

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

THE AUTHORS GUILD, INC., et al.,

Plaintiffs,

v.

HATHITRUST, et al.,

Defendants.

Case No. 11-cv-6351(HB)

**ORAL ARGUMENT
REQUESTED**

**MEMORANDUM IN SUPPORT OF THE MOTION OF
THE NATIONAL FEDERATION OF THE BLIND AND OTHERS
TO INTERVENE AS DEFENDANTS**

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

OF COUNSEL:

The Authors Guild, Inc. et al v. Hathitrust et al Doc. 25
Daniel F. Goldstein
Laura Ginsberg Abelson
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

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

*Counsel for National Federation of the Blind,
Georgina Kleege, Blair Seidlitz and Courtney Wheeler*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
FACTS	1
ARGUMENT	6
I. The Proposed Intervenor may intervene as of right	6
A. The Proposed Intervenor's application is timely	7
B. The Proposed Intervenor has protectable interests that may be impaired by disposition of this action	8
1. This action could impair Defendants' obligations under the ADA to make the HathiTrust Digital Library available to Proposed Intervenor	10
2. This action could impair Defendants' ability to use limitations on a copyright holder's rights to make the HathiTrust Digital Library available to Proposed Intervenor	12
a. Proposed Intervenor has a legally protectable interest arising from Section 121 of the Copyright Act, which authorizes the Defendants to provide accessible copies of published books to blind and other print-disabled students and faculty.....	14
b. Proposed Intervenor has a legally protected interest in the fair use of the HathiTrust Digital Library	16
C. The Proposed Intervenor's interests are not adequately protected by the parties	17
II. Proposed Intervenor may also be permitted to intervene.....	19
CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

<i>Alleman v. United States</i> , CIV. 99-3010-CO, 2003 WL 23975165 (D. Or. Nov. 10, 2003)	13
<i>Alston v. Coughlin</i> , 109 F.R.D. 609 (S.D.N.Y. 1996)	9, 18
<i>Campbell v. Acuff-Rose Music Inc.</i> , 510 U.S. 569 (1994).....	16
<i>County of St. Louis v. Thomas</i> , 162 F.R.D. 583 (D. Minn. 1995).....	13
<i>D'Amato v. Deutsche Bank</i> , 236 F.3d 78 (2d Cir. 2001).....	8
<i>Dow Jones & Co., Inc. v. U.S. Dep't of Justice</i> , 161 F.R.D. 247 (S.D.N.Y. 1995)	18
<i>Entergy Nuclear Vermont Yankee, LLC v. Shumlin</i> , 1:11-CV-99-JGM, 2011 WL 2173785 (D. Vt. June 2, 2011).....	13
<i>Farmland Dairies v. Comm'r of N.Y. State Dep't of Agric. & Mkts.</i> , 847 F.2d 1038 (2d Cir. 1988).....	8
<i>Harper & Row v. Nation Enterprises</i> , 471 U.S. 539 (1985).....	16
<i>In re Bank of N.Y. Derivative Litig.</i> , 320 F.3d 291 (2d Cir.2003).....	7, 8
<i>In re Egri</i> , 68 F. App'x 249 (2d Cir. 2003).....	8
<i>In re Holocaust Victim Assets Litig.</i> , 225 F.3d 191 (2d Cir. 2000).....	7
<i>In re NASDAQ Mkt.-Makers Antitrust Litig.</i> , 184 F.R.D. 506 (S.D.N.Y. 1999)	8
<i>In re Sierra Club</i> , 945 F.2d 776, 779 (4th Cir.1991)	13
<i>Ligas v. Maram</i> , No. 05 C 4331, 2010 WL 1418583 (N.D. Ill. April 7, 2010)	12

<i>MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.</i> , 471 F.3d 377 (2d Cir. 2006).....	8
<i>McNeill v. N.Y. Housing Auth.</i> , 719 F. Supp. 233 (S.D.N.Y. 1989).....	20
<i>N.J. Carpenters Health Fund v. Residential Capital, LLC</i> , 08 CV 8781 (HB), 2010 WL 5222127 (S.D.N.Y. Dec. 22, 2010).....	9
<i>N.Y. Public Interest Research Grp., Inc. v. Regents of Univ. of State of N.Y.</i> , 516 F.2d 350 (2d Cir. 1975).....	18, 19
<i>R Best Produce, Inc. v. Shulman-Rabin Mktg. Corp.</i> , 467 F.3d 238 (2d Cir. 2006).....	7
<i>Restor-A-Dent Dental Labs, Inc. v. Certified Alloy Prods., Inc.</i> , 725 F.2d 871 (2d Cir. 1984).....	9
<i>Trbovich v. United Mine Workers of Am.</i> , 404 U.S. 528 (1972).....	18
<i>United States v. Pitney Bowes, Inc.</i> , 25 F.3d 66 (2d Cir. 1994).....	8, 20
<i>United States v. State of N.Y.</i> , 820 F.2d 554 (2d Cir. 1987).....	8
<i>Utah Ass'n of Counties v. Clinton</i> , 255 F.3d 1246 (10th Cir. 2001)	13
<i>Weixel v. Bd. of Educ. of City of N.Y.</i> , 287 F.3d 138 (2d Cir. 2002).....	10
<i>Werbungs Und Commerz Union Austalt v. Collectors' Guild, Ltd.</i> , 782 F. Supp. 870 (S.D.N.Y. 1991).....	9
<i>WildEarth Guardians v. Nat'l Park Serv.</i> , 604 F.3d 1192 (10th Cir. 2010)	13

