

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**In re LITERARY WORKS IN ELECTRONIC
DATABASES COPYRIGHT LITIGATION**

MDL 1379 (GBD)

**DECLARATION OF CHARLES
CHALMERS IN SUPPORT OF
MOTION FOR AWARD OF
ATTORNEYS' FEES, COSTS AND
INCENTIVE AWARDS**

1. I, Charles Chalmers, am licensed to practice in the State of California. I am admitted to the Second Circuit, the Federal Circuit and Ninth Circuit Courts of Appeal, and to the bar of the Supreme Court of the United States. I am admitted pro hac vice in this matter in which I represent Christopher Goodrich and Judith Stacey as the C Claims subclass representatives.

THE DISTRICT COURT 2005

2. I spent 334.2 hours working on this matter between March 2005 and September 2005. Activities included communications with nine of the objectors, predominately with Irvin Muchnick; learning about the freelance business and the general history of freelance copyrights and databases, primarily by communication with Muchnick and reading materials; learning about the history of the combined class actions, primarily from obtaining and studying the pleadings and transcripts of hearings; learning about other copyright class actions and studying the decisions, legal arguments and settlements in those cases; research on all the issues raised during the course of the proceedings in the district court; studying the motion for preliminary approval, the settlement, all the forms of notice and the claim form; researching the law of copyright registration and the *Tassini* Supreme Court decision; preparing the pleadings listed below; studying the filings of the parties starting with their response to the objectors' first motion and ending with their presentation to the Court on the motion for final approval; miscellaneous written and telephone

communications with opposing counsel and the court, and; appearing at three hearings in New York including the related travel.

These are the substantive pleadings I prepared in 2005 and my appearances.

1. Motion to Vacate Preliminary Approval, etc.; 4-26-05
2. Declaration of Chalmers in Support of Motion to Vacate, etc.
3. Declaration of Irvin Muchnick ISO Motion to Vacate, etc. 4-26-05. 41 pages with exhibits.
4. Reply Memorandum ISO Motion to Vacate, etc.
5. Application for Emergency Stay of Order of Preliminary Approval to Postpone Mailing and Publishing of Notice. 5-10-05
6. Appear on motion to vacate. 5-24-05
7. Motion for Production of Information etc. 6-20-05
8. Reply Memorandum ISO Motion for Production of Information, etc. 6-27-05
9. Declaration of Charles D. Chalmers ISO Reply on Motion, etc. 6-27-05
10. Objections to Settlement 7-15-05
11. Memorandum ISO Objections to Proposed Class Settlement, etc. 7-15-05
12. Declaration of Irvin Muchnick ISO Objections to Settlement 7-15-05
13. Declaration of Charles D. Chalmers ISO Objections to Settlement 7-15-05
14. Declaration of Abraham Zaleznik ISO Objections
15. Declaration of Charles Schwartz ISO Objections
16. Declaration of Judith Stacey ISO Objections
17. Declaration of Todd Pittock ISO Objections
18. Declaration of Judith Trotsky ISO Objections
19. Declaration of Sands ISO Objections
20. Objections to Request for Attorneys' Fees, etc. 7-15-05
21. Response of Objectors to Motion for Preliminary Approval of Settlement As Amended 7-26-05.
22. Declaration of Irvin Muchnick ISO of Objections to Preliminary Approval etc.

