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Attorneys for Defendants

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

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| <p>THE AUTHORS GUILD, INC., ET AL.,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>HATHITRUST, ET AL.,</p> <p style="text-align: right;">Defendants.</p> |
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Case No. 11 Civ. 6351 (HB)

**THE LIBRARIES' STATEMENT OF MATERIAL FACTS
IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT
ON FAIR USE AND LACK OF INFRINGEMENT
UNDER SECTION 106 OF THE COPYRIGHT ACT**

Pursuant to Rule 56.1 of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, the Defendants in the above captioned action (the “Libraries”) respectfully submit, in connection with their motion for summary judgment on fair use and lack of infringement under Section 106 of the Copyright Act, the following statement of material facts as to which there is no genuine issue to be tried.

The Core Functions of Academic Libraries

1. Academic libraries buy works for academic and scholarly pursuits. (June 28, 2012 Declaration of John Wilkin (“Wilkin Decl.”) ¶ 11.)
2. Academic libraries curate, maintain, and preserve works in their collections. (*Id.*)
3. Academic libraries help scholars and students identify works pertinent to their pursuits. (*Id.*)
4. Academic libraries make works within their collections available and accessible consistent with applicable law. (*Id.*)
5. The Libraries are non-profit educational institutions. (*Id.* ¶¶ 8, 55, Ex. B.)

Acquisition of Works by the Libraries

6. Academic libraries acquire works to satisfy anticipated future demand by their patrons. (*Id.* ¶¶ 13, 17–19, 21.)
7. When there is increased demand for a particular work, academic libraries will try to purchase additional copies of that work. (*Id.* ¶ 13.)
8. Each year the Libraries spend tens millions of dollars acquiring new works. (*Id.* ¶ 14.)

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. (*Id.* ¶¶ 20–21.)

Deterioration of Works in the Libraries' Collections

10. Books, in their physical form, are inherently subject to damage, deterioration and loss. (*Id.* ¶ 22.)

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. (*Id.*)

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. (*Id.* ¶ 23.)

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.e.* on paper that is particularly vulnerable to deterioration and, ultimately, loss. (*Id.* ¶ 25.)

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. (*Id.* ¶ 26.)

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. (*Id.* ¶¶ 30–31.)

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.)

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. (*Id.* ¶ 17.)

**In The Past It Has Been Difficult and Sometimes Impossible
for Academic Libraries to Help Scholars Identify Works of Potential Interest**

18. Academic libraries aid scholars in the identification of relevant works. (Wilkin Decl. ¶ 33.)

19. The immense collections housed by academic libraries would be significantly diminished without reliable and efficient search methods and related technology. (*Id.*)

20. Until relatively recently, most searches of a library’s collection relied on a physical card catalog. (*Id.* ¶ 34; June 26, 2012 Declaration of Dr. Stanley N. Katz (“Katz Decl.”) ¶ 5.)

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.)

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; *see also* Katz Decl. ¶ 8.)

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.)

Digitization of Works With the Libraries' Collections

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. (*Id.* ¶ 39.)

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. (*Id.* ¶ 41.)

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. (*Id.* ¶ 42.)

27. During this time period academic libraries lost irreplaceable volumes which, as a result, have vanished from the academic and cultural landscape. (*Id.*)

Google's Involvement in the Libraries' Digitization Efforts

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. (*Id.* ¶ 44.)

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. (*Id.* ¶ 45.)

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. (*Id.* ¶ 46, Ex. A.)

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. (*Id.* ¶ 47.)

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 missions of providing specialized services to the blind or other persons with disabilities. (*Id.*)

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. (*Id.* ¶¶ 48–51.)

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. (*Id.* ¶ 52.)

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. (*Id.*)

The Formation of HathiTrust

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. (*Id.* ¶ 53.)

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. (*Id.* ¶ 54.)

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. (*Id.* ¶ 55.)

39. The University of Michigan and HathiTrusts’s purposes are non-profit, educational purposes. (*Id.* ¶¶ 8, 55, Ex. B.)

40. The Libraries’ digitization efforts do not diminish their acquisitions of in-copyright material (digital or otherwise). (*Id.* ¶¶ 16, 69.)

