

# 12-4547-cv

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**United States Court of Appeals**  
*for the*  
**Second Circuit**

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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)*

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

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**JOINT DEFERRED APPENDIX**  
**Volume 5 of 5 (Pages A-1119 to A-1367)**

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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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<sup>1</sup> The Transcript from the Deposition of T.J. Stiles, dated May 31, 2012 is attached as Exhibit 3 to the Rosenthal Declaration and the Transcript from the Deposition of Pat Cummings, dated May 22, 2012 is attached as Exhibit 1 to the Rosenthal Declaration.

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Defendant responds that the following individuals were primarily responsible for the direction, supervision, and facilitation of the Initial OWP Process between May 16, 2011 and September 16, 2011. All of the individuals who are currently employed by UM may be contacted through Defendants' counsel.

John Wilkin, Associate University Librarian and Executive Director of the HathiTrust, University of Michigan	Authorized and supervised the Initial OWP Process.
Melissa Levine, Lead Copyright Officer, University of Michigan	Supervised and participated in the design of the Initial OWP Process as the head of the Library's Copyright Office.
Greg Grossmeier, Copyright Specialist, University of Michigan	Supervised and participated in the design of the Initial OWP Process and project tools as the OWP Project Administrator until August 2011.
Julia Lovett, Special Projects Librarian, University of Michigan	Supervised and participated in the design and implementation of the Initial OWP Process and project tools as the OWP Project Administrator beginning in late August 2011
Benjamin Tobey, Senior Orphan Works Investigator, University of Michigan	Conducted copyright research as an OWI under the Initial OWP Process and served in a technical role in organizing research results.
Lisa Hardman, Orphan Works Investigator, University of Michigan	Conducted copyright research as an OWI under the Initial OWP Process.
Melvin Whitehead, Orphan Works Investigator, University of Michigan	Conducted copyright research as an OWI under the Initial OWP Process.
Bobby Glushko, Copyright Specialist, University of Michigan	Periodic assistance with OWP project management from August 10, 2011 to early September 2011.

DATED: February 8, 2012

Respectfully Submitted,



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*Attorneys for Defendants*

A-1121

**Exhibit A to Responses to Plaintiff's First Set of Interrogatories to Defendant Mary Sue Coleman**  
**Interrogatory No. 3**

(a) the title and author of the Work;	Master Digital Copy	Initial HathiTrust Digital Copy	Mirror Site HathiTrust Digital Copy	First Backup Tape HathiTrust Digital Copy	Second Backup Tape HathiTrust Digital Copy
<i>Bok-Norge : en litteraturoversikt</i> by Trond Andreassen					
(b) the date the digital copy was created;	On information and belief, August 10, 2007	October 25, 2007	December 1, 2008	November 13, 2008	November 13, 2008
(j) the Virtual Location of the digital copy;	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr6/obj/mdp/pairtree_root/39/01/50/50/52/28/49/39015050522849/39015050522849.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/50/52/28/49/39015050522849/39015050522849.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/50/52/28/49/39015050522849/39015050522849.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/50/52/28/49/39015050522849/39015050522849.zip
<i>C.L.O. U.D.S.</i> by Pat Cummings					
(b) the date the digital copy was created;	On information and belief, August 28, 2009	October 9, 2009	October 9, 2009	October 10, 2009	October 10, 2009
(j) the Virtual Location of the digital copy;	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr18/obj/mdp/pairtree_root/39/01/50/14/28/03/85/39015014280385/39015014280385.zip	/sdr18/obj/mdp/pairtree_root/39/01/50/14/28/03/85/39015014280385/39015014280385.zip	/sdr18/obj/mdp/pairtree_root/39/01/50/14/28/03/85/39015014280385/39015014280385.zip	/sdr18/obj/mdp/pairtree_root/39/01/50/14/28/03/85/39015014280385/39015014280385.zip
<i>C.L.O. U.D.S.</i> by Pat Cummings					
(b) the date the digital copy was created;	On information and belief, December 15, 2010	January 6, 2011	January 6, 2011	January 7, 2011	January 7, 2011

**Exhibit A to Responses to Plaintiff's First Set of Interrogatories to Defendant Mary Sue Coleman**  
**Interrogatory No. 3**

(a) the title and author of the Work;	(j) the Virtual Location of the digital copy;	Master Digital Copy	Initial HathiTrust Digital Copy	Mirror Site HathiTrust Digital Copy	First Backup Tape HathiTrust Digital Copy	Second Backup Tape HathiTrust Digital Copy
<i>Clean Your Room, Harvey Moon!</i> by Pat Cummings		Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr7/obj/mdp/pairtree_root/49/01/50/00/89/65/98/49015000896598/49015000896598.zip	/sdr7/obj/mdp/pairtree_root/49/01/50/00/89/65/98/49015000896598/49015000896598.zip	/sdr7/obj/mdp/pairtree_root/49/01/50/00/89/65/98/49015000896598/49015000896598.zip	/sdr7/obj/mdp/pairtree_root/49/01/50/00/89/65/98/49015000896598/49015000896598.zip
	(b) the date the digital copy was created;	On information and belief, December 15, 2010	January 6, 2011	January 6, 2011	January 6, 2011	January 6, 2011
<i>Jimmy Lee Did It</i> by Pat Cummings	(j) the Virtual Location of the digital copy;	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr7/obj/mdp/pairtree_root/49/01/50/01/47/07/32/49015001470732/49015001470732.zip	/sdr7/obj/mdp/pairtree_root/49/01/50/01/47/07/32/49015001470732/49015001470732.zip	/sdr7/obj/mdp/pairtree_root/49/01/50/01/47/07/32/49015001470732/49015001470732.zip	/sdr7/obj/mdp/pairtree_root/49/01/50/01/47/07/32/49015001470732/49015001470732.zip
	(b) the date the digital copy was created;	On information and belief, December 13, 2010	January 19, 2011	January 19, 2011	January 20, 2011	January 20, 2011
	(j) the Virtual Location of the digital copy;	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr7/obj/mdp/pairtree_root/49/01/50/01/47/12/50/49015001471250/49015001471250.zip	/sdr7/obj/mdp/pairtree_root/49/01/50/01/47/12/50/49015001471250/49015001471250.zip	/sdr7/obj/mdp/pairtree_root/49/01/50/01/47/12/50/49015001471250/49015001471250.zip	/sdr7/obj/mdp/pairtree_root/49/01/50/01/47/12/50/49015001471250/49015001471250.zip

**Exhibit A to Responses to Plaintiff's First Set of Interrogatories to Defendant Mary Sue Coleman**  
**Interrogatory No. 3**

<b>(a) the title and author of the Work;</b>	<b>Master Digital Copy</b>	<b>Initial HathiTrust Digital Copy</b>	<b>Mirror Site HathiTrust Digital Copy</b>	<b>First Backup Tape HathiTrust Digital Copy</b>	<b>Second Backup Tape HathiTrust Digital Copy</b>
<i>Talking With Artists: Volume 1</i> by Pat Cummings					
<b>(b) the date the digital copy was created;</b>	On information and belief, August 31, 2009	September 7, 2009	September 7, 2009	September 8, 2009	September 8, 2009
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr16/obj/mdp/pairtr ee_root/39/01/50/29/5 7/08/61/39015029570 861/39015029570861 .zip	/sdr16/obj/mdp/pairtr ee_root/39/01/50/29/5 7/08/61/39015029570 861/39015029570861 .zip	/sdr16/obj/mdp/pairtr ee_root/39/01/50/29/5 7/08/61/39015029570 861/39015029570861 .zip	/sdr16/obj/mdp/pairtr ee_root/39/01/50/29/5 7/08/61/39015029570 861/39015029570861 .zip
<i>Talking With Artists: Volume 2</i> by Pat Cummings					
<b>(b) the date the digital copy was created;</b>	On information and belief, August 31, 2009	September 30, 2009	September 30, 2009	October 4, 2009	October 4, 2009
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr17/obj/mdp/pairtr ee_root/39/01/50/37/7 6/92/65/39015037769 265/39015037769265 .zip	/sdr17/obj/mdp/pairtr ee_root/39/01/50/37/7 6/92/65/39015037769 265/39015037769265 .zip	/sdr17/obj/mdp/pairtr ee_root/39/01/50/37/7 6/92/65/39015037769 265/39015037769265 .zip	/sdr17/obj/mdp/pairtr ee_root/39/01/50/37/7 6/92/65/39015037769 265/39015037769265 .zip
<i>Vernacular Dreams</i> by Angelo Loukakakis					
<b>(b) the date the digital copy was created;</b>	On information and belief, September 11, 2006	April 8, 2009	April 8, 2009	April 9, 2009	April 9, 2009

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<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr9/obj/mdp/pairtree_root/39/01/50/30/75/_66/65/39015030756665/39015030756665.zip	/sdr9/obj/mdp/pairtree_root/39/01/50/30/75/_66/65/39015030756665/39015030756665.zip	/sdr9/obj/mdp/pairtree_root/39/01/50/30/75/_66/65/39015030756665/39015030756665.zip	/sdr9/obj/mdp/pairtree_root/39/01/50/30/75/_66/65/39015030756665/39015030756665.zip
<i>Summer light</i> by Roxana Robinson					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 12, 2008	May 31, 2008	December 10, 2008	November 28, 2008	November 28, 2008
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr8/obj/mdp/pairtree_root/39/01/50/19/34/_54/72/39015019345472/39015019345472.zip	/sdr8/obj/mdp/pairtree_root/39/01/50/19/34/_54/72/39015019345472/39015019345472.zip	/sdr8/obj/mdp/pairtree_root/39/01/50/19/34/_54/72/39015019345472/39015019345472.zip	/sdr8/obj/mdp/pairtree_root/39/01/50/19/34/_54/72/39015019345472/39015019345472.zip
<i>Georgia O'Keeffe: a life</i> by Roxana Robinson					
<b>(b) the date the digital copy was created;</b>	On information and belief, November 12, 2007	January 26, 2008	December 10, 2008	November 26, 2008	November 26, 2008
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr8/obj/mdp/pairtree_root/39/01/50/15/44/_99/14/39015015449914/39015015449914.zip	/sdr8/obj/mdp/pairtree_root/39/01/50/15/44/_99/14/39015015449914/39015015449914.zip	/sdr8/obj/mdp/pairtree_root/39/01/50/15/44/_99/14/39015015449914/39015015449914.zip	/sdr8/obj/mdp/pairtree_root/39/01/50/15/44/_99/14/39015015449914/39015015449914.zip

**Exhibit A to Responses to Plaintiff's First Set of Interrogatories to Defendant Mary Sue Coleman**  
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<i>A glimpse of scarlet and other stories</i> by Roxana Robinson					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 12, 2008	November 11, 2009	November 11, 2009	November 11, 2009	November 11, 2009
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr4/obj/mdp/pairtree_root/39/01/50/22/00/81/09/39015022008109/39015022008109.zip	/sdr4/obj/mdp/pairtree_root/39/01/50/22/00/81/09/39015022008109/39015022008109.zip	/sdr4/obj/mdp/pairtree_root/39/01/50/22/00/81/09/39015022008109/39015022008109.zip	/sdr4/obj/mdp/pairtree_root/39/01/50/22/00/81/09/39015022008109/39015022008109.zip
<i>A glimpse of scarlet and other stories</i> by Roxana Robinson					
<b>(b) the date the digital copy was created;</b>	On information and belief, January 20, 2010	January 27, 2010	January 27, 2010	January 29, 2010	January 29, 2010
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr21/obj/mdp/pairtree_root/39/01/50/21/56/27/42/39015021562742/39015021562742.zip	/sdr21/obj/mdp/pairtree_root/39/01/50/21/56/27/42/39015021562742/39015021562742.zip	/sdr21/obj/mdp/pairtree_root/39/01/50/21/56/27/42/39015021562742/39015021562742.zip	/sdr21/obj/mdp/pairtree_root/39/01/50/21/56/27/42/39015021562742/39015021562742.zip
<i>Asking for love and other stories</i> by Roxana Robinson					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 12, 2008	May 31, 2008	December 10, 2008	October 26, 2008	October 26, 2008

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**Interrogatory No. 3**

(a) the title and author of the Work;	(j) the Virtual Location of the digital copy;	Master Digital Copy	Initial HathiTrust Digital Copy	Mirror Site HathiTrust Digital Copy	First Backup Tape HathiTrust Digital Copy	Second Backup Tape HathiTrust Digital Copy
<i>Sweetwater : a novel</i> by Roxana Robinson		Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr5/obj/mdp/pairtree_root/39/01/50/37/47/07/24/39015037470724/39015037470724.zip	/sdr5/obj/mdp/pairtree_root/39/01/50/37/47/07/24/39015037470724/39015037470724.zip	/sdr5/obj/mdp/pairtree_root/39/01/50/37/47/07/24/39015037470724/39015037470724.zip	/sdr5/obj/mdp/pairtree_root/39/01/50/37/47/07/24/39015037470724/39015037470724.zip
<i>A perfect stranger: and other stories</i> by Roxana Robinson	(b) the date the digital copy was created;	On information and belief, March 17, 2008	July 19, 2008	December 10, 2008	November 20, 2008	November 20, 2008
	(j) the Virtual Location of the digital copy;	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr6/obj/mdp/pairtree_root/39/01/50/56/79/32/87/39015056793287/39015056793287.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/56/79/32/87/39015056793287/39015056793287.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/56/79/32/87/39015056793287/39015056793287.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/56/79/32/87/39015056793287/39015056793287.zip
	(b) the date the digital copy was created;	On information and belief, May 29, 2008	September 23, 2008	December 10, 2008	December 18, 2008	December 18, 2008
	(j) the Virtual Location of the digital copy;	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr9/obj/mdp/pairtree_root/39/01/50/60/83/84/90/39015060838490/39015060838490.zip	/sdr9/obj/mdp/pairtree_root/39/01/50/60/83/84/90/39015060838490/39015060838490.zip	/sdr9/obj/mdp/pairtree_root/39/01/50/60/83/84/90/39015060838490/39015060838490.zip	/sdr9/obj/mdp/pairtree_root/39/01/50/60/83/84/90/39015060838490/39015060838490.zip



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<i>Marguerite Duras à Montréal</i> by André Roy					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 25, 2008	October 20, 2008	December 10, 2008	October 29, 2008	October 29, 2008
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr10/obj/mdp/pairtr ee_root/39/01/50/10/7 3/51/19/39015010735 119/39015010735119 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/10/7 3/51/19/39015010735 119/39015010735119 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/10/7 3/51/19/39015010735 119/39015010735119 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/10/7 3/51/19/39015010735 119/39015010735119 .zip
<i>Southern light : a novel</i> by J.R. Salamanca					
<b>(b) the date the digital copy was created;</b>	On information and belief, June 27, 2006	April 9, 2009	April 9, 2009	April 9, 2009	April 9, 2009
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr10/obj/mdp/pairtr ee_root/39/01/50/48/8 8/16/46/39015048881 646/39015048881646 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/48/8 8/16/46/39015048881 646/39015048881646 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/48/8 8/16/46/39015048881 646/39015048881646 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/48/8 8/16/46/39015048881 646/39015048881646 .zip
<i>Embarkation</i> by J.R. Salamanca					
<b>(b) the date the digital copy was created;</b>	On information and belief, June 27, 2006	March 25, 2009	March 25, 2009	March 26, 2009	March 26, 2009



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<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr7/obj/mdp/pairtree_root/39/01/50/02/75/_43/42/390150027543_42/39015002754342.zip	/sdr7/obj/mdp/pairtree_root/39/01/50/02/75/_43/42/390150027543_42/39015002754342.zip	/sdr7/obj/mdp/pairtree_root/39/01/50/02/75/_43/42/390150027543_42/39015002754342.zip	/sdr7/obj/mdp/pairtree_root/39/01/50/02/75/_43/42/390150027543_42/39015002754342.zip
<i>The lost country: a novel</i> by J.R. Salamanca					
<b>(b) the date the digital copy was created;</b>	On information and belief, June 27, 2006	April 3, 2009	April 3, 2009	April 3, 2009	April 3, 2009
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr2/obj/mdp/pairtree_root/39/01/50/02/75/_45/32/390150027545_32/39015002754532.zip	/sdr2/obj/mdp/pairtree_root/39/01/50/02/75/_45/32/390150027545_32/39015002754532.zip	/sdr2/obj/mdp/pairtree_root/39/01/50/02/75/_45/32/390150027545_32/39015002754532.zip	/sdr2/obj/mdp/pairtree_root/39/01/50/02/75/_45/32/390150027545_32/39015002754532.zip
<i>A sea change</i> by J.R. Salamanca					
<b>(b) the date the digital copy was created;</b>	On information and belief, September 20, 2007	August 14, 2008	December 10, 2008	October 14, 2008	October 14, 2008
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr2/obj/mdp/pairtree_root/39/01/50/02/75/_43/59/390150027543_59/39015002754359.zip	/sdr2/obj/mdp/pairtree_root/39/01/50/02/75/_43/59/390150027543_59/39015002754359.zip	/sdr2/obj/mdp/pairtree_root/39/01/50/02/75/_43/59/390150027543_59/39015002754359.zip	/sdr2/obj/mdp/pairtree_root/39/01/50/02/75/_43/59/390150027543_59/39015002754359.zip

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<i>That summer's trance : a novel</i> by J.R. Salamanca					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 12, 2008	October 31, 2008	December 10, 2008	October 31, 2008	October 31, 2008
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr10/obj/mdp/pairtree ee_root/39/01/50/42/9 5/43/08/39015042954 308/39015042954308 .zip	/sdr10/obj/mdp/pairtree ee_root/39/01/50/42/9 5/43/08/39015042954 308/39015042954308 .zip	/sdr10/obj/mdp/pairtree ee_root/39/01/50/42/9 5/43/08/39015042954 308/39015042954308 .zip	/sdr10/obj/mdp/pairtree ee_root/39/01/50/42/9 5/43/08/39015042954 308/39015042954308 .zip
<i>Lilith</i> by J.R. Salamanca					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 12, 2008	May 22, 2008	December 10, 2008	December 5, 2008	December 5, 2008
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr7/obj/mdp/pairtree _root/39/01/50/02/75/ 43/67/390150027543 67/39015002754367. zip	/sdr7/obj/mdp/pairtree _root/39/01/50/02/75/ 43/67/390150027543 67/39015002754367. zip	/sdr7/obj/mdp/pairtree _root/39/01/50/02/75/ 43/67/390150027543 67/39015002754367. zip	/sdr7/obj/mdp/pairtree _root/39/01/50/02/75/ 43/67/390150027543 67/39015002754367. zip
<i>Oberammergau</i> by James Shapiro					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 20, 2008	October 24, 2008	December 10, 2008	October 31, 2008	October 31, 2008

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<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr10/obj/mdp/pairtr ee_root/39/01/50/42/5 5/31/34/39015042553 134/39015042553134 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/42/5 5/31/34/39015042553 134/39015042553134 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/42/5 5/31/34/39015042553 134/39015042553134 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/42/5 5/31/34/39015042553 134/39015042553134 .zip
<i>Jesse James : last rebel of the Civil War</i> by T.J. Stiles					
<b>(b) the date the digital copy was created;</b>	On information and belief, September 23, 2008	January 5, 2009	January 5, 2009	January 5, 2009	January 5, 2009
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr11/obj/mdp/pairtr ee_root/39/01/50/55/8 2/32/00/39015055823 200/39015055823200 .zip	/sdr11/obj/mdp/pairtr ee_root/39/01/50/55/8 2/32/00/39015055823 200/39015055823200 .zip	/sdr11/obj/mdp/pairtr ee_root/39/01/50/55/8 2/32/00/39015055823 200/39015055823200 .zip	/sdr11/obj/mdp/pairtr ee_root/39/01/50/55/8 2/32/00/39015055823 200/39015055823200 .zip
<i>Watching me, watching you</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 13, 2008	December 2, 2008	December 2, 2008	December 3, 2008	December 3, 2008
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr11/obj/mdp/pairtr ee_root/39/01/50/16/9 8/17/58/39015016981 758/39015016981758 .zip	/sdr11/obj/mdp/pairtr ee_root/39/01/50/16/9 8/17/58/39015016981 758/39015016981758 .zip	/sdr11/obj/mdp/pairtr ee_root/39/01/50/16/9 8/17/58/39015016981 758/39015016981758 .zip	/sdr11/obj/mdp/pairtr ee_root/39/01/50/16/9 8/17/58/39015016981 758/39015016981758 .zip

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<i>Praxis : a novel</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 18, 2008	October 27, 2008	December 10, 2008	October 28, 2008	October 28, 2008
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr10/obj/mdp/pairtr ee_root/39/01/50/01/7 8/85/49/39015001788 549/39015001788549 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/01/7 8/85/49/39015001788 549/39015001788549 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/01/7 8/85/49/39015001788 549/39015001788549 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/01/7 8/85/49/39015001788 549/39015001788549 .zip
<i>Puffball : a novel</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 13, 2008	October 31, 2008	December 10, 2008	November 3, 2008	November 3, 2008
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr10/obj/mdp/pairtr ee_root/39/01/50/01/5 2/68/16/39015001526 816/39015001526816 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/01/5 2/68/16/39015001526 816/39015001526816 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/01/5 2/68/16/39015001526 816/39015001526816 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/01/5 2/68/16/39015001526 816/39015001526816 .zip
<i>Remember me</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 13, 2008	July 19, 2008	December 10, 2008	December 6, 2008	December 6, 2008

**Exhibit A to Responses to Plaintiff's First Set of Interrogatories to Defendant Mary Sue Coleman**  
**Interrogatory No. 3**

<b>(a) the title and author of the Work;</b>	<b>Master Digital Copy</b>	<b>Initial HathiTrust Digital Copy</b>	<b>Mirror Site HathiTrust Digital Copy</b>	<b>First Backup Tape HathiTrust Digital Copy</b>	<b>Second Backup Tape HathiTrust Digital Copy</b>
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr7/obj/mdp/pairtree_root/39/01/50/04/12/41/89/39015004124189/39015004124189.zip	/sdr7/obj/mdp/pairtree_root/39/01/50/04/12/41/89/39015004124189/39015004124189.zip	/sdr7/obj/mdp/pairtree_root/39/01/50/04/12/41/89/39015004124189/39015004124189.zip	/sdr7/obj/mdp/pairtree_root/39/01/50/04/12/41/89/39015004124189/39015004124189.zip
<i>The heart of the country</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 13, 2008	October 31, 2008	December 10, 2008	November 3, 2008	November 3, 2008
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr10/obj/mdp/pairtree_root/39/01/50/12/99/26/19/39015012992619/39015012992619.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/12/99/26/19/39015012992619/39015012992619.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/12/99/26/19/39015012992619/39015012992619.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/12/99/26/19/39015012992619/39015012992619.zip
<i>The hearts and lives of men</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 13, 2008	November 3, 2009	November 3, 2009	November 4, 2009	November 4, 2009
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr8/obj/mdp/pairtree_root/39/01/50/12/99/54/89/39015012995489/39015012995489.zip	/sdr8/obj/mdp/pairtree_root/39/01/50/12/99/54/89/39015012995489/39015012995489.zip	/sdr8/obj/mdp/pairtree_root/39/01/50/12/99/54/89/39015012995489/39015012995489.zip	/sdr8/obj/mdp/pairtree_root/39/01/50/12/99/54/89/39015012995489/39015012995489.zip

**Exhibit A to Responses to Plaintiff's First Set of Interrogatories to Defendant Mary Sue Coleman**  
**Interrogatory No. 3**

<b>(a) the title and author of the Work;</b>	<b>Master Digital Copy</b>	<b>Initial HathiTrust Digital Copy</b>	<b>Mirror Site HathiTrust Digital Copy</b>	<b>First Backup Tape HathiTrust Digital Copy</b>	<b>Second Backup Tape HathiTrust Digital Copy</b>
<i>The rules of life</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 13, 2008	July 19, 2008	December 10, 2008	November 17, 2008	November 17, 2008
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr8/obj/mdp/pairtree_root/39/01/50/12/98/86/74/39015012988674/39015012988674.zip	/sdr8/obj/mdp/pairtree_root/39/01/50/12/98/86/74/39015012988674/39015012988674.zip	/sdr8/obj/mdp/pairtree_root/39/01/50/12/98/86/74/39015012988674/39015012988674.zip	/sdr8/obj/mdp/pairtree_root/39/01/50/12/98/86/74/39015012988674/39015012988674.zip
<i>The Shrapnel Academy</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 13, 2008	October 31, 2008	December 10, 2008	November 3, 2008	November 3, 2008
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr10/obj/mdp/pairtree_root/39/01/50/14/72/24/10/39015014722410/39015014722410.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/14/72/24/10/39015014722410/39015014722410.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/14/72/24/10/39015014722410/39015014722410.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/14/72/24/10/39015014722410/39015014722410.zip
<i>The heart of the country</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 21, 2006	October 11, 2009	October 11, 2009	October 13, 2009	October 13, 2009



**Exhibit A to Responses to Plaintiff's First Set of Interrogatories to Defendant Mary Sue Coleman**  
**Interrogatory No. 3**

<b>(a) the title and author of the Work;</b>	<b>Master Digital Copy</b>	<b>Initial HathiTrust Digital Copy</b>	<b>Mirror Site HathiTrust Digital Copy</b>	<b>First Backup Tape HathiTrust Digital Copy</b>	<b>Second Backup Tape HathiTrust Digital Copy</b>
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr4/obj/mdp/pairtree_root/39/01/50/25/81/37/37/39015025813737/39015025813737.zip	/sdr4/obj/mdp/pairtree_root/39/01/50/25/81/37/37/39015025813737/39015025813737.zip	/sdr4/obj/mdp/pairtree_root/39/01/50/25/81/37/37/39015025813737/39015025813737.zip	/sdr4/obj/mdp/pairtree_root/39/01/50/25/81/37/37/39015025813737/39015025813737.zip
<i>Sacred cows</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 18, 2008	June 15, 2009	June 15, 2009	June 18, 2009	June 18, 2009
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr13/obj/mdp/pairtree_root/39/01/50/47/5616/03/39015047561603/39015047561603.zip	/sdr13/obj/mdp/pairtree_root/39/01/50/47/5616/03/39015047561603/39015047561603.zip	/sdr13/obj/mdp/pairtree_root/39/01/50/47/5616/03/39015047561603/39015047561603.zip	/sdr13/obj/mdp/pairtree_root/39/01/50/47/5616/03/39015047561603/39015047561603.zip
<i>The fat woman's joke</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 18, 2008	July 19, 2008	December 10, 2008	November 29, 2008	November 29, 2008
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr8/obj/mdp/pairtree_root/39/01/50/19/98/21/18/39015019982118/39015019982118.zip	/sdr8/obj/mdp/pairtree_root/39/01/50/19/98/21/18/39015019982118/39015019982118.zip	/sdr8/obj/mdp/pairtree_root/39/01/50/19/98/21/18/39015019982118/39015019982118.zip	/sdr8/obj/mdp/pairtree_root/39/01/50/19/98/21/18/39015019982118/39015019982118.zip
<i>The cloning of Joanna May</i> by Fay Weldon					

**Exhibit A to Responses to Plaintiff's First Set of Interrogatories to Defendant Mary Sue Coleman**  
**Interrogatory No. 3**

(a) the title and author of the Work;		Master Digital Copy	Initial HathiTrust Digital Copy	Mirror Site HathiTrust Digital Copy	First Backup Tape HathiTrust Digital Copy	Second Backup Tape HathiTrust Digital Copy
(b) the date the digital copy was created;		On information and belief, March 13, 2008	October 31, 2008	December 10, 2008	November 3, 2008	November 3, 2008
(j) the Virtual Location of the digital copy;		Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr10/obj/mdp/pairtree_root/39/01/50/14/75/38/52/39015014753852/39015014753852.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/14/75/38/52/39015014753852/39015014753852.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/14/75/38/52/39015014753852/39015014753852.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/14/75/38/52/39015014753852/39015014753852.zip
<i>Little sisters</i> by Fay Weldon						
(b) the date the digital copy was created;		On information and belief, January 2, 2007	May 9, 2007	December 10, 2008	November 26, 2008	November 26, 2008
(j) the Virtual Location of the digital copy;		Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr8/obj/mdp/pairtree_root/39/01/50/15/51/98/15/39015015519815/39015015519815.zip	/sdr8/obj/mdp/pairtree_root/39/01/50/15/51/98/15/39015015519815/39015015519815.zip	/sdr8/obj/mdp/pairtree_root/39/01/50/15/51/98/15/39015015519815/39015015519815.zip	/sdr8/obj/mdp/pairtree_root/39/01/50/15/51/98/15/39015015519815/39015015519815.zip
<i>Darcy's utopia</i> by Fay Weldon						
(b) the date the digital copy was created;		On information and belief, March 13, 2008	October 31, 2008	December 10, 2008	November 3, 2008	November 3, 2008



**Exhibit A to Responses to Plaintiff's First Set of Interrogatories to Defendant Mary Sue Coleman**  
**Interrogatory No. 3**

(a) the title and author of the Work;	(j) the Virtual Location of the digital copy;	Master Digital Copy	Initial HathiTrust Digital Copy	Mirror Site HathiTrust Digital Copy	First Backup Tape HathiTrust Digital Copy	Second Backup Tape HathiTrust Digital Copy
<i>The cloning of Joanna May</i> by Fay Weldon	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr10/obj/mdp/pairtr ee_root/39/01/50/18/9 3/34/92/39015018933 492/39015018933492 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/18/9 3/34/92/39015018933 492/39015018933492 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/18/9 3/34/92/39015018933 492/39015018933492 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/18/9 3/34/92/39015018933 492/39015018933492 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/18/9 3/34/92/39015018933 492/39015018933492 .zip
	(b) the date the digital copy was created;	On information and belief, January 20, 2010	January 27, 2010	January 27, 2010	January 29, 2010	January 29, 2010
<i>Moon over Minneapolis/Why she couldn't stay</i> by Fay Weldon	(j) the Virtual Location of the digital copy;	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr21/obj/mdp/pairtr ee_root/39/01/50/19/4 3/73/78/39015019437 378/39015019437378 .zip	/sdr21/obj/mdp/pairtr ee_root/39/01/50/19/4 3/73/78/39015019437 378/39015019437378 .zip	/sdr21/obj/mdp/pairtr ee_root/39/01/50/19/4 3/73/78/39015019437 378/39015019437378 .zip	/sdr21/obj/mdp/pairtr ee_root/39/01/50/19/4 3/73/78/39015019437 378/39015019437378 .zip
	(b) the date the digital copy was created;	On information and belief, March 13, 2008	October 31, 2008	December 10, 2008	November 3, 2008	November 3, 2008
	(j) the Virtual Location of the digital copy;	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr10/obj/mdp/pairtr ee_root/39/01/50/21/9 9/13/62/39015021991 362/39015021991362 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/21/9 9/13/62/39015021991 362/39015021991362 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/21/9 9/13/62/39015021991 362/39015021991362 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/21/9 9/13/62/39015021991 362/39015021991362 .zip

**Exhibit A to Responses to Plaintiff's First Set of Interrogatories to Defendant Mary Sue Coleman**  
**Interrogatory No. 3**

<b>(a) the title and author of the Work;</b>	<b>Master Digital Copy</b>	<b>Initial HathiTrust Digital Copy</b>	<b>Mirror Site HathiTrust Digital Copy</b>	<b>First Backup Tape HathiTrust Digital Copy</b>	<b>Second Backup Tape HathiTrust Digital Copy</b>
<i>Life force</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 13, 2008	November 3, 2009	November 3, 2009	November 4, 2009	November 4, 2009
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr6/obj/mdp/pairtree_root/39/01/50/56/89/04/63/39015056890463/39015056890463.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/56/89/04/63/39015056890463/39015056890463.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/56/89/04/63/39015056890463/39015056890463.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/56/89/04/63/39015056890463/39015056890463.zip
<i>Growing rich</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 13, 2008	November 3, 2009	November 3, 2009	November 4, 2009	November 4, 2009
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr10/obj/mdp/pairtree_root/39/01/50/25/20/07/29/39015025200729/39015025200729.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/25/20/07/29/39015025200729/39015025200729.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/25/20/07/29/39015025200729/39015025200729.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/25/20/07/29/39015025200729/39015025200729.zip
<i>Life force</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 18, 2008	February 14, 2009	February 14, 2009	February 14, 2009	February 14, 2009

**Exhibit A to Responses to Plaintiff's First Set of Interrogatories to Defendant Mary Sue Coleman**  
**Interrogatory No. 3**

<b>(a) the title and author of the Work;</b>	<b>Master Digital Copy</b>	<b>Initial HathiTrust Digital Copy</b>	<b>Mirror Site HathiTrust Digital Copy</b>	<b>First Backup Tape HathiTrust Digital Copy</b>	<b>Second Backup Tape HathiTrust Digital Copy</b>
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr10/obj/mdp/pairtree_root/39/01/50/55/16/61/96/39015055166196/39015055166196.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/55/16/61/96/39015055166196/39015055166196.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/55/16/61/96/39015055166196/39015055166196.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/55/16/61/96/39015055166196/39015055166196.zip
<i>Trouble by Fay Weldon</i>					
<b>(b) the date the digital copy was created;</b>	On information and belief, January 20, 2010	January 27, 2010	January 27, 2010	January 29, 2010	January 29, 2010
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr21/obj/mdp/pairtree_root/39/01/50/32/71/94/48/39015032719448/39015032719448.zip	/sdr21/obj/mdp/pairtree_root/39/01/50/32/71/94/48/39015032719448/39015032719448.zip	/sdr21/obj/mdp/pairtree_root/39/01/50/32/71/94/48/39015032719448/39015032719448.zip	/sdr21/obj/mdp/pairtree_root/39/01/50/32/71/94/48/39015032719448/39015032719448.zip
<i>Affliction by Fay Weldon</i>					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 13, 2008	July 19, 2008	December 10, 2008	November 12, 2008	November 12, 2008
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr6/obj/mdp/pairtree_root/39/01/50/34/41/08/63/39015034410863/39015034410863.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/34/41/08/63/39015034410863/39015034410863.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/34/41/08/63/39015034410863/39015034410863.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/34/41/08/63/39015034410863/39015034410863.zip
<i>Splitting by Fay Weldon</i>					

**Exhibit A to Responses to Plaintiff's First Set of Interrogatories to Defendant Mary Sue Coleman**  
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<b>(a) the title and author of the Work;</b>	<b>Master Digital Copy</b>	<b>Initial HathiTrust Digital Copy</b>	<b>Mirror Site HathiTrust Digital Copy</b>	<b>First Backup Tape HathiTrust Digital Copy</b>	<b>Second Backup Tape HathiTrust Digital Copy</b>
<b>(b) the date the digital copy was created;</b>	On information and belief, March 18, 2008	November 3, 2009	November 3, 2009	November 4, 2009	November 4, 2009
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr6/obj/mdp/pairtree_root/39/01/50/34/89/79/45/39015034897945/39015034897945.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/34/89/79/45/39015034897945/39015034897945.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/34/89/79/45/39015034897945/39015034897945.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/34/89/79/45/39015034897945/39015034897945.zip
<i>Wicked women : stories</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, August 17, 2010	October 31, 2010	October 3, 2010	November 4, 2010	November 4, 2010
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr4/obj/mdp/pairtree_root/49/01/50/02/45/16/73/49015002451673/49015002451673.zip	/sdr4/obj/mdp/pairtree_root/49/01/50/02/45/16/73/49015002451673/49015002451673.zip	/sdr4/obj/mdp/pairtree_root/49/01/50/02/45/16/73/49015002451673/49015002451673.zip	/sdr4/obj/mdp/pairtree_root/49/01/50/02/45/16/73/49015002451673/49015002451673.zip
<i>Leader of the band</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 13, 2008	July 19, 2008	December 10, 2008	November 18, 2008	November 18, 2008

**Exhibit A to Responses to Plaintiff's First Set of Interrogatories to Defendant Mary Sue Coleman**  
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(a) the title and author of the Work;	(j) the Virtual Location of the digital copy;	Master Digital Copy	Initial HathiTrust Digital Copy	Mirror Site HathiTrust Digital Copy	First Backup Tape HathiTrust Digital Copy	Second Backup Tape HathiTrust Digital Copy
<i>Growing rich</i> by Fay Weldon		Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr6/obj/mdp/pairtree_root/39/01/50/55/10/_98/16/39015055109816/39015055109816.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/55/10/_98/16/39015055109816/39015055109816.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/55/10/_98/16/39015055109816/39015055109816.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/55/10/_98/16/39015055109816/39015055109816.zip
	(b) the date the digital copy was created;	On information and belief, March 13, 2008	July 19, 2008	December 10, 2008	November 18, 2008	November 18, 2008
	(j) the Virtual Location of the digital copy;	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr6/obj/mdp/pairtree_root/39/01/50/55/10/_99/72/39015055109972/39015055109972.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/55/10/_99/72/39015055109972/39015055109972.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/55/10/_99/72/39015055109972/39015055109972.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/55/10/_99/72/39015055109972/39015055109972.zip
<i>The hearts and lives of men</i> by Fay Weldon						
	(b) the date the digital copy was created;	On information and belief, March 13, 2008	July 19, 2008	December 10, 2008	November 18, 2008	November 18, 2008
	(j) the Virtual Location of the digital copy;	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr6/obj/mdp/pairtree_root/39/01/50/55/10/_99/64/39015055109964/39015055109964.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/55/10/_99/64/39015055109964/39015055109964.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/55/10/_99/64/39015055109964/39015055109964.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/55/10/_99/64/39015055109964/39015055109964.zip

**Exhibit A to Responses to Plaintiff's First Set of Interrogatories to Defendant Mary Sue Coleman**  
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<b>(a) the title and author of the Work;</b>	<b>Master Digital Copy</b>	<b>Initial HathiTrust Digital Copy</b>	<b>Mirror Site HathiTrust Digital Copy</b>	<b>First Backup Tape HathiTrust Digital Copy</b>	<b>Second Backup Tape HathiTrust Digital Copy</b>
<i>A hard time to be a father: a collection of short stories by Fay Weldon</i>					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 13, 2008	October 31, 2008	December 10, 2008	November 1, 2008	November 1, 2008
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr10/obj/mdp/pairtree_e_root/39/01/50/55/10/98/24/39015055109824/39015055109824.zip	/sdr10/obj/mdp/pairtree_e_root/39/01/50/55/10/98/24/39015055109824/39015055109824.zip	/sdr10/obj/mdp/pairtree_e_root/39/01/50/55/10/98/24/39015055109824/39015055109824.zip	/sdr10/obj/mdp/pairtree_e_root/39/01/50/55/10/98/24/39015055109824/39015055109824.zip
<i>Life force by Fay Weldon</i>					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 18, 2008	July 19, 2008	December 10, 2008	November 10, 2008	November 10, 2008
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr4/obj/mdp/pairtree_root/39/01/50/29/18/60/64/39015029186064/39015029186064.zip	/sdr4/obj/mdp/pairtree_root/39/01/50/29/18/60/64/39015029186064/39015029186064.zip	/sdr4/obj/mdp/pairtree_root/39/01/50/29/18/60/64/39015029186064/39015029186064.zip	/sdr4/obj/mdp/pairtree_root/39/01/50/29/18/60/64/39015029186064/39015029186064.zip
<i>Nothing to wear and nowhere to hide: stories by Fay Weldon</i>					

**Exhibit A to Responses to Plaintiff's First Set of Interrogatories to Defendant Mary Sue Coleman**  
**Interrogatory No. 3**

<b>(a) the title and author of the Work;</b>	<b>Master Digital Copy</b>	<b>Initial HathiTrust Digital Copy</b>	<b>Mirror Site HathiTrust Digital Copy</b>	<b>First Backup Tape HathiTrust Digital Copy</b>	<b>Second Backup Tape HathiTrust Digital Copy</b>
<b>(b) the date the digital copy was created;</b>	On information and belief, March 13, 2008	October 31, 2008	December 10, 2008	November 1, 2008	November 1, 2008
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr10/obj/mdp/pairtree ee_root/39/01/50/55/8 5/96/00/39015055859 600/39015055859600 .zip	/sdr10/obj/mdp/pairtree ee_root/39/01/50/55/8 5/96/00/39015055859 600/39015055859600 .zip	/sdr10/obj/mdp/pairtree ee_root/39/01/50/55/8 5/96/00/39015055859 600/39015055859600 .zip	/sdr10/obj/mdp/pairtree ee_root/39/01/50/55/8 5/96/00/39015055859 600/39015055859600 .zip
<i>Big women</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 13, 2008	July 19, 2008	December 10, 2008	November 29, 2008	November 29, 2008
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr8/obj/mdp/pairtree _root/39/01/50/40/36/ 71/49/390150403671 49/39015040367149. zip	/sdr8/obj/mdp/pairtree _root/39/01/50/40/36/ 71/49/390150403671 49/39015040367149. zip	/sdr8/obj/mdp/pairtree _root/39/01/50/40/36/ 71/49/390150403671 49/39015040367149. zip	/sdr8/obj/mdp/pairtree _root/39/01/50/40/36/ 71/49/390150403671 49/39015040367149.z ip
<i>Godless in Eden : a book of essays</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 13, 2008	October 31, 2008	December 10, 2008	October 31, 2008	October 31, 2008



**Exhibit A to Responses to Plaintiff's First Set of Interrogatories to Defendant Mary Sue Coleman**  
**Interrogatory No. 3**

<b>(a) the title and author of the Work;</b>	<b>Master Digital Copy</b>	<b>Initial HathiTrust Digital Copy</b>	<b>Mirror Site HathiTrust Digital Copy</b>	<b>First Backup Tape HathiTrust Digital Copy</b>	<b>Second Backup Tape HathiTrust Digital Copy</b>
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr10/obj/mdp/pairtree_root/39/01/50/48/5782/34/39015048578234.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/48/5782/34/39015048578234.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/48/5782/34/39015048578234.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/48/5782/34/39015048578234.zip
<i>Rhode Island blues</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 18, 2008	October 27, 2008	December 10, 2008	October 31, 2008	October 31, 2008
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr10/obj/mdp/pairtree_root/39/01/50/49/524/427/39015049524427.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/49/524/427/39015049524427.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/49/524/427/39015049524427.zip	/sdr10/obj/mdp/pairtree_root/39/01/50/49/524/427/39015049524427.zip
<i>The Bulgari connection</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 13, 2008	July 19, 2008	December 10, 2008	November 17, 2008	November 17, 2008
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr6/obj/mdp/pairtree_root/39/01/50/53/74/68/41/39015053746841.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/53/74/68/41/39015053746841.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/53/74/68/41/39015053746841.zip	/sdr6/obj/mdp/pairtree_root/39/01/50/53/74/68/41/39015053746841.zip
<i>Auto da foy</i> by Fay Weldon					



**Exhibit A to Responses to Plaintiff's First Set of Interrogatories to Defendant Mary Sue Coleman**  
**Interrogatory No. 3**

<b>(a) the title and author of the Work;</b>	<b>Master Digital Copy</b>	<b>Initial HathiTrust Digital Copy</b>	<b>Mirror Site HathiTrust Digital Copy</b>	<b>First Backup Tape HathiTrust Digital Copy</b>	<b>Second Backup Tape HathiTrust Digital Copy</b>
<b>(b) the date the digital copy was created;</b>	On information and belief, March 18, 2008	November 11, 2009	November 11, 2009	November 12, 2009	November 12, 2009
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr10/obj/mdp/pairtr ee_root/39/01/50/55/1 8/15/75/39015055181 575/39015055181575 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/55/1 8/15/75/39015055181 575/39015055181575 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/55/1 8/15/75/39015055181 575/39015055181575 .zip	/sdr10/obj/mdp/pairtr ee_root/39/01/50/55/1 8/15/75/39015055181 575/39015055181575 .zip
<i>Flood warning : a play</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, March 3, 2008	July 10, 2009	July 10, 2009	July 10, 2009	July 10, 2009
<b>(j) the Virtual Location of the digital copy;</b>	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr14/obj/mdp/pairtr ee_root/39/01/50/58/1 1/87/98/39015058118 798/39015058118798 .zip	/sdr14/obj/mdp/pairtr ee_root/39/01/50/58/1 1/87/98/39015058118 798/39015058118798 .zip	/sdr14/obj/mdp/pairtr ee_root/39/01/50/58/1 1/87/98/39015058118 798/39015058118798 .zip	/sdr14/obj/mdp/pairtr ee_root/39/01/50/58/1 1/87/98/39015058118 798/39015058118798 .zip
<i>Wicked women : stories</i> by Fay Weldon					
<b>(b) the date the digital copy was created;</b>	On information and belief, January 20, 2010	January 27, 2010	January 27, 2010	January 29, 2010	January 29, 2010

**Exhibit A to Responses to Plaintiff's First Set of Interrogatories to Defendant Mary Sue Coleman**  
**Interrogatory No. 3**

(a) the title and author of the Work;	(j) the Virtual Location of the digital copy;	Master Digital Copy	Initial HathiTrust Digital Copy	Mirror Site HathiTrust Digital Copy	First Backup Tape HathiTrust Digital Copy	Second Backup Tape HathiTrust Digital Copy
<i>Mantrapped</i> by Fay Weldon		Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr21/obj/mdp/pairtree_root/39/01/50/41/7709/52/39015041770952/39015041770952.zip	/sdr21/obj/mdp/pairtree_root/39/01/50/41/7709/52/39015041770952/39015041770952.zip	/sdr21/obj/mdp/pairtree_root/39/01/50/41/7709/52/39015041770952/39015041770952.zip	/sdr21/obj/mdp/pairtree_root/39/01/50/41/7709/52/39015041770952/39015041770952.zip
	(b) the date the digital copy was created;	On information and belief, May 28, 2008	September 21, 2008	December 10, 2008	December 18, 2008	December 18, 2008
	(j) the Virtual Location of the digital copy;	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr9/obj/mdp/pairtree_root/39/01/50/60/12/34/14/39015060123414/39015060123414.zip	/sdr9/obj/mdp/pairtree_root/39/01/50/60/12/34/14/39015060123414/39015060123414.zip	/sdr9/obj/mdp/pairtree_root/39/01/50/60/12/34/14/39015060123414/39015060123414.zip	/sdr9/obj/mdp/pairtree_root/39/01/50/60/12/34/14/39015060123414.zip
<i>She may not leave</i> by Fay Weldon		On information and belief, May 29, 2008	October 2, 2008	December 10, 2008	December 18, 2008	December 18, 2008
	(b) the date the digital copy was created;	On information and belief, May 29, 2008				
	(j) the Virtual Location of the digital copy;	Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr9/obj/mdp/pairtree_root/39/01/50/62/61/12/42/39015062611242/39015062611242.zip	/sdr9/obj/mdp/pairtree_root/39/01/50/62/61/12/42/39015062611242/39015062611242.zip	/sdr9/obj/mdp/pairtree_root/39/01/50/62/61/12/42/39015062611242/39015062611242.zip	/sdr9/obj/mdp/pairtree_root/39/01/50/62/61/12/42/39015062611242/39015062611242.zip
<i>The spa decameron</i> by Fay Weldon						

**Exhibit A to Responses to Plaintiff's First Set of Interrogatories to Defendant Mary Sue Coleman**  
**Interrogatory No. 3**

(a) the title and author of the Work;		Master Digital Copy	Initial HathiTrust Digital Copy	Mirror Site HathiTrust Digital Copy	First Backup Tape HathiTrust Digital Copy	Second Backup Tape HathiTrust Digital Copy
(b) the date the digital copy was created;		On information and belief, May 28, 2008	September 22, 2008	December 10, 2008	December 19, 2008	December 19, 2008
(j) the Virtual Location of the digital copy;		Such information is not in Defendant's, the University's, or the Library's possession, custody, or control.	/sdr9/obj/mdp/pairtree_root/39/01/50/70/73/_93/81/39015070739381/39015070739381.zip	/sdr9/obj/mdp/pairtree_root/39/01/50/70/73/_93/81/39015070739381/39015070739381.zip	/sdr9/obj/mdp/pairtree_root/39/01/50/70/73/_93/81/39015070739381/39015070739381.zip	/sdr9/obj/mdp/pairtree_root/39/01/50/70/73/_93/81/39015070739381/39015070739381.zip

**VERIFICATION**

I, Paul N. Courant, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am University Librarian and Dean of Libraries at The University of Michigan (the "University").
2. All of the information provided in the attached Responses to Plaintiffs' First Set of Interrogatories to Defendant Mary Sue Coleman has been gathered from various employees of the University.
3. I am informed and believe that the best efforts of those employees have been employed in procuring the information, and on that basis I am informed and believe that the information is true and correct.

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

Executed this 8<sup>th</sup> day of February, 2012.



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Paul N. Courant

# EXHIBIT 78

**KILPATRICK TOWNSEND & STOCKTON LLP**

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Joseph M. Beck (admitted *pro hac vice*)  
W. Andrew Pequignot (admitted *pro hac vice*)  
Allison Scott Roach (admitted *pro hac vice*)  
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Facsimile: (404) 815-6555  
Email: jbeck@kilpatricktownsend.com

*Attorneys for Defendants*

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

THE AUTHORS GUILD, INC., ET AL.,

Plaintiffs,

v.

HATHITRUST, ET AL.,

Defendants.

Case No. 11 Civ. 6351 (HB)

**RESPONSES TO PLAINTIFFS'  
FIRST SET OF  
INTERROGATORIES TO  
DEFENDANT KEVIN REILLY**

Defendant Kevin Reilly (“Defendant”), in his official capacity as President of The University of Wisconsin System (the “University”) states the following objections and responses to Plaintiffs’ First Set of Interrogatories to Defendant Kevin Reilly pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure (“FRCP”) and the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York (the “Local Rules”) and based upon information provided to him by employees of the University with personal knowledge of the relevant facts.

**A. GENERAL OBJECTIONS AND LIMITATIONS**

1. Defendant’s discovery and investigation of the facts of this proceeding are continuing. These Interrogatory responses are based on information gathered as of the date of these responses. Defendant reserves the right to amend or supplement his responses when and if additional information is obtained, as required by the FRCP.

2. Defendant objects to each of Plaintiffs’ definitions and instructions to the extent they impose burdens and requirements on Defendant that are inconsistent with or beyond those set forth in the FRCP or the Local Rules.

3. Defendant objects to the Interrogatories in their entirety and to each Interrogatory to the extent they impose burdens and requirements on Defendant that are inconsistent with or beyond those set forth in the FRCP or the Local Rules.

4. Defendant objects to the Interrogatories in their entirety and to each Interrogatory to the extent that the information sought is protected from disclosure by (a) agreements with other parties, including, but not limited to, confidentiality agreements, (b) court order, or (c) statute, regulation, administrative order or case law.

5. Defendant objects to the Interrogatories in their entirety and to each Interrogatory

to the extent that the information sought is commercially sensitive proprietary and/or confidential information and trade secrets (“Confidential Information”). Defendant will provide non-privileged, responsive Confidential Information only pursuant to the Protective Order in place in this litigation.

6. Defendant objects to the Interrogatories in their entirety and to each Interrogatory to the extent that the information sought was prepared in anticipation of litigation, constitutes attorney work product, discloses mental impressions, conclusions, opinions, or legal theories of Defendant’s attorneys, contains privileged attorney-client communications (including but not limited to those subject to the common interest or joint defense privilege) or is otherwise protected from disclosure under applicable privileges, law, or rules, or because such information is not properly discoverable under the FRCP or the Local Rules. Any disclosure of such protected or privileged information in any response is inadvertent and shall not constitute a waiver of such privilege, protection or immunity.

7. Defendant objects to the Interrogatories in their entirety and to each Interrogatory to the extent that the information sought is (a) not in Defendant’s, the University’s, and/or the Library’s possession, custody, or control, (b) in the possession, custody, or control of Plaintiffs, (c) publicly available, or (d) as equally available and/or readily accessible to Plaintiffs as it is to Defendant. These interrogatory responses are based on a reasonably diligent search for and review of information in those areas within Defendant’s, the University’s, and/or the Library’s direct knowledge, custody, or control where information of the type requested would be expected to be found, and Defendant disclaims any obligation to solicit information from any other parties in responding to the Interrogatories.



8. Defendant objects to the Interrogatories in their entirety and to each Interrogatory to the extent they are vague, ambiguous, and/or contain terms that are undefined or otherwise unclear.

9. Defendant objects to the Interrogatories in their entirety and to each Interrogatory to the extent that the information sought is irrelevant to the subject matter of this action and to the extent that the Interrogatories are not reasonably calculated to lead to the discovery of admissible evidence.

10. Defendant objects to the Interrogatories in their entirety and to each Interrogatory to the extent that they prematurely call for the disclosure of information that Defendant may obtain through discovery.

11. Defendant objects to the Interrogatories in their entirety and to each Interrogatory insofar as they assume disputed facts or legal conclusions. To the extent any interrogatory assumes disputed facts or legal conclusions, Defendant denies such disputed facts or legal conclusions. Any response or objection by Defendant with respect to any such Interrogatory is without prejudice to this objection and Defendant's right to dispute facts and legal conclusions assumed by the Interrogatories.

12. Defendant objects to the Interrogatories in their entirety and to each Interrogatory to the extent they fail to contain defined time periods or limits, or seek information outside of the relevant time period. In particular, Defendant objects to all demands in the Interrogatories that require Defendant to search for, produce, disclose or identify information without any limitation as to time. Unless otherwise indicated in a particular Interrogatory or the response thereto, Defendant's responses refer only to the time period between October 6, 2008 and October 6, 2011.

13. No objection or limitation, or lack thereof, made in these responses and objections shall be deemed an admission by Defendant as to the existence or nonexistence of information.

14. Defendant's responses to the Interrogatories are made without prejudice to the assertion of additional objections and responses by him at a later date or to Defendant's right to supplement, modify, or amend his responses as appropriate, and to rely upon and produce evidence during trial or at any other proceeding that may be held in this action.

15. Defendant reserves the right to object on any ground at any time to a demand for further response, and reserves the right to revise, supplement, correct, or add to these responses. Defendant expressly reserves any and all rights and privileges under the FRCP, the Local Rules, and any other law or rule, and the failure to assert such rights and privileges shall not constitute a waiver thereof, either with respect to these responses or with respect to any future discovery responses or objections.

16. Defendant incorporates by reference these General Objections into each of the Responses and Specific Objections set forth below, as if fully set forth in each of them.

## **B. SPECIFIC OBJECTIONS AND LIMITATIONS**

### **DEFINITIONS**

1. Defendant objects to Plaintiffs' definition of "University" as overly broad and unduly burdensome in that it includes "each of its subsidiaries, divisions and affiliates, principals, officers, directors, members, employees, agents and attorneys," which refers to thousands of individuals, the vast majority of which have no knowledge of and have had no involvement in the activities that are the subject of Plaintiffs' claims in this action.

2. Defendant objects to Plaintiffs' definition of "Library" on the ground that it is vague and ambiguous.

3. Defendant objects to Plaintiffs' definition of "Master Print Copy" and to each Interrogatory including that term as vague and ambiguous in that Plaintiffs' definition of "Master Print Copy" refers to each "original print copy" without identifying the meaning of "original." As used in Plaintiffs' Interrogatories and theses responses, Defendant understands "Master Print Copy" to refer to a print copy of a Work purchased or otherwise acquired through lawful means by the University.

4. Defendant objects to Plaintiffs' definition of "Master Digital Copy" and to each Interrogatory including that term on the ground that they presume the existence of certain digital copies that may not exist, or that may exist in the possession, custody, or control of third parties and without Defendant's, the University's, or the Library's knowledge. Defendant further objects to Plaintiffs' definition of "Master Digital Copy" and to each Interrogatory including that term to the extent that they seek information in the possession, custody, or control of third parties and not in the possession, custody, or control of Defendant, the University, or the Library. Defendant states that upon information and belief Google prepared a "Master Digital Copy" of each Work listed on Schedule A to Plaintiffs' First Set of Interrogatories to Defendant Kevin Reilly ("Schedule A") based on Master Print Copies, but further information concerning such Master Digital Copies lies with third parties and is not in Defendant's possession, custody, or control.

5. Defendant objects to Plaintiffs' definitions of "Master University Copy" and "Secondary University Copies" on the ground that they presume the existence of certain digital copies that do not exist. Defendant states that the University did not receive from Google a digital copy of any of the Works listed in Schedule A.

6. Defendant objects to Plaintiffs' definition of "HathiTrust Digital Copies" and to

each Interrogatory including that term on the ground that they presume the existence of certain digital copies that may not exist, or that may exist in the possession, custody, or control of third parties and without Defendant's, the University's, or the Library's knowledge. Defendant further objects to Plaintiffs' definition of "HathiTrust Digital Copy" and to each Interrogatory including that term to the extent that they seek information in the possession, custody, or control of third parties and not in the possession, custody, or control of Defendant, the University, or the Library. Defendant states that the Library requested that Google provide to the University of Michigan library digital copies of each of the Works listed on Schedule A based on Master Print Copies and, on information and belief, these digital works are now a part of the HathiTrust Digital Library, but further information concerning such digital copies lies with third parties and is not in the possession, custody, or control of Defendant, the University, or the Library.

7. Defendant objects to Plaintiffs' definition of "Third Party Digital Copies" and to each Interrogatory including that term on the ground that they presume the existence of certain digital copies that may not exist, or that may exist in the possession, custody, or control of third parties and without Defendant's, the University's, or the Library's knowledge. Defendant further objects to Plaintiff's definition of "Third Party Digital Copies" and to each Interrogatory including that term as overly broad to the extent Plaintiffs' definition includes digital copies created from the Master Digital Copy or digital copies thereof because, as described above, the Master Digital Copy and information concerning the Master Digital Copy are with third parties and are not in the possession, custody, or control of Defendant, the Library, or the University.

#### **INSTRUCTIONS**

8. Defendant objects to Paragraph 1 of Plaintiffs' "Instructions" to the extent that it impermissibly seeks to impose burdens and requirements beyond those set forth in the FRCP 26

and 33 by requiring responses to the Interrogatories based upon the knowledge of, and information available to, parties other than the party upon which the Interrogatories are served, and Defendant disclaims any obligation to solicit information from any other parties in responding to the Interrogatories. Defendant further objects to this definition because it could potentially refer to thousands of individuals, the vast majority of which have no knowledge of and have had no involvement in the activities that are the subject of Plaintiffs' claims in this action, and in this regard is overly broad, unduly burdensome, seeks irrelevant information and is not reasonably calculated to lead to the discovery of admissible evidence.

### **RESPONSES TO INTERROGATORIES**

1. For each Work listed on Schedule A, separately identify the total number of (i) print and (ii) digital copies the Library created of each Master Print Copy it owns.

RESPONSE: Defendant objects to Interrogatory No. 1 on the ground that it is vague and ambiguous in that it requests information without specifying the time or time period for which the information is sought. Subject to the foregoing general and specific objections, and without waiving the same, Defendant responds that as of February 8, 2012, the Library has not created any print or digital copies from a Master Print Copy of any Work listed on Schedule A. Defendant further responds that the Library prepared for shipment to one of Google's scanning centers a Master Print Copy of each Work listed in Schedule A and, upon information and belief, Google prepared one or more digital copies of each Work listed on Schedule A based on Master Print Copies.

2. For each Master Print Copy of a Work listed on Schedule A that the University caused to be digitized, (i) describe the method by which the Library selected, identified, collected and transported the Master Print Copy for digitization, and (ii) identify the individuals (a) who directed or performed each of the foregoing actions, and (b) to whom the Master Print Copy was delivered for digitization.

RESPONSE: Defendant objects to Interrogatory No. 2 on the ground that it is vague and ambiguous in that “caused to be digitized” is not defined and the meaning of this phrase is not clear in the context of the Interrogatory. Defendant further objects to Interrogatory No. 2 to the extent it seeks the identity of individuals who directed or performed actions that were not directed or performed by Defendant, the University, or the Library. Subject to the foregoing general and specific objections, and without waiving the same, Defendant responds as follows:

(i) Google Inc. (“Google”) provided the Library with a list of candidate works for digitization, which included the Works listed on Schedule A. The Library’s staff retrieved the Master Print Copy of each Work on Schedule A and prepared them for shipment to one of Google’s scanning centers. Google arranged for transportation of the Master Print Copies from, and back to, the Library.

(ii) (a) For each of the foregoing actions that was directed or performed by the Library, the individual who was primarily responsible for such actions is Ed Van Gemert, Deputy Director of Libraries for the University. For each of the foregoing actions that was directed or performed by Google, the individuals who were primarily responsible for such actions are, upon information and belief, Irene Zimmerman, Interim Associate Director for Central Technical Services, Google Project Manager, and Jeanne Witte, Google Operations Manager.

(b) A Master Print Copy of each Work on Schedule A was delivered to Google for digitization.

3. For each Work listed on Schedule A, provide the following information with regard to the Master Digital Copy, Master University Copy, and all Secondary University Copies, HathiTrust Digital Copies and Third Party Digital Copies of the Work:

(a) the title and author of the Work;

- (b) the date the digital copy was created;
- (c) the identity of the source of the digital copy;
- (d) a description of the equipment and method used to create the digital copy;
- (e) a description of the means by which the digital copy was transferred from its source;
- (f) the type of media (e.g., DVD, flash drive, internal/external hard drive, tape backup, etc.) on which the digital copy is stored;
- (g) the identity of any computer system connected to media on which the digital copy is stored;
- (h) the identity of any computer network to which a device storing the digital copy is connected;
- (i) the Physical Location of the digital copy;
- (j) the Virtual Location of the digital copy;
- (k) the identities of the individual(s) who authorized, directed, supervised, facilitated and/or participated in the creation of the digital copy, including each such individual's name and current address, as well as his or her employer (at the time of the digitization), job title and role in the creation of the digital copy;
- (l) the identities of the individual(s) who currently have authorized access to the Physical Location and/or Virtual Location of the digital copy, including each such individual's name and current address, as well as his or her current employer, title and job description.

RESPONSE: Defendant objects to Interrogatory No. 3 on the ground that it presumes the existence of certain digital copies that may not exist, or that may exist in the possession, custody, or control of third parties and without Defendant's knowledge. Defendant further objects to Interrogatory No. 3 to the extent that it seeks information in the possession, custody, or control of third parties and not in the possession, custody, or control of Defendant, the University or the Library. Defendant further objects to Interrogatory No. 3 on the grounds that subparts (c) and (e) are vague and ambiguous in that "source" and "transferred from its source" are not defined and the meaning of such terms is not clear in the context of the Interrogatory. Defendant also objects

to Interrogatory No. 3 on the grounds that subparts (g), (h), (i), and (j) seek Confidential Information regarding the identity of computer systems and computer networks and regarding the “Physical Location” and “Virtual Location” of digitized works, and the disclosure of such Confidential Information would compromise the security of the HDL. Defendant also objects to Interrogatory No. 3 on the grounds that subpart (k) is vague and ambiguous in that “authorized,” “directed,” “supervised,” “facilitated” and “participated” are not defined and the meaning of such terms is not clear in the context of the Interrogatory. Defendant further objects to Interrogatory No. 3 on the grounds that subpart (l) seeks private and confidential information protected from disclosure by agreements with other parties, and by federal statutes and regulations.

Subject to the foregoing general and specific objections, and without waiving the same, Defendant responds that no Master University Copy or Secondary University Copies exist of any of the Works listed on Schedule A, and that Defendant has no knowledge or information concerning the existence of any Third Party Digital Copies of any Work listed on Schedule A. Defendant further responds that, upon information and belief, Google prepared a Master Digital Copy of each Work listed on Schedule A based on Master Print Copies, but further information concerning such Master Digital Copies lies with third parties and is not in Defendant’s possession, custody, or control. Defendant further responds that, upon information and belief, a HathiTrust Digital Copy exists for each Work listed on Schedule A, but any information concerning such HathiTrust Digital Copies lies with third parties and is not in Defendant’s possession, custody, or control.

Based, in part, on information provided to the Library by Google, Defendant provides the following further response only as to the Master Digital Copy of each Work listed on Schedule A, and disclaims any knowledge concerning any other digital copies of such Works:



(a) the title and author of the Works are:

*Oss målvakter emellan*, by Erik Grundström (Alba)

*Den umuligen friheten: Henrik Ibsen og moderniteten*, by Helge Rønning (Gylendal)

*Je cours plus vite que la lycose: poèmes*, by Danièle Simpson (Naaman)

(b) upon information and belief, Master Digital Copies of each Work listed on

Schedule A were created on the following dates:

*Oss målvakter emellan* – January 10, 2010

*Den umuligen friheten: Henrik Ibsen og moderniteten* – November 6, 2009

*Je cours plus vite que la lycose: poèmes* – April 15, 2010.

(c) Defendant reiterates his objection to this sub-part on the ground that “source” is not defined and the meaning of such term is not clear in the context of the Interrogatory. Subject to this objection, and without waiving the same, Defendant understands that the Master Digital Copies of the Works on Schedule A were prepared by Google based on Master Print Copies.

(d) This subpart calls for information in the possession, custody, or control of third parties, including Google, and that is not known to Defendant, the University or the Library.

(e) Defendant reiterates his objection to this subpart on the ground that “transferred from its source” is not defined and the meaning of such phrase is not clear in the context of the Interrogatory. Subject to this objection, and without waiving the same, Defendant responds that this subpart calls for information in the possession, custody, or control of third parties, including Google, and that is not known to Defendant, the University or the Library.

(f) This subpart calls for information in the possession, custody, or control of third parties, including Google, and that is not known to Defendant, the University or the Library.

