

12-4547-cv

United States Court of Appeals
for the
Second Circuit

AUTHORS GUILD, INC., AUSTRALIAN SOCIETY OF AUTHORS
LIMITED, UNION DES ECRIVAINES ET DES ECRIVAINS QUEBECOIS,
ANGELO LOUKAKIS, ROXANA ROBINSON, ANDRE ROY, JAMES
SHAPIRO, DANIELE SIMPSON, T.J. STILES, FAY WELDON,
AUTHORS LEAGUE FUND, INC., AUTHORS' LICENSING AND
COLLECTING SOCIETY, SVERIGES FORFATTARFORBUND, NORSK
FAGLITTERAER FORFATTERO OG OVERSETTERFORENING,
WRITERS' UNION OF CANADA, PAT CUMMINGS, ERIK GRUNDSTROM,
HELGE RONNING, JACK R. SALAMANCA,

Plaintiffs-Appellants,

(For Continuation of Caption See Inside Cover)

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

JOINT DEFERRED APPENDIX
Volume 2 of 5 (Pages A-278 to A-560)

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(For Continuation of Appearances See Inside Cover)

v.

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

Defendants-Appellees,

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

Intervenor Defendants-Appellees.

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Court File No. 01-2529/96

ONTARIO COURT
(GENERAL DIVISION)
at Toronto

IN THE ESTATE OF EDITH MARGARET FOWKE, deceased,
late of the Borough of East York
occupation writer/folklorist
who died on March 28, 1996

CERTIFICATE OF APPOINTMENT
OF ESTATE TRUSTEE WITH A WILL

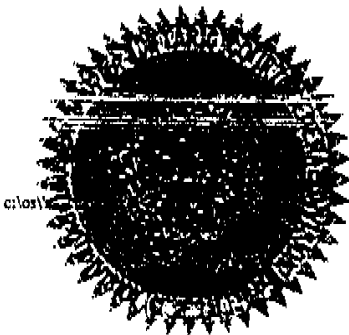
Applicant	Address	Occupation
Franklin George Fowke	5 Notley Place East York, Ontario M4B 2M7	Retired Engineer

This CERTIFICATE OF APPOINTMENT OF ESTATE TRUSTEE WITH A WILL is hereby issued under the seal of the court to the applicant named above. A copy of the deceased's last will ~~(and codicil(s) if any)~~ is attached.

DATE OCTOBER 1ST, 1996


J. J. P. P. P.
Registrar

Address of Court Office:
439 University Avenue
Suite 301
Toronto, Ontario
M5G 1Y8



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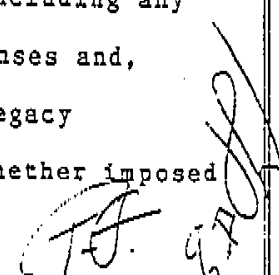
THIS IS THE LAST WILL AND TESTAMENT of me, EDITH MARGARET FOWKE, of the Borough of East York, in the Municipality of Metropolitan Toronto, in the Province of Ontario, Writer.

I. I HEREBY REVOKE all former Wills or other testamentary dispositions heretofore made by me and declare this only to be and contain my last Will and Testament.

II. I NOMINATE, CONSTITUTE AND APPOINT my husband, FRANKLIN GEORGE FOWKE, to be the sole Executor and Trustee of this my Will, provided that if my said husband dies either before or after me and either before or after obtaining Letters Probate of this my Will or is or becomes at any time unable or unwilling to act or to continue to act as the Executor and Trustee of this my Will, then I NOMINATE, CONSTITUTE AND APPOINT my lawyer, MARIAN DINGMAN HEBB, of Toronto, Ontario, to act as Executrix and Trustee of this my Will in the place of my said husband, and I refer to him or her as my Trustee.

III. I GIVE, DEVISE AND BEQUEATH all the assets of my estate, both real and personal, of whatsoever kind and wheresoever situate, including any property over which I may have a general power of appointment, to my Trustee upon the following trusts:

(a) I DIRECT my Trustee to pay out of and charge to the capital of my general estate my just debts (including any taxes payable), funeral and testamentary expenses and, except as hereinafter provided, all estate, legacy succession and inheritance taxes or duties, whether imposed



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by or pursuant to the law of this or any other jurisdiction whatsoever, that may be payable in connection with any property passing on my death or any gift or benefit given or provided by me, either in my lifetime or by survivorship or by this my Will or any Codicil hereto.

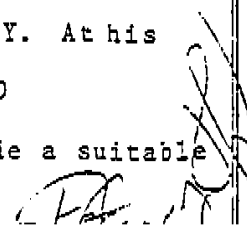
(b) I DIRECT my Trustee to donate to the University of Calgary, my folklore books, folk music records, tapes, manuscripts and my other literary papers (excluding all of my copyrights therein).

(c) I DIRECT my Trustee to give my jewelry to my niece, DARLENE SMITH, of Moose Jaw, Saskatchewan.

(d) I DIRECT my Trustee to give to my friend, MRS. DORIS SANGSTER, currently residing at 43 Brule Crescent, Toronto, any of my clothing which she wishes to have.

(e) I DIRECT my Trustee to give the sum of TWENTY THOUSAND (\$20,000.00) DOLLARS to each of my nieces, MRS. JEAN KNOUREK, of Esterhazy, Saskatchewan, DARLENE SMITH of Moose Jaw, Saskatchewan, and my nephew, JAMES MILLHAM, of Esterhazy, Saskatchewan.

(f) If any dog or dogs belonging to me survive both myself and my husband, I DIRECT my Trustee to find a home for the dog or dogs and, for this purpose, suggest to my Trustee that he may wish to consult with MADELINE KRONBY. At his discretion my Trustee may pay up to TEN THOUSAND (\$10,000.00) DOLLARS to a person who will provide a suitable



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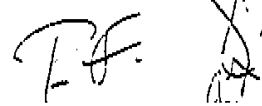
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home for the dog or dogs.

(g) I DIRECT my Trustee to assign to THE WRITERS' UNION OF CANADA, my copyrights and the right to receive all royalties and all other revenue arising from my published works, including but not limited to works published by my current publishers, McClelland & Stewart, W. J. Gage, the Waterloo Music Company, Penguin, NC Press and Doubleday, and from any works posthumously published. It is my wish in making this bequest, without imposing any legal restrictions, to benefit a special project or projects being carried on by THE WRITERS' UNION OF CANADA rather than to contribute to its general operating fund. If THE WRITERS' UNION OF CANADA is unwilling to accept this bequest, or if THE WRITERS' UNION OF CANADA requests that the bequest be offered to THE WRITERS' DEVELOPMENT TRUST before being offered to THE WRITERS' UNION, then my Trustee shall offer this bequest to THE WRITERS' DEVELOPMENT TRUST in place of the WRITERS' UNION, and if accepted, make such assignment to THE WRITERS' DEVELOPMENT TRUST.

(h) I DIRECT my Trustee to give to my husband, if he survives me for more than thirty (30) days, all articles of personal, domestic and household use or ornament belonging to me at my death, including consumable stores and any automobiles and accessories thereto then owned by me, such articles to be kept by him, given away or otherwise disposed of as he wishes.



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(i) I DIRECT my Trustee to hold all of my property not otherwise disposed of by this Will for the use and benefit of my husband until his death. My Trustee may at any time and from time to time pay to my husband or on his behalf such part or parts of the capital of the residue of my estate as my Trustee in his uncontrolled discretion may consider necessary or advisable for his benefit.

(j) Subject to sub-clause (i) herein, I DIRECT my Trustee to give the residue of my estate, with the exception of my copyrights and the bequest contained in sub-clause (g), to DR. ALAN NEWCOMBE and DR. HANNA NEWCOMBE, of Dundas, Ontario, in trust to be used for such charitable purpose or purposes as they in their uncontrolled discretion deem desirable. I DESIRE, without imposing any legal or other restrictions on the discretion of the NEWCOMBES as my trustees, to further the work of organizations such as Amnesty International, the Unitarian Service Committee and the Canadian Peace Alliance.

IV. IN ADDITION to all other powers by this my Will or by any Codicil hereto or by any statute or law conferred on him my Trustee shall have the following powers:

(a) My Trustee may use his discretion in the realization of my estate with power to my Trustee to sell, call in and convert into money any part of my estate not consisting of money and excluding my copyrights at such time or times, in such manner and upon such terms, and either for cash or

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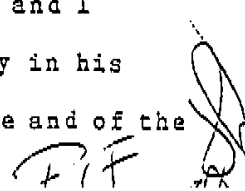
Channel-0 P 7/9

Case 1:11-cv-06351-HB Document 87 Filed 06/29/12 Page 15 of 20

credit or for part cash and part credit as my Trustee in his uncontrolled discretion decides upon, or to postpone such conversion of my estate or any part or parts thereof for such length of time as he may think best, and I HEREBY DECLARE that my Trustee may retain any portion of my estate in the form in which it may be at my death (notwithstanding that it may not be in the form of an investment in which Trustees are authorized to invest trust funds) for such length of time as my Trustee may in his discretion deem advisable and my Trustee shall not be held responsible for any loss that may happen to my estate by so doing.

