
12-4547-cv

United States Court of Appeals for the Second Circuit

AUTHORS GUILD, INC., AUSTRALIAN SOCIETY OF AUTHORS
LIMITED, UNION DES ECRIVAINES ET DES ECRIVAINS QUEBECOIS,
ANGELO LOUKAKIS, ROXANA ROBINSON, ANDRE ROY, JAMES
SHAPIRO, DANIELE SIMPSON, T.J. STILES, FAY WELDON,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AMICI CURIAE OF 133 ACADEMIC AUTHORS IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE (The full list of *Amici* appear in Appendix A)

JENNIFER M. URBAN
SAMUELSON LAW, TECHNOLOGY
& PUBLIC POLICY CLINIC
University of California, Berkeley,
School of Law
396 Simon Hall
Berkeley, California 94720
(510) 642-7338

On the Brief:

Professor Pamela Samuelson and
David Hansen, Digital Library Fellow
University of California, Berkeley

Attorney for Amici Curiae

AUTHORS LEAGUE FUND, INC., AUTHORS' LICENSING AND
COLLECTING SOCIETY, SVERIGES FORFATTARFORBUND, NORSK
FAGLITTERAER FORFATTERO OG OVERSETTERFORENING,
WRITERS' UNION OF CANADA, PAT CUMMINGS, ERIK GRUNDSTROM,
HELGE RONNING, JACK R. SALAMANCA,

Plaintiffs-Appellants,

v.

HATHitrust, CORNELL UNIVERSITY, MARY SUE COLEMAN, President,
University of Michigan, MARK G. YUDOF, President, University of California,
KEVIN REILLY, President, University of Wisconsin System,
MICHAEL MCROBBIE, President, Indiana University,

Defendants-Appellees,

NATIONAL FEDERATION OF THE BLIND, GEORGINA KLEEGE,
BLAIR SEIDLITZ, COURTNEY WHEELER,

Intervenor Defendants-Appellees.

TABLE OF CONTENTS

| | |
|---|----|
| TABLE OF AUTHORITIES | ii |
| INTERESTS OF AMICI..... | 1 |
| SUMMARY OF ARGUMENT..... | 2 |
| ARGUMENT | 5 |
| I. The District Court Correctly Ruled that the Authors Guild Lacks Associational Standing under the Copyright Act..... | 5 |
| II. The Authors Guild Also Lacks Associational Standing Under Prudential Standing Rules Applicable in Article III Courts. | 11 |
| III. The Interests of Academic Authors in Fair Use and the Continued Availability of the HathiTrust Corpus Diverge from the Authors Guild’s Claimed Interests, Reinforcing the Wisdom of Limiting Associational Standing in This Case. | 18 |
| CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)..... | 26 |
| APPENDIX A | 28 |

TABLE OF AUTHORITIES

CASES

| | |
|--|------------|
| <i>ABKO Music Inc. v. Harrisongs Music, Ltd.</i> , 944 F.2d 971 (2d Cir. 1991) | 7 |
| <i>Am. Inst. of Physics v. Winstead PC</i> , Case No. 3:12-cv-01230-M, Minute Order (N.D. Tex. May 22, 2013) | 22 |
| <i>Ass'n for Info. Media & Equip. v. Regents of the Univ. of California</i> , CV 10-9378 CBM MANX, 2011 WL 7447148 (C.D. Cal. Oct. 3, 2011) ... | 15 |
| <i>Ass'n for Info. Media & Equip. v. Regents of the Univ. of California</i> , 2:10-CV-09378-CBM, 2012 WL 7683452 (C.D. Cal. Nov. 20, 2012)..... | 15 |
| <i>Authors Guild v Google Inc.</i> , 770 F. Supp.2d 666 (S.D.N.Y. 2011) | 20 |
| <i>Authors Guild v. Google, Inc.</i> , Case Nos. 05 Civ. 8136 & 10 Civ. 2977, 2012 WL 1951790 (S.D.N.Y. May 31, 2012) | 13 |
| <i>A.V. ex rel Vanderhye v. iParadigms, LLC</i> , 562 F.3d 630 (4th Cir. 2009) | 22 |
| <i>Bano v. Union Carbide Corp.</i> , 361 F.3d 696 (2d Cir. 2004) | 11 |
| <i>Bill Graham Archives v. Dorling Kindersley Ltd.</i> , 448 F.3d 605(2d Cir. 2006) | 22, 23, 24 |
| <i>Cambridge Univ. Press v. Becker</i> , 863 F.Supp.2d 1190 (N.D. Ga. 2012)..... | 17 |
| <i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1992)..... | 22 |
| <i>CBS Broad., Inc. v. EchoStar Comms. Corp.</i> , 450 F.3d 505(11th Cir. 2006) | 8 |
| <i>Eden Toys, Inc. v. Florelee Undergarment Co.</i> , 697 F.2d 27(2d Cir. 1982) | 7 |

| | |
|---|--------|
| <i>Elk Grove Unified Sch. Dist. v. Newdow</i> , 542 U.S. 1 (2004)..... | 13 |
| <i>Getty Images (USA), Inc. v. Advernet</i> , 797 F.Supp.2d 399 (S.D.N.Y. 2011) | 17 |
| <i>HarperCollins Publishers LLC v. Open Road Integrated Media, LLP</i> , No. 1:2011-cv-09499, complaint (S.D.N.Y., Dec. 23, 2011)..... | 16 |
| <i>Hulex Music v. Santy</i> , 698 F. Supp. 1024 (D.N.H. 1988)..... | 10 |
| <i>Hunt v. Washington State Advertising Commission</i> , 432 U.S. 333 (1977)..... | 12 |
| <i>Kelly v. Arriba Soft Corp.</i> , 336 F.3d 811 (9th Cir. 2003) | 22 |
| <i>Mullen v. Soc'y of Stage Directors & Choreographers</i> , No. 06 C 6818, 2007 WL 2892654 (N.D. Ill. Sept. 30, 2007) | 8 |
| <i>Nat'l Ass'n of Coll. Bookstores, Inc. v. Cambridge Univ. Press</i> , 990 F. Supp. 245 (S.D.N.Y. 1997) | 13, 18 |
| <i>Nat'l Ass'n. of Freelance Photographers v. Associated Press</i> , 97 CIV. 2267 (DLC), 1997 WL 759456 (S.D.N.Y. Dec. 10, 1997) | 14 |
| <i>Perfect 10, Inc. v. Amazon.com, Inc.</i> , 508 F.3d 1146 (9th Cir. 2007) | 22 |
| <i>Plunket v. Doyle</i> , No. 09 Civ. 11006, 2001 WL 175252 (S.D.N.Y. Feb. 22, 2001) | 7 |
| <i>Random House, Inc. v. Rosetta Books, LLC</i> , 283 F.3d 490 (2d Cir. 2002) | 16 |
| <i>Righthaven LLC v. Hoehn</i> , ____F.3d ___, 2013 WL 1908876 (9th Cir., May 9, 2013) | 9 |
| <i>Silvers v. Sony Pictures Entm't, Inc.</i> , 402 F.3d 881 (9th Cir. 2005) | 7 |

| | |
|---|--------|
| <i>Southern Illinois Carpenters Welfare Fund v. Carpenters Welfare Fund of Illinois</i> , 326 F.3d 919 (7th Cir. 2003) | 10 |
| <i>The Football Association Premier League Ltd. v. YouTube, Inc.</i> , No. 07-cv-3583 (LLS), slip op. (S.D.N.Y., May 15, 2013) | 14 |
| <i>United Food & Commercial Workers Union Local, 751 v. Brown Grp. Inc.</i> , 517 U.S. 544 (1996)..... | 12, 17 |

STATUTES

| | |
|--------------------------------------|------|
| 17 U.S.C. § 107..... | 22 |
| 17 U.S.C. § 201(d) (2006) | 17 |
| 17 U.S.C. § 501(b) (2006) | 6, 9 |
| 29 U.S.C. § 1132(a)(1) (2006) | 9 |
| FED. R. CIV. PROC. R. 23 (2013)..... | 10 |

