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

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

DEFENDANT INTERVENORS' RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Rule 56.1(b), Defendant Intervenors in the above-captioned case (collectively "NFB") respectfully submit the following responses to Plaintiffs' Statement of Undisputed Material Facts. NFB incorporates by reference Libraries' Response to Plaintiffs' Statement of Undisputed Material Facts and adds the following with respect to statements 128 through 137, entitled "Market Harm."

Statements 128-33:

> **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.**
>
> **(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;**
>
> **(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;**
>
> **(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**

(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;

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";

RESPONSE: As to all, with respect to uses by and for the blind and print-disabled, DENIED.

In fact, all evidence points to the contrary conclusion that because no market exists or is likely to arise for the licensing of a database of academic library collections for use by the blind in the United States, no relevant market harm exists.

Indeed, Plaintiffs state that "by tradition and industry practice, authors generally do not receive royalties for the licensing and sale of works distributed in specialized formats for use by the blind and other persons with disabilities." Pls.' Resps. to Interrog. No. 1 in Pls.' Objections and Resps. to NFB's First Set of Interrogs. and Document Reqs., dated May 8, 2012 (attached as Ex. C to Abelson Decl.) (hereinafter "Pls.' Resp to NFB Interrog. No. _"). They also acknowledge that "[Plaintiffs] have not identified any specific, quantifiable past harm, or any documents relating to any such past harm, suffered as a result of the actions of Defendants in making books in fully accessible formats available for library lending to persons who cannot access print versions of such books." Pls.' Resp. to NFB Interrog No. 5.

Some individual plaintiffs apparently favor allowing use by the blind, while others oppose it without explanation. Dep. of Timothy J. Stiles, May 31, 2012, at 50:24-51:1 (attached as Ex. 3 to Decl. of Edward H. Rosenthal (hereinafter "Rosenthal Decl.), June 29, 2012); Dep. of Pat Cummings, May 22, 2012, at 56:15-57:3 (attached as Ex. U to Decl. of Joseph Petersen, June 29, 2012). However, none of the declarations submitted by Plaintiffs, or depositions taken of

them, identify use for or by the blind as an actual or potential source of revenue, and neither do their responses to requests for admission and interrogatories specifically seeking such information. John W. White, a literary agent currently representing Plaintiff J.R. Salamanca, testified at deposition that he has never received "any offers to sell or license digital copies of Mr. Salamanca's works for the purpose of creating such derivative uses." Dep. of John W. White, June 8, 2012, at 93:15-19 (attached as Rosenthal Decl. Ex. 4).

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Dep. of the Copyright Clearance Center (hereinafter "CCC Dep."), June 4, 2012, at 13:15-14:12, 15:20-19:17, 50:15-19, 51:16-52:6 (attached as Ex. A to Decl. of Laura Ginsberg Abelson, June 29, 2012). By contrast, the declarations of Marc Maurer and George Kerscher, submitted by NFB, affirmatively demonstrate the absence of any present or reasonably emergent market mechanism for providing accessible copies to blind students and scholars. Decl. of Marc Maurer, June 27, 2012 ¶¶ 15-40; Decl. of George Kerscher, June 28, 2012, 41-50.

Statement 134:

> **(e) 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;**

RESPONSE: With respect to uses by and for the print-disabled, DENIED.

In fact, the only evidence in the record bearing on whether providing accessible copies to the blind would enhance the risk of infringement by third parties indicates that it would not.

No evidence submitted or referred to by Plaintiffs indicates the existence of any heightened risk of diversion of copyright books into illicit channels as the result of copies having

been made available to the blind, or to others with print disabilities. To the contrary, the Supplemental Declaration of James Fruchterman demonstrates the absence of such a risk. The declaration describes how, despite his organization's history of making unencrypted copies of new, popular books available to blind readers, there has been no appreciable diversion of these materials. Supplemental Decl. of James Fruchterman (hereinafter "Supp. Fruchterman Decl."), July 17, 2012, ¶¶ 13-15.

Statement 135:

> **(g) Loss or potential loss of control over the reproduction and distribution of plaintiffs' copyrighted works.**

RESPONSE: With respect to uses by and for the blind and print-disabled, DENIED.

In fact, the only evidence in the record bearing on whether providing accessible copies to the blind would appreciably affect authors' control over their works demonstrates that it would not.

No evidence submitted or referred to by Plaintiffs supports the conclusion that making accessible digital copies available to the blind appreciably diminishes authors' control over reproduction and distribution. Instead, the Supplemental Declaration of James Fruchterman indicates that the risk of authors losing control over their works through illicit reproduction and distribution is minimal. *See* Response to Statement 134, *supra* (citing Supp. Fruchterman Decl. ¶¶ 13-15).

Statement 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.**

RESPONSE: With respect to uses by and for the blind and print-disabled, DENIED.

In fact, the only relevant evidence in the record demonstrates that no market exists for the sale of accessible copies to libraries and archives.

By definition, libraries are unlikely to purchase additional hardcopies of books to serve blind or print-disabled patrons who are unable to read them, and as demonstrated in the response to Statements 129-33, *supra*, there is no actual or emergent market in accessible copies.

Statement 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

RESPONSE: With respect to uses by and for the blind and print-disabled, DENIED.

In fact, all evidence points to the conclusion that there is no plausible or likely harm from this source.

Again, Plaintiffs have produced no evidence whatsoever that any actual or emergent collective license arrangements have been or will be disturbed by a program designed to make books in university libraries practically accessible to blind and print-disabled students and scholars. As indicated in the response to Statements 133-38, *supra*, neither the Plaintiffs

CONFIDENTIAL / REDACTED have pointed to any arrangements of this kind now in being or likely to arise in the United States. In addition, the declaration of a distinguished European copyright expert casts doubt on whether such arrangements can function, in Europe or, by extension, in this country. Decl. of P. Bernt Hugenholtz (hereinafter "Hugenholtz Decl."), July 19, 2012, ¶¶ 16-19, 21-28. Furthermore, to the extent that uses for accessibility purposes are lawful in the United States under sections 107 and/or 121 of the Copyright Act, authors and other copyright owners lack the authority to require libraries or others to obtain licenses for such activities. Hugenholtz Decl. ¶ 25 & n.2.

Respectfully submitted,

/s/

Daniel F. Goldstein (admitted pro hac vice)
Laura Ginsberg Abelson (admitted pro hac vice)
BROWN, GOLDSTEIN & LEVY, LLP
120 E. Baltimore Street
Suite 1700
Baltimore, Maryland 21202
Telephone: 410-962-1030
Facsimile: 410-385-0869
dfg@browngold.com
labelson@browngold.com

Robert J. Bernstein (RB 4230)
THE LAW OFFICE OF ROBERT J. BERNSTEIN
380 Lexington Avenue, 17th Floor
New York, NY 10168
Telephone: 212-551-1068
Facsimile: 212-551-1001
rjb@robert-bernsteinlaw.com

Peter Jaszi (admitted pro hac vice)
5402 Surrey Street
Chevy Chase, Maryland 20815
Telephone: 301-656-1753
Facsimile: 301-656-7483
pjaszi@wcl.american.edu

Counsel for Defendant Intervenors