(b) My Trustee when making investments for my estate shall not be limited to investments authorized by law for Trustees but may make any investment which in his uncontrolled discretion he considers advisable and my Trustee shall not be liable for any loss that may happen to my estate in connection with any investment hereby authorized and made by him in good faith.

(c) My Trustee in making any division of my estate or any part thereof or in setting aside or paying any share or interest therein may either wholly or in part divide, set aside or pay over in specie the assets forming my estate at the time of such division, setting aside or payment of such of the said assets as he may deems advisable, and I expressly will and declare that my Trustee may in his absolute discretion fix the value of my estate and of the

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Channel-0 P 8/9

Case 1:11-cv-06351-HB Document 87 Filed 06/29/12 Page 16 of 20

assets thereof and any part or parts thereof for the purposes of making any such division, setting aside or payment or for any other purpose in the administration of my estate and the decision of my Trustee shall be final and binding on all persons concerned.

(d) So long as any real or leasehold property forming part of my estate remains unsold my Trustee may let or lease the same from month to month, from year to year or for any term of years, and subject to such covenants and conditions as he shall think fit; may accept surrenders of leases and tenancies; may expend money on repairs and improvements and generally manage the property; and with a view to the sale thereof may give any option he may consider advisable.

IN TESTIMONY WHEREOF I have to this my last Will and Testament, written upon this and the five ^{or exceeding of the Will} ^{COPIE CERTIFIEE CONFORME AU} ^{FILED IN THIS OFFICE} ^{TESTAMENT DEPOSE DANS CE BUREAU} pages of paper, subscribed my name this 7th day of

SIGNED, PUBLISHED AND DECLARED by the)
said Testatrix, EDITH MARGARET FOWKE,)
as and for her last Will and Testament)
in the presence of us both present at)
the same time, who at her request, in)
her presence and in the presence of)
each other have hereunto subscribed)
our names as witnesses)

NAME: *Edith Margaret Fowke*

ADDRESS: 8 NOTLEY PLACE

Toronto M4B 2M4

OCCUPATION: Designer

LOCAL REGISTRAR
ONTARIO COURT (GEN. DIV.)

GREFFIER LOCAL
COUR D'ONTARIO (DIV. GEN.)

Edith Margaret Fowke
EDITH MARGARET FOWKE

NAME: *Edith Margaret Fowke*

ADDRESS: 12 Vallermaude Rd

Toronto

OCCUPATION: Sci. Educ.

2012-06-15 11:16

marian hebb

416 971 9184 >>

Channel-0 P 9/9

Case 1:11-cv-06351-HB Document 87 Filed 06/29/12 Page 17 of 20

ESTATE OF EDITH MARGARET FOWKE

(Short title of Proceeding)

(Court file no.) 01-2529/96

ONTARIO COURT (GENERAL DIVISION)
 Proceeding commenced at: TORONTO

CERTIFICATE OF APPOINTMENT OF
 ESTATE TRUSTEE WITH A WILL

Otto Robert Siebenmann
 179 John St., Suite 404
 Toronto, Ont.
 M5T 1X4

Tel: (416) 971 6617

Solicitor for the Estate of
 EDITH MARGARET FOWKE

EXHIBIT C

Copyright Board
Canada



Commission du droit d'auteur
Canada

Ottawa, April 30, 2010

FILE: 2009-UO/TI-22

UNLOCATABLE COPYRIGHT OWNERS

Non-exclusive licence issued to the University of Athabasca for the digital reproduction and communication to the public of community newspapers

Pursuant to the provisions of subsection 77(1) of the *Copyright Act*, the Copyright Board grants a licence to the University of Athabasca as follows:

(1) The licence authorizes the digital reproduction and the communication to the public of the complete contents of the following community newspapers, in their original format, published between the dates shown, for non-commercial purposes only and subject to the limitations set out in this licence:

- *Novosti* (1944-1948) - Croatian
- *Vaba Estlane* (1952-1987) - Estonian
- *Liekki* ((1944-1973) - Finnish
- *Canadian Utiset* (1919-1927 / 1982-1987) - Finnish
- *Isien Usko* (1936-1978) - Finnish
- *Vapaus Sana* (1921-1930 / 1932-1977 / 1979) - Finnish
- *Viikkosanomat* (1975-1986) - Finnish
- *Kanadai Magyarsae* (1951-1977) - Hungarian
- *Magyar Elet* (1957-1997) - Hungarian
- *Zwilazkowiec Alliancer* (1933-1987) - Polish
- *Serbian Herald* (1946-1948) - Serb
- *Edmonton Ukrainian News* (1928-1971) - Ukrainian
- *Vilne Slovo* (1934-1977) - Ukrainian
- *Jedinstvo* (1948-1970) - Yugoslavian
- *Nasa Novine* (1971-1986) - Yugoslavian
- *Bavarijas Latviesu Vestnesis* (1945-1946) - Latvian
- *Brivais Latveitis* (1948-1949) - Latvian
- *Liaudies Balsas* (1937-1976) - Lithuanian

(2) The licence applies only to issues that are not part of the public domain when this licence is issued.

- 2 -

- (3) The licence does not authorize
- (a) the reproduction of individual works;
 - (b) the translation of the publications.
- (4) The issuance of this licence does not release the licensee from the obligation to obtain permission for any other use not covered by this licence.
- (5) The licence expires in respect of each issue at the time the issue joins the public domain.
- (6) The licence is non-exclusive and valid only in Canada. For other countries, it is the law of that country that applies.
- (7) The licensee shall pay \$5,000 to Access Copyright, The Canadian Copyright Licensing Agency, who may dispose of this amount as it sees fit for the general benefit of its members. Access Copyright undertakes, however, to reimburse 6 ¢ per page to any person who establishes, within five years of an issue joining the public domain, ownership in that issue. Should the total amount of claims exceed the licence fee, each claim shall be reduced on a pro rata basis.
- (8) The licensee shall ensure that the following notices are prominently displayed on the web site:
- “Some of the content shown is used under a non-exclusive licence issued by the Copyright Board of Canada in cooperation with Access Copyright, pursuant to subsection 77(1) of the *Copyright Act*.”
- “A user may not reproduce or otherwise use any of the content found on this website unless the contemplated use is authorized by the *Copyright Act* or the content is in the public domain.”
- (9) The owner of copyright in an issue is entitled to end the licence with respect to future uses of that issue.
- (10) The coming into force of this licence is conditional on Access Copyright filing with the Board a notice of receipt which confirms that the royalties, as specified in paragraph (7) above, have been received and that Access Copyright undertakes to comply with the conditions set out in same.



Gilles McDougall
A/Secretary General

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
THE AUTHORS GUILD, INC., et al.,	:
	:
Plaintiffs,	:
	:
- against -	:
	:
HATHITRUST, et al.,	:
	:
Defendants.	:
-----X	:

Index No. 11 Civ. 6351 (HB)

DECLARATION OF FRANCIS FARLEY-CHEVRIER

I, Francis Farley-Chevrier, hereby declare as follows:

1. I am the Directeur General of Union des Écrivaines et des Écrivains Québécois (Quebec Union of Writers) ("UNEQ"), one of the plaintiffs in the above-captioned action.
2. I submit this declaration in support of Plaintiffs' motion for summary judgment. I have personal knowledge of the facts set forth in this Declaration and could testify competently at a hearing or trial if called upon to do so.
3. UNEQ is a professional union of writers with its principal place of business located in Montreal, Québec. UNEQ's mission is to defend writers' socio-economic interests and promote Québec's literature. With a membership of 1,400 writers of fiction, poetry, drama, nonfiction, children's and other books, UNEQ is the primary representative for writers in Québec, a status recognized by a 1990 Québec Act (RSQ, chapter S-32.01), and for authors throughout Canada of original French language literary or dramatic works, as certified by the Canadian Artists and Producers Professional Relations Tribunal in 1996.

The Works at Issue

4. Upon information and belief, Defendants have digitized without authority many books by UNEQ members (the “UNEQ Works”), including at least two books by Daniele Simpson and Andre Roy, plaintiffs in the instant action and the President and Vice President of UNEQ.

Harm Resulting From Defendants’ Use Of The Works

5. UNEQ agreed to join this lawsuit as an associational plaintiff after learning that print copies of UNEQ Works and millions of other copyrighted books were digitized and being used as part of the Google Library Project, and that Defendants planned to begin making digital copies of purported “orphan works” available for free.

6. I have reviewed the declarations of T.J. Stiles, Daniele Simpson and Andre Roy, who are authors and plaintiffs in this litigation. I agree with and incorporate by reference the description in those declarations of the various harms and potential harms that result from Defendants’ unauthorized digitization and use of copyrighted works. Those descriptions need not be repeated here in full, but can be summarized as follows.

