

GENERAL ALLEGATIONS

The Library Exemption Under the Copyright Act

40. Recognizing the tremendous societal value provided by our nation's libraries and archives in preserving and securing works of art, literature and science, Congress included in the 1976 Copyright Act a special exemption to allow those institutions to engage in the limited reproduction and distribution of in-copyright works that would otherwise violate the exclusive rights of the copyright holders, fair use notwithstanding. Section 108 of the Copyright Act embodies the compromise adopted by Congress following decades of heated debate between authors, publishers and copyright holders, on the one hand, and libraries, on the other.

41. Section 108 specifies the limited circumstances under which libraries are permitted to reproduce and distribute copyrighted works for purposes of preservation, replacement copies and the fulfillment of patron requests. For example, under Section 108(b), a library is permitted to make three copies of any *unpublished* work in its collection for preservation and security purposes. With respect to *published* works, Section 108(c) also permits a library make three copies. The copies of published works, however, may only be made to *replace* a work in the library's collection that is (or was) damaged, deteriorating, lost or stolen, and only if the library is unable to obtain a new copy at a fair price.

42. Under the original version of Section 108 passed in 1976, libraries were not permitted to make copies of works in "machine-readable," or digital, format. In 1998, Congress passed the Digital Millennium Copyright Act ("DMCA"). Among other things, the DMCA amended Section 108 to permit libraries to make digital copies of unpublished works for preservation purposes and as replacements for published works. The statute, however, placed two restrictions on the permissible use of digital copies:

- (a) There can be no further distribution of the digital format; and

(b) The digital copy cannot be used “outside the premises of the library or archives.”

43. In passing the DMCA, Congress explained the reasons for restricting the libraries’ use of digital copies:

In recognition of the risk that uncontrolled public access to the copies or phonorecords in digital formats could substantially harm the interests of the copyright owner by facilitating immediate, flawless and widespread reproduction and distribution of additional copies or phonorecords of the work, the amendment provides that any copy of a work that the library or archive makes in a digital format must not be otherwise distributed in that format and must not be made available in that format to the public outside the premises of the library or archives. In this way, the amendment permits the utilization of digital technologies solely for the purposes of this subsection.

* * *

In the view of the Committee, this proviso is necessary to ensure that the amendment strikes the appropriate balance, permitting the use of digital technology by libraries and archives while guarding against the potential harm to the copyright owner’s market from patrons obtaining unlimited access to digital copies from any location.

S. Rep. Nos. 105-190, at 61-62 (1998) (emphasis added).

44. Congress also addressed the libraries’ desire to make “orphan works” more broadly available to the public. In 1998, Congress added Section 108(h) to the Copyright Act in response to libraries’ concerns that the twenty-year extension granted to copyrights through passage of the Copyright Term Extension Act would deprive the public of the availability of older, out-of-print works that otherwise would have been placed in the public domain. Section 108(h) permits libraries to reproduce, distribute and perform published copyrighted works that are in the last 20 years of their copyright term and are not commercially exploited or otherwise reasonably available during the extended term.

45. Notwithstanding the more expansive reproduction and distribution rights granted to libraries, in Section 108(g), Congress made clear that those rights “extend only to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions[.]” Libraries are expressly prohibited from “engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material” or “the systematic reproduction or distribution of single or multiple copies or phonorecords. . .” 17 U.S.C. § 108(g)(1) and (2).

46. Since the 1998 updates, significant efforts have been made to further amend Section 108 to address the preservation practices of libraries in an increasingly digital environment. For example, in 2005, the Library of Congress, in cooperation with the U.S. Copyright Office, sponsored a “Section 108 Study Group” to prepare findings and make suggestions to the Library of Congress for modifications to Section 108 to reflect new technology. On March 31, 2008, the Group released its final report, which recommended, among other things, that Section 108 be amended to expand a library’s right to create and store digital copies of published works in their collections for preservation purposes.

47. Despite receiving numerous recommendations from the Section 108 Study Group and other interested parties, since 1998, Congress has not amended Section 108.

The Universities Engage in Systematic Digitization of Copyright Works

48. In blatant derogation of Plaintiffs’ exclusive rights under Section 106 and the express regulations governing libraries’ rights under Section 108 of the Copyright Act, Defendants have engaged in a concerted, systematic and widespread campaign to digitize, reproduce, distribute and otherwise exploit millions of copyrighted works in their libraries without permission from the copyright holders associated with those works.

49. On December 14, 2004, Google announced that it was working with four U.S. libraries, including MLibrary, to digitally scan books from their collections. Upon information and belief, partnerships between Google and other universities and institutions followed over the next several years, including partnerships with UC on or about August 9, 2006, UW on or about October 12, 2006, IU (through its membership in CIC) on or about June 6, 2007 and Cornell on or about August 7, 2007. Since commencing the digitization project, Google and its partners have digitized more than 12 million books.

50. Upon information and belief, pursuant to separate Cooperative Agreements entered into by Google and each University, the parties cooperate to identify books from the University's collection to be digitized. The books selected for digitization are not limited to works in the public domain, unpublished works or deteriorating published works that cannot be replaced, but include in-print books that are commercially available and are protected by copyright. The University then collects the works and has them delivered to a facility located either on or off the school's campus that is occupied by Google personnel and scanning equipment.

51. Upon information and belief, Google is responsible for digitizing the content of the works. After a work has been digitized, Google retains at least one copy for commercial exploitation through "Google Books," an online system that allows users to search the content and view "snippets" of millions of digitized books.

52. Upon information and belief, Google also provides a digital copy of the work to the University. The digital copy comprises a set of scanned image files, files containing the text of the work extracted through optical character recognition ("OCR") technology, and data associated with the work indicating bibliographic and other information. By creating both scanned image files of the pages and a text file from the printed work, the digitization process,

and each subsequent copy thereof, includes two reproductions of the original. After digitization, the original works are returned to the source library.

53. In light of the high-priced and sophisticated scanning technology and amount of staff required to digitize the works, the digital copies obtained by the Universities carry significant economic value. Prior to Google's involvement, libraries estimated their costs of digitization at approximately \$100 per volume. Thus, the value of the digitization project is measured in the hundreds of millions of dollars.

54. Upon information and belief, certain Universities, including MLibrary, also digitize works in their collections, including copyrighted works, "in-house," meaning they create digital copies of works using their own equipment and personnel and without Google's assistance.

55. Neither Google nor the Universities obtained permission from the vast majority of copyright holders to digitize their books.

Google Books Lawsuit

56. On September 20, 2005, the Guild and several published authors filed a class action lawsuit against Google in the United States District Court for the Southern District of New York (the "Google Books Lawsuit"), alleging that Google's digitization and commercial exploitation of copyrighted works constituted massive copyright infringement. *See The Authors Guild, Inc., et al. v. Google Inc.*, Case No. 05 Civ. 8136 (S.D.N.Y.).

57. On October 28, 2008, after extended negotiations, the parties filed a proposed settlement agreement to resolve the dispute. On November 13, 2009, the parties filed for final court approval an Amended Settlement Agreement (the "ASA"), pursuant to which, *inter alia*, Google agreed to compensate authors and publishers in exchange for the right to make the digitized books available to the public. If approved, the ASA would have established a "Book

Rights Registry” to maintain a database of copyright holders and administer distributions of revenues. The ASA also would have created an “Unclaimed Works Fiduciary” to represent the interests of unclaimed, or “orphan,” works, and offered a framework to make orphan works available to the public.

58. On March 22, 2011, the ASA was rejected, with now Circuit Judge Denny Chin concluding that “[w]hile the digitization of books and the creation of a universal digital library would benefit many, the ASA would simply go too far.” *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 669 (S.D.N.Y. 2011).

59. One of Judge Chin’s chief rationales for rejecting the ASA was his concern that “the establishment of a mechanism exploiting unclaimed books is a matter more suited for Congress than this Court.” The Court reasoned:

The questions of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards are matters more appropriately decided by Congress than through an agreement among private, self-interested parties. Indeed, the Supreme Court has held that “it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.”

Id. at 677.

60. The Court noted “longstanding efforts” by Congress to pass legislation to address the orphan works problem, including “Orphan Books” bills that were proposed in 2006 and 2008 but were never enacted. *Id.* at 678. The Court also concluded that the ASA raised significant international law concerns.

61. The Google Books Lawsuit is still pending in this Court.

HathiTrust

62. On October 13, 2008, the thirteen universities comprising the CIC, led by MLibrary, the UC library system, led by the CDL, and the University of Virginia announced the launch of HathiTrust to construct a shared repository of their combined digitized collections.

HathiTrust soon expanded to include over fifty universities, consortia and research institutions from around the world. According to its website, HathiTrust's mission is "to contribute to the common good by collecting, organizing, preserving, communicating, and sharing the record of human knowledge."

63. Upon information and belief, members of HathiTrust "contribute" to the HathiTrust Digital Library digital copies of works in their libraries that were scanned by Google, other organizations such as the Internet Archive, or the libraries' own staff. In derogation of the restrictions of Section 108 on the number of digital copies libraries are permitted to make, HathiTrust members *copy*, rather than *transfer*, their digital works to HathiTrust, meaning that at least two further reproductions are made (one image file, one digital-text OCR file) when a digital object is delivered to HathiTrust. Upon information and belief, digital objects are generally copied to HathiTrust by uploading the files over the Internet or delivering them on removable media.

64. Upon information and belief, the "ingestion" of digital works and their associated metadata into the HDL is performed at MLibrary. As explained below, the digital objects are then replicated to HathiTrust's active mirror site located on IU's Indianapolis campus, and stored on backup tapes located at different UM facilities.

65. Upon information and belief, HathiTrust thereafter provides three primary services to its constituent members, their patrons and the general public.

66. *First*, HathiTrust provides a clustered storage system to hold more than 435 terabytes of combined digital files deposited to date by HathiTrust's 50+ members. Upon information and belief, HathiTrust's storage architecture employs two synchronized instances of server farms (each including at least two web servers, a database server and a storage cluster), with the primary site located at UM's Ann Arbor, Michigan campus where ingestion occurs, and

a redundant mirror site located at IU's Indianapolis campus. HathiTrust also routinely creates tape backups of all data contained in the HDL. The tapes are stored at a different facility on UM's campus and, upon information and belief, these tapes are replicated and the copies are stored at yet another facility on UM's campus. Thus, once a University distributes a digital object to the HDL, at least eight digital copies of the work (four image files, four digital-text OCR files) are generated.

67. *Second*, according to HathiTrust's website, "HathiTrust provides secure, reliable, long-term preservation for deposited materials." Upon information and belief, HathiTrust preserves and secures not only unpublished or difficult-to-replace published works as permitted by Sections 108(b) and (c) of the Copyright Act, but also works that are in-copyright, published and commercially-available.

68. *Third*, HathiTrust provides a variety of tools to allow its users to access content in the HDL. For example, all users may search and identify bibliographic information (title, author, subject, ISBN, publisher, and year of publication) for the works contained in the HDL. HathiTrust also permits all users to search the entire text of all works in the HDL (including public domain and in-copyright works) to determine the number of times and page location(s) of any keyword or phrase found in a book.

69. In addition, HathiTrust permits users to view, search, print and download full copies of certain volumes in the HDL. Whether a user may access this "full view" of a digital object is determined by the identity of the user seeking access to the work (*e.g.*, whether the user is from a HathiTrust university), and the work's purported copyright status according to the "HathiTrust Rights Database."

70. The HathiTrust Rights Database specifies the purported copyright status of each work in the HDL, as determined through automated and manual processes conducted by

HathiTrust, including whether the work is (i) in the public domain, (ii) in-copyright, (iii) in-copyright but has been authorized for certain uses by the associated rights holder, (iii) in-copyright but too brittle to circulate, (iv) of unknown copyright status, or (v) an orphan work. For example, UM students, faculty and patrons of MLibrary, wherever they may be located worldwide, may obtain “full view” access of works that are specified as being in the public domain and originated from MLibrary.

71. Upon information and belief, the HDL is capable of providing public access to the “full view” of every digital object in the database, even if access is purportedly restricted by settings in the HathiTrust Rights Database. Thus, if the copyright status of a work is misidentified in the HathiTrust Rights Database, the HDL malfunctions or a user obtains unauthorized access to the HDL, the work may become fully viewable, printable and downloadable by the general public.

72. In all, through their systematic and concerted digitization efforts, the Universities and HathiTrust are responsible for the creation of at least twelve unauthorized digital copies (six image files, six digital-text files) of every physical work in their libraries that is selected for digitization: two copies for Google, two copies for the originating University, two copies for the HDL servers at UM, two copies for the HDL servers at IU and two tape backups of the image and digital text files at separate UM facilities. Each pair of digital copies is stored at a different location and is accessible by different individuals. It is likely that additional copies are made at some or all of the locations.

HathiTrust Orphan Works Project

73. On May 16, 2011, MLibrary announced the launch of the HathiTrust Orphan Works Project – an initiative to identify so-called orphans amongst the in-copyright works in the HDL, with an initial focus on works published in the United States between 1923 and 1963.

John Wilkin, executive director of HathiTrust, published an article estimating that as many as 50% of the volumes in the HDL may be “orphan works.”

74. To identify an in-copyright work as a work HathiTrust will treat as an “orphan,” the HathiTrust Orphan Works Project purports to follow a multistep due diligence process to check whether the work is commercially available for sale and, if it is not, to attempt to locate and contact the copyright holder. If HathiTrust fails to contact the copyright holder, it then lists the bibliographic information for the work on the HathiTrust Orphan Candidates webpage for ninety days. If no copyright holder emerges during that time, the work will become available for “full view” on HathiTrust to UM’s students, professors and other authenticated users and visitors to the libraries at UM’s campuses, allowing them to view, download and print the entire copyrighted work.

75. In July and August 2011, other HathiTrust members, including Defendants UW, UC and Cornell, announced their participation in the HathiTrust Orphan Works Project and their intent to make works in their collections identified as HathiTrust Orphans available to their respective students, faculty and library patrons.

76. The first list of HathiTrust Orphan Candidates was posted on the HathiTrust website on or about July 15, 2011.

77. The initial complaint in this action was filed on September 12, 2011. The filing of the complaint directly led to the identification and emergence of numerous authors and copyright holders whose works were scheduled to become available for “full view” on HathiTrust beginning October 13, 2011.

78. On September 16, 2011, MLibrary announced that “[t]he close and welcome scrutiny of the list of potential orphan works has revealed a number of errors, some of them serious,” and that “we have already begun an examination of our procedures to identify the gaps

that allowed volumes that are evidently not orphan works to be added to the list.” MLibrary promised, however, that it would “proceed with the work” without specifying a date certain.

79. Unless enjoined by this Court, copyright protected works deemed to be orphans by the HathiTrust process will become available for “full view” to hundreds of thousands of users affiliated with the Universities.

