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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)

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.

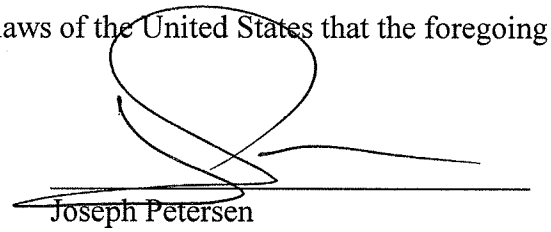
2. Attached hereto as **Exhibit A** is a true and correct copy of "Statement of Position as to Certain of the Draft Copyright Proposals of the Register of Copyrights," by American Book Publishers Council, Inc. & American Textbook Publishers Institute, dated June 12, 1964 and included in *Copyright Law 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 A

88th Congress
2d Session

HOUSE COMMITTEE PRINT

COPYRIGHT LAW REVISION

Part 4

FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW

DECEMBER 1964

Printed for the use of the House Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
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FOREWORD

DECEMBER 1, 1964.

This is the fourth in a series of prints on Copyright Law Revision released by the House Committee on the Judiciary. The first, issued in July 1961, presented the Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law. The second (Part 2), issued in February 1963, contained the discussions and comments on the report. Part 3, issued in September 1964, contained (1) a preliminary draft of provisions for a revised copyright law, prepared by the Copyright Office and discussed in a series of eight meetings of an advisory group of specialists convened by the Register, and in letters of comment; and (2) a transcript of the first four meetings and related comments. The instant print (Part 4) contains a transcript of the last four meetings and additional letters of comment.

In issuing this material the committee neither approves nor disapproves any of the views expressed therein. The material is issued for the information and convenience of persons interested in U.S. copyright law revision.

EMANUEL CELLER,
Chairman, Committee on the Judiciary.

or otherwise respond to this memo—not only now, but throughout the whole period in which we shall be concerned with copyright revision.

Finally, we should bear in mind that the final statute should and no doubt will reflect a synthesis of private interests in the general public interest. We are likely to be the more successful in having our industry's interests protected in the statute the more closely they stand in full accord with the public interest.

By DAN LACY,
Managing Director,
American Book Publishers Council.

AMERICAN BOOK PUBLISHERS COUNCIL, INC.
AND
AMERICAN TEXTBOOK PUBLISHERS INSTITUTE

June 12, 1964

STATEMENT OF POSITION AS TO CERTAIN OF THE DRAFT COPYRIGHT PROPOSALS OF THE REGISTER OF COPYRIGHTS*

Section 4 (Works Authored by Government Employees)

The Council and the Institute endorse the Register's proposal set forth in subsection (a) affording copyright protection to works created by an official or employee of the United States Government except as to works created in the course of executing the duties required of him by his office or position. The Council and the Institute also endorse the proposal in subsection (c) permitting copyright in certain Government publications as set forth therein, provided, however, that the agency authorized to grant copyright to such Government publications be the Director of the Budget rather than the Congressional Joint Committee on Printing.

It is obviously in the public interest for Federal officials and employees to be free to write for the public about matters in the area of their responsibility (but not required by their official duties) and to publish such works through non-governmental channels, and indeed for them to be encouraged to do so. To deny copyright to such authors and hence to make private publication difficult or impossible and thereby remove their incentive to write would, in fact, constitute a serious suppression of important discussions. It would be most unfortunate if Federal officials were silenced except for their publications through official channels.

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*"This is a joint statement of position submitted by American Book Publishers Council, Inc. and American Textbook Publishers Institute. The members of these associations publish at least 85 percent of all books published in the United States."

A very high proportion—and a rapidly increasing proportion—of research in practically all fields, especially in medicine and nuclear physics, is carried on by or with the financial assistance of agencies of the Federal Government. To deny copyright to reports embodying the results of such research is in effect to deny the opportunity of their private publication. It would mean that the public could enjoy the benefits of such research only to the extent that a Federal agency might have the desire and the means to publish them.

Even for works that come within the purview of proposed subsection (a), non-governmental publication may be clearly in the public interest in certain circumstances:

(i) The publication may be of a kind that will receive much wider dissemination if privately than if officially published. It is relevant, for example, to compare the dissemination of the history of the Navy in World War II, published by a commercial publisher, with that of the history of the Army, published by the Government Printing Office, or of the privately and officially published editions of the Smyth report on atomic energy.

