array of possible future uses of digitized works, authors are struggling to determine what sort of disputes may arise between authors and publishers – who often hold complementary rights in books – and how those disputes may be resolved under the terms of the Agreement. (*See Id.*, Attachment A, App. VII.) Absent more time to consider these issues, authors are unable to make informed decisions regarding whether these procedures are acceptable.

* * *

At the most basic level authors have a right to know whether, if they do not opt out of the settlement, their books or lyrics will show up next to targeted advertising content or be syndicated to appear on an obscene or racist third-party website, whether they have remedies with regards to such uses, and whether they will be compensated for such uses. After such a strikingly brief period to learn of and study such a complex agreement, most authors do not yet know the answers to even these basic questions.

For all of the foregoing reasons, we respectfully request a four-month extension of the May 5, 2009, deadline for opting out and objecting to the proposed settlement, and a corresponding extension of the final settlement/fairness hearing now scheduled for June 11, 2009. Pursuant to the Court's Individual Practice 1.E, please find attached a proposed Revised Scheduling Order reflecting the proposed revised dates.

Respectfully submitted,

Handwritten signature of Andrew C. DeVore in black ink, with a circled 'RUP' next to it.

Andrew C. DeVore

Cc: Michael J. Boni (by e-mail)
Bruce P. Keller (by e-mail)
Daralyn J. Durie (by e-mail)

analysis, the Supreme Court will hear argument later this year in *Reed Elsevier, Inc. v. Muchnick*, which will determine whether federal courts have subject matter jurisdiction over claims of infringement of unregistered works. 129 S. Ct. 1523 (Mar. 2, 2009).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE AUTHORS GUILD, INC., ASSOCIATION :
OF AMERICAN PUBLISHERS, INC., et al., :
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Plaintiffs, :
 :
v. : No. 05 Civ. 8136 (DC)
 :
GOOGLE INC., :
 :
Defendant. :
 :
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[PROPOSED] SCHEDULING ORDER

WHEREAS certain authors and their heirs and assigns, including The Palladin Group for John Steinbeck and Thomas Myles Steinbeck, Catherine Ryan Hyde, The Philip K. Dick Testamentary Trust, Arlo Guthrie, Michael W. Perry, Eugene Linden, and James Rasenberger (the "Subject Authors"), have requested additional time in order to opt-out or object to the proposed settlement in the above-captioned matter preliminarily approved on November 14, 2008;

WHEREAS, for the reasons set forth in their letter requesting an extension of time dated April 21, 2009, the Subject Authors seek the additional time in order to (1) digest the Settlement Agreement, (2) attempt to gauge its potential present and long-term future implications, and (3) make a reasoned judgment about whether to opt out, object, or appear at the fairness hearing.

NOW, THEREFORE, the parties' request for a four-month adjournment is granted as follows:

- 1. The Opt-Out Deadline shall be September 7, 2009.
- 2. The final settlement/fairness hearing shall be held on October 12, 2009 at 1:00 p.m.

3. The deadline for any member of the Settlement Class who does not exclude himself or herself to object to (i) the proposed Settlement Agreement; (ii) certification of the Settlement Class or one or both of the Sub-Classes for purposes of the settlement; (iii) dismissal of the Action or the judgment and releases to be entered with respect thereto; and/or (iv) Author Sub-Class Counsel's application for attorneys' fees and reimbursement of expenses in the Action shall be September 7, 2009.

4. The deadline for any attorney representing a Settlement Class member in this litigation to file a notice of appearance with the Clerk of the Court and counsel for the parties shall be September 7, 2009.

SO ORDERED:

Hon. Denny Chin
U.S.D.J.