Statutes

17 U.S.C. § 107.....	12
17 U.S.C. § 121.....	14

42 U.S.C. § 12131.....	10
42 U.S.C. § 12132.....	10
42 U.S.C. § 12181.....	10

Other Authorities

142 Cong. Rec. S. 9763, Sept. 3, 1996	14, 15
Charles Alan Wright and Arthur R. Miller, <u>Federal Practice and Procedure</u>	19
Facts: Copyright Law Amendment, 1996,” at loc.gov/nls/reference/factsheets/copyright.html.	15
House Report No. 94-1476, <i>Copyright Law Revision</i> , 94th Cong., 2d Session (1976).....	16, 17
M. Suzanne Brown and LeiLani Freund, SPEC Kit 321: Services for Users with Disabilities (Association of Research Libraries, December 2010), available at www.arl.org/ bm~doc/spec-321-web.pdf	15
Submitting Scanned Books to Bookshare,” available at www.bookshare.org/assets/docs	15
Wright and Miller, <u>Federal Practice and Procedure</u>	20

Rules

Fed. R. Civ. P. 24.....	Passim
-------------------------	--------

INTRODUCTION

The National Federation of the Blind, Blair Seidlitz, Courtney Wheeler, and Georgina Kleege (collectively "Proposed Intervenor"), seek leave pursuant to Rule 24, Fed. R. Civ. P., to intervene in this case as defendants. The Proposed Intervenor represents the rights of blind individuals who would be denied access to the works in the HathiTrust Digital Library if the relief the Plaintiffs have requested is granted. Were the Court to accede to the Plaintiffs' demands in this matter, it would obstruct Proposed Intervenor's rights under the Americans with Disability Act ("ADA") to have equal access to the information that Defendants offer sighted students and faculty. By seeking both to impound all of the digital copies of the works in the HathiTrust Digital Library and to prevent all future digitization of copyrighted works by the Defendants, the Plaintiffs threaten (1) to deny the Proposed Intervenor their legal right to access texts in the Defendants' collections and (2) to interfere with the Defendant's rights to facilitate that access under Sections 107 and 121 of the Copyright Act. The Proposed Intervenor is therefore entitled to intervene as a matter of right under Federal Rule of Civil Procedure 24(a). Alternatively, the Court should use its discretion under Federal Rule 24(b) to allow the Proposed Intervenor to enter this case as defendants.

FACTS

The National Federation of the Blind ("NFB") and its affiliates are widely recognized by the public, Congress, executive agencies of state and federal governments, and the courts as a collective and representative voice on behalf of blind Americans and their families.¹ The organization promotes the general welfare of the blind by (1) assisting the blind in their efforts to integrate themselves into society on terms of equality and (2) removing barriers that result in the

¹ Declaration of Marc Maurer ("Maurer Decl.") ¶¶ 6, 9, 19 (attached as Ex. A).

denial of opportunity to blind persons in virtually every sphere of life, including education, employment, family and community life, transportation, and recreation.²

In recent years, the NFB has focused considerable effort to promoting access to digital technology and information.³ Digital information is not inherently visual and therefore can also be presented audibly or tactilely.⁴ Where, once, blind individuals had to have separate, braille copies of print materials to read, they, now, can access the same digital information as sighted people, through screen access software. This computer software can vocalize text using a synthetic voice or present the text on a refreshable braille display.⁵ It can also use the metadata in properly coded content not only to distinguish page 9 from chapter 9 from footnote 9 from figure 9, for example, but also to navigate within the content to such designations within the text.⁶

Since its inception, one of the HathiTrust's core objectives has been to provide access to its collection digitally to persons with print disabilities. Indeed, in October 2008, the University of Michigan held a demonstration for the NFB of the procedure and software it had developed to make the collection's digital information accessible to the print disabled.⁷ By contrast, throughout the history of the printed word, publishers and authors have, overwhelmingly, not made their publications available in formats that are accessible to the blind and the authors who authorized those publishers to publish those works have not insisted that publishers do so—which means that the efforts of universities to provide access to millions of works to blind people

² Maurer Decl. ¶ 6.

³ Maurer Decl. ¶¶ 15-20.

⁴ Maurer Decl. ¶ 10.

⁵ Maurer Decl. ¶ 11.

⁶ Maurer Decl. ¶ 11.