(ii) It may be much less costly to the Government to license the private publication of a work than to publish it itself. When a work is published by the Government Printing Office, the issuing agency must pay with taxpayers' money for all costs of authorship and editing, all plant costs (*i.e.*, composition and platemaking), make-ready costs, and the costs of an initial press run. The Superintendent of Documents buys, or may buy, a stock for sale to the public but pays only the extra cost of the additional run; and the sales price to the public is based on a modest mark-up from that overrun cost. This means that the taxpayer subsidizes every purchaser. On the other hand, if the work is licensed to a private publisher, the publisher meets many editorial and all manufacturing costs, and by royalty payments may reimburse the issuing agency for all or part of the costs of authorship. These costs in turn are ultimately borne by the purchaser who directly benefits, rather than by the taxpayer.

These considerations of public interest argue for a definition of Government publications as is now set forth in proposed subsection (a) that would include writings by Government officials or employees only if the preparation of such writings were a part of their specifically assigned duties and would therefore permit copyright in the name of the author of writings done under contract with or supported by grants from Federal agencies.

Section 5 (Exclusive Rights Given to a Copyright Owner, Including Uses by Information Storage and Retrieval Systems)

The Council and the Institute agree in principle with the Register's Draft as to what exclusive rights ought to be ascribed to the copyright proprietor. However, that portion of Section 5(a) that makes reference to the rights of the copyright owner with respect to uses by information storage and retrieval systems requires a substantive change. The Council and the Institute recommend that the second sentence of Section 5(a) as set forth in the Register's Draft be revised as follows:

> "It shall include the right to reproduce the work in visual copies, to make or duplicate sound recordings of it, to make a translation, adaptation, or any other derivative work from it and to reproduce or program it in whole or in part in any form in the operation of an information storage and retrieval system."

It must be emphasized that the rights granted by this revised provision, like all other rights granted to a copyright owner, are subject to the concept of fair use. It is only to the extent that information storage and retrieval systems by conceptual indexing, abstracting and other techniques exceed the boundaries of fair use that the book publishing industry is seeking protection.

The process of information retrieval begins with the construction of an index to new and recurrently used documents. These documents may be research reports, journal articles or entire books.

The publication of an ordinary topical index of a book comes within the concept of fair use as a matter of common sense and equity. Such indexes are not substitutes for purchase of the books involved. By contrast, indexing for information storage and retrieval is designed to substitute in part for handling and reading the book itself. (Cf. *Macmillan Co.* v. *King*, 223 Fed. 862, 864–867)

The index references prepared for this purpose are significantly different from the index entries found in books. For information retrieval from machines, the relatively simple topical index of books is inadequate.

Part of the programming for information storage and retrieval systems is the reduction of a book to key words conveying concepts. To the extent that the user seeking information from the machine calls upon the results of such programming he is using the machine as a substitute for the book from which the conceptual index was derived. Only if the user ultimately (upon recommendation by the machine) calls upon the retrieval of the basic book or document or a page thereof is there a "copying" or "reproduction".

The inescapable point of these processes is that they are designed to substitute for books and to make multiple copies of books unnecessary. Even the initial indexing offers a substitute to the user for taking a book in his hand and turning its pages.

Thus, it should be realized that the kind of indexing undertaken in the programming for information storage and retrieval systems is really in the nature of an adaptation or a condensed version of the work. It ought to be recognized as a new use of literary property. In addition, such activities as scanning, abstracting, momentary flashing of a page or other small portion of a work on a screen come under the categories of uses of copyrighted works by the newly developed machinery. Such uses, it is submitted, should be rights afforded to the copyright owner. In fact, the Copyright Office has taken the position that copyright registration for computer programs is possible under the present law. It would seem to us only fair, if a computer program, based upon a copyrighted work, is entitled to its own copyright, that the right to control such programming should belong to the owner of the copyright of the work upon which such programming is based.

The basic question is whether the owners of these mechanical devices should be given free use of the printed works which they utilize. If such free use were allowed, obviously the number of purchasers of printed works would be so reduced that the incentive to create and publish would be virtually destroyed.

A close analogy can be found in the field of music. The value of a musical composition is recognized as a matter of common sense and as a matter of law as including income from uses other than copying the melody or composition from the printed sheet music on to other sheets of paper or other tangible substances. Today we take for granted that the main source of income to the composer and publisher of a musical composition are from *performance* of the work on phonograph records, over the airways, and on the living stage. That portion of the Copyright Law that protects performance of music from free use best serves the intent of copyright protection, which is to give economic incentive to continuing creation and dissemination of music for the ultimate benefit of our culture and our citizens. The consequence of free performance rights to the composers and the publishers of music is so obvious that no one would contemplate it. The book publishing industry is now seeking similar protection of literary works as that afforded musical compositions.

