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)

DECLARATION OF JAMES FRUCHTERMAN
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I, James Fruchterman, do hereby declare that:

Background and Qualifications

1. I am over eighteen years old and am competent to make this declaration.

2. I have attached here as Exhibit A a current version of my curriculum vitae.

3. Currently, I serve as Founder and Chief Executive Officer of Benetech®, a non-profit dedicated to creating new technology solutions that serve humanity and empower people to improve their lives.

4. In 1980 I earned a B.S. in Engineering and an M.S. in Applied Physics from California Institute of Technology.

5. I co-founded Calera Recognition Systems in 1982. Calera developed optical character recognition (OCR) technology that allowed computers to read virtually all printed text.

6. In 1989, I founded Arkenstone, a nonprofit social enterprise, that produced reading machines for the disabled community based on the Calera technology. The Arkenstone product

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line was sold in 2000 and the resulting capital funded the next phase of Arkenstone under its new

name, Benetech. I have been the CEO of Benetech/Arkenstone since 1989.

7.   I have served on three U.S. federal government advisory committees for disability issues:

the Section 255 Telecommunications Access Advisory Committee, the Section 508 Electronic

Information and Technology Access Advisory Committee, and the Advisory Commission on

Accessible Instructional Materials in Postsecondary Education for Students with Disabilities.

8.   I have received numerous other awards and recognition for my work making print

materials accessible to the blind and print disabled. In 2006 I received a MacArthur Fellowship.

I was named an Outstanding Social Entrepreneur in 2003 by the Schwab Foundation and have

regularly participated in the World Economic Forum Annual Meetings in Davos, Switzerland.

Benetech received the Skoll Award for Social Entrepreneurship under my leadership. I also

received the Robert F. Bray Award from the American Council of the Blind, and the American

Library Association's Francis Joseph Campbell Award in recognition of my successful efforts to

make literary works more accessible to people who are blind or visually impaired.

Opinions

9.   Having reviewed Daniel Clancy's description of the Google Books project and the

HathiTrust website, it is my opinion that the HathiTrust provides the best opportunity blind

students will ever have to access a comprehensive digital library of university collections.

10. Based on my experience with the Bookshare® online library for people with print

disabilities, I believe that there is no economically feasible way to digitize the print book

collections of university libraries for use by people with print disabilities except through a

cooperative project such as the one involving Google and its partner libraries, now members of

the HathiTrust. There are no other resources available to devote to creating such a collection of

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infrequently used, old, or out-of-print academic books. Although there is a small demand for accessible copies of some of these books, it cannot sustain a viable market that would offset the cost of creating these copies.

11. In addition, because commercial academic publishers have been the least willing to provide digital files to Bookshare, it is my opinion that academic works in born-digital formats will become available to people with print disabilities much more slowly than trade publishing titles.

Facts Relied Upon

12. One of Benetech's primary programs is Bookshare, an online library which provides people with print disabilities in the United States access to more than 150,000 books and 150 periodicals that can be converted to braille, large print or synthetic speech. Originally created by a community of volunteers, Bookshare is a subscription-based service operated by Benetech. Bookshare has the capacity to create 2,000-3,000 accessible digital books per month.

13. Bookshare texts and periodicals are organized in collections by subject area, just as they would be in a physical library. Members can search by title, author and subject. The virtual bookshelves at Bookshare feature a wide assortment of reading material including a broad collection of children's literature, titles from the New York Times bestseller list, and an array of textbooks. Bookshare staff and volunteers take pride in making sure that the library includes bestsellers such as the Harry Potter books which become available on Bookshare just hours after they are released to the public. If a particular book is not yet available in the Bookshare library, Members can submit the title to a wish list for volunteers to scan and upload to the library.

14. Bookshare's digital texts allow readers with print disabilities to easily navigate to specific pages or search for keywords, making them much more usable than audio books on tape or other media.

15. Bookshare works with state education agencies and schools to deliver digital books to students in a timely manner. The library partners with authors and publishers who contribute digital content with global permissions to make books available to print disabled readers worldwide. These partnerships allow Bookshare to deliver the best quality content possible at the lowest cost. The Bookshare library also makes extensive use of K-12 textbook files provided by publishers using the National Instructional Materials Accessibility Standard (NIMAS), to create high quality student-ready materials in digital audio, large print or Braille.

16. The vast majority of new books in the Bookshare collection now come directly from publishers in digital formats such as XML. Close to 200 publishers share these digital files with Bookshare. To make these books accessible can be done automatically in a few minutes. Unfortunately, however, the books that are available in XML formats are heavily weighted to trade books, including genre fiction, New York Times best sellers, romance novels, science fiction, mysteries, political commentary, religious books, and other books with mass-market appeal. They also typically include books published in the last ten years, since e-books have become widely available. Publishers also have focused on digitizing only that part of their backlist they think can sell enough books to justify the effort. In general, only those books published in the last ten years.