(g) Defendant reiterates his objection to this sub-part on the ground that it calls for Confidential Information. Subject to this objection, and without waiving the same, Defendant responds that this subpart calls for information in the possession, custody, or control of third parties, including Google, and that is not known to Defendant, the University or the Library.

(h) Defendant reiterates his objection to this subpart on the ground that it calls for Confidential Information. Subject to this objection, and without waiving the same, Defendant responds that this subpart calls for information in the possession, custody, or control of third parties, including Google, and that is not known to Defendant, the University or the Library.

(i) Defendant reiterates his objection to this subpart on the ground that it calls for Confidential Information. Subject to this objection, and without waiving the same, Defendant responds that this subpart calls for information in the possession, custody, or control of third parties, including Google, and that is not known to Defendant, the University or the Library.

(j) Defendant reiterates his objection to this sub-part on the ground that it calls for Confidential Information. Subject to this objection, and without waiving the same, Defendant responds that this subpart calls for information in the possession, custody, or control of third parties, including Google, and that is not known to Defendant, the University or the Library.

(k) Ed Van Gemert, Deputy Director of Libraries for the University, supervised the transfer to Google of the Master Print Copies of each Work listed on Schedule A, with the assistance of Irene Zimmerman, Interim Associate Director for Central Technical Services, Google Project Manager, and Jeanne Witte, Google Operations Manager. Mr. Van Gemert was not directly involved in the creation of the Master Digital Copy nor, upon information and belief, were Ms. Zimmerman or Ms. Witte.

(l) Defendant reiterates his objection to this subpart on the ground that it seeks private and confidential information protected from disclosure by agreements with other parties, and by federal statutes and regulations. Subject to this objection, and without waiving the same, Defendant responds that neither Defendant, the University nor the Library have any knowledge

of the identities of any individuals with authorized access to the Physical and/or Virtual Location of any digital copies made from the Master Print Copy.

4. Identify the number of books the University contributed to HathiTrust and the estimated number of those books the University believes are protected by copyright.

RESPONSE: Defendant objects to Interrogatory No. 4 on the ground that the phrase “books the University contributed” is not defined and the meaning of such phrase is not clear in the context of the Interrogatory. Subject to the foregoing general and specific objections, and without waiving the same, Defendant responds that the University has contributed no “books” to the HathiTrust. Defendant further responds that, as of December 9, 2011, the University had provided Google with 511,432 volumes that, upon information and belief, were digitized by Google and are now in the HDL. Defendant does not have an estimate of the number of such works are protected by copyright under the United States Copyright Act.

5. Describe in detail the process followed by the University between May 16, 2011 and September 16, 2011 in connection with the Orphan Works Project to determine whether a work would be designated as an “orphan candidate.”

RESPONSE: Subject to the foregoing general objections, and without waiving the same, Defendant responds that, aside from generally indicating its support for the initiative on April 25, 2011, the University has not participated in, nor taken any actions whatsoever in connection with, the University of Michigan library’s 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, which the University of Michigan library calls the “Orphan Works Project.”

6. Identify the individual(s) who authorized, directed, supervised, facilitated and/or participated in the Orphan Works Project between May 16, 2011 and September 16, 2011,

including each such individual's name and current address, as well as his or her employer (at the time the individual was involved with the Orphan Works Project), job title and role in the Orphan Works Project.

RESPONSE: Defendant objects to Interrogatory No. 6 on the ground that the terms "authorized," "directed," "supervised," "facilitated" and "participated" are not defined and the meaning of such terms is not clear in the context of the Interrogatory. Defendant further objects to Interrogatory No. 6 to the extent it seeks the identity of individuals who were involved in performing actions that were not instructed, overseen, and/or performed by Defendant, the University, or the Library. Subject to the foregoing general and specific objections, and without waiving the same, Defendant responds that, aside from generally indicating its support for the "Orphan Works Project" on April 25, 2011, the University has not participated in, nor taken any actions whatsoever in connection with, the "Orphan Works Project."

DATED: February 8, 2012

Respectfully Submitted,



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*Attorneys for Defendants*

**VERIFICATION**

I, Kevin Reilly, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am President of The University of Wisconsin System (the "University").
2. All of the information provided in the attached Responses to Plaintiffs'

First Set of Interrogatories to Defendant Kevin Reilly has been gathered from various employees of the University.

3. I am informed and believe that the best efforts of those employees have been employed in procuring the information, and on that basis I am informed and believe that the information is true and correct.

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

Executed this 8<sup>th</sup> day of February, 2012.

  
\_\_\_\_\_  
Kevin Reilly

# EXHIBIT 86

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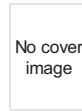
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The latest form which the business sagacity behind Harvard University has taken to **secure cheap advertising** for the institution is to lend out the grounds and the name of the college to the most experienced professionals of the epoch, ...

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Either Novel Effort to **Secure Cheap Advertising** or It's a Unique Gift. "Barstow," a burro, reared on the ranch of ET Hillis, near Barstow, holds the record for being the first of his kind to travel under care of the Wells-Fargo express, ...

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It is doubtful if in writing them the intention to make a match was near so great as the intention to **secure cheap advertising**. On their face, most of the challenges bear the imprint of an intention to advertise free and a lack of ...

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Anent Fake Lens Bargains In an editorial last month we explained the method employed to **secure cheap advertising** by one who is supposed to be a manufacturer of photographic lenses. The month before, we explained a few of his other ...

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We do this not to **secure cheap advertising**, as has been suggested by one of your correspondents, but through great respect for the man who holds the highest office within the gift of the people of the United States.

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Dressing room walls were considered places where one could **secure cheap advertising**, hence they were almost covered by actors' signatures, sometimes scribbled in pencil, sometimes printed with brown

Ads

Ads

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Secure your website immediately with single root RapidSSL

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"secure cheap advertising" - Google Search

http://www.google.com/search?q="secure+cheap+advertising"&btnG=Se...

Case 1:11-cv-06351-HB Document 114-86 Filed 06/29/12 Page 3 of 3

or black "liners," which was a thin ...

[Glued to the box: television criticism from the Observer, 1979-82](#)



[books.google.com](#)

Clive James - 1983 - 280 pages - Snippet view

The only certain beneficiaries of a telethon are the corporations who **secure cheap advertising** time by putting up prizes or making tax-deductible donations. The audience gets little to enjoy beyond the unintentional humour generated by ...

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# EXHIBIT 94

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## U-M Library statement on the Orphan Works Project

News | September 16th, 2011



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.

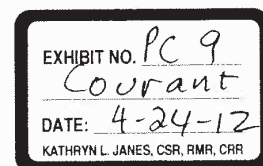
It was always our belief that we would be more likely to succeed with the cooperation and assistance of authors and publishers. This turns out to be correct. The widespread dissemination of the list has had the intended effect: rights holders have been identified, which is in fact the project's primary 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.

MLibrary News

Access this page at: <http://www.lib.umich.edu/node/55687>



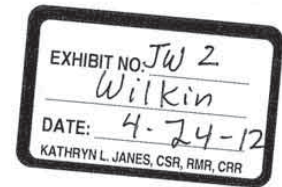
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# EXHIBIT 96



## News from Google



# Google Checks Out Library Books

*The Libraries of Harvard, Stanford, the University of Michigan, the University of Oxford, and The New York Public Library Join with Google to Digitally Scan Library Books and Make Them Searchable Online*

**MOUNTAIN VIEW, Calif. – December 14, 2004** – As part of its effort to make offline information searchable online, Google Inc. (NASDAQ: GOOG) today announced that it is working with the libraries of Harvard, Stanford, the University of Michigan, and the University of Oxford as well as The New York Public Library to digitally scan books from their collections so that users worldwide can search them in Google.

"Even before we started Google, we dreamed of making the incredible breadth of information that librarians so lovingly organize searchable online," said Larry Page, Google co-founder and president of Products. "Today we're pleased to announce this program to digitize the collections of these amazing libraries so that every Google user can search them instantly.

"Our work with libraries further enhances the existing Google Print program, which enables users to find matches within the full text of books, while publishers and authors monetize that information," Page added. "Google's mission is to organize the world's information, and we're excited to be working with libraries to help make this mission a reality."

Today's announcement is an expansion of the Google Print™ program, which assists publishers in making books and other offline information searchable online. Google is now working with libraries to digitally scan books from their collections, and over time will integrate this content into the Google index, to make it searchable for users worldwide.

"We believe passionately that such universal access to the world's printed treasures is mission-critical for today's great public university," said Mary Sue Coleman, President of the University of Michigan.

For publishers and authors, this expansion of the Google Print program will increase the visibility of in and out of print books, and generate book sales via "Buy this Book" links and advertising. For users, Google's library program will make it possible to search across library collections including

out of print books and titles that weren't previously available anywhere but on a library shelf.

Users searching with Google will see links in their search results page when there are books relevant to their query. Clicking on a title delivers a Google Print page where users can browse the full text of public domain works and brief excerpts and/or bibliographic data of copyrighted material. Library content will be displayed in keeping with copyright law. For more information and examples, please visit [print.google.com/googleprint/library.html](http://print.google.com/googleprint/library.html).

### **About Google Inc.**

Google's innovative search technologies connect millions of people around the world with information every day. Founded in 1998 by Stanford Ph.D. students Larry Page and Sergey Brin, Google today is a top web property in all major global markets. Google's targeted advertising program, which is the largest and fastest growing in the industry, provides businesses of all sizes with measurable results, while enhancing the overall web experience for users. Google is headquartered in Silicon Valley with offices throughout North America, Europe, and Asia. For more information, visit [www.google.com](http://www.google.com).


### **Media Contact:**

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Google Inc.  
+1 650-623-4311  
[nate@google.com](mailto:nate@google.com)

###

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# EXHIBIT 105



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Search words that occur within the items.

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Collections

Browse, search, or make HathiTrust collections.

View Public Collections

Collections are a way to group items for private or public use. The full-text of items within a collection can be searched independently of the full digital library. Read more about [creating collections](#).

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- HathiTrust, MPublishing, and mPach: Digital Libraries and Digital Publishing at the University of Michigan
- HathiTrust Research Center UnCamp 2012
- We're Preserving Our Past, What About the Present?
- How HathiTrust Serves the UC Community

Currently Digitized

10,405,889 total volumes

5,519,596 book titles

272,002 serial titles

3,642,061,150 pages

466 terabytes

123 miles

8,455 tons

3,097,761 volumes (~30% of total) in the public domain

View visualizations of HathiTrust call numbers, languages, and dates

[statistics information >>](#)

Featured Collection

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)

**MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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[anelson@fkks.com](mailto:anelson@fkks.com)

*Attorneys for Plaintiffs*



producing and distributing these copies cannot be deemed reasonable, even under the most favorable light of fair use for non-profit educational purposes”); *see also Campbell*, 510 U.S. at 584 (“[T]he mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fair use”); *Texaco*, 60 F.3d at 922 (systematic photocopying and archiving of journal articles to facilitate “research in the sciences . . . might well serve a broader public purpose” but does not constitute fair use).

While Defendants may argue that their *patrons* use HathiTrust for the purposes set forth in the preamble to Section 107 (“for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”), it is the purpose for which the Defendant *libraries* digitized and used the Infringed Books that is at issue here. In other words, fair use must be judged by the conduct of the infringer, not the final user. Otherwise, any reproduction of educational, informational or artistic material could be justified as benefitting the public. *See Infinity*, 150 F.3d at 108 (rejecting broadcaster’s argument that his unauthorized retransmissions of plaintiff’s programming constituted fair use based on the acts of the end-users); *Byrne v. British Broad. Corp.*, 132 F. Supp. 2d 229, 234 (S.D.N.Y. 2001) (non-profit organization BBC “enjoys no special immunity from determinations of copyright infringement” as “question under factor one is the purpose and character of the use, not of the alleged infringer”). Here, Defendants agreed to allow Google to digitize their library collections for the purpose of receiving their own digital copies that carry enormous value. They cannot escape the commercial purpose of that transaction. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (“Commercial use is demonstrated by a showing that repeated

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 jgoldman@fkks.com

*Attorneys for Plaintiffs*

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)

**PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS**

Pursuant to Rule 56.1 of the Local Rules of the United States District Court for the Southern District of New York, Plaintiffs The Authors Guild, Inc. ("Authors Guild"), The Authors League Fund, Inc. ("ALF"), The Australian Society of Authors Limited ("ASA"), Union Des Écrivaines et des Écrivains Québécois ("UNEQ"), Authors' Licensing and Collecting Society ("ALCS"), Sveriges Författarförbund, Norsk Faglitterær Forfatter- Og Oversetterforening ("SFF"), The Writers' Union of Canada ("TWUC"), Trond Andreassen ("Andreassen"), Pat Cummings ("Cummings"), Erik Grundström ("Grundström"), Angelo Loukakis ("Loukakis"), Roxana Robinson ("Robinson"), Helge Rønning ("Rønning"), André Roy ("Roy"), Jack R. Salamanca ("Salamanca"), James Shapiro ("Shapiro"), Danièle Simpson ("Simpson"), T.J. Stiles ("Stiles") and Fay Weldon ("Weldon") (collectively, "Plaintiffs"), by




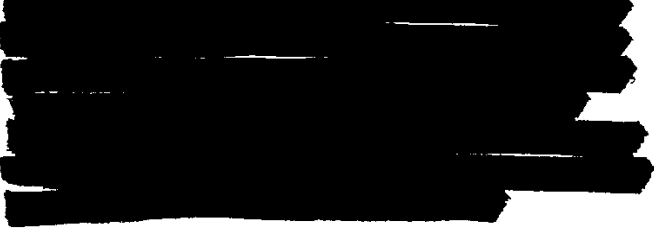
and through their attorneys, Frankfurt Kurnit Klein & Selz, P.C., hereby submit this statement of material facts as to which Plaintiffs contend there is no genuine issue to be tried, as well as citations to the admissible evidence in support of each fact. Except where specifically defined in the chart below, capitalized terms shall have the meanings ascribed to them in the “Definitions” set forth in Appendix A to this Statement.






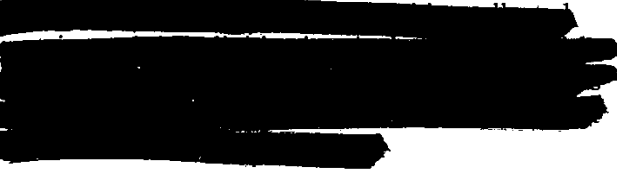

No.	PLAINTIFFS’ UNDISPUTED FACT	SUPPORTING EVIDENCE
	<b>GOOGLE LIBRARY PROJECT ORIGINS</b>	
1.	<p>Marybeth Peters, formerly the Register of Copyrights of the United States, submitted a statement to the Committee on the Judiciary of the United States House of Representatives at 111th Congress, 1st Session on September 10, 2009 which included the following:</p> <p>“The Copyright Office has been following the Google Library Project since 2003 with great interest. We first learned about it when Google approached the Library of Congress, seeking to scan all of the Library’s books. At that time, we advised the Library on the copyright issues relevant to mass scanning, and the Library offered Google the more limited ability to scan books that are in the public domain. An agreement did not come to fruition because Google could not accept the terms.”</p>	<p>Statement of Marybeth Peters, The Register of Copyrights, before the Committee on the Judiciary, United States House of Representatives, 111th Congress 1st Session, September 10, 2009, <i>Competition and Commerce in Digital Books: The Proposed Google Book Settlement</i>, <a href="http://www.copyright.gov/docs/regstat091009.html">http://www.copyright.gov/docs/regstat091009.html</a>.</p>
2.	<p>[REDACTED]</p>	<p>Wilkin Tr. 35:20-36:3, 43:18-25.</p>
3.	<p>[REDACTED]</p>	<p>Wilkin Tr. 54:8-21; <i>see also</i> Courant Tr. 38:14-39:5.</p>
4.	<p>[REDACTED]</p>	<p>Wilkin Tr. 137:12-138:18.</p>

No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
5.	Wilkin "heard that Harvard publicly asserted that they didn't allow Google to digitize in-copyright works."	Wilkin Tr. 119:12-14.
6.	On December 14, 2004, Google issued a press release announcing "that it was working with the libraries of Harvard, Stanford, the University of Michigan and the University of Oxford as well as The New York Public Library to digitally scan from their collections so that users worldwide can search them in Google."	Wilkin Tr. 33:24-34:16, JW2.
7.	James Hilton, who at one time held the position of UM's Associate Provost for Academic Information and Instructional Technology Affairs, told Wilkin that he had been warned by Dale Flecker, who at one time held the position of Associate Director for Planning and Systems at the Harvard University Library, that UM had not "done much deep thinking on copyright issues" in connection with UM's decision to allow Google to digitize in-copyright works.	Wilkin Tr. 122:7-124:15.
8.	Microsoft funded a mass digitization project at several university libraries that intended to scan only public domain books.	Christenson Tr. 24:9-17; Hirtle Tr. 50:24-52:16; Farley Tr. 11:16-14:14.
	<b>GOOGLE BOOK SEARCH PROJECT</b>	
9.		Clancy Tr. 17:5-11.
10.		Clancy Tr. 20:24-21:5.
11.		Clancy Tr. 17:12-18:6.


No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
12.	[REDACTED] [REDACTED] [REDACTED] [REDACTED] in [REDACTED]	Clancy Tr. 17:12-18:6.
	<b>GOOGLE COOPERATIVE AGREEMENTS</b>	
13.	[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]	Answer ¶ 34; UM ROG No. 3(k); Rosenthal Decl., Ex. 80 (UM-Google Cooperative Agreement).
14.	[REDACTED] [REDACTED] [REDACTED] [REDACTED]	Answer ¶ 35; Christenson Tr. 39:19-40:4; Rosenthal Decl., Ex. 82 (UC-Google Cooperative Agreement).
15.	[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]	Answer ¶ 36; Rosenthal Decl., Ex. 85 (UW-Google Cooperative Agreement).
16.	[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]	Answer ¶ 37; Rosenthal Decl., Ex. 83 (CIC-Google Cooperative Agreement).
17.	[REDACTED] [REDACTED] [REDACTED] [REDACTED]	Answer ¶ 38; Rosenthal Decl., Ex. 84 (Cornell-Google Cooperative Agreement) at ¶ 3; Hirtle Tr. 71:2-6.

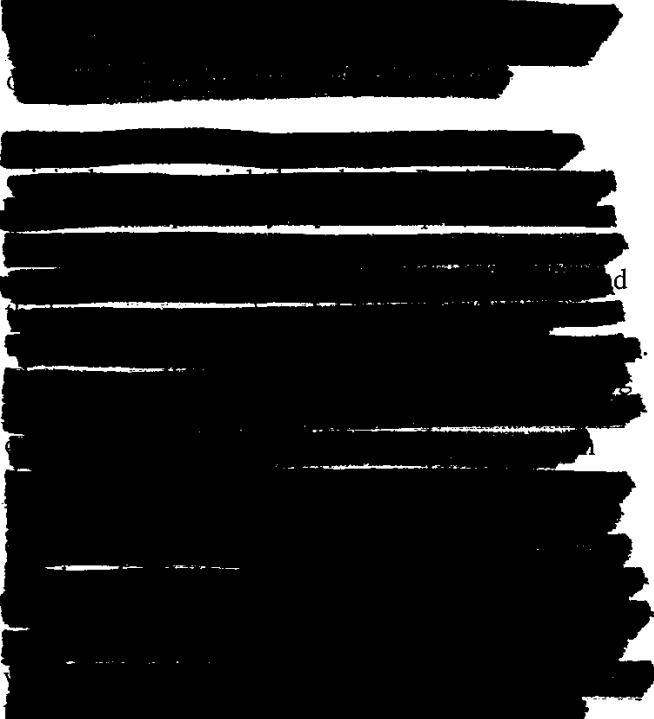



No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
	<b>SCOPE OF PROJECT</b>	
18.	In 2004, Google announced that it planned to create an online database of all the world's books, beginning with agreements with major universities in the United States.	Rosenthal Decl., Ex. 96 (Clancy Exhibit No. 3).
19.	[REDACTED]	Clancy Tr. 54:10-20.
20.	[REDACTED]	Clancy Tr. 54:21-55:1.
21.	[REDACTED]	Wilkin Tr. 100:8-13.
22.	As of December 20, 2011, UM had incorporated into the HDL 4,490,155 digitized volumes.	UM RFA No. 32.
23.	With the exception of digitizing books to make them available to people with print disabilities, the University Librarian of UM was not aware of any instance prior to entering into the UM-Google Cooperative Agreement in which UM digitized works that were still protected by copyright.	Courant Tr. 31:12-25.
24.	As of December 9, 2011, UC had provided Google with 3,105,945 printed volumes that were digitized by Google and are now in the HDL.	UC RFA No. 26; Farley Tr. 63:14-18.
25.	[REDACTED]	Christenson Tr. 103:10-11.
26.	UC was prepared to provide up to five million books for digitization, including works protected by copyright.	Farley Tr. 90:13-91:6.
27.	As of December 9, 2011, UW had provided Google with 511,432 printed volumes that, upon information and belief, were digitized by Google and are now in the HathiTrust Digital Library.	UW RFA No. 26.
28.	[REDACTED]	Hirtle Tr. 123:25-124:13; 178:20-179:10.

No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
	<b>OPERATIONS</b>	
	<i>Selection/Collection</i>	
29.	Pursuant to the UM-Google Cooperative Agreement, UC-Google Cooperative Agreement, UW-Google Cooperative Agreement, CIC-Google Cooperative Agreement and Cornell-Google Cooperative Agreement (collectively, the "Google Cooperative Agreements"), each Defendant cooperates with Google to identify works from its individual collection to be digitized.	Answer ¶ 50.
30.	The books selected for digitization pursuant to the Google Cooperative 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.	Answer ¶ 50.
31.	It was UM's and MLibrary's intent to digitize essentially all of the collections of the library except for works that were fragile, not of the size that would fit the digitization process or unable or difficult to be copied for one reason or another.	Courant Tr. 64:15-25.
32.		Farley Tr. 41:2-19.
33.		Wilkin Tr. 148:9-149:7; Christenson Tr. 68:6-11; Hirtle Tr. 153:12-18; Farley Tr. 44:20-45:2, 49:5-18; 52:21-53:17.
34.		Hirtle Tr. 153:12-18.
35.		Clancy Tr. 47:16-49:8; Christenson 68:18-70:15; Hirtle Tr. 152:16-153:9.


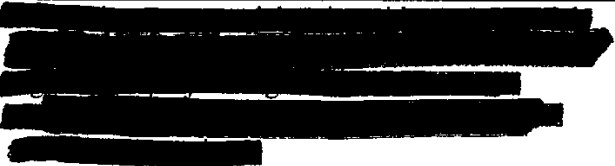
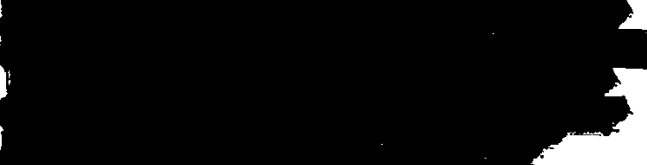
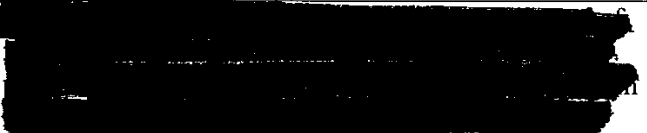

No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
36.		Clancy Tr. 49:9-50:21.
37.		Christenson Tr. 76:3-77:12.
38.		Hirtle Tr. 135:2-16.
39.	Witnesses from UC and Cornell were not aware of any person at any time analyzing any of the four fair use factors set forth in 17 U.S.C. § 107 with respect to any particular book that was digitized from their library collections.	Christenson 145:20-149:14; Hirtle Tr. 227:13-229:14.
40.		UM/UC ROG No. 2; Christenson Tr. 65:8-65:24.
41.		Clancy Tr. 42:19 – 43:5; Christenson Tr. 67:8-14.
42.		UM/UC/UW ROG No. 2; Wilkin Tr. 143:6-145:18; Farley Tr. 45:10-47:17.
43.		Hirtle Tr. 128:12-129:3.
	<i>Shipment/Delivery</i>	

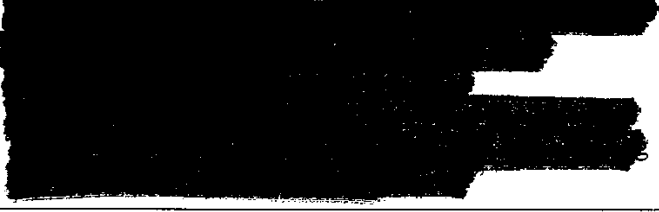



No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
44.	Library staff at each of the University prepared print copies of works from the University's library collection, including the Infringed Books, for shipment to one of Google's scanning centers.	UM/UC/UW RFA No. 12.
45.		Christenson Tr. 77:19-78:25.
46.	Google arranged for transportation of print copies of works in the Universities' collection, including the Infringed Books, from, and back, to the library that prepared the print copies for shipment.	UM/UC/UW RFA No. 12.
47.	Pursuant to the Google Cooperative Agreements, the works selected for digitization are delivered to a facility that is located either on or off the Defendant's campus and that is occupied by Google personnel and scanning equipment.	Answer ¶ 50.
	<i>Scanning</i>	
48.	Google prepared a digital copy of each Infringed Book based on a print copy of the work obtained from one of the Universities (each such copy, a "Master Digital Copy").	UM/UC/UW RFA Response No. 13.
49.	Each Master Digital Copy created by Google includes an image component representing photographic reproductions of the pages of the Work ("Image File") and a Unicode text component representing text in machine-readable format ("Text File").	UM RFA Response No. 14; Answer ¶ 52; Clancy Tr. 64:13-16; Christenson Tr. 91:12-23; Hirtle Tr. 109:10-15.

No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
50.		Courant Tr. 68:14-69:23.
51.		Clancy Tr. 64:17-65:9.
	<i>Digitization Costs</i>	
52.		Clancy Tr. 57:20-58:5.
53.	Some libraries have estimated their costs of performing the act of digitization at approximately \$100 per volume.	Answer ¶ 53.
54.	UM estimates it costs somewhere between \$35 and several hundred dollars per volume and that an estimate of \$60 per book sounds "a bit low."	Wilkin Tr. 99:4-8; 102:11.
55.		Wilkin Tr. 156:3-10; Rosenthal Decl., Ex. 92.


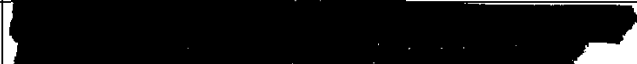











No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
56.	[REDACTED]	Wilkin Tr. 156:16-157:3.
57.	[REDACTED]	Hirtle Tr. 146:7-136:22; 140:16-25.
58.	[REDACTED]	Farley Tr. 36:21-37:19, 64:3-18.
59.	[REDACTED]	Hirtle Tr. 149:21-151:9.
60.	[REDACTED]	Farley Tr. 63:19-64:1.
61.	For 2011 the general fund budget for UM's libraries was between \$50 and \$55 million.	Courant Tr. 25:3-25.
	<i>University Copy</i>	
62.	Pursuant to the Google Cooperative Agreements, after digitizing a book from the collection of a Defendant, Google has provided digital copies of books from a Defendant's library collections either to that Defendant or, at the Defendant's request, to MLibrary.	Answer ¶¶ 2, 52.
63.	Google provided one or more digital copies of each of the Infringed Books to UM.	UM RFA No. 19.
64.	[REDACTED]	UC/UW RFA No. 20; Farley Tr. 70:6-18.
	<b>GOOGLE COMMERCIAL PURPOSES</b>	
65.	[REDACTED]	Courant Tr. 52:3-25.
66.	[REDACTED]	Wilkin Tr. 131:2-8.

No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
67.		Wilkin Tr. 131:24-132:22.
68.		Christenson Tr. 98:3-99:12.
69.	If a user conducts a search on the website books.google.com for the phrase "secure cheap advertising," which appears in the text of page 287 in the book <i>Good Troupers All</i> by Gladys Malvern, the copyright in which is owned by Plaintiff ALF, the search results page includes a link to the work (without displaying the content), as well as various advertisements from which Google will earn revenue if the user clicks on one of the advertisements.	Clancy Tr. 87:17 – 89:23; Rosenthal Decl. ¶ 88, Ex. 86 (6/4/12 Printout of Google Books Search Results).
70.		Clancy Tr. 108:11-22.
71.		Clancy Tr. 117:4-20.
72.		Clancy Tr. 121:19-122:10.
	<b>HATHITRUST</b>	
73.	<i>HathiTrust Overview</i>	
74.	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 HathiTrust Digital Library ("HDL"), the shared digital repository of digital collections of institutions participating in the HathiTrust Service.	Answer ¶ 62.

No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
75.	Defendants store digital copies of the books that were provided to them by Google in the HDL.	Answer ¶ 2.
76.	As of October 5, 2011, the HDL contained 9,709,348 volumes, amounting to 435 terabytes of data.	Answer ¶ 39.
77.	As of June 25, 2012, the HDL included 10,405,889 total volumes, 5,519,596 book titles, 272,002 serial titles, 3,642,061,150 pages, 466 terabytes of data, the equivalent of 123 miles and 8,455 tons of printed materials. Of the 10,405,889 volumes, 3,097,761 volumes (~ 30%) are considered as being in the public domain, meaning that 7,308,128 (~ 70%) of the total) are protected by copyright.	Rosenthal Decl., Ex. 105.
78.	HathiTrust receives the “overwhelming” majority of its revenues from participating academic libraries that “contribute” to HathiTrust.	Courant Tr. 119:5-20.
	<i>HathiTrust Revenues</i>	
79.		Wilkin Tr. 204:10-19; Rosenthal Decl., Ex. 93.
80.	“[T]here are years in which HathiTrust has brought in more than it spent” to cover “the expectation of future equipment upgrades” and “to be able to develop new projects and such.”	Courant Tr. 127:20-129:4.
81.		Wilkin Tr. 205:8-206:21; Rosenthal Decl., Ex. 93.
	<i>HathiTrust Architecture</i>	
82.	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.	Answer ¶ 66.

No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
83.	The incorporation of digital works and their associated metadata into the HDL is performed at MLibrary.	Answer ¶ 64.
84.	The digital works and associated metadata incorporated into the HDL are replicated to an active mirror site located on IU's Indianapolis campus.	Answer ¶ 64.
85.	The HathiTrust Service includes routine tape backups of all data in the HDL, which are stored at a facility on UM's campus and are replicated to create a second backup stored at a separate location on UM's campus.	Answer ¶¶ 64, 66.
86.	Four "HathiTrust Digital Copies" of each of the Infringed Books are maintained in the HDL: (1) the "Initial HathiTrust Digital Copy" received from Google, (2) the "Mirror Site HathiTrust Digital Copy," (3) the "First Backup Tape Digital Copy," and (4) the "Second Backup Tape HathiTrust Digital Copy."	UM/HathiTrust/UC/UW ROG No. 3.
87.	Each Initial HathiTrust Digital Copy received from Google includes an Image File and Text File.	UM RFA Response No. 14.
88.	The Initial HathiTrust Digital Copy is stored on a server (a) connected to the HathiTrust private computer network and the UM campus computer network and (b) physically located at Michigan Academic Computing Center, Room 100, 1000 Oakbrook Drive, Ann Arbor, Michigan.	HT/UM ROG Nos. 3(h) & (i).
89.	The Mirror Site HathiTrust Digital Copy is stored on a server (a) connected to the HathiTrust private computer network and the IU – Purdue University Indianapolis campus computer network and (b) physically located at Informatics & Communications Technology Complex, Room IT 024, 535 West Michigan Street, Indianapolis, Indiana.	HT/UM ROG Nos. 3(h) & (i).
90.	The Initial HathiTrust Digital Copy and Mirror Site HathiTrust Digital Copy are stored on media connected to World Wide Web servers.	HT/UM ROG No. 3(g).
91.	The First Backup HathiTrust Digital Copy is stored on a server (a) connected to the UM campus computer network and (b) physically located at Michigan Academic Computing Center, Room 100, 1000 Oakbrook Drive, Ann Arbor, Michigan.	HT/UM ROG Nos. 3(h) & (i).

No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
92.	The Second Backup HathiTrust Digital Copy is stored on a server (a) connected to the UM campus computer network and (b) physically located at Arbor Lakes Data Facility, Room 9100, Arbor Lakes Building 1, 4251 Plymouth Rd., Ann Arbor, Michigan.	HT/UM ROG Nos. 3(h) & (i).
	<i>HathiTrust Uses</i>	
93.	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).	Answer ¶ 68.
94.	It is theoretically possible to “reverse engineer” a search index to display snippets, meaning to display the words in a book that precede and follow the queried text.	Wilkin Tr. 234:3-236:13.
95.	The HathiTrust Service permits certain users to view, search, print, and download full copies of certain volumes in the HDL, with the level of access determined in part by the identity of the user and the copyright status of the work.	Answer ¶ 69.
96.	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.	Answer ¶ 70.
97.	A work stored in the HDL may be assigned the attribute “OPB” (an acronym standing for Out of Print and Brittle) – in the HathiTrust Rights Database, which indicates that the work has been determined to be out of print and unusable or no longer in the library’s collection because it is missing.	Wilkin Tr. 85:6-88:23.
98.	The “OPB” attribute is typically assigned after digitization.	Wilkin Tr. 88:7-20.
99.	The “OPB” attribute are made available to UM authenticated users and users of the UM library to view, print and download.	Wilkin Tr. 222:2-227:17; JW7 at 7, No. 2.

No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
	<i>HathiTrust User Access and Security</i>	
100.	Ninety-three (93) individuals located in Michigan, New York, Minnesota, Wisconsin and California have "privileged access" to materials stored in the HDL.	HT ROG No. 3(l); Wilkin Tr. 190:21-23, 192:11-19.
101.	Authenticated users with "privileged access" to the HDL can view and download any work that is stored in the HDL one page at a time.	Wilkin Tr. 192:21-194:9.
102.	Approximately five (5) users and thirty-two students (32) or faculty with print disabilities may obtain "privileged access" to the HDL without authenticating onto the system from a particular workstation.	HT ROG No. 3(l); Wilkin Tr. 193:20-194:6.
103.	Fourteen (14) different individuals located in Michigan and Indiana have physical access to one or more of the servers or backup tapes comprising storing the digital content in the HDL.	HT ROG No. 3(l).
104.	 fy	Clancy Tr. 94:1-99:20, 104:2-18.
105.		Christenson Tr. 120:14-24.
106.		Wilkin Tr. 198:13-200:19; Rosenthal Decl., Exs. 87   88     , 89    



No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
107.	[REDACTED]	Rosenthal Decl., Ex. 88 [REDACTED] [REDACTED]t [REDACTED] [REDACTED] [REDACTED] of [REDACTED] [REDACTED] [REDACTED] [REDACTED]  [REDACTED]l [REDACTED] [REDACTED]
108.	[REDACTED] [REDACTED] [REDACTED]	Wilkin Tr. 174:23-178:17.
109.	[REDACTED] [REDACTED] [REDACTED]	Wilkin Tr. 174:23-178:17.
	<b>BOOK EXAMINATION</b>	
110.	UM evaluated the physical condition of the Infringed Books that came from MLibrary and conducted searches of the databases it uses to identify the availability and price of a new book in response to Plaintiffs' discovery requests.	Wilkin Tr. 74:16-75:5; 78:24-79:5.
111.	When, in response to Plaintiffs' discovery requests, UM and UC performed a search to determine whether unused replacement copies of the Infringed Books from their libraries could be obtained at a "fair price," they reported that new copies of identical versions of many Infringed Books were advertised for sale for under \$20 a copy.	UM/UC RFA No. 5 (admitting that new copies of identical versions of many Infringed Books could be purchased for under \$20).
112.	When, in response to Plaintiffs' discovery requests, UM, UC and UW evaluated the physical condition of the Infringed Books, only six were identified as "damaged" and only twenty-six were identified as "deteriorating or at substantial risk of deteriorating in the near future."	UM/UC/UW RFA No. 8.

No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
113.	Works published between 1850 and 1990 were typically printed with acid content in the paper and that he considers any such works to be "deteriorating with the natural process of decay."	Wilkin Tr. 66:8-67:25; <i>see also</i> Courant Tr. 43:11-44:10.
	<b>ORPHAN WORKS PROJECT</b>	
114.	The Orphan Works Project ("OWP") is an initiative to, <i>inter alia</i> , identify amongst the in-copyright works in the HDL so-called "orphan works" – in-copyright works for which the copyright holder cannot be found. "[U]nder the OWP pilot process, OWP staff undertook a multistep due diligence process to check whether a work is commercially available for sale and, if it is not, to attempt to locate and contact the copyright holder. If the OWP staff were unsuccessful in identifying the copyright holder, the bibliographic information for the work would have been listed on the HathiTrust Service for ninety days." Furthermore, "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."	Answer ¶¶ 3, 73, 74.
115.	UM decided to engage in the OWP in the months following, and in light of, Judge Chin's rejection of the Amended Settlement Agreement ("ASA") in the Google Books case because the ASA had provided "a mechanism whereby orphan works could be used without negative consequences . . . [a]nd when the settlement didn't go through, that avenue for making these works useable was blocked off and we asked ourselves the question, is there some way we can get some benefit out of these works for digital uses."	Courant Tr. 141:22-144:20.
116.	Books determined to be orphan works under the OWP will be made available to "tens of thousands" of people, including currently registered UM students, faculty, staff and people who walk into the MLibrary facilities.	Courant Tr. 146:7-20.

NO.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
117.	On May 16, 2011, MLibrary announced the launch of the OWP.	FAC ¶ 73; Answer ¶ 73.
118.	On June 23, 2011, UW's intention to participate in the OWP became public.	Answer ¶ 36.
119.	On August 24, 2011, UC announced its intention to join the OWP.	Answer ¶ 35.
120.	On August 24, 2011, Cornell announced its intention to join the OWP.	Answer ¶ 38.
121.	A book entitled <i>Good Troupers All: The Story of Joseph Jefferson</i> by Gladys Malvern was digitized and included in the HDL and was preliminarily identified as a book that UM planned to make available on a limited basis contemplated as part of the OWP if the copyright holder were not identified.	Answer ¶ 13.
122.	A book entitled <i>Lost Country</i> by Jack Salamanca was digitized and included in the HDL and was preliminarily identified as a book that UM planned to make available on a limited basis contemplated as part of the OWP if the copyright holder were not identified.	Answer ¶ 29.
123.	On September 16, 2011, UM announced that there were "number of errors, some of them serious," in the process that had been used to identify orphan candidates as part of the Orphan Works Project.	Rosenthal Decl., Ex. 94 (9/16/11 UM Library Announcement); Answer ¶ 78; Wilkin Tr. 241:24-242:14.
124.	UM suspended work in the OWP.	Courant Tr. 159:8-11.
125.	Under the OWP, several books whose authors should have been easily locatable but were not located were wrongly identified as orphan candidates.	Wilkin Tr. 241:24-242:14; Courant Tr. 159:12-19, 173:8-23.
126.	Wilkin characterized the "errors" in the OWP process as "errors of execution of management" – meaning that steps that had been designed were not followed, so "closer management" is required.	Wilkin Tr. 241:24-242:14.
127.	UM intends to proceed with identifying prospective orphan works and expects to list candidate orphan works on a website and plausibly other locations.	Courant Tr. 158:20-25, 161:6-10. Answer ¶ 78.

No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
	<b>MARKET HARM</b>	
128.	Defendants' unlicensed digitization and use of the Infringed Books has harmed or threatens to harm Plaintiffs' interests in the Infringed Books in several ways, including those described below.	<p>In addition to the evidence cited below, descriptions of the various harms to the Individual Plaintiffs are set forth at:</p> <p>Stiles Decl. ¶¶ 10-19;  Andreassen Decl. ¶¶ 6-10;  Cummings Decl. ¶¶ 6-13;  Grundstrom Decl. ¶¶ 6-12;  Robinson Decl. ¶¶ 6-10;  Ronning Decl. ¶¶ 6-11; Shapiro Decl. ¶¶ 6-10; Simpson Decl. ¶¶ 6-10; Weldon Decl. ¶¶ 6-10; and White Decl. ¶¶ 7-10, 12-17.</p> <p>Descriptions of the various harms to the Associational Plaintiffs are set forth at:</p> <p>AG Decl. ¶¶ 27-34; ALF Decl. ¶¶ 5-18; NFF Decl. ¶¶ 5-12; SFF ¶¶ 5-12; TWUC Decl. ¶¶ 7-15; and UNEQ Decl. ¶¶ 5-12.</p>
129.	(a) Loss or potential loss of revenue from sale or licensing of digital copies of Plaintiffs' copyrighted works to Defendants for inclusion in a digital archive for preservation or other purposes;	<p>Andreassen/Cummings/Grundstrom/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC ROG II No. 5; Stiles Decl. ¶¶ 11-12, Exs. B-D; Stiles Tr. 22:25-23:3; 104:14-22, 105:4-9; 163:6-9, 166:4-23; Cummings Tr. 63:25-64:19.</p>
130.	(b) Loss or potential loss of revenue from sale or licensing of digital copies of Plaintiffs' copyrighted works for use in connection with non-consumptive research;	<p>Andreassen/Cummings/Grundstrom/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC ROG II No. 5; Stiles Tr. ¶ 13; Stiles Tr. 35:15-20; 168:6-19.</p>

No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
131.	(c) Loss or potential loss of revenue from sale or licensing of digital copies of Plaintiffs' copyrighted works for use purely in connection with full-text searching, including disruption of commercial licenses granted to online booksellers such as Amazon, whereby authors (or their publishers) authorize their books to be indexed and made fully searchable in order to promote sales.	Andreassen/Cummings/Grundstrom/Loukakis/Robinson/Ronnin g/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC ROG II No. 5; Stiles Decl. ¶ 14; Rosenthal Decl., Ex. 104 (Amazon Search Inside License); Stiles Tr. 180:10-182:11, 184:18-23, 189:14-191:17.
132.	(d) Loss or potential loss of revenue from sale or licensing of derivative uses, including derivative uses made possible by artificial intelligence and other technologies to create translations, anthologies, abridgments and versions suited for new and emerging platforms and devices;	Andreassen/Cummings/Grundstrom/Loukakis/Robinson/Ronnin g/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC ROG II No. 5.
133.	(e) Loss or potential loss of revenue from sale or licensing of digital copies of Plaintiffs' copyrighted works due to the availability of such works for tens of thousands of people to view, print and download as a result of the accidental or mistaken identification of such works as public domain or "orphan works";	Andreassen/Cummings/Grundstrom/Loukakis/Robinson/Ronnin g/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC ROG II No. 5; White Decl. ¶¶ 7-10, Exs. C & D; ALF Decl. ¶¶ 12-18, Exs. D & E; UNEQ Decl. ¶ 10, Ex. A; White Tr. 98:2-18; Stiles Tr. 188:1-189:13.

No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
134.	(f) Exposure of Plaintiffs' copyrighted works to virtually unlimited piracy due to breaches in security without providing Plaintiffs any contractual protections or financial remuneration in exchange for that risk;	<p>Edelman Decl., <i>passim</i>;  Stiles Decl. ¶ 16;  Stiles Tr. 130:4-14, 167:1-4;  Cummings Tr. 63:25-64:19;  Cummings Tr. 108:13-20;  110:19-11:2; Rønning Tr. 102:11-18;</p> <p>Andreassen/Cummings/Grundstrom/Loukakis/Robinson/Ronnin g/Roy/Salamanca/Shapiro/Simp son/Stiles/Weldon ROG Nos. 6-7; AG/ALCS/ALF/ASA/TWUC ROG Nos. 8-9;</p> <p>Andreassen/Cummings/Grundstrom/Loukakis/Robinson/Ronnin g/Roy/Salamanca/Shapiro/Simp son/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC RFA Nos. 9-11;</p> <p>Andreassen/Cummings/Grundstrom/Loukakis/Robinson/Ronnin g/Roy/Salamanca/Shapiro/Simp son/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC ROG II No. 5.</p>
135.	(g) Loss or potential loss of control over the reproduction and distribution of plaintiffs' copyrighted works.	<p>Andreassen/Cummings/Grundstrom/Loukakis/Robinson/Ronnin g/Roy/Salamanca/Shapiro/Simp son/Stiles/Weldon ROG Nos. 6-7; AG/ALCS/ALF/ASA/TWUC ROG Nos. 8-9;</p> <p>Andreassen/Cummings/Grundstrom/Loukakis/Robinson/Ronnin g/Roy/Salamanca/Shapiro/Simp son/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC RFA Nos. 9-11;</p> <p>Andreassen/Cummings/Grundstrom/Loukakis/Robinson/Ronnin g/Roy/Salamanca/Shapiro/Simp son/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC ROG II No. 5.</p>

No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
136.	(h) Loss or potential loss of revenue from sale and/or licensing of hardcopies and digital copies of Plaintiffs' copyrighted works to libraries and/or archives.	<p>Andreassen/Cummings/Grundstrom/Loukakis/Robinson/Ronnin g/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon ROG Nos. 6-7; AG/ALCS/ALF/ASA/TWUC ROG Nos. 8-9;</p> <p>Andreassen/Cummings/Grundstrom/Loukakis/Robinson/Ronnin g/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC RFA Nos. 9-11;</p> <p>Andreassen/Cummings/Grundstrom/Loukakis/Robinson/Ronnin g/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC ROG II No. 5;</p> <p>Christenson Tr. 136:25-139:4 (existence of digital copy in HDL may impact library's decision whether to acquire print copy of book), Rosenthal Decl., Ex. 103 (Christenson article discussing cost-savings by libraries resulting from HathiTrust);</p> <p>Cummings Tr. 64:10-19 (lost library book sales); Rønning Tr. 106:4-10.</p>
137.	(i) Loss or potential loss of revenue from entering into collective licensing agreements for mass digitization of works, including disruption of existing programs to digitize library collections	<p>Gervais Decl., <i>passim</i>;</p> <p>NFF Decl. ¶¶ 7, 10, Ex. A;</p> <p>SFF Decl. ¶¶ 7, 10, Ex. A¶.</p>
	<b>COPYRIGHT OWNERSHIP</b>	
138.	Andreassen owns the copyright in and to the Andreassen Works.	Andreassen Decl. ¶ 3.
139.	Cummings owns the copyright in and to the Cummings Works.	Cummings Decl. ¶ 3, Exs. A & B.
140.	Grundström owns the copyright in and to the Grundström Works.	Grundström Decl. ¶ 3.

<b>No.</b>	<b>PLAINTIFFS' UNDISPUTED FACT</b>	<b>SUPPORTING EVIDENCE</b>
141.	Loukakis owns the copyright in and to the Loukakis Works.	Loukakis ROG No. 1, Schedule A.
142.	Robinson owns the copyright in and to the Robinson Works.	Robinson Decl. ¶ 3, Exs. A & B.
143.	Rønning owns the copyright in and to the Rønning Works.	Rønning Decl. ¶ 3.
144.	Roy owns the copyright in and to the Roy Works.	Roy Decl. ¶ 3.
145.	Salamanca owns the copyright in and to the Salamanca Works.	White Decl. ¶ 5, Exs. A & B.
146.	Shapiro owns the copyright in and to the Shapiro Works.	Shapiro Decl. ¶ 3, Ex. A.
147.	Simpson owns the copyright in and to the Simpson Works.	Simpson Decl. ¶ 3.
148.	Stiles owns the copyright in and to the Stiles Works.	Stiles Decl. ¶ 6, Ex. A.
149.	Weldon owns the copyright in and to the Weldon Works.	Weldon Decl. ¶ 3, Exs. A & B.
150.	AG owns the copyrights in and to the AG Works.	AG Decl. ¶ 26, Ex. A.
151.	ALF owns the copyright in and to the ALF Works.	ALF Decl. ¶ 4, Exs. A-C.
152.	ASA owns the copyright in and to the ASA Works.	ASA ROG No. 1, Schedule A.
153.	TWUC owns the copyright in and to the TWUC Works.	TWUC Decl. ¶ 6, Exs. A & B.
	<b>PUBLICATION</b>	
154.	Each of the Infringed Books is published.	Andreassen/Cummings/Grundstrom/Loukakis/Robinson/Rønning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALF/ASA/TWUC ROG No. 1, Ex. A.
155.	Only published works were digitized in the Google Library Project.	UM/UC/UW RFA No. 4; Clancy Tr. 45:3 – 46:8; Hirtle Tr. 191:7-20.
	<b>COPYING OF INFRINGED BOOKS</b>	
156.	Pursuant to one or more of the Google Cooperative Agreements, the Andreassen Works were digitized and included in the HDL.	Answer ¶ 22; <a href="http://www.hathitrust.org/hathifiles">http://www.hathitrust.org/hathifiles</a> ; UM RFA No. 35.



No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
157.	Pursuant to one or more of the Google Cooperative Agreements, the Cummings Works were digitized and included in the HDL.	Answer ¶ 23; <a href="http://www.hathitrust.org/hathifiles">http://www.hathitrust.org/hathifiles</a> ; UM RFA No. 35.
158.	Pursuant to one or more of the Google Cooperative Agreements, the Grundstrom Works were digitized and included in the HDL.	Answer ¶ 24; <a href="http://www.hathitrust.org/hathifiles">http://www.hathitrust.org/hathifiles</a> ; UM RFA No. 35.
159.	Pursuant to one or more of the Google Cooperative Agreements, the Loukakis Works were digitized and included in the HDL.	Answer ¶ 25; <a href="http://www.hathitrust.org/hathifiles">http://www.hathitrust.org/hathifiles</a> ; UM RFA No. 35.
160.	Pursuant to one or more of the Google Cooperative Agreements, the Ronning Works were digitized and included in the HDL.	Answer ¶ 26; <a href="http://www.hathitrust.org/hathifiles">http://www.hathitrust.org/hathifiles</a> ; UM RFA No. 35.
161.	Pursuant to one or more of the Google Cooperative Agreements, the Robinson Works were digitized and included in the HDL.	Answer ¶ 27; <a href="http://www.hathitrust.org/hathifiles">http://www.hathitrust.org/hathifiles</a> ; UM RFA No. 35.
162.	Pursuant to one or more of the Google Cooperative Agreements, the Roy Works were digitized and included in the HDL.	Answer ¶ 28; <a href="http://www.hathitrust.org/hathifiles">http://www.hathitrust.org/hathifiles</a> ; UM RFA No. 35.
163.	Pursuant to one or more of the Google Cooperative Agreements, the Salamanca Works were digitized and included in the HDL.	Answer ¶ 29; <a href="http://www.hathitrust.org/hathifiles">http://www.hathitrust.org/hathifiles</a> ; UM RFA No. 35.
164.	Pursuant to one or more of the Google Cooperative Agreements, the Shapiro Works were digitized and included in the HDL.	Answer ¶ 30; <a href="http://www.hathitrust.org/hathifiles">http://www.hathitrust.org/hathifiles</a> ; UM RFA No. 35.
165.	Pursuant to one or more of the Google Cooperative Agreements, the Simpson Works were digitized and included in the HDL.	Answer ¶ 31; <a href="http://www.hathitrust.org/hathifiles">http://www.hathitrust.org/hathifiles</a> ; UM RFA No. 35.
166.	Pursuant to one or more of the Google Cooperative Agreements, the Stiles Works were digitized and included in the HDL.	Answer ¶ 32; <a href="http://www.hathitrust.org/hathifiles">http://www.hathitrust.org/hathifiles</a> ; UM RFA No. 35.
167.	Pursuant to one or more of the Google Cooperative Agreements, the Weldon Works were digitized and included in the HDL.	Answer ¶ 33; <a href="http://www.hathitrust.org/hathifiles">http://www.hathitrust.org/hathifiles</a> ; UM RFA No. 35.
168.	Pursuant to one or more of the Google Cooperative Agreements, the AG Works were digitized and included in the HDL.	<a href="http://www.hathitrust.org/hathifiles">http://www.hathitrust.org/hathifiles</a> ; UM RFA No. 35.

No.	PLAINTIFFS' UNDISPUTED FACT	SUPPORTING EVIDENCE
169.	Pursuant to one or more of the Google Cooperative Agreements, the ALF Works were digitized and included in the HDL.	Answer ¶ 13; <a href="http://www.hathitrust.org/hathifiles">http://www.hathitrust.org/hathifiles</a> ; UM RFA No. 35.
170.	Pursuant to one or more of the Google Cooperative Agreements, the TWUC Works were digitized and included in the HDL.	<a href="http://www.hathitrust.org/hathifiles">http://www.hathitrust.org/hathifiles</a> ; UM RFA No. 35.
171.	Pursuant to one or more of the Google Cooperative Agreements, the ASA Works were digitized and included in the HDL.	<a href="http://www.hathitrust.org/hathifiles">http://www.hathitrust.org/hathifiles</a> ; UM RFA No. 35.
172.	Defendants admit that the Image File and Text File, which were generated through the digitization process for each Infringed Book and incorporated into the HDL, each "implicates the right of reproduction referenced in 17 U.S.C. § 106(1)."	UM RFA No. 15.
173.	Plaintiffs never authorized any of the Defendants to digitize, copy or make any other uses of any of the Infringed Books.	Stiles Decl. ¶ 9; White Decl. ¶ 11; Andreassen/Cummings/Grundstrom/Loukakis/Robinson/Ronning/Roy/Shapiro/Simpson/Weldon Decl. ¶ 5; AG Decl. ¶ 26; ALF ¶ 4; TWUC ¶ 6; UM/UC/ UW RFA No. 7.
174.	Of the 116 Infringed Books, 77 are in print and 30 are available for purchase in digital format.	Andreassen/Cummings/Grundstrom/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC ROG II No. 1; Andreassen/Cummings/Grundstrom/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC ROG II No. 4.

Dated: New York, New York  
June 29, 2012

FRANKFURT KURNIT KLEIN & SELZ, P.C.

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*Attorneys for Plaintiffs*

**APPENDIX A**

**DEFINITIONS**

**Parties**

***Associational Plaintiffs***

1. “AG” means Plaintiff The Authors Guild, Inc.
2. “ALF” means Plaintiff The Authors League Fund, Inc.
3. “ASA” means Plaintiff The Australian Society of Authors Limited.
4. “UNEQ” means Plaintiff Union Des Écrivaines et des Écrivains Québécois.
5. “ALCS” means Plaintiff Authors’ Licensing and Collecting Society.
6. “SFF” means Plaintiff Sveriges Författarförbund.
7. “NFF” means Plaintiff Norsk Faglitterær Forfatter- Og Oversetterforening.
8. “TWUC” means Plaintiff The Writers’ Union of Canada.
9. “Associational Plaintiffs” means AG, ALF, ASA, UNEQ, ALCS, SFF, NFF and TWUC, collectively.

***Individual Plaintiffs***

10. “Andreassen” means Plaintiff Trond Andreassen.
11. “Cummings” means Plaintiff Pat Cummings.
12. “Grundström” means Plaintiff Erik Grundström.
13. “Loukakis” means Plaintiff Angelo Loukakis.
14. “Robinson” means Plaintiff Roxana Robinson.
15. “Rønning” means Plaintiff Helge Rønning.
16. “Roy” means Plaintiff André Roy.
17. “Salamanca” means Plaintiff Jack R. Salamanca.
18. “Shapiro” means Plaintiff James Shapiro.
19. “Simpson” means Plaintiff Danièle Simpson.

20. “Stiles” means Plaintiff T.J. Stiles.

21. “Weldon” means Plaintiff Fay Weldon.

22. “Individual Plaintiffs” means Andreassen, Cummings, Grundstrom, Loukakis, Robinson, Ronning, Roy, Salamanca, Shapiro, Simpson, Stiles and Weldon, collectively.

***Defendants***

23. “UM” means The Regents of The University of Michigan which, pursuant to a stipulation between the parties, Plaintiffs have sued herein by naming as a defendant Mary Sue Coleman in her official capacity as President of UM.

24. “UC” means the Board of Regents of the University of California which, pursuant to a stipulation between the parties, Plaintiffs have sued herein by naming as a defendant Mark G. Rudof in his official capacity as President of UC.

25. “UW” means The Board of Regents of The University of Wisconsin which, pursuant to a stipulation between the parties, Plaintiffs have sued herein by naming as a defendant Kevin Reilly in his official capacity as President of UW.

26. “IU” means The Trustees of Indiana University which, pursuant to a stipulation between the parties, Plaintiffs have sued herein by naming as a defendant Michael McRobbie in his official capacity as President of IU.

27. “Cornell” means defendant Cornell University.

28. “HathiTrust” means defendant HathiTrust which, according to Defendants’ Answer (defined below), “is the name of a service provided by UM under agreements with member institutions including [UM, UC, UW, IU and Cornell] (but only to the extent that HathiTrust constitutes an entity capable of being sued, which Defendants contend it does not) (‘HathiTrust Service’).”

29. “Defendants” means HathiTrust, UM, UC, UW, IU and Cornell, collectively.

30. “University” or “Universities” means UM, UC and UW, collectively or individually, as the case may be.

***Non-Parties***

31. “Google” means Google Inc.

**Pleadings**

32. “FAC” means Plaintiffs’ First Amended Complaint dated October 5, 2011.

33. “Answer” means Defendants’ Joint Answer and Defenses dated December 2, 2011.

**Declarations*****Attorneys***

34. “Rosenthal Declaration” means the Declaration of Edward H. Rosenthal dated June 29, 2012.

***Individual Plaintiffs***

35. “Andreassen Declaration” means the Declaration of Plaintiff Trond Andreassen dated June 22, 2012.

36. “Cummings Declaration” means the Declaration of Plaintiff Pat Cummings dated June 28, 2012.

37. “Grundström Declaration” means the Declaration of Plaintiff Erik Grundström dated June 26, 2012.

38. “Robinson Declaration” means the Declaration of Plaintiff Roxana Robinson dated June 26, 2012.

39. “Rønning Declaration” means the Declaration of Plaintiff Helge Rønning dated June 27, 2012.

40. “Roy Declaration” means the Declaration of Plaintiff André Roy dated June 27, 2012.

41. “Shapiro Declaration” means the Declaration of James Shapiro dated June 25, 2012.

42. “Simpson Declaration” means the Declaration of Danièle Simpson dated June 25, 2012.

43. “Stiles Declaration” means the Declaration of Plaintiff T.J. Stiles dated June 26, 2012.

44. “Weldon Declaration” means the Declaration of Plaintiff Fay Weldon dated June 25, 2012.

45. “White Declaration” means the Declaration of John White, literary agent for Plaintiff Jack R. Salamanca, dated June 21, 2012.

***Associational Plaintiffs***

46. “AG Declaration” means the Declaration of Paul Aiken dated June 29, 2012.

47. “ALCS Declaration” means the Declaration of Owen Atkinson dated June 27, 2012.

48. “ALF Declaration” means the Declaration of Isabel Howe dated June 26, 2012.
49. “UNEQ Declaration” means the Declaration of Francis Farley-Chevrier dated June 26, 2012.
50. “SFF Declaration” means the Declaration of Louise Hedberg dated June 26, 2012.
51. “NFF Declaration” means the Declaration of Jan Terje Helmi dated June 27, 2012.
52. “TWUC Declaration” means the Declaration of Kelly Duffin dated June 28, 2012.

***Experts***

53. “Gervais Declaration.” means the Declaration of Professor Daniel Gervais dated June 29, 2012.
54. “Edelman Declaration” means the Declaration of Professor Benjamin Edelman dated June 29, 2012.

**Deposition Transcripts**

***Depositions of Plaintiffs***

55. “Cummings Tr.” means the transcript from the deposition of Pat Cummings dated May 22, 2012, a copy of which is annexed as Exhibit 1 to the Rosenthal Declaration.
56. “Rønning Tr.” means the transcript from the deposition of Helge Rønning dated May 29, 2012, which is annexed as Exhibit 2 to the Rosenthal Declaration.
57. “Stiles Tr.” means the transcript from the deposition of T.J. Stiles dated May 31, 2012, which is annexed as Exhibit 3 to the Rosenthal Declaration.
58. “White Tr.” means the transcript from the deposition of John White, literary agent for Plaintiff J.R. Salamanca, dated June 8, 2012, which is annexed as Exhibit 4 to the Rosenthal Declaration.

***Depositions of Defendants***

59. “Christenson Tr.” means the transcript from the deposition of Heather Christenson (University of California) dated April 11, 2012, which is annexed as Exhibit 5 to the Rosenthal Declaration.
60. “Courant Tr.” means the transcript from the deposition of Paul Courant (HathiTrust/University of Michigan) dated April 24, 2012, which is annexed as Exhibit 6 to the Rosenthal Declaration.
61. “Farley Tr.” means the transcript from the deposition of Laine Farley (University of California) dated April 12, 2012, which is annexed as Exhibit 7 to the Rosenthal Declaration.

62. “Hirtle Tr.” means the transcript from the deposition of Peter Hirtle (Cornell University) dated April 18, 2012, which is annexed as Exhibit 8 to the Rosenthal Declaration.

63. “Wilkin Tr.” means the transcript from the deposition of John Wilkin (HathiTrust/University of Michigan) dated April 25, 2012, which is annexed as Exhibit 9 to the Rosenthal Declaration.

***Depositions of Non-Parties***

64. “Clancy Tr.” means the transcript from the deposition of Dan Clancy (Google) dated June 1, 2012, excerpts of which are annexed as Exhibit 10 to the Rosenthal Declaration.

**Written Discovery Responses**

***Responses from Individual Plaintiffs***

65. “Andreassen ROG” means Objections and Responses of Plaintiff Trond Andreassen to Defendants’ First Set of Interrogatories and Requests for the Production of Documents dated January 6, 2012, a copy of which is annexed as Exhibit 11 to the Rosenthal Declaration.

66. “Andreassen RFA” means Objections and Responses of Plaintiff Trond Andreassen to Defendants’ First Set of Requests for Admission dated January 6, 2012, a copy of which is annexed as Exhibit 12 to the Rosenthal Declaration.

67. “Andreassen ROG II” means Objections and Responses of Plaintiff Trond Andreassen to Defendants’ Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012, a copy of which is annexed as Exhibit 13 to the Rosenthal Declaration.

68. “Cummings ROG” means Objections and Responses of Plaintiff Pat Cummings to Defendants’ First Set of Interrogatories and Requests for the Production of Documents dated January 6, 2012, a copy of which is annexed as Exhibit 14 to the Rosenthal Declaration.

69. “Cummings RFA” means Objections and Responses of Plaintiff Pat Cummings to Defendants’ First Set of Requests for Admission dated January 6, 2012, a copy of which is annexed as Exhibit 15 to the Rosenthal Declaration.

70. “Cummings ROG II” means Objections and Responses of Plaintiff Pat Cummings to Defendants’ Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012, a copy of which is annexed as Exhibit 16 to the Rosenthal Declaration.

71. “Grundstrom ROG” means Objections and Responses of Plaintiff Erik Grundstrom to Defendants’ First Set of Interrogatories and Requests for the Production of Documents dated January 13, 2012, a copy of which is annexed as Exhibit 17 to the Rosenthal Declaration.



72. “Grundstrom RFA” means Objections and Responses of Plaintiff Erik Grundstrom to Defendants’ First Set of Requests for Admission dated January 13, 2012, a copy of which is annexed as Exhibit 18 to the Rosenthal Declaration.

73. “Grundstrom ROG II” means Objections and Responses of Plaintiff Erik Grundstrom to Defendants’ Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012, a copy of which is annexed as Exhibit 19 to the Rosenthal Declaration.

74. “Loukakis ROG” means Objections and Responses of Plaintiff Angelo Loukakis to Defendants’ First Set of Interrogatories and Requests for the Production of Documents dated January 13, 2012, a copy of which is annexed as Exhibit 20 to the Rosenthal Declaration.

75. “Loukakis RFA” means Objections and Responses of Plaintiff Angelo Loukakis to Defendants’ First Set of Requests for Admission dated January 12, 2012, a copy of which is annexed as Exhibit 21 to the Rosenthal Declaration.

76. “Loukakis ROG II” means Objections and Responses of Plaintiff Angelo Loukakis to Defendants’ Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012, a copy of which is annexed as Exhibit 22 to the Rosenthal Declaration.

77. “Robinson ROG” means Objections and Responses of Plaintiff Roxana Robinson to Defendants’ First Set of Interrogatories and Requests for the Production of Documents with Amended Schedule A dated January 9, 2012, a copy of which is annexed as Exhibit 23 to the Rosenthal Declaration.

78. “Robinson RFA” means Objections and Responses of Plaintiff Roxana Robinson to Defendants’ First Set of Requests for Admission dated January 9, 2012, a copy of which is annexed as Exhibit 24 to the Rosenthal Declaration.

79. “Robinson ROG II” means Objections and Responses of Plaintiff Roxana Robinson to Defendants’ Second Set of Interrogatories and Requests for the Production of Documents dated March 28, 2012, a copy of which is annexed as Exhibit 25 to the Rosenthal Declaration.

80. “Ronning ROG” means Objections and Responses of Plaintiff Helge Ronning to Defendants’ First Set of Interrogatories and Requests for the Production of Documents dated January 12, 2012, a copy of which is annexed as Exhibit 26 to the Rosenthal Declaration.

81. “Ronning RFA” means Objections and Responses of Plaintiff Helge Ronning to Defendants’ First Set of Requests for Admission dated January 12, 2012, a copy of which is annexed as Exhibit 27 to the Rosenthal Declaration.