CLAIM FOR RELIEF

80. Plaintiffs incorporate by reference paragraphs 1 through 79 as if set forth herein.

81. Plaintiffs’ copyrights specified in Exhibit A are valid and enforceable.

82. By scanning, creating multiple digital copies of and distributing copyrighted works – including without limitation each of Plaintiffs’ copyrighted works identified on Exhibit A – on a systematic, continuous and unauthorized basis, Defendants have violated and are continuing to violate Section 108 of the Copyright Act and have infringed and are continuing to infringe Plaintiffs’ copyrights and exclusive rights under Section 106 of the Copyright Act.

83. Defendants’ infringing acts have been and continue to be willful, intentional and purposeful, in disregard of the rights of Plaintiffs.

84. Defendants’ conduct has caused, is causing and, unless enjoined by this Court, will continue to cause Plaintiffs great and irreparable injury that cannot be remedied with money. Plaintiffs have no adequate remedy at law.

85. An actual controversy presently exists between the parties regarding whether Defendants’ ongoing, systematic digitization of copyrighted works without authorization and their threat to imminently display the HathiTrust Orphans without authorization constitute and, unless enjoined by this Court, will constitute violations of Sections 106 and 108 of the Copyright Act.

86. Because of Defendants' actions and threatened actions as described herein, including the threat by Defendants HathiTrust and UM to begin displaying copyrighted HathiTrust Orphans, there is a substantial controversy between the parties with adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

87. Plaintiffs are entitled to prospective, injunctive and declaratory relief to enjoin Defendants from their continuous, ongoing and threatened violations of federal copyright law as described herein.

DEMAND FOR RELIEF

WHEREFORE, Plaintiffs demand that:

- (a) Pursuant to 28 U.S.C. § 2201, this Court declare that:
 - (i) Defendants' systematic digitization and distribution of copyrighted materials without authorization constitutes unlawful copyright infringement in violation of Sections 106 and 108 of the Copyright Act;
 - (ii) Defendants' distribution and display of copyrighted works through the HathiTrust Orphan Works Project will infringe the copyrights of Plaintiffs and others likely to be affected;
- (b) Pursuant to 17 U.S.C. § 502, this Court issue an injunction enjoining Defendants from:
 - (i) systematically reproducing, distributing and/or displaying Plaintiffs' or any other copyrighted works without authorization except as specifically provided by 17 U.S.C. § 108;
 - (ii) providing to Google for digitization copyrighted works without authorization;

(iii) proceeding with the HathiTrust Orphans Work Project, including without limitation, from displaying, distributing or otherwise making available any so-called orphan work protected by copyright.

(c) Pursuant to 17 U.S.C. § 503, this Court order the impoundment of all unauthorized digital copies of works protected by copyright within Defendants' possession, custody or control, including works whose copyrights are held by Plaintiffs, to be held in escrow under commercial grade security, with any computer system storing the digital copies powered down and disconnected from any network, pending an appropriate act of Congress.

(d) Pursuant to 17 U.S.C. § 505, this Court award Plaintiffs their attorneys' fees and costs; and

(e) Plaintiffs be granted such other relief as may be deemed just and equitable.

Dated: New York, New York
October 5, 2011

FRANKFURT KURNIT KLEIN & SELZ, P.C.

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EXHIBIT A

COPYRIGHT HOLDER	TITLE	PUBLISHER	PUB. DATE	U.S. COPYRIGHT REGISTRATION NO.	DEFENDANT UNIVERSITY
Authors League Fund	Good troupers all: the story of Joseph Jefferson	Macrae Smith Company	1945	A189587	University of California
Trond Andreassen	Bok-Norge : en litteratursosiologisk oversikt	Universitetsforlaget	2000		University of Michigan
Pat Cummings	C.L.O.U.D.S.	Lothrop, Lee & Shepard Books	1986	TX0001806038	University of Michigan
Pat Cummings	Clean Your Room, Harvey Moon!	Bradbury Press	1991	TX0003159777	University of Michigan
Pat Cummings	Jimmy Lee Did It	Lothrop, Lee & Shepard Books	1985	TX0001650936	University of Michigan
Pat Cummings	Talking With Artists: Volume 1	Bradbury Press	1992	TX0003422950	University of Michigan
Pat Cummings	Talking With Artists: Volume 2	Simon & Schuster Books for Young Readers	1995	TX0004242559	University of Michigan
Pat Cummings	Talking With Adventurers	National Geographic Society	1998	VA0000932461 VA0000932460	University of California
Erik Grundstrom	Oss málvakter emellan	Alba	1988		University of Wisconsin
Angelo Loukakis	Vernacular Dreams	University of Queensland Press	1986	TX0001967553	University of Michigan
Roxana Robinson	Summer light	Viking	1988	TX0002346979	University of Michigan
Roxana Robinson	Georgia O'Keeffe : a life	Harper & Row	1989	TX0002736171	University of Michigan
Roxana Robinson	A glimpse of scarlet and other stories	E. Burlingame Books	1991		University of Michigan
Roxana Robinson	A glimpse of scarlet and other stories	HarperPerennial	1992		University of Michigan
Roxana Robinson	Asking for love and other stories	Random House	1996	TX0004268621	University of Michigan
Roxana Robinson	Sweetwater : a novel	Random House	2003	TX0005905727	University of Michigan

COPYRIGHT HOLDER	TITLE	PUBLISHER	PUB. DATE	U.S. COPYRIGHT REGISTRATION NO.	DEFENDANT UNIVERSITY
Roxana Robinson	A perfect stranger: and other stories	Random House	2005		University of Michigan
Helge Ronning	Den umulige friheten : Henrik Ibsen og moderniteten	Gyldendal	2006		University of Wisconsin
Helge Ronning	Dødsdom over et folk? : imperialismen og Biafrakonflikten	Pax	1969		University of California
André Roy	Marguerite Duras à Montréal	Spirale	1984		University of Michigan
André Roy	Marguerite Duras à Montréal	Editions Spirale	1981		University of California
J.R. Salamanca	Southern light : a novel	Knopf	1986	TX0001800562	University of Michigan
J.R. Salamanca	Embarkation	Knopf	1973		University of Michigan
J.R. Salamanca	The lost country: a novel	Simon & Schuster	1958	RE0000313041	University of Michigan
J.R. Salamanca	A sea change	Knopf	1969		University of Michigan
J.R. Salamanca	That summer's trance : a novel	Welcome Rain	2000		University of Michigan
J.R. Salamanca	Lilith	Simon & Schuster	1961	RE0000459151	University of Michigan
J.R. Salamanca	Lilith	Simon & Schuster	1961	RE0000459151	University of California
J.R. Salamanca	Embarkation	Knopf	1973		University of California
J.R. Salamanca	The lost country: a novel	Simon & Schuster	1958	RE0000313041	University of California
J.R. Salamanca	A sea change	Knopf	1969		University of California
J.R. Salamanca	Southern light : a novel	Knopf	1986	TX0001800562	University of California
James Shapiro	Oberammergau	Pantheon Books	2000	TX0005234556	University of Michigan
Danièle Simpson	Je cours plus vite que la lycose : poèmes	Naaman	1983		University of Wisconsin
T.J. Stiles	Jesse James : last rebel of the Civil War	A.A. Knopf	2002	TX0003959406	University of Michigan

COPYRIGHT HOLDER	TITLE	PUBLISHER	PUB. DATE	U.S. COPYRIGHT REGISTRATION NO.	DEFENDANT UNIVERSITY
Fay Weldon	Watching me, watching you	Summit Books	1981	TX0000907715	University of Michigan
Fay Weldon	Praxis : a novel	Summit Books	1978	TX0000161661	University of Michigan
Fay Weldon	Puffball : a novel	Summit Books	1980	TX0000550383	University of Michigan
Fay Weldon	Remember me	Random House	1976		University of Michigan
Fay Weldon	The heart of the country	Hutchinson	1987	TX0002580673	University of Michigan
Fay Weldon	The hearts and lives of men	Heinemann	1987	TX0002176563	University of Michigan
Fay Weldon	The rules of life	Hutchinson	1987	TX0002139543	University of Michigan
Fay Weldon	The Shrapnel Academy	Viking	1987	TX0001967142	University of Michigan
Fay Weldon	The heart of the country	Viking	1988	TX0002580673	University of Michigan
Fay Weldon	Sacred cows	Chatto & Windus	1989		University of Michigan
Fay Weldon	The fat woman's joke	Academy Chicago	1986		University of Michigan
Fay Weldon	The cloning of Joanna May	Collins	1989	TX0002728206	University of Michigan
Fay Weldon	Little sisters	Chivers Press	1987		University of Michigan
Fay Weldon	Darcy's utopia	Collins	1990	TX0002931605	University of Michigan
Fay Weldon	The cloning of Joanna May	Penguin Books	1991	TX0002728206	University of Michigan
Fay Weldon	Moon over Minneapolis, or, Why she couldn't stay	HarperCollins	1991	TX0003114513	University of Michigan
Fay Weldon	Life force	Viking	1992	TX0003274167	University of Michigan
Fay Weldon	Growing rich	HarperCollins	1992		University of Michigan
Fay Weldon	Life force	HarperCollins	1992	TX0003274167	University of Michigan
Fay Weldon	Trouble	Penguin Books	1994	TX0003682496	University of Michigan
Fay Weldon	Affliction	HarperCollins	1993		University of Michigan
Fay Weldon	Splitting	Flamingo	1995	TX0004084784	University of Michigan
Fay Weldon	Wicked women : stories	The Atlantic Monthly Press	1997	TX0004578645	University of Michigan
Fay Weldon	Leader of the band	Penguin Books	1990	TX0002560295	University of Michigan
Fay Weldon	Growing rich	Flamingo	1992		University of Michigan

COPYRIGHT HOLDER	TITLE	PUBLISHER	PUB. DATE	U.S. COPYRIGHT REGISTRATION NO.	DEFENDANT UNIVERSITY
Fay Weldon	The hearts and lives of men	Flamingo	1992	TX0002176563	University of Michigan
Fay Weldon	A hard time to be a father : a collection of short stories	Flamingo	1998		University of Michigan
Fay Weldon	Life force	HarperCollins	1992	TX0003274167	University of Michigan
Fay Weldon	Nothing to wear and nowhere to hide : stories	Flamingo	2002		University of Michigan
Fay Weldon	Big women	Flamingo	1997	TX0004843655	University of Michigan
Fay Weldon	Godless in Eden : a book of essays	Flamingo	1999		University of Michigan
Fay Weldon	Rhode Island blues	Flamingo	2000	TX000533279	University of Michigan
Fay Weldon	The Bulgari connection	Flamingo	2001		University of Michigan
Fay Weldon	Auto da fay	Flamingo	2002	TX0005741087	University of Michigan
Fay Weldon	Flood warning : a play	Samuel French	2003	PA0001247989	University of Michigan
Fay Weldon	Wicked women : stories	The Atlantic Monthly Press	1997	TX0004578645	University of Michigan
Fay Weldon	Mantrapped	Fourth Estate	2004		University of Michigan
Fay Weldon	She may not leave	Fourth Estate	2005	TX0006444289	University of Michigan
Fay Weldon	The spa decameron	Quercus	2007	TX0007138911	University of Michigan
Fay Weldon	The hearts and lives of men	Heinemann	1987	TX0002176563	University of California
Fay Weldon	Big women	Flamingo	1997	TX0004843655	University of California
Fay Weldon	Life force	Penguin Books	1993	TX0003274167	University of California
Fay Weldon	Worst fears	Flamingo	1996	TX0004405886	University of California

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

THE AUTHORS GUILD, INC., *et al.*

Plaintiffs,

v.

HATHITRUST, *et al.*

Defendants.

11 CIV 6351 (HB)(JLC)

**DEFENDANTS' JOINT ANSWER
AND DEFENSES**

Defendants Julia Donovan Darlow, Laurence B. Deitch, Denise Ilitch, Olivia P. Maynard, Andrea Fischer Newman, Andrew C. Richner, S. Martin Taylor and Katherine E. White, in their official capacities as The Regents of The University of Michigan (the named Regents are defined collectively as the "UM Regents," and The University of Michigan is hereinafter referred to as "UM"); Richard C. Blum, David Crane, William De La Pena, Russell Gould, Eddie Island, Odessa Johnson, George Kieffer, Sherry L. Lansing, Monica Lozano, Hadi Makarechian, George M. Marcus, Alfredo Mireles, Jr., Norman J. Pattiz, Bonnie Reiss, Fred Ruiz, Leslie Tang Schilling, Bruce D. Varner, Paul Wachter and Charlene Zettel, in their official capacities as appointed members of the Board of The Regents of the University of California (the named

members of the Board are defined collectively as the “UC Regents,” and The Regents of the University of California is hereinafter referred to as “UC”); Jeffrey Bartell, Mark J. Bradley, Judith V. Crain, John Drew, Tony Evers, Michael J. Falbo, Edmund Manydeeds, Katherine Pointer, Charles Pruitt, Troy Sherven, Brent Smith, Michael J. Specter, S. Mark Tyler, Jose F. Vasquez And David G. Walsh, in their official capacities as The Board of Regents of The University of Wisconsin (the named members of the Board are defined collectively as the “UW Regents,” and The University of Wisconsin is hereinafter referred to as “UW”); William R. Cast, Patrick A. Shoulders, Maryellen Kiley Bishop, Bruce Cole, Philip N. Eskew, Jr., Cora J. Griffin, Thomas E. Reilly, Jr., Derica W. Rice and William H. Strong, in their official capacities as The Trustees of Indiana University (the named Trustees are defined collectively as the “IU Trustees,” and Indiana University is hereinafter referred to as “IU”); Cornell University (“Cornell”) (UM, UC, UW, IU, and Cornell are collectively referred to as the “Universities” and each may be referred to individually as a “University”); and HathiTrust, which is the name of a service provided by UM under agreements with member institutions including the Universities (but only to the extent that HathiTrust constitutes an entity capable of being sued, which Defendants contend it does not) (“HathiTrust Service”) (collectively, “Defendants”) hereby state the following for their JOINT ANSWER AND DEFENSES to the First Amended Complaint filed by the Plaintiffs in the above-captioned action (“Plaintiffs”). Defendants respond to the paragraphs of the First Amended Complaint (“FAC”) in correspondingly numbered paragraphs. Defendants deny each allegation in the FAC unless expressly admitted.

1. Defendants admit that Plaintiffs, in the FAC, seek prospective injunctive and declaratory relief but deny that Plaintiffs are entitled to such relief. Defendants admit that “the Regents of the University of Michigan/University Library, Ann Arbor Campus”; “The Regents

of the University of California on behalf of its California Digital Library”; “the Board of Regents of the University of Wisconsin System, d/b/a the University of Wisconsin-Madison, General Library System”; and Cornell University entered into agreements with Google Inc. (“Google”) regarding the digitization of works in their libraries’ collections, and that The Board of Trustees of the University of Illinois, on behalf of the Committee on Institutional Cooperation (“CIC”) and its member universities (the “CIC Universities”), entered into an agreement with Google regarding the digitization of works in the CIC Universities’ library collections. Defendants further admit that “HathiTrust” is the name of a service of UM in which the Universities and other institutions participate under agreements with UM. Defendants admit that Defendants have engaged in uses of and activities with respect to the works, which uses are permitted under the United States Copyright Act (the “Copyright Act”). Defendants lack knowledge or information sufficient to form a belief about whether Plaintiffs hold a copyright in any work used by Defendants and thus deny such allegations. Defendants deny the remaining allegations in Paragraph 1 of the FAC.

