

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 -	:
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HATHITRUST, et al.,	:
	:
Defendants.	:
	:
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Index No. 11 Civ. 6351 (HB)

DECLARATION OF JOHN WHITE

I, John Warren White, hereby declare as follows:

1. I am the literary agent for Jack R. Salamanca, one of the plaintiffs in the above-captioned action and I submit this declaration in support of Plaintiffs’ motion for summary judgment.

2. In light of Mr. Salamanca’s poor health, I have assisted Mr. Salamanca in connection with this litigation, including providing documents and information concerning Mr. Salamanca’s works in response to written discovery requests that Defendants issued to Mr. Salamanca and appearing for a deposition taken by Defendants’ counsel. I am fully familiar with all of the facts set forth in this declaration and am able and authorized to submit this declaration regarding Mr. Salamanca’s works.

3. I began my career as a full-time literary agent in 1995 and presently represent approximately 36 authors. I have been Mr. Salamanca’s literary agent since 1999.

4. Mr. Salamanca is Professor Emeritus of the English Department at the University of Maryland. He is the author of six novels, two of which have been made into movies.

Although only one of Mr. Salamanca's novels was published while I was his agent, I am familiar with all of his prior works.

The Works At Issue

5. Mr. Salamanca is the sole author and copyright owner of each work listed on Exhibit A hereto (hereafter referred to as the "Works"). A true and correct copy of the copyright registration for each of his six Works that is registered with the U.S. Copyright Office is attached hereto as Exhibit B.

6. Although Mr. Salamanca licensed to his publishers certain exclusive rights in connection with the commercial exploitation of the Works, he did so in exchange for the payment of royalties and he remains the legal and/or beneficial owner of all rights in and to his Works. He never assigned to any third party the copyright to the Works.

Orphan Works Program

7. In or around September 2011, I was contacted by Paul Aiken, the Executive Director of The Authors Guild. Mr. Aiken informed me that as part of a so-called "Orphan Works Program," an organization called HathiTrust had listed one of Mr. Salamanca's novels, entitled *The Lost Country*, as an "orphan candidate," and that HathiTrust intended to make a digital copy of the book available on the Internet for students, faculty and users of the University of Michigan library to view, download, print and copy without providing any compensation to Mr. Salamanca. I informed Mr. Aiken that Mr. Salamanca's works were certainly not "orphan works," as Mr. Salamanca is still alive and I am his literary agent.

8. I was particularly troubled by HathiTrust's imminent plans to distribute electronic copies of *The Lost Country* for free because at that time I was in the process of finalizing an agreement with Tantor Media, Inc. ("Tantor") to have that novel and four others authored by Mr.

Salamanca, digitized and released for sale as electronic books. A copy of that agreement, which was finalized and entered into on or about November 29, 2011, is attached hereto as Exhibit C. A prior agreement with Tantor covering the digitization and electronic release of *Lilith*, entered into on September 1, 2011, is attached as Exhibit D. As shown on the schedule attached as Exhibit A, each of Mr. Salamanca's works has now been digitized and is available for sale as an electronic book on Amazon.com and other online retailers.

9. Had Plaintiffs not intervened to stop the Orphan Works Project and, as Defendants had planned, digital copies of *The Lost Country* were made available for others to view, print and/or download in full, Mr. Salamanca may have lost the opportunity to license the work for digital distribution. In addition, it is likely that Defendants' unauthorized digital release of *The Lost Country* would have adversely impacted Plaintiff's anticipated revenues from sales of both the paper and electronic versions of the novel.

10. While this lawsuit apparently caused HathiTrust to halt its Orphan Works Program and prevented Mr. Salamanca's works from being distributed online, I am deeply concerned about the potential harm to him and others if the program resumes. Mr. Salamanca is easily locatable and, in fact, was found by The Authors Guild through a simple Internet search. Had The Authors Guild not contacted me, neither Mr. Salamanca nor I likely would have become aware of HathiTrust's plans to display and distribute electronic copies of his books until it was too late to prevent their harmful effects. Defendants' missteps strongly suggest a lack of thoroughness on their part and an ineffective system of notice for authors whose works are listed as orphans. This is likely to result in substantial economic harm and to undermine the potential of bringing older books back into print, a possibility that was imminent for Mr. Salamanca and likely very real for many other authors whose works are supposedly "orphans."