LEGISLATIVE MATERIALS

| | |
|---|---|
| H.R. Rep. 94-1476, 94th Cong., 2d Sess. | 8 |
|---|---|

OTHER AUTHORITIES

| | |
|--|-------|
| Jess Davis, <i>Patent Attys' USPTO Applications Protected By Fair Use</i> , LAW360, May 22, 2013, http://www.law360.com/articles/442985/patent-attys-uspto-applications-protected-by-fair-use | 22-23 |
| Authors Guild, Inc., Comments in Response to the U.S. Copyright Office Notice of Inquiry Regarding Orphan Works and Mass Digitization, Feb. 4, 2013, http://www.copyright.gov/orphan/comments/noi_10222012/Authors-Guild.pdf | 20-21 |

| | |
|--|-------|
| Authors Guild, Inc., <i>Model Trade Book Contract and Guide</i> (2000)..... | 16 |
| Ariel Katz, <i>The Orphans, the Market, and the Copyright Dogma: A Modest Solution for a Grand Problem</i> , 27 Berkeley Tech. L.J. 1285(2013)..... | 21 |
| Brian Lavoie & Lorcan Dempsey, <i>Beyond 1923: Characteristics of Potentially In-Copyright Print Books in Library Collections</i> , D-LIB MAG., Nov./Dec. 2009, http://www.dlib.org/dlib/november09/lavoie/11lavoie.html | 19 |
| Martin P. Levin, <i>The Contemporary Guide to Negotiating the Author-Publisher Contract</i> , 54 N.Y. L. Sch. L. Rev. 447, 455 (2009/2010)..... | 16 |
| Maria A. Pallante, <i>The Curious Case of Copyright Formalities, Keynote Address</i> , 28 Berkeley Tech. L.J. (forthcoming 2013), http://www.law.berkeley.edu/files/Pallante-BerkeleyKeynote.pdf | 15-16 |

INTERESTS OF AMICI

Amici Curiae are academic authors who have two main interests that motivated us to file this brief.¹ First, we care deeply about the sound development of U.S. copyright law and fair use as it applies to scholarly works, such as those typically found in the research libraries of nonprofit educational institutions and now in the HathiTrust corpus. Second, we want the HathiTrust digital library to continue to provide access to our books and those of other academic authors because this promotes the progress of science in keeping with the constitutional purpose of copyright law. These interests diverge significantly from the interests represented by the Authors Guild in its assertion of associational standing. Accordingly, we have a strong interest in a sound conception of associational standing for this and similar cases and focus our discussion in this brief on that issue.

Amici teach at universities such as those served by HathiTrust and many of us have used the HathiTrust corpus in the course of our research. *Amici* also are authors of scholarly works, many of which have been digitized and included in the

¹ Pursuant to Fed. R. App. P. 29(c)(5) and Rule 29.1 of the Local Rules of the United States Court of Appeals for the Second Circuit, *Amici* hereby state that none of the parties to this case nor their counsel authored this brief in whole or in part; no party or any party's counsel contributed money intended to fund preparing or submitting the brief; and no one else other than *Amici* and their counsel contributed money that was intended to fund preparing or submitting this brief.

Pursuant to Fed. R. App. P. 29(c)(4) and 29(a), *Amici* hereby state that all parties have consented to the filing of this brief, and we rely on that consent as our source of authority to file.

HathiTrust repository. We believe that the digitization of scholarly works from major research library collections and uses of those works that HathiTrust enables do not infringe copyrights. The names, affiliations,² and a list of representative publications of individual *Amici* are listed in Appendix A.

SUMMARY OF ARGUMENT

The HathiTrust digital library contains over 7.3 million potentially in-copyright books. The complaint in this case has demanded that the court impound the in-copyright books in this repository and enjoin the use of all 7.3 million of these books, although the Authors Guild and its co-plaintiffs have identified only 116 works in which they claim to hold copyrights. Relying on an exceptionally broad conception of associational standing, the plaintiffs have asserted an entitlement to litigate this case and to attain injunctive relief that goes far beyond what the law allows.

The Authors Guild's broad theory of associational standing is wrong for two reasons. First, the Copyright Act itself prohibits suits by non-rightsholders. Recognizing the dangers of allowing non-rights holders to litigate claims that would implicate the rights of absent parties, Congress decided that only the legal or beneficial holder of an exclusive right under a copyright may bring suit under the

² Affiliations are provided for identification purposes only.

Act. The Guild does not claim to hold such an interest in its members' copyrights; the district court therefore correctly held that the Authors Guild does not have associational standing to bring broad claims of infringement under the Act.

Second, the Authors Guild's theory of standing violates prudential limits on associational standing that have been developed carefully by courts over time. To ensure fair and efficient adjudication of claims, Article III courts have prohibited third party associations from pursuing claims when those claims would require more than the limited participation of individual association members. In the copyright context, proof of being a copyright holder is an essential element of the claim. Because the works in the HathiTrust corpus likely implicate the rights of a very large number of third parties—including ourselves, co-authors, publishers, and other transferees—it would take involved participation by individual association members to prove who holds the rights in the works which the Guild claims to represent.

Academic authors' interests in the continued existence of the HathiTrust digital library illustrate why it was prudent for Congress and the courts to limit associational standing in cases like this. If the Authors Guild were allowed to continue this suit on the basis of its associational claims, public access to millions of scholarly works would be placed under a cloud of uncertainty as the Guild pursued this large but indeterminate set of claims. Those claims would consume a

substantial amount of judicial resources, time, and effort on the part of individual authors and publishers who would need to sort out (and in some cases litigate separately) who holds the rights to individual works on which the Guild bases its right to sue.

Academic authors—whose works are likely more typical of those in the HathiTrust corpus than works of the Authors Guild and its members —would be harmed by this outcome because we typically benefit from HathiTrust, both because it makes our books more accessible to the public than ever before and because we use HathiTrust in conducting our own research. HathiTrust’s fair use defense is more persuasive to us than the Authors Guild’s theory of infringement. If granted, the Guild’s request for an injunction to stop HathiTrust from making its corpus available would directly harm academic author interests. In short, a “win” for the Authors Guild would be a “loss” for academic authors. This divergence in the interests of academic authors and of the Guild and its members, which may also affect the fair use calculus, is an additional reason why this Court should limit the Guild’s standing to the copyrights it actually holds.

ARGUMENT

I. The District Court Correctly Ruled that the Authors Guild Lacks Associational Standing under the Copyright Act.

The HathiTrust digital library presently contains more than 7.3 million potentially in-copyright books from the collections of major research libraries, such as the University of Michigan's. The Authors Guild claims not only that the repository itself, but also the very limited uses of these works that HathiTrust allows, are copyright infringements. HathiTrust contends that it has made only fair uses of the works. Although the Guild and its co-plaintiffs have identified themselves as rights holders of only 116 copyrights implicated in this lawsuit, the Guild has sought an injunction that would forbid all unauthorized uses of “Plaintiffs’ *or any other copyrighted works.*” *See* Pl. First Amd. Compl., Dkt_4, Demand for Relief (emphasis added) (“Compl.”).

The Guild wants, more specifically, to stop HathiTrust from enabling researchers to conduct electronic searches on the whole corpus to find out which books in the physical collections of member-libraries mention the topic they are investigating, from preserving books so that future generations can have access to them even if the physical books have deteriorated, and from enabling blind and print-disabled persons from being able to get full-text access to books from HathiTrust members’ collections.

As its justification for asserting that it can speak for the authors of millions of other works in the HathiTrust library—most of which, we believe, were written by academic authors like ourselves—the Authors Guild has relied on an expansive theory of associational standing that, if allowed, would enable special interest organizations, like the Authors Guild, to aggressively pursue large-scale copyright litigation against HathiTrust in a way that harms the interests of other authors like ourselves, as well as the public, while avoiding evidentiary requirements that all other copyright litigants must satisfy. In effect, the Authors Guild is seeking to pursue litigation and obtain relief on a class-wide basis without satisfying the rigors of the class action certification process.

But this is not permissible under U.S. copyright law. Section 501(b) of the Copyright Act could not be plainer: only “[t]he legal or beneficial owner of an exclusive right . . . [can] institute an action for any infringement of that particular right committed while he or she is the owner of it.” 17 U.S.C. § 501(b) (2006). Based on that unambiguous language, the district court correctly held that associations such as the Authors Guild lack standing to bring suits on behalf of their members. Opinion and Order dated October 10, 2012, Dkt_156, at 8. (“Op.”).