7. *First*, each digital copy of a UNEQ Work that is created by Defendants without purchase or license represents a lost sale to the associated rightsholder. Defendants could have purchased a copy but instead had it scanned without compensating the copyright owner. For example, Defendants could have sought a digitization license from Copibec, a collective rights society that manages reproduction rights for many authors in Quebec and has bilateral agreements with foreign collective rights societies such as the Copyright Clearance Center in the United States. UNEQ is a co-founder of Copibec and occupies three seats on its Board of Directors.

8. *Second*, Defendants' storage of the UNEQ Works in an online digital repository exposes that property to security risks for which the rightsholders receive no commensurate remuneration. Unauthorized access to copyrighted books leading to widespread piracy would gravely impact the market for those works.

9. *Third*, Defendants' various uses of the UNEQ Works undermine various licensing opportunities for rightsholders. For example, authors routinely grant online distributors like Amazon a license to index their books and make them searchable as part of a commercial arrangement targeted at promoting book sales. Defendants do the same thing, but without a license and without the search function being part of an effort to sell the books and provide revenue to the author. Defendants also permit the books to be used for non-consumptive research, an emerging field that represents another potential licensing stream for authors.

10. *Fourth*, Defendants' mass digitization and orphan works programs undercut opportunities for authors to generate royalty streams by entering into collective licensing agreements. For example, if permitted to proceed, the Orphan Works Project is likely to negatively impact author revenues generated through a system established in Canada to address orphan works. Section 77 of the Canadian Copyright Act permits the Copyright Board of Canada (the "Board") to issue licenses to users whose reasonable efforts to locate a copyright holder have been unsuccessful. The Board sets a price for each permitted use, which compensation is generally directed to a designated collective management organization. Attached as Exhibit A is an example of a license issued by the Board to the University of Athabasca to digitally reproduce and distribute certain newspapers in exchange for a \$5,000 licensing fee. Defendants' Orphan Works Project allows people to make uses of orphan works but without any system to compensate rightsholders.


11. *Fifth*, making books available through the Orphan Works Project will directly undermine efforts to revive out of print books and will impact future sales of such books.

12. In short, Defendants activities have harmed or have the potential to cause enormous harm to the rights of authors.

[THIS SPACE INTENTIONALLY LEFT BLANK]

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

Dated: Montreal, Québec
June 26, 2012



FRANCIS FARLEY CHEVRIER

EXHIBIT A

Copyright Board
Canada



Commission du droit d'auteur
Canada

Ottawa, April 30, 2010

FILE: 2009-UO/TI-22

UNLOCATABLE COPYRIGHT OWNERS

Non-exclusive licence issued to the University of Athabasca for the digital reproduction and communication to the public of community newspapers

Pursuant to the provisions of subsection 77(1) of the *Copyright Act*, the Copyright Board grants a licence to the University of Athabasca as follows:

(1) The licence authorizes the digital reproduction and the communication to the public of the complete contents of the following community newspapers, in their original format, published between the dates shown, for non-commercial purposes only and subject to the limitations set out in this licence:

- *Novosti* (1944-1948) - Croatian
- *Vaba Estlane* (1952-1987) - Estonian
- *Liekki* ((1944-1973) - Finnish
- *Canadian Utiset* (1919-1927 / 1982-1987) - Finnish
- *Isien Usko* (1936-1978) - Finnish
- *Vapaus Sana* (1921-1930 / 1932-1977 / 1979) - Finnish
- *Viikkosanomat* (1975-1986) - Finnish
- *Kanadai Magyarsae* (1951-1977) - Hungarian
- *Magyar Elet* (1957-1997) - Hungarian
- *Zwilazkowiec Alliancer* (1933-1987) - Polish
- *Serbian Herald* (1946-1948) - Serb
- *Edmonton Ukrainian News* (1928-1971) - Ukrainian
- *Vilne Slovo* (1934-1977) - Ukrainian
- *Jedinstvo* (1948-1970) - Yugoslavian
- *Nasa Novine* (1971-1986) - Yugoslavian
- *Bavarijas Latviesu Vestnesis* (1945-1946) - Latvian
- *Brivais Latveitis* (1948-1949) - Latvian
- *Liaudies Balsas* (1937-1976) - Lithuanian

(2) The licence applies only to issues that are not part of the public domain when this licence is issued.

- 2 -

- (3) The licence does not authorize
- (a) the reproduction of individual works;
 - (b) the translation of the publications.
- (4) The issuance of this licence does not release the licensee from the obligation to obtain permission for any other use not covered by this licence.
- (5) The licence expires in respect of each issue at the time the issue joins the public domain.
- (6) The licence is non-exclusive and valid only in Canada. For other countries, it is the law of that country that applies.
- (7) The licensee shall pay \$5,000 to Access Copyright, The Canadian Copyright Licensing Agency, who may dispose of this amount as it sees fit for the general benefit of its members. Access Copyright undertakes, however, to reimburse 6 ¢ per page to any person who establishes, within five years of an issue joining the public domain, ownership in that issue. Should the total amount of claims exceed the licence fee, each claim shall be reduced on a pro rata basis.
- (8) The licensee shall ensure that the following notices are prominently displayed on the web site:
- “Some of the content shown is used under a non-exclusive licence issued by the Copyright Board of Canada in cooperation with Access Copyright, pursuant to subsection 77(1) of the *Copyright Act*.”
- “A user may not reproduce or otherwise use any of the content found on this website unless the contemplated use is authorized by the *Copyright Act* or the content is in the public domain.”
- (9) The owner of copyright in an issue is entitled to end the licence with respect to future uses of that issue.
- (10) The coming into force of this licence is conditional on Access Copyright filing with the Board a notice of receipt which confirms that the royalties, as specified in paragraph (7) above, have been received and that Access Copyright undertakes to comply with the conditions set out in same.



Gilles McDougall
A/Secretary General

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
THE AUTHORS GUILD, INC., et al.,	:
	:
Plaintiffs,	:
	:
- against -	:
	:
HATHITRUST, et al.,	:
	:
Defendants.	:
-----X	

Index No. 11 Civ. 6351 (HB)

DECLARATION OF ERIK GRUNDSTRÖM

I, Erik Grundström, hereby declare as follows:

1. I am one of the plaintiffs in the above-captioned action and submit this declaration in support of Plaintiffs' motion for summary judgment.
2. I am a novelist, short-story writer, playwright and former vice-president of plaintiff Sveriges Författarförbund ("SFF"), a non-profit organization in Sweden dedicated to securing reasonable remuneration and working conditions for professional writers and translators. I am the former principal of Skrivarakademin, Sweden's leading school for creative writing, and winner of the Arnold Röring literary prize in 1993.

The Work At Issue

3. I am the sole author and copyright holder of the fictional work *Oss Målvakter Emellan* (*Goalkeeper Between Us*), and holder of a valid copyright to it under Swedish law.
4. Although I have licensed to my publishers certain exclusive rights in connection with the commercial exploitation of *Oss Målvakter Emellan*, I did so in exchange for the payment of royalties and I remain the legal and/or beneficial owner of all rights in and to *Oss Målvakter Emellan*. I never assigned to any third party the copyright to *Oss Målvakter Emellan*.

Unauthorized Uses Of My Work

5. It has come to my attention that a print copy of *Oss Målvakter Emellan* was copied without my permission when it was digitized by one the defendant universities (collectively referred to herein along with HathiTrust as “Defendants”) in partnership with Google, as part of the HathiTrust and/or Google Books projects. This digitization took place without my knowledge, consent, or approval. I did not authorize Google, HathiTrust, or any of the university defendants to digitize or make any other use of *Oss Målvakter Emellan*. To date, I have received no compensation of any kind for Defendants’ digitization and various uses of *Oss Målvakter Emellan*.

Harm Resulting From Defendants’ Use Of My Work

6. As an author who depends in large part on the value of my work to earn a living, I brought this action because the Defendants’ unauthorized digitization and use of *Oss Målvakter Emellan* has harmed or threatens to harm me in a number of ways.

7. I have reviewed the Declaration of T.J. Stiles and I agree with and incorporate by reference Mr. Stiles’ descriptions of the various harm and potential harm caused by the Defendants’ actions. Two differences between Mr. Stiles and me are that (as described below) my book is no longer in print and I have not yet chosen to make it available in digital form. However, these differences do not change the fact that Defendants’ actions are causing and threatening to cause damage to me and to the value of *Oss Målvakter Emellan*.

8. While *Oss Målvakter Emellan* is no longer in print, the harms articulated in the Declaration of T.J. Stiles nevertheless apply to me because *Oss Målvakter Emellan* is still protected by copyright law and I still hold the copyright. Whether *Oss Målvakter Emellan* is in print or not, I have the right choose whether or not to engage in licensing agreements for

emerging uses of *Oss Målvakter Emellan*, be they digital archiving, non-consumptive research, full-text searching, or other derivative uses. By preempting my right to make a decision as to how I wish to exploit *Oss Målvakter Emellan*, Defendants have narrowed the scope of my rights and lessened the strength of my control over my own work.