2. Defendants admit that pursuant to Google’s various agreements with the Regents of the University of Michigan/University Library, Ann Arbor Campus; The Regents of the University of California on behalf of its California Digital Library; the Board of Regents of the University of Wisconsin System, d/b/a the University of Wisconsin-Madison, General Library System; Cornell University; and The Board of Trustees of the University of Illinois, on behalf of the CIC and the CIC Universities, Google has provided digital copies of books from a University’s library’s collections either to that University or, at the University’s request, to the University of Michigan Library in Ann Arbor (the “MLibrary”), and that the Universities store these digital copies in a repository called the HathiTrust Digital Library (“HDL”), which

contains at least 9.7 million volumes. Defendants also admit that the Universities participate in the HathiTrust Service along with more than fifty other institutions. Defendants lack knowledge or information sufficient to form a belief about whether seventy-three percent (73%) of these volumes are protected by copyright and thus deny such allegations. Defendants deny the remaining allegations in Paragraph 2 of the FAC.

3. Defendants admit that UM and UC have announced their participation in the Orphan Works Project (“OWP”), an initiative to, *inter alia*, identify “orphan works”—in-copyright works for which the copyright holder cannot be found—and eventually to make lawful uses of these works. Defendants also admit that Cornell and UW have announced plans to participate in the OWP and that IU has not announced plans to participate in the OWP. Defendants deny the remaining allegations in Paragraph 3 of the FAC.

4. Defendants admit that the Universities have asserted that their activities are beneficial to society and permissible under a variety of sections of the Copyright Act, including as fair use, which received statutory recognition in Section 107 of the Copyright Act. Defendants deny the remaining allegations in Paragraph 4 of the FAC.

5. Defendants admit that, in a separate case, Google and The Authors Guild, Inc. (among other parties) filed a motion for approval of a proposed settlement agreement that was denied by the court. The referenced proposed settlement agreement and court order denying approval speak for themselves. Defendants deny the remaining allegations in Paragraph 5 of the FAC.

6. Defendants deny the allegations in Paragraph 6 of the FAC.

7. Defendants deny the allegations in Paragraph 7 of the FAC.

8. Defendants admit that the FAC seeks injunctive relief and purports to state claims for copyright infringement under the United States Copyright Act, 17 U.S.C. 101 *et seq.* and seeks declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202, but Defendants deny that any such infringement has occurred, deny that Plaintiffs are entitled to the relief sought, and otherwise deny the remaining allegations in Paragraph 8 of the FAC.

9. Defendants deny the allegations in Paragraph 9 of the FAC.

10. Defendants deny the allegations in Paragraph 10 of the FAC.

11. Cornell admits the allegations in Paragraph 11 of the FAC, and the remaining Defendants deny the allegations in Paragraph 11 of the FAC.

12. Upon information and belief, Defendants admit that The Authors Guild, Inc. is a corporation with a place of business at 31 East 32nd Street, New York, New York, 10016. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 12 of the FAC and thus deny such allegations.

13. Defendants admit that a book entitled “Good Troupers All: The Story of Joseph Jefferson” by Gladys Malvern was digitized and included in the HDL and was preliminarily identified as a book that UM planned to make available on the limited basis contemplated as part of the OWP if the copyright holder were not identified, and Defendants otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 13 of the FAC and thus deny such allegations.

14. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 14 of the FAC and thus deny such allegations.

15. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 15 of the FAC and thus deny such allegations.

16. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 16 of the FAC and thus deny such allegations.

17. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 17 of the FAC and thus deny such allegations.

18. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 18 of the FAC and thus deny such allegations.

19. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 19 of the FAC and thus deny such allegations.

20. Defendants deny that the “Associations” have associational standing to pursue claims for declaratory and injunctive relief on behalf of their members. Defendants also deny that participation of the Associations’ individual members would not be required to resolve the issues in this case. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 20 of the FAC and thus deny such allegations.

21. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 21 of the FAC and thus deny such allegations.

22. Defendants admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 22 of the FAC was digitized and included in the HDL, and Defendants otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 22 of the FAC and thus deny such allegations.

23. Defendants admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 23 of the FAC were digitized and included in the HDL, and Defendants otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 23 of the FAC and thus deny such allegations.

24. Defendants admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 24 of the FAC was digitized and included in the HDL, and Defendants otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 24 of the FAC and thus deny such allegations.

25. Defendants admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 25 of the FAC was digitized and included in the HDL, and Defendants otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 25 of the FAC and thus deny such allegations.

26. Defendants admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 26 of the FAC were digitized and included in the HDL, and Defendants otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 26 of the FAC and thus deny such allegations.

27. Defendants admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 27 of the FAC were digitized and included in the HDL, and Defendants otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 27 of the FAC and thus deny such allegations.

28. Defendants admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 28 of the FAC were digitized and included in the HDL, and Defendants otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 28 of the FAC and thus deny such allegations.

29. Defendants admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 29 of the FAC were digitized and included in the HDL and that a book entitled “Lost Country” by Jack Salamanca was preliminarily identified as a book that UM planned to make available on the limited basis contemplated as part of the OWP if the copyright holder were not identified, and Defendants otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 29 of the FAC and thus deny such allegations.

30. Defendants admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 30 of the FAC was digitized and included in the HDL, and Defendants otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by

Defendants. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 30 of the FAC and thus deny such allegations.

31. Defendants admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 31 of the FAC was digitized and included in the HDL, and Defendants otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 31 of the FAC and thus deny such allegations.

32. Defendants admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 32 of the FAC was digitized and included in the HDL, and Defendants otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 32 of the FAC and thus deny such allegations.

33. Defendants admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 33 of the FAC were digitized and included in the HDL, and Defendants otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 33 of the FAC and thus deny such allegations.

34. Defendants admit that UM is a state university comprising three campuses with a principal place of business in Ann Arbor, Michigan. Defendants also admit that UM is governed by its Board of Regents. Defendants further admit that UM owns, operates, and controls MLibrary and that, upon information and belief, MLibrary is one of the largest university library systems in the United States, holding more than 8.5 million volumes and with more than 3

million patron visits per year to its facilities and its website. Defendants also admit that on or about December 14, 2004, “the Regents of the University of Michigan/University Library, Ann Arbor Campus” entered into a Cooperative Agreement with Google to digitize works from the MLibrary collection (the “UM-Google Cooperative Agreement”). Defendants further admit that UM is a co-founder, host, and primary administrator of the HathiTrust Service and is the largest contributor to the HDL, which contains the collection of digital works with respect to which the HathiTrust Service operates. Defendants deny the remaining allegations in Paragraph 34 of the FAC.

35. Defendants admit that UC is a public trust comprising ten campuses with a principal place of business in Oakland, California. Defendants also admit that UC is governed by its Board of Regents. Defendants further admit that UC owns, operates, and controls the UC library system, that the UC library system consists of more than 100 libraries, and that, upon information and belief, the UC library system collectively is the largest research/academic library in the world. Defendants also admit that on or about August 3, 2006, “The Regents of the University of California on behalf of its California Digital Library” entered into a Cooperative Agreement with Google to digitize works from UC’s libraries (the “UC-Google Cooperative Agreement”). Defendants further admit that UC is a co-founder of the HathiTrust Service and is the second largest contributor to the HDL. Defendants also admit that UC announced on August 24, 2011 its intention to join the OWP. Defendants deny the remaining allegations in Paragraph 35 of the FAC.

36. Defendants admit that UW is a state university system comprising twenty-six campuses with a principal place of business in Madison, Wisconsin. Defendants also admit that UW is governed by its Board of Regents. Defendants further admit that UW owns, operates, and

controls the UW library system, holding more than 8 million volumes. Defendants also admit that on or about October 12, 2006, the “the Board of Regents of the University of Wisconsin System, d/b/a the University of Wisconsin-Madison, General Library System” entered into a Cooperative Agreement with Google to digitize works from UW’s libraries (the “UW-Google Cooperative Agreement”). Defendants further admit that UW is a co-founder of the HathiTrust Service and is the third largest contributor to the HDL. Defendants also admit that UW’s intention to participate in the OWP became public on June 23, 2011. Defendants deny the remaining allegations in Paragraph 36 of the FAC.

37. Defendants admit that “the trustees of Indiana University” governs IU, which is a body politic of the State of Indiana, a State institution of higher education comprising eight campuses with a principal place of business in Bloomington, Indiana. Defendants aver that the campus at Fort Wayne, called Indiana University-Purdue University Fort Wayne, is managed by Purdue University. Defendants further admit that IU owns, operates, and controls the IU library system, holding more than 7.8 million books in over 900 languages. Defendants also admit that IU’s Bloomington campus is a member of the CIC, a consortium of Big Ten universities plus the University of Chicago. Defendants further admit that on or about June 6, 2007, The Board of Trustees of the University of Illinois, on behalf of the CIC and the CIC Universities, entered into a Cooperative Agreement with Google to digitize works from CIC Universities’ libraries (the “CIC-Google Cooperative Agreement”). Defendants further admit that IU’s Bloomington campus is the seventh largest contributor to the HDL. Defendants admit that a fully operational, synchronized, and live “mirror site” of the HDL is located on IU’s Indianapolis campus. Defendants deny the remaining allegations in Paragraph 37 of the FAC.

38. Defendants admit that Cornell is a corporation and private land-grant university with its principal place of business in Ithaca, New York. Defendants also admit that Cornell owns, operates, and controls the Cornell library, holding more than 8 million volumes. Defendants further admit that on or about August 6, 2007, Cornell entered into a Cooperative Agreement with Google to digitize works from the Cornell library (the “Cornell-Google Cooperative Agreement”). Defendants also admit that Cornell is the fourth largest contributor to the HDL. Defendants further admit that Cornell announced on August 24, 2011 its intention to join the OWP. Defendants deny the remaining allegations in Paragraph 38 of the FAC.

39. Defendants admit that “HathiTrust” is the name of a service through which more than fifty institutions, which include universities, libraries, educational institutions, and consortia, are collaborating with UM to create a reliable and increasingly comprehensive digital repository of books. Defendants also admit that UM’s principal place of business for purposes of providing the HathiTrust Service is in Ann Arbor, Michigan. Defendants further admit that as of October 5, 2011, the HDL contained 9,709,348 volumes, amounting to 435 terabytes of data. Defendants deny the remaining allegations in Paragraph 39 of the FAC.

40. Defendants admit that libraries and archives provide a tremendous societal value in preserving and securing works of art, literature, and science. Defendants also admit that Section 108 of the Copyright Act is one of many limitations on copyright holders’ rights. Defendants deny the remaining allegations in Paragraph 40 of the FAC.

41. Defendants admit that Section 108(b) permits a library to make three copies of an unpublished work for preservation and security purposes (among other purposes). Defendants also admit that Section 108(c) permits a library to make three copies of a published work. Defendants deny the remaining allegations in Paragraph 41 of the FAC.

42. Defendants respond to Paragraph 42 by stating that Section 108 of the Copyright Act, as it has existed at various times, speaks for itself. Defendants further respond that Plaintiffs' description of Section 108 is incomplete and therefore mischaracterizes the statute. Defendants thus deny the allegations in Paragraph 42 of the FAC.

43. Defendants admit that Paragraph 43 appears to be an accurate quote of selected text (with Plaintiffs' emphasis) from Senate Report No. 105-190 (1998), which speaks for itself, and therefore is an incomplete and inaccurate representation of the legislative history. Defendants deny the remaining allegations in Paragraph 43 of the FAC.

44. Defendants respond to Paragraph 44 by stating that Section 108 of the Copyright Act, as it has existed at various times, speaks for itself. Defendants further respond that Plaintiffs' description of Section 108 is incomplete and therefore mischaracterizes the statute. Defendants thus deny the allegations in Paragraph 44 of the FAC.

45. Defendants respond to Paragraph 45 by stating that Section 108 of the Copyright Act, as it has existed at various times, speaks for itself. Defendants further respond that Plaintiffs misquote Section 108 and that Plaintiffs' description of Section 108 is incomplete and therefore mischaracterizes the statute. Defendants thus deny the allegations in Paragraph 45 of the FAC.

46. Defendants admit the allegations in Paragraph 46 of the FAC.

47. Defendants deny the allegations in Paragraph 47 of the FAC.

48. Defendants deny the allegations in Paragraph 48 of the FAC.

49. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 49 regarding an announcement made by Google; regarding whether, when, and with whom Google has formed partnerships; and regarding whether Google

and “its partners” have digitized more than 12 million books and thus deny such allegations. Defendants admit that on or about August 3, 2006, The Regents of the University of California on behalf of its California Digital Library entered the UC-Google Cooperative Agreement; that on or about October 12, 2006, the Board of Regents of the University of Wisconsin System, d/b/a the University of Wisconsin-Madison, General Library System entered the UW-Google Cooperative Agreement; that on or about June 6, 2007, The Board of Trustees of the University of Illinois, on behalf of the CIC and the CIC Universities, entered the CIC-Google Cooperative Agreement; and that on or about August 6, 2007, Cornell entered the Cornell-Google Cooperative Agreement. Defendants deny the remaining allegations in Paragraph 49 of the FAC.

50. Defendants admit that pursuant to the UM-Google Cooperative Agreement, UM cooperates with Google to identify books from UM’s collection to be digitized; that pursuant to the UC-Google Cooperative Agreement, UC cooperates with Google to identify books from UC’s collection to be digitized; that pursuant to the UW-Google Cooperative Agreement, UW cooperates with Google to identify books from UW’s collection to be digitized; that pursuant to the CIC-Google Cooperative Agreement, each of the CIC Universities, including IU, cooperates with Google to identify books from their individual collections to be digitized; and that pursuant to the Cornell-Google Cooperative Agreement, Cornell cooperates with Google to identify books from Cornell’s collection to be digitized. Defendants admit that the books selected for digitization pursuant to these agreements are not limited to works in the public domain, unpublished works, or deteriorating published works that cannot be replaced, and include in-print books that are commercially available and books that are protected by copyright. Defendants further admit that pursuant to the terms of these various agreements, the works selected for

digitization are delivered to a facility that is located either on or off the University's campus and that is occupied by Google personnel and scanning equipment. Defendants deny the remaining allegations in Paragraph 50 of the FAC.

51. Defendants admit that Google has digitized books owned by the Universities' libraries. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding "Google Books" and Google's actions with respect to "Google Books" and thus deny the remaining allegations in Paragraph 51 of the FAC.