Despite the Guild’s attempts to conflate the statutory standing question with the prudential and constitutional questions of standing noted below,³ decisions from the Second Circuit and other circuits have concluded that the statute is clear; only a person with a copyright interest—and not third parties—may sue for infringement. *See ABKO Music Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 980 (2d Cir. 1991) (“[T]he Copyright Act does not permit copyright holders to choose third parties to bring suits on their behalf.”); *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 32 n.3 (2d Cir. 1982) (“We do not believe that the Copyright Act permits holders of rights under copyrights to choose third parties to bring suits on their behalf. . . . [T]he Copyright Law is quite specific in stating that only the ‘owner of an exclusive right under a copyright’ may bring suit.”); *Plunkett v. Doyle*, No. 09 Civ. 11006, 2001 WL 175252, at *5 (S.D.N.Y. Feb. 22, 2001) (explaining that standing is limited to “(1) owners of copyrights and (2) persons who have been granted exclusive licenses by owners of copyrights”). *See also Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (“[U]nder

³ *See* (Op. at 8); Pl-Appellant’s Br. at 44-48 (asserting that “[t]he flaw in the District Court’s analysis is that statutory standing under the Copyright Act is satisfied through the first prong of the 3-part *Hunt* test for associational standing.”) As the district court explained in its opinion, this “once again fails to answer the question of whether Congress has precluded associational standing in the text of the Copyright Act itself, a question of statutory interpretation and one that Plaintiffs have repeatedly sidestepped or obfuscated.” (Op. at 5 n.7). The district court “gave Plaintiffs numerous opportunities to address this issue, which included a letter to the parties dated July 12, 2012. Plaintiffs failed to respond to Defendants’ argument that the text of the Copyright Act precludes associational standing.” *Id.*

traditional principles of statutory interpretation, Congress' explicit listing of who may sue for copyright infringement should be understood as an exclusion of others from suing for infringement.”); *Mullen v. Soc'y of Stage Directors & Choreographers*, No. 06 C 6818, 2007 WL 2892654, *4 (N.D. Ill. Sept. 30, 2007) (“[I]f USA [a guild] sought a declaratory judgment of copyright infringement or damages for copyright infringement against Plaintiffs, it would surely fail for lack of standing because it is [not] an ‘owner’ nor is it a ‘beneficial owner’ (e.g. a licensee) of any copyright at issue under the Copyright Act.”).⁴

Congress chose to limit standing in copyright cases because it recognized “the need in infringement actions to safeguard the rights of all copyright owners and to avoid a multiplicity of suits.” H.R. Rep. 94-1476, 94th Cong., 2d Sess., at 159 (1976). Hence, it decided that “Subsection (b) of section 501 enables the owner of a particular right to bring an infringement action *in that owner’s name alone.*” *Id.* (emphasis added). So concerned was Congress that copyright holders with an actual interest receive notice about litigation regarding their works, it

⁴ The Authors Guild cites *CBS Broad., Inc. v. EchoStar Comms. Corp.*, 450 F.3d 505, 518 n.25 (11th Cir. 2006) as contrary authority. See Pl.-Appelleant’s Br. at 46. *CBS Broadcasting* does not interpret Section 501(b), but rather addresses two separate issues: 1) whether individual broadcasters, as non-exclusive licensees, had the right to sue under a special exception created for them in Section 501(e), and 2) whether associations of broadcasters met the three-part *Hunt* test, described below, for constitutional and prudential standing. The court did not address whether the associations, which it concluded had met the *Hunt* test, therefore also satisfied statutory standing requirements.

included a lengthy provision in the remainder of Section 501(b) detailing ways that courts may and must notify parties who would likely be affected. *See* 17 U.S.C. § 501(b) (stating that the court may require a plaintiff to notify “any person shown . . . to have or claim an interest in the copyright,” and stating that the court “*shall* require that such notice be served upon any person whose interest is likely to be affected by a decision in the case.” (emphasis added)).

These provisions would be rendered meaningless if the Authors Guild’s theory of associational standing is permitted. No other potential claimants or persons whose interests are likely to be affected—including academic authors such as ourselves—can be sufficiently notified because neither the court nor anyone else can know which specific copyrighted works actually form the basis of the suit.

Although Congress rejected third-party suits in copyright litigation, it still left open a number of avenues through which copyright owners could collectively assert their rights, including by transferring to others a slice of their rights so those other parties can assert rights on their behalf. Section 201 of the Act allows copyright owners to freely divide their exclusive rights among third parties—including associations like the Authors Guild—thereby allowing those parties to bring suit.⁵ *See Righthaven LLC v. Hoehn*, ___F.3d___, 2013 WL 1908876, *2

⁵ The Authors Guild attempts to liken Section 501(b) to a statutory standing provision found in ERISA, which allows “plan participants and beneficiaries” to bring suit. 29 U.S.C. § 1132(a)(1) (2006). *See* Pl-Appellant’s Br. at 46-47. Courts

(9th Cir., May 9, 2013) (explaining that for standing under Section 501(b), a litigant must hold some portion of one of the exclusive rights enumerated in Section 106, and not just a “bare right to sue”). Associations can also bring infringement litigation by naming members as real parties in interest. *See Hulex Music v. Santy*, 698 F. Supp. 1024, 1029 (D.N.H. 1988) (noting that the American Society of Composers, Authors and Publishers (ASCAP) helped facilitate the suit for its named members, but refusing to join ASCAP itself as a party).

Finally, class action law allows groups of plaintiffs to join together to make their claims collectively. *See FED. R. CIV. PROC. R. 23* (2013). Unlike the Authors Guild’s associational theory, however, class action litigation must comply with rigorous safeguards to protect absent but potentially interested parties (such as the interests of academic authors in litigation such as this one). For example, to maintain a class action suit, plaintiffs must show that the class is being adequately represented, harm to the class is sufficiently homogenous, there is commonality in facts at issue and questions presented, and that plaintiffs’ claims are typical of other members of the class. *FED. R. CIV. PROC. R. 23(a)*. In this suit, the Authors

interpreting this section of ERISA have allowed third parties to bring suit on behalf of association (in most cases, union) members. *See Southern Illinois Carpenters Welfare Fund v. Carpenters Welfare Fund of Illinois*, 326 F.3d 919 (7th Cir. 2003). However, unlike copyright suits where multiple copyright holders with varying interests both in the same work and in larger-scale combinations of works—such as the digital corpus of the HathiTrust—ERISA suits focus on particular claims with a discrete and a defined set of potential claimants.

Guild seeks to use associational standing to litigate and obtain relief on the functional equivalent of a class-wide basis, while avoiding the rigorous requirements and protections of class action law. This Court should not allow this evasion.

Without a plaintiff who holds a real interest in specifically identified copyrighted works, infringement suits such as this harm the rights of many copyright holders—including *Amici*—without adequate notice to those copyright holders that their works will be affected by the outcome of the litigation. For this reason, Congress and the courts interpreting the Act have rejected third party standing under the Act. This Court should affirm the district court’s ruling that the Authors Guild lacks standing under the Copyright Act to proceed with their suit except as to copyrights it holds.

II. The Authors Guild Also Lacks Associational Standing Under Prudential Standing Rules Applicable in Article III Courts.

Over the years, courts have developed a set of prudential rules that are routinely considered when associations such as the Authors Guild seek to bring lawsuits on behalf of their members. In addition to upholding the District Court’s ruling on the inadequacy of the Guild’s associational standing under U.S. copyright law, this Court should rule that the Guild lacks standing to sue on behalf of its

members under the prudential rules on associational standing applicable to causes of action of all kinds.

As the Second Circuit has so aptly observed, “[a]ssociational standing carves only a narrow exception from the ordinary rule that a litigant must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” *Bano v. Union Carbide Corp.*, 361 F.3d 696, 715 (2d Cir. 2004). To qualify for that narrow exception, courts have required that associational plaintiffs show, among other things, that “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Washington State Advertising Commission*, 432 U.S. 333, 343 (1977). The Supreme Court described this requirement as “prudential,” meaning that it is a self-imposed judicial restraint “best seen as focusing on . . . matters of administrative convenience and efficiency.” *United Food & Commercial Workers Union Local, 751 v. Brown Grp. Inc.*, 517 U.S. 544, 555–56 (1996).⁶

The district court’s conclusion that the Authors Guild satisfied this standard on the grounds that this suit would only require a “limited amount of individual proof” on the part of associational members was in error. (Op. at 6) (citing *Nat’l*

⁶ The Authors Guild must also show that “its members would otherwise have standing to sue in their own right” and that “the interests it seeks to protect are germane to the organization’s purpose” *Hunt v. Washington State Advertising Commission*, 432 U.S. 333, 343 (1977). These two aspects of the test are constitutional in nature.