23. Declaration of Edward Hasbrouck ISO of Objections to Preliminary Approval, etc.
23. Appear on Motion for Preliminary Approval of Settlement as Amended. 7-28-05
24. Application for Order to Show Cause re Violation of Court's Order Regarding Notice of Amended Settlement, Continuation of Fairness Hearing and Related Deadlines 8-15-05
25. Declaration of Charles D. Chalmers ISO Application for Order to Show Cause re Violation of Court's Order Regarding Notice of Amended Settlement, etc. 8-15-05
26. Renewed Application for Order to Show Cause re Violation of Court's Order Regarding Notice of Amended Settlement, Continuation of Fairness Hearing and Related Deadlines. 8-18-05
27. Declaration of Charles D. Chalmers ISO Renewed Application for Order to Show Cause re Violation of Court's Order Regarding Notice of Amended Settlement, etc.
28. Declaration of Charles D. Chalmers ISO Reply to Letter of August 24, 2005 from Plaintiffs' Counsel, etc. 8-26-05
29. Memorandum ISO Motion for Discovery Related to Settlement 9-06-05
30. Declaration of Irvin Muchnick ISO Motion for Discovery Related to Settlement Approval. 9-06-05
31. Declaration of Irvin Muchnick ISO Motion for Discovery 9-06-05
32. Motion for Discovery Related to Award of Attorneys' Fees and Costs 9-06-05
33. First Supplement to Objections to Proposed Class Settlement – As Amended - By Class Members Irvin Muchnick, etc. 9-13-05
34. Declaration of Irvin Muchnick ISO Objections to Amended Settlement. 9-13-05
35. Notice of Motions and Motions for:
 - Leave to File Supplemental Objections;
 - Leave to Obtain Additional Discovery Beyond That Already Requested
 - Leave to File Response to Legal Arguments Advanced by Plaintiffs and Defendants ISO Final Approval. 9-26-05
36. Appear on motion for final approval of settlement. 9-28-05

THE COURT OF APPEALS 2005 TO 2008

3. The first phase before the Court of Appeal involved at least 494.4 hours. Approximate allocation of this time to distinct activities is:
 - a. the initial period of appeal effort, including analysis of the record, choice of issues and arguments, assembling possible supporting authorities and completely shepardizing them, routine communication with the Court of Appeals, review appellate procedural rules, prepare the record on appeal which included extensive communication with opposing counsel – 63 hours;
 - b. early to final drafting of the opening brief, with continued reference to the record and research, additional research as it became necessary; finalization of record on appeal, miscellaneous submissions and procedures (pre-argument conference) required by the rules -163 hours;
 - c. reading opposition briefs, noting evidence of claims value that was not in the record; extensive communications with opposing counsel and the Court on this issue; research on this issue; communications with clients about their experience with the claims process as related to this issue; begin legal research to prepare reply brief; research in record about claims value as compared to new information; research in the Copyright Office regarding registrations by named plaintiffs as related to this issue; receipt and review of revised briefs filed by the parties; completion of research and drafting a reply to both opposition briefs – 124 hours;
 - d. preparation of motion to the Court regarding the citation to evidence outside the record, begin process to prepare for oral argument, including review of record and briefs, identify, study and submit two supplemental authorities – 32 hours;
 - e. respond to Court’s request for letter brief on jurisdiction issue; including research and review of the parties’ letter briefs – 42 hours;
 - f. final preparation for argument, travel and appearance for argument – 29 hours;

g. read Court's two opinions, analyze and research, review procedures for petition for rehearing and rehearing en banc, communications with opposing parties on our response to the decision; drafting petition for rehearing - 41hours.

4. Ultimately the record was composed of 157 pleadings and 4 transcripts comprising 1850 pages. The extent of research involved is reflected by the fact that objectors' opening brief cited 44 case authorities and five texts and the opposing briefs cited those authorities and 24 different cases and four different texts. This does not include the research regarding the jurisdictional question raised by the Court. I have substantial experience with federal appellate practice. This was one of the most time consuming appeals I worked on for several reasons. First, the paper record of pleadings and exhibits was comparable to appeal of a trial verdict in terms of the amount of detail; second, the issues and time occasioned by the parties presenting new claims information in their opposing briefs; third, replying to two opposition briefs which together were 95 pages; fourth, responding to Court order for additional briefing on a new issue, and; fifth, the preparation of petitions for rehearing.