9. New technology is opening new possibilities in publishing and it is now possible, for the first time in history, to self-publish a book in print or digital forms without the aid of a publishing company. While I have not yet made a decision on how to proceed with *Oss Målvakter Emellan*, I am aware of this option and consider it a possibility for the future. This is why even my currently out-of-print book is affected by the Defendants' unauthorized copying.

10. I believe that I also am entitled to determine whether, when and under what circumstances *Oss Målvakter Emellan* is scanned, digitized, copied and used. Defendants' insistence that the new, complex, technologically-enabled uses they intend to make of *Oss Målvakter Emellan* should be permitted without my consent dangerously presupposes that copyright law does not give authors any right to control how their works are used and exploited in these contexts. To the best of my knowledge, this is not the law in the United States, and it certainly is not the law in Sweden.

11. Defendants argue that uses of *Oss Målvakter Emellan* that do not allow individuals to read the text, such as non-consumptive research and full text searching, do not inhibit sales of *Oss Målvakter Emellan* or deprive me of licensing opportunities and therefore do not require my permission. This is not so. As the Declaration of T.J. Stiles points out, these kinds of uses represent a new market whose value is evidenced by Defendants' use of *Oss Målvakter Emellan*, as well as the works owned by the other Plaintiffs and the millions of other works Defendants scanned and copied. I believe that I have the legal right to decide whether or

not to permit these uses, and to seek remuneration for these uses if I do decide to allow them.

Defendants could have asked my permission to digitize *Oss Målvakter Emellan*.

12. In addition, by failing to seek a license, Defendants eliminated the usual mechanism that authors use to exercise control over our work: licensing or other agreements that define terms of use and hold licensees accountable. Without such a contract, I am rendered powerless to dictate terms as to how *Oss Målvakter Emellan* may or may not be used. I also have no ability to insist that HathiTrust take security measures to protect my work. I have no power to ensure that the infringing copies of my work are truly in a “dark archive” that is not accessible for viewing or further copying. I have no assurance that Defendants’ actual use of my work is limited to the uses they claim to intend to make, and no power of enforcement if their uses exceed this scope.

[The rest of this page intentionally left blank]

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

Dated: June 26, 2012, Sweden
June __, 2012


ERIK GRUNDSTRÖM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
THE AUTHORS GUILD, INC., et al.,	:
	:
Plaintiffs,	:
	:
- against -	:
	:
HATHITRUST, et al.,	:
	:
Defendants.	:
-----X	:

Index No. 11 Civ. 6351 (HB)

DECLARATION OF LOUISE HEDBERG

I, Louise Hedberg, hereby declare as follows:

1. I am the Director of Sveriges Författarförbund (The Swedish Writers' Union) ("SFF"), one of the plaintiffs in the above-captioned action.
2. I submit this declaration in support of Plaintiffs' motion for summary judgment. I have personal knowledge of the facts set forth in this Declaration and could testify competently at a hearing or trial if called upon to do so.
3. SFF is a non-profit organization with its principal place of business in Stockholm, Sweden. The SFF, first organized in 1893 as the Swedish Association of Authors, has more than 2,750 professional writers and translators as its members and is the leading organization for book authors in Sweden. In pursuit of its mission of securing its members' rights to reasonable remuneration and working conditions, the SFF negotiates standard, minimum-terms agreements with book publishers, radio and television broadcasters, film producers and others on behalf of authors and translators. The SFF also defends freedom of expression and of the press by safeguarding the principles of the Swedish Freedom of the Press Act.

The Works At Issue

4. Upon information and belief, Defendants have digitized without authority many books by SFF members (the “SFF Works”), including at least one work by author Erik Grunstrom, who is the former Vice President of SFF and a plaintiff in the instant action.

Harm Resulting From Defendants’ Use Of The Works

5. The SFF agreed to join this lawsuit as an associational plaintiff after learning that print copies of SFF Works and millions of other copyrighted books were digitized and being used as part of the Google Library Project, and that Defendants planned to begin making digital copies of purported “orphan works” available for free.

6. I have reviewed the declarations of T.J. Stiles and Erik Grundstrom, who are authors and plaintiffs in this litigation. I agree with and incorporate by reference the description in those declarations of the various harms and potential harms that result from Defendants’ unauthorized digitization and use of copyrighted works. Those descriptions need not be repeated here in full, but can be summarized as follows.

7. *First*, each digital copy of an SFF Work that is created by Defendants without purchase or license represents a lost sale to the associated rightsholder. Defendants could have purchased a copy but instead had it scanned without compensating the copyright owner. SFF itself administers digital reproduction rights on behalf of many of its members, and SFF works closely with collecting societies in Sweden that manage the rights to thousands of additional works.

8. *Second*, Defendants’ storage of the SFF Works in an online digital repository exposes that property to security risks for which the rightsholders receive no commensurate remuneration. Unauthorized access to copyrighted books leading to widespread piracy would

gravely impact the market for those works. Although the Swedish market for electronic books is relatively undeveloped, there has recently been an immense amount of activity in this field, with authors, publishers, booksellers and libraries each making significant investments to optimize their relative position in the market when it finally emerges in full force. Hence, the risk of a project like HathiTrust causing a disturbance to the emerging markets for electronic books in Sweden is particularly troublesome.

9. *Third*, Defendants' various uses of the SFF Works undermine various licensing opportunities for rightsholders. For example, authors in Sweden routinely grant publishers the right to display one or two chapters of a book in order to promote sales of the book. Defendants' full-text search feature is comparable, but in that case there is no license and the service is not part of an effort to sell the books and provide revenue to the author. Defendants also permit the books to be used for non-consumptive research, an emerging field that represents another potential licensing stream for authors.

10. *Fourth*, Defendants' mass digitization and orphan works programs undercut opportunities for authors to generate royalty streams by entering into collective licensing agreements. For example, the National Library of Sweden entered into a memorandum of understanding ("MOU") with the SFF and the Swedish Publishers Association with the goal of creating a digital library that would make all works published in Sweden available to the public. The primary focus was on digitizing out of print works and works that had not yet been digitized. Rights would be cleared through an extended collective licensing agreement. The MOU contemplates that in exchange for granting rights to the National Library, authors would receive a set amount per work digitized, along with a copy of the digital file. A copy of a presentation summarizing the terms of the MOU in English is attached hereto as Exhibit A. Defendants have

undertaken similar activities as those discussed in the MOU, but they have not agreed to compensate authors for the use of their works or to provide any of the protections contained in the MOU.

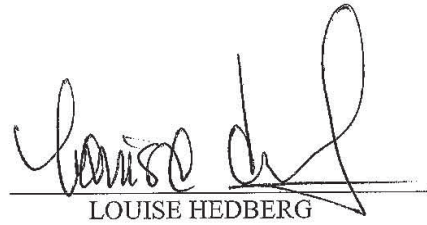
11. *Fifth*, making books available through the Orphan Works Project will directly undermine efforts to revive out of print books and will impact future sales of such books.

12. In short, Defendants activities have harmed or have the potential to cause enormous harm to the rights of authors.

[THIS SPACE INTENTIONALLY LEFT BLANK]

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

Dated: Stockholm, Sweden
June 26, 2012



LOUISE HEDBERG

EXHIBIT A

”Sweden’s Digital Library”

–

ECL a flexible model of rights clearance and making available

2011-03-31

Jerker Rydén
Chief Legal Adviser
National Library of Sweden

The Parties

- The following Parties have signed a MOU concerning the digitization of the Swedish literary heritage:
 - The Swedish Writers' Union,
 - The Swedish Publishers' Association,
 - The National Library of Sweden and
 - The Visual Arts Copyright Society in Sweden.

Principles

- The ambition is to create a digital library
 - all books published in Sweden should be made accessible
 - on-line to the public,
 - free of charge for the readers
- The Extended Collective License [ECL] is the best means to solve the copyright related issues.
- Cooperation with representatives for other right holders and producers.
- The National Library of Sweden must receive increased financial resources, through both private and state initiatives.

Out of Commerce

- The major focus will be to provide access to digitized books that are not available in print or have not been issued as an E-book.
- Access to the digital library will have to be adjusted. Conditions will vary from time to time.
- The best way to adapt the making availability of the Digital Library is for the Parties to negotiate an agreement [ECL] and modulate such an agreement when needed.

Different roles

- The National Library will digitize the books and provide access to them on the Internet
- To make the books available for research and educationally purposes
- But also in the interest of the general public to make the culture heritage of Sweden available to as many as possible
- The Parties agree that the Digital Library can provide a legitimate service where the market oriented publishing ends

Financing

- Additional financial means will be necessary
- Both private as well as government initiatives.
- Public Private Partnership will be essential to realize the digital library

”The Forties”

- A pilot project with a selection of Swedish poetry, prose and magazines
- A non-exclusive license for a period until a new ECL provision is introduced in the Copyright Act, and an agreement is concluded. However, the period will be at most three years.
- Gives the National Library a right to digitize and make the works in question available to the public via a web page.
- Remuneration – a symbolic sum of one SEK/work and the digital file.
- One purpose with the project – two identify obstacles and to define the roles of the stakeholders in a future ECL as well as features conducive for mass digitisation and making available

Features conducive for mass digitisation and making available

- Transparency / Heads Up
 - Give the stakeholders an opportunity to assess the commercial value of the work in question,
 - and the time to take necessary actions to put the work on the market, i.e. make the work commercially available
- Opt-Out
 - prohibition against the use of their works.
 - individual remuneration on the basis of the law

ECL

- An extended collective license applies
 - *when an agreement has been concluded concerning the exploitation of works pursuant to specific articles in the Sw. Copyright Act*
 - *with the organization that is most representative for, and best represents, the authors of the works in the field concerned that are being exploited in Sweden.*
- The extended collective license confers to the user the right to exploit works of the kind referred to in the agreement despite the fact that the authors of those works are not represented by the organization (*extended collective license effect*).