Ass'n of Coll. Bookstores, Inc. v. Cambridge Univ. Press, 990 F. Supp. 245, 249 (S.D.N.Y. 1997)). The court borrowed heavily from the reasoning of a decision in the related Google Books litigation, (Op. at 6) (citing *Authors Guild v. Google, Inc.*, Case Nos. 05 Civ. 8136 & 10 Civ. 2977, 2012 WL 1951790, at *6 (S.D.N.Y. May 31, 2012),⁷ without analyzing in detail what proof would be required for the associations to establish their claims of infringement. Because of the uniqueness of each in-copyright work in the HathiTrust repository and the high volume of individualized evidence that would be required to prove, among other things, which Guild members held copyrights in which works in the HathiTrust repository, this Court should conclude that the Authors Guild cannot satisfy the prudential test for associational standing.⁸

Concerns about judicial efficiency and the need for (or not) individualized proof as to who holds copyright has often been a consideration in class action

⁷ *Authors Guild v. Google, Inc.* is currently on appeal regarding the issue of class certification. One of the issues before the Court in that appeal is whether there are common questions—and more importantly, common answers to those questions—regarding the infringement claims the Authors Guild class representative plaintiffs have asserted. See *Authors Guild v. Google, Inc.*, No. 12-3200-cv (2d Cir. 2012).

⁸ The Supreme Court has explained that prudential concerns also underlie a related rule “barring adjudication of generalized grievances more appropriately addressed in the representative branches.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004). This rule provides an additional prudential reason that this Court should reject the Authors Guild’s claims for lack of standing. Because the Guild’s complaint and its requested relief are so broad and would affect so many non-parties, the intended result is more appropriately characterized as legislative than adjudicatory in nature.

cases. Just weeks ago, in *The Football Association Premier League Ltd. v. YouTube, Inc.*, No. 07-cv-3583 (LLS), slip op. (S.D.N.Y., May 15, 2013), a District Court judge observed that “copyright claims are poor candidates for class-action treatment” because copyright claims often have only “superficial similarities.” *Id.* at 3. Like the claims the Guild brought against HathiTrust, that class action suit involved claims of widespread infringement of millions of works whose copyrights were held by a diverse set of plaintiffs, which in that case were allegedly uploaded to YouTube. *Id.* at 1-2. Specifically identifying the “validity and ownership of the copyright” as among the issues that “arise from facts peculiar to each protected work and each claimed infringement of it, in a compartmented case differing from every other one,” *Id.* at 6, the court concluded that it could not allow the suit to proceed based in part on concerns regarding administrative efficiency and the difficulty of handling so many diverse claims of infringement in one suit. *Id.* at 7 “Each claim presents particular factual issues of copyright ownership, infringement, fair use, and damages, among others.” *Id.*

Very similar considerations have led courts to reject associational standing in copyright suits similar to this one. *See Nat'l Ass'n. of Freelance Photographers v. Associated Press*, 97 CIV. 2267 (DLC), 1997 WL 759456 (S.D.N.Y. Dec. 10, 1997) (finding that the National Association of Freelance Photographers lacked associational standing for prudential and constitutional reasons because “any

judicial determination on the claims in this lawsuit requires proof regarding individual claimants, for example, whether given payment checks were effective to transfer copyright.”); *Ass'n for Info. Media & Equip. v. Regents of the Univ. of California*, CV 10-9378 CBM MANX, 2011 WL 7447148 *4 (C.D. Cal. Oct. 3, 2011) (“In order to establish a claim for copyright infringement, individual copyrights owners' participation is necessary. This is because having the rights over a copyright is essential to establishing a copyright infringement claim. . . . Therefore, Plaintiff AIME, as a matter of law, has failed to establish associational standing because it cannot meet the [prudential standard for associational standing].”); *Ass'n for Info. Media & Equip. v. Regents of the Univ. of California*, 2:10-CV-09378-CBM, 2012 WL 7683452 * 3 (C.D. Cal. Nov. 20, 2012) (rejecting associational standing under amended complaint).

The present case also involves the rights of a large number of diverse copyright holders. The logistical challenges of sorting out which works in the HathiTrust repository were authored by associational members and which were not would itself be a difficult task. Proving precisely who holds rights in the works at issue in this case is even more complex. While reference to copyright registration certificates is an important start, many published works that are the subject of this litigation are subject to contracts between publishers and authors that are not publicly available. *See* Maria A. Pallante, *The Curious Case of Copyright*

Formalities, Keynote Address, 28 Berkeley Tech. L.J. (forthcoming 2013),
<http://www.law.berkeley.edu/files/Pallante-BerkeleyKeynote.pdf> (explaining challenges regarding incentivizing the public recordation of copyright transfers). At a minimum the court would need to review those contracts, which would require that individual association members produce and testify regarding them for several reasons.

First, these contracts may contain complicated reversion of rights clauses based on current sales figures or the out-of-print status of the book, see Martin P. Levin, *The Contemporary Guide to Negotiating the Author-Publisher Contract*, 54 N.Y. L. Sch. L. Rev. 447, 455 (2009/2010), which the court would be forced to interpret by referring to individualized evidence regarding each work. Second, publishing contracts can be unclear about who holds electronic rights to publish, an unanticipated development in many contracts. See *Random House, Inc. v. Rosetta Books, LLC*, 283 F.3d 490 (2d Cir. 2002); see also *HarperCollins Publishers LLC v. Open Road Integrated Media, LLP*, Case No. 1:2011-cv-09499, complaint (S.D.N.Y., Dec. 23, 2011) (contesting whether Jean Craighead George—an Authors Guild member—holds the rights to publish the electronic version of her popular book *Julie of the Wolves*). See also Levin, *supra* (suggesting that authors should negotiate contracts that would revert certain portions of electronic rights to the author after a variety of trigger events) (citing Authors Guild, Inc., *Model*

Trade Book Contract and Guide 37 (2000)). Interpreting contested clauses would require the participation of associational members and third parties such as publishers, and would likely lead to separate, embedded disputes regarding some works. Third, in many cases, contracts are missing or incomplete. *See Cambridge Univ. Press v. Becker*, 863 F.Supp.2d 1190, 1363 (N.D. Ga. 2012) (dismissing 17 of 75 infringement claims for failure to produce contracts that proved ownership). *See also Getty Images (USA), Inc. v. Advernet*, 797 F.Supp.2d 399 (S.D.N.Y. 2011) (dismissing 35 of 37 infringement claims for failure to produce evidence of ownership). When no agreement is available, individual testimony by association members would almost certainly be required. This is especially true in cases of joint authorship or in cases where, as the Copyright Act permits, the exclusive rights to the work were divided among many different parties. *See* 17 U.S.C. § 201(d) (2006).

In sum, the question of who holds rights is often complex and requires much more than simple reference to copyright registration certificates, even in cases when those are available. Other related questions regarding these claims, such as assignment, waiver, and fair use all require even more individual participation.

The prudential test for associational standing is rooted in a desire to promote administrative convenience and efficiency. *United Food & Commercial Workers Union Local*, 751, 517 U.S. at 555–56. Given the uniqueness of each claim in this

case and the large amount of individualized proof required, there is no efficiency to be gained, and much to be lost, by hearing all associational members' claims together in one suit. Therefore, we urge this Court to hold that the Authors Guild does not have standing based on its members' interests, and that the district court erred in holding that the associational plaintiffs' claims would satisfy this prudential test.⁹

III. The Interests of Academic Authors in Fair Use and the Continued Availability of the HathiTrust Corpus Diverge from the Authors Guild's Claimed Interests, Reinforcing the Wisdom of Limiting Associational Standing in This Case.

One additional powerful reason to limit associational standing in this case is that if the Authors Guild is allowed to pursue this lawsuit under its broad conception of associational standing, the interests of academic authors would be harmed because public access to millions of scholarly works for research purposes would be placed under a cloud of uncertainty as a special interest group pursues its

⁹ The district court also concluded that “where an association seeks an injunction or declaration that an entire practice is unlawful, courts have concluded that the individual proof required is limited.” (Op. at 6) (citing *Nat'l Ass'n of Coll. Bookstores, Inc. v. Cambridge Univ. Press*, 990 F. Supp. 245, 250 (S.D.N.Y. 1997) for the point that “associational standing would facilitate adjudication better than ‘requiring duplicative proof’ from each member). Far from being “duplicative” the claims involved here would require highly individualized proof regarding a diverse set of circumstances.

indiscriminate and indeterminate set of claims seeking to restrict and control access to the works in the HathiTrust digital library.