⁷ Maurer Decl. ¶ 18. Additional information about the University of Michigan's efforts can be found at: http://mblog.lib.umich.edu/blt/archives/2009/10/hathitrust_acce.html.

through the HathiTrust is the single largest endeavor in history to make print materials accessible to the blind.⁸

The collaboration between the HathiTrust institutions, including the University of California, Cornell University, Indiana University, the University of Michigan, and the University of Wisconsin (together, the “University Defendants”) has created an invaluable resource, offering the possibility that the blind could have equal access to the wealth of information these libraries offer the sighted. Through the HathiTrust Digital Library, blind members of these university communities would have the opportunity to access more than nine million works, rather than being largely restricted to the tiny body of books that have been printed in braille or digitized piece-meal for use by the blind.

The availability of such an enormous collection could revolutionize how the blind learn on college campuses and offer, for the first time, equal access to information. A sighted student who wishes to check out a print book that has been placed on reserve in his university library simply enters the library and borrows the book. When such a student has a research paper, he can look to a large number of journals or books and then more closely peruse the most relevant. When a blind student wishes to access print books, he must contact his university’s student disability services office, which must then scan the work into a digital format and run it through optical character recognition software and, perhaps, proofread it for scanning errors. Rarely will such an office have available personnel and time to tag metadata, such as that which is included in the HathiTrust scans. Because classes for all students begin and end on the same schedule, and because school terms are brief in duration, the typical student disability services office is flooded by concurrent requests to scan a large body of assigned materials in a very short time.

⁸ Maurer Decl. ¶ 14.

Blind students with research papers based on library research are generally thrown back to using human readers, a resource that is limited both in supply and utility. No matter how timely blind students submit their requests upon receiving their syllabi, they typically wait several weeks of a ten- or twelve-week term to receive an accessible copy of required reading.

To understand how time-intensive the digitization process can be, consider that the National Library Service ("NLS") of the Library of Congress has the capacity to digitize approximately two thousand books each year for use by blind Americans.⁹ Because the NLS seeks to reach the widest popular audience, it prioritizes bestsellers, rather than academic works, and therefore reaches a very different audience than the HathiTrust. But, even if the NLS focused on academic works, at its current pace it would take more than 3,500 years to create the digital collection maintained by the HathiTrust.

With access to the HathiTrust, blind university students and faculty can, for the first time, access all the same books available to their sighted peers, at the same time as their peers, and at a considerable savings to the universities in time and expense.

The individual Proposed Intervenors are all blind and are either students or faculty at the defendant universities. They are members of disciplines in which they regularly must conduct library research, using either books or professional journals. If the Court impounds the HathiTrust collection and prevents future digitization, they will be unable to access these materials to the same extent.

Blair Seidlitz is in his junior year as an engineering major at the University of Wisconsin, Madison.¹⁰ He intends to apply to Ph.D. programs when he graduates. When he wishes to

⁹ Maurer Decl. ¶ 12.

¹⁰ Declaration of Blair Seidlitz ("Seidlitz Decl.") ¶ 4 (attached as Ex. B).

borrow books from the Wisconsin library, because he is blind, he must photocopy the books and scan each page with his Kurzweil™ scanner, which is a device that scans print text and converts it to an accessible format.¹¹ Because of the incredibly time-consuming nature of this process, Mr. Seidlitz avoids borrowing books from the library.¹² If he had access to digital copies of the library's collection, he would be able to access books that would enrich his learning experience.¹³ Currently, he purchases accessible copies of required texts, but does not use supplemental materials that are only in the library, and which are available to his sighted classmates.¹⁴

Courtney Wheeler is a junior Psychology major at the University of Wisconsin, Eau Claire and will be transferring to the University of Wisconsin, Stout, for the Spring 2012 semester.¹⁵ Ms. Wheeler reads using screen access software.¹⁶ Because digital copies of library works are unavailable, Ms. Wheeler brings her husband or a friend as a reader when she wishes to borrow library books.¹⁷ Because of this, Ms. Wheeler does not take electives that require research papers and has petitioned the University of Wisconsin for exemptions from classes that require conducting library research and classes that require textbooks or other print materials that are not available in an accessible format.¹⁸

¹¹ Seidlitz Decl. ¶ 5.

¹² Seidlitz Decl. ¶ 6.

¹³ Seidlitz Decl. ¶ 8.

¹⁴ Seidlitz Decl. ¶ 7.

¹⁵ Declaration of Courtney Wheeler ("Wheeler Decl.") ¶ 4 (attached as Ex. C).

¹⁶ Wheeler Decl. ¶ 5.

¹⁷ Wheeler Decl. ¶ 7.

¹⁸ Wheeler Decl. ¶ 8.

Georgina Kleege is a Lecturer in Creative Writing and Disability Studies and a member of the English Department at the University of California, Berkeley.¹⁹ Previously, she was an Adjunct Professor at the Ohio State University from 1991-2002.²⁰ To access textual materials, Ms. Kleege uses a screen reader.²¹ Thus, when Ms. Kleege wishes to read print books from the Berkeley library, she must scan each page and run it through optical character recognition software. As a result of this time-consuming process, she rarely borrows print materials from the library.²² Currently, Ms. Kleege devotes much of her time searching for or making accessible copies of print materials, time that her sighted colleagues are able to devote to their academic pursuits.²³

As the experiences of the individual intervenors demonstrate, access to a comprehensive digital library collection would allow blind students and faculty to participate fully in university life. The HathiTrust has created such a digital library and an injunction prohibiting use of that resource and future digitization would have a serious negative impact on the blind, depriving them of this opportunity.

