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1 MR. NIMMER: Absolutely not. Google has never  
2 threatened to engage in unlicensed print-on-demand consumer  
3 subscription, because if it did so it would boot its possible  
4 fair use defense out the window, not to mention that it would  
5 be the largest criminal copyright violator in the history of  
6 the Republic to have taken ten million books and exploited them  
7 without permission. For both those reasons Google has never  
8 made that claim and never would make the claim.

9 And the plaintiffs, who are master of their complaint,  
10 never put into the complaint, even after negotiating the  
11 settlement, that Google is threatening to engage in unlicensed  
12 print-on-demand, consumer subscriptions and the like.

13 For both of those reasons, your Honor -- I would be  
14 delighted to answer anymore questions the court has, but I  
15 would submit that under two basic principles of copyright  
16 law -- the permission required in advance, and the identical  
17 factual predicate as interpreted by Second Circuit law -- there  
18 is no basis on which to approve the proposed amended  
19 settlement.

20 THE COURT: Thank you.

21 MR. NIMMER: Thank you very much.

22 THE COURT: Now we will hear from Mr. Lazebnik.

23 MR. LAZEBNIK: Good morning, your Honor. My name is  
24 Ronald Lazebnik, and I am here on behalf of class members  
25 Science Fiction & Fantasy Writers of America, the American

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1 Society for Journalists and Authors, and the amicus National  
2 Writers Union.

3           Members of these organizations are typically authors  
4 who unlike the Authors Guild do not receive substantial  
5 advances from large publishers for their books but still rely  
6 on their writing as their primary source of income.

7           These writers have been very active in developing the  
8 growing and increasingly competitive markets for electronic  
9 rights which reduce or eliminate the need for publishers as  
10 intermediaries between writers and readers. This is the belief  
11 of the organizations that this proposed settlement -- a lawsuit  
12 that was undertaken to defend writers in these new markets --  
13 has morphed into a business plan that harms them and endangers  
14 their rights.

15           We have many objections to the settlement. We would  
16 like to highlight for your Honor just one of the ways we think  
17 this settlement is unfair and unreasonable to authors.

18           The statistics related to the settlement provided by  
19 the parties last week are a little hard to analyze given that  
20 some of them don't include headers of what the data is, but  
21 from what we can tell there is cause for concern.

22           As your Honor has heard, 1.1 million books have  
23 already been claimed. What is interesting though is that these  
24 1.1 million books have been claimed by only 44,000 --  
25 approximately 44,000 different people. Clearly, the ratio

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1 indicates that the majority of the books being claimed right  
2 now are by publishers and not authors. What is more  
3 disconcerting, however, to my clients is that 620,000 of these  
4 books are considered out of print under the terms of the  
5 settlement. This means that the majority of the books being  
6 claimed for the proposed new electronic distribution system  
7 under the settlement are being claimed by publishers who no  
8 longer support the hard copy version of these books. This fact  
9 pattern demonstrates the exact reason why we believe the  
10 settlement is unfair and unreasonable to authors. It is  
11 allowing publishers to lay claim to rights and revenues that  
12 belong with authors.

13 The typical author has not forgotten about her  
14 out-of-print books. She may have excerpts on her website from  
15 which she earns money through advertising. She may sell  
16 printed remainder copies through her website or at readings.  
17 She may sell e-book downloads, or she may have licensed e-book  
18 editions of her book. These sources of incremental revenue may  
19 be critical to her ability to support a living from her  
20 writing.

21 As noted by many objectors in their submissions,  
22 including the United States, and even the Authors Guild  
23 website, the majority of publishing contracts of books at issue  
24 for this settlement probably do not include provisions related  
25 to electronic rights of books. After all, if you go back 20

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1 years there was no reason for such a right to be considered  
2 most of the time.

3 As such, authors are the sole rights holders for  
4 e-books and other electronic distribution mechanisms for most  
5 of the millions of books subject to this proposed settlement.  
6 The settlement agreement, however, unnecessarily allows not  
7 only Google to profit from the electronic distribution rights  
8 of authors but also the publishers who have no claim to this  
9 right in the first place.

10 For books published before 1987, many of which in all  
11 likelihood do not have any provisions related to electronic  
12 rights, after Google takes its cut of profits the remaining  
13 profits get split between the author and the publisher despite  
14 no provision for this in the original contracts.

15 For more recent book contracts, regardless of what was  
16 negotiated between the author and the publisher at the time,  
17 the publisher now will receive 50 percent of the revenue.  
18 These revenues for the publishers are not being taken out of  
19 Google's profit, your Honor, but rather out of the author's  
20 much needed income.

21 In short, the settlement unreasonably allows  
22 publishers to simply lay claim to any book and puts the burden  
23 on the author to initiate proceedings to prove that she is in  
24 fact the sole rights holder.

25 For the author of short stories or poetry her

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1 situation may be even worse. She will receive at most a  
2 one-time fee for unlimited use in perpetuity even for a work  
3 that would normally command a separate fee for each appearance  
4 in each edition of an anthology. The publisher of an anthology  
5 in which one of her works appeared most likely, even if a  
6 publisher paid her for a limited time license for a single  
7 edition with the specified maximum print run, can authorize its  
8 display by Google regardless of her objections. That publisher  
9 and Google will receive all advertising revenue for the  
10 duration of her copyright. Her ability to generate revenue  
11 from licensing the electronic rights to her insert will have  
12 been effectively destroyed by its availability under the  
13 settlement.

14 The claims at issue in this case surrounded Google's  
15 desire to display snippets of books online yet somehow the  
16 potential resolution of this case involves Google --

17 THE COURT: I am hearing that point over and over  
18 again.

19 MR. LAZEBNIK: Your Honor --

20 THE COURT: Why don't you finish up.

21 MR. LAZEBNIK: Last sentence. Your Honor, this is  
22 simply an unfair and unjust resolution, and therefore we do not  
23 support this proposed agreement.

24 THE COURT: Thank you. Professor Samuelson?

25 MS. SAMUELSON: May it please the court, my name is  
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