The majority of the works in the HathiTrust corpus were created by academic authors whose interests are more similar to *Amici* than those of the associational plaintiffs in this case. The HathiTrust is built from the collections of several major academic research libraries, (Compl. ¶ 1–2; Pls.’ 56.1 Statement, Dkt_116, ¶ 62; Defs.’ 56.1 Statement, Dkt_113, ¶¶ 30–31). Those collections—and therefore the vast majority of the contents of the HathiTrust digital library—were assembled to serve a scholarly audience. *See Brian Lavoie & Lorcan Dempsey, Beyond 1923: Characteristics of Potentially In-Copyright Print Books in Library Collections*, D-LIB MAG., Nov./Dec. 2009, <http://www.dlib.org/dlib/november09/lavoie/11lavoie.html> (reporting that 93% of the collections of three major academic partners in the Google Books project—from which a large portion of the HathiTrust scans were created—are nonfiction and that 78% of those are aimed at a scholarly audience).

Academic authors are typically motivated to create scholarly works to share the knowledge they contain with the world, thereby promoting the progress of science in keeping with the constitutional purpose of copyright. This was recognized by a District Court judge in a related case who observed that “ ‘[a]cademic authors, almost by definition, are committed to maximizing access to

knowledge. The [Authors] Guild..., by contrast, [is] institutionally committed to maximizing profits.’ ” *Authors Guild v Google Inc.*, 770 F. Supp.2d 666, 679 (S.D.N.Y. 2011) (internal citation omitted).

Because such a large portion of the corpus is likely authored by academic authors, it is particularly important that this Court recognizes how their views on the merits of the case diverge markedly from those of the Authors Guild. *Amici* would be harmed if Plaintiffs prevailed and the injunction sought in this case were imposed on works created by academic authors that are in the HathiTrust corpus.

This lawsuit is not the first time the Authors Guild has inadequately represented the interests of academic authors. In a related case, the Authors Guild and a handful of its members are pursuing a class action lawsuit against Google for digitizing the very same books as are at issue in the *HathiTrust* case. In that case, a District Court judge ruled that the plaintiffs and their counsel had inadequately represented the interests of academic authors in negotiating the settlement of this class action lawsuit and cited this inadequacy as among the reasons the settlement should be rejected. *Authors Guild*, 770 F. Supp.2d at 679. The court noted that academic authors tend to favor open access, for example, as a solution to the “orphan works” problem. *Id.*, n. 16. The Authors Guild, in contrast, supports an approach to orphan works in which users must pay a licensing fee regardless of whether there is an owner available to collect those funds. *See Authors Guild, Inc.*,

Comments in Response to the U.S. Copyright Office Notice of Inquiry Regarding
Orphan Works and Mass Digitization, Feb. 4, 2013,

http://www.copyright.gov/orphan/comments/noi_10222012/Authors-Guild.pdf.

See also Ariel Katz, *The Orphans, the Market, and the Copyright Dogma: A Modest Solution for a Grand Problem*, 27 Berkeley Tech. L.J. 1285, 1335–36 (2013) (arguing that collective licensing does nothing to address the root of the orphan works problem because functioning markets for orphans do not and cannot exist; if anything, licensed access for orphan works would “decrease, rather than enhance, access to and dissemination of orphan works”). Indeed, the Guild has argued that it is never permissible under the Copyright Act to allow the public to freely view and download copies of orphan works. Pl-Appellants’ Br. at 13. *Amici* fundamentally disagree with the Authors Guild on the application of fair use in this case, in particular as to the copyright implications of non-expressive uses of copyrighted works, such as text-mining. Rather, *Amici* agree with the District Court below that the non-expressive uses of the HathiTrust digital library now permitted for research purposes do not infringe copyrights.¹⁰

¹⁰ See (Op. at 16 n.22) (“Mass digitization allows new areas of non-expressive computational and statistical research, often called ‘text mining.’ One example of text mining is research that compares the frequency with which authors used ‘is’ to refer to the United States rather than ‘are’ over time.” (citing Brief of Digital Humanities and Law Scholars as Amici Curiae in Support of Defendants’ Motion for Summary Judgment, Dkt_123, at 7 (“[I]t was only in the latter half of the

Academic authors such as *Amici* more generally find HathiTrust's fair use defense more persuasive than the Authors Guild's theory of infringement. Weighing together the four statutory factors in 17 USC § 107 in light of the purposes of copyright, as the Supreme Court directed in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1992), *Amici* believe that HathiTrust qualifies as a fair user and its digital library serves the underlying goals of copyright.

Making digital copies of works to create search tools that facilitate new forms of academic research, to provide materials held by libraries in formats accessible to registered students with print disabilities, and to preserve copies of works held by libraries for cultural heritage, are all transformative uses that support a finding of fair use. *Amici* agree with the findings of the court below that HathiTrust's use of the works are transformative because the use and purpose of the copying was entirely different, and clearly distinguishable from, the original work. (Op. at 16-17) (citing *A.V. ex rel Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 640 (4th Cir. 2009); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003)). See also *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006); *Am. Inst. of Physics v. Winstead PC*, Case No. 3:12-cv-01230-M, Minute Order (N.D. Tex. May 22, 2013) (written order forthcoming); Jess

Nineteenth Century that the conception of the United States as a single, indivisible entity was reflected in the way a majority of writers referred to the nation.”))).

Davis, *Patent Attys' USPTO Applications Protected By Fair Use*, LAW360, May 22, 2013, <http://www.law360.com/articles/442985/patent-attys-uspto-applications-protected-by-fair-use> (reporting that the court in *American Inst. of Physics* agreed with intervenor-defendant U.S. Patent and Trademark Office that copying and distribution of articles to facilitate otherwise lawful uses falls “ ‘comfortably within’ the right to make incidental and necessary copies.”)

Most of the books scanned in the HathiTrust corpus are non-fiction scholarly works, which also supports a finding of fair use. Although HathiTrust has made copies of entire works, because its uses are transformative, the third factor is not dispositive, and also favors fair use. *Bill Graham*, 448 F.3d at 612. As the court below found, making copies of entire works does not weigh against fair use if it was necessary to do so in order to make the transformative use at issue. (Op. at 18–19); *Arriba Soft* 336 F.3d at 821.

Finally, the court below was correct in finding that there is unlikely to be any harm to the market for the original works because HathiTrust only displays the name, page numbers, and frequency of occurrence of in-copyright works in which the particular search term can be found, not the copy of the actual text itself, other than full text copies provided to qualifying blind and print disabled students. (Op. at 3). In addition, there is no real prospect of market usurpation in the cases where HathiTrust consortium libraries make available an entire work in accessible format

to the circumscribed group of print disabled students that have registered with their university libraries because the number of users are very small, there is no existing licensing market for accessible format versions of many of these scholarly works, and the prospect of a future licensing market being developed for print disabled students seems remote. (Op. at 19-21). *See also Bill Graham Archives*, 448 F.3d at 614-15 (copyright holders cannot preempt transformative markets).

Indeed, academic authors such as *Amici* who create the scholarly works that form the majority of the HathiTrust corpus benefit from the greater accessibility to their works made possible by HathiTrust. Accordingly, *Amici* consider that HathiTrust's uses fall squarely within the core of fair use and further the goal of access to knowledge, which lies at the heart of academic endeavor.

By contrast, the Authors Guild seeks to enjoin use of the digital copies of academic works in the HathiTrust's corpus, and to put an end to the development of full text search facilities and other innovative research tools made possible by those digitized copies. The Authors Guild's challenge would harm us by restricting access to our works and put at risk the myriad public benefits of the HathiTrust digital library. For these reasons, we disagree with the Authors Guild's understanding and views on fair use, which fundamentally conflict with our own, and we urge this Court to consider this factor as it interprets statutory and prudential rules that limit associational standing in cases such as this.

CONCLUSION

Because the Authors Guild holds only a small number of copyrights implicated in this litigation, we urge this Court, first, to affirm the lower court's ruling that the Authors Guild lacks standing under the Copyright Act to pursue the broad claims it has made in this lawsuit, and, second, to recognize that judicially-developed prudential rules of standing caution against granting associational standing in this case. Denial of associational standing is especially warranted because most of the in-copyright works in the HathiTrust digital library were written by scholars motivated to share the knowledge their works contain, and because scholars benefit from HathiTrust's fair use by using its digital library for research. *Amici* and scholars like *Amici* would be harmed, rather than benefited, if the Guild were granted standing and succeeded in pursuing the injunction it requests.