Just as composers and music publishers under a changed technology found economic survival under the performance rights provisions of the Copyright Law instead of those provisions protecting printed sheet music, the authors and book publishers may find that the protection of printed books from "copying" or "reproduction"

is an illusory protection and leaves them economically vulnerable if free use of their copyrighted material is permitted in the operation of information storage and retrieval systems.

Given adequate copyright protection, the book publishing industry can accommodate to advancing technology.

Alternative B of Section 5 (c) and Section 8 (Public Performance of Literary Works)

The Council and the Institute agree in principle with the Register's proposed Alternative B of Section 5 (c).

Most non-profit "public performances" of literary works probably consist of the reading of poems, stories, or children's books aloud in school, Sunday school, churches, or libraries; and generally speaking, copyright owners wish neither to forbid such use nor to be burdened with many thousands of requests to make such uses.

The rapid growth of educational television, however, has introduced a wholly new problem. Although any commercial broadcast would no doubt be considered to be "for profit", even though on an unsponsored sustaining program, educational station broadcasts presumably would not be held to be "for profit". Yet educational broadcasts may reach very large audiences of hundreds of thousands or conceivably of millions. The basis of a program so broadcast may be the reading of a poet's works, or of a short story, or of installments of a novel. It may well consist of the presentation of long extracts from a textbook, and may employ copyrighted maps, charts, and other visual aids. This is obviously an altogether different use from the non-profit performances above referred to, and it seems intolerable that a copyright owner should have no right to claim compensation for the vastly expanded uses of his work by radio and television.

The book publishing industry has an important stake in educational broadcasting and in an increased attention to books in educational programming. Reading extensive portions of a book on educational radio or television may indeed be a useful means of promotion; but even more important in the long run will be the effect of well-conceived educational broadcasting on the general stimulation of reading interests. We have every reason to encourage the fullest attention to, and use of, literary works in educational broadcasting that are consistent with the protection of the basic rights of copyright owners.

A further complication is that the law regarding performance rights must address itself not only to the technology and practices of broadcasting as they now exist, but to the presently unforeseeable media of many years hence, when the performance of written works may have an importance and a character very different from anything we can now imagine.

The Council and the Institute believe that educational broadcasting of high quality should be nurtured, but that copyright owners should be fairly compensated for educational uses of their work as well as for other uses, whether that educational use be made by the application of ink to paper or by the dissemination of electromagnetic waves.

The Council and the Institute recommend that all broadcasts of non-dramatic copyrighted material should be treated as public performances for profit. Accordingly, the Council and the Institute endorse Section 8 provided that subsection (a) thereof, referring to "normal teaching activities", be changed so as to read "normal teaching activities excluding broadcasts".

Section 5(d) (The Right to Exhibit Pictorial, Graphic and Sculptural Works)

The Register's proposed Section 5(d) gives to a purchaser of a pictorial, graphic or sculptural work complete freedom to exhibit purchased copies of each such work. The Council and the Institute believe that this provision was not intended to include the right to exhibit such purchased copies over television or any other medium of mass communication.

Therefore, the Council and the Institute recommend that the second sentence of Section 5(d) be deleted. However, in order to preserve the normal right of private exhibition, it is further recommended that the exemptions from exclusive performance rights as set forth in Section 8 be broadened to include exhibition rights, subject to the proviso that such rights shall not include the right to exhibit over television or any other medium of mass communication.

Section 6 (Fair Use)

Again in view of a rapidly changing technology, express language with respect to fair use becomes appropriate in the Copyright Law. Accordingly, the Register's proposed Section 6 is endorsed with some language changes. Thus, fair use, it is urged, should be referred to in the following terms:

> "All of the exclusive rights specified in Section 5 shall be limited by the privilege of making fair use of a copyrighted work. In determining whether, under the circumstances in any particular case, the use of a copyrighted work constitutes a fair use rather than an infringement of copyright, the following factors, not to the exclusion of others, shall be considered: (a) the purpose and character of the use, (b) the nature of the copyrighted work, (c) the amount and importance of the material used in relation to the copyrighted work as a whole, and (d) the effect of the use upon the potential value of or demand for the copyrighted work."

The Council and the Institute also favor the inclusion of the following language in connection with Section 6, which language has been suggested by others interested in the revision of the Copyright Law:

> "Fair use may be pleaded as a defense to a claim of alleged infringement, as to which defense the alleged infringer shall bear the burden of proof."