THE SUPREME COURT

5. My work for the proceedings before the Supreme Court involved 156 hours. It initially included modest research on Supreme Court procedure. It was understood that the defendants would file a petition for certiorari. I read the petition when filed and researched some authorities. I decided to waive any response but the Supreme Court specifically requested the objectors to respond to the petition. In preparing the brief in response I read and researched both the petition and the plaintiffs' brief supporting the petition. I did the necessary research and prepared the response in which objectors supported one of the defendants' proposed questions for review, opposed the second question, and proposed a third question. In March 2009 the Court granted the petition but stated its own question presented. I studied that question and conducted some research regarding it. I then communicated with the Stanford Law School Supreme Court Clinic to ask if it would undertake a co-counsel role with me in presenting our position. This involved written

communications, a memorandum on the situation and one meeting with the faculty of the Clinic. The Clinic accepted the representation. Thereafter there were extensive communications with the Clinic as it conducted research on the issues. I also conducted research. There were two lengthy meetings with the group of students involved and the supervising faculty. The Clinic undertook the initial drafting of the two briefs that we filed, but I was involved in the commenting and revision process. We agreed to the fundamental point advanced by the defendants, that the federal courts did have jurisdiction to approve a settlement involving unregistered U.S. copyrights. However, in both the petition and main briefing stages it appeared that the defendants, and the plaintiffs in their supporting briefs at both stages, were attempting to achieve an opinion which might color future consideration of our issues on appeal. The main thrust of our briefing to the Court was to avoid that possibility, to support the defendants where we agreed, and to propose alternate grounds for finding jurisdiction that the defendants were not advancing. I read, researched, and discussed with the Stanford team all of the five amicus briefs, including the Court appointed amicus curiae who was appointed to represent the Court of Appeals decision since none of the parties had urged that position. The second brief submitted on behalf of the objectors was specifically to address two arguments made by the court appointed amicus.

THE SECOND CIRCUIT 2010 TO 2011

6. My time in the period from the Supreme Court decision in early 2010 to the Second Circuit decision in August 2011 was 177.8 hours. I started by reading and research to refresh myself about the issues. The research was particularly related to identifying authority that did not exist in 2006-7. I also reviewed the record to see if the Supreme Court decision had any implications for the continued appeal. I became aware, from one of the objectors, that there was a copyright settlement pending for approval in the S.D.N.Y. concerning Google. I investigated that case thoroughly to see if any of the positions being taken, or legal arguments being advanced, had implications for our case. They did, as also did the decision of the court in the Google case in late March 2010. Early in this period I was contacted by opposing counsel and a number of communications ensued about the possibility of engaging in a mediation, with the assistance of Kenneth Feinberg, to try and settle our appeal. This

mediation was conducted over the next two months or so, and involved extensive communication by email and phone with the mediator, the opposing parties, and with my client representatives, Irvin Muchnick and Anita Bartholomew. I was given some actual claim data during this effort and I spent approximately 10-15 hours analyzing this information for the purpose of formulating settlement positions. From inception to the point where it was deemed that a settlement was not possible, I spent 43.5 hours on this effort.

As mentioned, I investigated the Google case. I downloaded from PACER 21 pleadings of objections and other arguments about that settlement. At the same time I was preparing a supplemental brief for the Second Circuit. I prepared an opening supplemental letter brief and then reply to two opposition letter briefs from the defendants and the plaintiffs. The initial brief involved two new cases since original briefing, and involved two arguments based on arguments I developed from the Google briefing. For the reply letter brief I read and analyzed the opposing briefs of plaintiffs and defendants. This briefing effort took 81.7 hours.

I continuously monitored important decisions from our various briefs, and when a second court of appeals decision was rendered in one of those decisions I studied it and submitted a letter of supplemental authority. In early 2011 the plaintiffs wrote the court on the subject of claims value. I prepared a supplemental brief on this subject and sought leave to file it. It was granted. Shortly thereafter the district court rendered a decision in the Google case, refusing approval of the proposed class action settlement. I prepared and filed a letter of supplemental authority noting the relevant parts of the decision. The court rendered its decision in August 2011 and I read and analyzed it to advise my clients and to plan for future proceedings. The defendants and plaintiffs each filed petitions for rehearing. Anticipating that the court might seek our reply to the petitions on fairly short notice, I spent about six hours reading, analyzing and researching these briefs. I also filed a cost bill. The work described in this paragraph, and routine communications with opposing counsel, the court and my clients, took 52.6 hours.