82. “Ronning ROG II” means Objections and Responses of Plaintiff Helge Ronning to Defendants’ Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012, a copy of which is annexed as Exhibit 28 to the Rosenthal Declaration.

83. “Roy ROG” means Objections and Responses of Plaintiff Andre Roy to Defendants’ First Set of Interrogatories and Requests for the Production of Documents dated January 13, 2012, a copy of which is annexed as Exhibit 29 to the Rosenthal Declaration.

84. “Roy RFA” means Objections and Responses of Plaintiff Andre Roy to Defendants’ First Set of Requests for Admission dated January 13, 2012, a copy of which is annexed as Exhibit 30 to the Rosenthal Declaration.

85. “Roy ROG II” means Objections and Responses of Plaintiff Andre Roy to Defendants’ Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012, a copy of which is annexed as Exhibit 31 to the Rosenthal Declaration.

86. “Salamanca ROG” means Amended Objections and Responses of Plaintiff Jack R. Salamanca to Defendants’ First Set of Interrogatories and Requests for the Production of Documents with Second Amended Schedule A dated April 10, 2012, a copy of which is annexed as Exhibit 32 to the Rosenthal Declaration.

87. “Salamanca RFA” means Objections and Responses of Plaintiff Jack R. Salamanca to Defendants’ First Set of Requests for Admission dated January 12, 2012, a copy of which is annexed as Exhibit 33 to the Rosenthal Declaration.

88. “Salamanca ROG II” means Objections and Responses of Plaintiff Jack R. Salamanca to Defendants’ Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012, a copy of which is annexed as Exhibit 34 to the Rosenthal Declaration.

89. “Shapiro ROG” means Amended Objections and Responses of Plaintiff James Shapiro to Defendants’ First Set of Interrogatories and Requests for the Production of Documents dated March 26, 2012, a copy of which is annexed as Exhibit 35 to the Rosenthal Declaration.

90. “Shapiro RFA” means Amended Objections and Responses of Plaintiff James Shapiro to Defendants’ First Set of Requests for Admission dated April 3, 2012, a copy of which is annexed as Exhibit 36 to the Rosenthal Declaration.

91. “Shapiro ROG II” means Objections and Responses of Plaintiff James Shapiro to Defendants’ Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012, a copy of which is annexed as Exhibit 37 to the Rosenthal Declaration.

92. “Simpson ROG” means Objections and Responses of Plaintiff Daniele Simpson to Defendants’ First Set of Interrogatories and Requests for the Production of Documents dated January 13, 2012, a copy of which is annexed as Exhibit 38 to the Rosenthal Declaration.

93. “Simpson RFA” means Amended Objections and Responses of Plaintiff Daniele Simpson to Defendants’ First Set of Requests for Admission dated April 3, 2012, a copy of which is annexed as Exhibit 39 to the Rosenthal Declaration.

94. “Simpson ROG II” means Objections and Responses of Plaintiff James Shapiro to Defendants’ Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012, a copy of which is annexed as Exhibit 40 to the Rosenthal Declaration.

95. “Stiles ROG” means Objections and Responses of Plaintiff T.J. Stiles to Defendants’ First Set of Interrogatories and Requests for the Production of Documents dated January 6, 2012, a copy of which is annexed as Exhibit 41 to the Rosenthal Declaration.

96. “Stiles RFA” means Objections and Responses of Plaintiff T.J. Stiles to Defendants’ First Set of Requests for Admission dated January 6, 2012, a copy of which is annexed as Exhibit 42 to the Rosenthal Declaration.

97. “Stiles ROG II” means Objections and Responses of Plaintiff T.J. Stiles to Defendants’ Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012, a copy of which is annexed as Exhibit 43 to the Rosenthal Declaration.

98. “Weldon ROG” means Objections and Responses of Plaintiff Fay Weldon to Defendants’ First Set of Interrogatories and Requests for the Production of Documents dated January 12, 2012, a copy of which is annexed as Exhibit 44 to the Rosenthal Declaration.

99. “Weldon RFA” means Objections and Responses of Plaintiff Fay Weldon to Defendants’ First Set of Requests for Admission dated January 12, 2012, a copy of which is annexed as Exhibit 45 to the Rosenthal Declaration.

100. “Weldon ROG II” means Objections and Responses of Plaintiff Fay Weldon to Defendants’ Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012, a copy of which is annexed as Exhibit 46 to the Rosenthal Declaration.

***Responses from Associational Plaintiffs***

101. “AG ROG” means Amended Objections and Responses of Plaintiff The Authors Guild to Defendants’ First Set of Interrogatories and Requests for the Production of Documents dated April 3, 2012, a copy of which is annexed as Exhibit 47 to the Rosenthal Declaration.

102. “AG RFA” means Amended Objections and Responses of Plaintiff The Authors Guild to Defendants’ First Set of Requests for Admission dated April 3, 2012, a copy of which is annexed as Exhibit 48 to the Rosenthal Declaration.

103. “AG ROG II” means Objections and Responses of Plaintiff The Authors Guild to Defendants’ Second Set of Interrogatories and Requests for the Production of Documents dated April 20, 2012, a copy of which is annexed as Exhibit 49 to the Rosenthal Declaration.

104. “ALCS ROG” means Objections and Responses of Plaintiff The Authors’ Licensing and Collecting Society to Defendants’ First Set of Interrogatories and Requests for the Production of Documents dated February 4, 2012, a copy of which is annexed as Exhibit 50 to the Rosenthal Declaration.

105. “ALCS RFA” means Objections and Responses of Plaintiff The Authors’ Licensing and Collecting Society to Defendants’ First Set of Requests for Admission dated February 4, 2012, a copy of which is annexed as Exhibit 51 to the Rosenthal Declaration.

106. “ALCS ROG II” means Objections and Responses of Plaintiff The Authors’ Licensing and Collecting Society to Defendants’ Second Set of Interrogatories and Requests for the Production of Documents dated April 20, 2012, a copy of which is annexed as Exhibit 52 to the Rosenthal Declaration.

107. “ALF ROG” means Objections and Responses of Plaintiff The Authors League Fund to Defendants’ First Set of Interrogatories and Requests for the Production of Documents with Amended Schedule A dated January 25, 2012, a copy of which is annexed as Exhibit 53 to the Rosenthal Declaration.

108. “ALF RFA” means Objections and Responses of Plaintiff The Authors League Fund to Defendants’ First Set of Requests for Admission dated January 25, 2012, a copy of which is annexed as Exhibit 54 to the Rosenthal Declaration.

109. “ALF ROG II” means Objections and Responses of Plaintiff The Authors League Fund to Defendants’ Second Set of Interrogatories and Requests for the Production of Documents dated April 20, 2012, a copy of which is annexed as Exhibit 55 to the Rosenthal Declaration.

110. “ASA ROG” means Objections and Responses of Plaintiff The Australian Society of Authors to Defendants’ First Set of Interrogatories and Requests for the Production of Documents dated February 10, 2012, a copy of which is annexed as Exhibit 56 to the Rosenthal Declaration.

111. “ASA RFA” means Objections and Responses of Plaintiff The Australian Society of Authors to Defendants’ First Set of Requests for Admission dated February 10, 2012, a copy of which is annexed as Exhibit 57 to the Rosenthal Declaration.

112. “ASA ROG II” means Objections and Responses of Plaintiff The Australian Society of Authors to Defendants’ Second Set of Interrogatories and Requests for the Production of Documents dated April 20, 2012, a copy of which is annexed as Exhibit 58 to the Rosenthal Declaration.

113. “SFF ROG” means Objections and Responses of Plaintiff Sveriges Författarförbund (The Swedish Writers’ Union) to Defendants’ First Set of Interrogatories and Requests for the Production of Documents dated January 23, 2012, a copy of which is annexed as Exhibit 59 to the Rosenthal Declaration.

114. “SFF RFA” means Objections and Responses of Plaintiff Sveriges Författarförbund (The Swedish Writers’ Union) to Defendants’ First Set of Requests for Admission dated January 23, 2012, a copy of which is annexed as Exhibit 60 to the Rosenthal Declaration.

115. “SFF ROG II” means Objections and Responses of Plaintiff Sveriges Författarförbund (The Swedish Writers’ Union) to Defendants’ Second Set of Interrogatories and Requests for the Production of Documents dated April 20, 2012, a copy of which is annexed as Exhibit 61 to the Rosenthal Declaration.

116. “NFF ROG” means Objections and Responses of Plaintiff Norsk Faglitterær Forfatter- og Oversetterforening (The Norwegian Non-Fiction Writers and Translators Association) to Defendants’ First Set of Interrogatories and Requests for the Production of Documents dated January 26, 2012, a copy of which is annexed as Exhibit 62 to the Rosenthal Declaration.

117. “NFF RFA” means Objections and Responses of Plaintiff Norsk Faglitterær Forfatter- og Oversetterforening (The Norwegian Non-Fiction Writers and Translators Association) to Defendants’ First Set of Requests for Admission dated January 26, 2012, a copy of which is annexed as Exhibit 63 to the Rosenthal Declaration.

118. “NFF ROG II” means Objections and Responses of Plaintiff Norsk Faglitterær Forfatter- og Oversetterforening (The Norwegian Non-Fiction Writers and Translators Association) to Defendants’ Second Set of Interrogatories and Requests for the Production of Documents dated April 20, 2012, a copy of which is annexed as Exhibit 64 to the Rosenthal Declaration.

119. “TWUC ROG” means Objections and Responses of Plaintiff The Writers’ Union of Canada to Defendants’ First Set of Interrogatories and Requests for the Production of Documents dated January 30, 2012, a copy of which is annexed as Exhibit 65 to the Rosenthal Declaration.

120. “TWUC RFA” means Objections and Responses of Plaintiff The Writers’ Union of Canada to Defendants’ First Set of Requests for Admission dated January 30, 2012, a copy of which is annexed as Exhibit 66 to the Rosenthal Declaration.

121. “TWUC ROG II” means Objections and Responses of Plaintiff The Writers’ Union of Canada to Defendants’ Second Set of Interrogatories and Requests for the Production of Documents dated April 20, 2012, a copy of which is annexed as Exhibit 67 to the Rosenthal Declaration.

122. “UNEQ ROG” means Objections and Responses of Plaintiff Union des Écrivaines et des Écrivains Québécois (Quebec Union of Writers) to Defendants’ First Set of Interrogatories and Requests for the Production of Documents dated January 26, 2012, a copy of which is annexed as Exhibit 68 to the Rosenthal Declaration.

123. “UNEQ RFA” means Objections and Responses of Plaintiff Union des Écrivaines et des Écrivains Québécois (Quebec Union of Writers) to Defendants’ First Set of Requests for Admission dated January 26, 2012, a copy of which is annexed as Exhibit 69 to the Rosenthal Declaration.

124. “UNEQ ROG II” means Objections and Responses of Plaintiff Union des Écrivaines et des Écrivains Québécois (Quebec Union of Writers) to Defendants’ Second Set of

Interrogatories and Requests for the Production of Documents dated April 20, 2012, a copy of which is annexed as Exhibit 70 to the Rosenthal Declaration.

***Responses from Defendants***

125. “HT ROG” means Responses to Plaintiffs’ First Set of Interrogatories to Defendant HathiTrust dated February 8, 2012, a copy of which is annexed as Exhibit 71 to the Rosenthal Declaration.

126. “HT ROG II” means Supplemental Responses to Plaintiffs’ First Set of Interrogatories to Defendant HathiTrust dated April 9, 2012, a copy of which is annexed as Exhibit 72 to the Rosenthal Declaration.

127. “UC ROG” means Responses to Plaintiffs’ First Set of Interrogatories to Defendant Mark G. Yudof (University of California) dated February 8, 2012, a copy of which is annexed as Exhibit 73 to the Rosenthal Declaration.

128. “UC RFA” means Responses to Plaintiffs’ First Requests for Admission to Defendant Mark G. Yudof (University of California) dated February 8, 2012, a copy of which is annexed as Exhibit 74 to the Rosenthal Declaration.

129. “UM ROG” means Responses to Plaintiffs’ First Set of Interrogatories to Defendant Mary Sue Coleman (University of Michigan) dated February 8, 2012, a copy of which is annexed as Exhibit 75 to the Rosenthal Declaration.

130. “UM ROG II” means Supplemental Responses to Plaintiffs’ First Set of Interrogatories to Defendant Mary Sue Coleman (University of Michigan) dated April 9, 2012, a copy of which is annexed as Exhibit 76 to the Rosenthal Declaration.

131. “UM RFA” means Responses to Plaintiffs’ First Requests for Admission to Defendant Mary Sue Coleman (University of Michigan) dated February 8, 2012, a copy of which is annexed as Exhibit 77 to the Rosenthal Declaration.

132. “UW ROG” means Responses to Plaintiffs’ First Set of Interrogatories to Defendant Kevin Reilly (University of Wisconsin) dated February 8, 2012, a copy of which is annexed as Exhibit 78 to the Rosenthal Declaration.

133. “UW RFA” means Responses to Plaintiffs’ First Requests for Admission to Defendant Kevin Reilly (University of Wisconsin) dated February 8, 2012, a copy of which is annexed as Exhibit 79 to the Rosenthal Declaration.

**Infringed Works**

134. “Infringed Works” means all of the works defined below, collectively.

***Individual Plaintiffs’ Works***

135. “Andreassen Works” means the work or works identified on Schedule A to the Andreassen ROG.

136. “Cummings Works” means the work or works identified on Schedule A to the Cummings ROG.

137. “Grundström Works” means the work or works identified on Schedule A to the Grundström ROG.

138. “Loukakis Works” means the work or works identified on Schedule A to Loukakis ROG.

139. “Robinson Works” means the work or works identified on Schedule A to the Robinson ROG.

140. “Rønning Works” means the work or works identified on Schedule A to the Rønning ROG.

141. “Roy Works” means the work or works identified on Schedule A to the Roy ROG.

142. “Salamanca Works” means the work or works identified on Schedule A to Salamanca ROG.

143. “Shapiro Works” means the work or works identified on Schedule A to the Shapiro ROG.

144. “Simpson Works” means the work or works identified on Schedule A to Simpson ROG.

145. “Stiles Works” means the work or works identified on Schedule A to the Stiles ROG.

146. “Weldon Works” means the work or works identified on Schedule A to Weldon ROG.

*Associational Plaintiffs' Works*

- 147. "AG Works" means the work or works identified on Schedule A to the AG ROG.
- 148. "ALF Works" means the work or works identified on Schedule A to the ALF ROG.
- 149. "ASA Works" means the work or works identified on Schedule A to the ASA ROG.
- 150. "TWUC Works" means the work or works identified on Schedule A to the TWUC ROG.



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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 GEORGE KERSCHER  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

I, George Kerscher, do hereby declare that:

**Background and Qualifications**

1. I am over eighteen years of age and am competent to make this Declaration.
2. I am legally blind.
3. Attached hereto as Exhibit A is a copy of my curriculum vitae.
4. I have dedicated the last 25 years to creating and promoting digital access to print documents for the blind. I received a bachelor's degree in English Education from Northeastern Illinois University in 1974 and taught special education and English in public schools from 1975 to 1985.
5. I then began working toward a master's degree in computer science at the University of Montana in 1985.

6. While working toward my master's degree, I developed the concept of computerized books for persons with print disabilities, a term I coined during the same time. A print-disabled person is someone who cannot effectively read print because of a visual, physical, perceptual, developmental, cognitive, or learning disability.

7. I developed computerized books because, as a blind master's degree candidate in computer science, I could not access even a single book I needed to complete my degree. I therefore decided to develop the technology to create such books for myself and others with print disabilities.

8. During my time as a student at University of Montana, I founded and developed Computerized Books for the Blind and Print Disabled (CBFB), through which I began creating e-books from files from publishers. In 1988, I created the first publicly available e-book, a copy of Mastering WordPerfect 5.0.

9. I did not attempt to patent the e-book technology because I wanted it to be readily available to anyone who was willing to make accessible books for the blind.

10. Ultimately, I left University of Montana without completing my degree. Because I could not obtain books relevant to my field of study, the thesis requirement for my master's degree was nearly impossible to complete. The university would not grant me thesis credit for the work I had done developing e-books. I chose instead to pursue my professional goal of improving accessibility for the broader population through CBFB.

11. Over the last twenty years, I have served on numerous panels and committees dedicated to improving the creation and distribution of electronic accessible texts for the blind. These include: The Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities; the National Instructional Materials Accessibility Center (NIMAC)

Advisory Committee; the U.S. National File Format Technical Panel; the World Wide Web Accessibility Initiative Steering Council; and the International Committee for Accessible Document Design.

12. On May 7, 2012, I was one of fourteen individuals honored at the White House as a Champion of Change for leading the fields of science, technology, engineering, and math for people with disabilities.

13. I serve as the Senior Officer of Accessible Technology at Learning Ally. Learning Ally, formerly known as Recording for the Blind & Dyslexic, creates recorded copies of print materials for K-12, college and graduate students, and veterans and lifelong learners, who cannot read standard print due to blindness, visual impairment, dyslexia, or other learning disabilities. Learning Ally's collection of more than 70,000 digitally recorded textbooks and literature titles is one of the largest of its kind in the world. I have worked at Learning Ally since 1991, first as Research and Development Director from 1991-1995, and in my current position since 1995. Learning Ally is a 501(c)(3) non-profit corporation.

14. Currently, I also serve as Secretary General of the DAISY Consortium, an international association that develops, maintains and promotes international DAISY (Digital Accessible Information System) Standards for authorship and distribution, and am President of the International Digital Publishing Forum (IDPF), which is the global trade and standards organization dedicated to the development and promotion of electronic publishing and content consumption. Both of these organizations work to promote accessibility in electronic publishing.

15. Through my committee participation and my positions with the DAISY Consortium, IDPF, and Learning Ally, I have remained integrally involved with the development of electronic

books and am intimately acquainted with the issues surrounding the creation and distribution of materials in formats that are accessible to the blind.

### **Statement of Opinions**

16. The availability of the HathiTrust Digital Library (HDL) stands to revolutionize blind students' and scholars' ability to compete with their sighted counterparts. The HDL titles I have reviewed are the most sophisticated and accessible scanned copies of print materials in a large collection I have ever seen.

17. New digital books can be readily made accessible but rarely are. Even if new books are to be made generally accessible, the expense of converting existing library collections with many highly specialized and even out-of-print books means that the type of mass digitization conducted by the HathiTrust, with complete metadata, is unlikely to ever occur again. There simply is no market for digital copies of old and out-of-print books in which only students and scholars have an interest. Publishers have not made digital copies for sale of the vast majority of the books that are available in a university library and are unlikely to do so in the future. Thus, the only way any one of these books will become available to the blind is if someone, either the HathiTrust, a disability student services (DSS) office, Learning Ally, Bookshare, or the NLS, makes an accessible copy.

18. To truly provide equal access for blind students and scholars to a university library, mass digitization of a collection like the HDL is necessary. Without this, blind students and scholars will always be limited to ad hoc access to titles they identify and request to be scanned without being able to search the library or skim materials in the way that sighted researchers can.

Without a fully digitized collection, therefore, blind researchers will never be able to compete with their sighted counterparts in academia on a level playing field.

### **Factual Basis for Opinions**

#### **I. Explanation of accessible digital books**

19. Prior to the development of accessible digital books, the blind could access print materials only if the materials were converted to braille or if they were read by a human reader, either live or recorded. Accessible digital books that are available to sighted and blind alike are a revolutionary change for blind readers seeking access to content over either braille or human readers.

20. Although human narration was once the best access a blind reader could receive to print materials, the technology of accessible books has advanced far past the capabilities offered by human narration, making human narration alone substantially inferior to use of accessible digital books. To use a live human reader is expensive or burdensome for a family member or friend. Moreover, live readers' orations cannot be reproduced, giving the blind reader only one opportunity to hear the material. Live readers also cannot increase their speed – they are inherently limited to the pace they can reasonably read aloud. (Live readers may not be available until the wee hours the morning before a term paper is due.) Recorded human narration resolves some of these issues, like repetition and speed (and reader exhaustion), but presents its own problems. Typically, it will take six months to more than a year for a blind person to receive a requested recording of a textbook from an entity like Learning Ally. Moreover, even recorded human narration cannot be navigated like an accessible digital book and will not allow a reader to hear each character to discern spelling.

21. Today, blind readers access digital books with a screen reader or built-in text-to-speech software, both of which can output information either as a computerized vocalization of the text or as braille, through a refreshable braille pad. Unlike books narrated by human readers, accessible digital books can be read as quickly as the reader wants, or even skimmed. Further, they provide significant search and navigation capabilities, allowing readers to jump from chapter to chapter, paragraph to paragraph, and sentence to sentence, as well as to discern spelling. This allows blind readers to re-read certain sections of a work they might not grasp on the first pass, just as a sighted reader may re-read a complicated passage.

22. Not all digital information is accessible. For example, scanning a copy of print material usually results in a file in portable document format (PDF). PDFs are created essentially by taking a picture of the page. This gives a sighted person enough to read on a computer screen, but it does not allow screen reader software to recognize the text.

23. To take this next step toward accessibility, the scan must be run through optical character recognition software (OCR) and optical structural recognition software (OSR). OCR/OSR software takes a high resolution image of the page and recognizes the image of characters and even structural data like columns and images. Character recognition software looks at the characters and compares them to a database of what it knows. For example, the software will match an image of the letter “c” to image of the letter “c” in its database. The software will also check spelling, to ensure it has matched the image correctly to images of characters in known words. The OSR component will recognize word boundaries, text block boundaries, and, on occasion, headings. The software then identifies the x/y coordinates of all the characters on a page and attempts to identify the correct reading order for each page, when there are columns or images that alter the usual reading order. The OCR process also allows the text to be searched.

24. A further step called “tagging” provides additional metadata about the content, such as the existence of tables in a work or the existence of headings and other document structures. Although the OCR engine will try to add meaningful style information, no existing software can recognize document structures perfectly and this final step must be completed manually. Only materials that are originally created for digital books, or “born digital,” rather than scanned from print material do not have to be manually tagged. Tagged works provide to blind readers the closest equivalent to the experience of a sighted person reading the material in its print form, but the labor required to create them has made them very rare.

25. Accessible digital texts present a further benefit for low vision readers over human narration alone. These users often will use print and sound at the same time. They may be able to visually discern paragraphs or chapters while using sound to read characters and words. Human narration therefore is substantially inferior for low vision readers who have some usable vision.

26. Even what are commonly referred to as “audiobooks” do not provide the benefit of accessible digital books. While having Jim Dale or Stephen Fry read *Harry Potter and the Order of the Phoenix* is ideal for entertainment purposes, it does not provide equal access for academic or scholarly pursuits. The ability to access text at high-speed is crucial for students and researchers alike—accessible digital books, like those in the HDL, make high-speed access possible, where audiobooks cannot. Digitally accessible books make it possible for readers with print disabilities to “virtually” bookmark a page, to electronically jot notes in the margin, and to digitally riffle through pages to “scan” for just the right passage. While there was a time where a book read dramatically or even non-dramatically by a human was the best users with print



disabilities could hope for, advances in technology mean audiobooks do not equal (and are vastly inferior to) OCR'ed books in the modern era.

27. The DAISY Consortium and the IDPF have established standards to ensure that “born digital” material is accessible. Any digital copy of print material that is created to meet the DAISY standard will be fully accessible to the blind.

28. The IDPF develops and maintains the EPUB content publication distribution standard, which is a generally available open standard, available without royalty, for the next generation of commercial and non-commercial digital books. The standardization of a distribution file means that publishers can design their print materials using any authorship tool, convert them to an EPUB file, and then provide that file to any e-book distributor, which will be able to publish the content on whatever platform it uses.

29. The latest EPUB standard, EPUB 3, incorporates the current DAISY requirements for distribution, which ensures that all documents published using EPUB 3 that follow the accessibility guidelines will be distributed in an accessible format, unless publishers then convert the EPUB files to platforms that are themselves inaccessible.

## **II. Availability of accessible books in higher education**

30. I spoke with the University of Michigan Library back in 2005 (before it established the HathiTrust). At that time, it had already taken proactive steps to make its digital collections accessible to users with print disabilities. Even in its early incarnation, the University of Michigan Library's accessible book platform was already enabling students and scholars with print disabilities to make unprecedented and meaningful use of the library's vast collection.

31. Since then, I have had the opportunity to review a number of the digital books in the HDL and to discuss the technical specifications of these scans with personnel from the

University of Michigan Library. The HDL scans are high resolution images that have been digitized using the most sophisticated OCR/OSR software I have ever encountered. Although images are not described and tables are not tagged, the table text is present, and the scans include the vast majority of metadata necessary to make them fully accessible. They can be navigated by chapter, page, line, and character. My understanding is that the collection encompasses close to ten million books.

32. Today, as when I was a graduate student, it is virtually impossible for blind students to conduct library research. A university's disability student services office (DSS) is responsible for scanning print materials and converting them into accessible digital copies for blind students, but the vast majority of these offices will only provide the works listed on the students' syllabi. They simply do not have the resources to create copies of books that are not required reading, and certainly not do so in a timely manner. As a practical matter, this means it is impossible for blind students to conduct independent library research. Even when a student switches classes or a professor adds a reading to the syllabus after the fact, DSS offices are often overwhelmed and unable to fill the requests. It may take weeks or even months for the student to receive the scanned materials.

33. The quality of the copies made by the DSS offices varies substantially from university to university. In the vast majority of cases, the scans will only be run through very basic OCR software, without any of the structural recognition in the HDL scans.

34. Even more significant, indexes and tables of contents are not available in an accessible format in almost any university library. Thus, blind students cannot view the index or table of contents of a book to see if it contains relevant information. In the HDL, most of the tables of contents have been manually tagged, allowing blind students to recognize them and navigate to

them with a screen reader the way a sighted person would open the book and flip to the table of contents.

35. At the universities with the best DSS offices, a graduate student may be able to provide a list of materials for research that the office then will have the capacity to digitize. The office, however, is limited to the books the student initially identifies as relevant. Blind students cannot do what sighted students do, that is, browse through many books to find the chapters or sections that are relevant.

36. At the vast majority of universities, where the DSS offices do not have the capacity to honor requests for research materials, a blind student's only option is to use a scanner in the library to scan individual books of possible interest one page at a time, listening to each, until he or she finds the tables of contents. It is an impossible task for a blind student to use a library in this way; the time it would take to complete this process prohibits blind students from completing any library research at a pace at which they can compete with their sighted peers.

37. Besides universities' DSS offices, the only accessible digital books available are those available for purchase as iBooks or Blio books, and the collections of Learning Ally, Bookshare, and the National Library Service for the Blind and Physically Handicapped (NLS). Bookshare is an initiative of the non-profit organization Benetech® that creates accessible copies of popular digital books and academic textbooks on an ad-hoc basis for people with print disabilities at no cost. NLS is an affiliate of the Library of Congress.

38. From my experience with Learning Ally, I know that each of these entities has a very limited capacity to make new books. Further, Learning Ally and the NLS focus their limited resources on particular titles with the greatest appeal. NLS focuses on novels and other current popular works. Learning Ally and Bookshare place an emphasis on K-12 education. Although

they do digitize some books for higher education, both have very limited budgets. Their collections therefore are significantly different than the HDL, which naturally has an academic focus. Learning Ally has approximately 70,000 titles in its collection, Bookshare has approximately 150,000 titles, and the NLS has approximately 20,000 titles. These include many that overlap. In total these organizations have approximately 200,000 titles available to blind readers, while the HDL has ten million.

39. The AccessText Network, a membership exchange network that is intended to facilitate and support sharing of textbooks for students with diagnosed print-related disabilities, has had limited success and has only focused on textbooks identified in the syllabi of students. The Network is intended to connect DSS offices directly with publishers to receive electronic files and facilitate the sharing of scanned copies between DSS offices at different universities. As an initial matter, the program involves voluntary participation and neither have publishers joined as expected), nor have DSS offices shared their files at the rates the founders of the network had hoped. Further, the network does not have a quality control mechanism to ensure that texts scanned by different DSS offices have the necessary structure and content. In addition, it is limited to textbooks and required items in syllabi, and therefore does not include the vast majority of titles available in a university library. Finally, the Access Text network was established because there was deemed to be no meaningful market in the blind and print-disabled community. That publishers are expected to give away the electronic files for free demonstrates that those involved do not believe there is any market for accessible books created for the blind.

40. Today, for scholars and students with print disabilities, the best promise of meaningful access to an academic library exists at the University of Michigan through the HDL. It is the kind of access, at the minimum, that should be available to all in the academy.

**III. History of failed attempts to achieve market-based access to digital text for blind readers**

41. Learning Ally struggles to find charitable funding because there simply is no market for accessible books for the blind. Learning Ally, Bookshare, and the NLS exist because of this market failure.

42. In 2007, I attended a presentation at the Annual International Technology & Persons with Disabilities Conference at California State University, Northridge, at which the Association of American Publishers announced that it had conducted a study and determined that there was no exploitable market for the creation of accessible print materials for the blind.

43. Authors and publishers have not only ignored accessibility concerns related to digital texts, but actively worked to prevent the market from reaching the blind. When Microsoft created the first commercially available e-reader device in the late 1990's, Microsoft and its competitors, Adobe, Gem Star, Sony, and others, ignored persons who are blind or print disabled. They did not build in any accessibility features that a blind person could use. While the underlying content was accessible, the user interfaces did not cater to the disabled community.

44. All of these companies indicated that the effort to make the products accessible did not justify the return on investment. From contemporaneous discussions with persons in charge of the various e-book programs or in charge of accessibility at each of these companies I learned that the choice to exclude the blind to preserve anti-piracy software was a deliberate decision. They consciously decided that the work to modify software to make it accessible to the blind was not economically worthwhile in light of the perceived small incremental addition of the blind to the market. They recognized that people with disabilities would be left out, but they were not willing to develop mechanisms for the blind to access the underlying information.

45. This trend has continued. The development of popular e-book platforms that are inaccessible, like the Amazon Kindle and the Barnes & Noble Nook, demonstrates that tech companies and publishers do not believe that there is sufficient economic benefit from making accessible books, or at least that their perceived concerns about possible piracy outweigh, from a business perspective, any monetary or societal benefits from creating accessible books.

46. Indeed, I, along with representatives from the National Federation of the Blind attempted to lobby Amazon to make the Kindle accessible, but encountered opposition from copyright owners and their allies. We met with representatives from Amazon, presented statistics concerning the market for talking e-books, and demonstrated the minimal cost associated with making both the text of the books and the menus on the Kindle accessible for people with print disabilities. But, when Amazon announced that it had released the Kindle 2 with a text-to-speech function, the Authors Guild actively opposed Amazon's policy, and Amazon capitulated, allowing individual publishers to turn off text-to-speech on the Kindle for, at their selection, all or some of their booklist.

47. Further, even when Amazon activated the text to speech function on the Kindle, it only worked for the text of the book, not the menus. Blind users therefore cannot effectively use a Kindle book. Amazon's failure to make these minimal changes in its platform demonstrates that it does not consider the blind to be a significant market.

48. New books could be made accessible with little expense to publishers. All new books are created digitally. However, the design software commonly used by publishers takes the accessible word processing files submitted by authors and converts them into an inaccessible format.

49. Because of the DAISY standards and because of partnerships, we have made some progress in building accessibility into new e-books. Adobe Indesign 6, the premier electronic publishing design software, exports into EPUB 3, which makes the basic text accessible. But, these new EPUB materials may still be made inaccessible if they are transformed for use with inaccessible platforms, such as those used on the Amazon Kindle or the Barnes and Noble Nook.

50. Given the lack of a market in the blindness community even for new popular books, and the publishers and technology companies' persistent refusal to make their products accessible to the blind, the access problems faced by blind readers with respect to academic library collections are unlikely to ever be solved unless the HathiTrust is permitted to continue providing accessible digital versions of the books in the university libraries' collections.

### Conclusion

51. Based on the facts set forth above, and my experience and expertise in providing accessible books for the blind, it is my view that the HDL represents an unparalleled opportunity to achieve true equality in higher education for blind and print-disabled students and scholars; and that the opportunity to participate in education on a basis of true equality is very unlikely to arise again if the blind are denied access to the HDL.

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

Dated: June 28, 2012



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George Kerscher

**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		

**EXHIBIT A  
TO  
DECLARATION OF GEORGE KERSCHER**

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



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**George Kerscher Ph.D.**

Last updated May 13,2012

**White House Highlights George Kerscher as a  
"Champion of Change" for his Dedication to  
STEM for People with Disabilities**

On May 7, 2012 , George Kerscher was one of fourteen individuals honored at the White House as Champions of Change for leading the fields of science, technology, engineering, and math for people with disabilities.

"STEM is vital to America's future in education and employment, so equal access for people with disabilities is imperative, as they can contribute to and benefit from STEM," said Kareem Dale, Special Assistant to the President for Disability Policy. "The leaders we've selected as Champions of Change are proving that when the playing field is level, people with disabilities can excel in STEM, develop new products, create scientific inventions, open successful businesses, and contribute equally to the economic and educational future of our country."

The Champions of Change program was created as a part of President Obama's Winning the Future initiative. Each week, a different sector is highlighted and groups of Champions, ranging from educators to entrepreneurs to community leaders, are recognized for the work they are doing to serve and strengthen their communities.

See the [video of the event at the White House.](#)

**AFB Names Kathleen Mary Huebner, Ph.D. and  
George Kerscher, Ph.D. 2012 Migel Medal  
Recipients**

On December 6, 2011)The American Foundation for the Blind (AFB) announced the 2012 winners of the Migel Medals, the highest honor in the blindness field. The 2012 recipients are George Kerscher, Ph.D. and Kathleen Mary Huebner, Ph.D.

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"It is an honor to present these medals to George and Kathleen for their outstanding achievements in the blindness and low vision field," said Carl R. Augusto, AFB president and CEO. "In dedicating their professional lives to ensuring that people with vision loss can live healthy and independent lives, the 2012 Migel Medal awardees are truly worthy of this special recognition."

see the  
announcement  
on [AFB's  
website](#)

**George  
Kerscher**



**Nominated for the Commission on Accessible  
Instructional Materials in Postsecondary  
Education for Students with Disabilities**

In August 2010, George Kerscher was nominated to serve on the Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities. The Commission will have up to one year to make recommendations to the U.S. Congress for improving

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access to and the distribution of instructional materials in accessible formats.

### **George Kerscher Elected President of the International Digital Publishing Forum (IDPF)**

In December 2009, George Kerscher was elected president of the IDPF, the trade organization that is setting the standards for eBooks and publications in digital formats. EPUB, is a trio of specifications that has been adopted in the publishing arena to deliver all types of digital publications. The challenge in the future will be to incorporate all types of content and to integrate rich media into the standards, while maintaining interoperability. Of course, access to digitally published materials must be fully accessible to persons who are blind and print disabled.

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### **George Kerscher Elected to the Board of Guide Dogs for the Blind**

In August 2009, George Kerscher was elected to the Board of Directors of Guide Dogs for the Blind located in San Raphael, California. George with current guide dog Mikey, and retired guide Nesbit are graduates of Guide Dogs for the Blind, the premier non-profit organization in the United States providing guide dogs, training, and graduate services to persons who are blind.

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### **George Kerscher named as chair for the EPUB Maintenance Activity**

The IDPF membership has approved the EPUB maintenance working group. George Kerscher will act as chair and Garth Conboy will be vice chair. The area for the activity can be found at: <http://www.daisy.org/epub/> The work will begin in August 2009.

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## **George Kerscher receives the 2008 Dr. Roland Wagner Award**

On July 10, 2008 George Kerscher, PhD received the 2008 Dr. Roland Wagner Award at the 11th International Conference on Computers Helping People with Special Needs (ICCHP) in Linz, Austria.

The Wagner award is named for the founder of ICCHP, a pioneer in information and communications technology for people with disabilities in Europe. The award was presented to Kerscher for his tireless efforts to ensure equal access to information by people with print disabilities. Read the [DAISY press release](#).

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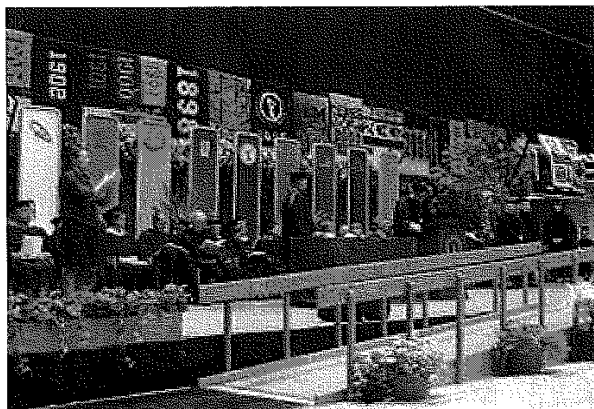
## **George Kerscher receives Dr. Jacob Bolotin Award from National Federation of the Blind**

On July 4, 2008 George Kerscher was named among the first recipients for the Dr. Jacob Bolotin Award which recognizes individuals and organizations working in the field of blindness that have made outstanding contributions toward achieving the full and equitable integration of individuals who are blind into society. The award was made at the 2008 National Federation of the Blind conference held in Dallas, Texas. More information about the Jacob Bolotin award [Can be found on the NFB Web site](#).

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## **Awarded a Doctorate from the University of Montana**

On May 12, 2007 at the graduation ceremony at the University of Montana, George Kerscher was awarded a Doctorate of Humane Letters, the highest honorary degree the University can bestow. The initiative was initiated from within the Computer Science Department. The recommendation received the unanimous endorsement of

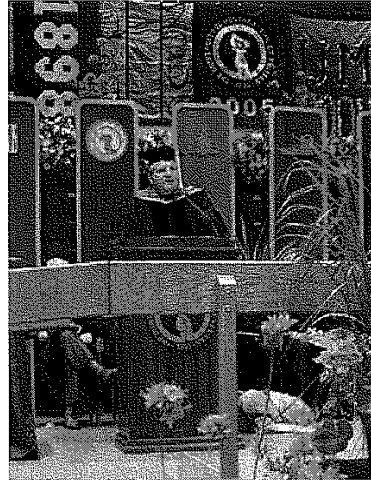


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the CS Department, the University faculty, and the Board of Regents.

Two photos shown are of Dr. Dennison, President of University of Montana with George Kerscher to his right. The other is of George Kerscher making his acceptance speech. The recording is of Dr. Dennison's remarks followed by George Kerscher's acceptance. George Kerscher is wearing the graduation robe, cap and hood awarded as part of the doctoral process.



Recording of George Kerscher's acceptance speech (MP3) Also A text transcription of the presentation.

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### **Since January 2007, Re-elected to the Board of the IDPF**

George Kerscher, who was one of the founding members of the Open eBook Forum (OeB), now the International Digital Publishing Forum (IDPF) was re-elected to the Board.

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### **Since January 2006 serving on the National Instructional Materials Accessibility Center (NIMAC) Advisory Committee**

George Kerscher was asked to serve on the Advisory Committee for the NIMAC. The NIMAC has been established as the repository for K-12 publishers to deposit XML files using the DAISY Standard that conform to the NIMAS guidelines for quality. More information about the NIMAC can be found at the NIMAC Web site.



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### **Since September 2005 Chair of the DAISY/NISO Standards Committee, formally the ANSI/NISO Z39.86 Advisory Committee**

In September 2005, George Kerscher became the chair of the Advisory Committee to the DAISY/NISO Standard. As his first move as chair, he initiated a change in policy to open the committee's work to a broader audience and make the process transparent. A general call for participation by experts was broadly circulated and companies stepped forward making their best people available for standards work. The work plans and minutes will be available from [the Z39.86's maintenance Web site](#).

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### **George Kerscher Receives Catalyst Award**

The [2004 Harry Murphy Catalyst Award](#) was presented to George Kerscher at the [CSUN Technology & Persons with Disabilities Conference](#) on March 16, 2004. This biennial award is presented by the Trace Center to honor those who bring people together and facilitate the efforts of others in the field of technology and disability. Past award winners are Judy Brewer (2002) and Harry Murphy (2000).

George Kerscher began working on document access in 1987 and has been a tireless advocate and leader ever since. He coined the term "print disabled" to describe people who cannot effectively read print because of a visual, physical, perceptual, developmental, cognitive, or learning disability, and believes that in the Information Age access to information is a fundamental human right. He also believes that properly designed information systems can make all information accessible to all people, and has worked consistently and effectively to push evolving technologies in that direction.

Although his personal accomplishments stand on their own, he is receiving the award for the quiet work he has done advancing the efforts of others in this area. Never one to take credit to himself, he has helped foster and advance the work of many and brings out the best in teams that he is associated with. He has also spearheaded the creation of, and then quietly bore a large share of the support for, key groups that we have all come to rely on in this area.

Find the [press release at the Trace Research Center Archives](#).

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**Since May 2003, Secretary General of the DAISY Consortium**

At the General Meeting of the DAISY Consortium, May 12, 2003 in Amsterdam, George Kerscher was voted to be the Secretary General of the DAISY Consortium.

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**Nominated to serve on the U.S. National File Format Technical Panel**

In the Fall of 2002, George Kerscher was nominated to serve on the technical panel which was charged with:

Scope of Work: The Technical Panel has been charged with providing the Secretary of Education with a set of technical specifications to facilitate the efficient delivery of accessible instructional materials, a time line for the implementation of the proposed standards, and process for assessing the success of standards implementation. The Secretary of Education will publish the proposed standards in the Federal Register for public comment.

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**Ingar Beckman Hirschfeldt and George Kerscher win 2001 Dayton Forman Award for their ground breaking work on Digital Talking Books**

On August 15, 2001, At a gala dinner as part of the International Federation of Library Associations Section of Libraries for the Blind (IFLA SLB) conference in Washington, DC, the CNIB Library for the Blind awarded the 2001 Dr. Dayton M. Forman Memorial Award to Ingar Beckman Hirschfeldt and George Kerscher. These two individuals, coming together from two different organizations on two different continents, have shown outstanding leadership in the development of the next generation of talking books, called DAISY (Digital Accessible Information SYstem).

"No single effort in the past 10 years has so radically altered the reading experience of those unable to read print," said Rosemary Kavanagh, executive director of the CNIB Library for the Blind and chair of IFLA SLB. "Through the DAISY Consortium, the visionary capabilities of Ms. Beckman Hirschfeldt combined with the technical and managerial talents of Mr. Kerscher have resulted in a monumental change in the talking-book experience."

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For more information about the Dr. Dayton M. Forman Memorial Award visit: <http://www.cnib.org/library/awards/dmfm/dmfm.htm>.

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### **1999-2006: International Digital Publishing Forum (IDPF) was Open EBook Forum (OeBF)**

May 23, 2000 George Kerscher was unanimously elected as Chairperson of the Board of Directors of OeBF. In May of 2002, he was reelected to the Board of Directors and retained as Chairperson of the Board. To learn more about the IDPF, its Mission, and the organization, please visit: <http://www.idpf.org/>

### **Interim Board of Directors**

December 15, 1999 George Kerscher was elected to the Interim Board of the OeBF, by the leaders in the emerging Electronic Book Industry, and charged to establish a formal organization to promote the emerging eBook industry.

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### **1999 Montana Association For the Blind Member of the Year Award**

Mr. Kerscher received the Keith E. Denton Member of the Year Award. This most prestigious and rarely given award is made to a member of the Association for exceptional service to the blind.

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### **1998 US News and World Report Innovator of the Year**

In the December 28, 1998 issue of US News and World Report, George Kerscher was honored as one of the Innovators of the year. For full details see: <http://www.usnews.com/usnews/issue/981228/28kers.htm>

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**Since January 1998: World Wide Web--Web Accessibility Initiative, Steering Committee Co-chair**

George Kerscher was appointed to serve on the Web Accessibility Initiative (WAI) Steering Counsel as the co-chair. The WAI is working to make the Internet fully accessible to persons with disabilities. The WAI is a project of the World Wide Web Consortium (W3C). To learn about the WAI visit: <http://www.w3.org/wai>

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**Since October 1997: DAISY Consortium Project Manager**

George Kerscher was nominated and elected through a competitive interview process as Project Manager for the DAISY Consortium.

The DAISY Consortium is the leading organization in the world developing information systems specifically designed for blind and print disabled persons. DAISY is devoted to developing the next generation of information technology for their consumers. The goal is to develop the standard for the "Digital Audio-based Information SYstem" (DAISY) for the world.

As Project Manager George Kerscher coordinates the activities of the Consortium. His duties include: developing the business plan and a world-wide communication strategy, working with hardware and software developers, and managing work teams of the Consortium. To learn more about DAISY visit: <http://www.daisy.org/>

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**Since 1991: Recording for the Blind & Dyslexic****Since 1995: Senior Officer, Accessible Information**

George Kerscher's position with RFB&D provides a consulting resource to all departments within RFB&D. His additional responsibilities are to work with initiatives that promote RFB&D's mission for access to educational and professional materials for all. RFB&D is not a research organization -- rather it is a service organization. It is important for RFB&D, through Mr. Kerscher's work, to facilitate development of emerging information technologies for persons with print disabilities. To learn more about RFB&D

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visit: <http://www.rfbd.org/>**1991 to 1995: Research and Development Director**

Primary activity focused on E-Text, the new form of accessible book delivery, provided by RFB&D.

In 1992 Mr. Kerscher completed a research project for the National Science Foundation that specifies computer file language standards for electronic books for persons with disabilities. The difficulty in this arena is mathematical and scientific information representation. In one file standard braille, large print and electronic access must be specified.

Another objective of the R&D division is the development of software that makes electronic access to information easy and efficient. Soft copy technology offers the possibility of equal access by print disabled people side-by-side with the sighted community. This phase of R&D focuses on the delivery of that information to the print disabled community.

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**1992 to 1997: International Committee for Accessible Document Design (ICADD)**

1996: George Kerscher was elected ICADD co-chair, to provide documents for people with print disabilities. He continued until its dissolution in 1997. Members of ICADD worked with early versions of HTML and other SGML specifications to ensure accessibility. Many of the members of ICADD were instrumental in forming the WAI, which carries on many of the activities that ICADD initiated.

1994 to 1995 Chair of the ICADD Technical Committee, which developed techniques to make documents accessible. Included in this work was access to mathematical and scientific information. The committee's work was primarily focused on the use of SGML for developing these techniques. They were incorporated in ISO 12083, Electronic Manuscript Preparation and Markup, and were in HTML 2.0.

1992 to 1994: Mr. Kerscher was the elected ICADD chairperson.

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**1994 Recipient of the American Foundation for**

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Professional Vita for George Kerscher

**the Blind's of "Equality of Access & Opportunity" award.**

Mr. Kerscher received this award for his contributions to the developments of electronic access to information for persons who are blind or visually impaired.

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**1994 Recipient of Frank Smith Award**

This award was for Outstanding Contribution to the Blind and Visually Impaired of Idaho - Montana - Wyoming by the Association for Education and Rehabilitation of the Blind & Visually Impaired (Northern Rockies Chapter).

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**1991 Texas Braille Commission Technical Representative**

The Texas Braille Commission requested Mr. Kerscher's service as technical representative to this commission. The purpose of the commission is to advise on the implementation of the Texas Braille Bill. The bill requires publishers to provide files to the state for production of braille for school children. The wider scope of the commission is to look at other aspects of education of the blind in Texas.

The Texas Braille Commission adopted the standards developed by ICADD, as a requirement for publishers. Since 1996 publishers were required to submit computer files that comply with the standards developed by ICADD. At present more than 18 states have adopted legislation similar to what was pioneered in Texas.

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**1988 to 1991: Computerized Books for the Blind and Print disabled**

Mr. Kerscher was the founder and developer of Computerized Books for the Blind and Print disabled (CBFB). He developed the concept of computerized books for persons with print disabilities. In this formative time

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the concept and support was developed. He demonstrated to publishers and consumers the effectiveness of electronic books for braille production and for direct access via adapted computers.

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### **1988-1989, coined the term "print disabled"**

George Kerscher coined the term "print disabled" to describe persons who could not access print. The definition is as follows:

**print disabled**, noun. When used as an adjective, the word should be hyphenated, e.g. print-disabled person.

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

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### **1985 to 1989: University of Montana**

Post graduate studies in Computer Science.

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### **1978 to 1985: Public School Teacher**

Darby, Montana High School Chairperson English Department.

Stevensville, Montana classroom teacher and manager of computer lab.

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### **1975 to 1977: Special Education Teacher**

Buffalo Narrows School District, Buffalo Narrows, Saskatchewan.

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### **1974: Northeastern Illinois University**

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Completed B.A. in English Education.

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### **Selected Papers**

The Soundproof Book: exploration of rights conflict and access to commercial e-books for people with disabilities.

Kerscher, George, and Jim Fruchterman. First Monday, v. 7, June 2002.

See [http://firstmonday.org/issues/issue7\\_6/kerscher/index.html](http://firstmonday.org/issues/issue7_6/kerscher/index.html)

"Implications of Digital Talking Books and Beyond", George Kerscher.

National Federation of the Blind presentation 1999. See

<http://www.nfb.org/Images/nfb/Publications/bm/bm00/bm0001/bm000114.htm>

"Beyond Gutenberg", Janina Sajka and George Kerscher, 2000, American Foundation for the Blind.

See [www.afb.org/Section.asp?SectionID=4&TopicID=222&DocumentID=1224](http://www.afb.org/Section.asp?SectionID=4&TopicID=222&DocumentID=1224)

more..

see The DAISY Consortium Web site at [www.daisy.org](http://www.daisy.org)

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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 BENJAMIN EDELMAN**

I, Benjamin Edelman, hereby declare as follows:

**Introduction and Qualifications**

1. I am an assistant professor at Harvard Business School. My research focuses on the design of electronic marketplaces, including Internet advertising, search engines, privacy, and information security. I hold a Ph.D. in Economics from Harvard University, a J.D. from Harvard Law School, an A.M. in statistics from Harvard University, and an A.B. in economics from Harvard College. Further information concerning my background and qualifications is provided in my curriculum vitae, which is attached hereto as Exhibit A.

2. My experience includes more than 15 years as a computer programmer, during which time I developed software for my own use, as well as for end-user computers, local networks, and web servers. I also administered servers for myself and others. My technical experience includes efforts to verify the security of other programmers' code, including uncovering shortfalls in their security systems. I have studied and written about issues of information security, accidental information revelation, and information distributed more broadly than online services anticipated. For example, I have uncovered multiple privacy flaws in

connection with services provided by Google, Inc. ("Google"), including improper data collection by Google Toolbar as well as improper data distribution by Google JotSpot. I also found and demonstrated to a court's satisfaction that an early online video service, iCraveTV, had failed to secure video contents in the way that it had previously represented to that court.

3. My academic publications explore a variety of aspects of online business, including multiple articles considering the difficulty of limiting access to and use of information systems. A full list of my publications is provided in my curriculum vitae (Exhibit A). Among the publications relevant to questions at issue in this matter are the following articles:

*Shortcomings and Challenges in the Restriction of Internet Retransmissions of Over-the-air Television Content to Canadian Internet Users*, a submission to Industry Canada in which I evaluated the difficulty of imposing certain access restrictions when distributing video material over the Internet and *Securing Online Advertising: Rustlers and Sheriffs in the New Wild West*; in which I presented the challenges of designing online advertising markets to satisfy the requirements of advertisers, online publishers, and advertising platforms while unauthorized activities such as advertising fraud are taking place. In numerous articles, I have described all manner of online miscreants using information systems in ways their providers did not intend, did not anticipate, sought to prevent, and/or claimed to seek to prevent.

4. My teaching assignment currently consists of a Harvard Business School elective course called *The Online Economy*, which analyzes strategies for all manner of online businesses. Among other topics, this course addresses issues of information security.

5. I have testified as an expert witness in federal and state courts including in the U.S. District Courts for Michigan and Pennsylvania and in Utah State Court. I also served as an expert for the plaintiffs in the so-called "Google Books" case that also is pending in this District. *Authors Guild v. Google, Inc.*, 05 Civ. 8136 (DC). That case presents many of the same facts

and concerns as are raised by this case. A listing of the other cases in which I have testified as an expert at trial or by deposition during the past four years is attached as Exhibit B. I also have testified before committees of the United States House of Representative and United States Senate.

6. I am being compensated for my work in this matter at the rate of \$450 per hour.

**Scope of Retention**

7. My understanding is that the Plaintiffs in this case have commenced a lawsuit against certain universities as well as the HathiTrust (collectively, the “Defendants”) alleging that these Defendants have collaborated with Google to digitally scan more than ten million printed books from university libraries, including millions of books that still are protected by copyright (the “Google Library Project”). My further understanding is that Google has retained a digital copy of each of these books, and that Defendants have received their own digital copies of the printed books they provided to Google, which they then copied and incorporated into the HathiTrust Digital Library (“HDL”), which comprises multiple server farms and backup tapes. As described below, Defendants have used, or threatened to use, these digitized works in a number of ways.

8. In this report, I address and opine on risks of a security breach exposing widely online the contents of in-copyright books that have been digitized as part of the Google Library Project. I conclude that Defendants’ storage and use of the digital book copies creates a significant security risk which threatens to cause a substantially adverse impact on the market for the books.

9. If Defendants’ conduct is found to be a fair use and Defendants are permitted to continue storing and using digital copies of copyrighted works in their shared digital repository, there will be serious risks of digital piracy, notwithstanding the access limitations and security



controls Defendants have established. The risks will increase substantially if a precedent set in this case that would permit persons or entities with weaker security controls to provide even limited access to digital versions of copyrighted works.

10. In preparing this report, I have reviewed the First Amended Complaint filed by Plaintiffs, the Answer to the First Amended Complaint filed by Defendants, and the motion papers filed by both sides in connection with Plaintiffs' motion for partial judgment on the pleadings. In addition, I have reviewed the sources described in this declaration as well as the additional materials listed on Exhibit C.

#### **Piracy of Books is Already a Real, Not Hypothetical Problem**

11. The electronic of digital copies of books, without authorization from publishers or rights-holders, is already occurring. For example, consider a user seeking a copy of *Calico Joe*, by John Grisham, which is the number one bestseller hardcover fiction book according to the New York Times bestseller list dated July 1, 2012. Such a user might run a Google search for "calico joe mobi" (without quotes), using the word "mobi" to indicate interest in a ".mobi" book (a popular electronic book file format). Each and every one of the first ten links found from that Google search offer or purport to offer copies of *Calico Joe*. I checked each of these ten links and found that eight confirmed that the book was available and offered a download link or download instructions. Of the ten links, not one pointed to a site that charged for access to the book. Given that *Calico Joe* is a top-selling in-copyright commercial publication one can be virtually certain that this offering of free electronic copies is being made without permission from the copyright holder or his publisher.

12. Sites offering pirated books fall into several categories. Some sites charge for pirated book copies, though they do not share the resulting revenues with those who created the books. Other sites distribute pirated book copies for free. Among sites offering free book

copies, some offer direct web-based downloads, providing pirated book copies when a user simply clicks to request a copy. Other sites offer links to Bit torrent “.torrent” files that direct a user’s computer to other computers from which a desired file may be copied.

13. A site variously known as library.nu, ebooksclub.org and gigapedia.com (collectively referred to below as “library.nu”) has facilitated particularly widespread unauthorized copying of books. According to a legal complaint from publishers, library.nu provided access to 400,000 electronic books. While library.nu was shut down pursuant to court order, the actions of library.nu continue to harm the market for books. In a presentation entitled *Media Piracy in Emerging Cultures*, Joe Karaganis, whose work at Columbia University focuses on the relationship between digital convergence and cultural production, and has recently included research on broadband adoption, data policy, and media piracy, explained the phenomenon of “shadow libraries” like library.nu as follows:

As cheap digital technologies displace paper, we’re seeing the emergence of something new: Massive digital copying, and in particular. the building, sharing and curation of large-scale digital archives among students, researchers and bibliophiles. . . . with students in the lead. And they’re just not waiting for the resolution of the larger legal questions around these issues. Not the orphan works issue, not the digital library lending model issue, the academic licensing issue, the Google Books settlement issue. They’re just doing it.

Joe Karaganis, *Media Piracy in Emerging Cultures*, audio and presentation available at <http://www.law.berkeley.edu/11731.htm> (April 13, 2012).

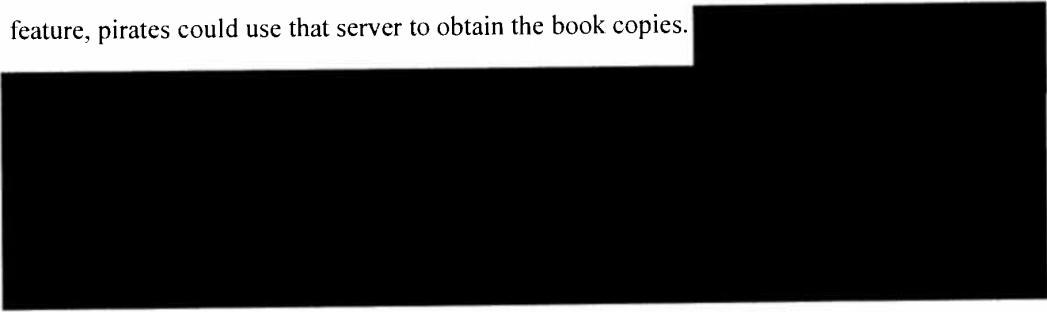
14. In my experience as a student and professor, I have personally observed first-hand the emergence and existence of such shadow libraries containing “free” digital copies of textbooks and other works, even after the demise of library.nu. Once electronic books have been placed into widespread circulation, such as what happened with library.nu, it is very difficult to prevent those files from continuing to circulate among anyone interested.

**The Digital Books Stored and Used by Defendants are Exposed to Numerous Risks**

15. If Defendants, Google or other providers (“providers”) scan books, the resulting digital book copies could enter widespread public circulation via any of several channels.

16. *First*, pirates could extract book copies through defects in the security of a provider’s systems. Once books are scanned, the resulting digital files are stored on a server or, more often, multiple servers. Based on the documents I have reviewed, the HDL employs two synchronized server farms, including a primary site in Ann Arbor and a mirror site in Indianapolis, as well as two separately-located sets of backup tapes, all of which are connected to a campus network (which presumably is connected to the Internet). Defects in the physical or virtual access controls of any such server or access point could allow pirates to gain access to digital book copies. Defects could also arise through flaws in the operating system, database server, web server, or other software run on a provider’s servers; such flaws have been widespread in even the most popular server software. Moreover, defects could also arise through the provider’s custom software, which is likely to be less secure because custom software usually receives a lesser level of scrutiny, testing, and verification than software that is distributed and used more broadly. I understand that the HDL server farms include web and database servers connected to the Internet, posing additional risks.

17. *Second*, pirates could extract books via errors in the security configuration of a provider’s systems. If even one of a provider’s servers lacks a required update or other security feature, pirates could use that server to obtain the book copies.



18. *Third*, a rogue employee could intentionally redistribute book copies. Rogue employees gain and exploit privileged access to data despite organizations' efforts to screen and supervise key staff. Consider the classified U.S. State Department material distributed by Wikileaks in 2010 – information obtained via a rogue employee. A rogue employee with access to book copies could intentionally make those copies available to the public. HathiTrust's Response to Plaintiffs' First Set of Interrogatories confirms that numerous employees enjoy authorized access to HDL book copies. Specifically, HathiTrust Response No. 2(l) identifies six employees with physical access to the server farm in Ann Arbor, three employees with physical access to the server farm in Indianapolis, five employees with physical access (and six employees with virtual access) to the two sets of backup tapes in Ann Arbor and ninety-three employees, students and faculty with virtual access to the copyrighted digital files stored on the primary and mirror HathiTrust servers. Any of these individuals could intentionally download and redistribute book copies.

19. *Fourth*, pirates could extract books by impersonating provider staff to access provider systems, including impersonating any of the twenty authorized persons noted in HathiTrust interrogatory response 2.l. Suppose an attacker can obtain the username and password of a person with full access to a provider's book copies. The attacker can log in with that password to access and copy the provider's book copies. Similar attacks are frequent: For example Amazon Zappos,<sup>1</sup> Gawker,<sup>2</sup> and Microsoft Hotmail<sup>3</sup> suffered this type of attack in

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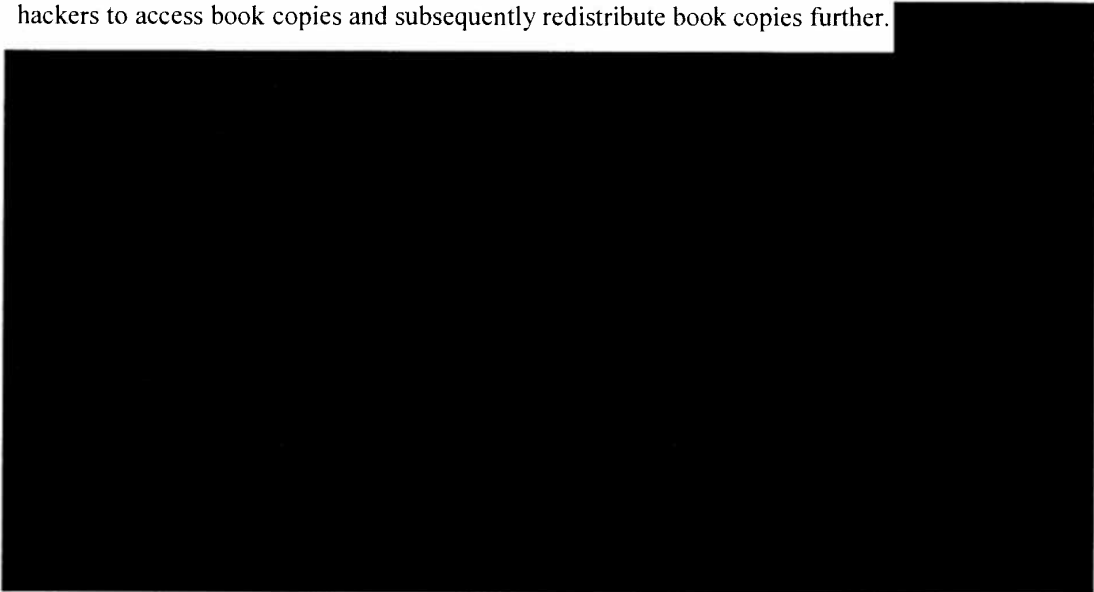
<sup>1</sup> Dominic Rushe. "Zappos Database Hit by Cyberattack." The Guardian. January 16, 2012.

<sup>2</sup> Zachary Seward and Albert Sun. "The Top 50 Gawker Media Passwords." Wall Street Journal - Digits. December 13, 2010.

<sup>3</sup> Bogdan Calin. "Statistics from 10,000 Leaked Hotmail Passwords." Acunetix. October 6, 2009. <http://www.acunetix.com/blog/news/statistics-from-10000-leaked-hotmail-passwords/>.

2009-2011. Even the United Nations has suffered a breach of a similar nature.<sup>4</sup> If a single staff person at a single book provider used the same password for a hacked site and for access to book copies, then a hacker could use that password to access book copies, copy book copies to the hacker's own systems, and redistribute book copies further from there.

20. *Fifth*, any error made by any employer could create a security breach allowing hackers to access book copies and subsequently redistribute book copies further.



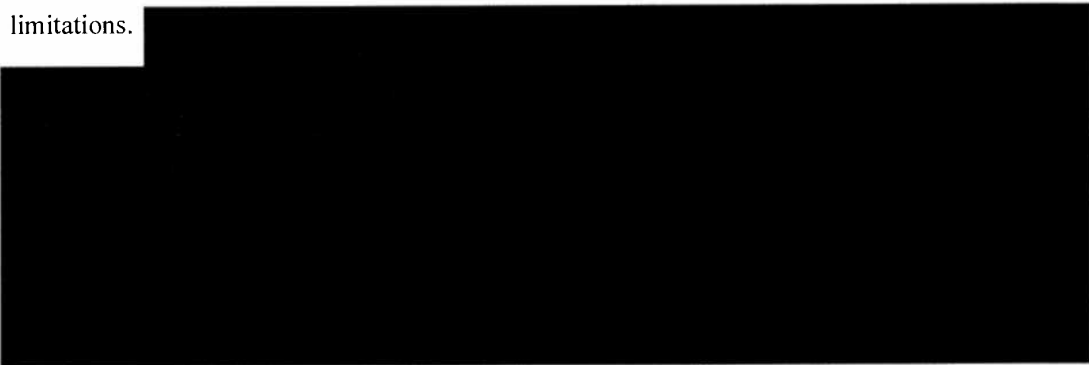
21. *Sixth*, if providers allow privileged access to copyrighted book content, it is likely that some users will attempt to exceed the intended scope of authorization to access and copy book contents en masse. I have not been fully informed of all the ways that Defendants intend to use the book contents data they receive from Google, nor have I been informed how they intend to secure that data. But the information I have reviewed indicates that Defendants' actions present a risk of book piracy. My understanding is that Defendants intended to display digital copies of entire books that they considered to be "Orphan Works" (i.e., works whose copyright

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<sup>4</sup> Chloe Albanesius. "Team Poison Hacks UN, Leaks Usernames, Passwords." PC Magazine. November 30, 2011.

owner could not easily be found), but suspended that program in the face of this lawsuit. I also understand that Defendants make digital copies of certain works available as replacements for physical books in their collections designated as damaged or deteriorating, as well as under specific conditions to visually-disabled students. As noted above in Paragraph 18, at least ninety-three people located throughout the country are granted “privileged” access to view, download and print all the books in the HDL. *See* Wilkin Tr. 192:11-194:13 (testifying that users authenticated with “privileged” access can view, download and print any work in the HDL).

