

# 12-4547-CV

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## United States Court of Appeals For the Second Circuit

THE AUTHORS GUILD, INC., et al.,  
*Plaintiffs-Appellants,*  
v.  
HATHITRUST, et al.,  
*Defendants-Appellees.*  
v.

NATIONAL FEDERATION OF THE BLIND, et al.  
*Intervenor Defendants-Appellees*

*On Appeal From The United States District Court  
For The Southern District of New York*

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### ***AMICUS BRIEF FOR EMORY VACCINE CENTER, A UNIT OF EMORY UNIVERSITY***

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Stephen M. Schaetzel  
MEUNIER CARLIN & CURFMAN, LLC  
817 W. Peachtree Street, Suite 500  
Atlanta, Georgia 30308  
Tel: (404) 645-7700  
*Attorneys for Amicus Emory Vaccine  
Center*

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Local Rule 26.1, Emory Vaccine Center states that it is a unit of Emory University and certifies that there is no parent company or any publicly held corporation that owns 10% or more of Emory University's stock.

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## **INTEREST OF *AMICUS***

Amicus Emory Vaccine Center (EVC) is a unit of Emory University.<sup>1</sup>

EVC's mission is to improve human health by conducting fundamental and clinical research that leads to the development of effective vaccines against infectious and chronic diseases of global importance. The EVC faculty and members conduct research in immunology, microbiology, and virology with a major emphasis on HIV/AIDS research. Additional areas of basic science benchwork research are devoted both to understanding the disease and identifying the treatment and/or cure for malaria, tuberculosis, herpes, hepatitis, dengue fever, West Nile Virus, influenza, yellow fever, and other emerging infectious diseases. This research work broadly covers any infectious disease, both emerging and historical.

Vaccine development for HIV/AIDS is progressing, although thirty-plus years of concentrated research has not yet produced a proven vaccine, therapeutic or preventative, which can be distributed to the public. The EVC is the first academic vaccine center to have an HIV/AIDS vaccine in clinical trials testing, and this vaccine is presently one of three vaccines in Phase IIb testing. The HIV

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<sup>1</sup> In compliance with Fed. R. App. P. 29(c)(5), Amicus Emory Vaccine Center, a unit of Emory University hereby states that none of the parties to this case or their counsel authored this brief in whole or part; that no party or party's counsel contributed money intended to fund preparing or submitting this brief; and that no one else other than Amicus Emory University or its counsel contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

Vaccine Trials Network (HVTN) oversees the testing of the vaccine candidates which are approved to enter and are making their way through the clinical trials testing program. The Hope Clinic of the EVC is a member of the HVTN and works with human volunteers in the testing of HVTN vaccines, including the DNA/MVA (J57/MVA62B) vaccine developed by Harriet Robinson at Emory University.

The work of the EVC contributes to the historical understanding of vaccines and the development of vaccine policy. Studies in the continuing efficacy of the smallpox vaccine were carried out at the EVC and concluded that some residual protection against this disease is present forty plus years after vaccination. The EVC is a signatory of and serves as the host for the Scientific Declaration on Polio Eradication. The vaccine to prevent polio was developed by Jonas Salk and made available in 1955. Yet, this disease still exists in areas of Asia and Africa. There is the distinct possibility that eradication of this disease is possible in the near future and that polio will join the ranks of smallpox as a disease that no longer circulates globally. Additional research at the EVC examines existing vaccines and the changing nature of the diseases they prevent. Preventable childhood diseases such as measles and pertussis are reappearing due to public conceptions/misconceptions of the relationship of childhood immunizations to the occurrence of autism and related to the changes in the vaccine contents.

While the basic benchwork science is critical to the continuing research, researchers need to read, review, and write the literature specific to their subject areas. EVC researchers are on the cutting edge as authors of current journal articles, which are based on research results and background literature. Multiple pieces of valuable research in progress are published in conference proceedings and cited in peer-reviewed journals. A major component of a grant submission is the literature review. The loss of access to the HathiTrust Digital Library (HDL) as requested by the Appellants would, in EVC's view, have a deleterious effect on access to and dissemination of information relevant to vaccine research.