DISTRICT COURT 2012 TO THE PRESENT

7. To date I've spent 271.4 hours since the Court of Appeals denied the petitions for rehearing. As there has only been one particular event, a mediation session in New York in early 2012, and only one pleading and appearance (motion for preliminary approval), it is hard to assign time to activities with particularity. It is more functional to present the time summary by period. The first period starts in December 2012 with communications with Michael Boni and Kenneth Feinberg. At first these were just about a settlement with the objectors, but they evolved into consideration of my representing the C Category claims in the manner suggested by the Second Circuit opinion. This period ends on March 26, 2012. During this time there were extensive communications with opposing counsel and the mediator, by telephone and by email. There was a modest amount of research about issues I thought would come up in negotiations. I also worked extensively with claims information I was provided, either in the earlier mediation or at this time, in order to formulate a negotiation position for C claims. There was an all-day mediation session on March 14, 2012 involving the mediator and about 15 counsel in New York City, which required approximately 15 hours of travel. Irwin Muchnick attended the mediation session as a consultant. Following the mediation negotiation continued by email and phone until March 26th. The time during this period was 69.8 hours.

The next period is until the end of June 2012. This involved continued negotiation by email and telephone, involving both counsel and the mediator, and continued analysis of numbers for the negotiation. There were at this time, and continued to be, essentially three or even four negotiations. One was for the compensation the defense group would provide for the C claims and the question of any cap on that compensation; the second was between me and the A-B counsel for an attorneys' fee for me so as to avoid having to dispute that matter, the third was for the payment of costs that would need to be incurred to complete a settlement, and the fourth, which surfaced later in 2013, was about procedures for the handling of claims review and eligibility. In early May 2012 the defendants presented a term sheet for a revised settlement. Negotiation continued focused on this and by the end of June

we had overall agreement on money from the defendants and money for my fee and costs. To this point was an additional 29 hours.

There was little activity then until August when a first draft of the Revised Settlement was produced by the defendants. From August to December 2012, the work in this period was 32 hours. There were comments on the draft and on a subsequent draft. The agreement did not appear to be a major item as we agreed that few if any changes, and none of substance except the C Category compensation, were contemplated. One major item to surface in this period was whether the \$343,500 being provided by the defendants would be reserved for payment of C claims, rather than available for costs. The defense and I could not agree on this for months and it slowed the negotiations. Eventually the defense agreed to my position that it be exclusively reserved for compensation. Time was for telephone and email communication, review and comment on drafts and misc. activities or review of old materials. It was during this time that the need to provide for costs, including old costs owed to the Claims Administrator, began to come into focus.

The next period is the year of 2013. The time is 128.4 hours. It is also spent on negotiating activities, including telephone and email communication, review of drafts, and arguments over major issues. Issues that arose and were ultimately agreed by negotiation included whether claimants would have the right to respond to Claims Administrator determinations of ineligibility. I was given a report on the ineligible determinations for the objectors and determined that there were at least a few mistakes or likely mistakes. I pressed for a right of claimant dispute and this was at first resisted. During this period the A-B counsel obtained a current, detailed report in excel form on all claims. I spent many hours reviewing this report in connection with this issue, and also in connection with the “one work – one claim” rule which surfaced as a difficult issue. The defendants brought up modifications they wished to have to the Claims Administration Memorandum regarding the “one work – one claim” rule which is expressed in the Agreement. There was substantial time spent of working on the application of the rule to claims review and dispute. Ultimately the Claims Administration Memorandum was revised, with multiple iterations to be

reviewed, to implement the resolutions on claim dispute. The period also saw substantial communications to resolve the issue of costs going forward, as well as payment of costs already incurred but unpaid. At issue was how much of the money being newly made available in this Revised Agreement should be devoted this. That some money would be so devoted was understood because the C claims changes made it fair for the new money to address the costs associated with those changes. Ultimately a complex formula was worked out so that not all the new money is exposed to those costs, and the A-B counsel share the exposure with the C claims for excessive costs. There were other smaller issues to be covered. During the end of this year we began in earnest to draft all necessary settlement documents and all of these went through many iterations. These included the Agreement, and all the forms of notice, as well as the agreement for costs. Finally we turned to preparing the motion for preliminary approval. I didn't initiate drafting of any of the these documents, but I participated in reviewing all of them and proposing changes or corrections. It was also during this year that we identified the two former objectors qualified to be the C claims representatives and I communicated with them to be sure they understood the proposed changes, as well as why more or different terms were not achievable.