To digitise works in library collections and make them accessible on the Internet

- A new provision to the Sw. Copyright Act enabling libraries and archives to
 - digitise works in their collections and
 - make them accessible on the Internet
- The new provision does not rely on the material being previously published or otherwise previously made available to the public.
- Therefore it would also apply to manuscripts etc that has been donated by the rightsholder to the library with the intent that the material should be made available to the public

A special extended collective license

- An extended collective license applies also:
 - *when an agreement has been concluded in accordance with the conditions set out in the previous slide and relating to other exploitation of works and*
 - *the agreement relates to exploitation within a limited and well defined area,*
 - *the ECL effect is a precondition for the exploitation, and*
 - *the agreement is in writing and contains information that the agreement is intended to have an extended collective license effect.*

The Special ECL & PPP

- The Special ECL aim to
 - *facilitate rights clearance in connection with various forms of mass use of works and performances protected by copyright so as*
 - *to make the great repertoire available in organised form and*
 - *on terms that are acceptable to the users, authors and other right holders. See http://www.wipo.int/meetings/en/2010/wipo_cr_lic_ge_10/program.html*
- The EU and many national governments have been encouraging national libraries to enter into Public Private Partnerships (PPP) to facilitate the large scale digitization of the each library's Corpus.

The Special ECL & PPP

- These efforts are extremely costly, so the participation of a private partner is, in most cases, a prerequisite.
- Both the library as well as the private partner in these endeavors will need a license to disseminate the content.
- The Special ECL will be instrumental to enable PPP.

Important!

- Collective Management Organization (CMO) is representative
- CMO and users conclude an agreement on the basis of free negotiations.
- The agreement is by law made binding on non-represented rights holders. **But** non represented right holders have a right to:
 - prohibition against the use of their works.
 - individual remuneration on the basis of the law



Important!

- An agreement allows to legally use all materials,
 - without the possibility of receiving individual claims from "outsiders" or
 - having to face criminal sanctions

Out of Commerce - ECL

- **Issue:** The model is flexible and future-proof
- Rights-holder organizations negotiate with users the conditions for a particular use of works
- Agreement applicable to all right holders, even if they are not a member
- Possibility for "opt out"
- +: Both exclusivity and contractual freedom are respected

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
THE AUTHORS GUILD, INC., et al.,	:
	:
Plaintiffs,	:
	:
- against -	:
	:
HATHITRUST, et al.,	:
	:
Defendants.	:
-----X	:

Index No. 11 Civ. 6351 (HB)

DECLARATION OF JAN TERJE HELMLI

I, Jan Terje Helmlí, hereby declare as follows:

1. I am the General Counsel for Norsk Faglitterær Forfatter- og Oversetterforening (The Norwegian Non-Fiction Writers and Translators Association) (the “NFF”), one of the plaintiffs in the above-captioned action.
2. I submit this declaration in support of Plaintiffs’ motion for summary judgment. I have personal knowledge of the facts set forth in this Declaration and could testify competently at a hearing or trial if called upon to do so.
3. The NFF is Norway’s union for nonfiction writers, representing 5,400 authors and translators. It represents its members’ professional interests by, among other activities, negotiating minimum-term agreements with book publishers and others, negotiating conditions for copying books in schools, libraries and elsewhere, and providing legal assistance to its members in negotiations and conflicts regarding literary rights.

The Works At Issue

4. Upon information and belief, Defendants have digitized without authority many books by NFF members (the “NFF Works”), including at least two books by Trond Andreassen

and Helge Ronning, plaintiffs in the instant action and the General Secretary and former President, respectively, of the NFF.

Harm Resulting From Defendants' Use Of The Works

5. The NFF agreed to join this lawsuit as an associational plaintiff after learning that print copies of NFF Works and millions of other copyrighted books were digitized and being used as part of the Google Library Project, and that Defendants planned to begin making digital copies of purported "orphan works" available for free.

6. I have reviewed the declarations of T.J. Stiles, Trond Andreassen and Helge Ronning who are authors and plaintiffs in this litigation. I agree with and incorporate by reference the description in those declarations of the various harms and potential harms that result from Defendants' unauthorized digitization and use of copyrighted works. Those descriptions need not be repeated here in full, but can be summarized as follows.

7. *First*, each digital copy of an NFF Work that is created by Defendants without purchase or license represents a lost sale to the associated rightsholder. Defendants could have purchased a copy but instead had it scanned without compensating the copyright owner. For example, the libraries could have worked with the NFF and/or Kopinor (the Reprographic Rights Organization for Norway) to negotiate a collective license agreement to digitize and make various uses of works of Norwegian authors, but instead they simply digitized and use them without authorization or compensating authors.

8. *Second*, Defendants' storage of the NFF Works in an online digital repository exposes that property to security risks for which the rightsholders receive no commensurate remuneration. Unauthorized access to copyrighted books leading to widespread piracy would gravely impact the market for those works.

9. *Third*, Defendants' various uses of the NFF Works undermine various licensing opportunities for rightsholders. For example, authors routinely grant online distributors like Amazon a license to index their books and make them searchable as part of a commercial arrangement targeted at promoting book sales. Defendants do the same thing, but without a license and without the search function being part of an effort to sell the books and provide revenue to the author. Defendants also permit the books to be used for non-consumptive research, an emerging field that represents another potential licensing stream for authors.

10. *Fourth*, Defendants' mass digitization and orphan works programs undercut opportunities for authors to generate royalty streams by entering into collective licensing agreements. In Norway, the National Library is in the process of digitizing the complete national literary heritage, not limited to works that are in the public domain. Rights were cleared through an agreement (the "Kopinor Agreement") between the National Library of Norway and Kopinor, on behalf of tens of thousands of Norwegian authors, including members of NFF. In exchange for granting rights to the National Library, authors receive NOK 0.56 per page (approximately \$0.09) per year. A copy of the Kopinor Agreement is attached hereto as Exhibit A. Defendants have undertaken similar activities as those licensed by the Kopinor Agreement, but they have not agreed to compensate authors for the use of their works or to provide any of the protections contained in the Kopinor Agreement.

11. *Fifth*, making books available through the Orphan Works Project will directly undermine efforts to revive out of print books and will impact future sales of such books.

12. In short, Defendants activities have harmed or have the potential to cause enormous harm to the rights of authors.

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

Dated: Oslo, Norway
June 27, 2012



JAN TERJE HELMLI

EXHIBIT A

Contract regarding the digital dissemination of books (Bokhylla / The Bookshelf)

between

The National Library of Norway

on the one hand,

and

Kopinor

on behalf of the members of

The Norwegian Specialized Press Association, The Norwegian Authors' Union, The Norwegian Publishers' Association, The Norwegian Association of Fine Arts Photographers, GRAFILL – Norwegian Organisation for Visual Communication, The Norwegian Magazine Publishers' Association, Norwegian Media Businesses' Association, NOPA Norwegian society of composers and lyricists, The Norwegian Association of Professional Photographers, The Norwegian Non-Fiction Writers' and Translators' Association, The Norwegian Union of Journalists, The Norwegian Society of Composers, Norwegian Critics' Association, The Norwegian Music Publishers' Association, The Norwegian Association of Literary Translators, The Association of Norwegian Editors, Norwegian Comedy Writers' Association, Norwegian Association of the Periodical Press, Norwegian Writers for Children, The Association of Norwegian Visual Artists, Norwegian Playwrights' Association, Norwegian Association of Arts and Crafts, New Music Composers' Group and foreign rightsholders' organisations

on the other hand.

THE SCOPE OF THE CONTRACT**§ 1**

This is a pilot contract regarding the Bokhylla (Bookshelf) project. The project relates to printed books published in Norway during the years 1790-1799, 1890-1899 and 1990-1999, including translated literature. This contract regulates that part of the copyright-protected material covered by the project, up to 50 000 books with an estimated average of 185 pages.

§ 2

Subject to the conditions stated in this contract and within the project's frameworks as stated in § 1, the National Library of Norway is given the right to make available published copyright-protected material. This right includes the necessary reproduction of viewing copies based on the digital storage copies that the National Library of Norway makes pursuant to the regulations issued pursuant to the Norwegian Copyright Act (FOR 21.12.2001 no. 1563 (§ 1-3)). The contract applies to Norwegian and foreign publications whose rightsholders are represented by Kopinor, cf Act no. 2 of 12 May 1961 (the Norwegian Copyright Act) and competition law rules.