ARGUMENT

I. The Proposed Intervenor may intervene as of right.

The Proposed Intervenor may intervene as of right, under Rule 24(a) if they meet four criteria: They must “(1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that

¹⁹ Declaration of Georgina Kleege (“Kleege Decl.”) ¶ 4 (attached as Ex. D).

²⁰ Kleege Decl. ¶ 4.

²¹ Kleege Decl. ¶ 4.

²² Kleege Decl. ¶ 5.

²³ Kleege Decl. ¶ 7.

the interest is not protected adequately by the parties to the action.”²⁴ The Proposed Intervenor satisfy all four elements.

A. The Proposed Intervenor’s application is timely.

The trial court has the discretion to determine whether a motion to intervene is timely.²⁵ But, in assessing the timeliness of an application to intervene, the Court must consider the totality of the circumstances.²⁶ The Court may consider, among other things, “(1) how long the applicant had notice of its interest in the action before making its motion; (2) the prejudice to the existing parties resulting from this delay; (3) the prejudice to the applicant resulting from a denial of the motion; and (4) any unusual circumstance militating in favor of or against intervention.”²⁷

Here, the Plaintiffs filed their Amended Complaint on October 6, 2011. The Proposed Intervenor learned of the case shortly thereafter and have not delayed in filing this motion. Indeed, they are within the Court’s scheduling order, entered on November 19, 2011, which established a deadline of January 1, 2012 for new parties to be added to this case. The Proposed Intervenor have complied with this schedule,²⁸ filing this motion well before that deadline, together with a proposed Answer, attached hereto as Exhibit F.

Further, the procedural posture of this case and the timing of this motion do not create the type of delay that would justify denying the motion. The Second Circuit has only affirmed denials of motions to intervene based on timeliness in cases where litigation has proceeded much

²⁴ *R Best Produce, Inc. v. Shulman-Rabin Mktg. Corp.*, 467 F.3d 238, 240 (2d Cir. 2006) (quoting *In re Bank of N.Y. Derivative Litig.*, 320 F.3d 291, 300 (2d Cir.2003)) (internal quotation marks omitted); Fed. R. Civ. P. 24(a)(2).

²⁵ *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 198 (2d Cir. 2000).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Declaration of Daniel F. Goldstein (“Goldstein Decl.”) ¶¶ 4-5 (attached as Ex. E).

farther than this case has. For instance, the Second Circuit has often held that motions to intervene are untimely when the proposed intervenors have waited years after learning of their interest in a case before moving to intervene, where they moved to intervene after judgment has been entered, or where they moved to intervene after the parties had negotiated a settlement.²⁹ These cases are all distinguishable from the present case, where litigation has barely begun. Indeed, the Defendants here have only just filed a responsive pleading and the parties have just commenced discovery. No party will be prejudiced by the Proposed Intervenors' entry into this case.

Further, as discussed in Sections I.B and I.C., *infra*, the Proposed Intervenors will be prejudiced if they are not permitted to defend their interests in this case. Because their interests diverge from the Defendants' interests, they may have to institute a second lawsuit, depending on the outcome of this case.

B. The Proposed Intervenors have protectable interests that may be impaired by disposition of this action.

The relief the Plaintiffs request would prevent the Proposed Intervenors' permissible use of the materials in question under the Copyright Act and interfere with the University

²⁹ See, e.g., *id.* at 198-99; *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 391 (2d Cir. 2006) (5 month delay made motion untimely where it delayed resolution of preliminary injunction motion); *In re Bank of N.Y. Derivative Litig.*, 320 F.3d 291, 300 (2d Cir. 2003) (two year delay rendered motion untimely); *In re Egri*, 68 F. App'x 249, 255 (2d Cir. 2003) (affirming denial of motion where settlement between the parties had already been reached); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001) (affirming denial of motion filed 3 days prior to settlement fairness hearing); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 72 (2d Cir. 1994); *Farmland Dairies v. Comm'r of N.Y. State Dep't of Agric. & Mkts.*, 847 F.2d 1038, 1042 (2d Cir. 1988) (motion to intervene properly denied as untimely where it would derail settlement agreement); *United States v. State of N.Y.*, 820 F.2d 554, 557 (2d Cir. 1987) (15 month delay after learning of interest, 6 years after judgment entered); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 184 F.R.D. 506, 514 (S.D.N.Y. 1999) (untimely where parties moved to intervene two months after hearing on proposed settlement).

Defendants' ability to provide equal access to the materials in their libraries, as required under the ADA. The Proposed Intervenors therefore have an interest in this action.

