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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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
	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.)	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. (*Id.*)	Uncontroverted.
3.	Academic libraries help scholars and students identify works pertinent to their pursuits. (*Id.*)	Uncontroverted.
4.	Academic libraries make works within their collections available and accessible consistent with applicable law. (*Id.*)	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. (*Id.* ¶¶ 8, 55, Ex. B.)	Uncontroverted.
	Acquisition of Works by the Libraries	
6.	Academic libraries acquire works to satisfy anticipated future demand by their patrons. (*Id.* ¶¶ 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. (*Id.* ¶ 13.)	Uncontroverted.
8.	Each year the Libraries spend tens of millions of dollars acquiring new works. (*Id.* ¶ 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. (*Id*. ¶¶ 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." *See* UM RFA No. 5(ii); Goldman Decl. ¶ 5, Ex. C.
	Deterioration of Works in the Libraries' Collections	
10.	Books, in their physical form, are inherently subject to damage, deterioration and loss. (*Id*. ¶ 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. (*Id*.)	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. (*Id*. ¶ 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.

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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.)	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. (*Id*. ¶ 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. (*Id*. ¶¶ 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. (*Id*. ¶ 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
	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.)	Uncontroverted.
19.	The immense collections housed by academic libraries would be significantly diminished without reliable and efficient search methods and related technology. (*Id.*)	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. (*Id.* ¶ 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; *see also* 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. *See, e.g.*, 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
	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.)	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. (*Id.* ¶ 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. (*Id*. ¶ 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.

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27.	During this time period academic libraries lost irreplaceable volumes which, as a result, have vanished from the academic and cultural landscape. (*Id*.)	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.
	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.)	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. (*Id*. ¶ 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. (*Id*. ¶ 46, Ex. A.)	Uncontroverted, except reference is made to the agreement with Google for proof of its contents. *See* 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. (*Id*. ¶ 47.)	Uncontroverted, except reference is made to the agreement with Google for proof of its contents. *See* 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. (*Id*.)	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. (*Id*. ¶¶ 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. (*Id*. ¶ 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. (*Id*.)	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.
	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.)	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. (*Id*. ¶ 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. (*Id*. ¶ 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's purposes are non-profit, educational purposes. (*Id*. ¶¶ 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. *See* 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). (*Id*. ¶¶ 16, 69.)	Controverted. Each book that the libraries digitized without permission represents a lost sale for the rightsholder. UF 129, 136.
	The Composition of the HathiTrust Digital Library ("HDL")	
41.	The combined corpus of the HDL now totals more than 10 million works. (*Id*. ¶ 57.)	Uncontroverted.
42.	At least 30% of the corpus consists of material that is clearly within the public domain. (*Id*. ¶ 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. (*See* 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%. *See* 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; *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").)	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. *See* 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. (*Id*.)	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. *See* 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. (*Id*. ¶ 93.)	Controverted in that the HDL presents numerous security risks**.** UF 134.
	The Limited Uses of the Works within the HDL	

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. (*Id.* ¶ 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. (*Id.*)	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. (*Id.*)	Uncontroverted.
51.	Unlike Google's service, the search results do not show portions of text in "snippet" format. (*Id.*)	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). (*Id*.)	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. (*Id*. ¶¶ 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. (*Id*. ¶ 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. (*Id*.)	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. (*Id*.)	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. (*Id.* ¶ 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. (*Id.*)	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. (*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.)	Controverted. Each book that the libraries digitized without permission represents a lost sale for the rightsholder. UF 129, 136.
	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.)	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. (*Id*. ¶ 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. (*Id*. ¶ 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. (*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.*)	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. (*Id*.)	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. (*Id*. ¶ 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; *see also* 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; *see also* 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. (*Id*.; 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; *see also* 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. *See, e.g.*, 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. *See, e.g.*, 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.
	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.)	Uncontroverted.

NO.	DEFENDANTS' ASSERTED UNDISPUTED FACT	RESPONSE
77.	The University of Michigan developed a project that it called the "Orphan Works Project" (the "OWP"). (*Id*. ¶ 109.)	Uncontroverted.
78.	The OWP contemplated two distinct phases. (*Id*. ¶ 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. (*Id*.)	Controverted because in the first phase of the OWP, the University of Michigan was not diligent or responsible in its effort to identity 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. (*Id*.)	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. (*Id*. ¶ 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. (*Id*.)	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. (*Id*. ¶¶ 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. (*Id*. ¶ 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. (*Id*. ¶ 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. (*Id*.)	Uncontroverted.

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