Section 7 (Photocopying)

In view of the widely divergent views expressed on this subject to date, the Council and the Institute are of the opinion that photocopying should not be specifically mentioned in the law and that Section 7 of the Register's draft should be deleted.

The Copyright Law is now silent on the question of photographic copies of work under copyright, and therefore, in each instance, the question is *sui generis* as to whether the making of a photocopy of a copyrighted item without the permission of the copyright owner is an infringement or justifiable under the doctrine of fair use.

Machines and materials used in photocopying are becoming rapidly less expensive and more efficient. They are available in virtually every office, every library, every school and even in railroad stations. Their most efficient use in schools and libraries is for copying portions of books as required by readers. They are used to copy articles from encyclopedias, from works of history, from source books, dictionaries, atlases—from any book that is not read entirely but used a few pages at a time.

As a result, a school or library need have only one copy of such books in its collection, where formerly it had many copies. Photocopying equipment substantially reduces the publisher's market for standard reference works and for all other scholarly works used for reference purposes.

At the present time 64 pages of a book can be placed upon microfilm for 15 cents. The microfilm may then be placed in a *reader*, where the pages are enlarged to original size. The film may also be used to produce other films, or in a *reader-printer* may be used to print out pages in original size on photosensitive paper.

Reference works, atlases, encyclopedias, dictionaries, glossaries of terms and the like are not purchased for cover to cover reading. It is customary for users of such works to consult only small portions or sections thereof. Thus, by having the required portions of the work made available to the user by a library's copying service, the result could well be that one copy of a work would suffice where the market had previously existed for fifty. The research department of a large manufacturing company purchases and pays for the machinery, equipment, furniture, paper and all other material utilized by the re-

searchers for the potential ultimate financial gain of the company. The technical knowledge or information created or assembled and prepared for dissemination to these researchers by the publishers should likewise be paid for.

Section 11 Alternatives B and C (Compulsory License for Sound Recording of Nondramatic Musical Works)

The Council and the Institute endorse the view that there should be no provision made for compulsory licenses of any copyrighted works.

Section 12 ("Juke Box Exemption")

The Council and the Institute endorse the view that performances of copyrighted works by coin-operated machines should be part of the exclusive rights afforded to the copyright owner.

Section 14(c) (Definition of a "Work Made for Hire")

The Register's Draft excludes from the definition of a "work made for hire" a work made on special order or commission.

The prior statements of the Council and the Institute as well as the exhibits submitted with this statement describing the reference book, the map publishers, and the test book segments of the industry present graphically why the Register's exclusion of works made on special order or commission would result in creating insuperable obstacles in connection with the publication of works containing introductory material or art work and in connection with the publication of translations, encyclopedias, maps and tests.

The Council and the Institute sympathize with the aim to exclude, for example, a composer commissioned to write a symphony from the status of an employee for hire. It is submitted, however, that the broad language suggested by the Register in an effort to protect a limited group of individuals results in major economic dislocation in areas of publishing which could not have been intended.

Accordingly, the Council and the Institute recommend deleting the definition of a work made for hire which appears as a footnote to Section 14(c) and urges instead that a work made for hire should be defined as

"(a) a work created by an employee within the scope of his employment;
(b) a work created on special order or commission if the parties so agree in writing."

Section 16 (Limitation on Transfers of Copyright)

The Council and the Institute reiterate their objections to both Alternatives A and B of this section. Alternative A limits the period of transfer or assignment of copyright to no more than 25 years from the date of the transfer. Alternative B provides that within 3 years

following the expiration of 20 years from the date of execution by an author of a transfer of copyright, if the profits received by the transferee or his successors are strikingly disproportionate to the compensation, etc. received by the author or his successors an action may be brought by the author or his legal representatives to reform or terminate the transfer.

Book publishers—who bear the entire financial risk—are, obviously, much better off under the present law than under either of these alternatives. The usual publishing contract provides that the publisher may use the material for the term of copyright and all renewals. Under such a contract if the author survives the renewal in the 28th year, the publisher may use the material for 56 years. If the author does not survive, then the minimum period available for the publisher's use of the material is 28 years. Under the new proposal, the publisher's term would be substantially decreased; conceivably such decreased term could be less than 25 years, as against today's minimum of 28 years and maximum of 56. On the other hand, the author would be obtaining a term of either 75 years or for his life plus 50 years.