### **SUMMARY OF ARGUMENT**

Background knowledge of what has been attempted is vital in forming the questions for current research projects. Re-examination of prior published materials in the light of current research permits researchers to unearth and bring to light bits of information discovered as relevant to one discipline, but now holding new relevance to current projects.

The access to resources provided through HDL searches allows EVC researchers to discover much more about each specialized research project in a much shorter search time. These searches allow access to material in unexpected places and increase the amount of material accessible. The powerful HDL search tool creates opportunities to uncover details that have been hidden within published

materials but not searchable from other databases. This enhances the breadth and depth of material which is accessible to the multiple areas of vaccine research being pursued by EVC researchers. This ease of access to multiple expected and unexpected sources expands the base of scientific knowledge. The full text capabilities of HDL searches leads researchers to additional search terms and enhanced information not easily attainable through subject searching of other databases. This brings an entirely new dynamic to research as information can be drawn from multiple current and historical sources.

## **ARGUMENT**

### **I. HDL IS UNIQUELY VALUABLE AS AN HISTORICAL RESOURCE FOR CURRENT VACCINE RESEARCH, SERVING THE PUBLIC GOOD**

#### **A. Searchable Databases Have Been Found Transformative**

Courts have repeatedly found the use of searchable databases to be a valuable and protected fair use because, *inter alia*, searchable database uses are transformative, providing “an entirely new use for the original work.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (“thumbnails” of copyrighted images from various websites “highly transformative” because Google transformed image into a “pointer directing a user to a source of information”); *A.V. ex rel. Vanderhye v. iParadigms*, 562 F. 3d 630 (4th Cir. 2009) ( copying and archiving student papers was transformative because it served the distinct purpose



of making an initial determination regarding possible plagiarism); *Bill Graham Archives v. Dorling Kindersley, Ltd*, 448 F. 3d 605 (2d Cir. 2006) (finding that the use of seven copies of entire concert posters in a “coffee table” book on the Grateful Dead was fair use); *Kelly v. Arriba Soft Corp.*, 336 F. 3d 811(9th Cir. 2003) (copying for purposes of search is a transformative use) (cited with approval in *Bill Graham*, 448 F.3d at 611). Each of these courts has based its finding of transformativeness on the social interests inherent in users of searchable databases and other collections in being able to locate materials of interest, such as websites, concert posters or plagiarized materials. For example, the Ninth Circuit found that “a search engine provides social benefit by incorporating an original work into a new work, namely an electronic reference tool.” *Perfect 10*, 508 F.3d at 1165.

As shown below, the full text searching capabilities of the HDL, as employed by the EVC, is an important and valuable tool for locating biomedical research items of interest and reflects the transformative use provided by searchable databases. Moreover, the HDL database presents a stronger transformative use than those in the above cited cases as the HDL database does not display or distribute any portion of an underlying work still protected by copyright.

## **B. The HDL Searchable Database Is Uniquely Beneficial To The EVC**

Diseases that affect people today have been present historically for hundreds of years. The terms used to describe them have evolved and the treatments for them have changed. The ability to search within the full text of older published materials provides a unique value for researchers seeking clues to these diseases as they continue to search or refine the treatments for them. The importance of what has occurred in vaccine research takes on a new significance as new interpretations of historical results are contemplated.

Attitudes toward childhood preventable diseases have challenged health care providers and vaccine policy advisory committees. Researchers need to understand the historical background and the connections of natural remedies along with the safe and effective vaccines presently in use. They also need to examine the recurrence of diseases and to understand the causes of the recurrence. An example of the effect of a change in the makeup of the pertussis vaccine (Tdap) is being seen in present day adolescents, as a booster shot known as DtaP is necessary to continue the vaccine efficacy.

Small pox has been eradicated and polio can follow suit. Malaria and tuberculosis still need the development of a vaccine. Leprosy, known in modern terms as Hansen's disease, does not carry the sentence of isolation it used to carry, but the disease is becoming more prevalent as climate and environmental changes

encourage the transmission of the bacteria which is treatable through a multi-drug combination. The bacteria that cause leprosy and tuberculosis are related so vaccine development for one benefits the other. Searches carried out through HDL produce a combination of results beneficial to studies of all three of these diseases.