In 2014 the work has been communication about completing the preliminary approval process, details about notice to the class and updating the settlement website; appearing by telephone for the preliminary approval hearing, and; preparations for the final approval process. To the date of this declaration this time is 15.2 hours.

There is certain to be at least fairly substantial time required to carry out the representation. The deadline for objections is a month from now. However, there will have to be a final approval presentation prepared, as well as responses to objections if there are any. I will travel to New York for the final approval hearing which is about 7-8 hours each way, and I'll spend time preparing for the hearing and attending the hearing. The C works claims are by far the largest part of the settlement and it will be my responsibility to represent individual C claims, and the holders thereof, in any disputes about eligibility resulting from the defense review of validity as well as from the Claims Administration review. I have

reason from study of the claims, and from the history of the claims process in 2005 in which many class members believed they could claim for syndicated articles, to believe there will be some disputes.

COSTS ADVANCED

8. The costs incurred are comprised of the following:

Use of New York base service for obtaining early pleadings and the docket and for delivering pleadings to the court.	\$1163.50
Travel:	
May 2005. Airfare, hotel, ground transportation and meals.	772.45
July 2005 “	986.88
September 2005 “	879.38
March 2007	928.05
March 2012	981.02
Cost of Printing & Serving Response of Objectors to Petition for Certiorari	\$582.17
Airfare lost by canceled flight re preliminary approval 2014.	\$370.00
Filing fees re pro hac admission.	\$246.00
Costs of miscellaneous copying, postage, courier from 2005 through 2013	\$1297.34
Argument tape from Court of Appeals and trial court transcripts.	\$505.82.

A cost frequently sought by attorneys but not included in this statement are internet research fees, such as Lexis. I used Lexis extensively from 2005 to 2012. The copying charges included in this statement are only those incurred with outside services.

I estimate the cost of attending the hearing for final approval will be around \$1800 for travel, two nights hotel, ground transportation and meals. With this estimate the total cost award sought is \$10,512.61.

INCENTIVE FEES

9. Irvin Muchnick spent an enormous amount of time just in working with me throughout the history of this case. For that reason I seek an incentive fee of \$5000 for him, to be deducted from my fee award and not the class compensation. He sought me out to

conduct this representation in 2005 because of his concerns about the settlement. I did not know him prior to that. My estimate of the time he has spent, based on my own observation, would be well over 300 hours. Much of this work, aside from his work to provide me with the historical background to the litigation, is reflected in his several declarations that were filed in 2005. Docket 56, 114, 122, and 159 (a delayed filing of a pleading delivered to Chambers but not concurrently filed) His declaration at Docket 56 explains the background that brought him to question this settlement, and it also describes how he has previously worked as a paid consultant to class action plaintiff's counsel in a previous copyright class action. For approximately a year, between 2000 and 2001 he was a paid consultant to counsel in this case. Docket 56, ¶ 10. His work supporting me was the same type of professional support that he provide to those two law firms, except he was paid nothing by me. He provided vast amounts of information for me concerning the background to the litigation, and facts relevant to the objections that were presented. This is in part evidenced by the extensive declarations by him that were presented in the district court. We spent easily over 40 hours, I believe it is likely more, on the telephone in 2005. In 2005 and until 2012 he was my primary objector contact except for Anita Bartholomew, who was not my client until the final approval hearing in September 2005. In 2006, when investigating what the claims administrator was doing with class member claims, which was relevant to new information being presented in the parties briefs, it was Muchnick and Bartholomew who spent substantial time getting information from class members that ultimately helped us show that the information presented by the parties was unreliable. Throughout the appeal I had frequent contact with him as issues arose. In 2010, when a mediation was conducted in an attempt to settle, Muchnick and Bartholomew served as my primary client contacts and were closely involved in the negotiations. They attended one or two telephone conferences for settlement that were conducted by the mediator, each lasting over an hour. They engaged in at least five telephone conferences with me at this time to establish our negotiating position, and each of these was on the order of an hour long. We concentrated on detailed analysis of compensation data, and claims data, so the issues we discussed were complex and required

them to understand documents I sent them. Muchnick attended the all-day New York mediation session in March 2012, spending more than 7 hours. Anita Bartholomew was in contact with us that day by telephone as the negotiations progressed. Both prior to and after that session I communicated with them to explain the negotiations and get their feedback on fairness. In early 2013 it was determined that the formal C claims representative, Christopher Goodrich and Judith Stacey, should be objectors with only C claims. Both Muchnick and Bartholomew have A and/or B claims so from that time forward I involved them less, but they still served as advisors. Muchnick maintained a blog throughout the case which informed the class of developments.