The core requirement of an "interest" sufficient to permit intervention is that it must clearly relate to the subject matter of the action³⁰ and be "significantly protectable such that it will be directly and immediately affected by the litigation."³¹ Although Rule 24(a) once required the proposed intervenor to have a property interest in the subject of the litigation or be otherwise bound by the judgment³², the current Rule 24(a) requires only a protectable interest "relating" to the subject matter of the litigation.³³

The Proposed Intervenors have protectable interests in maintaining access to the HathiTrust Digital Library as permitted by the Copyright Act and required by the ADA. Plaintiffs seek to impound the HathiTrust Digital Library, taking it completely offline, and preventing anyone from accessing the digital archive; in addition, they seek to prevent Defendants from making further additions of copyrighted material to that archive. In passing the ADA and certain provisions of the Copyright Act, Congress sought to ensure that the blind are not, because of their disability, denied access to the information in copyrighted materials. The remedy the Plaintiffs seek would deny the Proposed Intervenors equal access to copyrighted works, thereby interfering with the Defendants' meeting their obligations, variously, under Titles II and III of the ADA, which create rights for the blind to have equal access to information offered by educational institutions as part of their programs and activities. The requested remedy

³⁰ *Alston v. Coughlin*, 109 F.R.D. 609, 613 (S.D.N.Y. 1996).

³¹ *Werbungs Und Commerz Union Austalt v. Collectors' Guild, Ltd.*, 782 F. Supp. 870, 874 (S.D.N.Y. 1991).

³² *See Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871, 874 (2d Cir. 1984) (discussing changes made to Rule 24 in 1966).

³³ Fed. R. Civ. P. 24(a); *see also N.J. Carpenters Health Fund v. Residential Capital, LLC*, 08 CV 8781 (HB), 2010 WL 5222127, at *4 (S.D.N.Y. Dec. 22, 2010).

would also prevent the Defendants from making works accessible to the blind and others with disabilities as they may do under Sections 107 and 121 of the Copyright Act.

1. This action could impair Defendants' Obligations under the ADA to make the HathiTrust Digital Library available to Proposed Intervenor.

Title II of the ADA states that “[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”³⁴ As public universities, the University of California, Indiana University, the University of Michigan, and the University of Wisconsin are all obligated to provide the Proposed Intervenor with equal access to their library collections as they afford sighted members of their communities.³⁵

Likewise, Title III of the ADA states that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation”³⁶ As a private university, Cornell is required to provide access to its library collection under Title III.³⁷

To prove a violation of the ADA, a plaintiff must demonstrate that he “(1) has a disability for purposes of [the ADA], (2) is otherwise qualified for the benefit that has been denied, and (3) has been denied the benefit by reason of his disability.”³⁸ All of the individual Proposed

³⁴ 42 U.S.C. § 12132.

³⁵ Public entities include “any department, agency, special purpose district, or other instrumentality of a State or States or local government.” 42 U.S.C. § 12131(1)(B).

³⁶ 42 U.S.C. § 12181.

³⁷ Both “places of education” and libraries are “public accommodations under Title III. *See* 42 U.S.C. § 12181.

³⁸ *See Weixel v. Bd. of Educ. of City of N.Y.*, 287 F.3d 138, 146-47 (2d Cir. 2002) (quoting *Doe v. Pfrommer*, 148 F.3d 73, 82 (2d Cir.1998)).

Intervenors and most of NFB's members are blind. NFB has an interest in protecting the rights of its members to access these library collections. The individual Proposed Intervenors, as members of the University Defendants' communities, have an interest in protecting their own rights to access the collections.

Universities have typically met their obligations under the ADA by creating braille or digital copies on demand in response to individual requests. This process is extremely time consuming and often inadequate, due to the time constraints of producing accessible copies on a university semester or quarter system; universities often simply cannot produce accessible copies quickly enough for students to be able to use them in the current term. Thus, historically, blind students have not had the full range of content available. Despite these inadequacies, no university has been asked to create a digital archive of its entire library collection just to accommodate print-disabled students and faculty, presumably because the ADA's promise of equal access is bounded by considerations of undue burden.

With the HathiTrust Digital Library, however, a comprehensive digital archive does now exist, providing the potential for access to the full range of material in the University Defendants' libraries. If this suit results in sequestration or elimination of the libraries' digital archives, the Proposed Intervenors will be denied that access, while that material will still be available to sighted members of the University Defendants' communities in its print form. Moreover, if this suit results in preventing the University Defendants from making, copying, storing, displaying, allowing search over, or otherwise using existing digital copies of copyrighted works, the University Defendants could not provide the same access to their programs and activities that they currently provide their students with print disabilities. Instead,

they would be required on as-needed basis to recreate the very same digital materials they were required to sequester, but to notably less effect.