52. Defendants admit that pursuant to Google's various agreements with the Regents of the University of Michigan/University Library, Ann Arbor Campus; The Regents of the University of California on behalf of its California Digital Library; the Board of Regents of the University of Wisconsin System, d/b/a the University of Wisconsin-Madison, General Library System; Cornell University; and The Board of Trustees of the University of Illinois, on behalf of the CIC and the CIC Universities, after digitizing a book from the collection of a University, Google may provide a digital copy of the book to the University library or, at the University's request, to MLibrary to be incorporated into the HDL, and Defendants admit that the terms of these various agreements provide that the digital copy include a set of image and OCR files and associated meta-information about the files. Defendants also admit that books that leave the premises of the Universities' libraries to be digitized are returned to the libraries. Defendants deny the remaining allegations in Paragraph 52 of the FAC.

53. Defendants admit that some libraries have estimated their costs of performing the act of digitization at approximately \$100 per volume. Defendants deny the remaining allegations in Paragraph 53 of the FAC.

54. Defendants admit that certain Universities, including UM, have digitized works in their library collections. Defendants deny the remaining allegations in Paragraph 54 of the FAC.

55. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 55 of the FAC and thus deny such allegations.

56. Defendants admit that The Authors Guild, Inc. and others filed a purported class action lawsuit against Google in the Southern District of New York, *Authors Guild, Inc. v. Google, Inc.*, Case No. 05 Civ. 8136 (S.D.N.Y. filed Sept. 20, 2005), involving Google's digitization of books (the "Google Books Lawsuit"). The complaint in the Google Books Lawsuit speaks for itself, and therefore Defendants deny the remaining allegations in Paragraph 56 of the FAC.

57. Defendants admit that Google and The Authors Guild, Inc. (among other parties) filed a motion for approval of a proposed settlement agreement in the Google Books Lawsuit. The proposed settlement agreement speaks for itself, and therefore Defendants deny the remaining allegations in Paragraph 57 of the FAC.

58. Defendants admit that the motion for approval of the proposed settlement agreement was denied on March 22, 2011. Defendants also admit that Paragraph 58 of the FAC accurately quotes from Judge Denny Chin's decision. Judge Chin's decision speaks for itself, and therefore Defendants deny the remaining allegations of Paragraph 58 of the FAC.

59. Defendants admit that Paragraph 59 of the FAC accurately quotes from Judge Denny Chin's decision, which speaks for itself. Defendants deny the remaining allegations in Paragraph 59 of the FAC.

60. Defendants admit that Judge Denny Chin's decision noted efforts by Congress to pass orphan works legislation. Defendants also admit that the decision discussed international

law concerns raised by foreign authors and entities regarding the ASA. Judge Chin's decision speaks for itself. Defendants deny the remaining allegations in Paragraph 60 of the FAC.

61. Defendants admit that the Google Books Lawsuit is still pending in the Southern District of New York.

62. Defendants admit that on October 13, 2008, the thirteen universities comprising the CIC, led by UM; UC's libraries, led by the CDL; and the University of Virginia announced the launch of the HathiTrust Service and the HDL, the shared repository of digital collections of institutions participating in the HathiTrust Service. Defendants also admit that there are currently more than fifty institutions, including universities, libraries, educational institutions, and consortia, from around the world participating in the HathiTrust Service. Defendants further admit that the website for the HathiTrust Service states that the mission of the HathiTrust Service is "to contribute to the common good by collecting, organizing, preserving, communicating, and sharing the record of human knowledge." Defendants deny the remaining allegations in Paragraph 62 of the FAC.

63. Defendants admit that digital copies of works in the Universities' libraries that were digitized by Google, other organizations such as the Internet Archive, or the Universities' libraries' staff have been deposited into the HDL by the Universities or at their request. UM Regents, the HathiTrust Service, and UC Regents admit that digital copies deposited in the HDL by some institutions have been delivered to the HDL over the Internet or via removable media, and the remaining Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in the third sentence of Paragraph 63 of the FAC and thus deny such allegations. Defendants deny the remaining allegations in Paragraph 63 of the FAC.

64. Defendants admit that the incorporation of digital works and their associated metadata into the HDL is performed at MLibrary, and deny the remaining allegations in the first sentence of Paragraph 64 of the FAC. UM Regents, the HathiTrust Service, and IU Trustees admit that the digital works and associated metadata are replicated to an active mirror site located on IU's Indianapolis campus and are stored on backup tapes located at UM's facilities, and deny the remaining allegations in Paragraph 64 of the FAC. The remaining Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in the second sentence of Paragraph 64 of the FAC and thus deny such allegations.

65. Defendants incorporate their responses to Paragraphs 66-68 of the FAC and deny the allegations in Paragraph 65 of the FAC.

66. UM Regents, the HathiTrust Service, and IU Trustees admit that the HathiTrust Service provides a clustered storage system to hold more than 435 terabytes of digital files deposited into the HDL by or at the request of institutions participating in the HathiTrust Service; that the architecture for storing the HDL and operating the HathiTrust Service employs two synchronized instances of server farms (each including at least two web servers, a database server, and a storage cluster), with the primary site located at UM's Ann Arbor, Michigan campus where incorporation into the HDL occurs, and a mirror site located at IU's Indianapolis campus; that the HathiTrust Service includes routine tape backups of all data in the HDL; and that these tapes are stored at a facility on UM's campus and are replicated to create a second backup stored at a separate facility on UM's campus. UM Regents, the HathiTrust Service, and IU Trustees deny the remaining allegations in Paragraph 66 of the FAC. UW Regents admit that the HathiTrust Service provides a clustered storage system to hold more than 435 terabytes of digital files deposited into the HDL by institutions participating in the HathiTrust Service, and

that the architecture for storing the HDL and operating the HathiTrust Service employs two synchronized instances of server farms (each including at least two web servers, a database server, and a storage cluster), with the primary site located at UM's Ann Arbor, Michigan campus where ingestion occurs, and a mirror site located at IU's Indianapolis campus. UW Regents lack knowledge or information sufficient to form a belief about the truth of the allegations in the third and fourth sentences of Paragraph 66 of the FAC and thus deny such allegations, and UW Regents deny the remaining allegations in Paragraph 66 of the FAC. The remaining Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 66 of the FAC and thus deny such allegations.

67. Defendants admit that this is an accurate quote from the HathiTrust Service website. Defendants also admit that the HathiTrust Service preserves and secures books that are in-copyright, published, and commercially-available. Defendants deny the remaining allegations in Paragraph 67 of the FAC.

68. Defendants admit that the HathiTrust Service includes a search tool that permits users to conduct full-text searches of the works in the HDL to determine the number of times a searched term appears, and the page numbers on which the searched term appears, in books in the HDL (including public domain and in-copyright works). Defendants deny the remaining allegations in Paragraph 68 of the FAC.

69. Defendants admit that the HathiTrust Service permits certain users to view, search, print, and download full copies of certain volumes in the HDL, and Defendants admit that the level of access to a work is determined in part by the identity of the user and the copyright status of the work, and deny the remaining allegations in Paragraph 69 of the FAC.

70. Defendants admit that the HathiTrust Rights Database includes categorizations of copyright status for each work in the HDL, as determined through processes conducted as part of the HathiTrust Service or through other resources. Defendants also admit that the HDL allows users to view books identified as being in the public domain on the HathiTrust Service website, wherever the users may have access to the website. Defendants deny the remaining allegations of Paragraph 70 of the FAC.

71. Defendants deny the allegations in Paragraph 71 of the FAC.

72. Defendants deny the allegations in Paragraph 72 of the FAC.

73. Defendants admit the allegations in Paragraph 73 of the FAC.

74. Defendants admit that to identify whether an in-copyright work in the HDL is an orphan work under its OWP pilot process, the OWP staff undertook a multi-step due diligence process to check whether the work is commercially available for sale and, if it is not, to attempt to locate and contact the copyright holder. Defendants also admit that, under the pilot process, if the OWP staff were unsuccessful in identifying a copyright holder, the bibliographic information for the work would have been listed on the HathiTrust Service website for ninety days. Defendants further admit that, under the pilot process, if no copyright holder emerged during the ninety days, and if UM owned a physical copy of the work in its collection, UM, through the HathiTrust Service, planned to make the work available on a limited basis to UM students, professors, and other authenticated users and visitors to the libraries at UM's campuses, to view the work in full, print the work one page at a time, and download the work one page at a time in single-page PDF files. Defendants admit that no works have been made available through the OWP and that the OWP pilot procedures are currently being reexamined. Defendants deny the remaining allegations in Paragraph 74 of the FAC.

75. Defendants admit that in July and August of 2011, other participants in the HathiTrust Service, including UC and Cornell, announced their intent to participate in the OWP and their intent to make works in their collections identified as orphan works available on a limited basis to their respective students, faculty, and library patrons. Defendants deny the remaining allegations in Paragraph 75 of the FAC.

76. Defendants admit that a list of orphan work candidates was posted on the HathiTrust Service website on or about July 15, 2011.

77. Defendants admit that the initial complaint in this action was filed on September 12, 2011. Defendants deny the remaining allegations in Paragraph 77 of the FAC.

78. Defendants admit that on September 16, 2011, MLibrary issued a statement, the text of which is quoted in full below:

The close and welcome scrutiny of the list of potential orphan works has revealed a number of errors, some of them serious. This tells us that our pilot process is flawed.

Having learned from our mistakes—we are, after all, an educational institution—we have already begun an examination of our procedures to identify the gaps that allowed volumes that are evidently not orphan works to be added to the list. Once we create a more robust, transparent, and fully documented process, we will proceed with the work, because we remain as certain as ever that our proposed uses of orphan works are lawful and important to the future of scholarship and the libraries that support it.

It was always our belief that we would be more likely to succeed with the cooperation and assistance of authors and publishers. This turns out to be correct. The widespread dissemination of the list has had the intended effect: rights holders have been identified, which is in fact the project's primary goal. And as a result of the design of our process, our mistakes have not resulted in the exposure of even one page of in-copyright material.

Defendants deny the remaining allegations in Paragraph 78 of the FAC.

79. Defendants deny the allegations in Paragraph 79 of the FAC.

80. Defendants incorporate by reference their responses to Paragraphs 1 through 79 above.

81. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 81 of the FAC and thus deny such allegations.

82. Defendants deny the allegations in Paragraph 82 of the FAC.

83. Defendants deny the allegations in Paragraph 83 of the FAC.

84. Defendants deny the allegations in Paragraph 84 of the FAC.

85. Defendants deny the allegations in Paragraph 85 of the FAC.

86. Defendants deny the allegations in Paragraph 86 of the FAC.

87. Defendants deny the allegations in Paragraph 87 of the FAC.

DEFENDANTS' AFFIRMATIVE DEFENSES AND OTHER DEFENSES

In further answer to the FAC, and by way of affirmative defenses and other defenses, Defendants state that they will rely upon the following defenses if applicable and if supported by the facts. Defendants do not admit that they bear the burden of proof for any of these defenses.

- A. The FAC fails to state a claim upon which relief can be granted.
- B. Plaintiffs' claims against the UM Regents, UC Regents, UW Regents, and IU Trustees are barred by state sovereign immunity.
- C. Plaintiffs' claims against the UM Regents, UC Regents, UW Regents, and IU Trustees are barred by the Eleventh Amendment.
- D. Plaintiffs' claims against "HathiTrust" are barred because "HathiTrust" is a service of UM and is not itself a legal entity and does not have the capacity to be sued as a distinct entity.
- E. The Court lacks personal jurisdiction over some or all of Defendants.

- F. The Court lacks subject matter jurisdiction because some or all of Plaintiffs lack statutory and Article III standing to bring this action.
- G. The Court lacks subject matter jurisdiction over Plaintiffs' OWP claims because the case or controversy is not ripe for adjudication.
- H. Plaintiffs are not entitled to declaratory judgment relief with respect to Plaintiffs' OWP claims because no case or controversy exists between the parties.
- I. Defendants' use of and activities with respect to the works that are subject to copyright are protected under the First Amendment of the United States Constitution.
- J. Defendants' use of and activities with respect to the works that are subject to copyright are non-infringing fair uses and do not require authorization pursuant to Section 107 of the Copyright Act.
- K. Defendants' use of and activities with respect to the works that are subject to copyright are non-infringing and do not require authorization pursuant to Section 108 of the Copyright Act.
- L. Defendants' use of and activities with respect to the works that are subject to copyright are non-infringing and do not require authorization pursuant to Section 109 of the Copyright Act.
- M. Defendants' use of and activities with respect to the works that are subject to copyright are permitted under Section 110 of the Copyright Act.
- N. Defendants' use of and activities with respect to the works that are subject to copyright are non-infringing and do not require authorization pursuant to Section 121 of the Copyright Act.

- O. Some or all of Plaintiffs' claims are barred by the statute of limitations under the Copyright Act.
- P. Some or all of Plaintiffs' claims are barred by the doctrine of laches as a result of Plaintiffs' unreasonable delay in bringing this lawsuit.
- Q. Some or all of Plaintiffs' claims are barred by the doctrine of estoppel because Defendants detrimentally relied on Plaintiffs' conduct leading up to this lawsuit.
- R. Some or all of Plaintiffs' claims are barred because the copyright holder consented to Defendants' use of and activities with respect to the works.
- S. Some or all of the copyrights upon which Plaintiffs rely have been waived or abandoned.
- T. Some or all of Plaintiffs' claims are barred because Plaintiffs do not own the copyright and/or electronic rights for the works.
- U. Some or all of the Plaintiffs' claims are barred for failure to comply with renewal, notice, and registration requirements, and/or other formalities.
- V. Some of the copyrights upon which Plaintiffs rely are in the public domain.
- W. Some or all of Plaintiffs' claims are barred because some or all of Plaintiffs have engaged in copyright misuse and/or have unclean hands.
- X. At all times relevant to this suit, Defendants acted in good faith and had reasonable grounds for believing their actions were not in violation of any law.

Defendants respectfully reserve the right to amend their answer to add additional or other defenses or to delete or withdraw defenses, or to add counterclaims as may become necessary after a reasonable opportunity for appropriate discovery.

WHEREFORE, Defendants request the following relief:

- (a) That Plaintiffs be denied all relief sought in the FAC;
- (b) That the claims asserted in the FAC be dismissed with prejudice;
- (c) That Defendants be awarded their attorneys' fees and costs pursuant to, *inter alia*, 17 U.S.C. § 505 and Fed. R. Civ. P. 54(d); and
- (d) Any such other and further relief as the Court deems just and proper.

Dated: December 2, 2011
New York, New York

Respectfully Submitted,

Joseph Petersen (JP 9071)
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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC., et al.,

Plaintiffs,

v.

HATHITRUST, et al.,

Defendants.