It is the position of the Council and the Institute that, as under the British Copyright Law, there should be no reversion; that the author is competent to bargain freely in transferring his copyrighted work, just as if he were selling his house. He should not be a ward of society and should not be entitled to any greater protection than is afforded to inventors who are free to deal with their patent rights as they see fit. Furthermore, the antiquated concept that an author requires protection against his own improvidence in bargaining with a publisher is not true today if it ever was. Today an author is generally represented by a literary agent, by an attorney trained in the field of literary property and by tax counsel. As a matter of fact, if an author's first book sells well, usually other publishers bid for him and his original publisher must bargain competitively or lose the author. And it should not be overlooked that the usual out-of-print clause in the publishing contract is an additional source of protection to the author.

The Council and the Institute submit that no logical basis exists for granting additional rights to authors by extending the term of copyright and at the same time diminishing the rights of publishers as is provided in Alternatives A and B. Therefore, the Council and the Institute recommend that any modification of the term of copyright should enure to the benefit of publishers as well as authors.

Additionally, we make the following comments:

As to Alternative A, the proposed section would impose upon both publishers and authors (or their representatives) the onerous burden of renegotiating contracts even though both parties are

satisfied with the terms of the contract as originally executed.

As to Alternative B, obviously such a remedy would tend to stir up litigation with its accompanying expense and subject the publisher to the risk of losing his publication rights at the end of about 20 years or of having a new contract imposed on him by a judge in most instances unfamiliar with the problems of the book publishing business.

Furthermore, if the proposed revision should provide for the term of copyright to commence with the creation of material, the publishers' rights, as limited under both Alternatives, would be further curtailed, particularly in the field of encyclopedias and other reference works where the collation of newly created material may take from 5 to 13 years.

Sections 20 and 21 (Duration of Copyright)

The Council and the Institute believe that it is wholly impracticable to date the commencement of the copyright term from creation of the work. Publishers have no effective way of ascertaining when such creation took place. It would seem that the present system of having the term commence from date of publication is still the most workable, whether the term of copyright be a specific number of years or the life of the author plus 50 years. In this connection, the following recommendation is made as to posthumous works: (i) if the term adopted should be for a specific number of years, then the duration of copyright of posthumous works should be for the same period as non-posthumous works, commencing with date of publication; (ii) if the term adopted should be life of the author plus 50 years, then the duration of copyright of posthumous works should be 50 years from date of publication.

Additionally, the Council and the Institute recommend that whatever system is adopted the provisions thereof should enure to the benefit of works in copyright on the effective date of the new law, with the proviso that such works, in no event, shall continue in copyright for a lesser period than under present law.

Section 38 (Remedies for Infringement)

The Council and the Institute oppose the alternative provision for damages as set forth in Section 38 of the Draft, i.e., limiting recovery for copyright infringement to whichever is the largest amount of (1) damages suffered as a result of the infringement, or (2) infringer's profits attributable to the infringement, or (3) statutory damages of not less than $250. nor more than $10,000.

The Council and the Institute believe that the present provision for damages (Title 17, Sec. 101 (b)) as interpreted by the U.S. Court of Appeals for the 2nd Circuit in the recent case of *Peter Pan Fabrics*,

Inc. v. *Jobela Fabrics, Inc.* (329 F.2d 194) constitutes a more realistic approach toward discouragement of infringement. In that case the Court held that the measure of recovery under Section 101(b) is cumulative, encompassing both net profits of the infringer and damages of the copyright holder.

In arriving at its decision in the *Peter Pan* case, the Court relied on the decision of the Supreme Court of the United States in *F. W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U.S. 228, 233, where the latter Court said:

> "[A] rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers. It would fall short of an effective sanction for enforcement of the copyright policy. The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct."

Section 43 (The "Manufacturing Clause")

The Council and the Institute at their last annual meetings voted unanimously for the abolition of the manufacturing clause and endorse the Register's Alternative A of Section 43, which proposes the elimination of that clause.

It is only fair that all authors be accorded equal treatment under the Copyright Law of the United States and that authors who are American citizens or domiciliaries not be placed in a less advantageous position than foreign authors as would result from the adoption of Alternative B which provides in substance for the continuation of the present manufacturing clause.

As the manufacturing clause now stands, any book in the English language must be printed and bound in the United States from type set in the United States in order to receive copyright protection with the exceptions noted below:

1. Works by citizens of countries that have ratified the Universal Copyright Convention or works first published in a ratifying country do not have to comply with the manufacturing clause unless the author is a citizen of or living in the United States. For practical purposes this means it does not apply to works of British authors.