Dated: June 4, 2013

/s/ Jennifer M. Urban

JENNIFER M. URBAN
SAMUELSON LAW, TECHNOLOGY &
PUBLIC POLICY CLINIC
University of California, Berkeley,
School of Law
396 Simon Hall
Berkeley, California 94720
510-642-7338

Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because this brief contains **6,150** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point font.

/s/ Jennifer M. Urban

JENNIFER M. URBAN
SAMUELSON LAW, TECHNOLOGY &
PUBLIC POLICY CLINIC
University of California, Berkeley,
School of Law
396 Simon Hall
Berkeley, California 94720
510-642-7338

Attorney for Amici Curiae

APPENDIX A

APPENDIX A

List of 133 academic authors as *Amici Curiae*

Affiliation is provided for identification purposes only. The views stated here are those of the signers and do not reflect the position, if any, of the named institutions.

Francesca Allegri

Head of User Services
Health Sciences Library
University of North Carolina at Chapel Hill
Editor of: Educational Services in Health Sciences Libraries. Current Practice in Health Sciences Librarianship (volume 2) (Medical Library Association and Scarecrow Press, 1995)

Ronald Aminzade

Professor of Sociology
University of Minnesota
Author of: Ballots and Barricades: Class Formation and Republican Politics in France, 1830-1871 (Princeton University Press, 1993)

Steve F. Anderson

Associate Professor
University of Southern California
Author of: Technologies of History: Visual Media and the Eccentricity of the Past (Dartmouth, 2011)

Zoe Argento

Assistant Professor
Roger Williams University School of Law

Patricia Aufderheide

University Professor
School of Communication
American University
Author of: Communications Policy and the Public Interest (Guilford Press, 1999)

Donald A. Barclay

Interim University Librarian

University of California, Merced

Author of: Into the Wilderness Dream (University of Utah Press, 1994)

Elizabeth Popp Berman

Assistant Professor of Sociology

University at Albany, State University of New York

Author of: Creating the Market University: How Academic Science Became an Economic Engine (Princeton University Press, 2012)

Professor Mario Biagioli

School of Law and Science & Technology Studies Program

University of California, Davis

Author of: Galileo's Instruments of Credit: Telescopes, Images, Secrecy (University of Chicago Press, 2006)

Christine L. Borgman

Professor & Presidential Chair in Information Studies

University of California, Los Angeles

Author of: From Gutenberg to the Global Information Infrastructure: Access to Information in the Networked World (MIT Press, 2000)

Geoffrey C. Bowker

Professor

Director, Evoke Laboratory

Department of Informatics

Donald Bren School of Information and Computer Sciences

University of California, Irvine

Author of: Sorting Things Out: Classification and its Consequences (with Susan Leigh Star) (MIT Press, 1999)

Danah Boyd

Microsoft Research and New York University

Author of: It's Complicated: The Social Lives of Networked Teens (Yale University Press, forthcoming 2014)

Oren Bracha

Professor of Law

The University of Texas School of Law

Author of: “Early American Printing Privileges: The Ambivalent Origins of Authors' Copyright in America”, in *Privilege and Property: Essays on the History of Copyright* 89 (Ronan Deazley, Martin Kretschmer & Lionel Bentley eds., OpenBook Publishers, 2010)

Annemarie Bridy

Associate Professor

College of Law

University of Idaho

Dan L. Burk

Chancellor's Professor of Law

University of California, Irvine

Author of: *The Patent Crisis and How the Courts Can Solve It* (with Mark A. Lemley) (University of Chicago Press, 2009)

L Jean Camp

Professor

School of Informatics and Computing

Indiana University

Author of: *Trust and Risk in Internet Commerce* (MIT Press, 2000)

Michael A. Carrier

Professor of Law

Rutgers Law School – Camden

Author of: *Innovation for the 21st Century: Harnessing the Power of Intellectual Property and Antitrust Law* (Oxford University Press, 2009)

Michael W. Carroll

Professor of Law and Director,

Program on Information Justice and Intellectual Property

American University, Washington College of Law

Danielle Keats Citron

Lois K. Macht Research Professor and

Professor of Law

University of Maryland School of Law

Julie E. Cohen

Professor

Georgetown University Law Center

Author of: Configuring the Networked Self (Yale University Press, 2012)

Danielle Conway

Michael J. Marks Distinguished Professor of Business Law

William S. Richardson School of Law

University of Hawaii at Manoa

Robert Cook-Deegan, MD

Genome Ethics, Law & Policy

Institute for Genome Sciences & Policy and

Sanford School of Public Policy

Duke University

Author of: The Gene Wars: Science, Politics, and the Human Genome (WW Norton, 1994; 1996)

Jonathan Culler

Class of 1916 Professor of English and Comparative Literature

Cornell University

Author of: On Deconstruction: Theory and Criticism after Structuralism (Cornell

University Press, 1982; London: Routledge, 1983; revised 25th anniversary ed.,

Cornell University Press, 2007, Routledge, UK, 2008)

Robert Darnton

Carl H. Pforzheimer University Professor

Harvard University.

Author of: The Case For Books: Past, Present, and Future (Public Affairs, 2009)

Peter Decherney

Associate Professor of English and Cinema Studies

University of Pennsylvania

Author of: Hollywood's Copyright Wars: From Edison to the Internet (Columbia University Press, 2012)

David L. Dill

Professor

Department of Computer Science
Stanford University

Author of: Trace theory for automatic hierarchical verification of speed-independent circuits Vol. 430 (MIT press, 1989)

Peter DiCola

Associate Professor

Northwestern University School of Law

Author of: Creative License: The Law and Culture of Digital Sampling (with Kembrew McLeod) (Duke University Press, 2011)

J. Stephen Downie, PhD

Professor and Associate Dean for Research
Graduate School of Library and Information Science
University of Illinois at Urbana-Champaign

Joseph Dumit

Professor of Science & Technology Studies
University of California, Davis

Author of: Drugs for Life: How Pharmaceutical Companies Define Our Health (Duke University Press, 2012)

Professor EC Ejiofor

Senior Researcher
Centre for Africa Studies (CAS)
University of the Free State, South Africa

Author of: The Roots of Political Instability in Nigeria (Ashgate, 2011)

Jeffrey L. Elman

Distinguished Professor of Cognitive Science & Dean of Social Sciences
University of California, San Diego

Author of: Rethinking Innateness (with E.A. Bates, M.H. Johnson, A. Karmiloff-Smith, D. Parisi, & K. Plunkett) (MIT Press, 1996)

James Evans

Associate Professor
Department of Sociology
University of Chicago

Author of: “Communication and the Evolution of Cognition,” *to appear in Scaffolding in Evolution, Cognition and Culture* (Linda Capra, James Griesemer and William Wimsatt, eds., MIT Press, forthcoming 2013)

Frank E. Fee Jr., Ph.D.

Associate Professor Emeritus
School of Journalism and Mass Communication
University of North Carolina at Chapel Hill

Malcolm M. Feeley

Professor of Law
University of California at Berkeley
Author of: *The Process is the Punishment* (New York: Russell Sage Foundation, 1979)

Edward Feigenbaum

Kumagai Professor of Computer Science (Emeritus)
Stanford University
Author of: *The Fifth Generation: Artificial Intelligence and Japan's Computer Challenge to the World* (Addison Wesley, 1983)

Jacob G. Foster

Research Associate
Department of Sociology
University of Chicago

Ian T. Foster

Professor of Computer Science
The University of Chicago
Author of: *The Grid: Blueprint for a New Computing Infrastructure* (with C. Kesselman) (Morgan Kaufmann, 1999)

Barbara Friedman, Ph.D.