17. For books that are not available in digital formats directly from the publishers, Bookshare obtains the books in physical form and will chop, scan, OCR (optical character recognition) and proofread them to make accessible copies. Bookshare used to do this for any books sent to it by

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members with disabilities, but Bookshare does not currently have the resources to do this kind of labor-intensive work for books that are not directly used in the classroom, because of the priorities of our funders.

18. `REDACTED - CONFIDENTIAL`
    `ATTORNEYS' EYES ONLY`

19. Bookshare has shifted its energy and resources in recent years to forming agreements with publishers to receive born-digital copies of their materials.

20. We get requests from university students and scholars to scan print books for their research, but we are not able to fulfill these requests because we do not have the resources to scan their books. We will only process requests for students in accredited programs in the United States who are working toward degrees, and currently only then if the books requested are assigned or required classroom reading. We do not have the capacity to make university library books more generally accessible because they are rarely assigned and we do not have the capacity to honor requests for digitization of books that a student or scholar wants to use as background research for a research paper or article.

21. The largest part of Bookshare's budget comes from the United States Department of Education, which funds Bookshare's efforts to create accessible copies books for students with print disabilities, with the highest priority on K-12 textbooks.

22. To add accessibility features to digital files received from publishers or to scan and add accessibility features to print works, Bookshare uses combination of volunteers, internal staff, and paid outsourcers.

23. Bookshare's average cost of creating an accessible book is roughly $40 per book. This average cost includes the proofreading for scanned books and creating the metadata for all

books, including those that provided to us in digital form. Our overall average cost per book is much lower than our average cost for a scanned textbook, because of the large numbers of digital books provided by publishers in high quality formats with structure (like sections, chapters, subsections, tables of contents and the like) already included. Our average cost for a making the text and structure of a scanned textbook accessible is over $400 per book.

24. Even once Bookshare has a scanned copy of a book, the cost of making it accessible varies enormously based on the complexity of the layout of the books. We need to proofread the text to ensure it is correct and books that have headers, footers, footnotes or other graphic features that change the reading order of the page must be tagged and properly structured to make them understandable and functional for a blind person using screen access software. Lastly, books that have images that are important for educational purposes should have image descriptions added, something that we don't have the budget to create for any but the most widely used K-12 textbooks.

25. Bookshare divides books into six levels based on their complexity. Level 1 books have no headers, footers, or pictures. Level 2 books have headers or footers and low-level formatting, such as chapters. Level 3 includes books that have images, footnotes, or line breaks, including children's chapter books, plays, and poems. Level 4 books have many images or charts, resource listings like bibliographies, insets, many foreign language words. Level 4 includes textbooks that are mainly text but have chapters. Level 5 books have complex layouts, including text in margins or text printed on image backgrounds. Level 6 includes the most complicated books, such as math or science texts, cookbooks or dictionaries.

26. The cost of making the text and structure of a scanned book for Bookshare varies by the complexity level. Level 1 books typically cost less than $50 per book to make accessible.   Level

4 books average more than $350 per book and Level 5 and Level 6 books cost progressively more to make accessible. These costs do not include the cost of image descriptions.
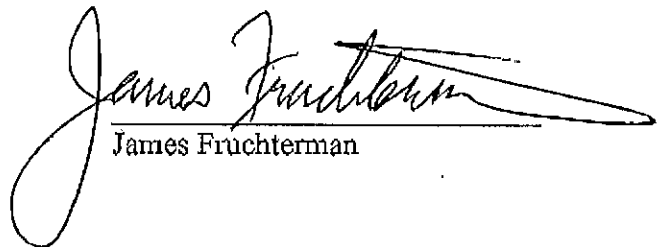
27. I believe the majority of books available in a university library would qualify as Level 3, 4 or 5 under Bookshare's complexity classifications.

28. Bookshare's budget only permits it to add image descriptions of illustrations, graphs, tables and other visually-oriented features to the K-12 textbooks in highest demand. In addition, because the U.S. Department of Education has made image descriptions in K-12 textbooks a policy priority, Bookshare must devote a significant portion of the Department of Education resources to adding image descriptions to this subset of the books in its collection.

29. For the last three years, Benetech has employed one person whose full time job is recruiting new publishers to contribute digital books to Bookshare's collection. It has been Bookshare's experience that textbook publishers and commercial academic publishers are the most reluctant to contribute to the Bookshare collection; when they do agree to provide digital files, they place more restrictions on our access to the files than trade publishers do.

30. I am not aware of a for-profit entity creating digital books from print books for the blind.

Dated: 6 | 2 8 | 2012

James Fruchterman