2. With respect to works by an American author published abroad an *ad interim* copyright can be obtained for five years permitting importation of not more than 1,500 copies of the work.

3. Under a widely accepted interpretation of the Act, works produced by lithographic process can be considered to have complied with the manufacturing clause if every step in that process is performed in the United States, even though the reproduction proof was imported.

In a prior statement the Council and the Institute concurred in the Register's recommended repeal of the manufacturing clause subject, however, to a study to be undertaken to ascertain whether any serious damage would result to the American book manufacturing industry. Such study has been nearly completed. From it, it becomes clear that the impact of repeal of the manufacturing clause on American book manufacturing would be very small, if not negligible.

The manufacturing clause has no logical place in the Copyright Act since it is purely a matter of commercial protection and not of copyright. It is unnecessary as a matter of protection.

Wage rates in the printing industries are substantially higher in the United States than in most other countries (though the gap seems to be rapidly closing), but except for difficult composition of scientific and technical texts and for color reproductions, this disadvantage is more than offset by the economies of high-speed printing and binding facilities and the convenience of having a nearby source of supply. This does not have to be a matter of conjecture. The manufacturing clause does not *now* apply to works in the public domain or to works of nationals of other members of the Universal Copyright Convention or to works of foreign authorship first published in UCC member countries. Yet there is no significant difference in the practices of American publishers with respect to the manufacture of works to which the clause does not apply. American editions of the works of Shakespeare and Tennyson and Churchill and Snow and Eliot are manufactured in the United States in precisely the same way as works of current American authors. Nor did the repeal of the manufacturing clause with respect to UCC members (*i.e.*, foreign authors) bring about any change in the manufacture of books of British authorship from the practices previously followed.

Meanwhile, American book manufacturing has been growing rapidly, and the Book Manufacturers Institute reports that its members have been compelled to reinvest a major part of their profits as well as to borrow heavily in order to expand rapidly enough to keep up with the evergrowing demand. It is perfectly clear that any slight transfer of work to foreign sources of supply would be almost imperceptible in the light of the continuing rapid growth of the industry. Increasing demands of schools, colleges, and libraries that are assured for as long as the future can be foreseen make it clear that the problem of the American book manufacturing industry will continue to be one of keeping up with the demand rather than finding enough work.

Against this background, it seems peculiarly unjustifiable to attempt to use the Copyright Law to force every step in the manufacture of every book to be done in the United States, even though the special circumstances of unusually difficult composition, foreign language

quotations, color work, or foreign collaboration may make some use of foreign facilities essential in the manufacture of a particular book.

Respectfully submitted.

AMERICAN BOOK PUBLISHERS COUNCIL, INC.,
(Signed) RAYMOND C. HARWOOD, *President.*
AMERICAN TEXTBOOK PUBLISHERS INSTITUTE,
(Signed) EMERSON BROWN, *President.*

APPENDICES

Membership of the American Textbook Publishers Institute includes publishers of map, tests and reference works.

The following is a description of certain special segments of the book publishing industry by its own representatives as illustrative of the problems created by the above-described sections of the Register's proposed draft of the Copyright Law:

Section A—Reference Book Publishing
Section B—Map Publishing
Section C—Test Publishing

A. THE INTEREST OF REFERENCE BOOK PUBLISHERS IN COPYRIGHT LAW

The Growth of an Industry

In today's world where the education needs and growth of knowledge are expanding at unbelievable rates, encyclopedia publishers are faced with the monumental task of further refining and evolving techniques adaptable to this age of science and space. Research and creative costs in publishing a reference work today have and will continue to multiply at extraordinary rates with the ever-changing and increasing store of knowledge that man has about himself and the world and universe he lives in.

Today there are 28 Subscription Reference Book Publishers and Distributors in the United States. Over the past decade the increasing demand for their publications in schools, libraries, and homes has been phenomenal. In 1952 their retail sales volume was $106 million. By 1963, this volume had more than tripled to a total of $380 million.

The Nature of Encyclopedia Publishing

The function of an encyclopedia is to bring together from diverse sources information of value to the general reader, to verify that information, and to present it in usable form.

No one person can write and publish an encyclopedia. No group of writers small enough to be thought of as collaborating authors can produce an encyclopedia. The enterprise calls for the combined talents of scholars and specialists, of researchers, librarians, and educators,

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 partners 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/itcsdocs/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) 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.

EXHIBIT C

SHARED DIGITAL REPOSITORY COLLABORATIVE EFFORT AGREEMENT