Although no court in the Second Circuit has addressed the interests of a party whose rights under the ADA would be threatened by the outcome of litigation, another court recently held that it would be “duplicative, wasteful and unjust” to prohibit such a party from intervening.³⁹ In *Ligas v. Maram*, the court permitted intervention because the settlement proposed by the parties could have fundamentally altered the nature of the services the state provided to individuals with mental disabilities, thereby possibly creating an ADA violation where none had previously existed.⁴⁰ Because the issues raised by the intervenors were “so closely related, and threatened by” the ongoing litigation, the court granted the motion to intervene.⁴¹

Likewise, here, because the Plaintiffs requested remedy would threaten the Proposed Intervenor’s interests under the ADA, the Court must hold that they have an adequate interest in this litigation.

2. This action could impair Defendants’ ability to use limitations on a copyright holder’s rights to make the HathiTrust Digital Library available to Proposed Intervenor.

In addition to the Proposed Intervenor’s interest in prohibiting a future violation of their rights under the ADA, the Proposed Intervenor has an interest in protecting the access Sections 107 and 121 of the Copyright Act⁴² permit the HathiTrust to grant to digital copies of its collection to those who are blind and others who have print disabilities. Congress expressly

³⁹ *Ligas v. Maram*, No. 05 C 4331, 2010 WL 1418583, at *4 (N.D. Ill. April 7, 2010).

⁴⁰ *Id.* at *3-4.

⁴¹ *Id.* at *4.

⁴² 17 U.S.C. §§ 107, 121.

carved out limitations on copyright protection to ensure that those who cannot read print material will not be denied access to copyrighted works merely because they happen to be copyrighted. If the Plaintiffs obtain their requested relief, the Proposed Intervenor will be denied the opportunity to access legally created digital materials.

An interest in use of property is a protectable interest under Rule 24(a). Although this type of right is rarely asserted to support intervention in intellectual property cases, courts have granted analogous motions to intervene in environmental cases.⁴³ For example, the Tenth Circuit has held that “organizations whose purpose is the protection and conservation of wildlife and its habitat have a protectable interest in litigation that threatens those goals.”⁴⁴ So, too, the Proposed Intervenor has a protectable interest in litigation that threatens their access to textual information. The injunction the Plaintiffs seek would prohibit the Proposed Intervenor from accessing the HathiTrust collection under any circumstances. In light of the policies embodied in Sections 107 and 121 of the Copyright Act, as described below, such a remedy would be overbroad because it would prevent permissible, indeed desirable, access to copyrighted materials by the blind. The Proposed Intervenor has an interest in arguing for an interpretation of the Copyright Act that would permit their use of the HathiTrust scans; the practical effect of a decision interpreting either Section 107 or Section 121 as not authorizing the creation or use of

⁴³ See, e.g., *In re Sierra Club*, 945 F.2d 776, 779 (4th Cir.1991); *Alleman v. United States*, CIV. 99-3010-CO, 2003 WL 23975165 (D. Or. Nov. 10, 2003); *County of St. Louis v. Thomas*, 162 F.R.D. 583, 586-87 (D. Minn. 1995); see also *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 1:11-CV-99-JGM, 2011 WL 2173785 (D. Vt. June 2, 2011) (acknowledging intervenors had an interest in the litigation, but denying motion because that interest was protected by the parties).

⁴⁴ *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1199 (10th Cir. 2010) (quoting *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1252 (10th Cir. 2001)).

the HathiTrust scans would not only prohibit the Proposed Intervenor from using existing scans, but would prevent the creation of accessible digital materials in the future.

- a. **Proposed Intervenor has a legally protectable interest arising from Section 121 of the Copyright Act, which authorizes the Defendants to provide accessible copies of published books to blind and other print-disabled students and faculty.**

This 1996 amendment to Title 17, known as the "Chafee Amendment,"⁴⁵ carves out an exempt space within the scheme of copyright regulation for "authorized entit[ies] . . . to reproduce or distribute copies . . . of a previously published, non-dramatic literary work . . . in specialized formats exclusively for use by the blind or other persons with disabilities." If an entity meets the other conditions of the provision (which requires certain forms of notice and specifically excludes standardized tests and computer programs), its reproduction and distribution activities are categorically non-infringing. On the Senate Floor, the sponsor described the Amendment's goal as being to assure that the print disabled can get full and prompt access to:

published material that is readily available to sighted individuals in libraries, bookstores, newsstands, and countless other locations. "Specialized formats" refers to braille, sound recordings-either on cassette or phonorecord-and new digital formats that can be used with special software. My amendment seeks to end the unintended censorship of blind individuals' access to current information. Under this amendment, groups that produce specialized formats for the blind no longer are required to gain permission from the copyright holder before beginning production.⁴⁶

In making copies available from the HathiTrust Digital Library to blind and other print-disabled students and faculty in accessible formats,⁴⁷ the University Defendants and the HathiTrust are

⁴⁵ 17 U.S.C. § 121.

⁴⁶ 142 Cong. Rec. S. 9763, 9764, Sept. 3, 1996.

⁴⁷ These would be provided in the "new digital formats that can be used with special software" to which Senator John Chafee (R-RI) referred in the passage above. These formats, including BRF

engaged in distribution and reproduction, two exclusive rights under Section 106 of the Copyright Act to which Section 121 provides an explicit exemption.