The Composition of the HathiTrust Digital Library (“HDL”)

41. The combined corpus of the HDL now totals more than 10 million works. (*Id.* ¶ 57.)

42. At least 30% of the corpus consists of material that is clearly within the public domain. (*Id.* ¶ 62.)

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. (*See* Staff of S. Comm. on the Judiciary (Barbara Ringer), 86th Cong., Renewal of Copyright 31, at 220 (Comm. Print 1960).)

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; *see also* Mem. of Law in Supp. of Pls.’ Mot. For Prelim. Settlement Approval at 27, *The Authors Guild, Inc. v. Google Inc.*, 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”).)

45. Less than 9% of the HDL corpus consists of prose fiction, poetry and drama.
(Wilkin Decl. ¶ 67.)

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. (*Id.*)

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.
(*Id.* ¶ 93.)

The Limited Uses of the Works within the HDL

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. (*Id.* ¶ 68.)

49. Through the Internet, users of the HathiTrust website may search for a particular term across all works within the HDL. (*Id.*)

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. (*Id.*)

51. Unlike Google's service, the search results do not show portions of text in "snippet" format. (*Id.*)

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). (*Id.*)

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. (*Id.* ¶¶ 16, 69).

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. (*Id.* ¶ 68.)

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. (*Id.*)

56. Digitization has significantly improved the quality of access for print-disabled readers. (*Id.*)

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. (*Id.* ¶ 105.)

58. The HDL was designed specifically to enable libraries to make their collections accessible in digital format to print-disabled readers. (*Id.*)

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. (*Id.* ¶ 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.)

The Immense Public Benefits of the HDL

60. The HDL offers immense public benefit. (Wilkin Decl. ¶¶ 75–77, 83–86, 100–102, 106); (Katz Decl. ¶¶ 9–17); (Leary Decl. ¶¶ 9–14.)

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.)

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. (*Id.* ¶ 101.)

63. The HDL was constructed with the objective of making the world’s first accessible research library. (*Id.* ¶ 100.)

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. (*Id.* ¶ 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. (*Id.*)

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. (*Id.*)

66. The HDL makes it possible for students with certified print disabilities to achieve their full academic and scholarly potential. (*Id.* ¶ 106.)

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; *see also* Katz Decl. ¶ 9.)

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; *see also* Katz Decl. ¶¶ 9–10.)

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.)

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. (*Id.*; Katz Decl. ¶¶ 10–11; Leary Decl. ¶¶ 9–11.)

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.)

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; *see also* June 26, 2012 Declaration of Dr. Neil Smalheiser (“Smalheiser Decl.”) ¶¶ 27–29.)

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.)

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.)

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.)

The Orphan Works Project

76. Orphan works are works which are presumed to be in-copyright and for which a rights holder cannot be identified. (*Id.* ¶ 108.)

77. The University of Michigan developed a project that it called the “Orphan Works Project” (the “OWP”). (*Id.* ¶ 109.)

78. The OWP contemplated two distinct phases. (*Id.* ¶ 110.)

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. (*Id.*)

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. (*Id.*)

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. (*Id.* ¶ 111.)

82. Readers would have been reminded, through watermarking and other explicit notices, that the books are subject to copyright. (*Id.*)

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. (*Id.* ¶¶ 112–114.)

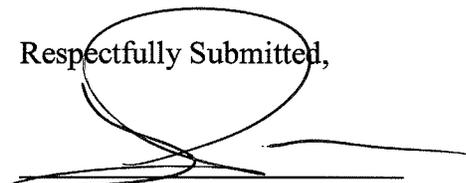
84. The University of Michigan suspended the OWP process and never proceeded to the second step of the project (i.e., it never proceeded to enable limited uses of putative orphan works) although it continues to study ways to improve the orphan identification process. (*Id.* ¶ 114.)

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. (*Id.* ¶ 116.)

86. Not a single in-copyright work has been distributed, displayed, or performed to the public as an orphan work. (*Id.*)

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Respectfully Submitted,



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