Associate Professor

School of Journalism and Mass Communication

University of North Carolina at Chapel Hill

Author of: From the Battlefront to the Bridal Suite: Media Coverage of British War Brides, 1942-1946 (University of Missouri Press, 2007)

Roberto Garvía

Professor

Comparative Sociology Group

Departament of Social Sciences

Universidad Carlos III de Madrid

Laura N. Gasaway

Paul B. Eaton Distinguished Professor of Law Emeritus

University of North Carolina School of Law

Author of: Copyright Questions and Answers for Information Professionals: from the Columns of Against the Grain (Purdue University Press, 2012)

Llewellyn Joseph Gibbons

University of Toledo College of Law

Author of: Mastering Trademark and Unfair Competition Law (co-authored) (Carolina Academic Press 2013)

Anne Gilliland

Scholarly Communications Officer

University of North Carolina at Chapel Hill

Author of: "The OhioLINK/OCLC Collection Analysis Project: A Preliminary Report" in Assessment of Library Collections in a Consortial Environment:

Experiences from Ohio (George Lupone, ed., Routledge, 2009)

Robert J. Glushko

Adjunct Full Professor

School of Information

University of California, Berkeley

Author of: Document Engineering (with Time McGrath) (MIT Press, 2005)

Andrew Gold

Professor

DePaul University College of Law

Kenneth W. Graham

Professor of Law (Emeritus)

School of Law

University of California, Los Angeles

Author of: Federal Practice and Procedure: Evidence, Vol. 21-30A (with Charles Alan Wright) (West Publishing, 1978-2000)

Bronwyn H. Hall

Professor of the Graduate School

Department of Economics

University of California, Berkeley

Editor of: Handbook of the Economics of Innovation (with Nathan Rosenberg) (2010)

John R. Hall

Distinguished Professor of Sociology

University of California, Davis,

Author of: Apocalypse: From Antiquity to the Empire of Modernity (Polity, 2009)

James A. Harrell, Ph.D.

Professor Emeritus of Geology

Department of Environmental Sciences

The University of Toledo

Jeffrey Haydu

Professor of Sociology

University of California, San Diego

Author of: Citizen Employers: Business Communities and Labor in Cincinnati and San Francisco, 1870–1916 (Cornell University Press, 2008)

Carla Hesse

Professor of History and Dean of Social Sciences

University of California, Berkeley

Author of: Publishing and Cultural Politics in Revolutionary Paris (California 1991).

Harry Hochheiser

Assistant Professor

University of Pittsburgh

Author of: Research Methods in Human-Computer Interaction (with J. Lazar. and J. Feng) (Wiley, 2010)

Clifton Hood

George E. Paulsen Professor of American History and Government,
Department of History

Hobart and William Smith Colleges (Geneva, NY)

Author of: 722 Miles: The Building of the Subways and How They Transformed New York (Simon and Schuster, 1992; paperback ed., Johns Hopkins University Press, 2004)

Alan Hyde

Distinguished Professor and Sidney Reitman Scholar
Rutgers University School of Law

Author of: Bodies of Law (Princeton University Press, 1997)

Lewis Hyde

Richard L. Thomas Professor of Creative Writing
Kenyon College

Author of: Common as Air (Farrar, Straus & Giroux, 2010)

Judith Innes

Professor Emerita

University of California, Berkeley

Author of: Planning with complexity: an Introduction to collaborative rationality (Routledge 2010)

Tonja Jacobi

Professor of Law

Northwestern University School of Law

Author of: “The New Separation of Powers: Integrating the Study of American Politics” (with Rui de Figueiredo and Barry R. Weingast), in *Handbook of Political Economy* (Barry R. Weingast and Donald Wittman, eds., Oxford University Press, 2006)

Adrian Johns

Allan Grant Maclear Professor

Department of History Chair

Committee on Conceptual and Historical Studies of Science

University of Chicago

Author of: The Nature of the Book (University of Chicago Press, 1998)

Victoria Johnson

Associate Professor of Organizational Studies

University of Michigan

Author of: Backstage at the Revolution: How the Royal Paris Opera Survived the End of the Old Regime (University of Chicago Press, 2008)

Douglas W. Jones

Associate Professor of Computer Science

University of Iowa

Author of: Broken Ballots: Will your vote count? (with Barbara Simons) (Center for the Study of Language and Information, 2012)

Russell Jones

Professor of the Graduate School

Department of Plant and Microbial Biology

University of California, Berkeley

Author of: The Molecular Life of Plants (with Helen Ougham, Howard Thomas, and Susan Waaland) (Wiley-Blackwell, 2012)

Steven Justice

Professor of English

University of California, Berkeley

Author of: Writing and Rebellion: England in 1381 (University of California Press, 1994)

Stephen Kalberg

Associate Professor

Boston University

Ariel Katz

Associate Professor, Innovation Chair in Electronic Commerce

Faculty of Law

University of Toronto

Molly Keener

Associate Librarian, Scholarly Communication
Wake Forest University

Christopher M. Kelty

Associate Professor of Anthropology and Information Studies
Institute for Society and Genetics
University of California, Los Angeles
Author of: Two Bits: The cultural significance of free software (Duke University Press, 2008)

Anne Klinefelter

Associate Professor of Law and Director of the Law Library
University of North Carolina at Chapel Hill

Author of: Privacy and Library Public Services: Or, I Know What You Read Last Summer, 26 Legal Reference Services Q. 253-279 (2007), reprinted in *Public Services in Law Libraries: Evolution and Innovation in The Twenty-First Century* (Barbara Bintliff & Lee F. Peoples, eds., Haworth, 2007)

Iga Kozlowski

Graduate Student
Department of Sociology
Northwestern University

Richard Lachmann

Professor of Sociology,
University at Albany, State University of New York
Author of: Capitalists in Spite of Themselves (Oxford University Press, 2000)

Lisa Lampert-Weissig

Professor, English Literature and Comparative Medieval Studies
Katzin Professor in Jewish Civilization
University of California, San Diego
Author of: Gender and Jewish Difference from Paul to Shakespeare (University of Pennsylvania Press, 2004)

Hannah Landecker

Associate Professor

Department of Sociology

University of California, Los Angeles

Author of: Culturing Life: How Cells Became Technologies (Harvard University Press, 2007)

Thomas C. Leonard

University Librarian

Professor, Graduate School of Journalism

University of California, Berkeley

Author of: News for All: America's Coming-of-Age with the Press (Oxford University Press, 1995)

Lawrence Lessig

Roy L. Furman Professor of Law and Leadership

Harvard Law School.

Author of: REMIX (2009)

Harry Lewis

Gordon McKay Professor of Computer Science

Harvard University

Jessica Litman

John F. Nickoll Professor of Law and Professor of Information

University of Michigan

Author of: Digital Copyright: protecting intellectual property on the Internet (Prometheus Books, 2001)

Lyn H. Lofland

Research Professor of Sociology (Emerita title)

University of California, Davis

Lydia Pallas Loren

Kay Kitagawa & Andy Johnson-Laird IP Faculty Scholar and

Professor of Law

Lewis & Clark Law School

Author of: Copyright in a Global Information Economy (with Julie E. Cohen) (3d ed., Aspen Publishers, 2010)

Gary Lupyan

Assistant Professor of Psychology
University of Wisconsin, Madison

Lisa A. Macklin

Director, Scholarly Communications Office
Emory University Libraries

Author of: Digital imaging of photographs: A practical approach to workflow design and project management (American Library Association, 1999)

Michael J. Madison

Professor of Law
University of Pittsburgh School of Law
Author of: The Law of Intellectual Property (co-authored with Craig Nard, Mark McKenna and David Barnes) (3d ed., Aspen Publishers, 2011)

John Markoff

Distinguished University Professor
University of Pittsburgh
Author of: The Abolition of Feudalism: Peasants, Lords, and Legislators in the French Revolution (Penn State University Press 1996)

Jerome McGann

University Professor
University of Virginia
Author of: Radiant Textuality: Literature after the World Wide Web (Palgrave Macmillan, 2001)

Stephen McJohn

Professor
Suffolk University Law School
Author of: Intellectual Property Law: Examples and Explanations (4th ed. Aspen Pub. 2012)

Kembrew McLeod

Professor
Communication Studies
University of Iowa
Author of: Creative License: The Law and Culture of Digital Sampling (with Peter DiCola) (Duke University Press, 2011)

Tara McPherson

Associate Professor
School of Cinematic Arts
University of Southern California

J. Hillis Miller

UCI Distinguished Research Professor Emeritus
Departments of Comparative Literature and English
University of California, Irvine

Author of: Reading for Our Time: Adam Bede and Middlemarch Revisited
(Edinburgh University Press, 2012)

Charles Nesson

Weld Professor of Law
Harvard Law School

Author of: Brief on behalf of Joel Tenenbaum in the First Circuit Court of Appeals,
<http://joelfightsback.com/wp-content/uploads/12-2146-Reply.pdf>

Mary Beth Norton

Mary Donlon Alger Professor of American History & Stephen H. Weiss
Presidential Fellow
History Department

Cornell University

Author of: In the Devil's Snare: The Salem Witchcraft Crisis of 1692 (Alfred A. Knopf, 2002).