22. Even if Defendants attempt to implement security controls and other limitations on users’ ability to download book copies, experience suggests that users will exceed those limitations.



23. I understand that Defendants are also using the massive digital corpus to allow certain users to conduct so-called “non-consumptive research,” including analyzing word and phrase usage and patterns in book text. From the perspective of a researcher seeking to perform such analysis, it is natural to begin by copying digital book copies onto a computer system the researcher controls, allowing the researcher to run flexible and high-speed searches of those book copies using the researcher’s preferred tools. (In contrast, if the researcher had to run analyses on a server controlled by the library, the researcher would ordinarily be able to use only those tools the library provides, and the speed of the researcher’s analysis might be constrained by

server capacity and availability.) Crucially, once a researcher copies the data onto his own system, the library's prior security efforts (whatever they might be) become largely irrelevant. A researcher might even store digital book copies on a laptop or USB drive, which are particularly susceptible to loss and theft. When book copies are processed into text using optical character recognition, the resulting files can be quite small – making it feasible to store tens of thousands of book copies on an ordinary laptop or USB drive.

24. A striking example of an authorized user exceeding the intended level of access to download mass quantities of library materials involves the case of Aaron Swartz, an internet activist and co-founder of Demand Progress, a political action group that has, among other things, supported Wikileaks. In July 2011 Swartz was indicted after, according to the indictment breaking into a restricted area at MIT and entering a computer wiring closet, supplying false information to bypass security measures and downloading over four million articles and other copyrighted documents.<sup>5</sup>

25. *Seventh*, when books are scanned by a smaller and less sophisticated provider, there is a particularly acute risk of book contents being accessed and redistributed. For one, less sophisticated organizations have a reduced capability to design, install, and maintain suitable web site, database, and related security systems as well as anti-reconstruction systems to secure books. Furthermore, less sophisticated organizations have a lesser ability to screen key staff to prevent data loss through rogue employees, and a lesser ability to configure security systems to exclude hackers. Thus, if Defendants' conduct is found to be legal, and if other companies and organizations follow Defendants' lead in scanning books, the risk that book contents will be accessed and redistributed becomes even greater.

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<sup>5</sup> *United States of America v. Aaron Swartz*. Indictment. July 14, 2011.

26. As set out in the section of this report captioned “A Single Breach Could Cause Devastating Harm,” one instance of book copying can have large effects. For example, if numerous companies and organizations scan books, attackers can focus their efforts on whichever installs the weakest security. Similarly, attackers can take advantage of even a brief period when a single book provider is insecure (for example, through failure to properly update a server). Once attackers obtain book copies, they can then redistribute the copies as desired. If many providers begin scanning and storing digital book copies, the affected books are only as secure as the least secure provider – so the diligent efforts of some providers would be undermined by lax security of others.


27. Some rightsholders may be willing to accept these risks in order to obtain the benefits of online distribution of their works. Other rightsholders may be willing to accept these risks only if they are appropriately compensated for the risk of piracy, for example if they receive contractual guarantees as to the steps to be taken to mitigate that risk, or if they receive appropriate compensation if piracy occurs. If large-scale book scanning requires permission from rightsholders, rightsholders will be able to express these preferences and obtain corresponding protections for their works. Conversely, if such scanning is deemed permissible without permission from rightsholders, then rightsholders will have little or no means to reduce risks they consider gravely important.

#### **Factors Unique to Academic Institutions Raise the Risk**

28. Structural factors unique to the academic setting also increase the difficulty of libraries properly securing book contents. University libraries typically serve myriad users including students, visitors, and others with limited long-term connection to the library – limiting a library’s ability to establish accountability. Moreover, libraries typically specialize in making information available rather than in restricting how information may be used.

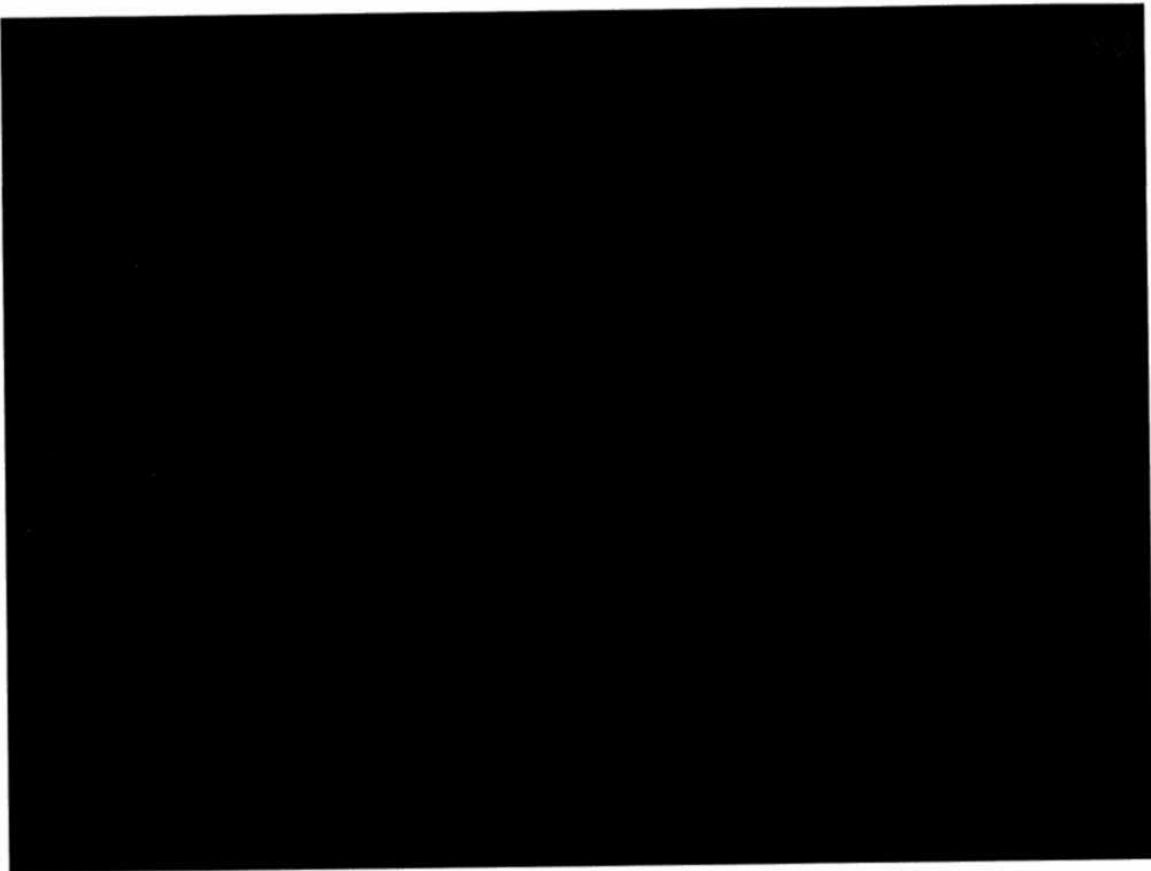


29. While some libraries offer electronic resources that are subject to restrictions on use, these restrictions are typically implemented by keeping the information on the information provider's servers so that the information provider, not the library, can monitor usage and attempt to assure compliance. For example, when libraries license journals and articles and other documents from the JSTOR digital archive, they generally do not receive full copies of the articles to store on library servers. Instead, libraries receive secure access to JSTOR servers, allowing library patrons to access individual documents on JSTOR without ever receiving the full corpus of all articles JSTOR holds. Access to documents held by Lexis-Nexis and Westlaw is similar.



30. From my time on university campuses, both as a student and as a faculty member, I am familiar with the views held by many students and some faculty with respect to copyright law. Many such users view it as permissible to make copies of all manner of copyrighted content. Often, receiving materials in digital form seems to embolden users: I know many people who would never steal an item from a retail store and who hesitate to photocopy a book (whether because such photocopying is too time-consuming, or because it "feels wrong" to them), but who do not hesitate to make copies of copyrighted works using tools such as BitTorrent or, before they were shut down, Napster and Kazaa. The prevalence of these views on university campuses makes it particularly likely that copying digital books, from university libraries or otherwise, would be seen as ethically acceptable.

31. A further risk of book piracy from or via university libraries comes from the culture of “pranks” enjoyed by many software and engineering students. For example, the MIT Hack Gallery presents hundreds of hacks including public displays of the Apple logo, the logo of the Boston Red Sox, and the logos of various movies.<sup>6</sup>



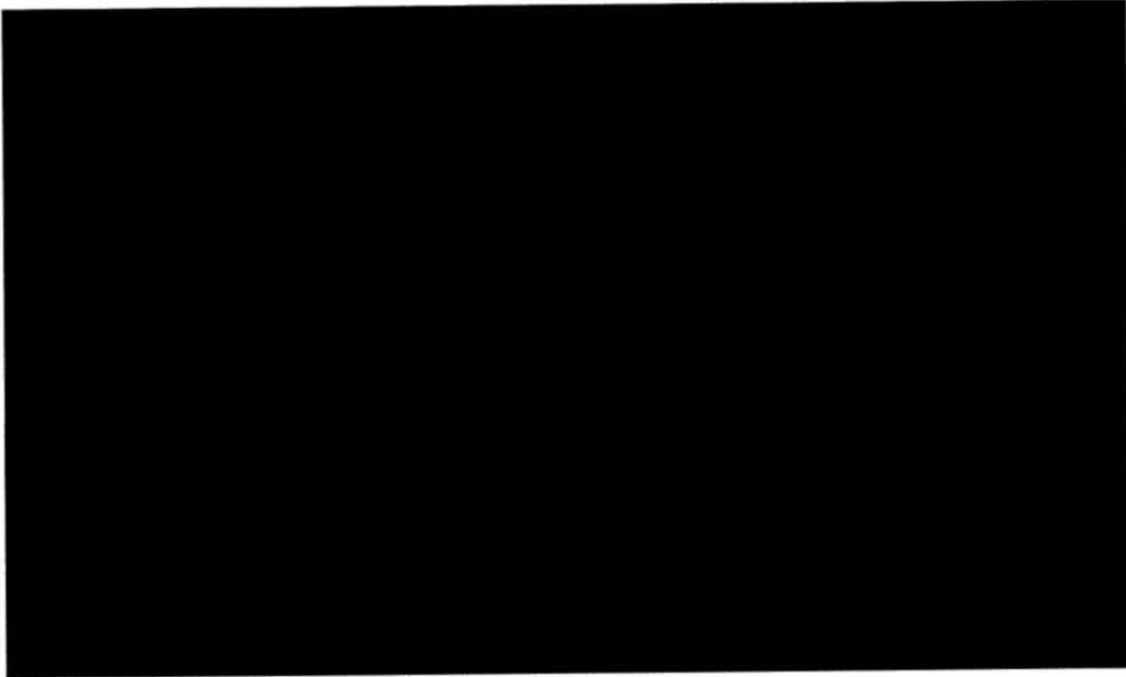
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<sup>6</sup> <http://hacks.mit.edu/>.

<sup>7</sup> Cooperative Agreement between Google Inc. and Regents of the University of Michigan, sections 2.3.1 and 2.7.

<sup>8</sup> Cooperative Agreement between Google Inc. and Regents of the University of Michigan, sections 4.4.1-2.

<sup>9</sup> For example, the Google NDA presented at <http://valleywag.com/230407/this-nda-never-existed> offers greater protection including greater restrictions on the circumstances in which

**Google Itself Is Not Immune to Design Flaws and Security Breaches**

34. Despite Google's considerable resources, Google products and services nonetheless suffer from design flaws and security breaches which result in information flowing in ways Google and/or users did not intend.

35. In general, Google faces each of the vulnerabilities detailed in the section entitled "Similar Scanning Operations Could Allow Book Copies to Be Copied and Redistributed" above. The following sections flag specific problems that could occur, as well as noting similar problems Google has already faced.

*Google's Security Systems are not Failproof*

36. In other information and distribution services, Google has failed to comply with its commitments to users and the public. For example, in January 2010, I found and reported the

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information can be shared, greater restrictions on the permissible recipients of such information, and more precise requirements as to how information must be secured.

popular Google Toolbar program – installed on “hundreds of millions” of computers<sup>10</sup> – continuing to track users’ browsing (including every web page visited) even after users had specifically requested that the Toolbar be “disable[d]” and even after the Toolbar had confirmed users’ request and disappeared from screen.<sup>11</sup> The user browsing at issue was users’ most sensitive online activities: reasonable users would activate the Toolbar’s “disable tracking” feature exactly when they sought to engage in private activities they did not wish Google to track. Google subsequently characterized its nonconsensual information collection as “an issue”<sup>12</sup> but offered no explanation for why it collected information users had specifically indicated, and Google had agreed, should not be collected. Google has paid no compensation to affected users. Neither did Google promise to undo the error: Google never offered to let affected users identify themselves so Google could delete their data from its records.

37. In early 2010, Google introduced Buzz, a social network for connecting to online colleagues and sharing information about who is doing what. For users of Google’s email service, Gmail, Buzz shared with the general public the names of the persons Gmail users corresponded with – information Google had previously indicated it would keep confidential. Google subsequently faced class litigation for this information breach, alleging that affected users suffered direct economic loss as a result of Google’s information revelation. For example,

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<sup>10</sup> Ian Paul. “Google Toolbar Tracks Some Browsing Even When It’s Not Supposed To.” PC World. January 25, 2010. [http://www.pcworld.com/article/187670/google\\_toolbar\\_tracks\\_some\\_browsing\\_even\\_when\\_its\\_not\\_supposed\\_to.html](http://www.pcworld.com/article/187670/google_toolbar_tracks_some_browsing_even_when_its_not_supposed_to.html).

<sup>11</sup> Benjamin Edelman. “Google Toolbar Tracks Browsing Even After Users Choose ‘Disable’.” January 26, 2010. <http://www.benedelman.org/news/012610-1.html>.

<sup>12</sup> Barry Schwarz. “Disabling The Google Toolbar Doesn’t Stop Google From Tracking You.” January 26, 2010. <http://searchengineland.com/disabling-the-google-toolbar-doesnt-stop-google-from-tracking-you-34438>

Buzz revealed the persons sending email to and receiving email from Andrew McLaughlin, who had previously served as a Google lobbyist, and was working in the White House as deputy Chief Technology Officer of the United States. Buzz's information revelation indicated that Mr. McLaughlin had engaged in impermissible activities with his prior employers, in violation of White House ethics rules. After Buzz-posted information prompted a complaint and an investigation, Mr. McLaughlin was formally reprimanded for the improper communications.<sup>13</sup> To the best of my knowledge, Google never offered any compensation to Mr. McLaughlin or other affected Gmail users.

38. In addition, during February 2012, researchers discovered that Google was bypassing Safari and Internet Explorer privacy settings to collect data that those browsers would ordinarily decline to provide.<sup>14</sup> While Google ceased further collection via these methods, Google has not offered to delete information improperly collected, nor has Google offered to compensate affected users.

39. In each of these examples, Google's services worked in exactly the way Google's engineers designed, in a way any Google engineer could have noticed through straightforward testing and, in many instances, in a way Google staff specifically intended. Yet Google lacked authorization for these information collection and distribution practices.

*Rogue Google Employees Could Access or Redistribute Book Contents*

40. In September 2010, news reports revealed that David Barksdale, a senior Google engineer, had used his privileged position at Google to spy on four teenagers for months.

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<sup>13</sup> J. Nicholas Hoover. "White House Reprimands Deputy CTO." Information Week. May 17, 2010. <http://www.informationweek.com/news/government/leadership/224900083>.

<sup>14</sup> Jonathan Mayer. "Safari Trackers." February 17, 2012. <http://cyberlaw.stanford.edu/blog/2012/02/safari-trackers>.

Because Barksdale was a Site Reliability Engineer at Google, he was able to tap into call logs for Google Voice (records of phone calls to and from the youths), read the youths' instant message chat logs, and unblock himself from buddy lists in order to send instant messages to and from the youths. Barksdale used each of these methods to access the communications of the affected youths. While Google terminated Barksdale's employment after these practices became known, Barksdale was able to continue his practices for months without Google's internal controls noticing what he was doing.<sup>15</sup> Google subsequently admitted that it had previously caught at least one other Google staff person accessing user data without authorization.<sup>16</sup>

*Hackers Could Access or Redistribute Book Contents*

41. Outside hackers could access or redistribute book contents. Many hackers disagree with the public policy embodied in applicable copyright law. For example, during January 2012, hackers disabled web sites of the U.S. Department of Justice and FBI, trade associations Recording Industry Association of America and Motion Picture Association of America, and record labels Universal, BMI, and Warner Music Group, when hackers disapproved of possible revisions to copyright law then under discussion in Congress.<sup>17</sup> Google's digitized book contents thus could attract hackers seeking to redistribute notable information.

42. In January 2010, Google reported a "highly sophisticated and targeted attack on our corporate infrastructure originating from China that resulted in the theft of intellectual

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<sup>15</sup> Adrian Chen. "GCreep: Google Engineer Stalked Teens, Spied on Chats." Gawker. September 14, 2010. <http://gawker.com/5637234/gcreep-google-engineer-stalked-teens-spied-on-chats>.

<sup>16</sup> Jacon Kincaid. "This Is the Second Time a Google Engineer Has Been Fired for Accessing User Data." TechCrunch. September 14, 2010.

<sup>17</sup> Ingrid Lunden. "SOPA Blackout, Anonymous-Style: FBI, DOJ Sites Downed In Megaupload Protest." paidContent.org. January 19, 2012. <http://paidcontent.org/article/419-sopa-blackout-anonymous-style-doj-riaa-hacked-in-megaupload-protest/>.

property from Google.”<sup>18</sup> A subsequent analysis by McAfee indicated that hackers had specifically sought access to the source code for Google systems, and that hackers had even obtained the ability to alter the source code for Google systems.<sup>19</sup> If Google cannot keep its own intellectual property secure from attackers, it is plausible to conclude that Google cannot keep book contents invulnerable to security breaches.

#### **A Single Breach Could Cause Devastating Harm to Authors**

43. A single breach of the systems that store book contents could allow book contents to become ubiquitous online. In particular, after that single breach occurs, users are likely to copy and/or share the material en masse, preventing any subsequent efforts to resecure book contents. For example, on August 4, 2006, AOL posted twenty million searches performed by more than 650,000 users over a three-month period. Once AOL realized that posting this information was inadvisable (because it included myriad sensitive subjects and could be easily linked to individual AOL users), AOL removed the file from its servers the same week, but the file remains easily available, including on the web and via BitTorrent.<sup>20</sup> Similarly, Wikileaks in February 2010 began publishing hundreds of thousands of pages of classified material. The information remains easily available, including via straightforward Google searches. The information simply cannot be “unpublished” once it has become publicly available on the

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<sup>18</sup> David Drummond. Official Google Blog. January 12, 2010.  
<http://googleblog.blogspot.com/2010/01/new-approach-to-china.html> .

<sup>19</sup> McAfee Labs. “Protecting Your Critical Assets: Lessons Learned from ‘Operation Aurora.’” March 2010.  
[http://www.wired.com/images\\_blogs/threatlevel/2010/03/operationaurora\\_wp\\_0310\\_fnl.pdf](http://www.wired.com/images_blogs/threatlevel/2010/03/operationaurora_wp_0310_fnl.pdf) .

<sup>20</sup> For example, I searched Google for “AOL search torrent” (without quotes) on March 27, 2012. Among the first ten results, I found six locations where I could download the files. <http://gregsadetksky.com/aol-data/> presents nine different locations where the data remains available.

Internet. The ongoing availability of materials previously distributed via Library.nu – months after Library.nu was shut down by court order – further confirms that once book copies have been freely distributed online, it is virtually impossible to prevent their further redistribution.

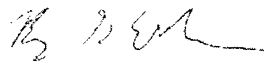
44. Thus, if book contents become available once – via a breach of book copies scanned by others, via a breach in libraries’ copies of books scanned by Google, or via a breach of Google’s own systems – the book contents are likely to be available easily and indefinitely.

45. Even if one considers the likelihood to be remote that a particular work will become available through piracy or some other security breach (and I do not think it is remote at all), one must evaluate that risk in light of the devastating effect of such a breach on the rightsholder.

#### **Conclusion**

46. It is my opinion that the Defendants’ activities as described above present serious security concerns and put at risk the ability of copyright owners to decide whether and when to exploit electronic copies of their works. This risk will be exacerbated further if Defendants’ practices of digitally copying, and in certain instances, distributing and displaying books without rightsholder permission are found to be fair uses and become widespread. Conversely, requiring Defendants and others to obtain the permission of rightsholders before engaging in such practices could prompt negotiations between rightsholders and those who seek to digitally use their works, thereby fostering standards for the allocation of the costs and risks of any harm flowing from such security breaches.

Dated: Cambridge, MA  
June 27, 2012




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Benjamin Edelman



**EXHIBIT A**

**Benjamin Edelman – *Curriculum Vitae***

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**Benjamin G. Edelman**

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## Experience

Assistant professor, Harvard Business School. Negotiations, Organizations & Markets unit. (April 2007 – present)

Fields: Industrial organization, market design, information economics.

Research interests: Electronic markets. Internet advertising, reputation, and fraud. Automated data collection.

Teaching: Networked businesses, market design, information systems, online marketing, negotiation.

Independent consultant and expert witness (November 1999 – present)

Conducted quantitative analyses and empirical testing for a variety of clients including the American Civil Liberties Union, AOL, Microsoft, National Association of Broadcasters, National Football League, New York Times, Universal Music Group, and Washington Post on topics including online advertising, advertising fraud, spyware, spam, pay-per-click advertising and click fraud, Internet filtering, geolocation and targeting, privacy, security, automated data collection, and user interface design. Qualified as an expert in Federal court on multiple occasions, and provided oral testimony under direct and cross examination.

Student Fellow / Technology Analyst, Berkman Center for Internet & Society (May 1998 – January 2004)

Conducted empirical studies of the Internet's domain name system, spyware/adware, content filtering by network intermediaries. Developed software systems for interactive real-time communication among class/meeting participants. Designed and operated system for webcast of and remote participation in numerous Berkman Center, Harvard Law School, and Cambridge community events as well as twelve ICANN public meetings.

## Education

Harvard Graduate School of Arts & Sciences - Ph.D., Economics, 2007. Dissertation: "Topics in Internet Advertising."

Harvard Law School - J.D., 2005.

Harvard Graduate School of Arts & Sciences - A.M., Statistics, 2002.

Harvard College - A.B., Economics, *summa cum laude*, 2002; Phi Beta Kappa.

Woodrow Wilson Senior High School - Washington, DC: 1998; valedictorian.

## Representative Research

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with Michael Ostrovsky and Michael Schwarz

Optimal Auction Design and Equilibrium Selection in Sponsored Search Auctions (*American Economic Review*, 2010)  
with Michael Schwarz

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Resources for Affiliates and Affiliate Merchants (2004-) [benedelman.org/affiliates](http://benedelman.org/affiliates)

Documentation of Internet Filtering Worldwide (2002-2003) with Jonathan Zittrain [cyber.law.harvard.edu/filtering](http://cyber.law.harvard.edu/filtering)

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## Additional Writings

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with Duncan Gilchrist *Information Economics and Policy*

Internet Protocol Numbers and the American Registry for Internet Numbers: Suggested Guidance for Bankruptcy Trustees, Debtors-in-Possession, and Receivers. *BNA's Bankruptcy Law Reporter* (2012) with Steven Ryan and Matthew Martel

Using Internet Data for Economic Research (2012) *Journal of Economic Perspectives*

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Knowing Certain Trademark Ads Were Confusing, Google Sold Them Anyway -- for \$100+ Million (2010)  
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Facebook Leaks Usernames, User IDs, and Personal Details to Advertisers (2010) [benedelman.org/news/052010-1.html](http://benedelman.org/news/052010-1.html)

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[cyber.law.harvard.edu/people/edelman/renewals](http://cyber.law.harvard.edu/people/edelman/renewals)

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Software Environments for Online Deliberative Discourse (1999-2000) [cyber.law.harvard.edu/projects/deliberation](http://cyber.law.harvard.edu/projects/deliberation)

Executive Summaries of Formative ICANN Documents (1999)  
[cyber.law.harvard.edu/pressbriefings/icann/briefingbook/executivesummaries.html](http://cyber.law.harvard.edu/pressbriefings/icann/briefingbook/executivesummaries.html)

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## Teaching Cases and Notes

Airbnb (A) and (B) (HBS Case 912-019, -020) (and TN) (2011) with Michael Luca

Attack of the Clones: Birchbox Defends Against Copycat Competitors (HBS Case 912-010) (2011) with Peter Coles

The Online Economy: Strategy and Entrepreneurship - Course Architecture Note (HBS Note 911-069) (2011) with Peter Coles

Mobilizing Online Businesses (HBS Module Note 911-048) (2011) with Peter Coles

Online Marketing at Big Skinny (HBS Case 911-033) (and TN) (2011) with Scott Kominers

The iPhone at IVK (TN) (HBS Teaching Note 911-414) (2010)

Akamai, Inc. (HBS Case 804-158) (2010) with Thomas Eisenmann and Eric Van den Steen

Google Inc. and Google Inc. (Abridged) (HBS Case 910-036 and 910-032) (2010) (and TN) with Thomas Eisenmann

Personal Rapid Transport at Vectus, Inc. (HBS Case 910-010) (2010) (and TN)

eBay Partner Network (A), (B), and (C) (HBS Case 910-008, -009, and -012) (2009) (and TN) with Ian Larkin

Symbian, Google & Apple in the Mobile Space (A) and (B) (HBS Case 909-055, -056) (2009) with F. Suarez & A. Srinivasan  
 Distribution at American Airlines (A) and (B) (HBS Case 909-035 and -036) (and TN) (2009)  
 Windows Vista (HBS Case 909-038) (2009)  
 Online Restaurant Promotions (HBS Case 909-034) (and TN) (2009)  
 Ad Classification at Right Media (HBS Case 909-032) (and TN) (2009)  
 Consumer Payment Systems – United States (HBS Case 909-006) (2009) (and TN) with Andrei Hagiu  
 Consumer Payment Systems – Japan (HBS Case 909-007) (2009) (and TN) with Andrei Hagiu  
 TheLadders (HBS Case 908-061) (2008) (and TN) with Peter Coles, Brian Hall, and Nicole Bennett  
 Opening Dot EU (A) and (B) (HBS Case 908-052 and -053) (2008)  
 Microsoft adCenter (HBS Case 908-049) (and TN) (2008) with Peter Coles

### **Programming Experience**

Microsoft Visual Basic (15+ years experience), VB.NET	Mathworks MatLab	Stata
SPlus / R	Python	PHP

### **Awards**

Emerald Citations of Excellence Award (2011)  
 ECCH Award for Outstanding Contribution to the Case Method – Strategy and General Management (2011)  
 Best Paper Award, Honorable Mention – The 11<sup>th</sup> International Conference on Electronic Commerce (2009)  
 Harvard University Graduate Economics Fellowship (2003-2006)  
 John M. Olin Fellowship in Law and Economics (2003-2004, 2004-2005)  
 Hoopes Prize for Undergraduate Research (2002)  
 Seymour and Ruth Harris Prize for Best Honors Thesis in Economics (2002)  
 John Harvard Scholarship, Harvard College (1998-1999, 1999-2000, 2000-2001)  
 Rank I Honors, Harvard College (1998-1999, 1999-2000, 2000-2001)  
 Phi Beta Kappa, Harvard College (2001)  
 Undergraduate Honors Research Scholarship, Department of Economics, Harvard College (2001)  
 Detur Prize, Harvard College (1999)

### **Congressional and Expert Testimony**

US Senate, Commerce Committee (2009) (statement for the record)  
 US House of Representatives, Committee on the Judiciary (2008) (invited / hearing cancelled)  
 US Senate, Committee on Commerce, Science, and Transportation (2008)  
 Federal Trade Commission Public Hearing on Effectiveness of CAN-SPAM (2005)  
 District Court, Third Judicial District of Utah (2004)  
 US Federal Court, Eastern District of Michigan (2003)  
 US House of Representatives, Committee on the Judiciary (2003)  
 US Federal Court, Eastern District of Pennsylvania (2002)  
 US Federal Court, Western District of Pennsylvania (2000)



### Academic Service

Associate Editor: Journal of Economic Perspectives (2008-2012)

Referee: American Economic Review, Quarterly Journal of Economics, Journal of Applied Economics, RAND Journal of Economics, Management Science, Journal of Economics & Management Strategy, Sponsored Search Workshop, Workshop on the Economics of Information Security, Workshop on the Economics of Securing the Information Infrastructure, Manufacturing & Services Operations Management, The International Conference on Electronic Commerce (2009), International Review of Law and Economics, Journal of Industrial Economics, Operations Research, Berkeley Electronic Press – Policy & Internet, Review of Economic Studies, Economics Letters, Management Science, Review of Industrial Organization, Telecommunications Policy, Emerald Program, National Science Foundation, Manufacturing and Service Operations Management

Program committee: Workshop on the Economics of Securing the Information Infrastructure (2006), Sponsored Search Workshop (2007), WWW2008, Fourth Workshop on Ad Auctions (2008), The First Conference on Auctions, Market Mechanisms and Their Applications (2009), ACM Conference on Electronic Commerce (2010), Workshop on the Economics of Information Security (2010), Workshop on the Economics of Information Security (2011), Seventh Workshop on Ad Auctions (2011), The Second Conference on Auctions, Market Mechanisms and Their Applications (2011), WWW2012, Anti-Phishing eCrime Researchers Summit (2012)

Co-organizer: Sixth Workshop on Ad Auctions (2010)

Non-resident tutor / senior common room member: Cabot House (2004-2012)

**EXHIBIT B****Benjamin Edelman – Prior Testimony at Trial or Deposition**

<b>Proceeding</b>	<b>Court</b>	<b>Reference</b>	<b>Context</b>	<b>Year</b>	<b>On behalf of</b>
National Football League, et al. v. TVRADIONOW Corporation, et al.	U.S. District Court, Western District of Pennsylvania	No. Civ.A. 00-120 and 00-121	Hearing	2000	Plaintiff
Multnomah County Public Library, et al. v. United States of America	U.S. District Court, Eastern District of Pennsylvania	No. Civ.A. 01-1322	Deposition, hearing	2002	Plaintiff
Washingtonpost.Newsweek Interactive Company, LLC, et al. v. The Gator Corporation	U.S. District Court, Eastern District of Virginia	02-909-A	Deposition	2002	Plaintiff
Wells Fargo & Company, et al., v. WhenU.com, Inc.	U.S. District Court, Eastern District of Michigan	03-71906	Deposition, hearing	2003	Plaintiff
WhenU.com, Inc. v. The State of Utah	Utah District Court	Civ. No. 040907478	Hearing	2004	Defendant
The People of the State of California ex. rel. Rockard J. Delgadillo, Los Angeles City Attorney v. Intermix Media, Inc.	Los Angeles Superior Court	BC343196	Deposition	2006	Plaintiff
State of South Carolina v. Casale Media, Inc., et al.	South Carolina Court of Common Pleas, Richland County	08-CP-40-0729	Deposition	2008	Plaintiff
UMG Recordings, Inc., et al. v. Veoh Networks, Inc., et al.	U.S. District Court, Central District of California	No. CV 07-5744 AHM (AJWx)	Deposition	2009	Plaintiff
Netscape Communications Corp. v. Valueclick, Inc., et al.,	U.S. District Court, Eastern District of Virginia	No. 1:09-cv-225-TSE-IDD	Deposition	2009	Plaintiff
Arista Records, et al., v. Myxer, Inc., et al.	U.S. District Court, Central District of California	No. CV 08-03935 GAF (JCx)	Deposition	2009	Plaintiff
Stephanie Lens v. Universal Music Corp., et al.	United States District Court, Northern District of California	No. C 07-03783 JF (PVT)	Deposition	2010	Defendant
Authors Guild v. Google Inc.	United States District Court, Southern District of New York	No. 05 Civ. 8136 (DC)	Deposition	2012	Plaintiff

**EXHIBIT C**

**Benjamin Edelman – Materials Considered**

In addition to the materials cited in my declaration, I have considered the following documents:

1. First Amended Complaint in *The Authors Guild Inc., et al., v. Hathitrust, et al.*;
2. Plaintiffs' Brief in Support of Motion for Partial Judgment on the Pleadings in the Authors Guild v. Hathitrust case;
3. Plaintiffs' Fourth Amended Class Action Complaint in *The Authors Guild Inc., et al. v. Google Inc.*;
4. Google's Objections and Responses to Plaintiffs' First Set of Requests for Admission in *The Authors Guild Inc., et al. v. Google Inc.*;
5. Plaintiffs' Class Certification Brief in *The Authors Guild Inc., et al. v. Google Inc.*;
6. Transcript from the declaration of Joanne Zack and exhibits in support of Plaintiffs' Class Certification Motion in *The Authors Guild Inc., et al. v. Google Inc.*;
7. Google's Brief in Opposition to Plaintiffs' Motion for Class Certification in *The Authors Guild Inc., et al. v. Google Inc.*;
8. Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss the Authors Guild as Associational Plaintiff in *The Authors Guild Inc., et al. v. Google Inc.*;
9. Declarations of Daniel Clancy, dated February 11, 2010, and February 7, 2012 in *The Authors Guild Inc., et al. v. Google Inc.*;
10. Google's Supplemental Responses and Objections to Plaintiffs' Second Request for Production of Documents and Things (Public Redacted Version);
11. Cooperative Agreement between Google and the University of Michigan;
12. Cooperative Agreement between Google and the University of California;
13. Transcript from the deposition of John Wilkin (HathiTrust/University of Michigan) dated April 25, 2012;
14. Transcript from the deposition of Dan Clancy (Google) dated June 1, 2012;
- 
16. Google Books website at <http://books.google.com>.

Defendants.

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5. Attached hereto as Exhibit 3 is a true and correct copy of the transcript from the deposition of Pat Cummings dated May 22, 2012.

6. Attached hereto as Exhibit 4 is a true and correct copy of the transcript from the deposition of John White, literary agent for Plaintiff J.R. Salamanca, dated June 8, 2012.

***Depositions of Defendants***

7. Attached hereto as Exhibit 5 is a true and correct copy of the transcript from the deposition of Heather Christenson (University of California) dated April 11, 2012.

8. Attached hereto as Exhibit 6 is a true and correct copy of the transcript from the deposition of Paul Courant (HathiTrust/University of Michigan) dated April 24, 2012.

9. Attached hereto as Exhibit 7 is a true and correct copy of the transcript from the deposition of Laine Farley (University of California) dated April 12, 2012.

10. Attached hereto as Exhibit 8 is a true and correct copy of the transcript from the deposition of Peter Hirtle (Cornell University) dated April 18, 2012.

11. Attached hereto as Exhibit 9 is a true and correct copy of the transcript from the deposition of John Wilkin (HathiTrust/University of Michigan) dated April 25, 2012.

***Depositions of Non-Parties***

12. Attached hereto as Exhibit 10 is a true and correct copy of the transcript from the deposition of Dan Clancy (Google) dated June 1, 2012.

**Written Discovery Responses**

***Responses from Individual Plaintiffs***

13. Attached hereto as Exhibit 11 is a true and correct copy of the Objections and Responses of Plaintiff Trond Andreassen to Defendants' First Set of Interrogatories and Requests for the Production of Documents dated January 6, 2012.

14. Attached hereto as Exhibit 12 is a true and correct copy of the Objections and Responses of Plaintiff Trond Andreassen to Defendants' First Set of Requests for Admission dated January 6, 2012.

15. Attached hereto as Exhibit 13 is a true and correct copy of the Objections and Responses of Plaintiff Trond Andreassen to Defendants' Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012.

16. "Attached hereto as Exhibit 14 is a true and correct copy of the Objections and Responses of Plaintiff Pat Cummings to Defendants' First Set of Interrogatories and Requests for the Production of Documents dated January 6, 2012.

17. Attached hereto as Exhibit 15 is a true and correct copy of the Objections and Responses of Plaintiff Pat Cummings to Defendants' First Set of Requests for Admission dated January 6, 2012.

18. Attached hereto as Exhibit 16 is a true and correct copy of the Objections and Responses of Plaintiff Pat Cummings to Defendants' Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012.

19. Attached hereto as Exhibit 17 is a true and correct copy of the Objections and Responses of Plaintiff Erik Grundstrom to Defendants' First Set of Interrogatories and Requests for the Production of Documents dated January 13, 2012.

20. Attached hereto as Exhibit 18 is a true and correct copy of the Objections and Responses of Plaintiff Erik Grundstrom to Defendants' First Set of Requests for Admission dated January 13, 2012.

21. Attached hereto as Exhibit 19 is a true and correct copy of the Objections and Responses of Plaintiff Erik Grundstrom to Defendants' Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012.

22. Attached hereto as Exhibit 20 is a true and correct copy of the Objections and Responses of Plaintiff Angelo Loukakis to Defendants' First Set of Interrogatories and Requests for the Production of Documents dated January 13, 2012.

23. Attached hereto as Exhibit 21 is a true and correct copy of the Objections and Responses of Plaintiff Angelo Loukakis to Defendants' First Set of Requests for Admission dated January 12, 2012.

24. Attached hereto as Exhibit 22 is a true and correct copy of the Objections and Responses of Plaintiff Angelo Loukakis to Defendants' Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012.

25. Attached hereto as Exhibit 23 is a true and correct copy of the Objections and Responses of Plaintiff Roxana Robinson to Defendants' First Set of Interrogatories and Requests for the Production of Documents with Amended Schedule A dated January 9, 2012.

26. Attached hereto as Exhibit 24 is a true and correct copy of the Objections and Responses of Plaintiff Roxana Robinson to Defendants' First Set of Requests for Admission dated January 9, 2012.

27. Attached hereto as Exhibit 25 is a true and correct copy of the Objections and Responses of Plaintiff Roxana Robinson to Defendants' Second Set of Interrogatories and Requests for the Production of Documents dated March 28, 2012.

28. Attached hereto as Exhibit 26 is a true and correct copy of the Objections and Responses of Plaintiff Helge Ronning to Defendants' First Set of Interrogatories and Requests for the Production of Documents dated January 12, 2012.

29. Attached hereto as Exhibit 27 is a true and correct copy of the Objections and Responses of Plaintiff Helge Ronning to Defendants' First Set of Requests for Admission dated January 12, 2012.

30. Attached hereto as Exhibit 28 is a true and correct copy of the Objections and Responses of Plaintiff Helge Ronning to Defendants' Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012.

31. Attached hereto as Exhibit 29 is a true and correct copy of the Objections and Responses of Plaintiff Andre Roy to Defendants' First Set of Interrogatories and Requests for the Production of Documents dated January 13, 2012.

32. Attached hereto as Exhibit 30 is a true and correct copy of the Objections and Responses of Plaintiff Andre Roy to Defendants' First Set of Requests for Admission dated January 13, 2012.

33. Attached hereto as Exhibit 31 is a true and correct copy of the Objections and Responses of Plaintiff Andre Roy to Defendants' Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012.

34. Attached hereto as Exhibit 32 is a true and correct copy of the Amended Objections and Responses of Plaintiff Jack R. Salamanca to Defendants' First Set of Interrogatories and Requests for the Production of Documents with Second Amended Schedule A dated April 10, 2012.



35. Attached hereto as Exhibit 33 is a true and correct copy of the Objections and Responses of Plaintiff Jack R. Salamanca to Defendants' First Set of Requests for Admission dated January 12, 2012.

36. Attached hereto as Exhibit 34 is a true and correct copy of the Objections and Responses of Plaintiff Jack R. Salamanca to Defendants' Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012.

37. Attached hereto as Exhibit 35 is a true and correct copy of the Amended Objections and Responses of Plaintiff James Shapiro to Defendants' First Set of Interrogatories and Requests for the Production of Documents dated March 26, 2012.

38. Attached hereto as Exhibit 36 is a true and correct copy of the Amended Objections and Responses of Plaintiff James Shapiro to Defendants' First Set of Requests for Admission dated April 3, 2012.

39. Attached hereto as Exhibit 37 is a true and correct copy of the Objections and Responses of Plaintiff James Shapiro to Defendants' Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012.

40. Attached hereto as Exhibit 38 is a true and correct copy of the Objections and Responses of Plaintiff Daniele Simpson to Defendants' First Set of Interrogatories and Requests for the Production of Documents dated January 13, 2012.

41. Attached hereto as Exhibit 39 is a true and correct copy of the Amended Objections and Responses of Plaintiff Daniele Simpson to Defendants' First Set of Requests for Admission dated April 3, 2012.

42. Attached hereto as Exhibit 40 is a true and correct copy of the Objections and Responses of Plaintiff James Shapiro to Defendants' Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012.

43. Attached hereto as Exhibit 41 is a true and correct copy of the Objections and Responses of Plaintiff T.J. Stiles to Defendants' First Set of Interrogatories and Requests for the Production of Documents dated January 6, 2012.

44. Attached hereto as Exhibit 42 is a true and correct copy of the Objections and Responses of Plaintiff T.J. Stiles to Defendants' First Set of Requests for Admission dated January 6, 2012.

45. Attached hereto as Exhibit 43 is a true and correct copy of the Objections and Responses of Plaintiff T.J. Stiles to Defendants' Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012.

46. Attached hereto as Exhibit 44 is a true and correct copy of the Objections and Responses of Plaintiff Fay Weldon to Defendants' First Set of Interrogatories and Requests for the Production of Documents dated January 12, 2012.

47. Attached hereto as Exhibit 45 is a true and correct copy of the Objections and Responses of Plaintiff Fay Weldon to Defendants' First Set of Requests for Admission dated January 12, 2012.

48. Attached hereto as Exhibit 46 is a true and correct copy of the Objections and Responses of Plaintiff Fay Weldon to Defendants' Second Set of Interrogatories and Requests for the Production of Documents dated April 10, 2012.

***Responses from Associational Plaintiffs***

49. Attached hereto as Exhibit 47 is a true and correct copy of the Amended Objections and Responses of Plaintiff The Authors Guild to Defendants' First Set of Interrogatories and Requests for the Production of Documents dated April 3, 2012.

50. Attached hereto as Exhibit 48 is a true and correct copy of the Amended Objections and Responses of Plaintiff The Authors Guild to Defendants' First Set of Requests for Admission dated April 3, 2012.

51. Attached hereto as Exhibit 49 is a true and correct copy of the Objections and Responses of Plaintiff The Authors Guild to Defendants' Second Set of Interrogatories and Requests for the Production of Documents dated April 20, 2012.

52. Attached hereto as Exhibit 50 is a true and correct copy of the Objections and Responses of Plaintiff The Authors' Licensing and Collecting Society to Defendants' First Set of Interrogatories and Requests for the Production of Documents dated February 4, 2012.

53. Attached hereto as Exhibit 51 is a true and correct copy of the Objections and Responses of Plaintiff The Authors' Licensing and Collecting Society to Defendants' First Set of Requests for Admission dated February 4, 2012.

54. Attached hereto as Exhibit 52 is a true and correct copy of the Objections and Responses of Plaintiff The Authors' Licensing and Collecting Society to Defendants' Second Set of Interrogatories and Requests for the Production of Documents dated April 20, 2012.

55. Attached hereto as Exhibit 53 is a true and correct copy of the Objections and Responses of Plaintiff The Authors League Fund to Defendants' First Set of Interrogatories and Requests for the Production of Documents with Amended Schedule A dated January 25, 2012.

56. Attached hereto as Exhibit 54 is a true and correct copy of the Objections and Responses of Plaintiff The Authors League Fund to Defendants' First Set of Requests for Admission dated January 25, 2012.

57. Attached hereto as Exhibit 55 is a true and correct copy of the Objections and Responses of Plaintiff The Authors League Fund to Defendants' Second Set of Interrogatories and Requests for the Production of Documents dated April 20, 2012.

58. Attached hereto as Exhibit 56 is a true and correct copy of the Objections and Responses of Plaintiff The Australian Society of Authors to Defendants' First Set of Interrogatories and Requests for the Production of Documents dated February 10, 2012.

59. Attached hereto as Exhibit 57 is a true and correct copy of the Objections and Responses of Plaintiff The Australian Society of Authors to Defendants' First Set of Requests for Admission dated February 10, 2012.

60. Attached hereto as Exhibit 58 is a true and correct copy of the Objections and Responses of Plaintiff The Australian Society of Authors to Defendants' Second Set of Interrogatories and Requests for the Production of Documents dated April 20, 2012.

61. Attached hereto as Exhibit 59 is a true and correct copy of the Objections and Responses of Plaintiff Sveriges Författarförbund (The Swedish Writers' Union) to Defendants' First Set of Interrogatories and Requests for the Production of Documents dated January 23, 2012.

62. Attached hereto as Exhibit 60 is a true and correct copy of the Objections and Responses of Plaintiff Sveriges Författarförbund (The Swedish Writers' Union) to Defendants' First Set of Requests for Admission dated January 23, 2012.

63. Attached hereto as Exhibit 61 is a true and correct copy of the Objections and Responses of Plaintiff Sveriges Författarförbund (The Swedish Writers' Union) to Defendants' Second Set of Interrogatories and Requests for the Production of Documents dated April 20, 2012.

64. Attached hereto as Exhibit 62 is a true and correct copy of the Objections and Responses of Plaintiff Norsk Faglitterær Forfatter- og Oversetterforening (The Norwegian Non-Fiction Writers and Translators Association) to Defendants' First Set of Interrogatories and Requests for the Production of Documents dated January 26, 2012.

65. Attached hereto as Exhibit 63 is a true and correct copy of the Objections and Responses of Plaintiff Norsk Faglitterær Forfatter- og Oversetterforening (The Norwegian Non-Fiction Writers and Translators Association) to Defendants' First Set of Requests for Admission dated January 26, 2012.

66. Attached hereto as Exhibit 64 is a true and correct copy of the Objections and Responses of Plaintiff Norsk Faglitterær Forfatter- og Oversetterforening (The Norwegian Non-Fiction Writers and Translators Association) to Defendants' Second Set of Interrogatories and Requests for the Production of Documents dated April 20, 2012.

67. Attached hereto as Exhibit 65 is a true and correct copy of the Objections and Responses of Plaintiff The Writers' Union of Canada to Defendants' First Set of Interrogatories and Requests for the Production of Documents dated January 30, 2012.

68. Attached hereto as Exhibit 66 is a true and correct copy of the Objections and Responses of Plaintiff The Writers' Union of Canada to Defendants' First Set of Requests for Admission dated January 30, 2012.

69. Attached hereto as Exhibit 67 is a true and correct copy of the Objections and Responses of Plaintiff The Writers' Union of Canada to Defendants' Second Set of Interrogatories and Requests for the Production of Documents dated April 20, 2012.

70. Attached hereto as Exhibit 68 is a true and correct copy of the Objections and Responses of Plaintiff Union des Écrivaines et des Écrivains Québécois (Quebec Union of Writers) to Defendants' First Set of Interrogatories and Requests for the Production of Documents dated January 26, 2012.

71. Attached hereto as Exhibit 69 is a true and correct copy of the Objections and Responses of Plaintiff Union des Écrivaines et des Écrivains Québécois (Quebec Union of Writers) to Defendants' First Set of Requests for Admission dated January 26, 2012.

72. Attached hereto as Exhibit 70 is a true and correct copy of the Objections and Responses of Plaintiff Union des Écrivaines et des Écrivains Québécois (Quebec Union of Writers) to Defendants' Second Set of Interrogatories and Requests for the Production of Documents dated April 20, 2012.

***Responses from Defendants***

73. Attached hereto as Exhibit 71 is a true and correct copy of the Responses to Plaintiffs' First Set of Interrogatories to Defendant HathiTrust dated February 8, 2012.

74. Attached hereto as Exhibit 72 is a true and correct copy of the Supplemental Responses to Plaintiffs' First Set of Interrogatories to Defendant HathiTrust dated April 9, 2012.

75. Attached hereto as Exhibit 73 is a true and correct copy of the Responses to Plaintiffs' First Set of Interrogatories to Defendant Mark G. Yudof (University of California) dated February 8, 2012.

76. Attached hereto as Exhibit 74 is a true and correct copy of the Responses to Plaintiffs' First Requests for Admission to Defendant Mark G. Yudof (University of California) dated February 8, 2012.

77. Attached hereto as Exhibit 75 is a true and correct copy of the Responses to Plaintiffs' First Set of Interrogatories to Defendant Mary Sue Coleman (University of Michigan) dated February 8, 2012.

78. Attached hereto as Exhibit 76 is a true and correct copy of the Supplemental Responses to Plaintiffs' First Set of Interrogatories to Defendant Mary Sue Coleman (University of Michigan) dated April 9, 2012.

79. Attached hereto as Exhibit 77 is a true and correct copy of the Responses to Plaintiffs' First Requests for Admission to Defendant Mary Sue Coleman (University of Michigan) dated February 8, 2012.

80. Attached hereto as Exhibit 78 is a true and correct copy of the Responses to Plaintiffs' First Set of Interrogatories to Defendant Kevin Reilly (University of Wisconsin) dated February 8, 2012.

81. Attached hereto as Exhibit 79 is a true and correct copy of the Responses to Plaintiffs' First Requests for Admission to Defendant Kevin Reilly (University of Wisconsin) dated February 8, 2012.

**Google Cooperative Agreements**

82. Attached hereto as Exhibit 80 is a document entitled "Cooperative Agreement" that was purportedly entered into by Google Inc. and the University of Michigan on or about June 19, 2005. The attached copy was produced by Google Inc. as GOOG05000355-366.

83. Attached hereto as Exhibit 81 is a document entitled “Amendment To Cooperative Agreement” that was purportedly entered into by Google Inc. and the University of Michigan on or about May 19, 2009. The attached copy was produced by Google Inc. as GOOG05000319-354.

84. Attached hereto as Exhibit 82 is a document entitled “Cooperative Agreement” that was purportedly entered into by Google Inc. and the University of California on or about August 3, 2006. The attached copy was produced by Google Inc. as GOOG05000306-318.

85. Attached hereto as Exhibit 83 is a document entitled “Cooperative Agreement” that was purportedly entered into by Google Inc. and the Indiana University on or about June 1, 2007. The attached copy was produced by Google Inc. as GOOG05000028-044.

86. Attached hereto as Exhibit 84 is a document entitled “Cooperative Agreement” that was purportedly entered into by Google Inc. and Cornell University on or about August 6, 2007. The attached copy was produced by Google Inc. as GOOG05000472-483.

87. Attached hereto as Exhibit 85 is a document entitled “Cooperative Agreement” that was purportedly entered into by Google Inc. and the University of Wisconsin on or about September 22, 2007. The attached copy was produced by Google Inc. as GOOG05000428-438.

**Other Documents**

88. On June 28, 2012, I conducted a search for the phrase “secure cheap advertising” on the website <http://books.google.com>. Attached hereto as Exhibit 86 is a true and correct copy of a printout of the results page from that search.

89. Attached hereto as Exhibit 87 is a true and correct copy of a document entitled [REDACTED] The attached copy was produced by Defendants as UM004243-4266.



90. Attached hereto as Exhibit 88 is a true and correct copy of a document entitled

[REDACTED]  
The attached copy was produced by Defendants as UM004267-81.

91. Attached hereto as Exhibit 89 is a true and correct copy of a document entitled

[REDACTED]  
The attached copy was produced by Defendants as UM004282-86.

92. Attached hereto as Exhibit 90 is a true and correct copy of a printout showing Amazon.com's "Look Inside!" feature for the book *Clean Your Room, Harvey Moon!* by Pat Cummings. This document was marked as Exhibit No. "PC 14" during the deposition of Pat Cummings on May 22, 2012.

93. Attached hereto as Exhibit 91 is a true and correct copy of the *Curriculum Vitae* of Paul N. Courant. This document was marked as Exhibit No. "PC 1" during the deposition of Paul Courant on April 24, 2012.

94. Attached hereto as Exhibit 92 is a true and correct copy of [REDACTED]  
[REDACTED] This document was produced by Defendants as UM001798-1798.01 and was marked as Exhibit No. "PC 4" during the deposition of Paul Courant on April 24, 2012.

95. Attached hereto as Exhibit 93 is a true and correct copy of a [REDACTED]  
[REDACTED] This document was produced by Defendants as UM001716-1717 and was marked as Exhibit No. "PC 8" during the deposition of Paul Courant on April 24, 2012.

96. Attached hereto as Exhibit 94 is a true and correct copy of a news article from the UM website entitled "U-M Library Statement on the Orphan Works Project" dated September

16, 2011. This document was marked as Exhibit No. "PC 9" during the deposition of Paul Courant on April 24, 2012.

97. Attached hereto as Exhibit 95 is a true and correct copy of the *Curriculum Vitae* of John Wilkin. This document was marked as Exhibit No. "JW 1" during the deposition of John Wilkin on April 25, 2012.

98. Attached hereto as Exhibit 96 is a true and correct copy of a press release entitled "Google Checks Out Library Books" dated December 14, 2004. This document was marked as Exhibit No. "JW 2" during the deposition of John Wilkin on April 25, 2012.

99. Attached hereto as Exhibit 97 is a true and correct copy of a blog article entitled "John Wilkin talks Google Print & Digitization." The document was marked as Exhibit No. "JW 4" during the deposition of John Wilkin on April 25, 2012.

100. Attached hereto as Exhibit 98 is a true and correct copy of a newsletter dated April 13, 2012 from the HathiTrust website entitled "Update on March Activities." This document was marked as Exhibit No. "PH 9" during the deposition of Peter Hirtle on April 18, 2012.

101. Attached hereto as Exhibit 99 is a true and correct copy of the Declaration of Daniel Clancy in Support of Motion for Final Approval of Amended Settlement Agreement. This document was marked as Exhibit No. "3" during the deposition of Daniel Clancy on June 1, 2012.

102. Attached hereto as Exhibit 100 is a true and correct copy of a presentation entitled "University of California Mass Digitization Projects Update" dated May 8, 2008. This document was marked as Exhibit No. "HC 3" during the deposition of Heather Christenson on April 11, 2012.

103. Attached hereto as Exhibit 101 is a true and correct copy of a presentation entitled “HathiTrust: Sharing a Federal Print Repository: Issues and Opportunities” dated May 25, 2011. This document was marked as Exhibit No. “HC 4” during the deposition of Heather Christenson on April 11, 2012.

104. Attached hereto as Exhibit 102 is a true and correct copy of an article entitled “HathiTrust: A Research Library at Web Scale” by Heather Christenson. This document was marked as Exhibit No. “HC 5” during the deposition of Heather Christenson on April 11, 2012.

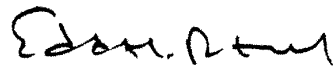
105. Attached hereto as Exhibit 103 is a true and correct copy of a printout showing Amazon.com’s “Look Inside!” feature for the book *Jesse James* by T.J. Stiles. This document was marked as Exhibit No. “10” during the deposition of T.J. Stiles on May 31, 2012.

106. Attached hereto as Exhibit 104 is a true and correct copy of a printout showing Amazon.com’s Search Inside! License dated June 18, 2012.

107. Attached hereto as Exhibit 105 is a true and correct copy of a printout of a screenshot from the HathiTrust website dated June 28, 2012.

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

Dated: New York, New York  
June 29, 2012



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EDWARD H. ROSENTHAL

# EXHIBIT 5

CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 1

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3  
4  
5 THE AUTHORS GUILD INC., et al., )  
6 Plaintiffs, )  
7 vs. ) No. 11 Civ. 6351 (HB)  
8 HATHITRUST, et al., )  
9 Defendants. )  
10 \_\_\_\_\_ )

11  
12 CONFIDENTIAL - ATTORNEYS EYES ONLY  
13 DEPOSITION OF  
14 HEATHER CHRISTENSON  
15 Berkeley, California  
16

Wednesday, April 11, 2012

17  
18  
19  
20  
21  
22

23 Reported by:  
24 JUDIE A. NICHOLAS, CSR NO. 12229  
25 JOB NO. 48480

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<p>1 inaccurate?</p> <p>2 A. No.</p> <p>3 Q. Do you believe that the number of works that</p> <p>4 were digitized by the university of California includes</p> <p>5 a greater percentage of in copyright work or a lower</p> <p>6 percentage of in copyright work that is in the</p> <p>7 HathiTrust database as a whole?</p> <p>8 A. Can you repeat that?</p> <p>9 I'm sorry. Repeat the question.</p> <p>10 Q. This chart states, or represents, that</p> <p>11 approximately 74 percent of the works in HathiTrust, and</p> <p>12 by "works," I mean the 8,234,081 volumes that were</p> <p>13 released at that time as of March 5th, 2011. This chart</p> <p>14 says 74 percent are in copyright.</p> <p>15 I'm asking you whether you know one way or the</p> <p>16 other whether the works you see contributed are roughly</p> <p>17 the same percentage -- roughly the same percentage of</p> <p>18 those works are in copyright.</p> <p>19 A. I don't know.</p> <p>20 Q. Do you know whether it's more than 50 percent</p> <p>21 of the works by UC are estimated to be in copyright?</p> <p>22 A. I would not estimate that 50 percent of the</p> <p>23 works digitized by UC are in copyright. I mean that's</p> <p>24 not -- it's not a -- no.</p> <p>25 Q. You wouldn't -- because you don't know one way</p>	<p>1 or another, or because you have reason to believe it's</p> <p>2 less than 50 percent?</p> <p>3 A. If I had to estimate and stake my life on it, I</p> <p>4 would take a guess that UC has a higher percentage of</p> <p>5 public domain content than indicated in this chart.</p> <p>6 Q. What is your basis for that statement?</p> <p>7 A. Several large projects we worked on were</p> <p>8 entirely public domain content -- with the intent to</p> <p>9 digitize public domain content.</p> <p>10 Q. If you look at the third slide from the back</p> <p>11 entitled Changing Library Landscapes. The first bullet</p> <p>12 point says Rapidly Changing Landscape. It says,</p> <p>13 "Libraries are making these decisions but they are more</p> <p>14 and more collective decisions," and the final bullet</p> <p>15 point says, "We cannot afford anymore to do work</p> <p>16 separately that could be done collaboratively."</p> <p>17 Do you agree with the final sentiment stated on</p> <p>18 this presentation?</p> <p>19 A. If I recall correctly, the slide is not my</p> <p>20 slide.</p> <p>21 Q. Do you know what's meant by this, "We cannot</p> <p>22 afford to do work anymore separately that could be done</p> <p>23 collaboratively"?</p> <p>24 A. My interpretation of that would be libraries</p> <p>25 are in an environment where there's many competing</p>
Page 144	Page 145
<p>1 information services on the web; otherwise, University</p> <p>2 budgets, hard times, many facets of the environmental</p> <p>3 situation that might indicate a call somewhat like this.</p> <p>4 Q. Okay. Are you familiar with the term "fair</p> <p>5 use" as it applies to copyright law?</p> <p>6 A. I'm familiar that there's a provision in law</p> <p>7 called fair use, yes.</p> <p>8 Q. Have you ever reviewed that provision?</p> <p>9 A. Yes, I have.</p> <p>10 Q. Actually -- could I have Tab 9.</p> <p>11 (Exhibit No. HC6 marked for</p> <p>12 identification.)</p> <p>13 Okay, what I've marked as HC6 is what I'll</p> <p>14 represent is a printout of Section 17 U.S.C.A. § 107,</p> <p>15 which is the Fair Use Provision in the Copyright Act.</p> <p>16 I guess my question is this. In connection</p> <p>17 with the selection of books as part of the Mass</p> <p>18 Digitization Project with Google, did you ever consider</p> <p>19 the -- did you ever consider fair use as it's set forth</p> <p>20 in this statute at that time?</p> <p>21 MR. POTTER: I'm going to object to the extent</p> <p>22 it calls for a legal conclusion, and she's not at</p> <p>23 lawyer.</p> <p>24 MR. GOLDMAN: Q. Yeah, and without -- yes.</p> <p>25 THE WITNESS: As I stated before, when I was</p>	<p>1 charged with carrying out these projects, it's according</p> <p>2 to a contract, and I assume that there's legal input</p> <p>3 into contracts at the University of California. And I'm</p> <p>4 not a lawyer.</p> <p>5 Q. But in connection with either the bulk pulls</p> <p>6 that were done or the candidate list method of selecting</p> <p>7 books for digitization, are you aware of any -- are you</p> <p>8 aware of any discussions that took place regarding any</p> <p>9 of the factors of fair use that are set forth in this</p> <p>10 provision?</p> <p>11 MR. POTTER: To the extent those discussions</p> <p>12 involve lawyers --</p> <p>13 MR. GOLDMAN: It's a yes-or-no question.</p> <p>14 Yes-or-no question.</p> <p>15 THE WITNESS: I don't know, but I'd have to</p> <p>16 assume that UC discussed with legal counsel.</p> <p>17 MR. GOLDMAN: Q. I'm not asking for</p> <p>18 assumptions. Are you aware of any such discussions?</p> <p>19 A. Not that I can recall here today.</p> <p>20 Q. With respect to any work that was digitized by</p> <p>21 Google that came from an UC library with respect to any</p> <p>22 particular work, are you aware whether any person at any</p> <p>23 time made an analysis regarding any of these four</p> <p>24 factors that are listed here in the statute?</p> <p>25 And let me just say, for example, when any</p>

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<p>1 particular work from UC was selected for digitization, 2 are you aware whether anyone ever considered the purpose 3 and characteristic of the use, including whether such 4 use is of a commercial nature or is for nonprofit 5 educational purposes? 6 A. At the point of action of choosing a specific 7 item, I'm not -- I'm not aware. 8 Q. And at that same point of action, were you 9 aware whether a determination was made regarding the 10 nature of the copyrighted work that was chosen for 11 digitization? 12 A. No. 13 Q. And what about the amount and substantiality of 14 the portion used in relation to the copyrighted work as 15 a whole, are you aware of any analysis made of that 16 factor at that point in time? 17 MR. POTTER: I'm going to object to this line 18 of questioning to the extent it could call for legal 19 conclusions what these various factors might mean. 20 MR. GOLDMAN: Q. Yes or no? 21 A. Can you repeat the question? 22 THE REPORTER: Question: "And what about the 23 amount and substantiality of the portion used in 24 relation to the copyrighted work as a whole, are you 25 aware of any analysis made of that factor at that point</p>	<p>1 in time?" 2 THE WITNESS: I'm not a lawyer. I don't have 3 an understanding of what -- 4 MR. GOLDMAN: Q. I'm not asking if you're a 5 lawyer, I'm just asking whether any analysis was 6 conducted at the point in time when this work was 7 selected for digitization. 8 A. A legal analysis? 9 Q. I'm not asking for a legal analysis, I'm asking 10 whether or not, yes or no, you're aware there was an 11 analysis done at that time? 12 MR. POTTER: Clarification. Are you asking if 13 she's aware that someone contemplated Fair Use Factor 3, 14 whether she knows what that means or not, or is she 15 aware that someone contemplated what she understands 16 that factor to mean? 17 MR. GOLDMAN: Q. I am asking -- I'm definitely 18 not asking what her understanding of that provision is 19 as a legal matter. I'm asking whether, just as I asked 20 with the other two, at the point of -- at the point when 21 a particular work was selected for digitization, are you 22 aware whether anyone considered any of these four 23 factors, and I'm going through each of the three 24 factors. 25 We're now on the third one. Are you aware</p>
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<p>1 whether anyone every considered the amount and 2 substantiality of the portion used in relation to the 3 copyrighted work as a whole? 4 A. Not that I can recall. 5 Q. And do you recall -- do you know whether anyone 6 at that point in time considered the effect of the use 7 upon the potential market for or value of the 8 copyrighted work? 9 A. Can you rephrase the question? 10 Q. Are you aware whether -- are you aware whether 11 anyone at UC, you, yourself or anyone else, considered 12 at the point in time when any work that was digitized by 13 Google of UC works, whether any person ever considered 14 at that time the effect of the use upon the potential 15 market for or value of the copyrighted work? 16 A. I'm still confused. It's legal terms. I am 17 not in the mind of people who are pulling books from the 18 shelves, so -- I could only say that I can't recall -- 19 Q. You were the one managing the pulling of the 20 books from the shelves, correct? 21 A. No. 22 Q. Who managed the pulling of the books from the 23 shelves? 24 A. In -- for each project there's a specific 25 person who handled that role, or persons.</p>	<p>1 Q. Are you aware whether any people that were 2 selecting the books from the shelves, or at any point up 3 the chain, people that selected the books, people that 4 supervised the selection of books, anyone at Google, 5 anyone, anyone in the whole world, whether they 6 determined at that time, are you aware whether anyone 7 made a consideration of any of those four factors that 8 we went through at any point in time when the books were 9 selected for digitization? 10 A. I'm still not certain I entirely understand the 11 question, but I don't see how I could be aware of all 12 those individual people's thought processes, so I would 13 say no. 14 That's my answer. 15 Q. There came a time when University of Michigan 16 announced the launch of something called the Orphan 17 Works Project. Have you ever heard of the Orphan Works 18 Project before? 19 A. Yes. 20 Q. What is the Orphan Works Project, to the best 21 of your understanding? 22 A. The best of my understanding, the University of 23 Michigan was going to develop a research process to look 24 at works or books, volumes, to try to further 25 information on whether or not --</p>

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<p>1 I'm going to take a pause. I'm thinking.</p> <p>2 Since the University of Michigan was going to</p> <p>3 develop a process to review a certain category of books</p> <p>4 called Orphan Works to try to develop a more complete</p> <p>5 picture of the rights situation.</p> <p>6 Q. And there came a time when UC announced that it</p> <p>7 would be participating in the Orphan Works Project; is</p> <p>8 that right?</p> <p>9 A. Yes.</p> <p>10 Q. Who was involved with the decision -- who made</p> <p>11 the decision to participate in the Orphan Works Project?</p> <p>12 A. I don't know who made -- I don't know is the</p> <p>13 answer.</p> <p>14 Q. Did you have any discussions with anyone</p> <p>15 about -- prior to joining the Orphan Works program or</p> <p>16 prior to announcing UC's intent to joining the Orphan</p> <p>17 Works program, did you have any discussion about the</p> <p>18 Orphan Works program?</p> <p>19 A. I don't specifically recall. I may have been</p> <p>20 in discussions where it was mentioned.</p> <p>21 Q. And what were the nature of those discussions?</p> <p>22 MR. POTTER: To the extent counsel was present,</p> <p>23 I'll instruct you not to reveal the substance of the</p> <p>24 conversations.</p> <p>25 THE WITNESS: There are HathiTrust project</p>	<p>1 discussions that take place.</p> <p>2 MR. GOLDMAN: Q. It's my understanding that UC</p> <p>3 provided assistance in refining the process that was</p> <p>4 being used by Michigan to isolate prospective Orphan</p> <p>5 Works; is that correct?</p> <p>6 A. I don't have firsthand -- there may have been</p> <p>7 participation outside of CDL. I didn't participate.</p> <p>8 Q. It's my understanding that an associate</p> <p>9 university librarian at UCLA provided assistance in</p> <p>10 refining the process. Do you know who that associate</p> <p>11 university librarian at UCLA to be that participated in</p> <p>12 refining the process at University of Michigan?</p> <p>13 A. I don't have knowledge of what may or may not</p> <p>14 have been contributed. A person who was a candidate for</p> <p>15 that was Sharon Farb.</p> <p>16 Q. Did you have any discussions with Sharon Farb</p> <p>17 regarding that process being used by the University of</p> <p>18 Michigan?</p> <p>19 A. I don't recall.</p> <p>20 Q. Do you know how -- part of the Orphan Works</p> <p>21 Project involved the creation of a list of orphan</p> <p>22 candidates; is that right?</p> <p>23 A. I don't know the specifics of the process.</p> <p>24 Q. Are you aware that certain of the works that</p> <p>25 were working candidates were works that originated from</p>
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<p>1 UC libraries?</p> <p>2 A. Yes.</p> <p>3 Q. Were you involved in any discussions regarding</p> <p>4 the designation of UC digitized works as orphan</p> <p>5 candidates?</p> <p>6 A. Not that I can recall.</p> <p>7 Q. How did you become aware that UC digitized</p> <p>8 works were being designated as orphan candidates?</p> <p>9 A. I can't recall. It may have been through the</p> <p>10 lawsuit. Through the lawsuit.</p> <p>11 MR. POTTER: Can you wrap it up in about five</p> <p>12 so she can pick up her children?</p> <p>13 MR. GOLDMAN: Yeah.</p> <p>14 Oh, Sigh.</p> <p>15 Okay. Let's take a minute break, just a</p> <p>16 minute, so I can go over my notes and talk to counsel.</p> <p>17 (A break was taken.)</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23 ///</p> <p>24 ///</p> <p>25 ///</p>	<p>1 MR. GOLDMAN: No further questions.</p> <p>2 Do you have any questions?</p> <p>3 MR. POTTER: No. I appreciate that. I think</p> <p>4 we're good.</p> <p>5</p> <p>6 (Time noted: 4:00 p.m.)</p> <p>7</p> <p>8 --oOo--</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>



# EXHIBIT 6

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PAUL COURANT  
IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK  
  
THE AUTHORS GUILD, INC., et al.,  
Plaintiffs,  
vs. Case No. 11 Civ. 6351  
(HB)  
  
HATHITRUST, et al.,  
Defendants.