Case No. 11-cv-6351(HB)

**ORAL ARGUMENT
REQUESTED**

**MEMORANDUM IN SUPPORT OF THE MOTION OF
THE NATIONAL FEDERATION OF THE BLIND AND OTHERS
TO INTERVENE AS DEFENDANTS**

THE LAW OFFICE OF
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*Counsel for National Federation of the Blind,
Georgina Kleege, Blair Seidlitz and Courtney Wheeler*

Blind students with research papers based on library research are generally thrown back to using human readers, a resource that is limited both in supply and utility. No matter how timely blind students submit their requests upon receiving their syllabi, they typically wait several weeks of a ten- or twelve-week term to receive an accessible copy of required reading.

To understand how time-intensive the digitization process can be, consider that the National Library Service (“NLS”) of the Library of Congress has the capacity to digitize approximately two thousand books each year for use by blind Americans.⁹ Because the NLS seeks to reach the widest popular audience, it prioritizes bestsellers, rather than academic works, and therefore reaches a very different audience than the HathiTrust. But, even if the NLS focused on academic works, at its current pace it would take more than 3,500 years to create the digital collection maintained by the HathiTrust.

With access to the HathiTrust, blind university students and faculty can, for the first time, access all the same books available to their sighted peers, at the same time as their peers, and at a considerable savings to the universities in time and expense.

The individual Proposed Intervenors are all blind and are either students or faculty at the defendant universities. They are members of disciplines in which they regularly must conduct library research, using either books or professional journals. If the Court impounds the HathiTrust collection and prevents future digitization, they will be unable to access these materials to the same extent.

Blair Seidlitz is in his junior year as an engineering major at the University of Wisconsin, Madison.¹⁰ He intends to apply to Ph.D. programs when he graduates. When he wishes to

⁹ Maurer Decl. ¶ 12.

¹⁰ Declaration of Blair Seidlitz (“Seidlitz Decl.”) ¶ 4 (attached as Ex. B).

borrow books from the Wisconsin library, because he is blind, he must photocopy the books and scan each page with his Kurzweil™ scanner, which is a device that scans print text and converts it to an accessible format.¹¹ Because of the incredibly time-consuming nature of this process, Mr. Seidlitz avoids borrowing books from the library.¹² If he had access to digital copies of the library's collection, he would be able to access books that would enrich his learning experience.¹³ Currently, he purchases accessible copies of required texts, but does not use supplemental materials that are only in the library, and which are available to his sighted classmates.¹⁴

Courtney Wheeler is a junior Psychology major at the University of Wisconsin, Eau Claire and will be transferring to the University of Wisconsin, Stout, for the Spring 2012 semester.¹⁵ Ms. Wheeler reads using screen access software.¹⁶ Because digital copies of library works are unavailable, Ms. Wheeler brings her husband or a friend as a reader when she wishes to borrow library books.¹⁷ Because of this, Ms. Wheeler does not take electives that require research papers and has petitioned the University of Wisconsin for exemptions from classes that require conducting library research and classes that require textbooks or other print materials that are not available in an accessible format.¹⁸

¹¹ Seidlitz Decl. ¶ 5.

¹² Seidlitz Decl. ¶ 6.

¹³ Seidlitz Decl. ¶ 8.

¹⁴ Seidlitz Decl. ¶ 7.

¹⁵ Declaration of Courtney Wheeler ("Wheeler Decl.") ¶ 4 (attached as Ex. C).

¹⁶ Wheeler Decl. ¶ 5.

¹⁷ Wheeler Decl. ¶ 7.

¹⁸ Wheeler Decl. ¶ 8.

Georgina Kleege is a Lecturer in Creative Writing and Disability Studies and a member of the English Department at the University of California, Berkeley.¹⁹ Previously, she was an Adjunct Professor at the Ohio State University from 1991-2002.²⁰ To access textual materials, Ms. Kleege uses a screen reader.²¹ Thus, when Ms. Kleege wishes to read print books from the Berkeley library, she must scan each page and run it through optical character recognition software. As a result of this time-consuming process, she rarely borrows print materials from the library.²² Currently, Ms. Kleege devotes much of her time searching for or making accessible copies of print materials, time that her sighted colleagues are able to devote to their academic pursuits.²³

As the experiences of the individual intervenors demonstrate, access to a comprehensive digital library collection would allow blind students and faculty to participate fully in university life. The HathiTrust has created such a digital library and an injunction prohibiting use of that resource and future digitization would have a serious negative impact on the blind, depriving them of this opportunity.

ARGUMENT

I. The Proposed Intervenors may intervene as of right.

The Proposed Intervenors may intervene as of right, under Rule 24(a) if they meet four criteria: They must “(1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that

¹⁹ Declaration of Georgina Kleege (“Kleege Decl.”) ¶ 4 (attached as Ex. D).

²⁰ Kleege Decl. ¶ 4.

²¹ Kleege Decl. ¶ 4.

²² Kleege Decl. ¶ 5.

²³ Kleege Decl. ¶ 7.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC., et al.,

Plaintiffs,

v.

HATHITRUST, et al.,

Defendants.

Case No. 11-cv-6351(HB)

**NOTICE OF MOTION
TO INTERVENE**

**ORAL ARGUMENT
REQUESTED**

PLEASE TAKE NOTICE that upon the annexed Declarations of Daniel F. Goldstein, sworn to December 6, 2011; Dr. Marc Mauer, sworn to December 6, 2011, Georgina Kleege, sworn to December 5, 2011, Blair Seidlitz, sworn to December 6, 2011, and Courtney Wheeler, sworn to December 6, 2011; the accompanying Memorandum of Law in Support of the Motion of the National Federation of the Blind, Georgina Kleege, Blair Seidlitz and Courtney Wheeler (collectively, "Proposed Intervenors) to Intervene as Defendants in this action; and all prior pleadings herein, Proposed Intervenors will move this Court, before the Honorable Harold Baer, United States District Court Judge, in Courtroom 23B, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, NY 10017-1312, on the date and time to be set by the Court, for an order pursuant to Rule 24 of the Federal Rules of Civil Procedure permitting Proposed Intervenors to intervene as defendants in this action.

PLEASE TAKE FURTHER NOTICE that answering papers, if any, shall be served upon the undersigned no later than December 23, 2011.

and

Joseph Peterson
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New York, NY 10019

Joseph M. Beck
W. Andrew Pequignot
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Atlanta, GA 30309-4528
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, under penalty of perjury, that the foregoing Notice of Motion to Intervene of National Federation of the Blind, Georgina Kleege, Blair Seidlitz and Courtney Wheeler; the accompanying Declarations of Daniel F. Goldstein, Dr. Marc Mauer, Georgina Keege, Blair Seidlitz and Courtney Wheeler in support thereof; and the accompanying Memorandum in Support of the Motion of the National Federation of the Blind and Others to Intervene as Defendants, are being filed electronically today, and that, upon such filing, pursuant to this Court's Local Rules and ECF procedures, these documents shall be served electronically on the above-referenced attorneys for plaintiffs and for defendants at their respective email addresses registered with the Court's ECF system.

/s/
Robert J. Bernstein

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC., et al.,

Plaintiffs,

v.

HATHITRUST, et al.,

Defendants.

Case No. 11-cv-6351(HB)

DECLARATION OF DR. MARC MAURER

I, Marc Maurer, do hereby declare that:

1. I am over eighteen years of age and am competent to make this Declaration.
2. My business address is 200 East Wells Street at Jernigan Place, Baltimore, Maryland 21230.
3. I am legally blind.
4. I am the President of the National Federation of the Blind, a position I have held since 1986.
5. I am also an attorney, licensed to practice in Maryland, Indiana, Ohio, Iowa and am a member of the bar of the Supreme Court of the United States.
6. The National Federation of the Blind is the oldest and largest membership organization of blind people in the United States, with more than 50,000 members. Through our affiliates in each of the fifty states, the District of Columbia, and Puerto Rico, and our 700 local chapters, we seek to advance the rights of blind people by helping both the blind and the

sighted to understand that blindness, in and of itself, need not be a tragedy. The real problem of blindness is not loss of eyesight, but misunderstandings and misconceptions about it that are prevalent in society. With proper training and opportunity, blindness can be reduced to the level of a mere physical nuisance.

7. Unlike the NFB, most other organizations that advocate on behalf of people with print disabilities are not membership organizations. Of those groups that are membership organizations, the NFB is one of the few that chooses to use litigation as an advocacy tool or has the resources to do so.

8. A person with a print disability is someone who cannot effectively read print because of a visual, physical, perceptual, developmental, cognitive, or learning disability.

9. Because of its unique position among peer organizations, the NFB has taken the lead in promoting the creation of accessible digital technology and information. NFB has long espoused creating the same access to information that other Americans enjoy on functionally equal terms. For example, in the 1970's, NFB financed Ray Kurzweil's development of a reading machine for the blind—a machine that converted printed text into digital text that could be read aloud by a synthetic voice. In 1998, NFB member George Kerscher developed Talking Books, the first commercially available digital books for the blind.

10. Equal access to all of the same information is technologically within reach. Because digital information is simply a series of zeros and ones, it is not inherently visual. If the creators of digital information are conscious of accessibility, it becomes no more difficult to create digital information that can be manifest audibly or tactilely than to create information that is only visual.

11. To access print material, I use all of the tools available to me and other blind people. Although I read conventional braille, I also use screen access software, which transmits textual information on a computer screen into an audio output or a refreshable braille display pad. When digital text is coded properly with metadata, that provides organizational information about the text, my screen reader will also read that information, which allows me more complete information and a way to navigate within a document.

12. There are a very limited number of print works that are available to be borrowed by blind Americans either in braille or in a digital format that can be accessed by a screen reader. The primary source of reading material for most blind Americans is the National Library Service for the Blind and Physically Handicapped of the Library of Congress. While this service has done an outstanding job of providing books to the blind within budgetary constraints, it only has approximately 52,000 circulating titles in its collection and can only create approximately 2,000 new titles each year. Bookshare®, another authorized entity under the Chafee Amendment, has a collection of tens of thousands of titles, according to its website: www.bookshare.org.

13. The lack of print information available to blind Americans has devastating effects. Fewer than fifty percent of blind Americans graduate from high school. Those who do graduate and matriculate at colleges and universities are blocked, as a practical matter, from taking many courses of their choosing.

14. The HathiTrust Digital Library stands to change the landscape of access to information and education for blind Americans. The more than 9,000,000 million titles in that collection are a far cry from the tens of thousands of titles available from the National Library

Service or Bookshare®. To serve the most people, and given the time constraints and expense of creating accessible copies of print materials, both of those entities must choose titles that have wide popular appeal. Consequently, those collections contain few academic books or journals. By contrast, the HathiTrust's collection includes academic works, which are critical educational tools for blind college and university students and faculty.

15. Recognizing the transformative effect of such a large digital collection, the NFB collaborated with Google and the libraries of the University Defendants, among others, over the last several years to ensure that the HathiTrust Digital Library will be accessible and made available to blind Americans.

16. In December 2004, the NFB learned of the Google scanning project and contacted Google to inquire whether the scans would be created in such a way that they would include the metadata necessary to make them accessible to the blind. In January 2005, Google responded that it did not intend to include the coding necessary to make the scans accessible.

17. Throughout 2005 and 2006, the NFB lobbied Google to change this decision and include the necessary metadata. In 2006, the NFB, together with Peter Jaszl, met with representatives from the University of California, the University of Michigan, and the University of Wisconsin, to recruit their support in convincing Google to commit to producing accessible scans. This effort was ultimately successful, and as I discussed above, the Google books scans that comprise the HathiTrust are accessible to the blind.

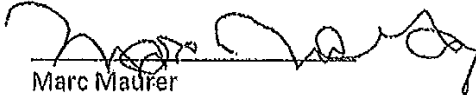
18. In October 2008, the University of Michigan held a demonstration for the NFB of the procedure and software it had developed to make the HathiTrust collection's digital information accessible to the print disabled.

19. In September 2009, I testified before the Committee on the Judiciary of the United States House of Representatives about the importance of the Google books/HathiTrust collection for the education of the blind.

20. Also in 2009, the NFB organized the Reading Rights Coalition, which is composed of 32 groups representing individuals with print disabilities (including neurological and physical conditions as well as learning disabilities) in response to the Authors Guild's attempt to convince Amazon to disable the text to speech function on the Kindle, another digital book technology. Through this effort, we successfully persuaded Amazon to maintain its text-to-speech function.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 12/6/11


Marc Maurer

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

THE AUTHORS GUILD, INC., et al.,

Plaintiffs,

v.

HATHITRUST, et al.,

Defendants.

Case No. 11-cv-6351(HB)

**DEFENDANT INTERVENORS'
JOINT ANSWER AND DEFENSES**

Defendant Intervenors National Federation of the Blind, Georgina Kleege, Blair Seidlitz, and Courtney Wheeler hereby state the following for their JOINT ANSWER AND DEFENSES to the First Amended Complaint filed by the Plaintiffs in the above-captioned action (“Plaintiffs”). Defendants respond to the paragraphs of the First Amended Complaint (“FAC”) in correspondingly numbered paragraphs. Defendant Intervenors deny each allegation in the FAC unless expressly admitted.

1. Defendants admit that Plaintiffs, in the FAC, seek prospective injunctive and declaratory relief but deny that Plaintiffs are entitled to such relief. Defendants admit that “the Regents of the University of Michigan/University Library, Ann Arbor Campus”; “The Regents of the University of California on behalf of its California Digital Library”; “the Board of Regents of the University of Wisconsin System, d/b/a the University of Wisconsin-Madison, General Library System”; and Cornell University entered into agreements with Google Inc. (“Google”) regarding the digitization of works in their libraries' collections, and that The Board of Trustees of the University of Illinois, on behalf of the Committee on Institutional Cooperation (“CIC”)

and its member universities (the "CIC Universities"), entered into an agreement with Google regarding the digitization of works in the CIC Universities' library collections. Defendant Intervenor further admit that "HathiTrust" is the name of a service of the University of Michigan in which the Universities and other institutions participate under agreements with the University of Michigan. Defendant Intervenor admit that they and Defendants have engaged in uses of and activities with respect to the works, which uses are permitted under the United States Copyright Act (the "Copyright Act"). Defendant Intervenor lack knowledge or information sufficient to form a belief about whether Plaintiffs hold a copyright in any work used by Defendant Intervenor and thus deny such allegations. Defendant Intervenor deny the remaining allegations in Paragraph 1 of the FAC.

2. Defendant Intervenor admit that pursuant to Google's various agreements with the Regents of the University of Michigan/University Library, Ann Arbor Campus; The Regents of the University of California on behalf of its California Digital Library; the Board of Regents of the University of Wisconsin System, d/b/a the University of Wisconsin-Madison, General Library System; Cornell University; and The Board of Trustees of the University of Illinois, on behalf of the CIC and the CIC Universities, Google has provided digital copies of books from a University's library's collections either to that University or, at the University's request, to the University of Michigan Library in Ann Arbor (the "MLibrary"), and that the Universities store these digital copies in a repository called the HathiTrust Digital Library ("HDL"), which contains at least 9.7 million volumes. Defendant Intervenor also admit that the Universities participate in the HathiTrust Service along with more than fifty other institutions. Defendants lack knowledge or information sufficient to form a belief about whether seventy-three percent (73%) of these

volumes are protected by copyright and thus deny such allegations. Defendants deny the remaining allegations in Paragraph 2 of the FAC.