The accumulated amount of published data is vast and requires sophisticated search tools. Researchers need to have access to both cutting edge information and to historical studies impacting new research areas. Emory Libraries offers access to more than thirty science and technology related databases. Among the search tools used by researchers, some are paid subscriptions, such as Web of Science, and others are freely available, such as PubMed. HDL offers a complement of serial and monograph publications. The search results found using HDL partially overlap with those of Web of Science and PubMed, but procure results from different sources. This range of sources available through HDL provides access to unmined resources.

The access to information continues to be a major research tool. Much research is individual experiments, but a great deal is collaborative. Often research in one area is parallel to research in another area. The methods are similar, but the goals are different -- and sharing of information benefits both researchers. The ability to search materials over multiple formats allows for more collaboration and sharing of results, all of which expands knowledge for all researchers. HDL as a

search tool leads to unexpected results in unexpected locations, creating opportunities for serendipity.

## **II. FULL-TEXT SEARCHING IN HDL ENABLES AND PROMOTES RESEARCH**

The information found in HDL searches provides a perspective not accessible through commonly used search tools for scientific discussions, such as PubMed and Web of Science. This is due to the ability of HDL to locate words and terms in the body of the text as opposed to the keyword indexing terms used by other database search tools. HDL offers a superior location capability which enhances access to the information and allows the researcher to locate more, and sometimes unanticipated, sources.

The ability to locate specific terms within a text is a powerful tool in locating information. Researchers may not always want or need this capability, especially in light of the large number of results often generated by simple search terms. HDL is not expected to displace customary search tools for most EVC researchers. The HDL database nevertheless provides an extremely valuable complement to the existing databases commonly used in vaccine research, a complement that is not, to our knowledge, available through other means. The HDL search results are so valuable in part because the search terms used are continually evolving as vocabularies change and as new aspects are discovered. Terms used in nineteenth century indexing are unknown to today's researchers.

The vocabulary of today's scientists did not exist to earlier researchers, even though some of the concepts did. The powerful search tool provided by HDL allows researchers to access items in full text searching. The words, small pox and malaria, entered the English language in 1562 and 1572, although 'pocks' and 'bad air' were known in the mid-twelfth century. Tuberculosis appeared as a term in 1860, although the 'wasting disease' was known in the eleventh century. The phrases, 'innate immunity', 'acquired immunity' and 'programmed death' are relatively new search terms.

Searching the term 'bird flu' locates 4,237 HDL results and 3,141 PubMed results. Revising the search term to 'avian influenza' produces 8,346 HDL items and 8,619 PubMed items, mostly 1990 or newer publications. Usage of the term 'bird flu' began in 1908, even though the disease existed prior to this terminology designation, as can be seen when the search term 'fowl pest' is used to locate 7,084 HDL results and 34 PubMed results. Similarly the term 'Newcastle disease' produces 37,412 HDL results and 11,959 PubMed results. Newcastle disease is an influenza-like poultry disease which is transmissible to humans. It made its first appearance in England in 1926 and is now controlled by a vaccine. Recent studies find that the Newcastle virus is showing promising results as an anticancer agent. A researcher seeking a complete picture of current H7N9 bird flu outbreaks in

China and prior results on bird flu studies would need to examine the alternate search terms and the breadth of historical material found through HDL results.

A simple HDL search for ‘Rafi Ahmed Emory Vaccine Center’ brought up 2,335 results. The first item on this list shows eleven instances of this matching term, which indicates a high probability of useful material in this publication. The content of this publication is available for searching; it is not available in full text. While the publication is not in the collections of Emory libraries, it is available in other collections and could be obtained through interlibrary loan. The publication is accessible for further study, and the relevance of this publication can be more easily determined because HDL includes the number of instances the search term appears in the publication.

Thus, the HDL searchable database makes a different and beneficial use of the original works, providing a “pointer” that aids researchers and thereby allows the public to benefit from their efforts. Consistent with the Constitutional framework, the HDL full search capability advances the “Progress of Science and the useful Arts. . . .” U.S. Const. Art. I., §8, cl. 8, and fulfills copyright’s intended purpose “to increase . . . . the harvest of knowledge,” *Harper & Row*, 471 U.S. 539, 545, 105 S. Ct. 2218, 2223 (1985). Consistent with the statutory framework, EVC’s research uses fall squarely within the preferred fair uses of “research,” “scholarship” and “teaching.” 17 U.S.C. §107, preamble.