10. Anita Bartholomew was of very substantial assistance, much of which I describe in the preceding paragraph. I request an incentive fee of \$3000 for her. She did not spend as much time with me in 2005 as Muchnick, but thereafter she spent essentially the same amount of time, except for his attendance in New York. Ms. Bartholomew contributed one very significant effort to the objections and the successful appeal. In September 2005 she filed a declaration in support of the objections she had previously submitted. (Docket No. 110) I did not represent her at the time and I had nothing to do with the declaration. In it she presented evidence of the possibility that claims could exceed the cap value of \$11.8 million. She used reference to the ASJA (one of the organizational plaintiffs) database, and other external sources to support her analysis. Her analysis was an important reason why I pursued this matter on appeal.

11. I request incentive fees of \$2000 each for the remaining objectors, except for the two Category C claims representatives, Christopher Goodrich and Judith Stacey. For those two I request incentive fees of \$3000 each. All these objectors spent time in communicating with me in 2005 and throughout the appeals. The C representatives spent extra hours working me during 2013 as we finalized the revised settlement.

REVISED SETTLEMENT BENEFITS FOR C WORKS CLAIMS

12. In 2013 I was provided a report of all claims filed by the Garden City Group. It shows every claim and each individual work in those claims, as well as the reasons that the

Administrator has concluded that the claim, or a work, is initially ineligible. I used this extensively during the negotiations on several issues. The claim numbers presented on page 3 of the accompanying memorandum come from that report. One reason this report was generated was that there was a negotiation difference about whether the initial eligibility determinations, where the claimant had no opportunity to correct an asserted deficiency, should be subject in the remaining claims processing to contest by the claimant. I found that there were errors for several objector claims and, based on that, insisted that all claimants should have the right of challenge. This was agreed.

13. I have examined the report at substantial length to investigate the issue of whether many examples exist of works in a single claim that have the same name, or subject identification, as this will be the primary method that the defense group will use to raise “one work – one claim” limitation of the settlement. Without attempting to quantify the number of such instances, it is clear that there are many of them. I will have the primary responsibility to assist holders of C claims with any disputes about eligibility, and C works claims are 306,000 out of the total of 314,000. I am likely to spend substantial time on this during claims processing.

PROFESSIONAL OBJECTORS

14. I am not a professional objector. That expression generally refers to attorneys who are simply trying to extract a fee. I have never agreed to drop an objection in order to be paid – all of the fees I’ve received were ordered by a trial court. I am a 1971 graduate of Stanford Law School. I have practiced continually since that time, primarily in business litigation. I was a partner of three firms, and for two years I was the general counsel of a computer software company. During my earlier career I represented plaintiffs in two class actions, one of which resulted in a successful settlement with compensation and declaratory relief for several thousand class members. Starting in 2001 I undertook to represent class members to challenge the fairness of settlements or fee awards. I have appeared in fourteen cases, not including this one, and obtained benefits for the class in seven of those cases. My objections were upheld, or led to agreed settlement changes, in four unreported California

cases. My objections have been upheld in three reported appellate decisions. *In re: Literary Works in Electronic Databases Copyright Litigation*, 654 F.3d 242, 254-255 (2d Cir. 2011); *Cho v. Seagate Technology Holdings, Inc.*, 177 Cal. App. 4th 734 (Cal. App. 2009); *Robbins v. Alibrandi*, 127 Cal. App. 4th 438 (Cal. App. 2005).

Executed in Fairfax, California on April 9, 2014. I declare under penalty of perjury that the foregoing is true and correct.

Charles D. Chalmers