The libraries and disabilities services offices of the University Defendants qualify as “authorized entit[ies]” under what Senator Chafee referred to as the “narrow definition” of eligibility when first offering the amendment.⁴⁸ Providing accessibility services to individuals is the core mission of university disabilities services offices. In addition, it is well-documented that academic libraries treat (and historically have treated) services to patrons with disabilities as a critical function.⁴⁹ Thus, the provision of such services constitutes “a primary mission” of such entities, as well as the HathiTrust. In addition, the HathiTrust receives the benefit of the Section 121 exemption as the agent of one or more qualifying universities when it participates in serving accessible electronic copies to their blind and otherwise print-disabled faculty and students on request.⁵⁰

In sum, Section 121 is a clear statutory warrant available to the Defendants as they seek to discharge their legal obligations under the ADA and other legislation to make the largest existing collection of accessible books available to blind and other print-disabled persons. To put that collection out of reach, as the plaintiffs seek to do, would frustrate the public policy

and DAISY, are the same ones relied upon by other organizations exempt under § 121. *See* “Submitting Scanned Books to Bookshare,” available at www.bookshare.org/assets/docs/Sharing_Scanned_Books.rtf.

⁴⁸ 142 Cong. Rec. S. 9066.

⁴⁹ *See generally* M. Suzanne Brown and LeiLani Freund, SPEC Kit 321: Services for Users with Disabilities (Association of Research Libraries, December 2010), available at www.arl.org/bm~doc/spec-321-web.pdf.

⁵⁰ The Chaffee Amendment “Fact Sheet” prepared by the Library of Congress’ National Library Service for the Blind and Physically Handicapped states that “[t]o the extent that authorized agencies and organizations use or delegate authority . . . to produce and distribute works under the exemption . . . , those activities appear to be fully covered by the exemption.” *See* “Facts: Copyright Law Amendment, 1996,” at loc.gov/nls/reference/factsheets/copyright.html.

objectives of the Copyright Act itself. The Proposed Intervenor have an interest in promoting the interpretation of the Copyright Act outlined above, to protect their right to use the HathiTrust Digital Library.

b. Proposed Intervenor have a legally protected interest in the fair use of the HathiTrust Digital Library.

In the underlying case, this Court will determine whether the HathiTrust and the University Defendants, in creating and enhancing the HathiTrust Digital Library, are making fair use of Plaintiffs' copyrighted works. This determination will have enormous impact on legally protected and vital interests of NFB and its constituents, as well as the individual Proposed Intervenor, not only under the ADA and Section 121 of the Copyright Act, but directly under the fair use doctrine codified in Section 107 of the Copyright Act.⁵¹

Fair use exists to promote public welfare by facilitating socially beneficial uses of copyrighted works made without license, under certain circumstances. Section 107, recognizes the important public interest in access to and use of copyrighted works.⁵² In assessing fair use, the Court must consider illustrative purposes set forth in the preamble in Section 107, weigh the four nonexclusive factors set forth in the body of that section, and take into account both equities and public interest – all in a flexible manner and in light of the circumstances of each case.

The special, and congressionally recognized, fair use interests of the blind in having accessible copies of printed materials entitle Proposed Intervenor to address that issue in this action so that it will be given due consideration by the Court in its fair use calculus. In the

⁵¹ *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994); *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 551 (1985) (referring to “the equitable nature of the fair use doctrine”); House Report No. 94-1476, *Copyright Law Revision*, 94th Cong., 2d Session (1976), at p. 65 (hereafter “House Rep. at ___”).

⁵² *Campbell*, 510 U.S. at 577, 579.

legislative history of the Copyright Act pertaining to Section 107, Congress emphasized that providing access to copyrighted works for the blind is a paradigmatic example of fair use. Thus, the Report of the House Judiciary Committee describes “the making of copies or phonorecords of works in the special forms needed for the use of blind persons” as a “*special instance* illustrating the application of the fair use doctrine.”⁵³

The analysis of whether the use sought by Proposed Intervenor is a fair use requires balancing the public interest as expressed in those statutes, with the copyright owner’s interest. Proposed Intervenor’s legally protected interests in assuring that Defendants can utilize fair use and the Chafee Amendment to meet their obligations under the ADA can only be adequately protected through intervention.

C. The Proposed Intervenor’s interests are not adequately protected by the parties.

The Proposed Intervenor carries the burden of showing that their interests are not adequately protected by the parties,⁵⁴ but that burden is minimal.⁵⁵ For example, it is met where there is “a divergence of interests” between the would-be intervenor and the party purporting to represent the would-be intervenor’s interests,⁵⁶ or when the would-be intervenor and the party

⁵³ House Report. at 73 (emphasis added).

⁵⁴ *Alston v. Coughlin*, 109 F.R.D. 609, 613 (S.D.N.Y. 1996).

⁵⁵ *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (“The requirement of the Rule is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.”)