## CONCLUSION

Libraries have been in the forefront of preservation of printed materials. HDL has the objective of contributing to the common good by collecting, organizing and making accessible the shared record of human knowledge. Part of this objective is in the preservation of the printed materials. Part of it is in making the content of these items searchable and accessible. The location feature of HDL is capable of procuring unique search results and of expanding the collection of search terms connected with a subject. The ability to locate the search terms in the original context offers the opportunity of locating additional terms as well as the serendipity of discovering what is hiding in the plain sight of older research materials. While there is no substitute for the original printed volumes, the digitized formats offer an opportunity for more researchers to access the information and to explore the data collected.

Dated: June 4, 2013

/s/Stephen M. Schaetzel

Stephen M. Schaetzel

*sschaetzel@mcciplaw.com*

Georgia Bar No. 628653

MEUNIER CARLIN & CURFMAN, LLC

817 W. Peachtree Street, N.W., Suite 500

Atlanta, Georgia 30308

Telephone: (404) 645-7700

Facsimile: (404) 645-7707

*Attorneys for Amicus Emory Vaccine Center*

## **CERTIFICATE OF COMPLIANCE**

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 2010 in Times New Roman 14-point font.

Date: June 4, 2013

/s/Stephen M. Schaetzel  
Stephen M. Schaetzel  
*sschaetzel@mcciplaw.com*  
Georgia Bar No. 628653  
MEUNIER CARLIN & CURFMAN, LLC  
817 W. Peachtree Street, N.W., Suite 500  
Atlanta, Georgia 30308  
Telephone: (404) 645-7700  
Facsimile: (404) 645-7707



## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that, on this 4th day of June 2013, I have electronically filed the foregoing Amicus Brief with the Clerk of Court for the United States Court of Appeals for the Second Circuit using the CM/ECF system, which will automatically send e-mail notification of such filing to all attorneys of record.

Joseph M. Beck, Esq.  
W. Andrew Pequignot, Esq.  
Kilpatrick Townsend & Stockton LLP  
Suite 2800  
1100 Peachtree Street, NE  
Atlanta, GA 30309

Robert J. Bernstein, Esq.  
Law Office of Robert J. Bernstein  
17th Floor  
380 Lexington Avenue  
New York, NY 10168

Edward Rosenthal, Esq.  
Jeremy Seth Goldman, Esq.  
Frankfurt Kurnit Klein & Selz, P.C.  
10th Floor  
488 Madison Avenue  
New York, NY 10022

Daniel Frank Goldstein, Attorney  
Jessica Paulie Weber, Esq.  
Brown, Goldstein & Levy LLP  
Suite 1700  
120 East Baltimore Street  
Baltimore, MD 21202

Joseph E. Petersen, Esq.  
Robert Nathan Potter, Esq.  
Allison M. Scott Roach, Esq.  
Kilpatrick Townsend & Stockton LLP  
The Grace Building  
1114 Avenue of the Americas  
New York, NY 10036

Elizabeth Anne McNamara  
Davis Wright Tremaine LLP  
1633 Broadway  
New York, NY 10019

David L. Leichtman  
Hillel Ira Parness  
Shane St. Hill, Esq.  
Robins, Kaplan, Miller & Ciresi L.L.P.  
Suite 3400  
601 Lexington Avenue  
New York, NY 10022

Steven Bernard Fabrizio, Esq.  
Jenner & Block LLP  
1099 New York Avenue, NW  
Washington, DC 20001

Mary Eleanor Rasenberger, Esq.  
Cowan, DeBaets, Abrahams & Sheppard LLP  
34th Floor  
41 Madison Avenue  
New York, NY 10010

/s/Stephen M. Schaetzel  
Stephen M. Schaetzel  
*sschaetzel@mcciplaw.com*  
Georgia Bar No. 628653  
MEUNIER CARLIN & CURFMAN, LLC  
817 W. Peachtree Street, N.W., Suite 500  
Atlanta, Georgia 30308  
Telephone: (404) 645-7700  
Facsimile: (404) 645-7707