Other Unauthorized Uses Of The Work

11. In addition to misidentifying *The Lost Country* as an orphan candidate, it has come to my attention that print copies of Mr. Salamanca's Works were copied without his permission when they were digitized by one the defendant universities (collectively referred to herein along with HathiTrust as "Defendants") in partnership with Google, as part of the HathiTrust and/or Google Books projects. This digitization took place without Mr. Salamanca's or my knowledge, consent, or approval. We did not authorize Google, HathiTrust, or any of the university defendants to digitize or make any other use of his Works. To date, Mr. Salamanca has received no compensation of any kind for Defendants' digitization and various uses of his Works.

Harm Resulting From Defendants' Other Uses Of The Works

12. As an author who depends in large part on the value of his work to earn a living, Mr. Salamanca agreed to join this lawsuit as a plaintiff because he believes Defendants' unauthorized digitization and use of his Works has harmed or threatens to harm him in a number of ways.

13. I have reviewed the Declaration of T.J. Stiles and agree with and incorporate by reference Mr. Stiles' descriptions of the various harms and potential harms caused by the Defendants' actions. Two differences between Mr. Stiles and Mr. Salamanca are that (as described below) Mr. Salamanca's works were out-of-print at the time Defendants' digitized his work, and he had not yet chosen to make his Works available in digital form. However, these differences do not change the fact that Defendants' actions are causing and threatening to cause damage to him and to the value of his Works.

14. Although his Works were not in print at the start of Defendants' digitization, the harms articulated in the Declaration of T.J. Stiles nevertheless apply because all of his Works are still protected by copyright law and he still held the copyrights. Whether his Works are in print or not, he has the right to choose whether or not to engage in licensing agreements for any uses of his Works, be they electronic publication, digital archiving, non-consumptive research, full-text searching, or other derivative uses. By preempting his right to make a decision as to how he wishes to exploit his Works, Defendants have narrowed the scope of his rights and lessened the strength of his control over his own Works. This is illustrated all the more deeply by the fact that Mr. Salamanca was engaged in negotiations to electronically publish his Works while Defendants were proceeding with their own unauthorized digitization and imminent distribution of *The Lost Country* in connection with the Orphan Works Program.

15. Mr. Salamanca is entitled to determine whether, when and under what circumstances his Works are scanned, digitized, copied and used. Defendants' insistence that the new, complex, technologically-enabled uses they intend to make of his Works should be permitted without his consent dangerously presupposes that copyright law does not give authors any right to control how their works are used and exploited in these contexts. To the best of my knowledge, this is not the law in the United States.

16. Defendants argue that uses of Mr. Salamanca's Works that do not allow individuals to read the text, such as non-consumptive research and full-text searching, do not inhibit sales of his Works or deprive him of licensing opportunities and therefore do not require my permission. This is not so. As the Declaration of T.J. Stiles points out, these kinds of uses represent a new market whose value is evidenced by Defendants' use of his Works, as well as the works owned by the other Plaintiffs and the millions of other works Defendants scanned and

copied. Mr. Salamanca has the legal right to decide whether or not to permit these uses, and to seek remuneration for these uses if he does decide to allow them. Defendants could have asked permission to digitize his work, but they chose not to.

17. In addition, by failing to seek a license, Defendants eliminated the usual mechanism that authors use to exercise control over our work: licensing or other agreements that define terms of use and hold licensees accountable. When Mr. Salamanca has licensed the electronic rights in certain of his works, for example to Tantor, his representatives, myself in particular, have been careful to ensure that he obtained appropriate financial benefits and other contractual protections. When Defendants make digital copies without his consent and without a contract, he is rendered powerless to dictate terms as to how his Work may or may not be used. He also has no ability to insist that HathiTrust take security measures to protect his work. He has no power to ensure that the infringing copies of his work are truly in a “dark archive” that is not accessible for viewing or further copying. He has no assurance that Defendants’ actual use of his work is limited to the uses they claim to intend to make, and no power of enforcement if their uses exceed this scope.

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

Dated: Cheshire, Connecticut
June 21, 2012



JOHN WARREN WHITE