⁵⁶ *Dow Jones & Co., Inc. v. U.S. Dep’t of Justice*, 161 F.R.D. 247, 354 (S.D.N.Y. 1995) (discussing intervention as appropriate means to preserve opportunities for appeal when there is likelihood that party purporting to represent interest might forego appeal).

have interests that would motivate them to offer different defenses for allegedly unlawful conduct.⁵⁷

Indeed, although the University Defendants' interests are aligned with the Proposed Intervenor's interests in that all of those parties wish to persuade the Court to deny the Plaintiffs' requested injunction, the Defendants' interest is in protecting the mission of the HathiTrust and access for all users to the collection. In contrast, although the Proposed Intervenor would also like to see broad access to the collection, their primary interest is in protecting access to digital information for the blind.

Further, requiring the University Defendants to argue that a decision for the Plaintiffs would violate the Proposed Intervenor's rights under the ADA would place those defendants in a precarious legal position. The University Defendants are responsible for ensuring that they do not violate Title II or Title III of the ADA. If the Plaintiffs were to prevail in this action and the Proposed Intervenor were required to institute a second lawsuit to ensure access to digital materials, the University Defendants could be the defendants in that action. Any admissions they made in this suit to the effect that preventing access to a digital library collection would violate the ADA would bind them in that suit. It is therefore unlikely that the University Defendants will assert this defense at all, let alone with the vigor with which the Proposed Intervenor would assert it.

⁵⁷ See *N.Y. Public Interest Research Grp., Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975) ("Specifically, we are satisfied that there is a likelihood that the pharmacists will make a more vigorous presentation of the economic side of the argument than would the Regents. Indeed, the Regents acknowledge that the pharmacists should have an opportunity to make their own arguments to protect their own interests as pharmacists since, as the Regents admit, their interests 'may significantly differ' from those of the pharmacists.").

The Second Circuit has held that intervention serves to prevent exactly this type of divergence; it is necessary to allow two parties to make their own arguments that protect their different interests, regardless of whether they seek the same outcome.⁵⁸ Intervention therefore allows the Court to consider the full range of arguments, without requiring one party to jeopardize its position in possible future litigation.

II. Proposed Intervenor may also be permitted to intervene.

Unlike intervention as of right, permissive intervention is a matter for the Court's discretion.⁵⁹ Even where the criteria discussed above are not met, Rule 24(b)(2) allows for intervention when the would-be intervenor files a timely motion and his claim "shares with the main action a common question of law or fact."⁶⁰ And, even though the intervention must not "unduly delay or prejudice the adjudication of the original parties' rights,"⁶¹ Rule 24(b)(2) is to be liberally construed.⁶² Indeed, the moving party's burden is satisfied where there is a single common question of law or fact even though other factual differences may exist between the parties.⁶³ In this sense, then, the rules governing permissive intervention illustrate the competing aims of the intervention rules as a whole, namely, ensuring (1) the efficient administration of disputes by resolving all related issues in one lawsuit, and (2) that a single lawsuit does not become unnecessarily complex, unwieldy or prolonged.⁶⁴

⁵⁸ *Id.*

⁵⁹ Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1902.

⁶⁰ Fed. R. Civ. P. 24(b)(2).

⁶¹ Fed. R. Civ. P. 24(b)(3).

⁶² *McNeill v. N.Y. Housing Auth.*, 719 F. Supp. 233, 250 (S.D.N.Y. 1989); *see also* Wright and Miller, Federal Practice and Procedure § 1904.

⁶³ *McNeill*, 719 F. Supp. at 250.

⁶⁴ *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 69 (2d Cir. 1994).

Permitting the Proposed Intervenor to intervene in this matter will satisfy both goals. The common questions of law and fact involved in this case are those discussed above, specifically, whether the Plaintiffs are entitled to the injunction they seek under the Copyright Act. The Proposed Intervenor will bring a different and relevant perspective to this question, providing the Court with a more complete picture of the legal and factual landscape.

Further, as a practical matter, the Proposed Intervenor's participation in this action will not make this lawsuit "complex or unwieldy." Rather, the Proposed Intervenor anticipates proffering the testimony of a limited number of experts and fact witnesses. In addition, the Proposed Intervenor anticipates they will spur minimal additional written discovery.⁶⁵ Thus, the Proposed Intervenor will not prolong the litigation.

Finally, given the likelihood that the Proposed Intervenor would bring separate suit if the Plaintiffs were to prevail, it is in the interests of judicial economy to permit them to intervene. The discovery that would be necessary in that future suit would largely duplicate that which will be conducted in this case, and it is in the interest of all parties to consolidate this effort.

CONCLUSION

Because the Proposed Intervenor has interests under the ADA and the Copyright Act that are not represented by the parties to this action, and because intervention is timely and would not delay this litigation, the Court should grant the Proposed Intervenor's motion to intervene under Rule 24(a), or in the alternative under Rule 24(b). A proposed Answer is

⁶⁵ Goldstein Decl. ¶ 5.

Dated: New York, New York
December 9, 2011

**THE LAW OFFICE OF
ROBERT J. BERNSTEIN**

*Counsel for National Federation of
the Blind, Georgina Kleege,
Blair Seidlitz and Courtney Wheeler*

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