Tyler T. Ochoa

Professor
High Tech Law Institute

Santa Clara University School of Law

Author of: Understanding Intellectual Property Law (with Donald S. Chisum, Shubha Ghosh, and Mary LaFrance) (2d ed., LexisNexis 2011)

Michael A. Olivas

William B. Bates Distinguished Chair in Law
University of Houston Law Center
Author of: Suing Alma Mater: Higher Education and the Courts (Johns Hopkins University Press, 2013)

Pamela Oliver, PhD

Professor of Sociology

University of Wisconsin-Madison

Author of: The Critical Mass in Collective Action: A Micro-Social Theory (with Gerald Marwell) (Cambridge University Press. 1993)

Victoria F. Phillips

Professor

Director, Glushko-Samuelson Intellectual Property Law Clinic

American University, Washington College of Law

Beth Plale

Professor of Computer Science

Indiana University, Bloomington

Thomas Pogge

Leitner Professor of Philosophy and International Affairs

Yale University

Author of: World Poverty and Human Rights (2d ed., Polity Press, 2008)

Malla Pollack

Author of: Callman on Unfair Competition, Trademarks and Monopolies (co-authored) (4th ed. Thomson Reuters); *What Is Congress Supposed to Promote? Defining ‘Progress’ in Article I, Section 8, Clause 8 of the U.S. Constitution, or Introducing the Progress Clause*, 80 Nebraska L. Rev. 754 (2001)

Hoifung Poon

Researcher

Microsoft Research

Stephen Ramsay

Associate Professor

Department of English

University of Nebraska-Lincoln

Eustáquio J. Reis

Instituto de Pesquisa Econômica Aplicada (IPEA), Rio de Janeiro, Brasil

Author of: The Dynamics of Deorestation and Economic Growth in Brazilian Amazon (with Clive Granger, Likke Andersen, Seteven Wunder, and Diana Weinhold) (Cambridge University Press. 2002)

Jenn Riley

Head, Carolina Digital Library and Archives

University of North Carolina at Chapel Hill

Author of: Metadata for Digital Resources: Implementation, Systems Design, and Interoperability (with Muriel Foulonneau) (Chandos, 2008)

Michael Risch

Associate Professor of Law

Villanova University School of Law

William G. Roy

Professor

Department of Sociology

University of California, Los Angeles

Author of: Reds, Whites and Blues: Social Movements, Folk Music, and Race in America (Princeton University Press, 2010).

Sara Sampson

Clinical Assistant Professor of Law and Deputy Director of the Law Library

University of North Carolina at Chapel Hill

Author of: Ohio Legal Research (with K. Hall), (Carolina Academic Press, 2009).

Joshua D. Sarnoff

Professor of Law and

Director, Center for Intellectual Property Law and Information Technology

DePaul University College of Law

AnnaLee Saxenian

Dean, School of Information

University of California, Berkeley

Author of: Regional Advantage: Culture and Competition in Silicon Valley and Route 128 (Harvard University Press, 1996)

Carly Elizabeth Schall, PhD.
Department of Sociology
Vanderbilt University

Niels Schaumann
Dean and Professor of Law
California Western School of Law

Lea Shaver
Associate Professor
Indiana University
McKinney School of Law
Editor of: Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation, and Development (Bloomsbury Academic, 2011)

Stuart M. Shieber
James O. Welch, Jr. and Virginia B. Welch Professor of Computer Science
Harvard University
Author of: Prolog and Natural-Language Analysis (CSLI Publications, 1987;
Microtome Publishing, 2002)

Jessica Silbey
Professor of Law
Suffolk University Law School
Editor of: Law and Justice on the Small Screen (with Peter Robson) (Hart Publishing, 2012)

Kevin L. Smith
Director of Copyright and Scholarly Communications
Duke University Libraries
Author of: Owning and Using Scholarship: A Handbook on Intellectual Property for Scholars (University of Chicago Press, forthcoming)

Eugene H. Spafford, Ph.D.
Professor
Department of Computer Science
Purdue University

Dr. Lynette Spillman

Professor of Sociology

University of Notre Dame

Author of: Solidarity in Strategy: Making Business Meaningful in American Trade Associations (University of Chicago Press, 2012)

Peter Stamatov

Associate Professor of Sociology

Yale University

Author of: The Origins of Global Humanitarianism: Religion, Empires, and Advocacy (Cambridge University Press, 2013)

Philip B. Stark

Professor and Chair

Department of Statistics

University of California, Berkeley

Author of: “A Primer of Frequentist and Bayesian Inference in Inverse Problems” in Large Scale Inverse Problems and Quantification of Uncertainty (with L. Tenorio) (Biegler et al., eds.) (John Wiley & Sons, 2010)

Katherine J. Strandburg

Professor of Law

New York University

Editor of: Research Handbook on Intellectual Property and Trade Secrecy (with Rochelle C. Dreyfuss) (Edward Elgar, 2011).

Peter Suber

Director of the Harvard Office for Scholarly Communication and

Director of the Harvard Open Access Project

Harvard University

Author of: Open Access (MIT Press, 2012)

Peter P. Swire

C. William O'Neill Professor of Law

Ohio State University

Author of: None of Your Business: World Data Flows, Electronic Commerce, and the European Privacy Directive (with Robert Litan) (Brookings Institution Press, 1998)

Stefan Tanaka

Professor of Communication
Director, Center for the Humanities
University of California, San Diego

Author of: Japan's Orient: Rendering Pasts into History (University of California Press, 1993)

David S. Touretzky

Research Professor of Computer Science
Carnegie Mellon University

Author of: Common Lisp: A Gentle Introduction to Symbolic Computation (The Benjamin/Cummings Publishing Company, 1990) (reprinted with minor corrections, Dover Publications, 2013)

Vilna Bashi Treitler

Professor of Sociology
Baruch College and The Graduate Center
City University of New York

Author of: The Ethnic Project: Transforming Racial Fiction into Ethnic Factions (Stanford University Press, 2013)

Jeffrey D. Ullman

Professor (emeritus)
Stanford University

Author of: Principles of Database Systems (2 volumes) (Computer Science Press, 1988, 1989).

Siva Vaidhyanathan

Chair, Department of Media Studies
Robertson Professor
University of Virginia
Department of Media Studies
& School of Law

Author of: The Googlization of everything: (and Why We Should Worry) (University of California Press, 2011)

Molly Shaffer Van Houweling

Professor of Law
University of California, Berkeley

Todd J. Vision

Associate Professor of Biology

University of North Carolina at Chapel Hill

Author of: “Computational tools and resources for plant genomics” (with McLaysaght, A.) in *Handbook of Plant Biotechnology* (Christou, P. & Klee, H., eds. John Wiley & Sons, 2004)

Eric von Hippel

T. Wilson Professor of Innovation

MIT Sloan School of Management

Author of: *Democratizing Innovation* (MIT Press, 2005)

Thomas Wasow

Professor of Linguistics and

Clarence Irving Lewis Professor of Philosophy

Stanford University

Author of: *Postverbal Behavior* (CSLI Publications, 2002)

Alan Weinstein

Professor of the Graduate School

Department of Mathematics

University of California, Berkeley

Author of: *Lectures on the Geometry of Quantization (Berkeley Mathematical Lecture Notes)* (with Sean Bates) (American Mathematical Society, 1997)

Jim Whitehead

Professor

Computer Science

University of California, Santa Cruz

Editor of: *Collaborative Software Engineering* (with Ivan Mistrík, John Grundy, and André van der Hoek) (Springer, 2010)

Melissa Wilde

Associate Professor of Sociology

University of Pennsylvania

Author of: *Vatican II: A Sociological Analysis of Religious Change* (Princeton University Press, 2007)

John Willinsky

Kholsa Family Professor of Education
Stanford University

Author of: The Access Principle: The Case for Open Access to Research and Scholarship (MIT Press, 2006)

Jane K. Winn

Charles I. Stone Professor
University of Washington School of Law

Terry Winograd

Professor Emeritus of Computer Science
Stanford University

Author of: Understanding Computers and Cognition: A New Foundation for Design (with Fernando Flores) (Ablex, 1986; Addison-Wesley, 1987)

Richard Wittman

Associate Professor
Department of the History of Art & Architecture
University of California, Santa Barbara
Author of: Architecture, Print Culture, and the Public Sphere in Eighteenth-Century France (Routledge, 2007).

Spencer D. Wood

Associate Professor
Department of Sociology, Anthropology and Social Work
Kansas State University

Jonathan Zittrain

Professor of Law
Harvard Law School and
Professor of Computer Science
Harvard School of Engineering and Applied Sciences
Author of: The Future Of The Internet -- And How To Stop It (Yale University Press, 2008)