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The Deposition of PAUL COURANT,  
Taken at 503 Thompson Street,  
Fleming Administration Building, Room 5021-503,  
Ann Arbor, Michigan,  
Commencing at 9:28 a.m.,  
Tuesday, April 24, 2012,  
Before Kathryn L. Janes, CSR-3442, RMR, RPR.  
TSG Job # 48910

<p style="text-align: right;">Page 22</p> <p>1 PAUL COURANT</p> <p>2 libraries.</p> <p>3 Q. So the libraries you were generally responsible</p> <p>4 for are the libraries you're responsible for now</p> <p>5 in your current position as university librarian</p> <p>6 and dean of libraries?</p> <p>7 MR. PETERSEN: Objection to form.</p> <p>8 BY MR. ROSENTHAL:</p> <p>9 Q. Is that essentially correct?</p> <p>10 A. Let me state it more precisely.</p> <p>11 Q. Okay.</p> <p>12 A. Yes, and also for two of the other libraries --</p> <p>13 Q. Right.</p> <p>14 A. -- that I'm not currently responsible for.</p> <p>15 Q. Do -- at the time you were a provost and</p> <p>16 executive vice president for academic affairs,</p> <p>17 were the budget -- were the budgets for all of</p> <p>18 the libraries that you were responsible for under</p> <p>19 one line item in an overall budget?</p> <p>20 A. So almost certainly, no. Let's try another</p> <p>21 version of the question.</p> <p>22 Q. What I'm getting to, just to cut through it, to</p> <p>23 the extent you know, do you know what percentage</p> <p>24 of the overall University of Michigan general</p> <p>25 fund budget went to the libraries at the time you</p>	<p style="text-align: right;">Page 23</p> <p>1 PAUL COURANT</p> <p>2 were a provost and executive vice president?</p> <p>3 MR. PETERSEN: Would he have known at</p> <p>4 the time or does he know as he sits here today?</p> <p>5 BY MR. ROSENTHAL:</p> <p>6 Q. Well, I can ask, did you know at the time?</p> <p>7 A. I would have had both those numbers handy and been</p> <p>8 able to accomplish the arithmetic operation to</p> <p>9 make that calculation. I'm not sure I ever looked</p> <p>10 at it that way.</p> <p>11 Q. Do you today have a recollection of what that</p> <p>12 arithmetic calculation would be?</p> <p>13 A. Not with any precision.</p> <p>14 Q. Even -- even roughly?</p> <p>15 A. So I -- I -- I could try to make a guess at what</p> <p>16 the calculation would have been, but I didn't --</p> <p>17 the budgeting was not in essence done with -- with</p> <p>18 the percentage as an interesting number, so it's</p> <p>19 not a number I kept track of.</p> <p>20 Q. Do you know in terms of the budget for the</p> <p>21 general -- the general fund budget for the</p> <p>22 libraries as a whole what that number was at the</p> <p>23 time you were provost and executive vice</p> <p>24 president for academic affairs?</p> <p>25 MR. PETERSEN: Did he know it at that</p>
<p style="text-align: right;">Page 24</p> <p>1 PAUL COURANT</p> <p>2 time?</p> <p>3 BY MR. ROSENTHAL:</p> <p>4 Q. Well, did you know it at that time?</p> <p>5 A. I'm so -- let me be careful again, when you say</p> <p>6 the libraries, what set of organizations are you</p> <p>7 referring to?</p> <p>8 Q. I'm talking about the libraries for which you</p> <p>9 were responsible in the position of provost and</p> <p>10 executive vice president?</p> <p>11 A. So including the Bentley and the Clements?</p> <p>12 Q. Including the Bentley and Clements.</p> <p>13 A. As provost, budgeting the general fund, I budgeted</p> <p>14 to the entities that I budgeted to, so I treated</p> <p>15 separately in my mind the Clements, the Bentley</p> <p>16 and the University Library, and indeed the</p> <p>17 Clements and the Bentley were under the</p> <p>18 approximate oversight of an associate provost</p> <p>19 because they're relatively small. So I -- I do</p> <p>20 not recall with any -- anything, with even</p> <p>21 speculative provision what the general fund</p> <p>22 budgets of those two --</p> <p>23 Q. How about for the University Library?</p> <p>24 A. I can make an approximate framing of what those</p> <p>25 numbers would have been.</p>	<p style="text-align: right;">Page 25</p> <p>1 PAUL COURANT</p> <p>2 Q. Please do.</p> <p>3 A. The general fund budget of the University Library</p> <p>4 at the time that I was provost would have ranged</p> <p>5 from the low 40 millions to the either high 40</p> <p>6 millions or low 50s.</p> <p>7 Q. And that range -- that range would encompass the</p> <p>8 period that you were provost and executive vice</p> <p>9 president for academic affairs?</p> <p>10 A. Yes.</p> <p>11 Q. And do you know what the budget for the</p> <p>12 University libraries is today for 2011 let's say?</p> <p>13 A. I do approximately, but the units that are in the</p> <p>14 purview of the library have changed.</p> <p>15 Q. Okay.</p> <p>16 A. And in particular the -- an entity that is called</p> <p>17 the Digital Media Commons was added to the library</p> <p>18 several years ago and that addition came with it</p> <p>19 several million dollars a year and so the figures</p> <p>20 are not strictly comparable.</p> <p>21 Q. So what is the current budget of the University</p> <p>22 Library?</p> <p>23 A. Again, I'm going to be -- cover a range here,</p> <p>24 it's -- it's more than \$50 million a year and less</p> <p>25 than \$55 million a year.</p>

<p style="text-align: right;">Page 26</p> <p>1 PAUL COURANT</p> <p>2 Q. What is the Digital Media Commons?</p> <p>3 A. The Digital Media Commons is a set of activities</p> <p>4 that are housed in the Duderstadt Center on North</p> <p>5 Campus involving teaching and research labs around</p> <p>6 information technology, audio and visual studios,</p> <p>7 places to do work, learning technologies, the</p> <p>8 orientation being the use of information</p> <p>9 technology in academic work.</p> <p>10 Q. Who is John Wilkin?</p> <p>11 A. He's the associate university librarian for</p> <p>12 information -- the library information technology</p> <p>13 and the executive director of the HathiTrust,</p> <p>14 H-A-T-H-I-T-R-U-S-T.</p> <p>15 Q. And are those two separation positions?</p> <p>16 A. Yes.</p> <p>17 Q. And do you know how long he's held those two</p> <p>18 positions, either or both?</p> <p>19 A. I do not know how long he has been associate</p> <p>20 university librarian. He was in that role when I</p> <p>21 came to the library. He's been executive director</p> <p>22 of the HathiTrust since there was such a person,</p> <p>23 which is a little less than four years.</p> <p>24 Q. Does Mr. -- is he Dr. Wilkin?</p> <p>25 A. No, I don't think so.</p>	<p style="text-align: right;">Page 27</p> <p>1 PAUL COURANT</p> <p>2 Q. Does Mr. Wilkin report to you?</p> <p>3 A. Yes.</p> <p>4 Q. Directly to you?</p> <p>5 A. In his role as associate university librarian,</p> <p>6 yes.</p> <p>7 Q. As the executive director of the HathiTrust, no,</p> <p>8 he does not?</p> <p>9 A. I do not give him orders in that role.</p> <p>10 Q. Do you supervise his work in that role?</p> <p>11 MR. PETERSEN: Objection to form.</p> <p>12 A. I'm broadly aware of his work in that role. We</p> <p>13 talk about it.</p> <p>14 BY MR. ROSENTHAL:</p> <p>15 Q. I'll get back to Mr. Wilkin.</p> <p>16 Do you know what the size of the</p> <p>17 general fund budget overall for the University of</p> <p>18 Michigan was at the time you were provost?</p> <p>19 MR. PETERSEN: I believe wasn't this</p> <p>20 asked and answered?</p> <p>21 MR. ROSENTHAL: I covered this, I asked</p> <p>22 about the library budget, but not the overall</p> <p>23 budget.</p> <p>24 A. Do I know now?</p> <p>25 BY MR. ROSENTHAL:</p>
<p style="text-align: right;">Page 28</p> <p>1 PAUL COURANT</p> <p>2 Q. Yes.</p> <p>3 A. Not with any precision.</p> <p>4 Q. Did you know then?</p> <p>5 A. Yes.</p> <p>6 Q. But you don't recall what it was?</p> <p>7 A. Not with any precision.</p> <p>8 Q. What about generally?</p> <p>9 A. I'm trying to remember. I was in that position</p> <p>10 for four years and it changed. Somewhat more than</p> <p>11 a billion dollars, less than two, but I don't want</p> <p>12 to speculate with any precision.</p> <p>13 Q. And what is the size of the University of</p> <p>14 Michigan general fund budget today for say 2011?</p> <p>15 A. Somewhat more than it was when I left the job.</p> <p>16 Q. More than \$2 billion?</p> <p>17 A. No, I don't think so, but I would have to check to</p> <p>18 be sure.</p> <p>19 MR. ROSENTHAL: Could we just take a</p> <p>20 break for a minute?</p> <p>21 MR. PETERSEN: Sure.</p> <p>22 (Recess taken at 10:04 a.m.)</p> <p>23 (Back on the record at 10:11 a.m.)</p> <p>24 BY MR. ROSENTHAL:</p> <p>25 Q. Dr. Courant, did there come a time when you</p>	<p style="text-align: right;">Page 29</p> <p>1 PAUL COURANT</p> <p>2 became aware of any digitization programs taking</p> <p>3 place at the University of Michigan with respect</p> <p>4 to books?</p> <p>5 MR. PETERSEN: Objection to form,</p> <p>6 objection to no definition for programs.</p> <p>7 A. Yes, and just that passive form became aware of.</p> <p>8 BY MR. ROSENTHAL:</p> <p>9 Q. When did you become aware of any digitization of</p> <p>10 books by University of Michigan?</p> <p>11 A. Probably sometime in the 1980s. Certainly by the</p> <p>12 early 1990s.</p> <p>13 Q. And do you recall the positions you held at the</p> <p>14 time you became aware of digitization of books at</p> <p>15 the University of Michigan?</p> <p>16 A. I was -- not specifically, throughout all of these</p> <p>17 times I was a professor. As chair of the</p> <p>18 economics department, and I can't -- I could look</p> <p>19 up on my CV and find out when I was that, I was</p> <p>20 responsible for a small departmental library. One</p> <p>21 of those libraries that the University Library is</p> <p>22 not responsible for, and we had some conversations</p> <p>23 about, you know, how to manage that collection</p> <p>24 which include digitization of some old works and</p> <p>25 public domain works.</p>

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<p>1 PAUL COURANT</p> <p>2 MR. ROSENTHAL: Okay, I apologize, let</p> <p>3 me try again.</p> <p>4 BY MR. ROSENTHAL:</p> <p>5 Q. The various universities that comprise the</p> <p>6 HathiTrust, it's hard to come up with a word</p> <p>7 since it's not clear what the entity is, but are</p> <p>8 any of those universities that are not defendants</p> <p>9 in the litigation that you are -- that you're</p> <p>10 testifying about today paying any of the costs of</p> <p>11 this litigation?</p> <p>12 MR. PETERSEN: Objection to form.</p> <p>13 BY MR. ROSENTHAL:</p> <p>14 Q. If you know?</p> <p>15 A. I don't know. Not to my knowledge.</p> <p>16 Q. Okay. And did -- do you know whether the</p> <p>17 University of Michigan has indemnified any of the</p> <p>18 other universities that are part of the</p> <p>19 HathiTrust with respect to any costs or expenses</p> <p>20 of this litigation?</p> <p>21 MR. PETERSEN: Objection to form,</p> <p>22 objection, lacks foundation and objection, vague.</p> <p>23 A. And I don't know.</p> <p>24 MR. ROSENTHAL: Let's take a few</p> <p>25 minutes.</p>	<p>1 PAUL COURANT</p> <p>2 MR. PETERSEN: Sure.</p> <p>3 MR. ROSENTHAL: And then I can switch</p> <p>4 topics.</p> <p>5 (Recess taken at 2:08 p.m.)</p> <p>6 (Back on the record at 2:21 p.m.)</p> <p>7 BY MR. ROSENTHAL:</p> <p>8 Q. What is the Orphan Works Program?</p> <p>9 MR. PETERSEN: Objection to form.</p> <p>10 A. I always refer to it as the Orphan Works Project,</p> <p>11 it may be the Orphan Works Program.</p> <p>12 BY MR. ROSENTHAL:</p> <p>13 Q. Okay. Well, let's call it the Orphan Works</p> <p>14 Project.</p> <p>15 A. It's an effort within the University of Michigan</p> <p>16 Library to identify the orphan works and make</p> <p>17 orphan works that are in the University of</p> <p>18 Michigan's collections available in a highly</p> <p>19 limited way to members of the university</p> <p>20 community.</p> <p>21 Q. Is this effort -- is the Orphan Works Project</p> <p>22 that you've described an effort solely by the</p> <p>23 University of Michigan?</p> <p>24 MR. PETERSEN: Objection to form.</p> <p>25 BY MR. ROSENTHAL:</p>
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<p>1 PAUL COURANT</p> <p>2 Q. Or does it involve other entities?</p> <p>3 MR. PETERSEN: Same objection.</p> <p>4 A. Other universities have indicated an interest in</p> <p>5 participating. The Orphan Works Project that I'm</p> <p>6 familiar with is at the University of Michigan.</p> <p>7 BY MR. ROSENTHAL:</p> <p>8 Q. And when you testified that the effort was to</p> <p>9 identify orphan works in the University of</p> <p>10 Michigan collection, do you mean works where</p> <p>11 there's a physical copy in the University of</p> <p>12 Michigan collection?</p> <p>13 MR. PETERSEN: Objection to form.</p> <p>14 A. Yes.</p> <p>15 BY MR. ROSENTHAL:</p> <p>16 Q. And can you briefly tell me what an orphan work</p> <p>17 is?</p> <p>18 MR. PETERSEN: Objection to form.</p> <p>19 A. It's a term of some discussion, but in simple</p> <p>20 form, these are works that are in copyright or at</p> <p>21 least unable to be identified as not being in</p> <p>22 copyright, and where a right's holder cannot be</p> <p>23 found and where there's not an active market for</p> <p>24 new copies of the work.</p> <p>25 BY MR. ROSENTHAL:</p>	<p>1 PAUL COURANT</p> <p>2 Q. And what's the basis of your description of what</p> <p>3 an orphan work is?</p> <p>4 MR. PETERSEN: Objection to form. And</p> <p>5 objection to the extent it calls for divulging</p> <p>6 privileged information.</p> <p>7 So if you can answer without divulging</p> <p>8 attorney-client privileged information, you may do</p> <p>9 so, but only in that case.</p> <p>10 A. So the simpler, the part that doesn't implicate</p> <p>11 any attorney-client privilege or legal</p> <p>12 interpretation is a work that is again -- that is</p> <p>13 not established as being in the public domain and</p> <p>14 which therefore could be in copyright, that is,</p> <p>15 where a right's owner cannot be found. And</p> <p>16 that's, I think, most definitions will say</p> <p>17 approximately that.</p> <p>18 BY MR. ROSENTHAL:</p> <p>19 Q. Most definitions from where?</p> <p>20 A. The community of people who talk about such things</p> <p>21 as orphan works.</p> <p>22 Q. When did the University of Michigan decide to</p> <p>23 engage in the Orphan Works Project?</p> <p>24 MR. PETERSEN: Objection to form.</p> <p>25 A. In the months following Judge Chin's rejection of</p>

<p style="text-align: right;">Page 142</p> <p>1 PAUL COURANT</p> <p>2 the amended settlement.</p> <p>3 BY MR. ROSENTHAL:</p> <p>4 Q. And why -- what impact did Judge Chin's refusal</p> <p>5 to accept the amended settlement have on the</p> <p>6 University of Michigan's decision to proceed on</p> <p>7 the Orphan Works Project?</p> <p>8 MR. PETERSEN: Objection to form,</p> <p>9 objection, mischaracterizes testimony.</p> <p>10 A. The failure of the settlement to go through</p> <p>11 involved per force the failure of what would have</p> <p>12 been a very effective solution to the orphan works</p> <p>13 problem, and the orphan works problem is that</p> <p>14 there are many works, plausibly millions, that are</p> <p>15 in this status where they are not known not to be</p> <p>16 in copyright and the right's holder can't be found</p> <p>17 and therefore the works are not available to be</p> <p>18 used electronically, even though there would be --</p> <p>19 could be no harm to a right's holder, if a right's</p> <p>20 holder really can't be found associated with</p> <p>21 making uses of the works.</p> <p>22 And the orphaned -- the amended</p> <p>23 settlement and its predecessor, the unamended</p> <p>24 settlement, would have made it possible for Google</p> <p>25 to develop with the Book Rights Registry and the</p>	<p style="text-align: right;">Page 143</p> <p>1 PAUL COURANT</p> <p>2 Authors Guild and the Association -- American</p> <p>3 Association of Publishers, a mechanism whereby</p> <p>4 orphan works could be used without -- without</p> <p>5 negative consequences arising were they found to</p> <p>6 be in copyright with a -- with a right's holder.</p> <p>7 That would have greatly enhanced the ability of</p> <p>8 the University of Michigan's collections to be</p> <p>9 used by our faculty and students and in the case</p> <p>10 of that project, that Google product that was</p> <p>11 being contemplated would have enabled others to</p> <p>12 use it as well, and thereby get the, you know, the</p> <p>13 benefit of being able to read works that otherwise</p> <p>14 are harder to find, harder to use than either very</p> <p>15 old works, which are in the public domain or</p> <p>16 current works which typically have digital</p> <p>17 licenses that make them easy to use licenses for</p> <p>18 which, of course, universities and other users</p> <p>19 pay.</p> <p>20 And when settlement didn't go through,</p> <p>21 that avenue for making these works useable was</p> <p>22 blocked off and we asked ourselves the question,</p> <p>23 is there some way we can get some benefit out of</p> <p>24 the -- out of these works for digital uses.</p> <p>25 BY MR. ROSENTHAL:</p>
<p style="text-align: right;">Page 144</p> <p>1 PAUL COURANT</p> <p>2 Q. You described in that answer, you described under</p> <p>3 the settlement and I'm paraphrasing, but under</p> <p>4 the settlement, the amended settlement, orphan</p> <p>5 works could be used without the negative</p> <p>6 consequences that otherwise would occur, what did</p> <p>7 you mean by negative?</p> <p>8 A. Otherwise might occur, so --</p> <p>9 Q. What did you mean by negative consequences?</p> <p>10 A. Well --</p> <p>11 MR. PETERSEN: Let me just note my</p> <p>12 objection to form on that question, please.</p> <p>13 A. What I meant was that as things stand now, were an</p> <p>14 entity -- were Google, for example, to create a</p> <p>15 project in which they made available orphan works</p> <p>16 on the web, they would be subject, if somebody</p> <p>17 happened to -- if they made a mistake in coding,</p> <p>18 to potentially severe monetary penalties, so that</p> <p>19 is a risk that neither they nor anyone else would</p> <p>20 take.</p> <p>21 BY MR. ROSENTHAL:</p> <p>22 Q. But University of Michigan has developed its own</p> <p>23 Orphan Works Program, correct?</p> <p>24 MR. PETERSEN: Objection to form.</p> <p>25 A. The University -- yes, the University of Michigan</p>	<p style="text-align: right;">Page 145</p> <p>1 PAUL COURANT</p> <p>2 has developed its own Orphan Works Program.</p> <p>3 BY MR. ROSENTHAL:</p> <p>4 Q. And how does that program differ than the program</p> <p>5 that was contemplated by the amended settlement?</p> <p>6 MR. PETERSEN: Objection to form.</p> <p>7 A. It was produced by an academic nonprofit for</p> <p>8 entirely noncommercial purposes and the only</p> <p>9 entities that would have had the works available</p> <p>10 under the Michigan project would have been</p> <p>11 authorized authenticated users of University of</p> <p>12 Michigan Library services, exactly the same</p> <p>13 population that has access to the underlying print</p> <p>14 work.</p> <p>15 MR. ROSENTHAL: Could you just read</p> <p>16 that back, the last answer back. Thank you.</p> <p>17 (The following record was read by</p> <p>18 the reporter at 2:21 p.m.:</p> <p>19 "ANSWER: It was produced by an</p> <p>20 academic nonprofit for entirely</p> <p>21 noncommercial purposes and the only</p> <p>22 entities that would have had the</p> <p>23 works available under the Michigan</p> <p>24 project would have been authorized</p> <p>25 authenticated users of University</p>



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<p>1 PAUL COURANT</p> <p>2 of Michigan Library services,</p> <p>3 exactly the same population that</p> <p>4 has access to the underlying print</p> <p>5 work.")</p> <p>6 BY MR. ROSENTHAL:</p> <p>7 Q. Who -- who are authorized users of the University</p> <p>8 of Michigan services?</p> <p>9 MR. PETERSEN: Objection to form.</p> <p>10 A. It's a very long list of people, there's</p> <p>11 probably -- there's tens of thousands of them.</p> <p>12 BY MR. ROSENTHAL:</p> <p>13 Q. Well, I wasn't asking for their names.</p> <p>14 A. Oh, okay.</p> <p>15 Q. Unless you know them?</p> <p>16 A. I know some of them.</p> <p>17 Q. Well, let's do it through categories.</p> <p>18 A. Students, currently registered students, faculty,</p> <p>19 staff, and people who walk into library</p> <p>20 facilities.</p> <p>21 Q. With respect to the last group, people who walk</p> <p>22 into library facilities, are -- can anyone walk</p> <p>23 into a University of Michigan library and use</p> <p>24 that library's facilities?</p> <p>25 MR. PETERSEN: Objection to form.</p>	<p>1 PAUL COURANT</p> <p>2 A. Anyone who is of adult age or accompanied by an</p> <p>3 adult and who behaves him or herself, yes.</p> <p>4 BY MR. ROSENTHAL:</p> <p>5 Q. Are there any University of Michigan library</p> <p>6 facilities outside of the state of Michigan that</p> <p>7 would meet -- that would -- I'll leave it at</p> <p>8 that. I mean, I won't add to the question.</p> <p>9 A. I don't believe so, although it is possible that</p> <p>10 there is a small library in Florence, Italy, but</p> <p>11 that's covered by a whole different bunch of</p> <p>12 rules, if there is a library there, and I don't</p> <p>13 know if there's a library in the chief geological</p> <p>14 camp or not.</p> <p>15 Q. Where is the chief geological camp?</p> <p>16 A. The geological -- I didn't mean chief, I just</p> <p>17 stuttered. The geological camp is in Wyoming.</p> <p>18 Q. Now, you may not know this, you described -- you</p> <p>19 said the entity in Florence to the extent it</p> <p>20 exists was under a different bunch of rules, do</p> <p>21 you know whether people with -- who walk into</p> <p>22 the -- that facility in Florence, Italy would be</p> <p>23 able to access -- strike that whole thing, let me</p> <p>24 back up.</p> <p>25 Again, to the extent you know,</p>
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<p>1 PAUL COURANT</p> <p>2 would -- in your list of various authorized users</p> <p>3 of University of Michigan services, would that</p> <p>4 include people who walked into a facility in</p> <p>5 Florence, Italy?</p> <p>6 MR. PETERSEN: Objection to form,</p> <p>7 objection, lacks foundation. You haven't --</p> <p>8 A. I would be very surprised if it did include such</p> <p>9 people.</p> <p>10 BY MR. ROSENTHAL:</p> <p>11 Q. If it did?</p> <p>12 A. If it did include.</p> <p>13 Q. Okay. Do you know whether Judge Chin addressed</p> <p>14 the issue of orphan works in his rejection of the</p> <p>15 amended settlement?</p> <p>16 MR. PETERSEN: Objection, lacks</p> <p>17 foundation, objection, calls for a legal</p> <p>18 conclusion.</p> <p>19 A. I don't know, he called for an opt in scheme which</p> <p>20 pretty much makes the orphan works problem not go</p> <p>21 away, but I don't know that he specifically</p> <p>22 addressed orphan works by name.</p> <p>23 BY MR. ROSENTHAL:</p> <p>24 Q. Or by substance?</p> <p>25 MR. PETERSEN: Objection to form.</p>	<p>1 PAUL COURANT</p> <p>2 A. I don't know specifically.</p> <p>3 BY MR. ROSENTHAL:</p> <p>4 Q. Have you read the Judge Chin's decision rejecting</p> <p>5 the amended settlement agreement?</p> <p>6 A. I have, but some time ago.</p> <p>7 Q. You just don't remember?</p> <p>8 A. Yeah.</p> <p>9 Q. Do you know whether, do you recall whether Judge</p> <p>10 Chin mentioned that the -- in that decision that</p> <p>11 the question of orphan works is best left to</p> <p>12 Congress?</p> <p>13 MR. PETERSEN: Objection to form,</p> <p>14 objection, calls for a legal conclusion, objection</p> <p>15 to the extent it would call for the witness to</p> <p>16 testify based upon privileged conversations and</p> <p>17 discussions with counsel.</p> <p>18 A. What you say sounds familiar, but I don't recall</p> <p>19 in detail.</p> <p>20 BY MR. ROSENTHAL:</p> <p>21 Q. Do you recall any discussions with anyone other</p> <p>22 than counsel on the substance of which was that</p> <p>23 since the amended settlement agreement was not</p> <p>24 going to go forward, the University of Michigan</p> <p>25 would take matters into its own hands and come up</p>

<p style="text-align: right;">Page 154</p> <p>1 PAUL COURANT</p> <p>2 Q. Yeah, I was just going to put a time frame on it.</p> <p>3 At the outset of the Michigan Orphan Works</p> <p>4 Project.</p> <p>5 A. So I was responsible for sort of the overall</p> <p>6 architecture, but not for details. This is not an</p> <p>7 area in which I have either expertise, or</p> <p>8 candidly, time to do their kind of detailed work</p> <p>9 involved. But the basic idea was to -- for works</p> <p>10 published between 1923 and 1960 something, the</p> <p>11 something being important in copyright law, but I</p> <p>12 forget the date, but the people who are doing the</p> <p>13 project did know the right date, to -- that</p> <p>14 were -- that were not established to be already in</p> <p>15 the public domain or authorized for use by the</p> <p>16 University of Michigan by a right's holder, for</p> <p>17 digital use by a right's holder, the project would</p> <p>18 first go and see if the work were for sale new in</p> <p>19 a variety of places where you might find such, and</p> <p>20 if so, that's that, it's not an orphan. And then</p> <p>21 go to the publisher to see if the publisher is</p> <p>22 still in business. If the publisher is still in</p> <p>23 business, actually the work would go -- and list</p> <p>24 of works that were published by publishers that</p> <p>25 were still in business, those might or might not</p>	<p style="text-align: right;">Page 155</p> <p>1 PAUL COURANT</p> <p>2 be orphans because the publisher doesn't always</p> <p>3 hold -- proven to hold rights, however, we</p> <p>4 would -- the system then jumped to looking at</p> <p>5 information about authors to establish if an</p> <p>6 author could be found and also to look at</p> <p>7 information from the copyright -- a copyright</p> <p>8 database about renewers because during that</p> <p>9 period, copyrights, as I understand it, had to be</p> <p>10 renewed.</p> <p>11 And then a second reviewer would go</p> <p>12 through the same set of steps and if both found</p> <p>13 that a work was not found or kicked out through</p> <p>14 one of these processes, that work would be deemed</p> <p>15 to be a prospective orphan and would be -- its</p> <p>16 bibliographic information would be posted on a</p> <p>17 website, that information trumpeted around on the</p> <p>18 web in the literature, and after a period of 90</p> <p>19 days in the design version, the work would be</p> <p>20 deemed to be an orphan, and made available, one</p> <p>21 digital copy per copy that we had bought in print</p> <p>22 form to authorize the authenticated users of the</p> <p>23 University of Michigan Library. That last stage</p> <p>24 never happened, so there we are.</p> <p>25 Q. You said you were responsible for the overall</p>
<p style="text-align: right;">Page 156</p> <p>1 PAUL COURANT</p> <p>2 architecture, but not the details?</p> <p>3 A. That's right.</p> <p>4 Q. Is what you just described, what you would call</p> <p>5 the overall architecture?</p> <p>6 A. It has some details in it.</p> <p>7 Q. Who was responsible for the details?</p> <p>8 A. The project was undertaken under the supervision</p> <p>9 of John Wilkin. The person who was most directly</p> <p>10 responsible was Melissa Levine.</p> <p>11 Q. Who is Melissa Levine?</p> <p>12 A. She's a member of the library's staff. She is the</p> <p>13 head of the copyright office.</p> <p>14 Q. Head of the copyright office?</p> <p>15 A. We have an office in the library that provides</p> <p>16 information about -- about copyright issues,</p> <p>17 not -- does not practice law, does not give</p> <p>18 specific advice to faculty, to people in the</p> <p>19 library, so.</p> <p>20 Q. Is Melissa Levine a lawyer?</p> <p>21 A. She is. She actually used to work for the</p> <p>22 Register of Copyrights and the Library of</p> <p>23 Congress.</p> <p>24 Q. You described that if both reviewers found a work</p> <p>25 to be a prospective orphan, the bibliographic</p>	<p style="text-align: right;">Page 157</p> <p>1 PAUL COURANT</p> <p>2 information with respect to that work would be</p> <p>3 published on a website, what website would that</p> <p>4 be?</p> <p>5 A. We're now into the details that I don't know.</p> <p>6 Q. And you also used the phrase, and I believe I</p> <p>7 have this correct, trumpeted around on the web</p> <p>8 and in the literature, what did you mean by that?</p> <p>9 A. What I meant was we had, as an integral part of</p> <p>10 the project the idea that we would be public,</p> <p>11 transparent, try to get as many people looking at</p> <p>12 these works as possible in order to -- in order to</p> <p>13 find out as much as we could find out.</p> <p>14 Q. Did you know how that was going to be done?</p> <p>15 A. Did I know in detail how that was going to be</p> <p>16 done?</p> <p>17 Q. Yeah.</p> <p>18 A. No.</p> <p>19 Q. How about generally?</p> <p>20 A. As I think I just said, trumpeted about on the web</p> <p>21 in relevant places.</p> <p>22 Q. Was there going to be a public relations or press</p> <p>23 agency retained in order to trumpet this</p> <p>24 information around on the web?</p> <p>25 MR. PETERSEN: Object, note my</p>



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<p>1 PAUL COURANT</p> <p>2 objection to form on that question, please.</p> <p>3 A. This was widely known. We made efforts to make</p> <p>4 this widely known.</p> <p>5 BY MR. ROSENTHAL:</p> <p>6 Q. What efforts did you take to make it widely</p> <p>7 known?</p> <p>8 A. We trumpeted about on the web and other relevant</p> <p>9 places, we went to library meetings, we talked to</p> <p>10 people, we talked to publishers, we actually</p> <p>11 talked to the Authors Guild. We talked to lots of</p> <p>12 people about this.</p> <p>13 Q. Did you engage in any paid advertising or</p> <p>14 promotion of the Orphan Works Project?</p> <p>15 MR. PETERSEN: Objection to form.</p> <p>16 A. I don't believe we did, however we -- it is</p> <p>17 something we have certainly considered as we go</p> <p>18 forward.</p> <p>19 BY MR. ROSENTHAL:</p> <p>20 Q. Does the University of Michigan intend to go</p> <p>21 forward with the Orphan Works Project?</p> <p>22 MR. PETERSEN: Objection to form.</p> <p>23 A. The University of Michigan intends to go forward</p> <p>24 identifying prospective orphan works and trying to</p> <p>25 make that a reliable process.</p>	<p>1 PAUL COURANT</p> <p>2 BY MR. ROSENTHAL:</p> <p>3 Q. Are there any specific plans to identify</p> <p>4 additional works as prospective orphan works?</p> <p>5 MR. PETERSEN: Objection to form.</p> <p>6 A. I don't understand the question.</p> <p>7 BY MR. ROSENTHAL:</p> <p>8 Q. All right. Is -- let's step back for a moment.</p> <p>9 So University of Michigan at some point stopped</p> <p>10 proceeding with the Orphan Work Project, correct?</p> <p>11 A. We suspended work in the project, that's right.</p> <p>12 Q. And why did you suspend work in the Orphan Works</p> <p>13 Project?</p> <p>14 A. Because we had learned that a number of the</p> <p>15 prospective works, two or three, were not orphan</p> <p>16 works and we made the judgment that -- that our</p> <p>17 process in not finding those works as being out of</p> <p>18 the project was clearly not working as well as our</p> <p>19 standards would require.</p> <p>20 Q. Have you implemented changes in the process since</p> <p>21 then?</p> <p>22 A. We have been experimenting with changes in the</p> <p>23 process since then, yes.</p> <p>24 Q. What changes in the process have you experimented</p> <p>25 with?</p>
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<p>1 PAUL COURANT</p> <p>2 A. Bringing in more people to look, more experienced</p> <p>3 librarians or people from other places, other</p> <p>4 universities taking independent looks at the same</p> <p>5 works in an effort to get really reliable</p> <p>6 agreement.</p> <p>7 Q. Is that what you described, something that you've</p> <p>8 contemplated doing or that you're actually doing</p> <p>9 now?</p> <p>10 A. Oh, we're working on that now.</p> <p>11 Q. You're actually having people from other</p> <p>12 universities involved in evaluating works to</p> <p>13 determine whether they're orphan works or orphan</p> <p>14 work candidates?</p> <p>15 A. Orphan work candidates.</p> <p>16 Q. Which other university?</p> <p>17 A. UCLA. I don't know if there are others.</p> <p>18 Q. And does the University of Michigan have any</p> <p>19 current specific plans to reinstate the Orphan</p> <p>20 Works Project?</p> <p>21 MR. PETERSEN: Objection to form,</p> <p>22 vague.</p> <p>23 A. I don't know what --</p> <p>24 BY MR. ROSENTHAL:</p> <p>25 Q. In other words, is there --</p>	<p>1 PAUL COURANT</p> <p>2 A. Not only objection, vague, but vague.</p> <p>3 Q. So in other words, it's not only your lawyer</p> <p>4 saying it, it's actually --</p> <p>5 A. I actually don't understand the question.</p> <p>6 Q. Are there any -- are there any current plans to</p> <p>7 list additional works as orphan works candidates</p> <p>8 on the -- on a website or in some other location?</p> <p>9 A. I expect that we will list candidate orphan works</p> <p>10 on a website and plausibly other locations.</p> <p>11 Q. Do you have any specific timetable for doing</p> <p>12 that?</p> <p>13 A. No.</p> <p>14 Q. Do you have any sense as to when you might start</p> <p>15 doing that?</p> <p>16 MR. PETERSEN: Objection to form,</p> <p>17 objection, asked and answered.</p> <p>18 A. Really no.</p> <p>19 BY MR. ROSENTHAL:</p> <p>20 Q. And are there any -- do you contemplate any</p> <p>21 changes in the -- in the categories of works that</p> <p>22 you will consider for inclusion as orphan works</p> <p>23 candidates?</p> <p>24 MR. PETERSEN: Objection to form.</p> <p>25 BY MR. ROSENTHAL:</p>

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<p>1 PAUL COURANT</p> <p>2 Q. In other words, beyond the -- you described</p> <p>3 earlier that you were looking at works between</p> <p>4 1923 and 1964 that were not obviously in the</p> <p>5 public domain?</p> <p>6 MR. PETERSEN: Objection, form,</p> <p>7 objection, mischaracterizes testimony, objection,</p> <p>8 vague.</p> <p>9 BY MR. ROSENTHAL:</p> <p>10 Q. And you said between 1923 and 1960 something?</p> <p>11 A. Yes.</p> <p>12 Q. I gave away the year, sorry.</p> <p>13 A. So I would expect that that would continue to be</p> <p>14 the broad class from which we would -- we would --</p> <p>15 where we would look.</p> <p>16 Q. Do you know which two to three prospective works</p> <p>17 that were listed as orphan works candidates</p> <p>18 turned out not to be orphan works?</p> <p>19 A. You know, there was one by somebody named</p> <p>20 Salamanca, and I can't remember the other.</p> <p>21 Q. How did you learn that there were situations</p> <p>22 where works listed as orphan works candidates</p> <p>23 were not actually orphan works?</p> <p>24 MR. PETERSEN: Objection to form, and</p> <p>25 objection to the extent it calls for privileged</p>	<p>1 PAUL COURANT</p> <p>2 information, and instruct the witness not to</p> <p>3 answer.</p> <p>4 But if the witness can answer without</p> <p>5 divulging privileged information, you certainly</p> <p>6 may do so.</p> <p>7 A. It was trumpeted about on the web widely.</p> <p>8 BY MR. ROSENTHAL:</p> <p>9 Q. Trumpeted about?</p> <p>10 A. Trumpeted about.</p> <p>11 Q. So and your recollection is there were only two</p> <p>12 or three such works?</p> <p>13 A. That is my recollection, yes.</p> <p>14 Q. Now, under the Orphan Works Project, as you</p> <p>15 contemplated implementing it once -- once a work</p> <p>16 was listed as an orphan works candidate and if no</p> <p>17 copyright owner came forward, that work I believe</p> <p>18 you testified would be made available in the</p> <p>19 limited sense that you described to the limited</p> <p>20 universe of users that you described?</p> <p>21 MR. PETERSEN: Objection to form,</p> <p>22 objection -- at what point in time, contemplated</p> <p>23 at what point in time?</p> <p>24 BY MR. ROSENTHAL:</p> <p>25 Q. Like in other words, once if a given work was</p>
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<p>1 PAUL COURANT</p> <p>2 listed as an orphan work candidate posted on the</p> <p>3 website and no owner came forward, then that</p> <p>4 particular work would be made available to the</p> <p>5 limited group of users you described earlier; is</p> <p>6 that correct?</p> <p>7 MR. PETERSEN: Same objection and same</p> <p>8 question about the timing issues that you're</p> <p>9 referring to.</p> <p>10 BY MR. ROSENTHAL:</p> <p>11 Q. Made available after -- would be made</p> <p>12 available --</p> <p>13 MR. PETERSEN: I guess my objection</p> <p>14 goes to what point, contemplated when,</p> <p>15 contemplated at the time, the summer when the list</p> <p>16 was --</p> <p>17 BY MR. ROSENTHAL:</p> <p>18 Q. Contemplated at the time that you were -- at the</p> <p>19 time that the University of Michigan posted</p> <p>20 certain works on the website as orphan works</p> <p>21 candidates, at that point it was -- I believe</p> <p>22 your testimony -- am I correct that your</p> <p>23 testimony is that if no owner came forward, then</p> <p>24 that particular -- after a certain period of</p> <p>25 time, that particular work would be made</p>	<p>1 PAUL COURANT</p> <p>2 available to a limited set of users under the</p> <p>3 limited conditions that you described?</p> <p>4 MR. PETERSEN: As the Orphan Works</p> <p>5 Project was contemplated --</p> <p>6 MR. ROSENTHAL: Yes.</p> <p>7 MR. PETERSEN: -- at that time?</p> <p>8 MR. ROSENTHAL: Yes.</p> <p>9 A. The answer to the question is no. It would</p> <p>10 absolutely not require that a right's holder come</p> <p>11 forward. Any persuasive information to the effect</p> <p>12 that rights were held by somebody would have been</p> <p>13 sufficient to strike the work from the list.</p> <p>14 BY MR. ROSENTHAL:</p> <p>15 Q. But if nobody came forward to strike the work</p> <p>16 from the list, then that work would be made</p> <p>17 available to the limited universe of users under</p> <p>18 the conditions you described?</p> <p>19 A. That was the original plan.</p> <p>20 Q. Right. And if, let's say one of the categories</p> <p>21 of users was a person who walked into a</p> <p>22 University of Michigan library, correct, that</p> <p>23 person could then access one of the works that</p> <p>24 had been listed as an orphan works candidate?</p> <p>25 A. So we're in the sort of triple subjunctive here.</p>

<p style="text-align: right;">Page 170</p> <p>1 PAUL COURANT</p> <p>2 Q. Of the physical copy?</p> <p>3 A. Of the physical copy.</p> <p>4 MR. PETERSEN: You want to take a</p> <p>5 break?</p> <p>6 MR. ROSENTHAL: Yeah.</p> <p>7 (Recess taken at 3:01 p.m.)</p> <p>8 (Back on the record at 3:20 p.m.)</p> <p>9 (Whereupon Ms. Roach left the room.)</p> <p>10 BY MR. ROSENTHAL:</p> <p>11 Q. Did you discuss with any person at any other</p> <p>12 university whether any other university would</p> <p>13 participate in the Orphan Works Project?</p> <p>14 MR. PETERSEN: I'm going to object to</p> <p>15 form on that. And to the extent it calls for a</p> <p>16 yes or no answer, it wouldn't seem to be</p> <p>17 appropriate, but I just caution the witness not to</p> <p>18 divulge attorney-client privileged information.</p> <p>19 A. We had conversation -- I certainly had</p> <p>20 conversations, I'm sure others did, with personnel</p> <p>21 in other universities saying that we thought that</p> <p>22 this was -- this was something that we wanted to</p> <p>23 do and that we'd be pleased if others would think</p> <p>24 about it too.</p> <p>25 BY MR. ROSENTHAL:</p>	<p style="text-align: right;">Page 171</p> <p>1 PAUL COURANT</p> <p>2 Q. And the we you meant was University of Michigan?</p> <p>3 A. University of Michigan.</p> <p>4 Q. But none of the others decided to participate?</p> <p>5 A. I'm actually not -- not sure about that, the other</p> <p>6 projects of the same form would have been</p> <p>7 independent since the project in its construction</p> <p>8 would only apply to works that were purchased by,</p> <p>9 in physical form, the individual library.</p> <p>10 Q. Are you aware of any other library that had</p> <p>11 contemplated an orphan works project similar to</p> <p>12 the University of Michigan's Orphan Works</p> <p>13 Project?</p> <p>14 MR. PETERSEN: Objection to form.</p> <p>15 A. Not by name.</p> <p>16 BY MR. ROSENTHAL:</p> <p>17 Q. But you believe there were some contemplating it?</p> <p>18 A. I believe people were thinking about it, yes.</p> <p>19 Q. Did any of the people you spoke with at any of</p> <p>20 the other universities tell you that they did not</p> <p>21 wish to engage in an orphan works project?</p> <p>22 MR. PETERSEN: Objection to form.</p> <p>23 A. Almost certainly, but I have no specific</p> <p>24 recollection.</p> <p>25 BY MR. ROSENTHAL:</p>
<p style="text-align: right;">Page 172</p> <p>1 PAUL COURANT</p> <p>2 Q. Almost certainly people told you, and without</p> <p>3 disclosing any attorney-client information, did</p> <p>4 any of them tell you why they did not want to</p> <p>5 engage in an orphan works project?</p> <p>6 MR. PETERSEN: I'm going to object and</p> <p>7 instruction is to the extent it calls for</p> <p>8 divulging attorney-client privileged information,</p> <p>9 instruct the witness not to respond to that.</p> <p>10 But, certainly, Dr. Courant, if you can</p> <p>11 answer without divulging attorney-client</p> <p>12 privileged information, please do so.</p> <p>13 A. You know, I just don't have any -- I don't have</p> <p>14 any specific instances in mind, so no.</p> <p>15 MR. ROSENTHAL: Let's mark as PC9 a</p> <p>16 one-page document that has a title U-M Library</p> <p>17 Statement on the Orphan Works Project and it's</p> <p>18 dated September 16, 2011.</p> <p>19 MARKED FOR IDENTIFICATION:</p> <p>20 DEPOSITION EXHIBIT PC9</p> <p>21 3:23 p.m.</p> <p>22 A. Yes.</p> <p>23 BY MR. ROSENTHAL:</p> <p>24 Q. Are you familiar with this document?</p> <p>25 A. I am.</p>	<p style="text-align: right;">Page 173</p> <p>1 PAUL COURANT</p> <p>2 Q. Were you involved in creating it?</p> <p>3 A. Yes.</p> <p>4 Q. Did you write it?</p> <p>5 A. I certainly am responsible for some words and</p> <p>6 phrases in it. I don't know that I authored it</p> <p>7 from top to bottom.</p> <p>8 Q. Reading the first sentence which is: The close</p> <p>9 and welcome scrutiny of the list of potential</p> <p>10 orphan works has revealed a number of errors,</p> <p>11 some of them serious, what errors are you</p> <p>12 referring to?</p> <p>13 A. Errors in that we classified as prospective</p> <p>14 orphans works that really shouldn't have gotten</p> <p>15 that far in the process.</p> <p>16 Q. And are any of those errors something other than</p> <p>17 the three instances that you described</p> <p>18 previously?</p> <p>19 A. They are -- I don't believe so, maybe there were</p> <p>20 four, but it's a small number, but ones -- there</p> <p>21 were a couple where it, you know, it should have</p> <p>22 been -- should have been easier to tell that that</p> <p>23 work was not an orphan.</p> <p>24 Q. And when you say a number of errors, some of them</p> <p>25 serious, what do you mean by the phrase some of</p>

<p style="text-align: right;">Page 174</p> <p>1 PAUL COURANT</p> <p>2 them serious?</p> <p>3 MR. PETERSEN: Just objection to form.</p> <p>4 There's no testimony that he, in fact, wrote those</p> <p>5 words, he said he was responsible for some of the</p> <p>6 words, but...</p> <p>7 BY MR. ROSENTHAL:</p> <p>8 Q. Okay. Do you have any understanding of what the</p> <p>9 phrase some of them serious means in the context</p> <p>10 of this document?</p> <p>11 A. I believe that I do. So serious in this case, it</p> <p>12 was again a misclassifying as an orphan -- as a --</p> <p>13 not as an orphan, as a prospective orphan, a work</p> <p>14 where it would have been relatively easy to</p> <p>15 establish that it wasn't. Then there were also</p> <p>16 small errors.</p> <p>17 Q. Do you know, do you have any recollection as to</p> <p>18 which works -- with respect to which works it</p> <p>19 would have been relatively easy to establish that</p> <p>20 they were not orphan works?</p> <p>21 A. You know, I really, again, there's this one by</p> <p>22 Salamanca that everybody keeps remembering, but I</p> <p>23 don't specifically remember the others.</p> <p>24 Q. Do you know what wasn't done that should have --</p> <p>25 that should have or could have been done easily?</p>	<p style="text-align: right;">Page 175</p> <p>1 PAUL COURANT</p> <p>2 MR. PETERSEN: Objection to form.</p> <p>3 A. What should have been done easily was establishing</p> <p>4 that this couldn't have been an orphan work.</p> <p>5 BY MR. ROSENTHAL:</p> <p>6 Q. But you don't know the specifics beyond that?</p> <p>7 A. That's correct.</p> <p>8 Q. Will John Wilkin know the specifics of that?</p> <p>9 A. He might.</p> <p>10 Q. Or Melissa Devine -- Levine, sorry?</p> <p>11 A. Levine, she might.</p> <p>12 Q. When -- in the final paragraph this document</p> <p>13 reads: It was always our belief that we would be</p> <p>14 more likely to succeed with the cooperation and</p> <p>15 assistance of authors and publishers. This turns</p> <p>16 out to be correct. Do you know what that phrase</p> <p>17 means?</p> <p>18 A. Well, yes, the Authors Guild constructively found</p> <p>19 errors and that was helpful. And I'm not sure</p> <p>20 when we wrote this. Well, and we had -- having</p> <p>21 lots of people, people who were expert in the</p> <p>22 matters of concern, help implement the process</p> <p>23 which was to say in this instance look at the</p> <p>24 works that had been listed, and also helped design</p> <p>25 the process which we had been discussing with both</p>
<p style="text-align: right;">Page 176</p> <p>1 PAUL COURANT</p> <p>2 the Authors Guild and the couple of publishers'</p> <p>3 organizations was something we always wanted.</p> <p>4 Q. When you say discussing with the Authors Guild</p> <p>5 and a couple of publishing organizations, can you</p> <p>6 tell me what you mean by that?</p> <p>7 A. Yeah, we had scheduled a meeting in Ann Arbor for</p> <p>8 approximately a couple of weeks after the date of</p> <p>9 this set of events in which we had invited and</p> <p>10 indeed have had positive responses from the</p> <p>11 American Association of Publishers, the American</p> <p>12 Association of University Presses and the Authors</p> <p>13 Guild Council, to come down to Ann Arbor and talk</p> <p>14 about how to organize a project like this so it</p> <p>15 would work well, we were looking forward to that</p> <p>16 meeting.</p> <p>17 Q. By the time you had scheduled this meeting, you</p> <p>18 already had published a list of -- at least one</p> <p>19 list of prospective orphan works, correct?</p> <p>20 A. That's correct.</p> <p>21 Q. And do you recall when those works were going to</p> <p>22 be made available if no one stepped forward to</p> <p>23 object to their status as orphan works?</p> <p>24 MR. PETERSEN: Objection to form.</p> <p>25 A. If no one stepped forward or other amendments in</p>	<p style="text-align: right;">Page 177</p> <p>1 PAUL COURANT</p> <p>2 the program weren't made, sometime in mid October,</p> <p>3 I think.</p> <p>4 BY MR. ROSENTHAL:</p> <p>5 Q. And did, in fact, the meeting that you described</p> <p>6 ever take place?</p> <p>7 A. Without the participation of the Authors Guild,</p> <p>8 yes.</p> <p>9 Q. So the American Association of Publishers and the</p> <p>10 American Association of University Presses met</p> <p>11 with the University of Michigan or met with whom?</p> <p>12 A. Met with staff in the University of Michigan</p> <p>13 Library who were involved with -- interested in</p> <p>14 the Orphans Work Project, and also -- the room was</p> <p>15 full of lawyers, so ours was probably there too.</p> <p>16 Q. In this case it's not -- presumably not a</p> <p>17 privileged meeting, so were you at that meeting?</p> <p>18 A. Yes.</p> <p>19 Q. Can you --</p> <p>20 A. I was there for part of that meeting, not the</p> <p>21 whole meeting.</p> <p>22 Q. Can you describe what happened at the part of the</p> <p>23 meeting that you attended?</p> <p>24 A. A full and frank exchange of ideas. We talked</p> <p>25 about what we were trying to accomplish and we</p>

# EXHIBIT 8

Confidential Attorneys' Eyes Only

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC., ET )  
AL., )  
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Plaintiffs, )  
) Index No.  
) 11 Civ. 6351 (HB)  
vs. )  
)  
HATHITRUST, et al., )  
)  
)  
Defendants. )  
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\*\*CONFIDENTIAL - ATTORNEYS' EYES ONLY\*\*

DEPOSITION OF PETER HIRTLE

New York, New York

Wednesday, April 18, 2012

Reported by:

THOMAS A. FERNICOLA, RPR

JOB NO. 48688



Confidential Attorneys' Eyes Only

Page 226	Page 227
<p>1 P. Hirtle</p> <p>2 Q. What was your involvement?</p> <p>3 A. I was asked my opinion. I made a</p> <p>4 recommendation that I shared with our counsel</p> <p>5 and then conveyed --</p> <p>6 MR. POTTER: I'll caution you not to</p> <p>7 further reveal the substance of any</p> <p>8 communications with counsel.</p> <p>9 A. And I conveyed my recommendation to</p> <p>10 the University librarian.</p> <p>11 Q. And did you have -- what did you tell</p> <p>12 the University librarian?</p> <p>13 MR. POTTER: Again, I'll ask you not</p> <p>14 to real the substance of legal</p> <p>15 communications to the --</p> <p>16 A. I recommended that Cornell should</p> <p>17 join the Orphan Works project.</p> <p>18 Q. And did you say why you believed so?</p> <p>19 A. Yes.</p> <p>20 Q. What were your reasons why?</p> <p>21 A. I felt that the project accorded with</p> <p>22 the mission and goals of the University</p> <p>23 library.</p> <p>24 Q. And what were those mission and</p> <p>25 goals?</p>	<p>1 P. Hirtle</p> <p>2 A. To provide ready access to research</p> <p>3 materials for Cornell faculty students and</p> <p>4 staff.</p> <p>5 MR. GOLDMAN: Let's take five</p> <p>6 minutes. I can go over my notes and I'll</p> <p>7 see -- I think I have one more line of</p> <p>8 questions, but I'll just take a break now</p> <p>9 and try to finish that up and then we'll be</p> <p>10 done. Take five minutes.</p> <p>11 (Recess taken from 5:06 p.m. to</p> <p>12 5:11 p.m.)</p> <p>13 MR. GOLDMAN: All right. Let's mark</p> <p>14 this.</p> <p>15 (PH Exhibit 14, Document entitled</p> <p>16 Checklist for Conducting a Fair Use</p> <p>17 Analysis before Using Copyrighted</p> <p>18 Materials, was marked for</p> <p>19 identification.)</p> <p>20 BY MR. GOLDMAN:</p> <p>21 Q. I marked as PH-14 a document</p> <p>22 entitled, "Checklist for Conducting a Fair Use</p> <p>23 Analysis before Using Copyrighted Materials."</p> <p>24 I downloaded this from the Cornell University</p> <p>25 website. Actually, if you see on the second</p>
Page 228	Page 229
<p>1 P. Hirtle</p> <p>2 page, it says -- in a footnote it says,</p> <p>3 "Revised for use by Cornell University from the</p> <p>4 Checklist for Fair Use, a project of the IUPUI</p> <p>5 Copyright Management Center."</p> <p>6 Have you ever seen this document</p> <p>7 before?</p> <p>8 A. Yes.</p> <p>9 Q. Okay.</p> <p>10 Do you know who created this</p> <p>11 document?</p> <p>12 A. Yes.</p> <p>13 Q. Who did?</p> <p>14 A. Patricia McClary.</p> <p>15 Q. Do you know how this document is used</p> <p>16 at Cornell?</p> <p>17 MR. POTTER: Objection.</p> <p>18 A. I know that it is used in conjunction</p> <p>19 with course teaching.</p> <p>20 Q. Anything else?</p> <p>21 A. I'm not aware of other uses.</p> <p>22 Q. Do you know whether this Checklist</p> <p>23 for Conducting a Fair Use Analysis was used at</p> <p>24 any point during the digitization process that</p> <p>25 occurred as part of the Google project?</p>	<p>1 P. Hirtle</p> <p>2 A. I'm not aware of that.</p> <p>3 Q. Do you know whether -- if you look at</p> <p>4 this list, there's -- there appear to be four</p> <p>5 categories that are to be examined, the purpose</p> <p>6 of the use, the nature of the copyrighted</p> <p>7 material, the amount copied, and the effect on</p> <p>8 the market for the original.</p> <p>9 Do you know whether anyone ever</p> <p>10 examined those factors with respect to any</p> <p>11 particular work that was digitized as part of</p> <p>12 the Google project?</p> <p>13 A. Someone may have, but I'm not aware</p> <p>14 of that.</p> <p>15 Q. Do you know whether those factors</p> <p>16 were examined with respect to the project as a</p> <p>17 whole -- withdrawn. I'll withdraw that</p> <p>18 question.</p> <p>19 MR. GOLDMAN: I have no further</p> <p>20 questions.</p> <p>21 MR. POTTER: Give me a couple of</p> <p>22 minutes to talk to my people and see if</p> <p>23 there's any redirect.</p> <p>24 MR. GOLDMAN: Absolutely.</p> <p>25 (Recess taken from 5:14 p.m. to</p>

Confidential Attorneys' Eyes Only

Page 230				Page 231			
1	P. Hirtle			1			
2	5:17 p.m.)			2			
3	MR. POTTER: No questions from me.			3	CERTIFICATE		
4	MR. GOLDMAN: Okay.			4			
5	(The deposition was concluded at			5	STATE OF NEW YORK )		
6	5:17 p.m.)			6	) ss.:		
7	(The exhibits were retained by the			7	COUNTY OF NEW YORK )		
8	court reporter to be attached to the			8			
9	transcript.)			9	I, THOMAS A. FERNICOLA, Registered		
10				10	Reporter and Notary Public within and for		
11				11	the State of New York, do hereby certify		
12				12	that the within is a true and accurate		
13				13	transcript of the proceedings held on		
14				14	April 18, 2012.		
15				15	That I am not related to any of the		
16				16	parties to this action by blood or		
17				17	marriage; and that I am in no way		
18				18	interested in the outcome of this matter.		
19				19	IN WITNESS WHEREOF, I have hereunto		
20				20	set my hand this 30th day of April 2012.		
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# EXHIBIT 9

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JOHN P. WILKIN  
IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK  
  
THE AUTHORS GUILD, INC., et al.,  
Plaintiffs,  
vs. Case No. 11 Civ. 6351  
(HB)  
  
HATHITRUST, et al.,  
Defendants.

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The Deposition of JOHN P. WILKIN,  
Taken at 530 State Street  
Ann Arbor, Michigan  
Commencing at 9:32 a.m.  
April 25, 2012,  
Before Kathryn L. Janes, CSR-3442, RMR, RPR.