3. Defendant Intervenors admit that UM and UC have announced their participation in the Orphan Works Project (“OWP”), an initiative to, *inter alia*, identify "orphan works"-in-copyright works for which the copyright holder cannot be found-and eventually to make lawful uses of these works. Defendant Intervenors also admit that Cornell and UW have announced plans to participate in the OWP and that IU has not announced plans to participate in the OWP. Defendants deny the remaining allegations in Paragraph 3 of the F AC.

4. Defendant Intervenors admit that the Universities have asserted that their activities are beneficial to society and permissible under a variety of sections of the Copyright Act, including as fair use, which received statutory recognition in Section 107 of the Copyright Act. Defendant Intervenors deny the remaining allegations in Paragraph 4 of the FA C.

5. Defendant Intervenors admit that, in a separate case, Google and The Authors Guild, Inc. (among other parties) filed a motion for approval of a proposed settlement agreement that was denied by the court. The referenced proposed settlement agreement and court order denying approval speak for themselves. Defendants deny the remaining allegations in Paragraph 5 of the FAC.

6. Defendant Intervenors deny the allegations in Paragraph 6 of the F AC.

7. Defendant Intervenors deny the allegations in Paragraph 7 of the F AC.

8. Defendant Intervenors admit that the FAC seeks injunctive relief and purports to state claims for copyright infringement under the United States Copyright Act, 17 U.S.C. 101 et seq. and seeks declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202, but Defendant

Intervenors deny that any such infringement has occurred, deny that Plaintiffs are entitled to the relief sought, and otherwise deny the remaining allegations in Paragraph 8 of the FAC.

9. Paragraph 9 of the FAC is a legal assertion that does not require an Answer.

10. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 10 of the FAC and thus deny such allegations.

11. Paragraph 11 of the FAC is a legal assertion that does not require an Answer

12. Upon information and belief, Defendant Intervenors admit that The Authors Guild, Inc. is a corporation with a place of business at 31 East 32nd Street, New York, New York, 10016. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 12 of the FAC and thus deny such allegations.

13. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 13 of the FAC and thus deny such allegations.

14. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 14 of the FAC and thus deny such allegations.

15. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 15 of the FAC and thus deny such allegations.

16. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 16 of the FAC and thus deny such allegations.

17. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 17 of the FAC and thus deny such allegations.

18. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 18 of the FAC and thus deny such allegations.

19. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 19 of the FAC and thus deny such allegations.

20. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 20 of the FAC and thus deny such allegations.

21. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 21 of the FAC and thus deny such allegations.

22. Defendant Intervenors admit that the book identified in Exhibit A to the FAC that is referred to is included in the HDL, but Defendant Intervenors otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 22 of the F AC and thus deny such allegations.

23. Defendants admit that the books identified in Exhibit A to the F AC that are referred to in Paragraph 23 of the FAC are included in the HDL, but Defendant Intervenors otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 23 of the F AC and thus deny such allegations.

24. Defendant Intervenors admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 24 of the FAC is included in the HDL, but Defendant Intervenors otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 24 of the FAC and thus deny such allegations.

25. Defendant Intervenors admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 25 of the FAC is in the HDL, but Defendant Intervenors otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 25 of the FAC and thus deny such allegations.

26. Defendants admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 26 of the FAC are included in the HDL, but Defendant Intervenors otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 26 of the FAC and thus deny such allegations.

27. Defendant Intervenors admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 27 of the FAC are in the HDL, but Defendant Intervenors otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 27 of the FAC and thus deny such allegations.

28. Defendant Intervenors admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 28 of the FAC were digitized and included in the HDL, and Defendants otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient

to form a belief about the truth of the remaining allegations in Paragraph 28 of the FAC and thus deny such allegations.

29. Defendant Intervenors admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 29 of the FAC are included in the HDL, but Defendant Intervenors otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 29 of the FAC and thus deny such allegations.

30. Defendant Intervenors admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 30 of the FAC is included in the HDL, but Defendant Intervenors otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 30 of the FAC and thus deny such allegations.

31. Defendant Intervenors admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 31 of the FAC is included in the HDL, but Defendant Intervenors otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 31 of the FAC and thus deny such allegations.

32. Defendant Intervenors admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 32 of the FAC is included in the HDL, but Defendant Intervenors otherwise deny the allegation that such book was “unlawfully reproduced, digitized and

distributed" by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 32 of the FAC and thus deny such allegations.

33. Defendant Intervenors admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 33 of the FAC are included in the HDL, but Defendant Intervenors otherwise deny the allegation that such books were "unlawfully reproduced, digitized and distributed" by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 33 of the FAC and thus deny such allegations.

34. Defendant Intervenors admit that UM is a state university comprising three campuses with a principal place of business in Ann Arbor, Michigan. Defendants also admit that UM is governed by its Board of Regents. Defendants further admit that UM owns, operates, and controls MLibrary and that, upon information and belief, MLibrary is one of the largest university library systems in the United States, holding more than 8.5 million volumes and with more than 3 million patron visits per year to its facilities and its website. Defendants also admit that on or about December 14, 2004, "the Regents of the University of Michigan/University Library, Ann Arbor Campus" entered into a Cooperative Agreement with Google to digitize works from the MLibrary collection (the "UM-Google Cooperative Agreement"). Defendant Intervenors further admit that UM is a co-founder, host, and primary administrator of the HathiTrust Service and is the largest contributor to the HDL, which contains the collection of digital works with respect to which the HathiTrust Service operates. Defendant Intervenors deny the remaining allegations in Paragraph 34 of the FAC.

35. Defendant Intervenors admit that UC is a public trust comprising ten campuses with a principal place of business in Oakland, California. Defendant Intervenors also admit that UC is governed by its Board of Regents. Defendant Intervenors further admit that UC owns, operates, and controls the UC library system, that the UC library system consists of more than 100 libraries, and that, upon information and belief, the UC library system collectively is the largest research/academic library in the world. Defendant Intervenors also admit that on or about August 3, 2006, “The Regents of the University of California on behalf of its California Digital Library” entered into a Cooperative Agreement with Google to digitize works from UC’s libraries (the “UC-Google Cooperative Agreement”). Defendant Intervenors further admit that UC is a co-founder of the HathiTrust Service and is the second largest contributor to the HDL. Defendant Intervenors also admit that UC announced on August 24, 2011 its intention to join the OWP. Defendant Intervenors deny the remaining allegations in Paragraph 35 of the FAC.

36. Defendant Intervenors admit that UW is a state university system comprising twenty-six campuses with a principal place of business in Madison, Wisconsin. Defendant Intervenors also admit that UW is governed by its Board of Regents. Defendant Intervenors further admit that UW owns, operates, and controls the UW library system, holding more than 8 million volumes. Defendant Intervenors also admit that on or about October 12, 2006, the “the Board of Regents of the University of Wisconsin System, d/b/a the University of Wisconsin-Madison, General Library System” entered into a Cooperative Agreement with Google to digitize works from UW’s libraries (the “UW-Google Cooperative Agreement”). Defendant Intervenors further admit that UW is a co-founder of the HathiTrust Service and is the third largest contributor to the HDL. Defendant Intervenors also admit that UW’s intention to

participate in the OWP became public on June 23, 2011. Defendant Intervenors deny the remaining allegations in Paragraph 36 of the FAC.

37. Defendant Intervenors admit that “the trustees of Indiana University” governs IU, which is a body politic of the State of Indiana, a State institution of higher education comprising eight campuses with a principal place of business in Bloomington, Indiana. Defendant Intervenors further admit that IU owns, operates, and controls the IU library system, holding more than 7.8 million books in over 900 languages. Defendant Intervenors also admit that IU's Bloomington campus is a member of the CIC, a consortium of Big Ten universities plus the University of Chicago. Defendant Intervenors further admit that on or about June 6, 2007, The Board of Trustees of the University of Illinois, on behalf of the CIC and the CIC Universities, entered into a Cooperative Agreement with Google to digitize works from CIC Universities' libraries (the “CIC-Google Cooperative Agreement”). Defendant Intervenors further admit that IU's Bloomington campus is the seventh largest contributor to the HDL. Defendant Intervenors admit that a fully operational, synchronized, and live "mirror site" of the HDL is located on IU's Indianapolis campus. Defendant Intervenors deny the remaining allegations in Paragraph 37 of the FAC.

38. Defendant Intervenors admit that Cornell is a corporation and private land-grant university with its principal place of business in Ithaca, New York. Defendant Intervenors also admit that Cornell owns, operates, and controls the Cornell library, holding more than 8 million volumes. Defendant Intervenors further admit that on or about August 6, 2007, Cornell entered into a Cooperative Agreement with Google to digitize works from the Cornell library (the “Cornell-Google Cooperative Agreement”). Defendant Intervenors also admit that Cornell is the fourth largest contributor to the HDL. Defendant Intervenors further admit that Cornell

announced on August 24, 2011 its intention to join the OWP. Defendant Intervenors deny the remaining allegations in Paragraph 38 of the FAC.

39. Defendant Intervenors admit that “HathiTrust” is the name of a service through which more than fifty institutions, which include universities, libraries, educational institutions, and consortia, are collaborating with UM to create a reliable and increasingly comprehensive digital repository of books. Defendant Intervenors also admit that UM's principal place of business for purposes of providing the HathiTrust Service is in Ann Arbor, Michigan. Defendant Intervenors further admit that as of October 5, 2011, the HDL contained 9,709,348 volumes, amounting to 435 terabytes of data. Defendant Intervenors deny the remaining allegations in Paragraph 39 of the FAC.

40. Defendant Intervenors admit that libraries and archives provide a tremendous societal value in preserving and securing works of art, literature, and science. Defendant Intervenors also admit that Section 108 of the Copyright Act is one of many limitations on copyright holders’ rights. Defendant Intervenors deny the remaining allegations in Paragraph 40 of the FAC.

41. Defendant Intervenors admit that Section 108(b) permits a library to make three copies of an unpublished work for preservation and security purposes (among other purposes). Defendant Intervenors also admit that Section 108(c) permits a library to make three copies of a published work. Defendant Intervenors deny the remaining allegations in Paragraph 41 of the FAC.

42. Defendant Intervenors respond to Paragraph 42 by stating that Section 108 of the Copyright Act, as it has existed at various times, speaks for itself. Defendant Intervenors further

respond that Plaintiffs' description of Section 108 is incomplete and therefore mischaracterizes the statute. Defendant Intervenors thus deny the allegations in Paragraph 42 of the FAC.

43. Defendant Intervenors admit that Paragraph 43 appears to be an accurate quote of selected text (with Plaintiffs' emphasis) from Senate Report No. 105-190 (1998), which speaks for itself, and therefore is an incomplete and inaccurate representation of the legislative history. Defendant Intervenors deny the remaining allegations in Paragraph 43 of the FAC.

44. Defendant Intervenors respond to Paragraph 44 by stating that Section 108 of the Copyright Act, as it has existed at various times, speaks for itself. Defendant Intervenors further respond that Plaintiffs' description of Section 108 is incomplete and therefore mischaracterizes the statute. Defendant Intervenors thus deny the allegations in Paragraph 44 of the FAC.

45. Defendant Intervenors respond to Paragraph 45 by stating that Section 108 of the Copyright Act, as it has existed at various times, speaks for itself. Defendant Intervenors further respond that Plaintiffs misquote Section 108 and that Plaintiffs' description of Section 108 is incomplete and therefore mischaracterizes the statute. Defendant Intervenors thus deny the allegations in Paragraph 45 of the FAC.

46. Defendant Intervenors admit the allegations in Paragraph 46 of the FAC.

47. Defendant Intervenors deny the allegations in Paragraph 47 of the FAC.

48. Defendant Intervenors deny the allegations in Paragraph 48 of the FAC.

49. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 49 regarding an announcement made by Google; regarding whether, when, and with whom Google has formed partnerships; and regarding whether Google and "its partners" have digitized more than 12 million books and thus deny such allegations.

50. Defendant Intervenors admit that pursuant to the UM-Google Cooperative Agreement, UM cooperates with Google to identify books from UM's collection to be digitized; that pursuant to the UC-Google Cooperative Agreement, UC cooperates with Google to identify books from UC's collection to be digitized; that pursuant to the UW-Google Cooperative Agreement, UW cooperates with Google to identify books from UW's collection to be digitized; that pursuant to the CIC-Google Cooperative Agreement, each of the CIC Universities, including IU, cooperates with Google to identify books from their individual collections to be digitized; and that pursuant to the Cornell-Google Cooperative Agreement, Cornell cooperates with Google to identify books from Cornell's collection to be digitized. Defendants admit that the books selected for digitization pursuant to these agreements are not limited to works in the public domain, unpublished works, or deteriorating published works that cannot be replaced, and include in-print books that are commercially available and books that are protected by copyright. Defendant Intervenors further admit that pursuant to the terms of these various agreements, the works selected for digitization are delivered to a facility that is located either on or off the University's campus and that is occupied by Google personnel and scanning equipment. Defendant Intervenors deny the remaining allegations in Paragraph 50 of the FAC.

51. Defendant Intervenors admit that Google has digitized books owned by the Universities libraries. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations regarding "Google Books" and Google's actions with respect to "Google Books" and thus deny the remaining allegations in Paragraph 51 of the FAC.

52. Defendant Intervenors admit that pursuant to Google's various agreements with the Regents of the University of Michigan/University Library, Ann Arbor Campus; The Regents of the University of California on behalf of its California Digital Library; the Board of Regents

of the University of Wisconsin System, d/b/a the University of Wisconsin-Madison, General Library System; Cornell University; and The Board of Trustees of the University of Illinois, on behalf of the CIC and the CIC Universities, after digitizing a book from the collection of a University, Google may provide a digital copy of the book to the University library or, at the University's request, to MLibrary to be incorporated into the HDL, and Defendant Intervenors admit that the terms of these various agreements provide that the digital copy include a set of image and OCR files and associated meta-information about the files. Defendant Intervenors also admit that books that leave the premises of the Universities' libraries to be digitized are returned to the libraries. Defendant Intervenors deny the remaining allegations in Paragraph 52 of the FAC.

53. Defendant Intervenors admit that some libraries have estimated their costs of performing the act of digitization at approximately \$100 per volume. Defendant Intervenors deny the remaining allegations in Paragraph 53 of the FAC.

54. Defendant Intervenors admit that certain Universities, including UM, have digitized works in their library collections. Defendant Intervenors deny the remaining allegations in Paragraph 54 of the FAC.

55. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 55 of the FAC and thus deny such allegations.