The provision stated in the first paragraph means, pursuant to section 16a, cf section 36 (extended collective licence) of the Norwegian Copyright Act, that published materials created by rightsholders that Kopinor does not represent are also covered by the contract.

HOW THE MATERIAL CAN BE MADE AVAILABLE

§ 3

The material is to be made available on the National Library of Norway's webpages for users with Norwegian IP addresses.

§ 4

The material is to be made available as individual pages in a digital format to be viewed on a computer screen. The users will be able to search in the text and search for covers, title pages and tables of contents, as well as to browse sequentially through individual pages. No arrangements are to be made for downloading or printing the material until the copyright-protected period has expired.

The material will be made searchable via search engines, and solutions to provide information on where the material can be borrowed or bought will be implemented.

CREDITING OF AUTHORS BY NAME, ETC.

§ 5

The name of the creator of the work and the work's title and source are to be stated in the manner required by proper usage, cf section 3, section 43a, third subsection and section 11 of the Norwegian Copyright Act.

RIGHT TO WITHDRAW WORK

§ 6

Kopinor may withdraw individual work from the scope of the contract during the contract period.

REMUNERATION

§ 7

An annual amount of NOK 0.56 (in 2009) per page made available is to be paid.

§ 8

The payment per page is to be adjusted by Kopinor annually on 31 December in accordance with changes in Statistics Norway's consumer price index or any other consumer price index that replaces this. The adjustment is to be made on the basis of the change in the consumer price index from 15 October of last year until 15 October of this year, and correspondingly for future years.

§ 9

The National Library of Norway is to be invoiced for the prevailing number of pages that have been made available. The parties are to agree further on the date for reporting and invoicing the pages that must be paid for. For 2009, a payment is to be made for 8/12 of the year.

BREACH OF THE CONTRACT AND DAMAGES**§ 10**

Should the contract be breached, a period of 30 days from the date when written notification of this is received is allowed for rectification.

§ 11

Should a party fundamentally breach the contract and the matter not be rectified pursuant to § 10, the other party may terminate the contract with immediate effect. Termination is to be declared in writing, stating the grounds for the termination. Damages for breach of contract may be claimed irrespective of whether or not the contract is terminated.

§ 12

By entering into this contract, the rightsholders have not renounced their right to claim damages and bring a civil action against the National Library of Norway for copying that is not permitted by this contract. If the National Library of Norway has paid a claim from Kopinor relating to such copying, Kopinor undertakes to pay the rightsholders' claims regarding this utilisation.

§ 13

Should this contract be terminated or expire, the National Library of Norway is obliged to remove from the National Library of Norway's open webpages all copyright-protected materials that cannot, pursuant to the law or a separate contract with rightsholders, be made available.

OTHER PROVISIONS**§ 14**

Kopinor is obliged to pay any claims for payment or damages that the National Library of Norway receives from Norwegian or foreign rightsholders in so far as the claims relate to a copying or making available of materials that has been paid for and carried out in accordance with this contract's provisions, cf otherwise section 37 of the Norwegian Copyright Act. The National Library of Norway is not obliged to pay such claims and Kopinor shall indemnify the National Library of Norway for any claims regarding costs incurred by the National Library of Norway in connection with such a claim. Should a claim be received, the National Library of Norway is to reject the claim and refer the claimant to Kopinor. Claims are not to be paid without consultation with Kopinor. In the case of any dispute regarding the claim, Kopinor is entitled to intervene.

§ 15

The National Library of Norway and Kopinor are entitled to publish this contract.

§ 16

The parties will continue to cooperate on information about the service. Any external costs resulting from this are to be agreed on between the parties.

§ 17

Pursuant to further agreement, the National Library of Norway will, if requested by Kopinor (on behalf of a specific rightsholder or a representative of this rightsholder), make available high-resolution digital copies of the material covered by the contract.

§ 18

The National Library of Norway will, in so far as possible, give Kopinor access to the necessary statistics for use in distributing the remuneration.

EVALUATION**§ 19**

The parties agree to appoint a common committee that is to evaluate the Bokhylla project during the contract period and upon the expiry of the contract. The costs of any external evaluation will be divided 50/50 between the parties.

DISPUTE RESOLUTION**§ 20**

During the contract period, attempts are first to be made to resolve through negotiations between the parties any dispute between the parties to the contract regarding its interpretation or existence, a breach of the contract or a claim that in some other way is based on a contract between the parties relating to copying.

Should such negotiations fail to succeed, either party may demand that the dispute be resolved through arbitration. The Arbitration Tribunal is to be composed of three members. The parties are each to appoint one member and are to jointly appoint a chair. Should the parties fail to agree on a chairman, this person is to be appointed by the president of the Norwegian Bar Association. Otherwise, the provisions stipulated in the Norwegian Arbitration Act shall apply.

The parties may each petition for mediation pursuant to section 38 of the Norwegian Copyright Act.

THE DURATION OF THE CONTRACT**§ 21**

The contract is valid until 31 December 2011 inclusive, unless the parties agree that the contract is to be prolonged.

Two – 2 – copies of this contract have been prepared and each of the parties is to retain one copy.

Oslo, 23 April 2009

For the National Library of Norway

For Kopinor

.....
Vigdis Moe Skarstein
National Librarian

.....
Yngve Slettholm
Executive Director

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

DECLARATION OF ISABEL HOWE

I, Isabel Howe, hereby declare as follows:

1. I am the Director of the Authors League Fund, Inc. (the "ALF"), one of the plaintiffs in the above-captioned action.
2. I submit this declaration in support of Plaintiffs' motion for summary judgment. I have personal knowledge of the facts set forth in this Declaration and could testify competently at a hearing or trial if called upon to do so.

The Authors League Fund

3. Since its founding in 1917, the ALF, which provides assistance to professional writers and dramatists in severe financial need because of health problems, temporary loss of income or other misfortune, has drawn most of its support from authors, some of whom leave their literary estates to the ALF.

The Works At Issue

4. Unlike the other associations that are plaintiffs in this action, the ALF is not seeking to assert claims on behalf of any of "members." Rather, the ALF itself owns the copyrights in and to several works that were scanned and incorporated into HathiTrust without

the ALF's knowledge or consent. Attached as Exhibit A is a schedule of works whose copyrights are owned by the ALF and have been infringed by Defendants (the "ALF Works"). Attached as Exhibit B is documentation evidencing the transfer of the relevant copyrights from each respective author to the ALF. A copy of the copyright registration certificate for each ALF Work is attached hereto as Exhibit C.

Harm Resulting From Defendants' Use Of The Work

5. I have reviewed the declarations of several individual authors who are plaintiffs in this litigation, including the declarations of T.J. Stiles, Pat Cummings and Roxana Robinson. I agree with and incorporate by reference the description in those declarations of the various harms and potential harms that result from Defendants' unauthorized digitization and use of copyrighted works. Those descriptions need not be repeated here in full, but can be summarized as follows.

6. *First*, each digital copy of an ALF Work that is created by Defendants without purchase or license represents a lost sale to the ALF. Defendants could have purchased a copy but instead had it scanned without compensating the ALF.

7. *Second*, Defendants' storage of the ALF Works in an online digital repository exposes that property to security risks for which the rightsholders receive no commensurate remuneration. Unauthorized access to copyrighted books leading to widespread piracy would gravely impact the market for those works.

8. *Third*, Defendants' various uses of the ALF Works undermine various licensing opportunities for the ALF. For example, authors routinely grant online distributors like Amazon a license to index their books and make them searchable as part of a commercial arrangement targeted at promoting book sales. Defendants do the same thing, but without a license and

without the search function being part of an effort to sell the books and provide revenue to the author. Defendants also permit the books to be used for non-consumptive research, an emerging field that represents another potential licensing stream for authors.

9. *Fourth*, Defendants' mass digitization and orphan works programs undercut opportunities for authors to generate royalty streams by entering into collective licensing agreements.

10. *Fifth*, as explained in more detail below, making books available through the Orphan Works Program will directly undermine efforts to revive out of print books and will impact future book sales.

11. In short, Defendants activities have harmed or have the potential to cause enormous harm to the rights of authors.

The Orphan Works Project

12. In addition to the harms outlined above and discussed in the individual author declarations I reviewed, the ALF was directly impacted by Defendants' Orphan Works Project, as well as by mistakes in the HathiTrust database.

13. The ALF became the owner of the copyrights in and to the works of Gladys Malvern when she passed away in 1962, having left a Last Will and Testament designating ALF as the beneficiary of "all rights and royalties and revenues from any sale of rights of any of [her] books." *See* Exhibit B.