Job Number: 48911

<p style="text-align: right;">Page 62</p> <p>1 JOHN P. WILKIN</p> <p>2 involved the digitization of copyrighted works?</p> <p>3 MR. PETERSEN: Objection to form,</p> <p>4 objection to the extent it would call for a legal</p> <p>5 conclusion as to works that were in copyright.</p> <p>6 A. Some of our activities digitizing works prior to</p> <p>7 digitization with Google did involve digitizing</p> <p>8 works that we believe to be in copyright.</p> <p>9 BY MR. GOLDMAN:</p> <p>10 Q. And tell me about those projects.</p> <p>11 MR. PETERSEN: Objection to form.</p> <p>12 A. I wouldn't characterize them as projects. I would</p> <p>13 characterize them as library preservation access</p> <p>14 activities.</p> <p>15 BY MR. GOLDMAN:</p> <p>16 Q. Under what circumstances did University of</p> <p>17 Michigan digitize books that were believed to be</p> <p>18 in copyright for the purposes of preservation,</p> <p>19 and we're talking about the time period prior to</p> <p>20 the Google MDP?</p> <p>21 MR. PETERSEN: Objection to form and</p> <p>22 objection to the extent it calls for a legal</p> <p>23 conclusion.</p> <p>24 But you can answer.</p> <p>25 A. The library routinely digitized works that were</p>	<p style="text-align: right;">Page 63</p> <p>1 JOHN P. WILKIN</p> <p>2 damaged or deteriorating.</p> <p>3 BY MR. GOLDMAN:</p> <p>4 Q. How was the -- was a determination made that a</p> <p>5 particular work was damaged or deteriorating?</p> <p>6 MR. PETERSEN: And you mean factually?</p> <p>7 BY MR. GOLDMAN:</p> <p>8 Q. Factually.</p> <p>9 A. Yes.</p> <p>10 Q. And how was that determination made?</p> <p>11 A. Those determinations were made in many different</p> <p>12 ways, sometimes at a circulation desk when</p> <p>13 somebody was checking out the work, sometimes by</p> <p>14 preservation and conservation staff.</p> <p>15 Q. And what was -- what was the process by which a</p> <p>16 work that was determined to be damaged or</p> <p>17 deteriorating at the circulation desk, what was</p> <p>18 the process by which such a work would be</p> <p>19 digitized at UM?</p> <p>20 A. The process by which it -- I'm sorry, there were</p> <p>21 two different questions there.</p> <p>22 MR. PETERSEN: Object to form on it,</p> <p>23 yeah.</p> <p>24 BY MR. GOLDMAN:</p> <p>25 Q. Well, I guess I'm asking you to walk me through</p>
<p style="text-align: right;">Page 64</p> <p>1 JOHN P. WILKIN</p> <p>2 step by step how a -- how a work that was</p> <p>3 determined to be damaged or deteriorating would</p> <p>4 be digitized by UM prior to the Google MDP?</p> <p>5 MR. PETERSEN: So you're talking about</p> <p>6 after a decision was made that it was, in fact,</p> <p>7 damaged or deteriorating at that point in time</p> <p>8 physically, mechanically how that work would have</p> <p>9 been digitized, is that fair to say, Jeremy, is</p> <p>10 that the nature of the question?</p> <p>11 MR. GOLDMAN: Yes, I mean, we could go</p> <p>12 step by step, but yes, that is the nature of my</p> <p>13 question.</p> <p>14 BY MR. GOLDMAN:</p> <p>15 Q. Why don't we start with that.</p> <p>16 A. A book that the circulation staff identified as</p> <p>17 damaged or deteriorating was sent to -- would be</p> <p>18 sent to the preservation and conservation staff.</p> <p>19 Preservation and conservation staff would make a</p> <p>20 treatment decision. It may be possible, for</p> <p>21 example, to repair the book. But if the book was</p> <p>22 to be digitized, there were a number -- there are</p> <p>23 a number of methods by which the -- there were</p> <p>24 then and there are now a number of methods by</p> <p>25 which the book could be digitized.</p>	<p style="text-align: right;">Page 65</p> <p>1 JOHN P. WILKIN</p> <p>2 Q. Are you aware of the criteria that were applied</p> <p>3 to determine whether a work was damaged?</p> <p>4 A. No, not specifically.</p> <p>5 Q. Where did you -- why are you using the word</p> <p>6 damaged, is that a term of art?</p> <p>7 MR. PETERSEN: Objection to form,</p> <p>8 objection to the extent it calls for a legal</p> <p>9 conclusion.</p> <p>10 A. It is -- I'm not -- I'm not using it as a term of</p> <p>11 art, I'm using it to broadly describe the rubric</p> <p>12 of materials that a circulation staff would</p> <p>13 identify as being in need of treatment.</p> <p>14 BY MR. GOLDMAN:</p> <p>15 Q. And do you distinguish between a work that is</p> <p>16 damaged and a work that is deteriorating?</p> <p>17 MR. PETERSEN: Objection to form.</p> <p>18 But if you can answer.</p> <p>19 You mean him personally?</p> <p>20 BY MR. GOLDMAN:</p> <p>21 Q. I mean you personally.</p> <p>22 A. Right.</p> <p>23 Q. When you say the words damaged or deteriorating,</p> <p>24 are you referring to one state of a book or are</p> <p>25 you referring to two different states of a book,</p>

<p style="text-align: right;">Page 66</p> <p>1 JOHN P. WILKIN</p> <p>2 and by state, I mean condition, physical</p> <p>3 condition?</p> <p>4 MR. PETERSEN: His personal view.</p> <p>5 A. My personal view, I can distinguish between the</p> <p>6 two and, of course, both may apply.</p> <p>7 BY MR. GOLDMAN:</p> <p>8 Q. What does it mean, in your opinion, when a book</p> <p>9 is damaged?</p> <p>10 A. For example -- for example, somebody may have</p> <p>11 spilled a drink or have food in the book or the</p> <p>12 bindings may be removed. There are many ways that</p> <p>13 a book could be damaged.</p> <p>14 Q. And what does it mean, in your view, that a work</p> <p>15 was deteriorating?</p> <p>16 A. Keeping in mind that this is outside of my</p> <p>17 professional sphere of responsibility, I generally</p> <p>18 understand that to be materials with acid content</p> <p>19 in the paper, that category of materials published</p> <p>20 between 1850 and 1990 typically where the paper is</p> <p>21 in a process of decaying.</p> <p>22 Q. Is the -- when you say that there's materials</p> <p>23 with acid content, is the acid content intrinsic</p> <p>24 to the medium itself?</p> <p>25 MR. PETERSEN: Objection to form,</p>	<p style="text-align: right;">Page 67</p> <p>1 JOHN P. WILKIN</p> <p>2 objection, lacks foundation.</p> <p>3 But if you have a basis on which to</p> <p>4 answer that's not speculative, please do so.</p> <p>5 A. The process of making paper during that period,</p> <p>6 pulping process typically involved creating paper</p> <p>7 with a high acid content, a low alkaline content.</p> <p>8 BY MR. GOLDMAN:</p> <p>9 Q. And when you say typically, you said typically</p> <p>10 for works that are in which date range did you</p> <p>11 mention?</p> <p>12 A. 1850 to 1990.</p> <p>13 Q. So are you saying books that were created during</p> <p>14 the time period 1850 to 1990 typically involved</p> <p>15 paper with a high acid content; is that correct?</p> <p>16 MR. PETERSEN: Objection to form.</p> <p>17 A. That's my -- that's my understanding.</p> <p>18 BY MR. GOLDMAN:</p> <p>19 Q. And so is it your understanding that works that</p> <p>20 were created during that time period with a high</p> <p>21 acid content are deteriorating?</p> <p>22 MR. PETERSEN: Objection to form.</p> <p>23 A. It is my understanding that works created using</p> <p>24 that method during that period are deteriorating</p> <p>25 with the natural process of decay.</p>
<p style="text-align: right;">Page 68</p> <p>1 JOHN P. WILKIN</p> <p>2 BY MR. GOLDMAN:</p> <p>3 Q. Now -- now, you said earlier that this wasn't</p> <p>4 your area of expertise; is that right?</p> <p>5 MR. PETERSEN: Objection to form.</p> <p>6 BY MR. GOLDMAN:</p> <p>7 Q. And by this area, I mean, the area of making a</p> <p>8 determination as to whether something is damaged</p> <p>9 or deteriorating; is that right?</p> <p>10 MR. PETERSEN: Same objection.</p> <p>11 A. The preservation and conservation is not my</p> <p>12 professional area of training or expertise.</p> <p>13 BY MR. GOLDMAN:</p> <p>14 Q. Who at UM ultimately would make the determination</p> <p>15 as to whether a particular work would be</p> <p>16 digitized for preservation purposes because it is</p> <p>17 damaged or deteriorating?</p> <p>18 MR. PETERSEN: Objection to the extent</p> <p>19 it suggests that only one person would make that</p> <p>20 determination. If the witness can answer, he is</p> <p>21 certainly free to do so.</p> <p>22 A. It's a complicated process with many people who</p> <p>23 are involved, including preservation and</p> <p>24 conservation staff, and not infrequently</p> <p>25 collection development staff.</p>	<p style="text-align: right;">Page 69</p> <p>1 JOHN P. WILKIN</p> <p>2 BY MR. GOLDMAN:</p> <p>3 Q. Do they -- do you know, are you aware of whether</p> <p>4 those -- those people have written guidelines</p> <p>5 that they use when making a determination as to</p> <p>6 whether a work is damaged or deteriorating?</p> <p>7 A. I'm not aware of whether they have written</p> <p>8 guidelines.</p> <p>9 Q. Have you ever seen written guidelines that set</p> <p>10 forth the criteria that should be applied to</p> <p>11 determine whether a work is damaged or</p> <p>12 deteriorating?</p> <p>13 MR. PETERSEN: Prepared by anyone?</p> <p>14 BY MR. GOLDMAN:</p> <p>15 Q. Prepared by anyone.</p> <p>16 A. I don't recall. This is an area of considerable</p> <p>17 professional activity and I'm sure that things</p> <p>18 like that have been around me and I may have seen</p> <p>19 them, but I don't recall.</p> <p>20 Q. Do you know whether prior to a work being</p> <p>21 digitized for preservation purposes anyone on the</p> <p>22 library staff made a search to determine whether</p> <p>23 an unused replacement copy of the particular work</p> <p>24 that was going to be digitized could be obtained</p> <p>25 on the market?</p>

<p style="text-align: right;">Page 70</p> <p>1 JOHN P. WILKIN</p> <p>2 MR. PETERSEN: If you could just give</p> <p>3 me a moment to look at that question. That was a</p> <p>4 huge question.</p> <p>5 MR. GOLDMAN: I know it's a long</p> <p>6 question, we can read it back if we need to.</p> <p>7 MR. PETERSEN: Yeah, I'm not sure, but</p> <p>8 when do you mean? What time?</p> <p>9 BY MR. GOLDMAN:</p> <p>10 Q. And this question still relates to the time</p> <p>11 period prior to the Google MDP. Let your counsel</p> <p>12 take a look and make his objections, if any.</p> <p>13 MR. PETERSEN: Objection to form,</p> <p>14 objection, vague, and objection, lacks foundation.</p> <p>15 If the witness is comfortable, if he understands</p> <p>16 the question, he certainly may answer it.</p> <p>17 I know it's been some time, been</p> <p>18 delayed occasioned by my objections, so you may</p> <p>19 want to have that question read back to you.</p> <p>20 A. Why don't we read it -- read it back.</p> <p>21 (The following record was read by</p> <p>22 the reporter at 11:01 a.m.:</p> <p>23 "QUESTION: Do you know whether</p> <p>24 prior to a work being digitized for</p> <p>25 preservation purposes anyone on the</p>	<p style="text-align: right;">Page 71</p> <p>1 JOHN P. WILKIN</p> <p>2 library staff made a search to</p> <p>3 determine whether an unused</p> <p>4 replacement copy of the particular</p> <p>5 work that was going to be digitized</p> <p>6 could be obtained on the market?")</p> <p>7 MR. PETERSEN: And this is prior to</p> <p>8 the -- and counsel clarified, this is prior to the</p> <p>9 MDP.</p> <p>10 A. Right. I believe it's the case that it was common</p> <p>11 for searches to be performed for unused</p> <p>12 replacement copies.</p> <p>13 BY MR. GOLDMAN:</p> <p>14 Q. Do you know how those searches were conducted at</p> <p>15 that time?</p> <p>16 A. I don't.</p> <p>17 Q. Who would know how those searches were conducted?</p> <p>18 A. At that time --</p> <p>19 MR. PETERSEN: Who at the university</p> <p>20 now would know then or who then would know?</p> <p>21 BY MR. GOLDMAN:</p> <p>22 Q. Who would know then?</p> <p>23 MR. PETERSEN: Titles of people or</p> <p>24 names?</p> <p>25 BY MR. GOLDMAN:</p>
<p style="text-align: right;">Page 72</p> <p>1 JOHN P. WILKIN</p> <p>2 Q. I'm asking generally who, and we'll see what</p> <p>3 answer you can provide.</p> <p>4 A. Probably preservation and conservation staff at</p> <p>5 that time.</p> <p>6 Q. And what about today?</p> <p>7 A. Today? I -- let me just think about that for a</p> <p>8 second. I think that might be done by technical</p> <p>9 services staff.</p> <p>10 Q. Okay, I'm going to show you what was marked</p> <p>11 yesterday as PC11, which are -- which are</p> <p>12 entitled Responses to Plaintiff's First Requests</p> <p>13 For Admission to Mary Sue Coleman, this is a</p> <p>14 document that was provided to us by counsel for</p> <p>15 University of Michigan and others.</p> <p>16 MR. BERNARD: Which document is it?</p> <p>17 MR. PETERSEN: The Response to</p> <p>18 Plaintiff's First Request For Admission to Mary</p> <p>19 Sue Coleman.</p> <p>20 BY MR. GOLDMAN:</p> <p>21 Q. And I see you're already taking a look at this</p> <p>22 document, but I guess I would just first ask you</p> <p>23 to take a look at the document and let me know</p> <p>24 whether you've seen a copy of this document</p> <p>25 before?</p>	<p style="text-align: right;">Page 73</p> <p>1 JOHN P. WILKIN</p> <p>2 MR. PETERSEN: And I'll just note for</p> <p>3 the record and also for the witness that this</p> <p>4 document was prepared in part under the advice of</p> <p>5 counsel, and so I just caution the witness not to</p> <p>6 divulge attorney-client privileged information.</p> <p>7 But you are free to answer factual</p> <p>8 questions addressed to that, but please be careful</p> <p>9 not to -- not to divulge attorney-client</p> <p>10 privileged information.</p> <p>11 BY MR. GOLDMAN:</p> <p>12 Q. Have you seen a copy of this document before?</p> <p>13 A. I have.</p> <p>14 Q. Okay. And did you help collect information</p> <p>15 that -- to respond to the request that was made</p> <p>16 for this document?</p> <p>17 A. I did.</p> <p>18 Q. If we could turn to page 5 -- sorry, page 7 and</p> <p>19 look at request number 5.</p> <p>20 A. Uh-huh.</p> <p>21 Q. Let's read the -- I'll read the request and then</p> <p>22 I'll direct you to the portion of the response</p> <p>23 for which I'm going to ask questions.</p> <p>24 A. Uh-huh.</p> <p>25 Q. So number 5 says: For each work listed on</p>

<p style="text-align: right;">Page 74</p> <p>1 JOHN P. WILKIN</p> <p>2 Schedule A hereto, admit that the library could,</p> <p>3 after a reasonable search (sic), obtain an unused</p> <p>4 replacement of the work at a fair price. And</p> <p>5 then if you turn to the next page, and after your</p> <p>6 counsel included a number of objections --</p> <p>7 A. Uh-huh.</p> <p>8 Q. -- which are, you know, preserved, subpoint (i)</p> <p>9 says: Defendant denies that, on the date the</p> <p>10 library conducted searches of the databases it</p> <p>11 uses to identify the availability and price of a</p> <p>12 new book, the library was able to identify an</p> <p>13 unused print copy of the following works listed</p> <p>14 on Schedule A, and then it sets forth a number --</p> <p>15 a number of works. I guess my first question is:</p> <p>16 Do you know the -- do you know the date that the</p> <p>17 library conducted the searches that are</p> <p>18 referenced in this question?</p> <p>19 MR. PETERSEN: Objection to form.</p> <p>20 A. I don't. They were conducted in -- in support of</p> <p>21 preparing a response.</p> <p>22 BY MR. GOLDMAN:</p> <p>23 Q. So you mean the searches that are referenced here</p> <p>24 were conducted in response to plaintiff's</p> <p>25 question; is that --</p>	<p style="text-align: right;">Page 75</p> <p>1 JOHN P. WILKIN</p> <p>2 MR. PETERSEN: Objection to form.</p> <p>3 BY MR. GOLDMAN:</p> <p>4 Q. Is that your understanding?</p> <p>5 A. That's my understanding.</p> <p>6 Q. When it says the library conducted searches, do</p> <p>7 you know who at the library conducted these</p> <p>8 searches?</p> <p>9 MR. PETERSEN: Objection to form.</p> <p>10 A. Are you asking about the individual or the</p> <p>11 department?</p> <p>12 BY MR. GOLDMAN:</p> <p>13 Q. Let's start with the department.</p> <p>14 A. I believe that would have been the acquisitions</p> <p>15 department.</p> <p>16 Q. And do you know who at the acquisitions</p> <p>17 department?</p> <p>18 A. I do not. I do not recall.</p> <p>19 Q. Did you -- you said that you did help collect</p> <p>20 information that was used in these responses; is</p> <p>21 that right?</p> <p>22 A. I did say that.</p> <p>23 Q. Did you help collect the information that was</p> <p>24 used to respond to this question number 5?</p> <p>25 MR. PETERSEN: Which part of number 5?</p>
<p style="text-align: right;">Page 76</p> <p>1 JOHN P. WILKIN</p> <p>2 MR. GOLDMAN: The part that we're</p> <p>3 talking about right now, subpart (i).</p> <p>4 MR. PETERSEN: Objection to form.</p> <p>5 A. By help do you mean coordinated the process?</p> <p>6 BY MR. GOLDMAN:</p> <p>7 Q. Let me -- let me ask a different question. What</p> <p>8 was the nature of your help? How did you help</p> <p>9 collect the information that was used in this</p> <p>10 response?</p> <p>11 A. I identified managers who could direct staff to</p> <p>12 collect this information.</p> <p>13 Q. And who was the manager that you directed to help</p> <p>14 staff in response to this question?</p> <p>15 A. Who was the manager who could direct staff to</p> <p>16 collect the information?</p> <p>17 Q. Yes.</p> <p>18 A. Right, because the manager wouldn't have collected</p> <p>19 the information. Our associate university</p> <p>20 librarian for collections, Bryan Skib.</p> <p>21 Q. I'm sorry, say the name again?</p> <p>22 A. Bryan Skib, S-K-I-B, B-R-Y-A-N. S-K-I-B.</p> <p>23 Q. Are you aware of which databases were used to</p> <p>24 conduct the searches referenced in this answer?</p> <p>25 MR. PETERSEN: Objection to form.</p>	<p style="text-align: right;">Page 77</p> <p>1 JOHN P. WILKIN</p> <p>2 A. I'm not. I could speculate.</p> <p>3 BY MR. GOLDMAN:</p> <p>4 Q. Well, are you generally aware of what databases</p> <p>5 the library uses to conduct searches like this?</p> <p>6 A. Not comprehensively.</p> <p>7 Q. So I'm going to ask you to speculate.</p> <p>8 MR. PETERSEN: It doesn't do the record</p> <p>9 any good, Jeremy, you know that. We can't use</p> <p>10 speculating on the record.</p> <p>11 BY MR. GOLDMAN:</p> <p>12 Q. Well, what is your -- let me ask this, not to</p> <p>13 speculate. Why would -- you said you could</p> <p>14 speculate, what do you mean by speculate?</p> <p>15 MR. PETERSEN: Is it an informed</p> <p>16 opinion or would you be guessing?</p> <p>17 THE WITNESS: I would be guessing.</p> <p>18 MR. PETERSEN: Okay. All right.</p> <p>19 BY MR. GOLDMAN:</p> <p>20 Q. I assume that Bryan Skib would know the answer to</p> <p>21 that question?</p> <p>22 A. He may know the answer to that question.</p> <p>23 Q. Are you aware of databases that are generally</p> <p>24 used by the acquisitions department to search for</p> <p>25 the availability of books?</p>



<p style="text-align: right;">Page 78</p> <p>1 JOHN P. WILKIN</p> <p>2 MR. PETERSEN: Objection to form.</p> <p>3 A. Some. One, maybe a couple.</p> <p>4 BY MR. GOLDMAN:</p> <p>5 Q. What are the databases that you're aware of?</p> <p>6 A. Amazon is one that they would use.</p> <p>7 Q. And what is another one?</p> <p>8 A. In the past in my experience, Bookhouse, keeping</p> <p>9 in mind that this is not my area of responsibility</p> <p>10 and I'm several steps removed from it.</p> <p>11 Q. If we go to subpart (ii), it says: Defendant</p> <p>12 avers that, on the date the library conducted</p> <p>13 searches of the databases it uses to identify the</p> <p>14 availability and price of a new book, the library</p> <p>15 identified offers advertising for sale one or</p> <p>16 more allegedly new print copies of an apparently</p> <p>17 identical edition of the following works listed</p> <p>18 on Schedule A for the following prices. When it</p> <p>19 says on the date that the library conducted</p> <p>20 searches, is it the same answer as before?</p> <p>21 MR. PETERSEN: Objection to form. If</p> <p>22 you put the question to him --</p> <p>23 BY MR. GOLDMAN:</p> <p>24 Q. Let me ask it again. Are you aware of when this</p> <p>25 search was conducted?</p>	<p style="text-align: right;">Page 79</p> <p>1 JOHN P. WILKIN</p> <p>2 MR. PETERSEN: Objection to form.</p> <p>3 But if you can answer.</p> <p>4 A. I'm not aware of the specific date. It was done</p> <p>5 in preparation for the response.</p> <p>6 BY MR. GOLDMAN:</p> <p>7 Q. And are you aware of which databases were</p> <p>8 searched?</p> <p>9 A. I'm not.</p> <p>10 Q. Now, when it says that the library identified</p> <p>11 offers advertising for sale one or more allegedly</p> <p>12 new print copies of an apparently identical</p> <p>13 edition of the following works, do you know what</p> <p>14 is meant by apparently identical edition?</p> <p>15 MR. PETERSEN: Objection to form.</p> <p>16 A. The whole sentence is important, often materials</p> <p>17 are advertised and when we attempt to acquire</p> <p>18 them, they are not available. Offers advertising</p> <p>19 for sale, sometimes the work is not available. It</p> <p>20 has advertised availability, but the work is not</p> <p>21 available. The works are alleged to be new, and</p> <p>22 when we acquired them, if we are able to acquire</p> <p>23 them, they are not new in some cases. And</p> <p>24 occasionally the work will be purported to be of a</p> <p>25 specific edition and when the book arrives, it's</p>
<p style="text-align: right;">Page 80</p> <p>1 JOHN P. WILKIN</p> <p>2 not the same edition.</p> <p>3 BY MR. GOLDMAN:</p> <p>4 Q. We were speaking earlier about the -- we were</p> <p>5 speaking earlier about the library's digitization</p> <p>6 of certain works for preservation purposes, and</p> <p>7 I'm talking about the time period prior to the</p> <p>8 Google MDP, and I believe you said that it was</p> <p>9 common for the library to make a search for a</p> <p>10 replacement work of an unused copy; is that -- is</p> <p>11 that right?</p> <p>12 MR. PETERSEN: Object to the extent it</p> <p>13 mischaracterizes his testimony.</p> <p>14 If you can identify if it does at all.</p> <p>15 BY MR. GOLDMAN:</p> <p>16 Q. And if I am mischaracterizing, please let me</p> <p>17 know.</p> <p>18 A. I think that's a fair, incomplete</p> <p>19 characterization. In many cases, not all cases</p> <p>20 necessarily, and I couldn't tell you which cases</p> <p>21 that was -- that where it did happen, but it was</p> <p>22 common for us to search for the availability of a</p> <p>23 replacement copy.</p> <p>24 Q. Now, turning to that phrase replacement copy --</p> <p>25 A. Uh-huh.</p>	<p style="text-align: right;">Page 81</p> <p>1 JOHN P. WILKIN</p> <p>2 Q. -- when the library does a search for a</p> <p>3 replacement copy for preservation purposes, does</p> <p>4 the library look for the identical edition of the</p> <p>5 copy it is looking to replace?</p> <p>6 A. Typically, frequently, and overwhelmingly, I would</p> <p>7 say.</p> <p>8 Q. So if there's a later imprint or edition of the</p> <p>9 work available, the library would not consider</p> <p>10 that a replacement copy?</p> <p>11 MR. PETERSEN: Objection, form,</p> <p>12 objection to the extent it would call for a legal</p> <p>13 conclusion, but the witness can certainly answer</p> <p>14 if he understands the question and has information</p> <p>15 to describe.</p> <p>16 A. So I didn't say we would not acquire that copy,</p> <p>17 and that's what you said.</p> <p>18 BY MR. GOLDMAN:</p> <p>19 Q. Would the library, if -- if the library conducted</p> <p>20 a search and found a later edition of the same</p> <p>21 work, do you know whether the general practice of</p> <p>22 the library would be to still digitize that work?</p> <p>23 MR. PETERSEN: Objection to form, lacks</p> <p>24 foundation, and objection to the extent it calls</p> <p>25 for legal conclusions.</p>

<p style="text-align: right;">Page 186</p> <p>1 JOHN P. WILKIN</p> <p>2 HathiTrust.</p> <p>3 BY MR. GOLDMAN:</p> <p>4 Q. Okay. If you look at page 11.</p> <p>5 A. Uh-huh.</p> <p>6 Q. Question 3.</p> <p>7 A. Yes.</p> <p>8 Q. It says: For each work listed on Schedule A,</p> <p>9 provide the following information with regard to</p> <p>10 the master digital copy, master university copy</p> <p>11 and all secondary university copies, HathiTrust</p> <p>12 digital copies and third party digital copies of</p> <p>13 the work. Everything I just read are capitalized</p> <p>14 and defined terms which may require you looking</p> <p>15 back in the document, but I don't think you'll</p> <p>16 have to.</p> <p>17 MR. PETERSEN: To which they are</p> <p>18 subject to objections.</p> <p>19 MR. GOLDMAN: Yes.</p> <p>20 BY MR. GOLDMAN:</p> <p>21 Q. And there's a number -- there's a list of</p> <p>22 information that's requested with respect to</p> <p>23 those works, and if you turn the page to</p> <p>24 subsection (l) --</p> <p>25 A. Uh-huh.</p>	<p style="text-align: right;">Page 187</p> <p>1 JOHN P. WILKIN</p> <p>2 Q. -- it says: The identities of the individuals</p> <p>3 who currently have authorized access to the</p> <p>4 physical location and/or virtual case of the</p> <p>5 digital copy, including such individual's name</p> <p>6 and current address, as well as his or her</p> <p>7 current employer, title and job description. Did</p> <p>8 you help collect information to respond to this</p> <p>9 particular request?</p> <p>10 MR. PETERSEN: To the extent you can</p> <p>11 recall.</p> <p>12 A. I managed staff who collected this information and</p> <p>13 reviewed the information that was submitted.</p> <p>14 BY MR. GOLDMAN:</p> <p>15 Q. Now, if you turn to page 16.</p> <p>16 A. Uh-huh.</p> <p>17 Q. In the middle of the page it says: In response</p> <p>18 to subpart L, which is the subpart I just read,</p> <p>19 it says: Defendant provides the information in</p> <p>20 the chart below, which applies to the master</p> <p>21 digital copy and the HathiTrust digital copies</p> <p>22 for each of the works listed on Schedule A as of</p> <p>23 February 1st, 2012. All individuals identified</p> <p>24 as employees of the university, the University of</p> <p>25 Wisconsin or Indiana University may be contacted</p>
<p style="text-align: right;">Page 188</p> <p>1 JOHN P. WILKIN</p> <p>2 through defendant's counsel. And then there's a</p> <p>3 chart here with a number of individuals listed,</p> <p>4 did you -- did you help prepare this schedule,</p> <p>5 Mr. Wilkin, and I mean, you personally?</p> <p>6 MR. PETERSEN: Objection to form.</p> <p>7 A. No, I believe that this is the processing of</p> <p>8 information we provided.</p> <p>9 BY MR. GOLDMAN:</p> <p>10 Q. Now, is it -- it's my understanding that the</p> <p>11 individuals that are listed in the second row and</p> <p>12 second column under initial HathiTrust digital</p> <p>13 copy, those are the list of individuals who</p> <p>14 have --</p> <p>15 A. I'm sorry, Jeremy, I'm having a hard time.</p> <p>16 Q. Sorry.</p> <p>17 A. Second row, second column, you mean --</p> <p>18 Q. The column that starts -- the cell that starts</p> <p>19 with Ezra Brooks.</p> <p>20 A. Thank you.</p> <p>21 Q. These are the individuals who have access to the</p> <p>22 physical location of the initial HathiTrust</p> <p>23 digital copy; is that right?</p> <p>24 MR. PETERSEN: Objection to form. He's</p> <p>25 going to need some time. I think these are very</p>	<p style="text-align: right;">Page 189</p> <p>1 JOHN P. WILKIN</p> <p>2 detailed.</p> <p>3 MR. GOLDMAN: I know.</p> <p>4 MR. PETERSEN: The interrogatories</p> <p>5 themselves are very detailed, and so it is</p> <p>6 difficult to have the witness just on the fly</p> <p>7 respond to a particular cell or component.</p> <p>8 A. Uh-huh.</p> <p>9 MR. PETERSEN: So I don't know how else</p> <p>10 to do it, he will have to spend a lot of time</p> <p>11 looking through each one and he -- obviously it's</p> <p>12 your time here today and if that's the way you</p> <p>13 want to put his time, that's absolutely fine, but</p> <p>14 I would caution you to give him enough time</p> <p>15 because he's --</p> <p>16 MR. GOLDMAN: Okay, I understand.</p> <p>17 BY MR. GOLDMAN:</p> <p>18 Q. Let's try to simplify it a little bit and maybe</p> <p>19 you can you use this as a reference point --</p> <p>20 A. Yeah.</p> <p>21 Q. -- rather than asking specifically about it.</p> <p>22 Which categories of staff have</p> <p>23 authorized access to the physical machines where</p> <p>24 the HathiTrust digital copies are stored?</p> <p>25 MR. PETERSEN: If you know.</p>



<p style="text-align: right;">Page 190</p> <p>1 JOHN P. WILKIN</p> <p>2 BY MR. GOLDMAN:</p> <p>3 Q. If you know.</p> <p>4 A. System administrators generally, and, yes.</p> <p>5 Q. Anyone else other than system administrators?</p> <p>6 A. To the physical, no.</p> <p>7 Q. And is it the same answer with respect to the --</p> <p>8 well, let me take a step back. There's a</p> <p>9 secondary copy at the Indiana University; is that</p> <p>10 right?</p> <p>11 MR. PETERSEN: Objection to form.</p> <p>12 A. A mirror copy?</p> <p>13 BY MR. GOLDMAN:</p> <p>14 Q. Yes.</p> <p>15 A. Yes.</p> <p>16 Q. And is it the same answer with respect to the</p> <p>17 mirror copy?</p> <p>18 A. Yes.</p> <p>19 Q. Now, in the next line, and I --</p> <p>20 A. Uh-huh.</p> <p>21 Q. -- and there's a list of people that extends for</p> <p>22 three pages --</p> <p>23 A. Yes.</p> <p>24 Q. -- of individuals who have what I called virtual</p> <p>25 access to the HathiTrust digital copy and the</p>	<p style="text-align: right;">Page 191</p> <p>1 JOHN P. WILKIN</p> <p>2 mirror copy at Indiana.</p> <p>3 A. Uh-huh.</p> <p>4 Q. Who are the categories of people who have access</p> <p>5 to that virtual copy?</p> <p>6 MR. PETERSEN: Objection to form.</p> <p>7 BY MR. GOLDMAN:</p> <p>8 Q. And you can answer by reference to the sheet to</p> <p>9 the extent it helps or you can answer if you have</p> <p>10 your own personal knowledge.</p> <p>11 A. Stipulating that virtual copy is not a term that</p> <p>12 has any meaning in our context, and that we</p> <p>13 understood it to be somebody who was permitted to</p> <p>14 read the materials, these -- they're given</p> <p>15 specific permission to read the materials. The</p> <p>16 categories of people are my staff, copyright</p> <p>17 reviewers at Michigan and at partnering</p> <p>18 institutions, staff who perform quality review at</p> <p>19 Michigan, and the unnamed persons who have print</p> <p>20 disabilities.</p> <p>21 Q. There's also listed on here people with a title</p> <p>22 orphan works investigators, is that --</p> <p>23 A. That is true.</p> <p>24 Q. -- a separate category of people?</p> <p>25 A. That is a separate category of people.</p>
<p style="text-align: right;">Page 192</p> <p>1 JOHN P. WILKIN</p> <p>2 Q. Are there any others that you might have left</p> <p>3 off? By reference to the list, you can look at</p> <p>4 the list to help you.</p> <p>5 A. I will look at the list.</p> <p>6 Q. And I'm not quizzing you, I just want to know</p> <p>7 whether I got all the categories.</p> <p>8 A. Staff from the copyright office generally,</p> <p>9 digitization staff, some catalogers, and I believe</p> <p>10 that covers it.</p> <p>11 Q. And can we refer to this group of people as</p> <p>12 people with privileged access to the materials;</p> <p>13 is that a fair -- or if you can characterize it</p> <p>14 differently, that's fine, I just want a way to</p> <p>15 refer to these people?</p> <p>16 MR. PETERSEN: Objection to form.</p> <p>17 How would you characterize?</p> <p>18 A. I believe that that's the term that was used by my</p> <p>19 staff in putting together this.</p> <p>20 BY MR. GOLDMAN:</p> <p>21 Q. You said that these privileged users have</p> <p>22 specific permission to read materials, are they</p> <p>23 limited in which materials they are permitted to</p> <p>24 view?</p> <p>25 MR. PETERSEN: Objection to form.</p>	<p style="text-align: right;">Page 193</p> <p>1 JOHN P. WILKIN</p> <p>2 If you can answer.</p> <p>3 A. No, they are not limited in which materials they</p> <p>4 can view.</p> <p>5 BY MR. GOLDMAN:</p> <p>6 Q. They can view any work that's stored in the</p> <p>7 HathiTrust Digital Library; is that right?</p> <p>8 A. They can view any work that's stored in the</p> <p>9 HathiTrust Digital Library.</p> <p>10 Q. Can they download any work that's stored in the</p> <p>11 HathiTrust Digital Library?</p> <p>12 MR. PETERSEN: Objection to form,</p> <p>13 compound.</p> <p>14 MR. GOLDMAN: Where's the compound?</p> <p>15 MR. PETERSEN: Variety of individuals,</p> <p>16 some may have different rights to do certain</p> <p>17 things than others.</p> <p>18 BY MR. GOLDMAN:</p> <p>19 Q. Well, if that's the case, then let me know.</p> <p>20 A. With very few exceptions, I would say five, and</p> <p>21 setting aside the students and faculty who have</p> <p>22 print disabilities, these individuals are</p> <p>23 permitted to read works from a specific location,</p> <p>24 a specific IP address that is from his or her desk</p> <p>25 as part of his or her work, and can read one page</p>

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<p>1 JOHN P. WILKIN</p> <p>2 at a time after authenticating to the system, that</p> <p>3 is, he or she must come from his or her desk, must</p> <p>4 authenticate to the system, and then can read or</p> <p>5 download one page at a time as part of doing his</p> <p>6 or her work.</p> <p>7 Q. So it is possible to download one page at a time,</p> <p>8 correct?</p> <p>9 A. It is.</p> <p>10 Q. After the user has been authenticated on the</p> <p>11 system, correct?</p> <p>12 A. After the user has been authenticated coming from</p> <p>13 a specific work station.</p> <p>14 Q. And who manages the list of privileged users?</p> <p>15 MR. PETERSEN: Objection to form.</p> <p>16 But you can answer.</p> <p>17 A. Again, that's Phil Farber as mentioned earlier,</p> <p>18 and I must give permission for the addition of</p> <p>19 any -- any user, individuals who leaves their</p> <p>20 employment or are removed from the list, and we</p> <p>21 review the entire list periodically.</p> <p>22 BY MR. GOLDMAN:</p> <p>23 Q. How often do you review the list?</p> <p>24 A. I believe we review the list quarterly.</p> <p>25 Q. So does that mean -- sorry, you were one of the</p>	<p>1 JOHN P. WILKIN</p> <p>2 people on this list of privileged users, correct?</p> <p>3 A. That's right.</p> <p>4 Q. Do you have access to read privileged material at</p> <p>5 home?</p> <p>6 MR. PETERSEN: Objection to form.</p> <p>7 A. Restate the question. Do I have access to read?</p> <p>8 BY MR. GOLDMAN:</p> <p>9 Q. Privileged material at home?</p> <p>10 A. What do you mean by privileged material?</p> <p>11 MR. PETERSEN: I don't think that's a</p> <p>12 term we've used.</p> <p>13 BY MR. GOLDMAN:</p> <p>14 Q. Do you have access to read copyrighted material</p> <p>15 that hasn't been authorized for use at home?</p> <p>16 A. I do not.</p> <p>17 MR. PETERSEN: Just please note my</p> <p>18 objection to form on that for the record.</p> <p>19 BY MR. GOLDMAN:</p> <p>20 Q. If we turn back to the technological profile.</p> <p>21 A. Yes.</p> <p>22 Q. And you turn back one page to the fifth page.</p> <p>23 A. Uh-huh.</p> <p>24 Q. The last line says API batch export.</p> <p>25 A. Yes.</p>
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<p>1 JOHN P. WILKIN</p> <p>2 Q. And it says under that entry or next to that</p> <p>3 entry, formats stored in a repository are</p> <p>4 exported through the data API, what does that</p> <p>5 mean, if you know?</p> <p>6 MR. PETERSEN: Objection, foundation.</p> <p>7 A. I would be guessing. I have an informed guess.</p> <p>8 MR. PETERSEN: That's blurry. If it's</p> <p>9 a guess or speculation, you shouldn't guess or</p> <p>10 speculate.</p> <p>11 BY MR. GOLDMAN:</p> <p>12 Q. It's not important enough to this deposition to</p> <p>13 ask, so it's fine. I apologize for jumping</p> <p>14 around, but if you turn the page and go back to</p> <p>15 the security section, and the last line says</p> <p>16 policy, on the next page it says management,</p> <p>17 right?</p> <p>18 A. Why don't we start from the -- what page number?</p> <p>19 Q. Sure.</p> <p>20 A. JW6.</p> <p>21 Q. It's JW6, page 6.</p> <p>22 A. Okay.</p> <p>23 Q. The last line of the page reads policy.</p> <p>24 A. Uh-huh.</p> <p>25 Q. And it continues management on the next page.</p>	<p>1 JOHN P. WILKIN</p> <p>2 A. Yep.</p> <p>3 Q. And the entry says: HathiTrust adheres to the</p> <p>4 information technology security policies of the</p> <p>5 University of Michigan Library, where it is</p> <p>6 hosted. The University Library participates in</p> <p>7 distributed organizational model where units</p> <p>8 across the university (of which it is one) have</p> <p>9 prime responsibility for planning and managing</p> <p>10 security within their units, coordinated by</p> <p>11 campus information Technology Security Services.</p> <p>12 Can you explain that to me? Are you able to</p> <p>13 explain that to me to the extent you can?</p> <p>14 MR. PETERSEN: Do you know?</p> <p>15 A. I do. Keeping in mind again that this is a</p> <p>16 foreign framework, a framework that is not</p> <p>17 designed to describe what we do and to which we</p> <p>18 were providing information. This is a fairly</p> <p>19 garbled, and you see some of the syntax there and</p> <p>20 case, noun, verb agreement statement that says:</p> <p>21 We have policies and we're part of a larger</p> <p>22 university that has policies that govern what we</p> <p>23 do. There's a reference to a now defunct</p> <p>24 organization responsible for security, it's now --</p> <p>25 these are now handled by IIA.</p>

<p style="text-align: right;">Page 206</p> <p>1 [REDACTED]</p> <p>2 [REDACTED]</p> <p>3 [REDACTED]</p> <p>4 [REDACTED]</p> <p>5 [REDACTED]</p> <p>6 [REDACTED]</p> <p>7 [REDACTED]</p> <p>8 [REDACTED]</p> <p>9 [REDACTED]</p> <p>10 [REDACTED]</p> <p>11 [REDACTED]</p> <p>12 [REDACTED]</p> <p>13 [REDACTED]</p> <p>14 [REDACTED]</p> <p>15 [REDACTED]</p> <p>16 [REDACTED]</p> <p>17 [REDACTED]</p> <p>18 [REDACTED]</p> <p>19 [REDACTED]</p> <p>20 [REDACTED]</p> <p>21 [REDACTED]</p> <p>22 [REDACTED]</p> <p>23 [REDACTED]</p> <p>24 [REDACTED]</p> <p>25 [REDACTED]</p>	<p style="text-align: right;">Page 207</p> <p>1 [REDACTED]</p> <p>2 [REDACTED]</p> <p>3 [REDACTED]</p> <p>4 [REDACTED]</p> <p>5 [REDACTED]</p> <p>6 [REDACTED]</p> <p>7 [REDACTED]</p> <p>8 [REDACTED]</p> <p>9 [REDACTED]</p> <p>10 [REDACTED]</p> <p>11 [REDACTED]</p> <p>12 [REDACTED]</p> <p>13 [REDACTED]</p> <p>14 [REDACTED]</p> <p>15 MR. PETERSEN: I think we've been going</p> <p>16 about an hour, a good spot for a break?</p> <p>17 MR. GOLDMAN: Okay. Let's try to do a</p> <p>18 quick one.</p> <p>19 MR. PETERSEN: Sure.</p> <p>20 MR. GOLDMAN: Because I want to try to</p> <p>21 get wrapped up here. I'm not up to wrapping up,</p> <p>22 so I --</p> <p>23 MR. PETERSEN: False hope.</p> <p>24 MR. GOLDMAN: I wish. I'm sorry, I</p> <p>25 would like to finish as quickly as possible.</p> <p>(Recess taken at 3:44 p.m.)</p>
<p style="text-align: right;">Page 208</p> <p>1 JOHN P. WILKIN</p> <p>2 (Back on the record at 3:52 p.m.)</p> <p>3 BY MR. GOLDMAN:</p> <p>4 Q. Okay. Do you believe that a member of HathiTrust</p> <p>5 could save costs by participating in HathiTrust?</p> <p>6 MR. PETERSEN: Objection to form.</p> <p>7 A. Save costs in what?</p> <p>8 BY MR. GOLDMAN:</p> <p>9 Q. In any way?</p> <p>10 MR. PETERSEN: Same objection.</p> <p>11 A. It's pretty broad, but yes. A contributing</p> <p>12 partner will get the storage and digital</p> <p>13 preservation work done more cost effectively. A</p> <p>14 sustaining partner has a framework for shared --</p> <p>15 shared interests through their participation that</p> <p>16 will ultimately allow them to save money, for</p> <p>17 example, in, we hope, shared print storage.</p> <p>18 BY MR. GOLDMAN:</p> <p>19 Q. Now, what do you mean by cost savings with print</p> <p>20 storage?</p> <p>21 A. Most libraries, certainly research libraries and</p> <p>22 many academic libraries have large storage, print</p> <p>23 storage facilities with volumes that are little</p> <p>24 used, unused and it's often the same volumes</p> <p>25 across institutions. We need to insure that the</p>	<p style="text-align: right;">Page 209</p> <p>1 JOHN P. WILKIN</p> <p>2 print is preserved and we can do it more cost</p> <p>3 effectively and we can do it better, for example,</p> <p>4 with climate control, perhaps mass</p> <p>5 deacidification, we can do it more effectively.</p> <p>6 BY MR. GOLDMAN:</p> <p>7 Q. Do you believe that there are opportunities for</p> <p>8 member institutions to reduce the number of books</p> <p>9 that they acquired by virtue of the fact that</p> <p>10 there is a shared digital repository?</p> <p>11 MR. PETERSEN: Objection to form.</p> <p>12 But you can certainly answer.</p> <p>13 A. Yeah, in my opinion that's never been the case,</p> <p>14 I've been asked about that and I've said no.</p> <p>15 BY MR. GOLDMAN:</p> <p>16 Q. Have other people thought that might be the case?</p> <p>17 MR. PETERSEN: Objection to form. Also</p> <p>18 speculation.</p> <p>19 A. I don't think -- right.</p> <p>20 BY MR. GOLDMAN:</p> <p>21 Q. Are you aware of anyone who has expressed the</p> <p>22 opinion that that is the case?</p> <p>23 A. I'm not aware of any credible collection</p> <p>24 development person who believes that that's the</p> <p>25 case, we don't buy anything less now than we did</p>

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<p>1 JOHN P. WILKIN</p> <p>2 before we began digitization unless there's less</p> <p>3 available on the market.</p> <p>4 Q. But do you believe there's a potential for that</p> <p>5 to occur in the future?</p> <p>6 MR. PETERSEN: Objection to form.</p> <p>7 A. I don't.</p> <p>8 MR. GOLDMAN: This is going to be JW7.</p> <p>9 MARKED FOR IDENTIFICATION:</p> <p>10 DEPOSITION EXHIBIT JW7</p> <p>11 3:55 p.m.</p> <p>12 BY MR. GOLDMAN:</p> <p>13 Q. There is a document entitled HathiTrust</p> <p>14 Constitutional Convention Opening Presentation,</p> <p>15 HathiTrust Past, Present and Future, John Wilkin,</p> <p>16 HathiTrust Executive Director. I'm going to ask</p> <p>17 you to take a look at this document and tell me</p> <p>18 whether you recognize it.</p> <p>19 A. This looks like my opening remarks at the</p> <p>20 Constitutional convention.</p> <p>21 Q. And these are remarks that you prepared?</p> <p>22 A. That's right.</p> <p>23 Q. You wrote this document?</p> <p>24 A. I wrote this document.</p> <p>25 Q. I will ask you to turn to page 6 where it talks</p>	<p>1 JOHN P. WILKIN</p> <p>2 about -- where the title is Uses of in-Copyright</p> <p>3 Materials.</p> <p>4 A. Uh-huh.</p> <p>5 Q. And on the next page it lists -- there's a -- a</p> <p>6 list of three -- three areas. Well, I'm going to</p> <p>7 ask you to explain, in what ways has HathiTrust</p> <p>8 made use of in-copyright materials, and again,</p> <p>9 you can use this as a reference or you can do it</p> <p>10 based on your own knowledge.</p> <p>11 MR. PETERSEN: Objection to form.</p> <p>12 A. HathiTrust at the University of Michigan has begun</p> <p>13 to provide services to users with print</p> <p>14 disabilities by combining authentication and</p> <p>15 authorization of those individuals, and providing</p> <p>16 to them a tailored view of the materials designed</p> <p>17 for use with screen readers and other forms of</p> <p>18 devices. We have also begun to provide limited</p> <p>19 access to some in-copyright materials not</p> <p>20 available on the market where the work is damaged</p> <p>21 or deteriorating or is gone from the University of</p> <p>22 Michigan collection.</p> <p>23 BY MR. GOLDMAN:</p> <p>24 Q. Anything else?</p> <p>25 A. Those are the two that I'm aware of.</p>
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<p>1 JOHN P. WILKIN</p> <p>2 MR. PETERSEN: It might be a</p> <p>3 definitional issue in terms of the search</p> <p>4 functionality, so just make sure you get a full</p> <p>5 record.</p> <p>6 A. Thank you.</p> <p>7 BY MR. GOLDMAN:</p> <p>8 Q. When you said users with print disabilities, who</p> <p>9 is considered a user with a print disability?</p> <p>10 MR. PETERSEN: Objection to form,</p> <p>11 objection, foundation.</p> <p>12 BY MR. GOLDMAN:</p> <p>13 Q. To the extent that you know?</p> <p>14 MR. PETERSEN: Who makes those</p> <p>15 determinations or --</p> <p>16 MR. GOLDMAN: We might get to that.</p> <p>17 A. Well, persons who are certified to have print</p> <p>18 disabilities is the simple answer to that</p> <p>19 question. We don't make those determinations.</p> <p>20 BY MR. GOLDMAN:</p> <p>21 Q. Who makes those determinations?</p> <p>22 A. An office for -- for services -- Office of</p> <p>23 Services For Students With Disabilities, OSSD.</p> <p>24 Q. Do you know whether a student who has, for</p> <p>25 example, a learning disability would be able to</p>	<p>1 JOHN P. WILKIN</p> <p>2 gain privileged access to these -- to materials</p> <p>3 on HathiTrust?</p> <p>4 A. I don't know. We do rely on that office which is</p> <p>5 charged with making those determinations.</p> <p>6 Q. So you don't know -- you don't know exactly</p> <p>7 which -- which types of people or which</p> <p>8 disabilities will permit someone to have access;</p> <p>9 is that correct?</p> <p>10 A. That's right. Assuming print disabilities in our</p> <p>11 conversations would then make that clear.</p> <p>12 Q. What is the process by which a person receives</p> <p>13 authentication through that office?</p> <p>14 MR. PETERSEN: Objection, I think he</p> <p>15 just disclaimed knowledge of those processes or</p> <p>16 decision making, but to the extent you --</p> <p>17 BY MR. GOLDMAN:</p> <p>18 Q. Well, I'm leaving out the decision as to which</p> <p>19 particular person will get access, but once a</p> <p>20 person is deemed to be print disabled, how does</p> <p>21 it come about that that person obtains access to</p> <p>22 materials in HathiTrust?</p> <p>23 MR. PETERSEN: If you know.</p> <p>24 A. I do. And there are -- it's authentication and</p> <p>25 authorization. Individuals have credentials which</p>

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<p>1 JOHN P. WILKIN</p> <p>2 are their identity and their privileges for</p> <p>3 access, and they're able to sign on at the</p> <p>4 University of Michigan which provides access to a</p> <p>5 suite of services like their financial information</p> <p>6 and e-mail. That is the authentication process</p> <p>7 and then that's matched up against a database of</p> <p>8 people, those people who are said reported or</p> <p>9 noted to have those disabilities. That's the</p> <p>10 authorization piece.</p> <p>11 BY MR. GOLDMAN:</p> <p>12 Q. Now, if a person has the proper credentials, does</p> <p>13 he or she have access to view the image files or</p> <p>14 only the full text of the work?</p> <p>15 MR. PETERSEN: Objection to form.</p> <p>16 A. A person certified to have print disabilities has</p> <p>17 access to view the text, and that's the primary</p> <p>18 means of accessing the work. We do also provide</p> <p>19 access to the image files to have them, for</p> <p>20 example, enlarged. They're one at a time and</p> <p>21 deemed to be ancillary, secondary to the text.</p> <p>22 BY MR. GOLDMAN:</p> <p>23 Q. HathiTrust does -- does HathiTrust make material</p> <p>24 available through an API mechanism?</p> <p>25 MR. PETERSEN: Objection to form,</p>	<p>1 JOHN P. WILKIN</p> <p>2 objection, foundation. Objection, vague.</p> <p>3 A. We do have a data API through which we make some</p> <p>4 content available.</p> <p>5 BY MR. GOLDMAN:</p> <p>6 Q. If a person with credentials, and let's take for</p> <p>7 example a person with print disability</p> <p>8 credentials.</p> <p>9 A. Uh-huh.</p> <p>10 Q. Can a person with print disability credentials</p> <p>11 obtain access to HathiTrust data through the data</p> <p>12 API?</p> <p>13 MR. PETERSEN: Objection to form.</p> <p>14 A. No.</p> <p>15 BY MR. GOLDMAN:</p> <p>16 Q. Why not?</p> <p>17 A. We don't make that possible. That's the simplest</p> <p>18 answer, we designed a service for them.</p> <p>19 Q. Do users with print disability credentials have</p> <p>20 the ability to download one page at a time?</p> <p>21 A. They do.</p> <p>22 Q. Do they have the ability to download the full</p> <p>23 text of a document?</p> <p>24 A. Can you be specific? I think I know what you're</p> <p>25 asking, but if you could --</p>
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<p>1 JOHN P. WILKIN</p> <p>2 Q. Which part is not -- which part would you like me</p> <p>3 to?</p> <p>4 MR. PETERSEN: I think the question</p> <p>5 would be broader than one page at a time, do you</p> <p>6 mean?</p> <p>7 BY MR. GOLDMAN:</p> <p>8 Q. The full text of an entire work?</p> <p>9 MR. PETERSEN: Object to form.</p> <p>10 But you can answer.</p> <p>11 A. Can they download the full text one page at a</p> <p>12 time?</p> <p>13 BY MR. GOLDMAN:</p> <p>14 Q. No, can they download the full text of an entire</p> <p>15 work at the same time?</p> <p>16 MR. PETERSEN: Objection.</p> <p>17 A. Are you asking if they can download the OCR?</p> <p>18 BY MR. GOLDMAN:</p> <p>19 Q. Yes, I am.</p> <p>20 A. Yes, they can.</p> <p>21 Q. Is there any location based limitations on users</p> <p>22 with print disabilities accessing HathiTrust?</p> <p>23 MR. PETERSEN: Objection to form.</p> <p>24 But you can answer.</p> <p>25 A. There are limitations.</p>	<p>1 JOHN P. WILKIN</p> <p>2 BY MR. GOLDMAN:</p> <p>3 Q. And what are those limitations?</p> <p>4 A. We restrict access to IP addresses in the United</p> <p>5 States.</p> <p>6 Q. Other than that, are there any restrictions?</p> <p>7 A. Not that I recall.</p> <p>8 Q. Is that -- is that program -- and by program I</p> <p>9 mean, making certain works available to users</p> <p>10 with print disabilities, does that program only</p> <p>11 exist for UM students at this point?</p> <p>12 A. It only exists for UM students for some works at</p> <p>13 this point.</p> <p>14 Q. What do you mean by for some works?</p> <p>15 A. If we do not own the work in print, we do not</p> <p>16 provide access to the work for the student.</p> <p>17 Q. Are there plans to extend this program to other</p> <p>18 universities?</p> <p>19 MR. PETERSEN: Objection to form.</p> <p>20 A. Would you rephrase the question?</p> <p>21 BY MR. GOLDMAN:</p> <p>22 Q. Are there plans to make -- are there plans to</p> <p>23 allow users with print disabilities at other</p> <p>24 universities to access works on HathiTrust that</p> <p>25 originate from their university libraries?</p>



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<p>1 JOHN P. WILKIN</p> <p>2 A. We hope to provide that access. I couldn't say</p> <p>3 there are plans. We hope to provide that access</p> <p>4 and we have -- we have provided specifications on</p> <p>5 the infrastructure and what would be necessary to</p> <p>6 configure it at other institutions. There are no</p> <p>7 plans at this time.</p> <p>8 Q. Now, prior to the launch of HathiTrust, was there</p> <p>9 a program through which University of Michigan</p> <p>10 provided access -- provided access to digital</p> <p>11 copies of works to people with print</p> <p>12 disabilities?</p> <p>13 MR. GOLDMAN: Objection to form.</p> <p>14 A. I'd have a hard time with the chronology, the</p> <p>15 precursor to HathiTrust and books may or may not</p> <p>16 have had that functionality, but I know we were</p> <p>17 working on that functionality. I don't recall</p> <p>18 when we deployed it and when HathiTrust emerged</p> <p>19 distinctly from M Books.</p> <p>20 BY MR. GOLDMAN:</p> <p>21 Q. How did the system under M Books work?</p> <p>22 MR. PETERSEN: Which --</p> <p>23 BY MR. GOLDMAN:</p> <p>24 Q. Let me actually withdraw that and ask --</p> <p>25 A. Yeah.</p>	<p>1 JOHN P. WILKIN</p> <p>2 Q. -- prior to the Google MDP, was there a system</p> <p>3 under which University of Michigan rented access</p> <p>4 to digital copies of works to people with print</p> <p>5 disabilities?</p> <p>6 A. There were services at the University of Michigan</p> <p>7 that provided access to persons with print</p> <p>8 disabilities.</p> <p>9 Q. And how did those services work?</p> <p>10 A. Typically -- well, certainly I don't have any</p> <p>11 direct experience of them.</p> <p>12 Q. So to the best of your knowledge?</p> <p>13 MR. PETERSEN: As long as you're not</p> <p>14 speculating or guessing.</p> <p>15 A. Yeah, to the best of my knowledge, a student would</p> <p>16 acquire a book, a copy of a book and take it to</p> <p>17 the office, the OSSD, and scan the book, sheet</p> <p>18 fed, typically it meant the loss of the book at</p> <p>19 the same time. A library book may be -- may have</p> <p>20 been borrowed and used on a flatbed scanner, one</p> <p>21 page at a time, which -- which was also</p> <p>22 problematic in terms of the care and handling of</p> <p>23 the book, but it was one book at a time.</p> <p>24 BY MR. GOLDMAN:</p> <p>25 Q. And the digital copy was made in response to a</p>
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<p>1 JOHN P. WILKIN</p> <p>2 request by a person; is that right?</p> <p>3 A. That's my understanding.</p> <p>4 Q. On a case-by-case basis?</p> <p>5 A. On a case-by-case basis.</p> <p>6 MR. PETERSEN: Objection to form.</p> <p>7 BY MR. GOLDMAN:</p> <p>8 Q. And how does the system work now with HathiTrust</p> <p>9 for users with print disabilities?</p> <p>10 A. Well, I think it needs to be said that the</p> <p>11 experience for the print disabled user is like the</p> <p>12 experience of a person without disabilities, that</p> <p>13 is, where you can walk into the library and use a</p> <p>14 book on the shelf. They can now, if we have the</p> <p>15 book digitized and online, use the book on that</p> <p>16 virtual shelf. They've authenticated and if we</p> <p>17 own a copy in print, they then have access to it.</p> <p>18 Their experience is much more similar. They have</p> <p>19 some of the advantages of their counterparts who</p> <p>20 don't have disabilities.</p> <p>21 BY MR. GOLDMAN:</p> <p>22 Q. And how does -- how does access to the HathiTrust</p> <p>23 copy help them with their disability?</p> <p>24 MR. PETERSEN: Objection to form.</p> <p>25 A. I think you'd have to rephrase the question for</p>	<p>1 JOHN P. WILKIN</p> <p>2 me.</p> <p>3 BY MR. GOLDMAN:</p> <p>4 Q. Okay. What -- does it provide, for example, text</p> <p>5 to speech or some other mechanism to help the</p> <p>6 person read the book?</p> <p>7 A. The form that we provide to them is designed to</p> <p>8 work well with devices like text to speech, JAWS,</p> <p>9 for example, or digital Braille devices. We have</p> <p>10 worked with users and those devices to ensure that</p> <p>11 they have something that provides them with</p> <p>12 reading capability for those devices.</p> <p>13 Q. Turning to the second category of uses of</p> <p>14 in-copyrighted works that you mentioned --</p> <p>15 A. Uh-huh.</p> <p>16 Q. -- which I believe refer to Section 108 uses,</p> <p>17 could you tell me what you meant by that second</p> <p>18 category, and by a second category I'm referring</p> <p>19 to --</p> <p>20 MR. PETERSEN: Yeah, it</p> <p>21 mischaracterizes the testimony. I don't believe</p> <p>22 the witness ever mentioned anything to do with</p> <p>23 Section 108.</p> <p>24 MR. GOLDMAN: I apologize then.</p> <p>25 BY MR. GOLDMAN:</p>

<p style="text-align: right;">Page 238</p> <p>1 JOHN P. WILKIN</p> <p>2 Q. What -- so do you know what's meant by this</p> <p>3 parenthetical?</p> <p>4 A. Let me read it, reread it.</p> <p>5 Q. Reread the parenthetical?</p> <p>6 A. No, I'm sorry, the parenthetical? Just the</p> <p>7 parenthetical?</p> <p>8 Q. Just the parenthetical.</p> <p>9 A. Let me read the whole thing.</p> <p>10 Q. Sure. You know what, why don't we read it for</p> <p>11 the record so that's clear.</p> <p>12 A. Yeah, sure, uh-huh.</p> <p>13 Q. It follows after the parenthetical, Alfredo</p> <p>14 Candia Guzman, Bolivia: un experimento coumnista</p> <p>15 en la America, published in Bolivia in the late</p> <p>16 1950s, is reformatted as part of a topical</p> <p>17 conversion effort. Although, based on its</p> <p>18 bibliographic information, parenthetical, see use</p> <p>19 case number 1, the volume enters the collection</p> <p>20 as an in-copyright text and access is restricted,</p> <p>21 our research determines that the author has died</p> <p>22 and the publishing house no longer exists. The</p> <p>23 volume is classified as an orphaned copyright</p> <p>24 work, parenthetical, attribute name equals orph,</p> <p>25 end parenthetical, with noted due diligence,</p>	<p style="text-align: right;">Page 239</p> <p>1 JOHN P. WILKIN</p> <p>2 parenthetical, reason name equals ddd, end</p> <p>3 parenthetical, and put online with access open to</p> <p>4 the world.</p> <p>5 A. Yep.</p> <p>6 Q. Do you know what was meant by the initial</p> <p>7 parenthetical that reads although all of these</p> <p>8 use cases are hypothetical, this one depends on</p> <p>9 legislation that has not been passed?</p> <p>10 MR. PETERSEN: Objection to form,</p> <p>11 objection to the extent it calls for a legal</p> <p>12 conclusion and caution the witness not to divulge</p> <p>13 any attorney-client privileged information.</p> <p>14 Subject to those objections, you can</p> <p>15 certainly answer.</p> <p>16 A. Keep in mind that the rights database was meant to</p> <p>17 be a flexible framework to support a number of</p> <p>18 types of use cases. The writer put together a</p> <p>19 hypothetical based on -- a hypothetical situation</p> <p>20 about passage of legislation, probably a</p> <p>21 hypothetical legislation, in fact, as legislation</p> <p>22 had not been passed, and described circumstances</p> <p>23 under which access would be -- would be provided</p> <p>24 to the work in question.</p> <p>25 BY MR. GOLDMAN:</p>
<p style="text-align: right;">Page 240</p> <p>1 JOHN P. WILKIN</p> <p>2 Q. You're aware of Michigan's participation or --</p> <p>3 you're aware that Michigan announced its</p> <p>4 participation in something called the Orphan</p> <p>5 Works Project, correct?</p> <p>6 A. I am.</p> <p>7 Q. And wouldn't works have been made available under</p> <p>8 the -- under the Orphan Works Project in the same</p> <p>9 manner that's described here but without any</p> <p>10 legislation having been passed?</p> <p>11 MR. PETERSEN: Objection to form,</p> <p>12 objection, mischaracterizes the record.</p> <p>13 A. Not at all.</p> <p>14 BY MR. GOLDMAN:</p> <p>15 Q. And why is that?</p> <p>16 A. There, you know, I can't recall when this was</p> <p>17 written, but it's bound to be years ago. It</p> <p>18 doesn't resemble in any way what we documented and</p> <p>19 publicized as the controls under which we would</p> <p>20 make works available. It talks about worldwide</p> <p>21 access, we didn't plan to do that. It doesn't</p> <p>22 talk about the access controls based on print</p> <p>23 holdings. We do that. It does not resemble in</p> <p>24 any way what was proposed and further the Orphan</p> <p>25 Works Project is primarily about the</p>	<p style="text-align: right;">Page 241</p> <p>1 JOHN P. WILKIN</p> <p>2 identification of works. The access to those</p> <p>3 works never took place, it's speculative.</p> <p>4 BY MR. GOLDMAN:</p> <p>5 Q. Are you -- the Orphan Works Project was</p> <p>6 suspended; is that right, or let me rephrase</p> <p>7 that.</p> <p>8 A. Yeah.</p> <p>9 Q. There came a time when Michigan announced that it</p> <p>10 was not going to list candidates for the Orphan</p> <p>11 Works Project anymore; is that right?</p> <p>12 A. That's right.</p> <p>13 Q. And is there a process occurring at this time to</p> <p>14 make adjustments to the procedures that are part</p> <p>15 of the Orphan Works Program -- Orphan Works</p> <p>16 Project?</p> <p>17 MR. PETERSEN: Objection to form.</p> <p>18 A. To the determination process?</p> <p>19 BY MR. GOLDMAN:</p> <p>20 Q. Yes.</p> <p>21 A. There is continuing -- there is continuing review</p> <p>22 of the process with scrutiny given to the</p> <p>23 reliability of the determinations.</p> <p>24 Q. The -- Michigan announced that there were errors</p> <p>25 found in the process that had been previously</p>

<p style="text-align: right;">Page 242</p> <p>1 JOHN P. WILKIN</p> <p>2 applied; isn't that correct?</p> <p>3 A. That is correct.</p> <p>4 Q. And what errors had been found in that process?</p> <p>5 MR. PETERSEN: If you recall.</p> <p>6 A. The errors were -- I would characterize them as</p> <p>7 errors of execution of management, steps -- steps</p> <p>8 that we had designed were not followed, and that</p> <p>9 requires closer -- closer management. I believe</p> <p>10 that the process was a good process and that</p> <p>11 listing the works gave those works the kind of</p> <p>12 attention that helped us to identify works that in</p> <p>13 some cases were not orphan works, that's a</p> <p>14 success. But we can always improve the process.</p> <p>15 BY MR. GOLDMAN:</p> <p>16 Q. When you say by listing the works, do you mean</p> <p>17 posting them on the HathiTrust website?</p> <p>18 A. The candidates on the HathiTrust website.</p> <p>19 Q. And were they posted anywhere else?</p> <p>20 A. To my knowledge, they were posted -- deliberately</p> <p>21 posed in two places, others may have reposted</p> <p>22 them, but they were posted -- to my knowledge,</p> <p>23 they were posted on the University of Michigan's</p> <p>24 website and the Orphan Works Project website and</p> <p>25 on the HathiTrust website.</p>	<p style="text-align: right;">Page 243</p> <p>1 JOHN P. WILKIN</p> <p>2 Q. Now, the Orphan Works Project was initially</p> <p>3 examining works in the 1923 to 1964 time period,</p> <p>4 that were published in the 1923 to 1964 time</p> <p>5 period; is that right?</p> <p>6 A. 1923 to 1963 time period, U.S. works.</p> <p>7 Q. So how -- what -- how old would the authors be of</p> <p>8 those works today?</p> <p>9 MR. PETERSEN: Objection, form,</p> <p>10 objection, calls for speculation.</p> <p>11 BY MR. GOLDMAN:</p> <p>12 Q. Can you answer it?</p> <p>13 A. There's no way to answer that. For example, the</p> <p>14 author could have died years before 1923, and have</p> <p>15 been 100 years old at the time. There's no way to</p> <p>16 answer that question.</p> <p>17 Q. What's the youngest that an author could be that</p> <p>18 published a work during that time period?</p> <p>19 MR. PETERSEN: Objection, same</p> <p>20 objection, calls for speculation.</p> <p>21 A. I don't know.</p> <p>22 BY MR. GOLDMAN:</p> <p>23 Q. Let me ask -- let me ask a different question.</p> <p>24 How do you have any confidence that a person</p> <p>25 would know that this list exists, that the</p>
<p style="text-align: right;">Page 244</p> <p>1 JOHN P. WILKIN</p> <p>2 candidate list exists on the University of</p> <p>3 Michigan or HathiTrust website?</p> <p>4 MR. PETERSEN: Objection to form.</p> <p>5 BY MR. GOLDMAN:</p> <p>6 Q. Or do you have any confidence that an author or a</p> <p>7 copyright holder would know that this list</p> <p>8 exists?</p> <p>9 MR. PETERSEN: Same objection.</p> <p>10 A. I have confidence that we -- so the list doesn't</p> <p>11 exist first of all, right, so --</p> <p>12 BY MR. GOLDMAN:</p> <p>13 Q. When did it exist?</p> <p>14 A. Well, when it did I think it -- it's funny too</p> <p>15 because it was an emerging process. We had</p> <p>16 planned to publicize the list in many places. We</p> <p>17 asked the Authors Guild if we could include the</p> <p>18 reference to the list in their publication. We</p> <p>19 were in the process of securing an advertisement</p> <p>20 in Publishers Weekly, explore the possibility of</p> <p>21 an advertisement in the New York Times. It's hard</p> <p>22 for me to see this as a static question with an</p> <p>23 answer, a list that does not exist any longer and</p> <p>24 with a process that didn't take place to publicize</p> <p>25 the list. I believe that we could have made the</p>	<p style="text-align: right;">Page 245</p> <p>1 JOHN P. WILKIN</p> <p>2 list well known.</p> <p>3 MR. ROSENTHAL: What was the last word?</p> <p>4 A. I believe that we could have -- Jeremy's</p> <p>5 question --</p> <p>6 MR. PETERSEN: Well known.</p> <p>7 MR. ROSENTHAL: I'm sorry.</p> <p>8 A. Yes.</p> <p>9 BY MR. GOLDMAN:</p> <p>10 Q. Do you know how many -- on the list of -- from</p> <p>11 the list of candidates that were posted on</p> <p>12 Michigan's website, how many of those candidates</p> <p>13 were wrongly identified as orphan candidates?</p> <p>14 MR. PETERSEN: Objection to form.</p> <p>15 A. I don't know.</p> <p>16 BY MR. GOLDMAN:</p> <p>17 Q. How many did University of Michigan find out</p> <p>18 about?</p> <p>19 A. I don't know.</p> <p>20 Q. Have any decisions been made about changes that</p> <p>21 will be made to the determination process as part</p> <p>22 of the Orphan Works Project?</p> <p>23 MR. PETERSEN: Objection to form,</p> <p>24 objection to the extent it was asked and answered.</p> <p>25 A. I think what I said before is true, we continue to</p>



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UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF NEW YORK

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THE AUTHORS GUILD, INC., et al,	:	
	:	Index No. 11 Civ. 6351 (HB)
Plaintiffs,	:	
	:	
- against -	:	
	:	
HATHITRUST, et al.	:	
	:	
Defendants.	:	
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**PLAINTIFFS' COUNTER-STATEMENT IN RESPONSE TO  
 DEFENDANTS' STATEMENT OF MATERIAL FACTS IN SUPPORT OF  
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Rule 56.1 of the Local Rules of the United States District Court for the Southern District of New York, Plaintiffs submit the following counter-statement in response to Defendants' Local Rule 56.1 Statement. Except where specifically defined in the chart below, capitalized terms shall have the meanings ascribed to them in the "Definitions" set forth in Appendix A to Plaintiffs' 56.1 Statement filed in support of Plaintiffs' motion for summary judgment ("UF").