56. Defendant Intervenors admit that The Authors Guild, Inc. and others filed a purported class action lawsuit against Google in the Southern District of New York, *Authors Guild, Inc. v. Google, Inc.*, Case No. 05 Civ. 8136 (S.D.N.Y. filed Sept. 20, 2005), involving Google's digitization of books (the "Google Books Lawsuit"). The complaint in the Google

Books Lawsuit speaks for itself, and therefore Defendant Intervenors deny the remaining allegations in Paragraph 56 of the FAC.

57. Defendant Intervenors admit that Google and The Authors Guild, Inc. (among other parties) filed a motion for approval of a proposed settlement agreement in the Google Books Lawsuit. The proposed settlement agreement speaks for itself, and therefore Defendant Intervenors deny the remaining allegations in Paragraph 57 of the FAC.

58. Defendant Intervenors admit that the motion for approval of the proposed settlement agreement was denied on March 22, 2011. Defendants also admit that Paragraph 58 of the FAC accurately quotes from Judge Denny Chin's decision. Judge Chin's decision speaks for itself, and therefore Defendant Intervenors deny the remaining allegations of Paragraph 58 of the FAC.

59. Defendant Intervenors admit that Paragraph 59 of the FAC accurately quotes from Judge Denny Chin's decision, which speaks for itself. Defendant Intervenors deny the remaining allegations in Paragraph 59 of the FAC.

60. Defendant Intervenors admit that Judge Denny Chin's decision noted efforts by Congress to pass orphan works legislation. Defendants also admit that the decision discussed international law concerns raised by foreign authors and entities regarding the ASA. Judge Chin's decision speaks for itself. Defendant Intervenors deny the remaining allegations in Paragraph 60 of the FAC.

61. Defendant Intervenors admit that the Google Books Lawsuit is still pending in the Southern District of New York.

62. Defendant Intervenors admit that on October 13, 2008, the thirteen universities comprising the CIC, led by UM; UC's libraries, led by the CDL; and the University of Virginia

announced the launch of the HathiTrust Service and the HDL, the shared repository of digital collections of institutions participating in the HathiTrust Service. Defendant Intervenors also admit that there are currently more than fifty institutions, including universities, libraries, educational institutions, and consortia, from around the world participating in the HathiTrust Service. Defendant Intervenors further admit that the website for the HathiTrust Service states that the mission of the HathiTrust Service is “to contribute to the common good by collecting, organizing, preserving, communicating, and sharing the record of human knowledge. Defendant Intervenors deny the remaining allegations in Paragraph 62 of the FAC.

63. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 63 of the FAC and thus deny such allegations.

64. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 64 of the FAC and thus deny such allegations.

65. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 65 of the FAC and thus deny such allegations.

66. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 66 of the FAC and thus deny such allegations.

67. Defendant Intervenors admit that this is an accurate quote from the HathiTrust Service website. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 68 of the FAC and thus deny such allegations.

68. Defendant Intervenors admit that the HathiTrust Service includes a search tool that permits users to conduct full-text searches of the works in the HDL to determine the number of times a searched term appears, and the page numbers on which the searched term appears, in

books in the HDL (including public domain and in-copyright works). Defendant Intervenor deny the remaining allegations in Paragraph 68 of the FAC.

69. Defendant Intervenor admit that the HathiTrust Service permits certain users to view, search, print, and download full copies of certain volumes in the HDL, and Defendant Intervenor admit that the level of access to a work is determined in part by the identity of the user and the copyright status of the work, and deny the remaining allegations in Paragraph 69 of the FAC.

70. Defendant Intervenor admit that the HathiTrust Rights Database includes categorizations of copyright status for each work in the HDL, as determined through processes conducted as part of the HathiTrust Service or through other resources. Defendant Intervenor also admit that the HDL allows users to view books identified as being in the public domain on the HathiTrust Service website, wherever the users may have access to the website. Defendant Intervenor deny the remaining allegations of Paragraph 70 of the FAC.

71. Defendant Intervenor deny the allegations in Paragraph 71 of the FAC.

72. Defendant Intervenor deny the allegations in Paragraph 72 of the FAC.

73. Defendant Intervenor admit the allegations in Paragraph 73 of the FAC.

74. Defendant Intervenor admit that to identify whether an in-copyright work in the HDL is an orphan work under its OWP pilot process, the OWP staff undertook a multi-step due diligence process to check whether the work is commercially available for sale and, if it is not, to attempt to locate and contact the copyright holder. Defendant Intervenor also admit that, under the pilot process, if the OWP staff were unsuccessful in identifying a copyright holder, the bibliographic information for the work would have been listed on the HathiTrust Service website for ninety days. Defendant Intervenor further admit that, under the pilot process, if no copyright

holder emerged during the ninety days, and if UM owned a physical copy of the work in its collection, UM, through the HathiTrust Service, planned to make the work available on a limited basis to UM students, professors, and other authenticated users and visitors to the libraries at UM's campuses, to view the work in full, print the work one page at a time, and download the work one page at a time in single-page PDF files. Defendant Intervenors admit that no works have been made available through the OWP and that the OWP pilot procedures are currently being reexamined. Defendant Intervenors deny the remaining allegations in Paragraph 74 of the FAC.

75. Defendant Intervenors admit that in July and August of 2011, other participants in the HathiTrust Service, including UC and Cornell, announced their intent to participate in the OWP and their intent to make works in their collections identified as orphan works available on a limited basis to their respective students, faculty, and library patrons. Defendant Intervenors deny the remaining allegations in Paragraph 75 of the FAC.

76. Defendant Intervenors admit that a list of orphan work candidates was posted on the HathiTrust Service website on or about July 15, 2011.

77. Defendant Intervenors admit that the initial complaint in this action was filed on September 12, 2011. Defendant Intervenors deny the remaining allegations in Paragraph 77 of the FAC.

78. Defendant Intervenors admit that on September 16, 2011, MLibrary issued a statement concerning the OWP. Defendant Intervenors deny the remaining allegations in Paragraph 78 of the FAC.

79. Defendant Intervenors deny the allegations in Paragraph 79 of the FAC.

80. Defendant Intervenors incorporate by reference their responses to Paragraphs 1 through 79 above.

81. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 81 of the PAC and thus deny such allegations.

82. Defendant Intervenors deny the allegations in Paragraph 82 of the PAC.

83. Defendant Intervenors deny the allegations in Paragraph 83 of the PAC.

84. Defendant Intervenors deny the allegations in Paragraph 84 of the PAC.

85. Defendant Intervenors deny the allegations in Paragraph 85 of the PAC.

86. Defendant Intervenors deny the allegations in Paragraph 86 of the PAC.

87. Defendant Intervenors deny the allegations in Paragraph 87 of the PAC.

DEFENDANT INTEVENORS'
AFFIRMATIVE DEFENSES AND OTHER DEFENSES

In further answer to the FAC, and by way of affirmative defenses and other defenses, Defendant Intervenors state that they will rely upon the following defenses if applicable and if supported by the facts. Defendant Intervenors do not admit that they bear the burden of proof for any of these defenses.

A. Defendant Intervenors are entitled to access to the HDL because Defendants' use of and activities with respect to the works that are subject to copyright are non-infringing fair uses and do not require authorization pursuant to Section 107 of the Copyright Act.

B. Defendant Intervenors are entitled to access to the HDL because Defendants' use of and activities with respect to the works that are subject to copyright are non-infringing and do not require authorization pursuant to Section 108 of the Copyright Act.

- C. Defendant Intervenors are entitled to access to the HDL because Defendants use of and activities with respect to the works that are subject to copyright are non-infringing and do not require authorization pursuant to Section 109 of the Copyright Act.
- D. Defendant Intervenors are entitled to access to the HDL because Defendants use of and activities with respect to the works that are subject to copyright are permitted under Section 110 of the Copyright Act.
- E. Defendant Intervenors are entitled to access to the HDL because Defendants use of and activities with respect to the works that are subject to copyright are non-infringing and do not require authorization pursuant to Section 121 of the Copyright Act.
- F. Defendant Intervenors are entitled to access to the HDL because the collection provides them equal access to the Defendants' library collections as required under Titles II and III of the Americans with Disabilities Act.

Defendant Intervenors respectfully reserve the right to amend their answer to add additional or other defenses or to delete or withdraw defenses after a reasonable opportunity for appropriate discovery.

WHEREFORE, Defendant Intervenors request the following relief:

- (a) That Plaintiffs be denied all relief sought in the F AC;
- (b) That the claims asserted in the F AC be dismissed with prejudice;
- (c) Any such other and further relief as the Court deems just and proper.

Dated: December 9, 2011

Respectfully submitted,

**THE LAW OFFICE OF
ROBERT J. BERNSTEIN**

By: _____ /s/

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

	Plaintiff,
THE AUTHORS GUILD, INC., et al.,	
-v-	
HATHITRUST, et al.,	
	Defendant.

Case No. 11-cv-6351(HB)

Rule 7.1 Statement

Pursuant to Federal Rule of Civil Procedure 7.1 [formerly Local General Rule 1.9] and to enable District Judges and Magistrate Judges of the Court to evaluate possible disqualification or recusal, the undersigned counsel for

National Federation of the Blind, Inc. (a private non-governmental party)

certifies that the following are corporate parents, affiliates and/or subsidiaries of said party, which are publicly held.

NONE

Date: April 12, 2012


Signature of Attorney

Attorney Bar Code: _____

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

-----X	:	
THE AUTHORS GUILD, INC., et al.,	:	
<i>Plaintiffs,</i>	:	Case No. 11-cv-6351(HB)
v.	:	
HATHITRUST, et al.,	:	
<i>Defendants.</i>	:	
-----X		

**DECLARATION OF LAURA GINSBERG ABELSON
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

I, Laura Ginsberg Abelson, do hereby declare that:

1. I am over eighteen years of age and am competent to make this Declaration.
2. I am attorney admitted to practice in the State of Maryland, the United States District Court for the District of Maryland, and the Fourth Circuit Court of Appeals. I have been admitted *pro hac vice* in this matter.
3. Attached hereto as Exhibit A is a true copy of excerpts from the transcript of the Rule30(b)(6) deposition of the Copyright Clearance Center by Fredric L. Haber, its General Counsel, taken on June 4, 2012.
4. Attached hereto as Exhibit B is a true copy of excerpts from the transcript of the Rule30(b)(6) deposition of Google, Inc. by Daniel Clancy, Engineering Director, taken on June 1, 2012.
5. Attached hereto as Exhibit C is a true copy of excerpts from Objections and Responses of the Individually Named Plaintiffs to Defendant-Intervenors’ First Set of Interrogatories and First Request for the Production of Documents, dated May 8, 2012.

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X		
THE AUTHORS GUILD, INC., et al,	:	
	:	Index No. 11 Civ. 6351 (HB)
Plaintiffs,	:	
	:	
- against -	:	
	:	
HATHITRUST, et al.	:	
	:	
Defendants.	:	
-----X		

**OBJECTIONS AND RESPONSES OF THE INDIVIDUALLY NAMED
PLAINTIFFS TO DEFENDANT-INTERVENORS' FIRST SET OF
INTERROGATORIES AND FIRST REQUEST FOR THE
PRODUCTION OF DOCUMENTS**

The individually named Plaintiffs in the above-captioned action ("Plaintiffs") hereby submit, pursuant to Rules 26, 34 and 36 of the Federal Rules of Civil Procedure and Rules 26.3 and 33.3 of the Local Rules for the United States District Courts for the Southern Districts of New York (the "Local Rules"), the following objections and responses to Defendant-Intervenors' First Request for the Production of Documents ("Requests").

GENERAL STATEMENTS

A. Plaintiffs incorporate by reference each and every General Objection set forth below into each and every specific response. From time to time a specific response may restate a

REDACTED

SPECIFIC OBJECTIONS AND RESPONSES TO INTERROGATORIES

1. *State the sales revenue for each of the last five years for sales to the blind of digital copies of all titles for which you hold a copyright. Identify all documents and communications related to these sales.*

RESPONSE:

Plaintiffs object to this Request on the ground that it is overbroad, unduly burdensome and seeks information not relevant to any claim or defense in this lawsuit and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objection or any General Objections, Plaintiffs respond that by tradition and industry practice, authors generally do not receive royalties for the licensing and sale of works distributed in specialized formats exclusively for use by the blind or other persons with disabilities.

Furthermore, 17 U.S.C. § 121 specifically permits the reproduction of copyrighted literary works by one or more “authorized entit[ies]” in “specialized formats exclusively for use by blind or other persons with disabilities.” Accordingly, for the purposes of this litigation, Plaintiffs are not

claiming that any revenue or other earnings of any kind were generated or are expected to be generated in whole or part by the reproduction or distribution by Defendants of copies of Plaintiffs' work(s) for use by blind or other visually disabled person. In addition, Plaintiffs refer to documents previously produced to Defendants in this action, which will be made available to Defendant-Intervenors upon request.

REDACTED

REDACTED

5. *If you contend that the actions of Defendants have affected the market for digital books in fully accessible formats made available for library lending to persons who cannot access print, state all facts that support this contention.*

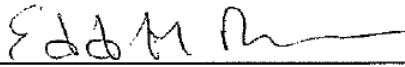
RESPONSE:

See Response to Request No. 1. In addition, Plaintiffs object to this Interrogatory on the ground that it seeks information in the possession of Defendants and/or third parties. Plaintiffs further state that they have not identified any specific, quantifiable past harm, or any documents relating to any such past harm, suffered as a result of the actions of Defendants in making books in fully accessible formats available for library lending to persons who cannot access print versions of such books.

REDACTED

Dated: New York, New York
May 8, 2012

FRANKFURT KURNIT KLEIN & SELZ, P.C.

By: 

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC., et al.,

Plaintiffs,

v.

HATHITRUST, et al.,

Defendants.

Case No. 11-cv-6351(HB)

DECLARATION OF GEORGINA KLEEGER

I, Georgina Kleege, do hereby declare that:

1. I am over eighteen years of age and am competent to make this Declaration.
2. I am legally blind.
3. I am a Lecturer in Creative Writing and Disability Studies and a member of the English Department at the University of California, Berkeley. I have served in this position since 2003. Previously, I was an Adjunct Professor at the Ohio State University from 1991-2002.
4. To access print materials, I use JAWS, a screen reader. Although I read braille, the paucity of titles in braille and the expenses and delays in creating a braille book cause me to rely mostly on digital copies of books and journals for work and pleasure reading. I obtain digital books from Bookshare when they are available.
5. Currently, when I wish to read books from the Berkeley library, I must scan each page and run it through optical character recognition software. This process is very time consuming. As a result, I rarely borrow print materials from the library.

6. The lack of accessible print materials has affected my education and career.

Although I was very successful as an undergraduate student at Yale University, I spent a significant amount of time searching for human readers to help me complete my coursework. Because of the time constraints involved with finding readers, my professors discouraged me from pursuing a Ph.D.