14. In the summer or fall of 2011, I became aware that one of Ms. Malvern's books, entitled *Good Troupers All*, had been listed as an "orphan candidate" in connection with HathiTrust's "Orphan Works Program." It was my understanding that HathiTrust intended to make a digital copy of the book available October 13, 2011, ninety days after the book was listed

as an orphan candidate. The book was to be made available on the Internet for students, faculty and users of the University of Michigan library to view, download, print and copy without providing any compensation to the ALF. Fortunately, after HathiTrust was informed that the copyright owners of *Good Troupers All* and other works could be found and objected to the HathiTrust's plans, the Orphan Works Project was "suspended.

15. I was particularly troubled by HathiTrust's plans to distribute electronic copies of *Good Troupers All* for free because I had recently been contacted by a publisher, Digital Pulse, which expressed an interest in republishing certain of Ms. Malvern's works, including *Good Troupers All*, in print and digital formats. Attached as Exhibit D is an email in which a representative of Digital Pulse recounts some of those discussions and reiterates his interest in bringing Ms. Malvern's works back into print. Defendants' missteps are indicative of a concerning lack of thoroughness on their part and an ineffective system of notice for authors whose works are listed as orphans.

16. Had Plaintiffs not intervened to stop the Orphan Works Program and, as Defendants had planned, digital copies of *Good Troupers All* were made available for others to view, print and/or download in full, the ALF may have lost the opportunity to license the work for print and digital distribution. In addition, it is likely that Defendants' unauthorized digital release of *Good Troupers All* would have adversely impacted the ALF's anticipated revenues from future sales of both the paper and electronic versions of the re-released novel.

17. While this lawsuit apparently caused HathiTrust to halt its Orphan Works Program and prevented Ms. Malvern's works from being distributed online, I am deeply concerned about the potential harm to the ALF and others if the program resumes, as Defendants have indicated that they plan to do so.

18. It is my understanding that Defendants' carelessness also led HathiTrust to misidentify two of Ms. Malvern's books – *Curtain Going Up!* and *Valiant Minstrel* – as works in the public domain. Before the ALF's attorneys advised HathiTrust of this error, these works were available in "full view" on HathiTrust's website, which I understand to mean that an electronic copy of the book could be viewed, downloaded and printed in full. *See* Exhibit E. I do not know what led HathiTrust to believe that these books were in the public domain, but they are still under copyright, as evidenced by the copyright registration renewal certificates for the works that are annexed as Exhibit C.

[THIS SPACE INTENTIONALLY LEFT BLANK]

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

Dated: New York, New York
June 26, 2012

A handwritten signature in cursive script that reads "Isabel Howe". The signature is written in dark ink and is positioned above a horizontal line.

ISABEL HOWE

EXHIBIT A

A-341

EXHIBIT A

AUTHOR	TITLE	FIRST PUBLICATION	SUBSEQUENT PUB(S).	MOST RECENT PUB. HARDCOPY OR ELECTRONIC?	U.S. COPYRIGHT REGISTRATIONS OR RENEWALS
Vera Caspary	Laura	1942/New York: Houghton	Between 1942 and 2010, there have been dozens of publications in multiple languages in hardcover, paperback and audio formats, including: 2006-02-02/New York: The Feminist Press 2012/Paris: Omnibus (under title "Etranges Verites")	Hardcopy	A170748 1943-01-26 R488945 1970-07-15
Vera Caspary	The Husband	1957/New York: Harper	1957/London: H. Allen 1958/Frankfurt: a.M. Nest-Verl 1959/London: Hamilton 2012/Paris: Omnibus (under title "Etranges Verites")	Hardcopy	A1000005861 1957-10-21; A00000332668 1958-04-16; RE0000273653 1985-12-30; RE0000314482 1986-12-19
Vera Caspary	The Man Who Loved His Wife	1966/London : W.H. Allen	1966/New York: Putnam 1972/New York and London: White Lion Publishers	Hardcopy	A817997 1966-02-15
Vera Caspary	The Rosecrest Cell	1967/New York: Putnam	1968/London: W. H. Allen	Hardcopy	A951486 1967-10-30

AUTHOR	TITLE	FIRST PUBLICATION	SUBSEQUENT PUB(S).	MOST RECENT PUB. HARDCOPY OR ELECTRONIC?	U.S. COPYRIGHT REGISTRATIONS OR RENEWALS
Vera Caspary	The Secrets of Grown-Ups	1979/New York: McGraw-Hill		Hardcopy	TX0000309480 1979-08-20
Gladys Malvern	Good Troupers All	1945/Philadelphia: Macrae Smith Company		Hardcopy	A189587 1945-08-27 R535400 1972-09-15
Gladys Malvern	Curtain Going Up	1943/New York: J. Messner	1946/New York: J. Messner 1947/New York: J. Messner 1966/New York: J. Messner	Hardcopy	A177096 1943-10-26 R494639 1970-11-09
Gladys Malvern	Valiant Minstrel	1943/New York: J. Messner	1944/New York: J. Messner	Hardcopy	A177096 1943-10-26 R494639 1970-11-09

EXHIBIT B

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1984 will

LAST WILL AND TESTAMENT

I, VERA CASPARY GOLDSMITH, also known as VERA CASPARY, residing in the City, County and State of New York, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all Wills and Codicils by me at any time heretofore made.

FIRST: I direct that all my just debts, the expenses of my last illness and funeral and the expenses of administering my estate be paid as soon after my death as may be convenient.

SECOND: I give and bequeath the following:

A. My oil painting entitled "A Walk by the Canal" by Camille Bombois to BERNARD SOLOMON. It is my wish, but I do not direct, that if he does not wish to keep this painting for himself, that it be sold by him and the proceeds given to any Jewish cause he chooses.

B. One (1) copy of each of my novels to the UNIVERSITY OF WISCONSIN CENTER FOR THEATRE RESEARCH, presently located at 6173 Vilas Communication Hall, Madison, Wisconsin 53706.

ACG

C. My unpublished typescripts, notes, discarded pages, etc., books carrying comment about my work and anthologies in which my work is included to the UNIVERSITY OF WISCONSIN CENTER FOR THEATRE RESEARCH, presently located at 6173 Vilas Communication Hall, Madison, Wisconsin 53706.

D. All the rest of my tangible personal property not hereinabove effectually disposed of, to my Executors hereinafter named, to be distributed in such manner as they believe I would wish. Any property not so distributed shall be sold by my Executors and the proceeds added to my residuary estate.

THIRD: I give and bequeath the following legacies:

A. To my step-son, MICHAEL Goldsmith, the sum of Five Thousand (\$5,000.00) Dollars, if he shall survive me.

B. To MARY GOLDSMITH STEPHENS, the sum of One Thousand (\$1,000.00) Dollars, if she shall survive me.

C. To my housekeeper, ROSA DELLAPORTA, the sum of One Thousand (\$1,000.00) Dollars.

FOURTH: I direct my Executor to return

to DR. WILLIAM E. DEUTSCH, presently of 232 Sheridan Road,
Evanston, Illinois 60202, the Pembroke table in my living
room.

FIFTH:

Laura
A. I give and bequeath all future royalties which may accrue to me on the novel "LAURA" and the stage play "LAURA" to GEORGE SKLAR, presently of 530 North Fuller Avenue, Los Angeles, California 90036, during his lifetime. Upon his death, or, if he shall not survive me, such royalties are to be given to the AUTHORS LEAGUE FUND, presently located at 234 West 44th Street, New York, New York 10036.

All other royalties
B. I give and bequeath all other

future royalties which may accrue to me to the AUTHORS LEAGUE FUND, presently located at 234 West 44th Street, New York, New York 10036.

SIXTH:

Residuary Estate
I give, devise and bequeath all of the rest, residue and remainder of the property, real and personal and wheresoever situate, of which I may die seized or possessed, or to which I may be entitled at the time of my death, including lapsed legacies hereinafter referred to as my "residuary estate", as follows:

A. One-fourth (1/4) thereof to my god-son, DANIEL SKLAR, or, if he should not survive me, to

my god-son, ZACHARY SKLAR.

B. One-fourth (1/4) thereof to my god-son, ZACHARY SKLAR, or, if he should not survive me to my god-son, DANIEL SKLAR.

C. One-fourth (1/4) thereof to OSCAR BRANN, or, if he should not survive me, to BLANCHE (O'SHEA) BRANN.

D. One-fourth (1/4) thereof to BLANCHE (O'SHEA) BRANN, or, if she should not survive me, to OSCAR BRANN.

SEVENTH: I appoint my friend, KAY KOMINSKY, and my god-sons, DANIEL SKLAR and ZACHARY SKLAR, to be the Co-Executors of this my Will. In the event that any should for any reason fail to qualify or cease to act, the remaining nominated fiduciary or fiduciaries shall serve alone.

I direct that no bond or other security shall be required of any Executor hereunder in any jurisdiction, and that no one of them shall be required to render periodic accounts in any court. All the duties and powers, discretionary and otherwise, imposed or conferred upon my Executor shall devolve upon his respective successor and successors.

EIGHTH: I direct that all inheritance,

estate and other death taxes (including any interest and penalties thereon) imposed by any jurisdiction whatsoever by reason of my death upon or with respect to any property includible in my estate for the purposes of any such taxes, whether such property passes under or outside, or has passed outside, the provisions of this Will shall be paid from my residuary estate and shall not be apportioned among any of the non-residuary beneficiaries of this Will.