No.	DEFENDANTS' ASSERTED UNDISPUTED FACT	RESPONSE
	<b>The Core Functions of Academic Libraries</b>	
1.	Academic libraries buy works for academic and scholarly pursuits. (June 28, 2012 Declaration of John Wilkin ("Wilkin Decl.") ¶ 11.)	Uncontroverted except to the extent that the statement as written suggests that there are no other reasons why libraries buy works.
2.	Academic libraries curate, maintain, and preserve works in their collections. ( <i>Id.</i> )	Uncontroverted.
3.	Academic libraries help scholars and students identify works pertinent to their pursuits. ( <i>Id.</i> )	Uncontroverted.
4.	Academic libraries make works within their collections available and accessible consistent with applicable law. ( <i>Id.</i> )	Controverted to the extent that the statement purports to include conduct by libraries other than the Defendant University Libraries and also because certain conduct by the Defendant University Libraries is not legal under the copyright law.
5.	The Libraries are non-profit educational institutions. ( <i>Id.</i> ¶¶ 8, 55, Ex. B.)	Uncontroverted.
	<b>Acquisition of Works by the Libraries</b>	
6.	Academic libraries acquire works to satisfy anticipated future demand by their patrons. ( <i>Id.</i> ¶¶ 13, 17–19, 21.)	Controverted to the extent that the statement purports to include conduct by libraries other than the Defendant University Libraries and also to the extent that it suggests that there is no other reason why academic libraries acquire works.
7.	When there is increased demand for a particular work, academic libraries will try to purchase additional copies of that work. ( <i>Id.</i> ¶ 13.)	Uncontroverted.
8.	Each year the Libraries spend tens of millions of dollars acquiring new works. ( <i>Id.</i> ¶ 14.)	Uncontroverted.

No.	DEFENDANTS' ASSERTED UNDISPUTED FACT	RESPONSE
9.	Most works go out of print after the initial print run and once that print run is sold out, it can be difficult if not impossible for libraries to obtain additional copies of the work. ( <i>Id.</i> ¶¶ 20–21.)	Controverted. The term “most works” is vague. In addition, the statement purports to make broad generalizations about works that may be subject to many different circumstances. The Internet makes it exceptionally easy to locate used and/or unused copies of many out-of-print works, including works that were digitized by Defendants and erroneously identified as “orphan candidates.” <i>See</i> UM RFA No. 5(ii); Goldman Decl. ¶ 5, Ex. C.
	<b>Deterioration of Works in the Libraries' Collections</b>	
10.	Books, in their physical form, are inherently subject to damage, deterioration and loss. ( <i>Id.</i> ¶ 22.)	Controverted to the extent that the statement purports to call for a legal conclusion as to the permissibility of making copies of books pursuant to Section 108(c) of the Copyright Act. Otherwise, uncontroverted but immaterial because Congress provided the rules and requirements for preservation and replacement of books by libraries and archives in Section 108 of the Copyright Act, 17 U.S.C. § 108.
11.	Books published between 1850 and 1990 are particularly at risk of damage, deterioration and loss because books published during this time period were generally published on paper with high acid content. ( <i>Id.</i> )	Controverted to the extent that the statement purports to call for a legal conclusion as to the permissibility of making copies of books pursuant to Section 108(c) of the Copyright Act. Otherwise, uncontroverted but immaterial because Congress provided the rules and requirements for preservation and replacement of books by libraries and archives in Section 108 of the Copyright Act, 17 U.S.C. § 108.
12.	Paper with high acid content degrades far more quickly than paper with low acid content because the fibers that comprise paper degrade when acid meets the moisture in the air. ( <i>Id.</i> ¶ 23.)	Uncontroverted but immaterial because Congress provided the rules and requirements for preservation and replacement of books by Libraries and Archives in Section 108 of the Copyright Act, 17 U.S.C. § 108.

No.	DEFENDANTS' ASSERTED UNDISPUTED FACT	RESPONSE
13.	As of 2004, the University of Michigan library (the "UM Library") estimated that about half of its collection—approximately 3.5 million books—was printed on paper with high acid content, <i>i.e.</i> on paper that is particularly vulnerable to deterioration and, ultimately, loss. ( <i>Id.</i> ¶ 25.)	Controverted to the extent that the statement purports to call for a legal conclusion as to the permissibility of making copies of books pursuant to Section 108(c) of the Copyright Act. Otherwise, uncontroverted but immaterial because Congress provided the rules and requirements for preservation and replacement of books by libraries and archives in Section 108 of the Copyright Act, 17 U.S.C. § 108.
14.	The process of searching the vast collections of academic libraries such as the UM Library can take so long that by the time the library identifies the most imperiled books from the millions potentially at risk, it is too late and the books is lost. ( <i>Id.</i> ¶ 26.)	Controverted to the extent that the statement purports to call for a legal conclusion as to the permissibility of making copies of books pursuant to Section 108(c) of the Copyright Act. Otherwise, uncontroverted but immaterial because Congress provided the rules and requirements for preservation and replacement of books by libraries and archives in Section 108 of the Copyright Act, 17 U.S.C. § 108.
15.	Gradual disintegration is not the only threat to books in the academic libraries. Loss from theft, vandalism, fire, and floods presents an ever-looming threat. ( <i>Id.</i> ¶¶ 30–31.)	Uncontroverted but immaterial because Congress provided the rules and requirements for preservation and replacement of books by Libraries and Archives in Section 108 of the Copyright Act, 17 U.S.C. § 108.
16.	Just last week the library at the University of Wisconsin Superior ("UW Superior") suffered a catastrophic loss of a portion of its collection as a result of flooding. (June 28, 2012 Declaration of Faith Hensrud ("Hensrud Decl.") ¶¶ 6–20.)	Uncontroverted but immaterial because Congress provided the rules and requirements for preservation and replacement of books by Libraries and Archives in Section 108 of the Copyright Act, 17 U.S.C. § 108.
17.	The flooding of the UW Superior library destroyed approximately 25-30% of the books in the library's collection, and approximately 70% of the periodicals. ( <i>Id.</i> ¶ 17.)	Uncontroverted but immaterial because Congress provided the rules and requirements for preservation and replacement of books by Libraries and Archives in Section 108 of the Copyright Act, 17 U.S.C. § 108.

No.	DEFENDANTS' ASSERTED UNDISPUTED FACT	RESPONSE
	<b>In the Past It Has Been Difficult and Sometimes Impossible for Academic Libraries to Help Scholars Identify Works of Potential Interest</b>	
18.	Academic libraries aid scholars in the identification of relevant works. (Wilkin Decl. ¶ 33.)	Uncontroverted.
19.	The immense collections housed by academic libraries would be significantly diminished without reliable and efficient search methods and related technology. ( <i>Id.</i> )	Uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq.
20.	Until relatively recently, most searches of a library's collection relied on a physical card catalog. ( <i>Id.</i> ¶ 34; June 26, 2012 Declaration of Dr. Stanley N. Katz ("Katz Decl.") ¶ 5.)	Controverted to the extent that the term "until relatively recently" is vague. Otherwise immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq.
21.	Each card contained limited information concerning a particular work, including its title, author, publication date and publisher and limited information concerning the work's subject matter. (Wilkin Decl. ¶ 34; Katz Decl. ¶ 5.)	Uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq.
22.	Online catalogs emerged in the 1970's but searches of such databases were still limited to the work's basic bibliographic data, namely, author, title, subject. (Wilkin Decl. ¶¶ 35–36; <i>see also</i> Katz Decl. ¶ 8.)	Uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq.
23.	A work that contained information of great importance to a researcher would not be discoverable by that researcher unless the work's title, subject headings, or other limited bibliographic data happened to contain certain key words or other evidently pertinent information. (Wilkin Decl. ¶¶ 36–37.)	Controverted. There are many other ways in which a particular work might be discovered by a researcher. <i>See, e.g.</i> , Stiles Tr. 51:19-60:3. In any event, Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq.

No.	DEFENDANTS' ASSERTED UNDISPUTED FACT	RESPONSE
	<b>Digitization of Works With the Libraries' Collections</b>	
24.	In the late 1980's academic libraries such as the UM Library began converting works at risk of damage, deterioration and loss to digital format. ( <i>Id.</i> ¶ 39.)	Controverted to the extent that the statement purports to cover conduct by academic libraries other than Defendant University Libraries. Also, the time frame is vague and because prior to entering into the Cooperative Agreement with Google, the books "converted" by the UM Library were in large part not protected by copyright and because the UM Library followed the requirements of Section 108.
25.	Academic libraries began digitizing at risk works in order to ensure that they would be available for future scholarly pursuits even in the event that the work in physical form was lost and the libraries could not find a replacement copy at a fair price. ( <i>Id.</i> ¶ 41.)	Controverted to the extent that the statement purports to cover conduct by academic libraries other than Defendant University Libraries. Otherwise, uncontroverted but immaterial because Congress provided the rules and requirements for preservation and replacement of books by Libraries and Archives in Section 108 of the Copyright Act, 17 U.S.C. § 108.
26.	Academic libraries such as the UM Library found that given the enormous size of their collections they could not digitize and, thereby, preserve deteriorating works quickly enough. ( <i>Id.</i> ¶ 42.)	Controverted to the extent that the statement purports to cover conduct by academic libraries other than Defendant University Libraries. Otherwise uncontroverted but immaterial because Congress provided the rules and requirements for preservation and replacement of books by Libraries and Archives in Section 108 of the Copyright Act, 17 U.S.C. § 108.

No.	DEFENDANTS' ASSERTED UNDISPUTED FACT	RESPONSE
27.	During this time period academic libraries lost irreplaceable volumes which, as a result, have vanished from the academic and cultural landscape. ( <i>Id.</i> )	Controverted to the extent that the statement purports to cover conduct by academic libraries other than Defendant University Libraries. Otherwise uncontroverted but immaterial because Congress provided the rules and requirements for preservation and replacement of books by Libraries and Archives in Section 108 of the Copyright Act, 17 U.S.C. § 108.
	<b>Google's Involvement in the Libraries' Digitization Efforts</b>	
28.	Prior to Google Inc.'s ("Google") involvement in the UM Library's digitization efforts, at its then rate of scanning, it would have taken the UM Library more than 1,000 years to digitize the UM Library's then over 7 million volumes. ( <i>Id.</i> ¶ 44.)	Uncontroverted but immaterial because Congress provided the rules and requirements for preservation and replacement of books by Libraries and Archives in Section 108 of the Copyright Act, 17 U.S.C. § 108.
29.	In 2002, the UM Library began speaking with Google about its interest in digitizing the UM Library's entire library collections in less than a decade. ( <i>Id.</i> ¶ 45.)	Uncontroverted.
30.	In late 2004, the University of Michigan entered into an agreement with Google under which Google would convert hardcopy books from the UM Library collections to a digital format and provide digital copies of those books to the University of Michigan. ( <i>Id.</i> ¶ 46, Ex. A.)	Uncontroverted, except reference is made to the agreement with Google for proof of its contents. <i>See</i> Rosenthal Decl., Ex. 80.
31.	In return for giving Google access to books in the UM Library collection, Google was required to give the UM Library a digital copy of the works digitized by Google. ( <i>Id.</i> ¶ 47.)	Uncontroverted, except reference is made to the agreement with Google for proof of its contents. <i>See</i> Rosenthal Decl., Ex. 80.

No.	DEFENDANTS' ASSERTED UNDISPUTED FACT	RESPONSE
32.	The University of Michigan bargained for this right because it was important to it that it had the right to control its own uses and satisfy its primary mission of providing specialized services to the blind or other persons with disabilities. ( <i>Id.</i> )	Controverted because the evidence does not support the statement that University of Michigan's "primary mission" was to provide specialized services to the blind or other persons with disabilities. Also controverted due to the vagueness of the term "other persons with disabilities" within the context of this statement. Otherwise uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
33.	If the Libraries digitized only select portions of their collections they would not have achieved their goals of providing a comprehensive search tool; nor would they have accomplished their goals of providing equal access to students with print disabilities or preserving all imperiled works. ( <i>Id.</i> ¶¶ 48–51.)	Uncontroverted but immaterial because Congress provided the rules and requirements for preservation and replacement of books by Libraries and Archives in Section 108 of the Copyright Act, 17 U.S.C. § 108 and the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
34.	While the University of Michigan's library was the first academic library to work with Google in connection with what would become the "Google Book Project," Google ultimately partnered with each of the Libraries as well as such universities as Harvard University, Stanford University, Oxford University, Columbia University, Princeton University, the University of Virginia, and the University of Texas at Austin, among others. ( <i>Id.</i> ¶ 52.)	Uncontroverted.



No.	DEFENDANTS' ASSERTED UNDISPUTED FACT	RESPONSE
35.	The benefits to society—in preserving books, making them accessible to people with print disabilities, and enabling people to find them—increased significantly with each institution that digitized books from its collections. ( <i>Id.</i> )	Controverted because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq. and specifically addressed the rules and requirements for preservation and replacement of books by Libraries and Archives in Section 108 of the Copyright Act, 17 U.S.C. § 108 and the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
	<b>The Formation of HathiTrust</b>	
36.	In 2008, the University of Michigan formed HathiTrust, named for the Hindi word for elephant, “hathi,” evoking the qualities of memory, wisdom, and strength symbolized by elephants. ( <i>Id.</i> ¶ 53.)	Uncontroverted.
37.	HathiTrust was formed because the Libraries concluded that by working together and pooling resources they could better serve their common goals of collecting, organizing, securing, preserving and, consistent with applicable law, sharing the record of human knowledge. ( <i>Id.</i> ¶ 54.)	Uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq. and specifically addressed the rules and requirements for preservation and replacement of books by Libraries and Archives in Section 108 of the Copyright Act, 17 U.S.C. § 108.
38.	Pursuant to the HathiTrust mission, participating members combined their digitized collections in order to provide more secure, long-term storage for the works, more comprehensive research and discovery tools, improved access to works in the public domain and improved access to works for students and faculty with print disabilities. ( <i>Id.</i> ¶ 55.)	Uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq. and specifically addressed the rules and requirements for preservation and replacement of books by libraries and archives in Section 108 of the Copyright Act, 17 U.S.C. § 108 and for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.

No.	DEFENDANTS' ASSERTED UNDISPUTED FACT	RESPONSE
39.	The University of Michigan and HathiTrusts' purposes are non-profit, educational purposes. ( <i>Id.</i> ¶¶ 8, 55, Ex. B.)	Uncontroverted to the extent that the University of Michigan and HathiTrust are non-profit organizations or entities, but controverted to the extent that either or both contracted with a commercial entity, Google Inc., to make copies of books in university libraries and received substantial financial and other benefit from their cooperative agreements with Google. <i>See</i> Rosenthal Decl., Ex. 80; UF 4, 52-60. In addition, the HathiTrust receives significant payments from various member organizations. UF 79-81.
40.	The Libraries' digitization efforts do not diminish their acquisitions of in-copyright material (digital or otherwise). ( <i>Id.</i> ¶¶ 16, 69.)	Controverted. Each book that the libraries digitized without permission represents a lost sale for the rightsholder. UF 129, 136.
	<b>The Composition of the HathiTrust Digital Library ("HDL")</b>	
41.	The combined corpus of the HDL now totals more than 10 million works. ( <i>Id.</i> ¶ 57.)	Uncontroverted.
42.	At least 30% of the corpus consists of material that is clearly within the public domain. ( <i>Id.</i> ¶ 62.)	Controverted to the extent that the word "clearly" is vague and ambiguous. Moreover, works considered by Defendants to be in the public domain may still be protected by copyright. ALF Decl. ¶ 18, Ex. E.
43.	Works published between 1923 and 1963 entered the public domain unless they were renewed, and according to a 1960 Copyright Office study only 7% of books were renewed. ( <i>See</i> Staff of S. Comm. on the Judiciary (Barbara Ringer), 86th Cong., Renewal of Copyright 31, at 220 (Comm. Print 1960).)	Controverted to the extent that this statement does not take into account foreign works. In addition, Defendants' key witness has indicated that estimates like these are "pretty wild" and that a better estimate is closer to 45%. <i>See</i> Declaration of Jeremy S. Goldman ("Goldman Decl.") Exs. A and B.

No.	DEFENDANTS' ASSERTED UNDISPUTED FACT	RESPONSE
44.	The vast majority of works in the HDL corpus are now out of print (and, in fact, for older works within the collection, have been out of print for decades). (Wilkin Decl. ¶ 66; <i>see also</i> Mem. of Law in Supp. of Pls.' Mot. For Prelim. Settlement Approval at 27, <i>The Authors Guild, Inc. v. Google Inc.</i> , No. 05-cv-8136 (S.D.N.Y. Oct. 28, 2008) (The Authors Guild confirms that "[a]pproximately 75% of the Books in United States libraries are out-of-print and have ceased earning any income at all for their Rightsholders").)	Controverted to the extent that out of print works have the potential to earn money for rightsholders. UF 133. Otherwise, uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq.
45.	Less than 9% of the HDL corpus consists of prose fiction, poetry and drama. (Wilkin Decl. ¶ 67.)	Controverted to the extent that approximately 76% of the works whose copyrights are owned by Plaintiffs and that were digitized and copied by Defendants are works of fiction. <i>See</i> Goldman Decl. ¶ 6. Otherwise, Uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq.
46.	Approximately 90% of the HDL corpus consists of factual works such as books and journals in many disciplines of the arts, humanities, social sciences and sciences. ( <i>Id.</i> )	Controverted to the extent that approximately 76% of the works whose copyrights are owned by Plaintiffs and that were digitized and copied by Defendants are works of fiction. <i>See</i> Goldman Decl. ¶ 6. Otherwise, uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq.
47.	The security employed with respect to the HDL meets, and in many ways exceeds, the specifications developed by the parties in the Google Books proposed settlement. ( <i>Id.</i> ¶ 93.)	Controverted in that the HDL presents numerous security risks. UF 134.
	<b>The Limited Uses of the Works within the HDL</b>	

No.	DEFENDANTS' ASSERTED UNDISPUTED FACT	RESPONSE
48.	The Libraries permit only three categories of uses of works within the HDL that are presumed to be in-copyright: (1) full text search; (2) preservation; and (3) access for people with certified print disabilities. ( <i>Id.</i> ¶ 68.)	Controverted to the extent that Defendants have identified at least 93 individuals with privileged access to the HDL, including employees and researchers performing analysis of the contents of the HDL. UF 100. Otherwise, uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq. and specifically addressed the rules and requirements for preservation and replacement of books by Libraries and Archives in Section 108 of the Copyright Act, 17 U.S.C. § 108 and the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
49.	Through the Internet, users of the HathiTrust website may search for a particular term across all works within the HDL. ( <i>Id.</i> )	Uncontroverted.
50.	For those works that are not in the public domain or for which the copyright holder has not expressly authorized use, the search results indicate only the page numbers on which a particular term is found within a particular book or periodical, and the number of times that term appears on each page. ( <i>Id.</i> )	Uncontroverted.
51.	Unlike Google's service, the search results do not show portions of text in "snippet" format. ( <i>Id.</i> )	Uncontroverted.

No.	DEFENDANTS' ASSERTED UNDISPUTED FACT	RESPONSE
52.	When searching in-copyright material, at no time does the user have digital access to any of the actual written content within such works (unless he/she is afforded access as a certified print disabled user). ( <i>Id.</i> )	Controverted to the extent that Defendants have identified at least 93 individuals with privileged access to the HDL, including employees and researchers performing analysis of the contents of the HDL. UF 100. Otherwise, uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq. and specifically addressed the rules and requirements for preservation and replacement of books by Libraries and Archives in Section 108 of the Copyright Act, 17 U.S.C. § 108 and the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
53.	The HDL is not a substitute, in any respect, for the Libraries' acquisitions of in-copyright material and does not diminish the Libraries' purchases of in-copyright works. ( <i>Id.</i> ¶¶ 16, 69).	Controverted. Each book that the libraries digitized without permission represents a lost sale for the rightsholder. UF 129, 136.
54.	The HDL represents protection against the prospect of damage, deterioration and loss in circumstances where the Libraries cannot obtain a replacement copy at a fair price. ( <i>Id.</i> ¶ 68.)	Uncontroverted but immaterial because Congress provided the rules and requirements for preservation and replacement of books by Libraries and Archives in Section 108 of the Copyright Act, 17 U.S.C. § 108.
55.	For decades, the Libraries have converted works in their collection to alternative formats for the blind and other persons who have disabilities that prevent them from accessing printed materials. ( <i>Id.</i> )	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
56.	Digitization has significantly improved the quality of access for print-disabled readers. ( <i>Id.</i> )	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.

No.	DEFENDANTS' ASSERTED UNDISPUTED FACT	RESPONSE
57.	Through digitization, an authorized patron with a print disability can have immediate access to a work in a format that can be made accessible through a variety of technologies, including software that translates the text into spoken words. ( <i>Id.</i> ¶ 105.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
58.	The HDL was designed specifically to enable libraries to make their collections accessible in digital format to print-disabled readers. ( <i>Id.</i> )	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
59.	The HDL has a positive effect on purchasing of in-copyright works because scholars, students, and other patrons are more likely to discover, purchase and use works that they can locate through digital search. ( <i>Id.</i> ¶ 70–74; June 29, 2012 Declaration of Dr. Joel Waldfogel (“Waldfogel Decl.”) ¶¶ 7, 48–50; June 26, 2012 Declaration of Margaret Leary (“Leary Decl.”) ¶ 15.)	Controverted. Each book that the libraries digitized without permission represents a lost sale for the rightsholder. UF 129, 136.
	<b>The Immense Public Benefits of the HDL</b>	
60.	The HDL offers immense public benefit. (Wilkin Decl. ¶¶ 75–77, 83–86, 100–102, 106); (Katz Decl. ¶¶ 9–17); (Leary Decl. ¶¶ 9–14.)	Uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq. and specifically addressed the rules and requirements for preservation and replacement of books by Libraries and Archives in Section 108 of the Copyright Act, 17 U.S.C. § 108 and the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
61.	One of the primary goals of HathiTrust has always been to enable people who have print disabilities to access the wealth of information within library collections. (Wilkin Decl. ¶ 100.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.

No.	DEFENDANTS' ASSERTED UNDISPUTED FACT	RESPONSE
62.	For centuries, libraries have been inaccessible to people who have a broad range of disabilities because library collections have not been available in accessible formats. ( <i>Id.</i> ¶ 101.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
63.	The HDL was constructed with the objective of making the world's first accessible research library. ( <i>Id.</i> ¶ 100.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
64.	To obtain access to digital versions of in-copyright works in the HDL, a student, faculty member, or staff member at the University of Michigan with a print disability must obtain certification from a qualified expert who in turn informs the UM Library that the individual has a certified print disability for which digital access is a reasonable accommodation. ( <i>Id.</i> ¶ 105.) The University of Michigan explains the digital library to the patron, describes appropriate uses of the service (including warnings about copyright infringement), and enables the patron to get secure digital access to the HDL corpus. ( <i>Id.</i> )	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
65.	With digital access, a print-disabled patron can perceive the works within the HDL using adaptive technologies such as software that translates the text into spoken words. ( <i>Id.</i> )	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
66.	The HDL makes it possible for students with certified print disabilities to achieve their full academic and scholarly potential. ( <i>Id.</i> ¶ 106.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.

No.	DEFENDANTS' ASSERTED UNDISPUTED FACT	RESPONSE
67.	Full-text searching such as the search functionality offered through the HDL constitutes the most significant advance in library search technology since the 1960s. (Wilkin Decl. ¶ 75; <i>see also</i> Katz Decl. ¶ 9.)	Controverted to the extent that Mr. Wilkin is not qualified to make such a broad statement about the value of full-text searching. Otherwise uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq.
68.	Rather than combing through electronic cataloging records and attempting to discern which works in the collection may be of interest, scholars can access the HDL website and search the actual text of over 10 million books and journals. (Wilkin Decl. ¶ 76; <i>see also</i> Katz Decl. ¶¶ 9–10.)	Uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq.
69.	The HDL has made it possible for university students, faculty, and staff, as well as the general public, to search the combined digital collections contributed by the HathiTrust members. (Wilkin Decl. ¶ 77.)	Uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq.
70.	The search results display bibliographic information—including title, author, publisher, and publication date—for books containing the search term, as well as the page numbers on which the term is found and the number of times the term appears on each page, giving some clues as to how useful the book might be. ( <i>Id.</i> ; Katz Decl. ¶¶ 10–11; Leary Decl. ¶¶ 9–11.)	Uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq.
71.	Without the ability to search the entire full text of in-copyright materials, the content within these resources—as distinct from basic bibliographic information describing that text—is invisible, or nearly so, to the majority of researchers. (Wilkin Decl. ¶ 82; Katz Decl. ¶¶ 11–17; Leary Decl. ¶¶ 9–13.)	Uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq.



No.	DEFENDANTS' ASSERTED UNDISPUTED FACT	RESPONSE
72.	The HDL empowers scholars to perform types of research on a scale that simply could not be performed before the HathiTrust libraries digitized their collections. (Wilkin Decl. ¶ 84; <i>see also</i> June 26, 2012 Declaration of Dr. Neil Smalheiser ("Smalheiser Decl.") ¶¶ 27–29.)	Controverted. There are many other ways in which a particular work might be discovered by a researcher. <i>See, e.g.</i> , Stiles Tr. 51:19-60:3. In any event, Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq.
73.	For example, a digital research method called "text mining"—which has the goal of finding patterns and connections from large databases of textual material—is already proving itself a powerful and important tool for scholarly research. (Smalheiser Decl. ¶¶ 3–6.)	Controverted to the extent that the terms "powerful" and "important" as used in this statement are vague and ambiguous. Otherwise, uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq.
74.	The HDL offers the promise to yield breakthrough research discoveries—including lifesaving scientific discoveries—that simply would not be possible if the HDL corpus and HathiTrust services ceased to exist. (Wilkin Decl. ¶ 77; Smalheiser Decl. ¶¶ 25–29.)	Controverted. There are many other ways in which a particular work might be discovered by a researcher. <i>See, e.g.</i> , Stiles Tr. 51:19-60:3. In any event, Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq.
75.	The HDL helps to ensure the preservation of the published record of human knowledge through the creation of reliable and accessible electronic representations of the works within the corpus. (Wilkin Decl. ¶ 86.)	Uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq. specifically provided the rules and requirements for preservation and replacement of books by Libraries and Archives in Section 108 of the Copyright Act, 17 U.S.C. § 108.
	<b>The Orphan Works Project</b>	
76.	Orphan works are works which are presumed to be in-copyright and for which a rights holder cannot be identified. ( <i>Id.</i> ¶ 108.)	Uncontroverted.

No.	DEFENDANTS' ASSERTED UNDISPUTED FACT	RESPONSE
77.	The University of Michigan developed a project that it called the "Orphan Works Project" (the "OWP"). ( <i>Id.</i> ¶ 109.)	Uncontroverted.
78.	The OWP contemplated two distinct phases. ( <i>Id.</i> ¶ 110.)	Uncontroverted.
79.	In the first phase of the OWP the goal was to identify potential orphan works through a diligent, reasonable process that eliminates works that are claimed by a putative rights holder or that are otherwise found not to be orphans. ( <i>Id.</i> )	Controverted because in the first phase of the OWP, the University of Michigan was not diligent or responsible in its effort to identify potential orphan works, a failure that led to the misidentification of multiple works as orphans when, in fact, their owners were easily ascertainable. UF 123-126.
80.	Under the second phase of the project, the University of Michigan considered making limited uses of works identified as orphans through the first phase of the project. ( <i>Id.</i> )	Controverted to the extent that the word "limited" in this statement is vague and ambiguous. Otherwise, uncontroverted.
81.	The uses that the University of Michigan contemplated making of works identified as orphans were limited to allowing access to orphan works for the purpose of online review, with the number of users permitted to view a given work limited at any one time to the number of copies held by the UM Library. ( <i>Id.</i> ¶ 111.)	Uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq.
82.	Readers would have been reminded, through watermarking and other explicit notices, that the books are subject to copyright. ( <i>Id.</i> )	Uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq.
83.	After completing its initial process to identify potential orphan works, the University of Michigan concluded that there were flaws in its pilot process and that it needed to remedy those flaws before moving ahead with the OWP. ( <i>Id.</i> ¶¶ 112-114.)	Uncontroverted.

No.	DEFENDANTS' ASSERTED UNDISPUTED FACT	RESPONSE
84.	The University of Michigan suspended the OWP process and never proceeded to the second step of the project (i.e., it never proceeded to enable limited uses of putative orphan works) although it continues to study ways to improve the orphan identification process. ( <i>Id.</i> ¶ 114.)	Uncontroverted.
85.	Not a single patron has been given access to a work through the OWP and at present, the University of Michigan does not know whether or how the OWP will continue. ( <i>Id.</i> ¶ 116.)	Controverted. University of Michigan's Dean of Libraries testified that the university intends to continue the OWP. UF 127.
86.	Not a single in-copyright work has been distributed, displayed, or performed to the public as an orphan work. ( <i>Id.</i> )	Uncontroverted.

Dated: New York, New York  
July 20, 2012

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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THE AUTHORS GUILD, INC., et al.,	:	
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Plaintiffs,	:	Index No. 11 Civ. 6351 (HB)
	:	
- against -	:	
	:	
HATHITRUST, et al.,	:	
	:	
Defendants.	:	
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**PLAINTIFFS' OPPOSITION TO DEFENDANTS' AND DEFENDANT-  
INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT**

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**B. The HDL's Uses For the Blind Are Not Protected Fair Use**

Notwithstanding NFB's endorsement of the Chafee Amendment, Intervenor's argue that even if the Defendant libraries are not "authorized entities" within the meaning of Section 121, the use of the HDL by blind persons constitutes fair use under Section 107. Intervenor's Mem. at 16. This argument fails for many of the same reasons that Defendants' uses for the blind are not covered by the Chafee Amendment.

The legislative history cited by Intervenor's supports the proposition that the making of a *single copy of a single work at the request of a blind individual* is fair use. See Intervenor's Mem. at 17 n. 73 (citing House Rep. No. 94-1476 at 73, which states: "While *the making of multiple copies* or phonorecords of a work for general circulation *requires the permission of the copyright owner*, a problem addressed in [a previous proposed section addressing copies for the blind], the making of a *single copy* or phonorecord by *an individual* as a free service for a blind persons would properly be considered a fair use under section 107.") (emphasis added).<sup>17</sup> There is no support for Intervenor's or Defendants' claim that fair use permits university libraries to preemptively digitize, store and replicate millions of copyrighted books in a digital format that includes universally-readable image and text files in case a person with a print disability may one day request access to one of the works.

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<sup>17</sup> Intervenor's reliance on *Sony*, 464 U.S. at 417, is misplaced. Intervenor's Mem. at 17. In that case, each time the Supreme Court references copies for the blind it refers to the making of a single copy for one individual blind person. See *Sony*, 464 U.S. at 455 ("Making *a copy* of a copyrighted work for the convenience of *a blind person* is expressly identified by the House Committee Report as an example of fair use."); *id.* at 465, n. 12 ("For example, 'the making of *a single copy* or phonorecord by *an individual* as a free service for *a blind person*' would be a fair use"); *id.* at 470, n. 21 ("The mention in the Senate and House Reports of situations in which copies for private use would be permissible under the fair use doctrine-for example, the making of *a free copy for a blind person*.")) (emphasis added).

Application of the four factors in Section 107 confirms that the HDL's uses for the blind do not constitute fair use. With respect to the first factor, Defendants' uses for the blind admittedly serve a purpose that benefits society, but because they exceed the allowances of Section 121, Defendants are seeking to avoid paying the customary fee. *See Harper & Row*, 471 U.S. at 562 ("The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."). Furthermore, there is nothing transformative about converting the words on a printed page into digital text as changing the medium of a work does not transform it. *Texaco*, 60 F.3d at 924.

The analysis of the second and third factors is no different than the analysis of the HDL above. The works copied include a large variety of books including highly expressive works, both fiction and non-fiction. And, once again, millions of books were copied in their entirety by Defendants, and HathiTrust grants persons with print disabilities access to the full text of those works, as well as the image files.

Finally, with respect to potential market harm, in addition to the various harms discussed above and in Plaintiffs' motion for summary judgment, HathiTrust's provision of image files to persons with print disabilities for the purpose of allowing them to create large print versions of the books creates "an infrastructure that would directly compete with and impair important growth businesses of publishers for [] large-type books[.]" *Statement of the Association of American Publishers on the NII Copyright Protection Act of 1995 before the House Subcommittee on Courts and Intellectual Property*, Feb. 8, 1996, available at <http://judiciary.house.gov/legacy/441.htm> (testifying that one of the key changes to the original proposed bill was to "avoid impairing large-type" publishing).

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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.

Case No. 11 Civ. 6351 (HB)

**DECLARATION OF P. BERNT HUGENHOLTZ IN OPPOSITION  
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I, P. Bernt Hugenholtz, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am Professor of Copyright Law at the University of Amsterdam, Faculty of Law, and Director of its Institute for Information Law (IViR). I am also Professor of Law at the University of Bergen (Norway). I submit this declaration in opposition to Plaintiffs' motion for



summary judgment. Unless otherwise noted, I make this declaration based upon my own personal knowledge.

**A. Background**

2. In 1989 I received my doctor's degree *cum laude* from the University of Amsterdam. I have written numerous books, studies and scholarly articles on a variety of topics involving copyright, information technology, new media and the Internet. At the Universities of Amsterdam and Bergen I teach courses in copyright law, international copyright law and (occasionally) industrial property law. I also regularly lecture or have lectured regularly at the University of Helsinki, Monash University (Melbourne, Australia), Charles University (Prague), and the Munich IP Law Centre of the Max Planck Institute for Intellectual Property (Munich).

3. I was a member of the Amsterdam Bar and partner of the law firm of Stibbe between 1990 and 1998. Since 2003 I have been a deputy judge at the Court of Appeal in Arnhem.

4. I am a member of the Dutch Copyright Committee that advises the Minister of Justice of the Netherlands, and have regularly acted as a consultant to the World Intellectual Property Organisation (WIPO), the European Commission, and several national governments. I have been on international missions in several countries representing WIPO, and am a regular speaker at international conferences, including the annual Fordham conference on International IP Law and Policy.

5. I am the co-author with Professor Paul Goldstein (Stanford University) of *International Copyright* (2nd edition, Oxford University Press, 2010), which is one of the leading treatises on international copyright law. I am the co-author and co-editor with Professor Thomas Dreier (Technical University of Karlsruhe) of *Concise European Copyright* (Kluwer Law



International, 2006), one of the leading commentaries on European copyright law. I am the General Editor of the academic Information Law Series, which is published by Kluwer Law International, and member of the board of editors of the Journal of World Intellectual Property, which is published by Blackwell.

6. I am a member of the Advisory Boards of the Max Planck Institute for Intellectual Property Law (Munich) and the Centre for Intellectual Property and Information Law (CIPIL) of Cambridge University. A true and correct copy of my *curriculum vitae* is attached hereto as Exhibit A.

7. I have been asked by the defendant libraries (the "Libraries") to address certain statements by Professor Daniel Gervais in his June 28, 2012 declaration ("Expert Report"). In particular, I have been asked to comment upon whether the European collective licensing regimes identified by Professor Gervais have any application to a service such as that offered by the Libraries in connection with their HathiTrust Digital Library or "HDL." I have also been asked to provide additional background on the legal status quo of mass digitization of library book holdings in Europe. I am being compensated for my time at the rate of €250.

8. My understanding is that the Libraries engage in the following limited activities with respect to the in-copyright works in the HDL:

- **Full-Text Search.** The Libraries' patrons may search for one or more terms or phrases across all works within the HDL. For those works that are not in the public domain or for which the copyright holder has not expressly authorized use, the search results indicate only the page numbers on which a term is found within a particular book and the number of times it appears on each page. Search results do not show sentences, "snippets," or other selections of text, and patrons do not have electronic access to any copyrighted content within such works (unless they are users with certified print disabilities). In other words, there is no copyrighted text displayed on the computer screen or available for print.

- **Preservation.** The HDL is a safeguard against the on-going loss of print books and enables the Libraries to make copies for, *inter alia*, replacing a work that is damaged, deteriorated, lost, or stolen, and a replacement copy cannot be obtained at a fair price.

- **Access for persons with print disabilities.** The Libraries, by digitizing works, enable them to be converted into alternative formats for the blind and other persons with disabilities enabling such persons to have equal access to the works within the Libraries' collections.

## B. Opinion

9. Professor Gervais states in his declaration, in paragraph 11, that “the type of copying involved in this case (mass digitization of library books) is already licensed in a number of other countries.” Professor Gervais then concludes in this same paragraph that this fact suggests that “there are alternatives to Defendants’ (and Google’s) unilateral decision to digitize copyrighted works.”

10. Professor Gervais’ reference to the practices of other countries (he principally focuses on Europe, which falls within my area of expertise) with respect to library digitization is, in my view, incomplete. First, Professor Gervais does not mention those countries whose laws directly authorize, without permission of rights holders, the digitization of library materials for the uses made by the Libraries in this action. Ignoring this issue makes it seem like the trend in Europe is to adopt a licensing regime for the types of uses made by the Libraries when this is, in fact, not the case.

11. Second, Professor Gervais does not mention that in many instances European collective rights management organizations (CMO’s) lack the legal mandate to grant licenses permitting digitization and digital uses of entire library holdings (*i.e.*, the authority of such CMO’s is limited to only a small portion of the library’s collection). In such instances, such CMO’s could not possibly license the uses made by the Libraries in this action because those uses necessarily depend on the Libraries having digitized the entirety of their collections.

12. Third, Professor Gervais does not mention that the countries that have adopted a licensing regime for large scale digitization have done so for the purpose of enabling full access

view of the digitized works. Such regimes are in fact not concerned with the types of very limited uses made by the HDL of in-copyright works. I discuss each of these points in further detail below.

**1. European Law Authorizes Libraries to Digitize Their Collections for Purposes of Preservation, Access to Individuals With Print Disabilities and Search.**

13. Article 5(2)(c) of the EU Directive on Copyright in the Information Society allows EU Member States to provide for limitations and exceptions “in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage.”<sup>1</sup> In line with the quoted provision the laws of copyright in a majority of Member States allow libraries and other cultural heritage institutions to digitize their holdings for preservation and conservation purposes. Such countries include, inter alia, Germany, France, Spain, and the Netherlands. See Westkamp report, [http://www.ivir.nl/publications/guibault/InfoSoc\\_Study\\_2007.pdf](http://www.ivir.nl/publications/guibault/InfoSoc_Study_2007.pdf), p. 22 ff. *In countries where such limitations or exceptions exist, libraries are free to engage in digitization subject to the conditions stated in the law; no copyright licenses and/or remuneration are therefore required.*

14. Article 5(3)(n) of the EU Directive on Copyright in the Information Society similarly allows EU Member States to provide for limitations and exceptions permitting libraries, educational establishments and archives to make their holdings accessible online by way of dedicated terminals on premises for the purpose of research or private study. This provision has been implemented by most Member States. *Again, exempted uses will not be licensed, nor is*

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<sup>1</sup> Directives are legal instruments adopted by the European Union that oblige EU Member States to transpose the rules of a directive within the time limits specified therein. Directives are not directly binding upon the citizens of the EU, and implementation into national law need not be done literally.



*remuneration required*. See Westkamp report,

[http://www.ivir.nl/publications/guibault/InfoSoc\\_Study\\_2007.pdf](http://www.ivir.nl/publications/guibault/InfoSoc_Study_2007.pdf), p. 45 ff.

15. Article 5(3)(b) of the EU Directive on Copyright in the Information Society additionally allows EU Member States to provide for limitations and exceptions permitting “uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability.” Article 5(3)(b) has been implemented in some form in the copyright laws of all EU Member States. See Westkamp report, [http://www.ivir.nl/publications/guibault/InfoSoc\\_Study\\_2007.pdf](http://www.ivir.nl/publications/guibault/InfoSoc_Study_2007.pdf), p. 35 ff.

16. While the EU Directive on Copyright in the Information Society harmonizes the basic economic rights protected under copyright (i.e. the rights of reproduction, communication to the public and distribution), the Directive does not address the specific question of whether enabling (library) users to search the digitized library holdings constitutes a separate restricted act. However, two recent decisions of the Court of Justice of the European Union (*Infopaq International A/S v. Danske Dagblades Forening*, Court of Justice EU, 16 July 2009, Case C-5/08; *Infopaq International A/S v. Danske Dagblades Forening*, 17 January 2012, Case C-302/10) offer some guidance on this issue.

17. In these cases, the Court of Justice opined on whether an information search and retrieval service that involved the scanning of published news articles, and which produced output in the form of 11-word keyword-in-context extracts, amounted to unauthorized reproduction. According to the Court, this was the case, “if the elements thus reproduced are the expression of the intellectual creation of their author.” However, the mere technical acts of ‘data capture’ were deemed to be exempted pursuant to Article 5(1) of the EU Directive on Copyright in the Information Society, which exempts certain “temporary acts of reproduction [...] which

are transient or incidental [and] an integral and essential part of a technological process.” Note that Article 5(1) of the Directive is a mandatory limitation to copyright, and therefore has been implemented in all copyright laws of the EU Member States.

18. From the holdings in these cases one might infer that an information search and retrieval service that does not produce (potentially copyright-relevant) extracts, but limits search results to bibliographic references (e.g. page numbers and occurrence) that do not qualify as ‘intellectual creations’, as does the HDL, would not be deemed by the Court of Justice to infringe the reproduction right.

19. Given the scope of the limitations and exceptions to copyright set out above (pars. 13--17), it is in my opinion unlikely that a library operating in an EU Member State where these limitations and exceptions exist in national law, would agree to a collective license for the activities and services that the HDL restricts itself to, *i.e.* full-text search, preservation, and providing access to the visually handicapped. This is because in these EU Member States the libraries would appear to have the right to make such uses without authorization of the copyright holder.

**2. Most European CMO’s Lack Legal Mandate to License the Digitization of a Libraries’ Entire Collection.**

20. Whereas many public libraries, broadcasting and film archives, museums and other cultural heritage institutions in Europe are currently engaged in mass digitization of their holdings (which by necessity include large volumes of orphan works), or are taking concrete steps towards mass digitization, few of these projects operate under a collective license. While in some of these cases libraries will rely on statutory exceptions that allow them to digitize and make available digitized holdings to library patrons (see above, at par. 14), in other cases – where statutory exception are not available or do not provide sufficient latitude – collective

licensing initiatives have not occurred or are highly problematic, because existing collective rights management organizations (CMO's) lack the legal mandate to grant licenses permitting digitization and digital uses of entire library holdings.

21. In most EU countries, CMO's that operate in the field of print-related uses, such as the Reprographic Rights Organizations ("RRO's") mentioned in the Expert Report, generally operate under a contractual mandate the scope of which is determined by the terms of the standard contracts of adherence signed by authors and/or publishers. Until recently, these terms allowed these CMO's merely to license and collect monies for non-digital print-related uses, such as library photocopying.

22. Whereas some CMO's have recently expanded their contractual mandate to include certain digital uses, this enhanced mandate will usually not extend to most of the older, but still in-copyright works in the holdings of the libraries, since most CMO's that operate in the print-related field were established in the 1970's or onwards, and therefore most likely will not have signed up the authors of these older works.

23. This lack of contractual mandate is particularly critical in the field of scientific publication. While under the copyright laws of many European countries digital rights in older (pre-digital era) publications will generally belong to the authors (not the publishers), few scientific authors have actually entrusted their rights to CMO's operating in this field. *With CMO's incapable of offering digitization licenses that cover even a substantial part of the entire corpus of in-copyright works that have been (or are to be) digitized by the libraries, voluntary collective licensing of complete library holdings is destined to fail.*

24. As the examples given in the Expert Report illustrate, such collective licensing approaches will develop only in countries that have special legislation in place that allows



CMO's to negotiate licenses without adequate legal mandate. This is notably the case in the Nordic countries, such as Denmark, Norway and (soon) Sweden, where the system of extended collective licensing (ECL) described in the Expert Report on p...15 ff., was invented, and is now being applied to some mass digitization projects in these countries.

**3. ECL's Have Been Created By Legislation For the Purpose of Authorizing Access to the Text Itself.**

25. In his report, Professor Gervais describes various recent or on-going initiatives towards an ECL model of collective licensing of mass digitization of library book holdings in European countries. Such initiatives, although still rare, indeed exist in respect of a small number of library book digitization projects, such as the projects mentioned in the Expert Report, paras. 44-46. Such licensing – whether collective or individual – will as a matter of course arise only for uses that are either not exempted by national copyright laws, or that exceed the boundaries of existing copyright exemptions.<sup>2</sup>

26. The ECL system described in the Expert Report as an example of successful collective licensing of mass digitization projects is in fact a largely regulatory solution that requires a solid statutory basis in the law. The copyright laws of the Nordic countries enumerate several specific uses by non-profit entities, such as libraries and public broadcasters, for which extended collective licenses may be granted by eligible CMO's.

27. For example, eligible CMO's must adequately represent the right holders in the relevant field of licensing. Any ECL that a CMO will enter into with non-profit entities will be binding not only upon the right holders it represents, but upon non-represented (*e.g.*, foreign and/or 'orphaned') right holders as well. For these non-represented right holders the ECL will

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<sup>2</sup> For instance, the Swedish Memorandum of Understanding mentioned in the Expert Report in para. 45 has been signed against a background of Swedish copyright law that does not provide for a copyright exception allowing libraries to digitize their own holdings. See Westkamp report, [http://www.ivir.nl/publications/guibault/InfoSoc\\_Study\\_2007.pdf](http://www.ivir.nl/publications/guibault/InfoSoc_Study_2007.pdf), p. 24.

have legal effect similar to that of a compulsory license. For these and other reasons, the ECL model remains controversial and is unlikely to be adopted in many EU countries outside the Nordic sphere.

28. As the examples of ECL's described in the Expert Report reveal, the scope of the ECL's currently in place in the Nordic countries well exceed the types of very limited uses made by the HDL of in-copyright works (i.e., preservation, search-only and access to the visually impaired). This is notably the case for the 'Bokhylla' book digitization project in Norway (Expert Report, par. 46), which allows full-text viewing of all books digitized, and also for the much older Danish agreement that allows the reproduction of copyright works for interlibrary loans and the reproduction of short excerpts (Expert Report, par. 47). The Swedish ECL initiative (Expert Report, par. 45) would also allow full-text access, but presently awaits amendment of the Swedish Copyright Act before it can become operational.

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

Executed: July 19, 2012



P. Berni Hugenholtz



# **EXHIBIT A**

## Curriculum Vitae

- 1 Family Name:** Hugenholtz  
**2 First Name:** P. Bernt  
**3 Date of Birth:** 23 august 1955  
**4 Nationality:** Dutch  
**5 Civil Status:** not married  
**6 Education / Professional Studies:**

1973-1980	Master of laws, University of Groningen
1983-1984	Visiting scholar, University of California, Los Angeles
1989	Doctor of law (cum laude), University of Amsterdam

**7 Membership of Professional Bodies:**

Vice-chairman, Vereniging voor Auteursrecht (Dutch chapter of ALAI) ; Founder, Vereniging voor Media- en Communicatierecht (Dutch Association for Media and Communications Law (VMC); General Editor, Information Law Series, Kluwer Law International; Member, Scientific Council, Max Planck Institute, Munich; Member, Advisory Committee, CIPIL, Cambridge University; Member, Board of Editors, Journal of World Intellectual Property (JWIP); Member, Association Internationale pour la Protection pour la Protection de la Propriété Industrielle (AIPPI) ; Member, Association for Teaching and Research in Intellectual property (ATRIP).

**8 Present Position:**

Director, Institute for Information Law, University of Amsterdam, Faculty of Law  
 Professor of Intellectual Property Law, University of Amsterdam, Faculty of Law  
 Professor II, University of Bergen, Faculty of Law

**9 Key Qualifications:**

Prof. Hugenholtz is a leading expert in the field of Information Law. He is the author of numerous books, published articles, book chapters, reports and studies, and the co-author of *European Copyright Law* (2006) and *International Copyright* (2010). He has acted as a consultant to the World Intellectual Property Organisation (WIPO), the European Commission, the European Parliament and several national governments, and has produced studies for the European Commission, the European Parliament, WIPO, UNESCO and various Dutch government agencies. He is a member of the Dutch Copyright Committee that advises the Minister of Justice of the Netherlands. He is a regular invited speaker at international conferences, including the annual Fordham Conferences on International Intellectual Property Law & Policy. Prof. Hugenholtz teaches courses on International and European copyright law at the University of Amsterdam, the Munich IP Law Centre, the University of Bergen (Norway), Monash University (Melbourne), and occasionally at other universities. Prof. Hugenholtz is also an adjunct-judge at the Court of Appeals in Arnhem.

**10 Professional Experience Record:**

1981-1983	Legal Advisor, Ministry of Culture, Dept. of Radio, Television and Press, Rijswijk (legal and policy matters in the field of media and copyright law)
1984 - present	Professor of Intellectual Property Law, University of Amsterdam, Institute for Information Law
1990 - 1998	Advocate (attorney, specialized in IP law), Stibbe, Amsterdam
1992 - present	Director, Institute for Information Law, University of Amsterdam,
2007	Fritt Ord Professor, University of Bergen, InfoMedia Institute
2008 - present	Professor II, University of Bergen, Faculty of Law

**11 Publications<sup>1</sup>****Books (English)**

(with A. W. Hins) *The Law of International Telecommunications in the Netherlands*, Nomos, Baden-Baden 1988.

(with E.J. Dommering (eds.) ), *Protecting Works of Fact: Copyright, Freedom of Expression and Information Law*, Information Law Series, Vol. 1, Kluwer, Deventer/Boston 1991.

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*Copyright Aspects of Data Banks*, Rapport néerlandais, ALAI Congrès 1989, L'informatique et le droit d'auteur, Cowansville (Québec) 1990, p. 390-397.

<sup>1</sup> More extensive listings of publications in Dutch and English are available at <http://www.ivir.nl/medewerkers/hugenholtz.html> and <http://www.ivir.nl/staff/hugenholtz.html>.

'Convergence and divergence in intellectual property law: the case of the Software Directive', in: W.F. Korthals Altes, E.J. Dommering, P.B. Hugenholtz, J.J.C. Kabel (red.), *Information law towards the 21st century*, Deventer/Boston: Kluwer Law and Taxation Publishers 1992, p. 319-324.

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'Fierce Creatures. Copyright Exemptions: Towards Extinction?', keynote speech, IFLA/IMPRIMATUR Conference, *Rights, Limitations and Exceptions: Striking a Proper Balance*, Amsterdam, 30-31 October 1997.

*Implementing the Database Directive*, in: Jan J.C. Kabel and Gerard J.H.M. Mom (eds.), 'Intellectual Property and Information Law', The Hague/London/Boston: Kluwer Law International 1998, p. 183-200.

'Electronic Rights and Wrongs in Germany and The Netherlands', *Columbia - VLA Journal of Law and the Arts* 1998, Vol. 22, No. 2, p. 151-159.

'Code as Code, or the End of Intellectual Property as We Know It', *Maastricht Journal of European and Comparative Law* 1999, Vol. 6, no. 3, p. 308-318.

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*Attorneys for Defendants*

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

THE AUTHORS GUILD, INC., ET AL.,

Plaintiffs,

v.

HATHITRUST, ET AL.,

Defendants.

Case No. 11 Civ. 6351 (HB)

**DECLARATION OF CORY SNAVELY IN OPPOSITION  
 TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I, Cory Snavely, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

- I am the Manager of Library IT Core Services at the University of Michigan Library. I submit this declaration in opposition to Plaintiffs' motion for summary judgment. Unless otherwise noted, I make this declaration based upon my own personal knowledge.

2. As Manager of Library IT Core Services at the University of Michigan (“Michigan”), I am responsible for, among other things, the continued development and maintenance of the HathiTrust Digital Library (“HDL”) server and storage infrastructure, which is where HDL content is stored and HDL services operate.

3. I have served as Manager of Library IT Core Services at Michigan for more than thirteen (13) years. During my tenure at Michigan, I have designed and overseen the development of the library’s technology infrastructure. In or about December 2004, I began to oversee the development of the infrastructure that would ultimately underlie HDL when it launched in 2008.

4. My duties include ensuring the security of the works within the HDL. This entails, among other things, ongoing attention to a rigorous security program for the entire Michigan library’s technology environment. I manage a team of five in connection with this work.

5. I have a degree in Systems Analysis which I received from Miami University in 1992. I have participated in numerous groups on campus to help guide Michigan’s strategies for security and storage. For example, I am currently serving on the Information and Infrastructure Assurance Council, a key oversight and decision-making body, which provides guidance to the campus on security initiatives, programs, and policy relating to computer security.

**A. The Unblemished Security Record of the HDL**


6. I have reviewed the declaration of Dr. Benjamin Edelman, which the Plaintiffs have submitted in connection with their motion for summary judgment. In that declaration, Dr. Edelman provides a list of generalized threats to the security of the HDL, but without regard to the steps already taken by the library defendants (the “Libraries”) to minimize if not eliminate



altogether the threats he identifies. His approach is akin to assessing the safety of commercial air travel by summarizing the ways in which a plane may fall from the sky without taking note of all of the steps taken by the aviation industry to guard against such calamity.

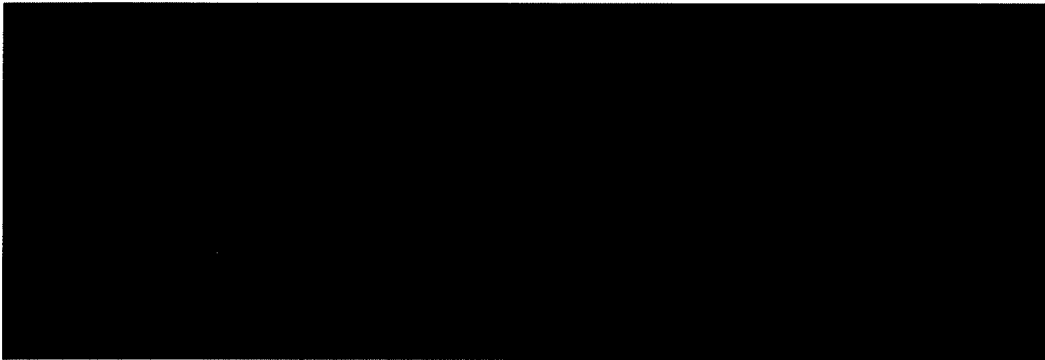
7. In fact, Dr. Edelman apparently had no choice but to limit his report to generalities. This is because he never attempted to study the specific security measures taken by Michigan to protect the HDL *and admits that he would not be qualified to conduct such a risk assessment in any event.*

8. Dr. Edelman, who has degrees in economics, not computer science, sat for a deposition in the Google lawsuit two weeks before submitting his declaration in this action. He confessed during that deposition that "I don't know about all of the security systems that [the Libraries] have." (Edelman Tr. at 248:11-12). He also conceded that apart from information contained in a risk assessment conducted by Michigan to improve the security of the HDL, "I don't think I have knowledge of [Michigan's] current security." (Edelman Tr. at 268:12-18). He testified that if a company asked him to conduct an evaluation of its security measures, "I don't think I would be the best person to evaluate their security systems, but I think I would be able to assist them in selecting an appropriate person." (Edelman Tr. at 288:15-18). True and correct copies of relevant excerpts of Dr. Edelman's deposition testimony are attached hereto as Exhibit A.





10. Based upon my experience in securing computer systems and first-hand knowledge of the security controls used to protect the HDL, I believe that the generalized risks identified by Dr. Edelman, which are customary and typical risks faced by the operators of any large service accessible through the Internet (including services demanding a high level of security such as Internet banking), do not render the works within the HDL corpus insecure.



**B. The Security Measures Protecting the HDL From the General Risks Dr. Edelman Identifies.**

12. Dr. Edelman, in paragraphs 16 through 26 of his declaration, sets out a number of generalized security risks associated with maintaining a digital library such as the HDL. The risks he identifies are, in fact, well known to experts in computer security and my team has taken a number of precautions to minimize them, if not eliminate them altogether.

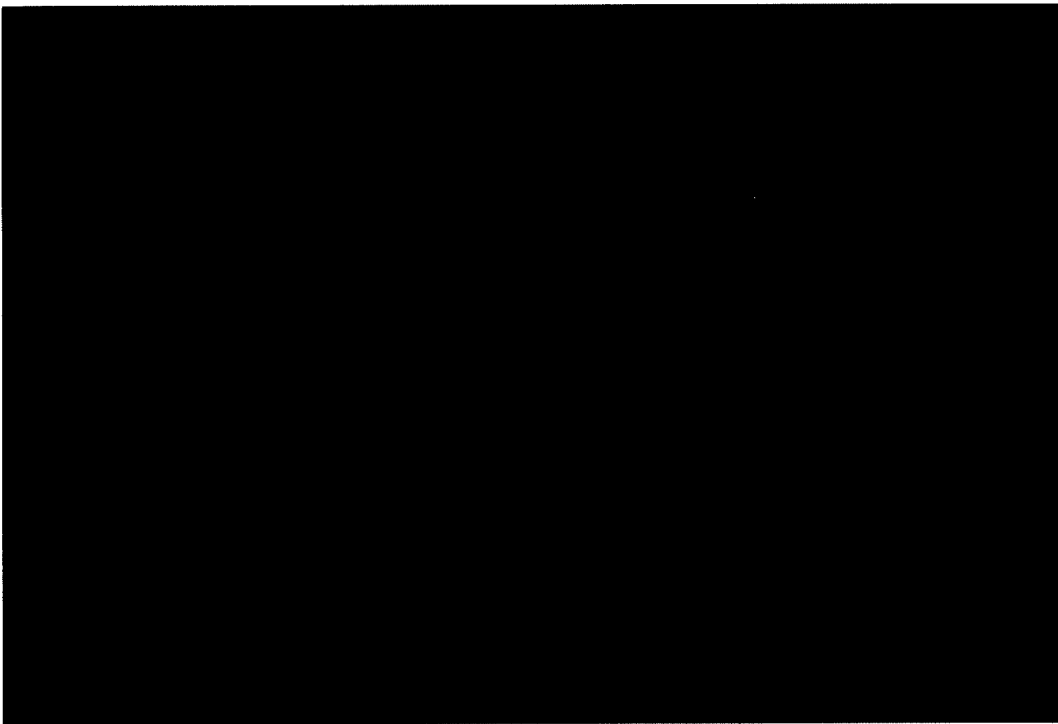
13. Specifically, in paragraph 16, Dr. Edelman claims that “pirates could extract book copies through defects in the security of a provider’s system.” Dr. Edelman continues by

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<sup>1</sup> Additional background on the security measures taken to protect the HDL is found in the June 28, 2012 declaration of the HathiTrust’s Executive Director, John Wilkin, submitted in support of the Libraries’ motion for summary judgment.

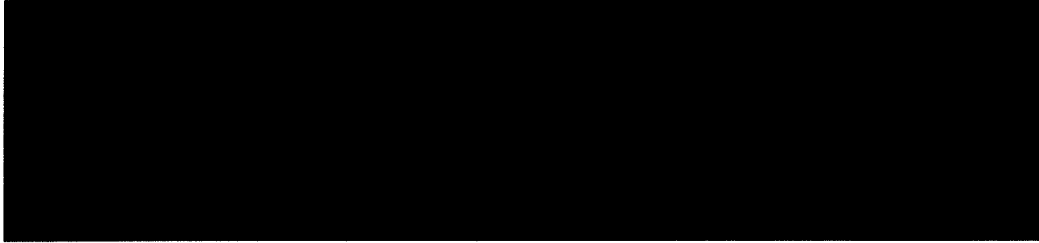
claiming that unauthorized individuals could gain access to digital copies of works through defects in the physical or virtual access controls guarding the servers housing the digital copies. Dr. Edelman also claims in this paragraph that “[d]efects could also arise through flaws in the operating system, database server, web server, or other software run on a provider’s servers; such flaws have been widespread in even the most popular server software” and claims that “defects could arise through the provider’s custom software.”

14. These are all well-known, common risks. The HDL uses industry best practices to greatly reduce the possibility of unauthorized access of the type discussed in paragraph 16 of Dr. Edelman’s declaration:



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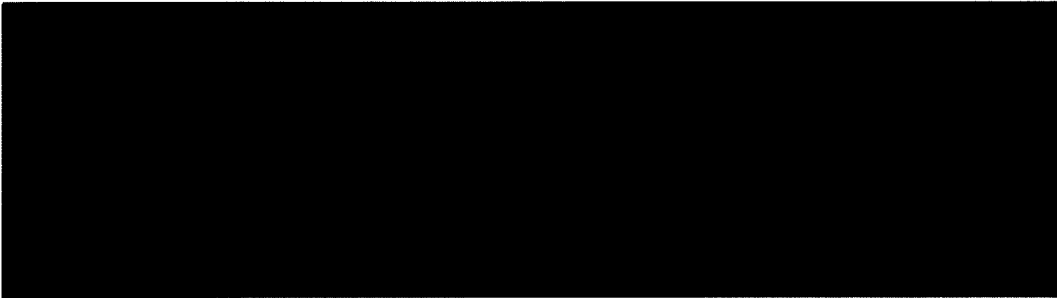
<sup>2</sup> Frequently, commercial enterprises do not apply updates because their business requirements demand that running systems be unchanged and untouched; this type of approach to security can, in fact, expose systems to some of the security risks identified by Dr. Edelman. HDL systems, in contrast, are designed to be maintained regularly and continuously kept up-to-date and secure.