7. In addition, I know that the Berkeley Student Disability Services Office cannot timely process all requests for accessible print materials. Although the people in that office are highly skilled and educated to provide training and counseling for students, they spend the majority of their time scanning books for print-disabled students. For blind Berkeley students and faculty to have immediate access to millions of books through the HathiTrust collection would elevate those students' and my own ability to function and would give us access to the same trove of information available to our sighted peers. Moreover, the time I spend searching for or making accessible copies could be devoted to my academic pursuits. Immediate access to electronic versions of millions of literary works would be, for me, transformative.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 12/5/11


Georgina Kleege

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC., et al.,

Plaintiffs,

v.

HATHITRUST, et al.,

Defendants.

Case No. 11-cv-6351(HB)

DECLARATION OF BLAIR SEIDLITZ

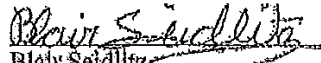
I, Blair Seidlitz, do hereby declare that:

1. I am over eighteen years of age and am competent to make this Declaration.
2. My home address is 11829 West Tesch Avenue, Greenfield, Wisconsin 53228.
3. I am legally blind.
4. I currently am a junior at the University of Wisconsin, Madison. I am pursuing a degree in Engineering Physics and I intend to apply to Ph.D. programs when I graduate.
5. Currently, when I wish to borrow books from the Wisconsin library, I must photocopy the books and scan each page with my Kurzweil™ scanner.
6. This process is very time consuming and I try to avoid borrowing print materials from the library.
7. To complete my reading for class, I purchases accessible copies of required texts, but I do not access supplemental materials that my sighted classmates borrow from the library. If I had access to digital copies of the library's collection, I would be able to access these supplemental materials.

8. If I had access to the HathiTrust collection, I would be able to explore any topic I wanted at any time, with ease, like my sighted classmates. My education would not be confined to the limited number of topics covered in the books I purchase.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 12/6/11


Blair Seidlitz

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

THE AUTHORS-GUILD, INC., et al.,

Plaintiffs,

v.

HATHITRUST, et al.,

Defendants.

Case No. 11-cv-6351(HB)

DECLARATION OF COURTNEY WHEELER

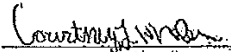
I, Courtney Wheeler, do hereby declare that:

1. I am over eighteen years of age and am competent to make this Declaration.
2. My home address is 3919 Sterling Drive, Eau Claire, Wisconsin, 54701.
3. I am legally blind.
4. I currently am a junior at the University of Wisconsin, Eau Claire. I intend to transfer to the University of Wisconsin, Stout, for the spring 2012 semester. I am pursuing a bachelor's degree in Psychology.
5. I prefer to access print materials using the screen reader on my computer.
6. When I purchase textbooks for my classes, I am usually able to obtain an accessible copy of those books from Learning Ally, a service that provides audio recorded versions of purchased texts for blind readers. Learning Ally, however, is not available for books I wish to borrow from the University of Wisconsin Library.
7. To get access to print library books, I bring my husband or a friend as a reader. This process is very time consuming and dependent on the availability of a reader.

8. As a result, I choose not to take elective classes that require research papers. In the past, I have unsuccessfully petitioned the University of Wisconsin to exempt me from conducting library research as an accommodation for my disability, and from courses that require specific books and reading materials that are not available in accessible formats. However, I would prefer the opportunity to have access to library materials to the same extent and at the same time as everyone else, because I would like to take advantage of all of the educational opportunities available to my peers.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 12/6/11



Courtney Wheeler

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**DECLARATION OF DR. MARC MAURER IN
SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

I, Marc Maurer, do hereby declare that:

1. I am over eighteen years of age and am competent to make this Declaration.
2. My business address is 200 East Wells Street at Jernigan Place, Baltimore, Maryland 21230.
3. I am legally blind and have been my entire life.
4. I received a bachelor's degree from Notre Dame University in 1974 and a J.D. from the University of Indiana School of Law in 1977.
5. I am the President of the National Federation of the Blind, a position I have held since 1986.
6. The National Federation of the Blind was founded in 1940 by a number of individuals notably including Jacobus tenBroek, a blind constitutional scholar, whose works, such as The Antislavery Origins of the Fourteenth Amendment, later published under the title Equal Under Law, The Right of the Disabled to Live in the World: Disability and the Law of Torts, and

Prejudice, War and the Constitution, have had a major influence on the development of civil rights. Dr. tenBroek founded the NFB in the belief that there are effective nonvisual alternatives for most educational, quotidian and workplace tasks and that with equal opportunity, the blind can be full participants in all aspects of society. Today, the NFB, with affiliates in all 50 states, Puerto Rico, and the District of Columbia, consists of more than 50,000 blind people, their families and friends.

7. Every year, the National Federation of the Blind offers significant scholarship to blind college and graduate students in disciplines as varied as chemistry, engineering, physics, history and law. While many of these students prosper according to their talents and commitment to their studies, they compete under a severe handicap. That handicap is not a lack of sight, but a lack of access to information in a world in which information is the key to success. In a world in which the bulk of intellectual capital was contained in printed text, access was limited by considerations of cost, labor, resources and the low incidence of blindness in the population. When it became possible for that intellectual capital to be available in a digital format, a format that does not require sight to get at the content, there was, for the first time the opportunity that the blind could get at the same information with the same facility and to the same degree as the sighted. To date, however, other than in the instance of the University of Michigan Library, that possibility has not yet been realized.

Significance of the HathiTrust Digital Library Scans to the Blind

8. As early as 1931, when Congress passed the Pratt-Smoot Bill, separate libraries for the blind emerged in the United States to create and offer recordings of print books and braille copies. However, given the production time involved to make such alternative copies, only a

small fraction of the world's books were available to us. As the technology to make digital books became possible, the system of separate libraries for the blind remained in place.

9. Today, the only accessible digital books available, other than those for purchase through Apple iBooks and KNFB Blio, are the library collections of Learning Ally, Bookshare, and the National Library Service for the Blind and Physically Handicapped (NLS). These libraries receive paltry funding and must perform much handwork to re-format the digital book files they receive from publishers or scan from print into accessible e-books that the blind can use.

10. Because the capacity and funding of these specialized libraries are so limited, they can make accessible only a small fraction of the titles available each year to the population at large. To appeal to the broadest audience, the libraries predominantly select the most popular titles. All together, the number of accessible books currently available to the blind for borrowing is a mere few hundred thousand titles, a minute percentage of the world's books. In contrast, the HDL contains more than ten million accessible volumes.

11. Access to the HDL scans would do far more than increase exponentially the textual information available to the blind; it would transform the opportunities for blind students and scholars to conduct research independently—a critical aspect both of modern education and the development of new ideas. Because today's blind students in higher education cannot independently conduct scholarly library research, they are at a severe disadvantage compared to their sighted peers. Rather, blind students have access, at most, to required reading. Even then, the blind student must generally first search to see if an accessible copy is available from one of the specialized libraries for the blind. Since those collections contain few scholarly or academic materials, the blind student most often turns to his to her disabled students service office (DSS) to attempt to locate a digital file from the publisher or rip out the pages of a print book to scan,

OCR, and render into what becomes a poor-quality digital file of the book that can be difficult to read with a screen reader. Because the work involved to create these scans is time-consuming and the DSS offices are often overworked, it sometimes takes months or until the end of the semester for the student to actually receive the accessible material.

12. In late 2004, when I became aware that Google was making arrangements with major academic libraries to make digital copies of their collections – works never before available independently to the blind, at a volume never before available to the blind – I realized the revolutionary and equalizing potential the scope of such a project could have for the blind, particularly the blind scholar or student, and set out to ensure these works would be accessible to us.

13. After an initial inquiry to Google about accessibility did not yield a positive response, I determined to visit each of the academic libraries partnering with Google to press upon them the importance of accessibility. Our first stop, in early 2006, was the University of Michigan, where we were advised by John Wilkin and the library's counsel, Jack Bernard, that it was the firm intention of the University of Michigan that the digital collection be available to the blind and they described how they envisioned that access would be triggered through certification of blindness by the DSS office.

14. In 2008, the University of Michigan advised that it had set up the infrastructure to begin to make the collection available to blind students and invited us to the campus for a demonstration of how the system worked.

History of the Publishing Industry's Lack of Interest in a Marketplace that Includes the Blind

15. For more than 20 years, the National Federation of the Blind has vigorously worked to ensure that digital information is rendered accessible on devices that are accessible.

16. In the 1980s, when DOS was first introduced, equal access by the blind to digital currently created information was simpler. Through our Research and Development Committee, we developed screen access technology, the speaqualizer, that could obtain and render aurally the information on the screen. In those days, computer screens displayed text and the screen access software simply read aloud the text information and navigational markers, such as paragraphs and page numbers, behind the screen.

17. When DOS was overtaken by Windows, we lost much of the access we had previously achieved. We fought and worked with developers to ensure that Windows technology would be compatible with screen access software and, though we won that battle, we continue to face barriers when developers create inaccessible websites, software programs, and now, mobile applications and devices.

18. With respect to books and printed materials, the proliferation of digital information and technology held great promise for the blind. Previously, when books were available only on ink and paper, the blind could only access these materials if they were converted to braille or read aloud by a human reader in person or by recording.

19. In the late 1980s, George Kerscher, a blind then-university student and now expert in accessible book technology, created the first publicly available e-book. The e-book was fully accessible to the blind. He later developed the DAISY standard to ensure that the digital content of publisher files could be read by everyone, including the blind.

20. In the late 1990s, the first commercially available e-books entered the marketplace, including e-readers from Microsoft and Adobe. While the underlying content of the books would have been accessible to us, the interfaces on which they were offered, were not. Thus the blind were locked out of these books.

21. As, over the years, the e-book marketplace grew, publishers and authors continued to exclude us, adding digital rights management software that further excluded us from the content or locked the content for use on inaccessible devices.

22. After Amazon announced the launch of the Kindle e-book reader, a completely inaccessible device, I convened at the NFB headquarters a summit of stakeholders to discuss commercially feasible solutions that would be accessible to the blind and people with print disabilities. The attendees included publishers such as the American Association of Publishers, the Association of Educational Publishers, university presses, companies in the business of file conversions, such as Overdrive, distributors, including Amazon, and other involved parties such as Bookshare and Reading for the Blind and Dyslexic (now Learning Ally).

23. The publishers and distributors largely expressed their belief that a marketplace of the blind and print disabled was too insignificant to justify making their content accessible in the mainstream marketplace. They told us they were more concerned about possible piracy if books were made accessible to screen access software than they were about the benefits of making a mainstream e-book marketplace accessible.

24. Around the same time, I also met with university publishers to persuade them to offer their digital catalogs for sale in accessible formats.

25. In 2008, I, along with George Kerscher and our legal counsel Daniel Goldstein, met with representatives of Amazon to try to persuade them of the commercial benefits of making the Kindle e-book reader accessible. We told them how the addition of text-to-speech on the Kindle would benefit everyone, from the dyslexic child in school to the business executive who after disembarking the plane, could continue reading his Kindle book in the rental car via text-to-

speech. To make the device accessible to the blind would only involve extension of text-to-speech to the menus, controls, and navigational infrastructure.

26. Subsequently, Amazon released the Kindle 2, which added text-to-speech to the content, but not to the navigational structure. As a result, we could not use it. We could not independently turn on the text-to-speech function, purchase books, select the books we wanted to read, or start, stop or otherwise navigate through a book.

27. Immediately after the release of the Kindle 2, however, we faced an even larger battle. The Authors Guild protested Amazon's deployment of text-to-speech software to read the content on the Kindle 2. They argued that reading a book out loud through text-to-speech requires the specific permission of the copyright holder. The Authors Guild also expressed a concern that text-to-speech could inhibit the development of the market for audio books. On February 24, 2009, the New York Times ran an op-ed piece by Roy Blount, Jr., President of the Authors Guild, which escalated media attention on the issue.

28. In response to increasing pressure from authors and publishers, Amazon announced only a few days later that it would modify its system so that authors and publishers could turn off text-to-speech on a title-by-title basis.

29. The NFB quickly worked to convene a coalition of disability groups, the Reading Rights Coalition, representing the more than 15 million Americans with print disabilities. The Coalition grew to include more than 30 national and international organizations.

30. Through the NFB's legal counsel, Daniel Goldstein, the Reading Rights Coalition, sent a letter to the six publishers who then provided e-books for the Kindle 2, asking each of them to allow their books to be read on the device with text-to-speech and explaining that the coalition would engage in a national public education campaign in hopes of reversing the stance of the

authors and publishers who had demanded disabling text-to-speech for the content of their Kindle books.

31. We then, through Mr. Goldstein, initiated a dialogue with Paul Aiken, executive director of the Authors Guild, to discuss the effect of its actions on the print-disabled community and the market benefits that would flow to the authors if it welcomed the 15 million new customers who cannot consume or easily consume print books.

32. In response Mr. Aiken proposed a separate registration system for people with print disabilities, whereby a blind or print-disabled person would register as disabled and receive a code that would override the disablement of text-to-speech on the Kindle 2.

33. After consulting with the coalition, Mr. Goldstein explained why a registration system is an unworkable and unacceptable solution. Mr. Aiken responded, offering the possibility of making text-to-speech e-books available at an additional cost. The Coalition unanimously agreed that a “disability tax” was also not an acceptable solution and declined to offer any other proposals.

34. The NFB and the Reading Rights Coalition promptly convened a protest in which we picketed the headquarters of the Authors Guild in New York City. We put together a petition, which obtained thousands of signatures, demanding that text-to-speech stay on, and we leaned on authors for support.

35. Our efforts culminated in a statement issued by the White House with agreement from the NFB, the Authors Guild and AAP that digital books should be accessible. However, two publishers continued to keep the text-to-speech turned off for the content of their books.

36. In May 2009, Amazon released the Kindle DX without adding any accessibility for the blind. Amazon marketed the Kindle DX as an e-book reader for academic and student use. Six

universities announced a pilot program in which they would deploy the inaccessible Kindle device to students. We promptly filed a federal court complaint against Arizona State University and administrative complaints against the other universities with the Departments of Justice and Education against the universities for violating their obligations under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. These complaints and the lawsuit ended in agreements to terminate use of the Kindle DX and to prohibit future programs involving inaccessible e-book reading technology.

37. While Amazon later released the Kindle 3 with some additional accessibility features, it lacked the navigational facility required to make the device usable. Subsequent e-reader devices released by Amazon, including the Kindle Fire, are completely inaccessible to the blind.

38. Meanwhile, Barnes & Noble's Nook became a significant e-book reader in the marketplace and completely ignored accessibility in both its device and online platforms.

39. The options for mainstream access in the marketplace are very slim today. Only Apple's iPad and iBooks and the KNFB reader platform are fully accessible.

40. The history is clear that publishers and authors have never considered the market for books for the blind to be commercially significant. I have not seen any evidence that this trend has reversed. There is no potential market of significance at this time for books for the blind.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: 6/27/2012



Marc Maurer