NINTH: In addition to any other powers granted by this Will or authorized by law, my Executor shall have the following powers and discretion which shall extend to all principal and income held hereunder in any capacity or for any purpose until the final and outright distribution thereof, and which my Executor may exercise in his sole and absolute discretion, without application to or approval by any court:

A. To retain and to purchase or otherwise acquire stocks, whether common or preferred, bonds, obligations, shares or interests in investment companies or investment trusts, or any other property, real or personal, of whatsoever nature, wheresoever situated, without duty to diversify and whether or not the same may be authorized by law for the investment of estates and trust funds.

B. To deposit funds in the savings department of any bank without limit as to duration or amount.

C. To sell at public or private sale, exchange, mortgage, lease without statutory or other limitation as to duration, partition, grant options on, alter, improve, demolish buildings or otherwise deal with any property, real or personal, upon any terms and whether for cash or upon credit.

D. To exercise in person or by proxy all voting, conversion, subscription or other right incident to the ownership of any property, including the right to participate in any corporate reorganization, merger or other transaction and to retain any property received thereunder and the right to delegate discretionary power.

E. To sell any property at such price as my Executor shall determine.

F. To compromise or arbitrate claims; to prepay or accept prepayment of any debt and to enforce or abstain from enforcing, extend, modify or release any right or claim or to hold any claim after maturity without extension, with or without consideration.

G. To execute and deliver deeds or other instruments, with or without covenants, warranties and representations and with or without consideration, in-

cluding releases which shall discharge the recipient from the responsibility for property receipted for thereby.

H. To abstain from rendering or filing any inventory or periodic account in any court.

I. To make division or distribution in cash or in kind or partly in each.

J. To employ investment counsel, accountants and other agents and to determine and pay reasonable compensation for their services.

K. Generally, to exercise in good faith and with reasonable care all investment and administrative powers and discretion of an absolute owner which may lawfully be conferred upon a fiduciary.

TENTH: All references herein to this Will shall be construed as referring to this Will and any Codicil or Codicils hereto which I may hereafter execute.

Whenever necessary or appropriate, the use herein of any gender shall be deemed to include the other genders and the use therein of either the singular or the plural shall be deemed to include the other.

IN WITNESS WHEREOF, I have hereunto subscribed my

name and affixed my seal to this my Last Will and Testament,
this 21st day of June, in the year One
Thousand Nine Hundred and Eighty-Four.

s/ Vera Casparz Goldsmith (L.S.)

s/ Sylvia Regan Ellstein

s/ Joseph Gordon

SIGNED, SEALED, PUBLISHED
and DECLARED by the above-named
Testatrix, VERA CASPARY GOLDSMITH,
as and for her Last Will and Testa-
ment in our presence, and we, at
her request, in her presence and in
the presence of each other, do
hereunto sign our names as attesting
witnesses and add opposite thereto
our respective place of residence,
all this 21st day of June 1984.

/ Sylvia Regan Ellstein residing at 55 East 9th St
NY, NY
/ Joseph Gordan residing at 55 East 9th St
NY, NY

_____ residing at _____

STATE OF NEW YORK)
) ss.:
 COUNTY OF NEW YORK)

Each of the undersigned, individually and severally,
 being duly sworn, deposes and says:

The within Will was subscribed in our presence and
 sight at the end thereof by VERA CASPARY GOLDSMITH, the within
 named testatrix on the 21st day of June, 1984,
 at 55 East 9th St, N.Y, N.Y.

Said testatrix at the time of making such subscription
 declared the instrument so subscribed to be her Last Will.

Each of the undersigned thereupon signed his name as
 a witness at the end of said Will, at the request of said
 testatrix and in her presence and sight and in the presence and
 sight of each other.

Said testatrix was, at the time of so executing said
 Will, over the age of eighteen years, and, in the respective
 opinions of the undersigned, of sound mind, memory and under-
 standing and not under any restraint or in any respect incom-
 petent to make a Will.

Said testatrix, in the respective opinions of the undersigned, could read, write and converse in the English language and was suffering from no defect of sight, hearing or speech, or from any other physical or mental impairment which would affect her capacity to make a valid Will. The Will was executed as a single, original instrument and was not executed in counterparts.

Each of the undersigned was acquainted with said testatrix at such time, and makes this affidavit at her request.

The within Will was shown to the undersigned at the time this affidavit was made, and was examined by each of them as to the signatures of said testatrix and of the undersigned.

The foregoing instrument was executed by said testatrix and witness by each of the undersigned affiants under the supervision of Robert H. Siegel, an attorney-at-law.

S/ Sylvia Resau Kilstein
S/ Joseph GORDAN

Severally sworn to before me
this 21st day of June 1984.

Notary Public

AGREEMENT

AGREEMENT made the 6 day of December 1991, by and among the Authors League Fund, a New York Non Profit, with a principal place of business at 234 West 44th Street, New York, New York 10036 (the "Fund"), Daniel Judah Sklar, Zachary Sklar and Judy Sklar Rasminsky (collectively the "Sklars"), Blanche Brann and Oscar Brann, residing at c/o Daniel Judah Sklar, 49 Grove Street, New York, New York.

R E C I T A L S

This Agreement is made premised on the following facts:

1. Vera Caspary Goldsmith, a/k/a Vera Caspary ("Caspary") was the author of the novel "Laura" and co-author with George Sklar of the stage play "Laura".
2. All dramatic rights in the novel have merged in the stage play.
3. By testamentary gift from Caspary:
 - a) The Fund owns 100% of the royalties from the novel "Laura", and 50% of the royalties from the stage play "Laura", and 100% of all other royalties accruing to Caspary.
 - b) Daniel Judah Sklar, Zachary Sklar, Blanche Brann and Oscar Brann, as residuary beneficiaries of the estate of Vera Caspary, own 100% of all copyrights in literary properties created by Caspary other than the stage play "Laura", but not including any royalties deriving therefrom.

a) The Sklars may engage agents and attorneys to represent the stage play on customary terms and conditions, but the Sklars shall make no charge for their own services in supervising the lease, licensing, exploitation and turning to account of the stage play.

b) No grant of rights in the stage play may be conditioned upon the engagement of any particular person in any capacity without the consent of the Fund and none of the Sklars may be engaged in any capacity in connection with any use of the stage play without the consent of the Fund.

c) The net proceeds from the lease, licensing, exploitation and turning to account of the stage play, after reasonable attorneys fees and customary agents commissions, shall be divided equally between the Sklars on the one hand and the Fund on the other.

d) The Sklars shall maintain accurate books and records of all transactions pertaining to any exercise of the authority herein granted and the Fund shall have the right to examine all such books and records upon reasonable notice.

e) Wherever possible, the Sklars shall use their reasonable efforts to obtain for the Fund direct accounting and payment of any monies due it by reason of any disposition of rights in the stage play made hereunder, but the Sklars make no representation or warranty that the same can or will be accomplished.

c) Daniel Judah Sklar, Zachary Sklar, Blanche Brann and Oscar Brann, as residuary beneficiaries of the estate of Vera Caspary, own 50% of the copyright in the stage play "Laura", but not including any royalties deriving therefrom.

4. By testamentary gift from George Sklar, Daniel Sklar, Zachary Sklar and Judy Sklar Rasminsky own 50% of the copyright in the stage play "Laura" and 50% of the royalties deriving therefrom.

AGREEMENT

In consideration of the premises and for good and valuable consideration, the parties hereto agree as follows:

1) Daniel Judah Sklar, Zachary Sklar, Blanche Brann and Oscar Brann, without warranty or recourse, assign to the Fund the copyrights referred to in Recital No. 3(b) above.

2) The Fund hereby agrees that the Sklars are the exclusive agent for, and shall exercise sole control over decisions regarding, the lease, license, exploitation and turning to account of all of its rights in the stage play "Laura" throughout the world for the full term of copyright therein and any renewal thereof. The said agency is coupled with an interest and is irrevocable, but is subject to the following:

3. Each party hereto forever releases and discharges every other party hereto from all actions, suits and claims whatsoever arising out of any party's action or omission to act in respect of any of the copyrights referred to herein.

4. All notices which either party may desire to give to the other shall be in writing, addressed to that address for the intended recipient set forth above or such other address as either party may, from time to time, fix for himself by notice in writing.

5. This Agreement shall inure to the benefit of, and be binding upon the parties hereto and their respective heirs, licensees, successors and assigns, and shall be governed by and construed according to the laws of the State of New York applicable to contracts made and wholly to be performed therein. Jurisdiction over any controversy or claim arising under this instrument, its construction, enforcement or breach shall be exclusively vested in the courts of the State of New York. Service in any action or proceeding may be made by registered mail addressed as set forth for notices pursuant to paragraph 4 above. Service by registered mail shall be deemed to be personal service, with the same force and effect as if personally delivered to the recipient in the State of New York.