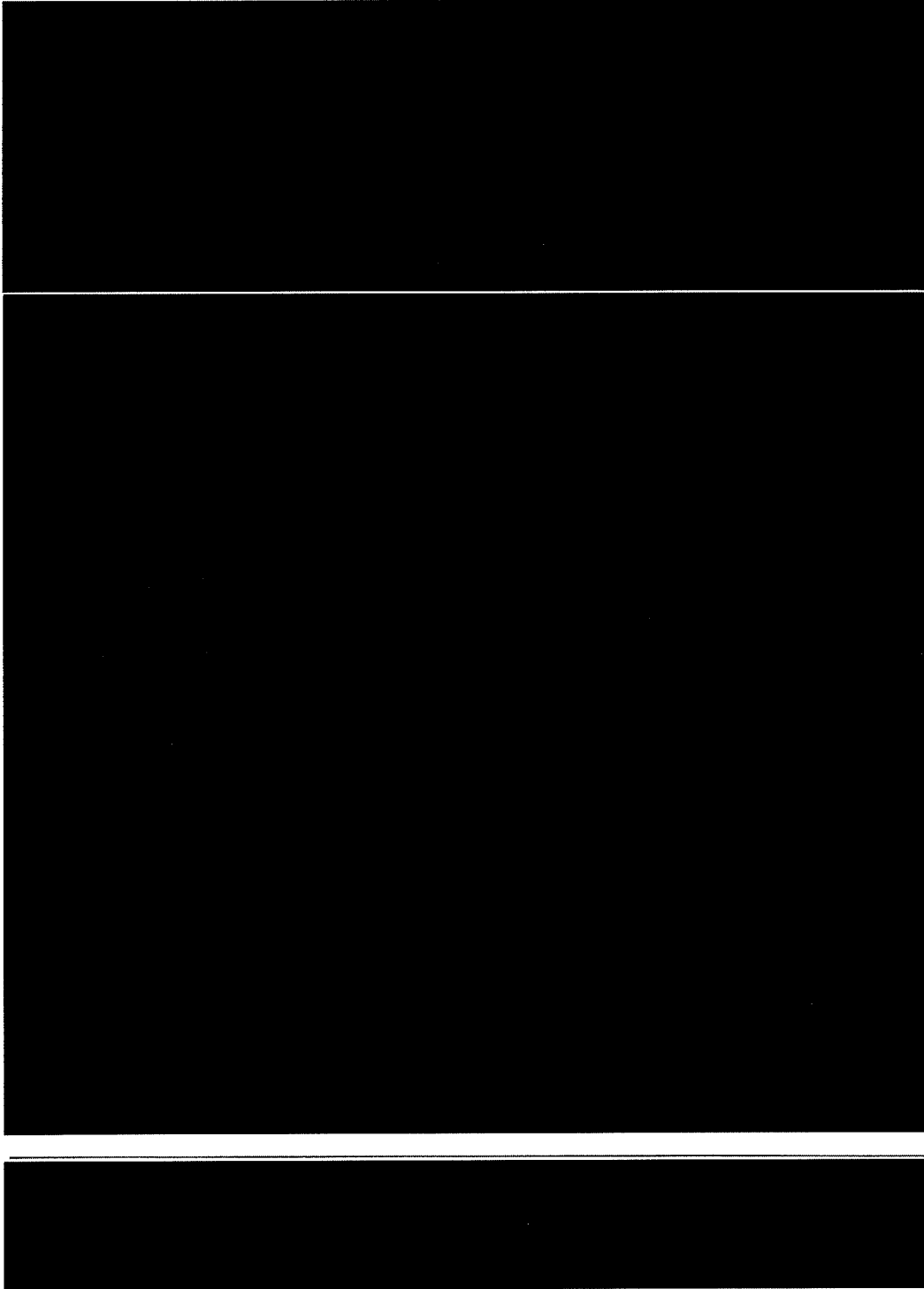


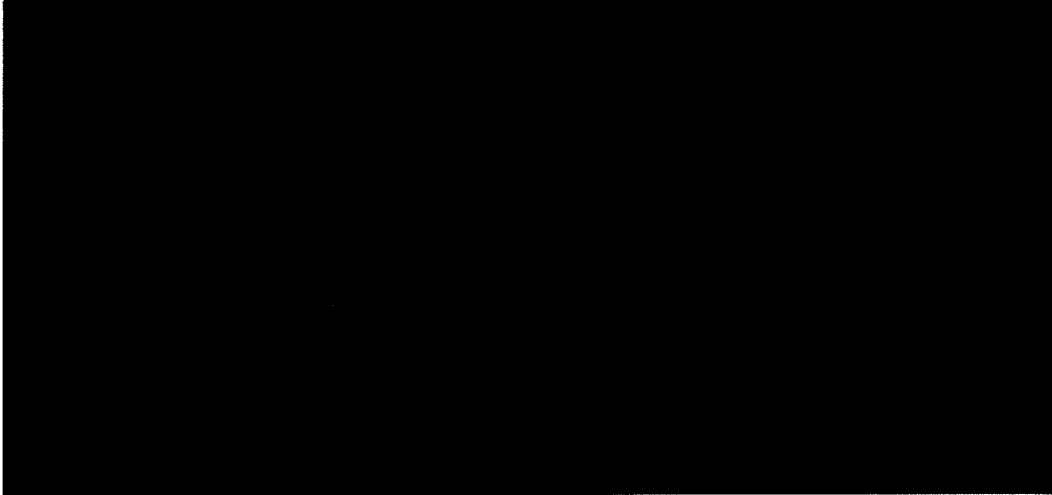
16. The security controls identified above (see paragraph 14), particularly the double perimeter firewalls, greatly minimize the risk of access through exploitation of errors in security configurations. Further, Dr. Edelman's selective use of Mr. Wilkin's testimony falsely suggests that the HDL experiences disproportionately frequent, targeted attacks as compared to similar



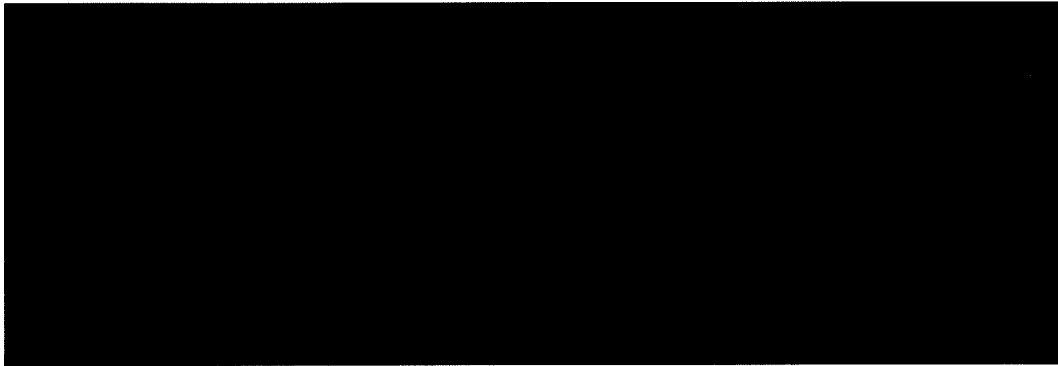
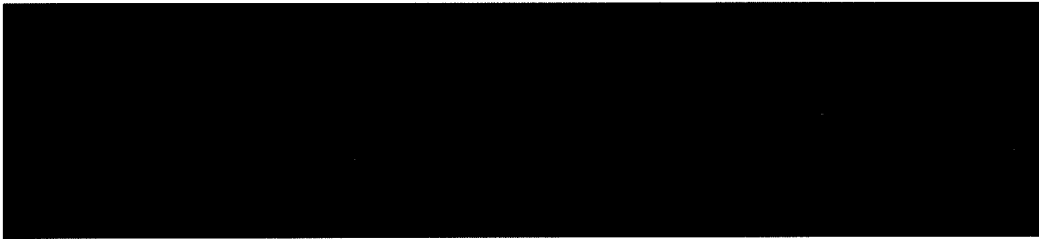
17. In paragraph 18 of his declaration, Dr. Edelman cites the risk of a "rogue employee" that "intentionally redistributes[s] book copies." In fact, employee access to in-copyright materials is far more restricted than Dr. Edelman suggests:

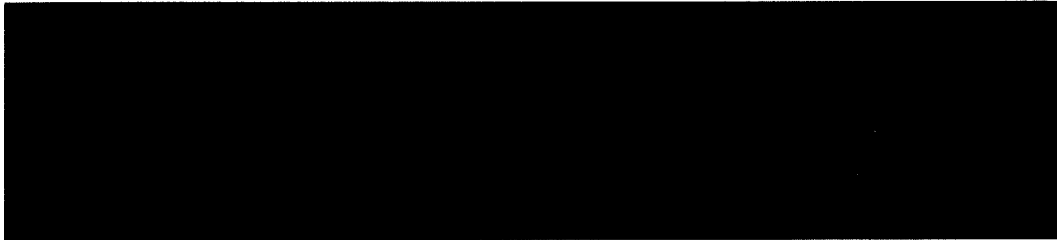




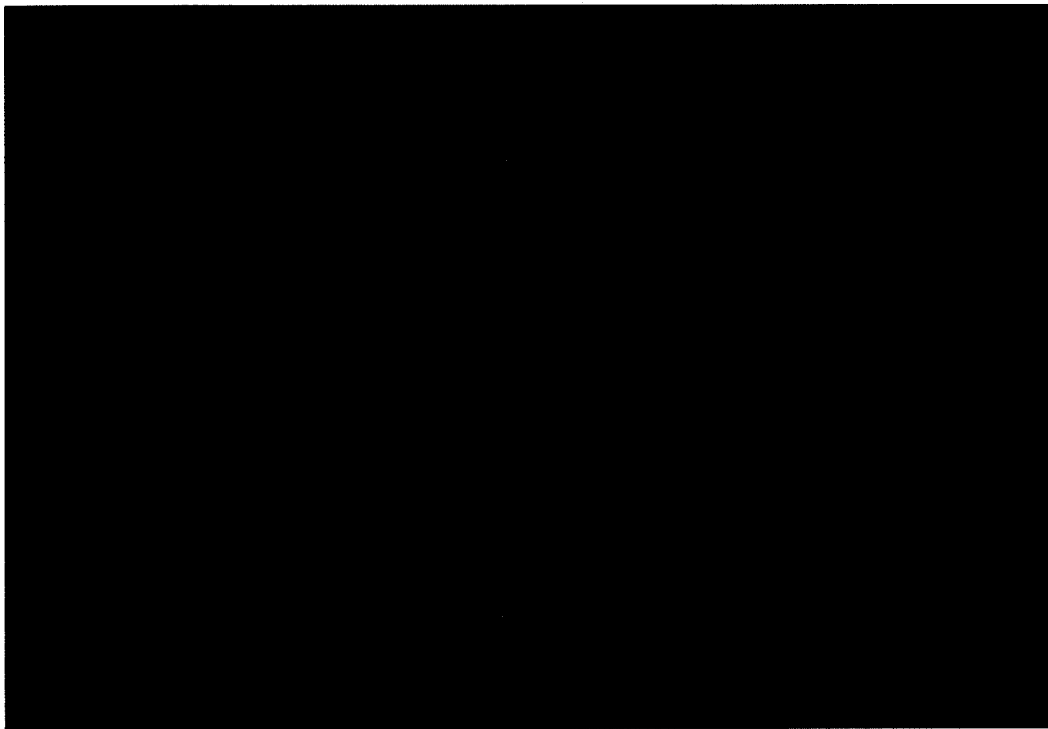


20. Dr. Edelman, in paragraph 20 of his declaration, speculates that “any error made by an employer could create a security breach allowing hackers to access book copies and





23. Dr. Edelman, in paragraph 22 of his declaration, asserts that “[e]ven if Defendants attempt to implement security controls and other limitations on users’ ability to download book copies, experience suggests that users will exceed those limitations.” He juxtaposes this claim



26. Dr. Edelman asserts in paragraph 23 of his declaration that the Libraries permit “non-consumptive research” aimed at analyzing patterns in the texts found in the HDL and he

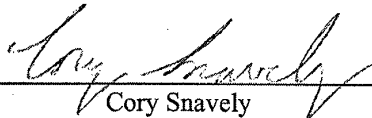


claims that this functionality increases the risk of a security breach. *The entire premise underlying this assertion is incorrect however.* The HDL only permits research on material determined to be in the public domain. If, in the future, the Libraries permit non-consumptive research over in-copyright text, security measures would be adopted to negate the security risks identified by Dr. Edelman, as well as other risks he did not .

27. In sum, Dr. Edelman's report offers the Court nothing more than a collection of hypothetical risks without any countervailing assessment of the ways in which the HDL is protected against such risks. A detailed assessment of the HDL's security protocols in fact establishes that the risk of a security breach is exceedingly low, well within the guidelines for a trustworthy repository of digital information.

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

Executed: July 20, 2012

  
Cory Snavelly



# EXHIBIT A

<p style="text-align: center;">Page 1</p> <p style="text-align: center;">UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK</p> <p>-----</p> <p>THE AUTHORS GUILD, INC., ) ASSOCIATIONAL PLAINTIFF, ) BETTY MILES, JOSEPH ) GOULDEN, AND JIM BOUTON, ) INDIVIDUALLY AND ON ) BEHALF OF ALL OTHERS ) SIMILARLY SITUATED, ) C.A. 05 CV 8136-DC Plaintiffs ) Volume: I vs. ) GOOGLE, INC. ) Defendant ) -----</p> <p>DEPOSITION OF EXPERT WITNESS, BENJAMIN G. EDELMAN, before Avis P. Barber, a Notary Public and Registered Professional Reporter, in and for the Commonwealth of Massachusetts, at the Harvard Business School, Baker Library, 25 Harvard Way, Boston, Massachusetts, on Thursday, June 14, 2012, commencing at 10:03 a.m.</p> <p>Job No. 148413 PAGES 1 - 312</p>	<p style="text-align: center;">Page 3</p> <p style="text-align: center;">I N D E X</p> <p>WITNESS DIRECT CROSS REDIRECT RECROSS</p> <p>BENJAMIN G. EDELMAN</p> <p>BY MR. GRATZ 6</p> <p style="text-align: center;">E X H I B I T S</p> <table> <tr> <th>NUMBER</th><th>PAGE</th></tr> <tr> <td>Exhibit 1 Expert Report of Benjamin Edelman</td><td>17</td></tr> <tr> <td>Exhibit 2 Whenu.com Emergency Motion</td><td>98</td></tr> <tr> <td>Exhibit 3 Initial Expert Report of Doctor Benjamin Edelman Concerning Industry Practices and Activities of Valueclick</td><td>101</td></tr> <tr> <td>Exhibit 4 Expert Report of Benjamin Edelman</td><td>112</td></tr> <tr> <td>Exhibit 5 Document entitled "Google Toolbar Tracks Browsing even after User Choose Disable"</td><td>129</td></tr> <tr> <td>Exhibit 6 Search Engine Land, Blog Post, 1/26/10</td><td>131</td></tr> <tr> <td>Exhibit 7 Document entitled "Privacy Lapse at Google JotSpot"</td><td>137</td></tr> <tr> <td>Exhibit 8 Document entitled "Google's JotSpot Exposes User Data"</td><td>139</td></tr> <tr> <td>Exhibit 9 Declaration of Benjamin Edelman</td><td>143</td></tr> <tr> <td>Exhibit 10 Supplemental Declaration of Benjamin Edelman</td><td>143</td></tr> </table>	NUMBER	PAGE	Exhibit 1 Expert Report of Benjamin Edelman	17	Exhibit 2 Whenu.com Emergency Motion	98	Exhibit 3 Initial Expert Report of Doctor Benjamin Edelman Concerning Industry Practices and Activities of Valueclick	101	Exhibit 4 Expert Report of Benjamin Edelman	112	Exhibit 5 Document entitled "Google Toolbar Tracks Browsing even after User Choose Disable"	129	Exhibit 6 Search Engine Land, Blog Post, 1/26/10	131	Exhibit 7 Document entitled "Privacy Lapse at Google JotSpot"	137	Exhibit 8 Document entitled "Google's JotSpot Exposes User Data"	139	Exhibit 9 Declaration of Benjamin Edelman	143	Exhibit 10 Supplemental Declaration of Benjamin Edelman	143
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<p style="text-align: center;">Page 2</p> <p>1 APPEARANCES:</p> <p>2</p> <p>3 On behalf of the Plaintiffs:</p> <p>4 BONI &amp; ZACK, LLC</p> <p>5 15 St. Asaphs Road</p> <p>6 Bala Cynwyd, Pennsylvania 19004</p> <p>7 By: Michael J. Boni, Esquire</p> <p>8 Tel: 610-822-0201</p> <p>9 Fax: 610-822-0206</p> <p>10 mboni@bonizack.com</p> <p>11</p> <p>12 On behalf of the Defendant</p> <p>13 DURIE TANGRI</p> <p>14 217 Leidesdorff Street</p> <p>15 San Francisco, California 94111</p> <p>16 By: Joseph C. Gratz, Esquire</p> <p>17 Tel: 415-362-6666</p> <p>18 Fax: 415-236-6300</p> <p>19 jgratz@durietangri.com</p> <p>20</p> <p>21 ALSO PRESENT: Jody Urbati, Videographer</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: center;">Page 4</p> <p style="text-align: center;">E X H I B I T S (Continued)</p> <table> <tr> <th>NO.</th><th>PAGE</th></tr> <tr> <td>Exhibit 11 Document entitled "The Online Economy: Strategy and Entrepreneurship"</td><td>156</td></tr> <tr> <td>Exhibit 12 Declaration of Benjamin G. Edelman</td><td>161</td></tr> <tr> <td>Exhibit 13 Document entitled "Advertisers Using WhenU"</td><td>164</td></tr> <tr> <td>Exhibit 14 Exhibit 1</td><td>171</td></tr> <tr> <td>Exhibit 15 Document entitled "Google Books Partner Program Standard Terms and Conditions"</td><td>213</td></tr> <tr> <td>Exhibit 16 Search Inside, Publisher Sign-Up</td><td>221</td></tr> <tr> <td>Exhibit 17 Participating Authors' Reprint Agreement v2.0</td><td>228</td></tr> <tr> <td>Exhibit 18 Cooperative Agreement</td><td>267</td></tr> <tr> <td>Exhibit 19 Document entitled "NDA Never Existed"</td><td>270</td></tr> <tr> <td>Exhibit 20 Benjamin Edelman's Thesis</td><td>306</td></tr> </table> <p style="text-align: center;">EXHIBITS RETAINED BY THE COURT REPORTER</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	NO.	PAGE	Exhibit 11 Document entitled "The Online Economy: Strategy and Entrepreneurship"	156	Exhibit 12 Declaration of Benjamin G. Edelman	161	Exhibit 13 Document entitled "Advertisers Using WhenU"	164	Exhibit 14 Exhibit 1	171	Exhibit 15 Document entitled "Google Books Partner Program Standard Terms and Conditions"	213	Exhibit 16 Search Inside, Publisher Sign-Up	221	Exhibit 17 Participating Authors' Reprint Agreement v2.0	228	Exhibit 18 Cooperative Agreement	267	Exhibit 19 Document entitled "NDA Never Existed"	270	Exhibit 20 Benjamin Edelman's Thesis	306
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<p style="text-align: right;">Page 5</p> <p>1 PROCEEDINGS</p> <p>2 THE VIDEOGRAPHER: Good morning. We</p> <p>3 are on the record at 10:03 A.M. on June 14th,</p> <p>4 2012. This is the videotaped deposition of</p> <p>5 Benjamin Edelman. My name is Jody Urbati, here</p> <p>6 with our court reporter Barbara Avis. We are</p> <p>7 here from Veritext National Deposition and</p> <p>8 Litigation Services at the request of counsel.</p> <p>9 This deposition is being held at</p> <p>10 Harvard Business School in the city of Boston,</p> <p>11 Massachusetts. The caption of this case is the</p> <p>12 Authors Guild versus Google, Inc. Please note</p> <p>13 that the audio and video recording will take</p> <p>14 place unless all parties agree to go off the</p> <p>15 record. Microphones are sensitive and may pick</p> <p>16 up whispers, private conversations and cellular</p> <p>17 interference.</p> <p>18 At this time will counsel and all</p> <p>19 present identify themselves for the record.</p> <p>20 MR. GRATZ: Joseph Gratz from Durie</p> <p>21 Tangri, LLP in San Francisco for defendant</p> <p>22 Google.</p> <p>23 MR. BONI: Michael Boni from Boni &amp;</p> <p>24 Zach, Bala Cynwyd, Pennsylvania for plaintiffs.</p> <p>25 THE WITNESS: Benjamin --</p>	<p style="text-align: right;">Page 7</p> <p>1 Q. You have an undergraduate degree and</p> <p>2 a Ph.D. in economics; is that right?</p> <p>3 A. Yes.</p> <p>4 Q. Do any of the opinions stated in your</p> <p>5 report apply economic analysis?</p> <p>6 A. I think they do broadly understood,</p> <p>7 yes.</p> <p>8 Q. How so?</p> <p>9 A. The report considers the incentives</p> <p>10 of various parties, the factors motivating them</p> <p>11 to act or not to act and the likely consequences</p> <p>12 of those incentives.</p> <p>13 Q. Are there any specific economic</p> <p>14 methods that are applied in your report?</p> <p>15 MR. BONI: Object to form.</p> <p>16 A. I'm not sure I understand what you</p> <p>17 mean.</p> <p>18 Q. What economic methods are applied in</p> <p>19 your report?</p> <p>20 MR. BONI: Same objection.</p> <p>21 A. My training and economics teaches me</p> <p>22 to understand and analyze incentives in</p> <p>23 considering the actions of any rational actor.</p> <p>24 That method of analysis of considering and</p> <p>25 applying incentives is applied throughout the</p>
<p style="text-align: right;">Page 6</p> <p>1 MR. BONI: I'm sorry, and here</p> <p>2 representing the witness.</p> <p>3 THE VIDEOGRAPHER: Thank you. The</p> <p>4 witness will be sworn in and we can proceed.</p> <p>5 BENJAMIN G. EDELMAN,</p> <p>6 A witness called for examination, having been</p> <p>7 duly sworn, testified as follows:</p> <p>8 DIRECT EXAMINATION</p> <p>9 BY MR. GRATZ:</p> <p>10 Q. Good morning.</p> <p>11 A. Good morning.</p> <p>12 Q. Could you state your name for the</p> <p>13 record, please.</p> <p>14 A. Benjamin Edelman.</p> <p>15 Q. And you're an assistant professor at</p> <p>16 Harvard Business School; is that right?</p> <p>17 A. Yes.</p> <p>18 Q. Do you have tenure?</p> <p>19 A. No.</p> <p>20 Q. You have a number of degrees from</p> <p>21 Harvard; is that right?</p> <p>22 A. Yes.</p> <p>23 Q. Are any of those degrees in computer</p> <p>24 science?</p> <p>25 A. No.</p>	<p style="text-align: right;">Page 8</p> <p>1 report.</p> <p>2 Q. Can you tell me more about that</p> <p>3 method?</p> <p>4 MR. BONI: Objection to form.</p> <p>5 A. Well, you know I think it's pretty</p> <p>6 intuitive. It can be structured in a formal</p> <p>7 algebraic model when a particular situation</p> <p>8 calls for that approach. It can be studied</p> <p>9 empirically through large sample or small sample</p> <p>10 data when the context calls for that approach.</p> <p>11 It can also inform understanding and analysis</p> <p>12 without specific application of modeling or of</p> <p>13 large sample data analysis.</p> <p>14 Q. Did you apply any algebraic modeling</p> <p>15 in preparing your report?</p> <p>16 A. No.</p> <p>17 Q. Did you apply any empirical large</p> <p>18 sample data analysis in preparing your report?</p> <p>19 A. I wouldn't call it large sample data</p> <p>20 analysis. There are sections that draw on</p> <p>21 specific examples considered individually which</p> <p>22 probably is a better example of small sample</p> <p>23 data analysis.</p> <p>24 Q. And those are the particular</p> <p>25 anecdotes that you set forth in your report?</p>

<p style="text-align: right;">Page 245</p> <p>1 it's pretty straightforward that if you have 2 more limited resources, your ability to expand 3 those resources on any given project is going to 4 be correspondently limited. 5 Q. In your view is it necessarily the 6 case that smaller and less sophisticated 7 entities have worse security than larger and 8 more sophisticated entities? 9 MR. BONI: Object to form. 10 A. Not always. Sometimes with simpler 11 systems or with less valuable contents to 12 safeguard, the security of a smaller entity can 13 be more than satisfactory. On the other hand, 14 when one flips around those conditions, a small 15 entity guarding a very large gem, one could 16 quickly get into trouble. 17 Q. Are your statements in Paragraph 18 18 of your report based on a survey of companies of 19 various sizes considering their security 20 measures? 21 A. No. 22 Q. Can you provide an example of one of 23 the smaller and less sophisticated companies to 24 which you refer? 25 A. For example, in the context of domain</p>	<p style="text-align: right;">Page 247</p> <p>1 report, you say that attackers can take 2 advantage of even a brief period when a single 3 book provider is insecure. You see that? 4 A. Yes. 5 Q. Is that true today? 6 A. Today there aren't so many book 7 providers. We've discussed only two today. 8 Both of them large, sophisticated companies with 9 impressive information security defenses; 10 whereas, the premise of this section, 11 Paragraph 13, is that there might be 12 significantly more in the future, and they might 13 look quite different. 14 Q. In the event of a fair use ruling? 15 A. Correct, which has been the premise 16 of the entire section where we've been here. 17 Q. Have you -- so it's your view that 18 today's book providers like Google and Amazon 19 have a different and higher level of security 20 than tomorrow's book providers might in event of 21 a fair use ruling, such that smaller entities 22 would enter the market and present the risks 23 discussed in this section; is that right? 24 A. That's right. 25 Q. Turning to Paragraph 20, you say, "I</p>
<p style="text-align: right;">Page 246</p> <p>1 names, there used to be one company, VeriSign 2 Network Solutions that was the sole vendor of 3 .com domain names. When that market was opened 4 up to competition, there were a variety of 5 benefits, but there have also been some 6 downsides, including that some of the smaller 7 guys have been hacked in various ways, have 8 allowed their servers to be taken down by 9 something as routine as a power outage and have 10 otherwise failed to lived up to their 11 contractual commitments. In contrast, the 12 larger vendors in that space have largely 13 succeeded in living up to their contractual 14 commitments. 15 Q. Are you aware of any in The Book 16 Space? 17 MR. BONI: Do you understand the 18 question? 19 A. I do, but I think it's a little bit 20 speculative at this point that there aren't that 21 many smaller sites holding digital copies of 22 books and presenting them in snippet form. If 23 there are any small such companies, I guess I 24 don't know about them. 25 Q. Turning to Paragraph 19 of your</p>	<p style="text-align: right;">Page 248</p> <p>1 understand that the Google Library Project 2 includes providing to the library partners a 3 full digital copy of the books the libraries 4 allowed Google to scan. Breaches at the 5 security systems at these libraries" -- excuse 6 me -- "breaches in the security systems at these 7 libraries, could facilitate book piracy." Do 8 you know what security systems the libraries who 9 store books such as the University of Michigan 10 have in place? 11 A. I don't know about all of the 12 security systems that they have. 13 Q. How do they compare to the security 14 systems that, for example, iUniverse which is 15 the party to the agreement in Exhibit 17 has in 16 place? 17 MR. BONI: Object to form. He just 18 said he's not sure what the security systems are 19 in the libraries. 20 A. I'm also not sure what the security 21 systems are at iUniverse, so I really don't 22 think I can make a comparison. 23 Q. You, likewise, couldn't make a 24 comparison to the security systems that Google 25 or Amazon has in place?</p>

<p style="text-align: right;">Page 249</p> <p>1 A. I don't know everything that I'd want 2 to know in order to make that comparison. In 3 general, I think there's good reason to suspect 4 that the libraries will have significantly lower 5 levels of security. 6 Q. But you don't know one way or the 7 other? 8 A. I don't know one way or the other, 9 and furthermore, I'm not sure the answer is 10 knowable just yet. We need to think about what 11 level of security libraries will have several 12 years from now. It's hard to say, sitting here 13 today what they'll do in several years. 14 Q. Are you aware of any books being 15 pirated or stolen from a research library 16 archived with scans made by Google? 17 A. No. 18 Q. Turning to Paragraph 21, you say, 19 "I've not been informed of all the ways that 20 libraries intend to use the book contents data 21 they receive from Google, nor have I been 22 informed how libraries intend to secure that 23 data. But the information currently available 24 indicates that libraries' actions present a risk 25 of book piracy." You see that?</p>	<p style="text-align: right;">Page 251</p> <p>1 Q. Did any of your work on the Multnomah 2 County case or the interviews with librarians 3 and other librarian staff members in that case 4 form a basis for any of the opinions you render 5 in your report in this case? 6 A. It's not a basis. It's part of my 7 overall professional background consistent with 8 expert service. 9 Q. Do you know whether the University of 10 Michigan is storing book scans in its normal 11 library information systems or in a separate 12 system? 13 MR. BONI: Object to form. 14 A. I don't know one way or the other. 15 Q. What information, additional to the 16 information you have about the library's 17 security measures, would permit you to better 18 assess the risks? 19 MR. BONI: What risks? 20 Q. The risks you discussed in Paragraphs 21 20 and 21. 22 A. Understanding both what they do now 23 and what they will do in the future, what they 24 commit in some sort of a binding contractual 25 sense to do or not to do. I need to understand</p>
<p style="text-align: right;">Page 250</p> <p>1 A. Yes. 2 Q. You don't know what security measures 3 the libraries have in place today; is that 4 right? 5 A. I don't know all of what they have in 6 place. 7 Q. What do you mean by "information 8 currently available" as you use it in Paragraph 9 21? 10 A. Yes, in Exhibit C, I cite the 11 Hathitrust materials which I did review. That 12 gives some information about some of the 13 libraries' security systems. I actually have 14 quite a bit of experience with library 15 information systems from the Multnomah County 16 Public Library case that we discussed 17 previously. 18 I've spent time interviewing 19 librarians. I've spent time with the CIOs of 20 libraries. I've spent time in the library 21 computer systems, understanding how they work 22 and how they interoperate and have come to have 23 a general understanding of the overall culture 24 and approach to information sharing that's 25 common in libraries.</p>	<p style="text-align: right;">Page 252</p> <p>1 the servers on which the data is to be stored, 2 the physical security, the network security, the 3 logical security, software level, user accounts, 4 credentialing. 5 This sounds like a full security 6 audit. I'm not sure I'm the best person to do 7 it, but in any event, it requires understanding 8 quite a bit about their practices, both in the 9 present and their future practices, which is a 10 little bit harder to investigate in 11 anticipation. 12 Q. Turning to Paragraph 22, you refer to 13 a student who used MIT library access to 14 download 4.8 million articles and other 15 documents. You see that? 16 A. Yes. 17 Q. Is that man named Aaron Swartz? 18 A. Yes. 19 Q. Aaron Swartz is being charged 20 criminally for that activity; is that right? 21 A. Yes. 22 Q. And those charges are currently 23 pending; is that right? 24 A. That's my understanding. 25 Q. What was the effect on the value of</p>

<p style="text-align: right;">Page 265</p> <p>1 A. Yes.</p> <p>2 Q. Do you consider that to be in</p> <p>3 violation of intellectual property rights?</p> <p>4 A. I think it's an infringement of the</p> <p>5 trademark, and the question is whether a fair</p> <p>6 use defense applies. There is a doctrine of</p> <p>7 fair use for trademarks and stylized images. I</p> <p>8 think it's a plausible fair use defense. There,</p> <p>9 I'd really have to apply the factors and read</p> <p>10 the cases. I'm much less familiar with the Fair</p> <p>11 Use Doctrine as it applies to stylized images</p> <p>12 and logos.</p> <p>13 Q. The Apple prank which you refer</p> <p>14 occurred in October of 2011; is that right?</p> <p>15 A. I don't recall.</p> <p>16 Q. Did it occur shortly after the death</p> <p>17 of Steve Jobs?</p> <p>18 A. If you say so.</p> <p>19 Q. Did students display the Apple logo</p> <p>20 in the clock tower of Maseeh Hall at MIT in</p> <p>21 honor of Steve Jobs in the prank you referred to</p> <p>22 in Paragraph 25?</p> <p>23 A. Now, that could be. I don't recall.</p> <p>24 Q. Do you think that that prank is</p> <p>25 relevant to the issues in this case?</p> <p style="text-align: right;">Page 266</p> <p>1 A. I can certainly see how it would seem</p> <p>2 peripheral. On the other hand, the fact that</p> <p>3 students are well known to disregard</p> <p>4 intellectual property is anything but</p> <p>5 peripheral. It's well known that Napster was</p> <p>6 most used on college campuses. There were</p> <p>7 distinctive trends. You could see the number of</p> <p>8 users signed into Napster decrease when major</p> <p>9 schools went onto spring break. So the</p> <p>10 relationship between students, university</p> <p>11 libraries and piracy is not peripheral.</p> <p>12 Q. Could you tell me about the Red Sox</p> <p>13 logo prank you referred to in Paragraph 25?</p> <p>14 A. I don't recall. I went through the</p> <p>15 site, looked at the distinctive images</p> <p>16 memorializing the pranks, but I didn't note them</p> <p>17 in great specificity.</p> <p>18 Q. Do you consider that an instance of</p> <p>19 piracy?</p> <p>20 A. I'm not sure. I do think it's</p> <p>21 probably an instance of trademark infringement,</p> <p>22 and it might be subject to a fair use defense.</p> <p>23 Q. The prank you referred to in</p> <p>24 Paragraph 25 with respect to the logo of the</p> <p>25 Boston Red Sox, did that prank occur in October</p>	<p style="text-align: right;">Page 267</p> <p>1 of 2004?</p> <p>2 A. I don't know.</p> <p>3 Q. Did it occur when the Red Sox made it</p> <p>4 to the World Series?</p> <p>5 A. I don't know.</p> <p>6 Q. Were the -- do you think that the</p> <p>7 students celebrating the Red Sox making it to</p> <p>8 the World Series by displaying the logo on the</p> <p>9 dome of the university building was intellectual</p> <p>10 property infringement?</p> <p>11 A. The law is what it is, and it's not</p> <p>12 for me to rewrite trademark law. I wouldn't be</p> <p>13 surprised if that is infringement as a matter of</p> <p>14 law, and fair use defense might or might not</p> <p>15 apply. It wouldn't shock me if you said that to</p> <p>16 do that a license must be paid to the Red Sox,</p> <p>17 and if you don't pay it, then you're in</p> <p>18 violation of the law.</p> <p>19 MR. GRATZ: Mark as Exhibit 19, this</p> <p>20 document. I want to note for the record before</p> <p>21 I hand it to the witness that despite the</p> <p>22 confidential legend at the bottom of this</p> <p>23 document, this is not a confidential document.</p> <p>24 (Document marked as Exhibit No. 18</p> <p>25 for identification.)</p> <p style="text-align: right;">Page 268</p> <p>1 Q. You have before you what's been</p> <p>2 marked as Exhibit 18. Do you recognize this</p> <p>3 document?</p> <p>4 A. Yes.</p> <p>5 Q. Is this the document to which you</p> <p>6 refer in Paragraph 26 of your report?</p> <p>7 A. I think so.</p> <p>8 Q. Do you know what security measures</p> <p>9 the University of Michigan has in place?</p> <p>10 A. That's discussed in part in this</p> <p>11 document.</p> <p>12 Q. Aside from this document, do you have</p> <p>13 any knowledge other than what is in this</p> <p>14 document of security measures that the</p> <p>15 University of Michigan has in place?</p> <p>16 A. Aside from what's discussed in this</p> <p>17 document, I don't think I have knowledge of</p> <p>18 their current security.</p> <p>19 Q. Is it your opinion that an author</p> <p>20 would not agree to have his work stored by the</p> <p>21 University of Michigan without greater security</p> <p>22 terms than those set forth in Exhibit 18?</p> <p>23 MR. BONI: Object to form.</p> <p>24 A. I'm not sure. It all depends on what</p> <p>25 the author gets in exchange. If they get zero,</p>
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<p>1 to pass in the event of a fair use ruling in 2 favor of Google? 3 MR. BONI: Object to form. You want 4 a mathematical response to that question? 5 MR. GRATZ: Whatever the response the 6 witness has for me. 7 MR. BONI: Object to form. 8 A. I don't know. It would be easier to 9 say once that fair ruling resulted, if it did 10 result, once we see who comes along and scans 11 which books and stores them in what ways, until 12 then, it's just a little bit too speculative for 13 me to want to put a number on it, but it 14 certainly is a serious concern. 15 Q. What's the magnitude of the harm in 16 dollars? The harm here, I mean the harm that 17 you were discussing in Paragraph 38. 18 MR. BONI: Object to form. 19 A. I'm not sure. It's difficult to put 20 a dollar value on it, but I do think it's 21 significant. If you asked a publisher what 22 would they be willing to pay to have a complete 23 protection against piracy, to be able to print 24 their books on uncopyable paper or with magical 25 ink, I think you'd find publishers would be</p>	<p>1 MR. BONI: Objection. You know he's 2 not a damages expert, Joe. 3 Q. You can answer. 4 A. I have not. I'm not a damages 5 expert. 6 Q. Has a company ever come to you and 7 asked you to evaluate the risk of intrusion into 8 their computer systems which protects books? 9 A. No. 10 Q. Has a company ever come to you and 11 asked you to evaluate the risk of intrusion into 12 their computer systems at all? 13 A. That seems like the kind of thing 14 someone would have asked me to do at some point. 15 I just need to take a moment to think about it. 16 Certainly I've thought about that 17 question for the organizations which -- with 18 which I've had long-term relationships. So, for 19 example, when I was running the Berkman Center 20 server, that was a question I thought about. I 21 thought about it with ICANN. I've thought about 22 it as to portions of Harvard Business School. 23 I've thought about it with Wesley as to the 24 servers that we operate together, as to paying 25 clients that come specifically for that.</p>
Page 286	Page 288
<p>1 willing to pay a significant portion of their 2 enterprise values in order to get that magical 3 technology. 4 Q. And you consider that to be the 5 measure of the magnitude of the harm set forth 6 in Exhibit -- in Paragraph 38? 7 MR. BONI: Object to form. 8 A. It's not that that's how you'd 9 measure it, but that's the sort of thought 10 experiment one would do. 11 Q. How would you measure it? 12 A. On thinking about the way that other 13 large harms are measured, how do we assess the 14 value of a life when a life is taken away from a 15 person? How do we assess the value of a plane 16 crash or a nuclear disaster? It's really not my 17 area of expertise. It's not something I've 18 opined on here. But here I consider the 19 totality of future lost profits. So I do my 20 best to figure out what profits would have been 21 and then what they will be as a result of the 22 loss, and I subtract those two numbers, and that 23 would be the starting point for the harm. 24 Q. Have you done that in preparing your 25 report?</p>	<p>1 I think it would be unusual for 2 anyone to seek my assistance for that solely and 3 specifically, but if they already knew me from 4 something else, I can think of a couple of 5 clients who have sought assistance with problems 6 generally in that vein based on prior 7 relationships. 8 Q. If a company came to you and asked 9 you to evaluate the risk of intrusion into its 10 computer systems which protect books, would you 11 accept the assignment? 12 MR. BONI: Object to form. That's 13 the entire hypothetical? 14 MR. GRATZ: That's the question. 15 A. I don't think I would be the best 16 person to evaluate their security systems, but I 17 think I would be able to assist them in 18 selecting an appropriate person. I would be 19 able to guide that person towards the areas of 20 greatest concern, perhaps review their initial 21 report, and suggest areas for extension and 22 further inquiry. 23 Q. What process would you recommend be 24 undertaken to evaluate the risk of intrusion 25 into those computer systems that protect books?</p>

<p style="text-align: right;">Page 289</p> <p>1 A. I suppose it would all depend on what 2 books I was trying to protect, what I was trying 3 to protect them from, what access I needed to 4 allow. The easiest thing to do to prevent 5 unauthorized access is to prevent all access by 6 destroying the digital records, but I imagine 7 that wouldn't be what someone hired me to tell 8 them. They'd want some way to use it for some 9 purposes while disallowing use for other 10 purposes. 11 Q. If a company came to you and asked 12 you to evaluate the risk of an intrusion into 13 their computer systems which protect books and 14 which host books for the purpose of making 15 snippets available in response to searches, what 16 process would you take to under -- to make that 17 evaluation? 18 A. Well, I think I would -- I would 19 consider the sorts of security systems that 20 we've discussed a couple times today in 21 different parts of our time together as to 22 physical security, network security, software 23 security, application level security, human 24 resources and internal controls. I'd consider 25 each of those. Each would be significant. Each</p>	<p style="text-align: right;">Page 291</p> <p>1 at Google. I'd look at my organizations's 2 experience or the client's organization's 3 experience with rogue employees. 4 When we have a thousand engineers, 5 how many of them turn out to be bad apples, how 6 many bad ones do you get out of a thousand? Is 7 there any way to prevent two of them from acting 8 together in concert? Could we have an audit 9 trail that prevents this kind of copying and 10 that kind of copying? Is it possible to make an 11 audit trail that's so robust that even a senior 12 engineer can't turn it off? Because we know 13 some of the problems occur from senior engineers 14 who can bypass the ordinary control. 15 So that's the kind of question I'd be 16 asking as to that facet, but to be sure, each of 17 the facets would require a different type of 18 analysis. 19 Q. Did you do any of that in preparing 20 your report in this case? 21 A. I considered those kinds of 22 approaches. The data and information required 23 aren't available to me and weren't necessary in 24 order to reach the conclusions set out in my 25 report.</p>
<p style="text-align: right;">Page 290</p> <p>1 would have multiple facets within it. 2 And then my analysis would be 3 informed, importantly, by the material that I 4 was holding. If it was unique and one of a kind 5 and highly sought after, then I would be 6 particularly concerned about the skills of my 7 intruders. And if I needed to allow massive, 8 high-volume access by a large number of 9 different users, potentially some of them fake 10 or automated or robotic, I would be even more 11 concerned, and I would need to be open to the 12 possibility, the very real possibility that I 13 couldn't do this with the required level of 14 quality and would need to revisit my plans. 15 Q. What information would you need to 16 evaluate the risk of intrusion into such a 17 system which stores books for the purpose of 18 making snippets available in response to 19 searches, for example? 20 A. One would need to think about each of 21 the aspects of security just discussed. So for 22 example, as to human resources security, making 23 sure that there isn't a rogue employee who takes 24 the data in the way that other rogue employees 25 have done other untoward things, including even</p>	<p style="text-align: right;">Page 292</p> <p>1 Q. Why weren't they necessary? Would 2 having them have aided you in reaching your 3 conclusions? 4 A. Perhaps I could have reached 5 additional conclusions. I imagine that with 6 enough study, I might get to the point where I 7 was prepared to put a number on some of the 8 probabilities. There's this probability per 9 year of this kind of bad thing happening if you 10 use these controls. I think that is an 11 estimatable number. One can estimate even these 12 very small probabilities with enough analysis 13 and enough review, but it's quite difficult, and 14 I didn't consider it necessary or appropriate, 15 given what I was asked to do in this report at 16 this time. 17 Q. Did you run any bargaining 18 experiments in connection with your report? 19 A. No. 20 Q. Did you perform any statistical 21 analysis in connection with your report? 22 A. No. 23 Q. In signing your own consulting 24 agreements, have you performed market checks 25 regarding terms?</p>



<p style="text-align: right;">Page 309</p> <p>1 Q. Turning to the references cited page 2 of your senior thesis on page 77, under G, do 3 you see a citation to a book by A. Greco called 4 The Book Publishing Industry? 5 A. Yes. 6 Q. And turning to page 33 of your senior 7 thesis, you see the bottom of page 33 it says, 8 "I further add two promotion-specific variables 9 to investigate market trends noted by Greco 10 (1997) in discussing clumping of book sales over 11 time"? 12 A. Yes. 13 Q. Is that a citation to the Greco work 14 titled The Book Publishing Industry cited in 15 your references cited section? 16 A. Seems to be. 17 Q. Do you have an opinion as to Albert 18 Greco's expertise regarding The Book Publishing 19 Industry? 20 A. Not really. 21 MR. BONI: Are you done with this, 22 Joe? 23 MR. GRATZ: Yes. Nothing further. 24 MR. BONI: I have nothing. 25 THE VIDEOGRAPHER: Here ends this</p>	<p style="text-align: right;">Page 311</p> <p>1 CERTIFICATE 2 COMMONWEALTH OF MASSACHUSETTS. 3 MIDDLESEX, SS. 4 I, Avis Barber, Registered Professional 5 Reporter and Notary Public, in and for the 6 Commonwealth of Massachusetts, do hereby certify 7 that: 8 BENJAMIN G. EDELMAN, the witness whose 9 deposition is hereinbefore set forth, was duly 10 sworn by me, that I saw a picture identification 11 for him in the form of his Harvard College 12 Identification card, and that the foregoing 13 transcript is a true and accurate transcription 14 of my stenotype notes to the best of my 15 knowledge, skill and ability. 16 I further certify that I am not related to 17 any of the parties in this matter by blood or 18 marriage and that I am in no way interested in 19 the outcome of this matter. 20 IN WITNESS WHEREOF, I have hereunto set my 21 hand and notarial seal this 20th day of June 22 2012. 23 ----- 24 Avis Barber, RPR 25 Notary Public My commission expires: July 30, 2015</p>
<p style="text-align: right;">Page 310</p> <p>1 deposition. Off the record, 6:18 p.m. 2 (Whereupon, the deposition was 3 concluded at 6:18 p.m.) 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 312</p> <p>1 I declare under penalty of perjury 2 under the laws that the foregoing is 3 true and correct. 4 5 Executed on _____, 20____, 6 at _____, _____. 7 8 9 10 11 12 13 BENJAMIN G. EDELMAN 14 15 16 17 18 19 20 21 22 23 24 25</p>

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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.

Case No. 11 Civ. 6351 (HB)

**DECLARATION OF JOSEPH PETERSEN IN SUPPORT OF  
THE LIBRARIES' OPPOSITION TO PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT**

I, Joseph Petersen, make the following declaration:

1. I am a member of the Bar of this Court and a partner at the law firm of Kilpatrick Townsend & LLP, attorneys for the Defendants in the above-captioned action (the "Libraries"). I

make this Declaration, based on my own personal knowledge, in support of the Libraries' opposition to Plaintiffs' Motion for Summary Judgment.

2. Attached hereto as **Exhibit A** is a true and correct copy of relevant pages from Plaintiffs' First Requests for Admission to Defendant Mary Sue Coleman.

3. Attached hereto as **Exhibit B** is a true and correct copy of relevant pages from Plaintiffs' First Requests for Admission to Defendant Mark G. Yudof.

4. Attached hereto as **Exhibit C** is a true and correct copy of relevant pages from Plaintiffs' First Requests for Admission to Defendant Kevin Reilly.

5. Attached hereto as **Exhibit D** is a true and correct copy of relevant pages from Plaintiffs' First Set of Interrogatories to Defendant Mary Sue Coleman.

6. Attached hereto as **Exhibit E** is a true and correct copy of relevant pages from Plaintiffs' First Set of Interrogatories to Defendant HathiTrust

7. Attached hereto as **Exhibit F** is a true and correct copy of relevant pages from Plaintiffs' First Set of Interrogatories to Defendant Mark G. Yudof.

8. Attached hereto as **Exhibit G** is a true and correct copy of relevant pages from Plaintiffs' First Set of Interrogatories to Defendant Kevin Reilly.

9. Attached hereto as **Exhibit H** is a true and correct copy of relevant pages of the transcript of the June 4, 2012 deposition of Frederic L. Haber, designated as a 30(b)(6) representative of The Copyright Clearance Center.

10. Attached hereto as **Exhibit I** is a true and correct copy of a print-out the Copyright Clearance Center's Management Summary Financial Data, printed from the Copyright Clearance Center's website at <http://annualreport.copyright.com/management-summary-financial-data> on July 18, 2012.

11. Attached hereto as **Exhibit J** is a true and correct copy of a print-out of the Amazon.com Kindle License Agreement and Terms of Use, printed from Amazon.com at <http://www.amazon.com/gp/help/customer/display.html?nodeId=200506200&> on July 18, 2012.

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

Dated: July 20, 2012

  
\_\_\_\_\_  
Joseph Petersen

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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.

Case No. 11 Civ. 6351 (HB)

**SUPPLEMENTAL DECLARATION OF JOHN WILKIN IN SUPPORT OF  
THE LIBRARIES' MOTION FOR SUMMARY JUDGMENT**

I, John Wilkin, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I understand that the Plaintiffs, in their Opposition to the Libraries' motion for summary judgment, have questioned the Libraries' use and retention of image and text files in the HathiTrust Digital Library ("HDL"). As discussed below, image and text files of each work are necessary for the search, preservation, and accessibility services HathiTrust provides.

2. The digital copy of each work in the HDL includes (a) an image component representing photographic reproductions of pages of the work (the “Image File”) and (b) a Unicode text component representing text in machine-readable format (the “Text File”). The Text File is created from the Image File using Optical Character Recognition (OCR) software that converts the page images into searchable text.

3. Maintaining only the Image File, or only the Text File, would not permit HathiTrust to provide its search, preservation, and accessibility services. For example, the Image File preserves for replacement purposes the text, formatting, images, and other features on the page as they appear in the book, but it cannot provide full-text searching. Conversely, the Text File, which allows full-text searching, cannot serve as an archival preservation format.

4. First, the Text File does not include completely accurate text. Even the best OCR technology available does not reliably recognize all characters correctly, particularly in the case of older or inconsistent fonts or creative typography. For example, “L’s” often become “l’s” and “s’s” in older fonts are often incorrectly identified by OCR software as “f’s.”

5. Second, existing OCR software is not capable of producing a Text File that includes all of the textual, formatting, and graphical features of a book. Through manual XML coding, we are able to identify and describe certain textual features, but running heads (a short title that appears at the top of each page), paragraphs, stanzas, and line breaks are either not coded or are not reliably included in coding. Moreover, illustrations, tables, graphs, and other images are not included in the Text File. These textual, formatting, and graphical features missing from the Text File may represent information necessary to communicate the information in the work. For example, in poetry and other creative writing forms, paragraph or stanza format, layout, and line breaks may be relevant to the works’ meaning. In addition, works that include

mathematical or scientific formulas often rely on superscript and subscript notations and other positional relationships between characters and symbols that are not reliably identified by OCR software, and maintaining a Text File alone for these works would be insufficient.

6. Because the Text File does not include all of the necessary information, as described above, the Image File remains the authoritative digital representation of the printed book. The Image File may also be used to improve the accuracy of the Text File as OCR technology enhancements becomes available.

7. Moreover, both the Image File and the Text File are critical to HathiTrust's fulfillment of its mission to provide equal access to users with print disabilities. Some blind users may be able to utilize a text-only digital format by using screen-readers and text-to-voice software that convert the text into an accessible format. Other print-disabled users—such as low-vision readers or sighted individuals with other print disabilities—may be able to read a digital image file that has been enlarged or otherwise optimized for their use. Providing these users with a text format only would deny them the ability to access information communicated in a book's text formatting and layout, special symbols or characters, or graphical features such as photographs, illustrations, graphs, or tables. Only by making the Image File available to these users can HathiTrust provide access more equivalent to that of their peers without print disabilities.

8. Recognizing that print disabilities take a variety of forms and that individuals with different print disabilities may require different formats, HathiTrust offers students and faculty with certified print disabilities both the Image File and a concatenated presentation of the Text File that is optimized for use with screen-readers and text-to-speech software.

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

Date: July 26, 2012



John P. Wilkin



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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.

Case No. 11 Civ. 6351 (HB)

**REPLY DECLARATION OF JOSEPH PETERSEN  
IN SUPPORT OF THE LIBRARIES' MOTION FOR SUMMARY JUDGMENT**

I, Joseph Petersen, make the following declaration:

1. I am a member of the Bar of this Court and a partner at the law firm of Kilpatrick Townsend & LLP, attorneys for the Defendants in the above-captioned action (the "Libraries"). I make this Declaration, based on my own personal knowledge, in further support of the Libraries' Motion for Summary Judgment.

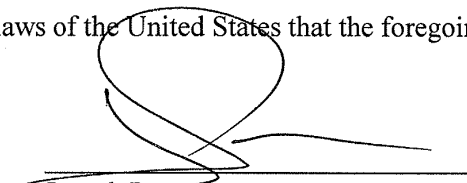
2. Attached hereto as **Exhibit A** is a true and correct copy of “Statement of Position as to Certain of the Draft Copyright Proposals of the Register of Copyrights,” by American Book Publishers Council, Inc. & American Textbook Publishers Institute, dated June 12, 1964 and included in *Copyright Law Revision Part 4 – Further Discussions and Comments on the Preliminary Draft for Revised U.S. Copyright Law* (December 1964) at page 267.

3. Attached hereto as **Exhibit B** is a true and correct copy of a printout of a web page titled “Functional Objectives,” printed from the HathiTrust website at <http://www.hathitrust.org/objectives> on July 25, 2012.

4. Attached hereto as **Exhibit C** is a true and correct copy of the Shared Digital Repository Collaborative Effort Agreement entered into between the University of Michigan and the Committee on Institutional Cooperation, fully executed on April 8, 2008, and produced to Plaintiffs in discovery under Bates numbers UW000103 - UW000109.

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

Dated: July 26, 2012



Joseph Petersen

# **EXHIBIT B**



## Functional Objectives

November 5, 2010

### Functional Objectives – Short-term

- **Page turner mechanism:** HathiTrust supports an application for reading, downloading, and interacting with (e.g., zooming and rotating) texts and images in HathiTrust. The page turner application interfaces with mechanisms such as the Rights Database and Shibboleth (a mechanism for inter-institutional authentication) to provide appropriate access to materials, and integrates with services such as the Collection Builder, full text search, and the bibliographic catalog.
- **Branding (overall initiative; individual libraries):** HathiTrust supports branding in the repository in a number of ways:
  - The pageturner prominently identifies the HathiTrust initiative;
  - A watermark on every page identifies the digitizing agent; and
  - A watermark on every page identifies the source library of the print material.
  - The source of the print material is included in our feed of bibliographic identifiers so that institutions can import or update records with this information.
  - The pageturner contains institution-specific branding, identifying to users at partner institutions that their institution is a member of HathiTrust.
- **Format validation, migration and error-checking:** Format validation and error-checking is performed for all content that enters HathiTrust. Although, to date, no migration of content has been necessary to date, we believe that we have mitigated this need by choosing rich, flexible, standards-based formats. HathiTrust stores a variety of technical and digital preservation metadata along with each object in order to aid in migration should it become necessary. Strategies are in place to ensure and validate the integrity of HathiTrust materials on an ongoing basis.
- **Development of APIs that will allow partner libraries to access information and integrate it into local systems individually:** Several APIs have been released for this purpose. Two key examples are a bibliographic API ([Bib API \(bib api\)](#)), which supports lookup and catalog integration, and a data API ([Data API \(data api\)](#)), which provides machine access to the underlying data in a digital object. Information on all modes of content and metadata distribution (including OAI and tab-delimited metadata files) can be found at <http://www.hathitrust.org/data>.
- **Access mechanisms for persons with disabilities:** HathiTrust has deployed an accessible interface that uses descriptive labeling, key tabs, and other strategies to facilitate navigation and use by users with print disabilities (e.g., optimized for use with screen readers). HathiTrust has also deployed authorization mechanisms that permit users who are certified as having print disabilities to access the full text of public domain and in copyright volumes in HathiTrust. These mechanisms, which have been deployed at the University of Michigan, are sufficiently generalized to provide access at partner institutions pending agreement on entitlement attributes (to be used in connection with Shibboleth) and institutional policies. A CIC working group chaired by Mark Sandler has initiated work to help address these needs.
- **Public 'Discovery' Interface for HathiTrust:** HathiTrust released a temporary public version of a comprehensive bibliographic search application (i.e., a catalog) in April 2009 and has worked through a collective process to define a HathiTrust view in WorldCat. The WorldCat implementation of the HathiTrust catalog will be released as a pilot in November 2010.
- **Ability to publish virtual collections:** HathiTrust has created a [Collection Builder \(http://babel.hathitrust.org/cgi/mb\)](#) application that permits individuals to create public (i.e., shared) and private collections. Collection Builder uses Shibboleth authentication for users at partner institutions, but also permits authentication through the University of Michigan "[friend \(http://www.itd.umich.edu/itcdocs/s4316/\)](http://www.itd.umich.edu/itcdocs/s4316/)" system so that unaffiliated users can create and maintain collections.
- **Mechanism for direct ingest of non-Google content:** HathiTrust developed automated ingest mechanisms for book and journal content digitized by the Internet Archive in April 2010. A technical and policy framework for ingest of other digitized book and journal content (e.g., digitized by partner institutions) is being finalized currently. When this is complete, routine ingest of partner content will begin.

### Functional Objectives – Long-term

- **Compliance with required elements in the Trustworthy Repositories Audit and Certification (TRAC) criteria and checklist:** The Center for Research Libraries is conducting an independent assessment of the HathiTrust repository, based largely on the Trusted Repositories Audit and Certification (TRAC) criteria. The assessment is targeted to be complete by the end of 2010. Information about HathiTrust's compliance with TRAC can be found at <http://www.hathitrust.org/standards> (<http://www.hathitrust.org/standards>).
- **Robust discovery mechanisms like full-text cross-repository searching:** An initial implementation of full-text search of the entire repository was released on November 19, 2009. The launch of this service represented significant research and development, much of which is documented on the HathiTrust website at [http://www.hathitrust.org/large\\_scale\\_search](http://www.hathitrust.org/large_scale_search) ([http://www.hathitrust.org/large\\_scale\\_search](http://www.hathitrust.org/large_scale_search)) and <http://www.hathitrust.org/blogs/large-scale-search> (<http://www.hathitrust.org/blogs/large-scale-search>).
- **Development of an open service definition to make it possible for partner libraries to develop other secure access mechanisms and discovery tools:** HathiTrust has created a [number of APIs \(data\)](#) for this purpose, as well as a collaborative development environment for partners to improve existing, and develop new applications.
- **Support for formats beyond books and journals:** HathiTrust is investigating issues relating to the storage and delivery of electronic publications (in the ePub format in particular) and digital audio and image files (such as maps). Pilot projects in each of these areas are underway.
- **Development of data mining tools for HathiTrust and use by HathiTrust of other analysis tools from other sources:** HathiTrust has engaged multiple strategies to support data mining in HathiTrust:

1. Data Distribution: HathiTrust has made [sample datasets \(datasets\)](#) available to researchers for computational processing and analysis. The purpose of the samples is to give researchers an idea of the structure of the repository ahead of broader distribution of the public domain in HathiTrust (planned for early 2011) and strategy 2 below.
2. SEASR integration: The SEASR development team is in the process of integrating SEASR into HathiTrust as a proof of concept.
3. HathiTrust Research Center: HathiTrust plans to create a Research Center equipped with a variety of tools and services to allow a broad variety of analyses on the repository corpus.

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

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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 FREDRIC K. SCHROEDER**

I, Fredric K. Schroeder, declare as follows:

**QUALIFICATIONS AND EXPERIENCE**

1. This declaration is based on my personal knowledge. I am competent to testify on the matters stated and declare that these items are true and accurate to the best of my knowledge and belief. I hold the following opinions to a reasonable degree of professional certainty based on the facts presented to me.

2. I am currently employed as a Research Professor at San Diego State University where I am responsible for developing curricula in the area of rehabilitation administration leadership and policy development. I also serve as the University's principal liaison with Congress and the current administration on vocational rehabilitation issues. I have held this position since 2001.

3. From 2001 to 2002, I also served as Director of the Professional Development and Research Institute on Blindness, Louisiana Tech University where I was temporarily appointed to establish a new research and training institute on blindness and where I established a master's degree program in the education of blind children.

4. In 1994, I was appointed by President Clinton and confirmed by the Senate to serve as the Commissioner of Rehabilitation Services Administration for the U.S. Department of Education. I served in that position until 2001. As Commissioner, I served as the principal officer of the federal agency authorized to carry out specified portions of the Rehabilitation Act of 1973, as amended; the Randolph-Sheppard Act, as amended; and the Helen Keller Act. In addition to other tasks, I also provided executive leadership to the Rehabilitation Services Administration, establishing goals and objectives for serving individuals with disabilities, and developed standards, criteria, guidelines, and policies to provide direction in the administration of agency programs.

5. From 1986 to 1994, I served as Executive Director of the New Mexico Commission for the Blind where I had administrative responsibility for statewide services for the blind.

6. From 1981 to 1986, I served as the Special Education Low Incidence Coordinator for Albuquerque Public Schools, District Diagnostic Center.

7. In 1984, I was a Part-time Instructor of a course in Special Education Services for Children with Visual Impairments or Blindness at the University of New Mexico.

8. I have previously served as a Teacher of the Visually Impaired and as an Orientation and Mobility Instructor.

9. I have a Ph.D. in Education Administration and Supervision from the University of New Mexico, a Master of Arts in Special Education of the Physically Handicapped and Visually Handicapped from San Francisco State University, and a Bachelor's degree in Psychology from San Francisco State University.

10. I am also a blind consumer of assistive technology.

11. A copy of my curriculum vitae is attached as Exhibit A.

12. Throughout my career and education, I have gained extensive experience in determining appropriate literacy methods and accommodations for those who are blind and visually impaired, for both individuals and at the policy and administrative levels and thus have had frequent professional encounters with all of the factors reflected in paragraphs 13 through 19 below.

### **OPINION**

13. Low vision readers who access HDL scans using software that uses screen magnification and text-to-speech will not affect the market for large print because such readers typically cannot do sustained reading based solely on large print.

### **BASIS FOR OPINION**

14. My opinion is based upon the facts set forth below and upon my extensive experience working with blind and visually impaired individuals as set forth in paragraphs 2 through 12 above and Exhibit A hereto.

15. Many persons who qualify as legally blind, that is, have vision in one eye worse than 20/200 when corrected, but retain some vision, do not have the option of using large print on paper for sustained reading. Eye fatigue and nystagmus set in for many low vision readers if that reader tries to read only visually.

16. Thus, a number of software programs are offered that combine screen magnification with text-to-speech, so that low vision readers have both visual and audible input.

17. Low vision readers using such programs typically use the visual input to get the physical layout of the material, such as where a paragraph begins or end or whether a notation like “(a)” refers to a variable in an equation or the first of several answer choices.




18. Low vision readers using screen magnification software generally experience a high error rate – a particularly significant issue when the reading relates to academic material.

19. Access to large print alone, without accompanying audio, is inadequate for most low vision readers.

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

Dated: July 23, 2012

  
Fredric K. Schroeder

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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 THE AUTHORS GUILD, INC. et al.

4 Plaintiffs

5 v.

11 CV 6351 (HB)

6 HATHITRUST, et al.

7 Defendants

8 -----x

New York, N.Y.  
August 6 2012  
3:15 p.m.

10 Before:

11 HON. HAROLD BAER, JR.

12 District Judge

13 APPEARANCES

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1           MR. ROSENTHAL: Well, the issue of the blind is  
2 governed by another section of the copyright law, Section 121,  
3 which again very carefully delineates the circumstances under  
4 which an authorized entity -- and the defendants here are not  
5 an authorized entity -- can make copies of works in certain  
6 formats for use by visually disabled students or otherwise.

7           And, again, in that instance, Congress weighed the  
8 rights of the various stakeholders, including profound concerns  
9 over security which were governed by saying it has to be in  
10 certain specified formats, and the interest of the visually  
11 disabled and came up in Section 121 with a mechanism for  
12 deciding when and how that could be allowed.

13           Also, defendants could have gone to individual rights  
14 holders and asked individual rights holders for permission to  
15 have their books made available under certain circumstances for  
16 visually disabled students. They didn't do that. They just  
17 copied everything. Had that done that --

18           THE COURT: You think that would have made it OK if  
19 they had gone and asked?

20           MR. ROSENTHAL: If they had asked permission of rights  
21 holders and rights holders gave --

22           THE COURT: I don't even think that's conceivable, but  
23 I gather you do.

24           MR. ROSENTHAL: How do I think it's conceivable? It  
25 might be difficult for them to get every single author of every

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1 impossible to do on a scale that the defendants want here which  
2 is every single book ever published.

3 THE COURT: I'm not sure that the every single book  
4 ever published has much to do with my concern. You have to  
5 read these laws, it seems to me, in conjunction with other  
6 laws. If you do read the copyright law and juxtapose it with  
7 the American Disabilities Act, it seems to me that you now have  
8 the ability to provide equal access to the blind, and that you  
9 have an obligation to do so, or the defendant has an obligation  
10 to do so. What do you think about that?

11 MR. ROSENTHAL: I think there is a problem with that  
12 argument which basically says that once you've done something  
13 illegal, like make multiple copies of all of the books, then  
14 you're going to argue well now that we've done this, we have to  
15 make it available to everyone.

16 THE COURT: I didn't think this was their argument.

17 MR. ROSENTHAL: I think that basically is, and under  
18 the ADA, every entity with 15 or more employees would be  
19 required then to make their books available to visually  
20 disabled if they were there. So, once the use has been made,  
21 once you've made the copies, then you have to provide them to  
22 the visually disabled.

23 THE COURT: But that's only if you've broken the law.  
24 My concern is whether looking at the ADA and juxtaposing it  
25 with your concerns, they did break the law or they didn't. It

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1 owned and they can say whether they are or aren't in the  
2 HathiTrust database. We don't have to do this stage and  
3 deprive all these authors of the right for their day in court  
4 because judicial efficiency would be very hard for all of them  
5 to come in and start bringing claims.

6 THE COURT: That's one type of judicial efficiency.

7 MR. ROSENTHAL: Well, right.

8 Finally, I just want to talk about marketing works for  
9 one moment because it tends to get forgotten and defendants in  
10 their briefing have put it at the very end of their brief, and  
11 basically said if you are really going to address that we  
12 should have more briefing, which is really astonishing given  
13 the fact I think we filed six briefs already in this case.

14 Orphan works -- there is simply no justification for  
15 defendant's orphan work program. They came up with a system  
16 where they identified works where they said we can't find the  
17 owners, and if no owner comes forward in 90 days, we're going  
18 to make them available for viewing and downloading in certain  
19 circumstances. We filed this lawsuit in that immediate time  
20 frame, at least two of the plaintiffs works were found to be  
21 orphan works. People came out of the woodwork and said, wait a  
22 minute. Those aren't orphans. In one of your declarations,  
23 the head of the Author Guild explained that he was able to find  
24 the owner of one of the orphan works with a Google search in a  
25 matter of minutes.

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1           Now defendants have said we've suspended the orphan  
2 works program, therefore, you can't adjudicate it here.  
3 Despite numerous opportunities, they've never said they ended  
4 it. They simply said we're not going to do it now. We're  
5 figuring out how to re-figure it and we'll do it later.

6           The orphan works program essentially is taking  
7 copyrighted works, making them fully available without  
8 permission, without compensation, without accountability to  
9 copyright owners. Congress has had orphan work legislation  
10 before it and hasn't acted yet. That doesn't give the  
11 defendants the right to simply decide it is time to take the  
12 law in their own hands and decide, OK, Congress won't do it,  
13 we're going to do it ourselves. So the orphan works program,  
14 leaving aside everything else in this case, is a clear  
15 copyright infringement.

16           THE COURT: Thank you.

17           I will be glad to hear from your adversary, if one or  
18 more of them have something to say.

19           MR. PETERSEN: Thank you, your Honor. I know there  
20 are a lot of facts for your Honor, but I think the easiest fact  
21 in terms of resolution of the motions is really this, this core  
22 fact, your Honor: You cannot read plaintiffs books through the  
23 HathiTrust Digital Library unless you are print disabled. The  
24 HathiTrust Digital Library does not distribute plaintiffs  
25 works, it does not display plaintiffs works, but scholars can

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UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF NEW YORK

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

**NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that all of the Plaintiffs in the above-captioned action hereby appeal to the United States Court of Appeals for the Second Circuit from the Opinion and Order of Judge Harold Baer, Jr., dated October 10, 2012, denying Plaintiffs' motions for judgment on the pleadings and summary judgment; granting in part Defendants' motions for judgment on the pleadings; and granting Defendants' and Defendant Intervenor's motions for summary judgment, and from the Judgment entered on October 12, 2012.

Respectfully submitted on this 8<sup>th</sup> day of November, 2012.

FRANKFURT KURNIT KLEIN & SELZ, P.C.

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