

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

I, Jan Terje Helmli, hereby declare as follows:

1. I am the General Counsel for Norsk Faglitterær Forfatter- og Oversetterforening (The Norwegian Non-Fiction Writers and Translators Association) (the “NFF”), one of the plaintiffs in the above-captioned action.

2. I submit this declaration in support of Plaintiffs’ motion for summary judgment. I have personal knowledge of the facts set forth in this Declaration and could testify competently at a hearing or trial if called upon to do so.

3. The NFF is Norway’s union for nonfiction writers, representing 5,400 authors and translators. It represents its members’ professional interests by, among other activities, negotiating minimum-term agreements with book publishers and others, negotiating conditions for copying books in schools, libraries and elsewhere, and providing legal assistance to its members in negotiations and conflicts regarding literary rights.

The Works At Issue

4. Upon information and belief, Defendants have digitized without authority many books by NFF members (the “NFF Works”), including at least two books by Trond Andreassen

and Helge Ronning, plaintiffs in the instant action and the General Secretary and former President, respectively, of the NFF.

Harm Resulting From Defendants' Use Of The Works

5. The NFF agreed to join this lawsuit as an associational plaintiff after learning that print copies of NFF Works and millions of other copyrighted books were digitized and being used as part of the Google Library Project, and that Defendants planned to begin making digital copies of purported “orphan works” available for free.

6. I have reviewed the declarations of T.J. Stiles, Trond Andreassen and Helge Ronning who are authors and plaintiffs in this litigation. I agree with and incorporate by reference the description in those declarations of the various harms and potential harms that result from Defendants’ unauthorized digitization and use of copyrighted works. Those descriptions need not be repeated here in full, but can be summarized as follows.

7. *First*, each digital copy of an NFF Work that is created by Defendants without purchase or license represents a lost sale to the associated rightsholder. Defendants could have purchased a copy but instead had it scanned without compensating the copyright owner. For example, the libraries could have worked with the NFF and/or Kopinor (the Reprographic Rights Organization for Norway) to negotiate a collective license agreement to digitize and make various uses of works of Norwegian authors, but instead they simply digitized and use them without authorization or compensating authors.

8. *Second*, Defendants’ storage of the NFF Works in an online digital repository exposes that property to security risks for which the rightsholders receive no commensurate remuneration. Unauthorized access to copyrighted books leading to widespread piracy would gravely impact the market for those works.

9. *Third*, Defendants' various uses of the NFF Works undermine various licensing opportunities for rightsholders. For example, authors routinely grant online distributors like Amazon a license to index their books and make them searchable as part of a commercial arrangement targeted at promoting book sales. Defendants do the same thing, but without a license and without the search function being part of an effort to sell the books and provide revenue to the author. Defendants also permit the books to be used for non-consumptive research, an emerging field that represents another potential licensing stream for authors.

10. *Fourth*, Defendants' mass digitization and orphan works programs undercut opportunities for authors to generate royalty streams by entering into collective licensing agreements. In Norway, the National Library is in the process of digitizing the complete national literary heritage, not limited to works that are in the public domain. Rights were cleared through an agreement (the "Kopinor Agreement") between the National Library of Norway and Kopinor, on behalf of tens of thousands of Norwegian authors, including members of NFF. In exchange for granting rights to the National Library, authors receive NOK 0.56 per page (approximately \$0.09) per year. A copy of the Kopinor Agreement is attached hereto as Exhibit A. Defendants have undertaken similar activities as those licensed by the Kopinor Agreement, but they have not agreed to compensate authors for the use of their works or to provide any of the protections contained in the Kopinor Agreement.

11. *Fifth*, making books available through the Orphan Works Project will directly undermine efforts to revive out of print books and will impact future sales of such books.

12. In short, Defendants activities have harmed or have the potential to cause enormous harm to the rights of authors.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: Oslo, Norway
June 27, 2012



JAN TERJE HELMLI

EXHIBIT A

Contract regarding the digital dissemination of books (Bokhylla / The Bookshelf)

between

The National Library of Norway

on the one hand,

and

Kopinor

on behalf of the members of

The Norwegian Specialized Press Association, The Norwegian Authors' Union, The Norwegian Publishers' Association, The Norwegian Association of Fine Arts Photographers, GRAFILL – Norwegian Organisation for Visual Communication, The Norwegian Magazine Publishers' Association, Norwegian Media Businesses' Association, NOPA Norwegian society of composers and lyricists, The Norwegian Association of Professional Photographers, The Norwegian Non-Fiction Writers' and Translators' Association, The Norwegian Union of Journalists, The Norwegian Society of Composers, Norwegian Critics' Association, The Norwegian Music Publishers' Association, The Norwegian Association of Literary Translators, The Association of Norwegian Editors, Norwegian Comedy Writers' Association, Norwegian Association of the Periodical Press, Norwegian Writers for Children, The Association of Norwegian Visual Artists, Norwegian Playwrights' Association, Norwegian Association of Arts and Crafts, New Music Composers' Group and foreign rightsholders' organisations

on the other hand.

THE SCOPE OF THE CONTRACT

§ 1

This is a pilot contract regarding the Bokhylla (Bookshelf) project. The project relates to printed books published in Norway during the years 1790-1799, 1890-1899 and 1990-1999, including translated literature. This contract regulates that part of the copyright-protected material covered by the project, up to 50 000 books with an estimated average of 185 pages.

§ 2

Subject to the conditions stated in this contract and within the project's frameworks as stated in § 1, the National Library of Norway is given the right to make available published copyright-protected material. This right includes the necessary reproduction of viewing copies based on the digital storage copies that the National Library of Norway makes pursuant to the regulations issued pursuant to the Norwegian Copyright Act (FOR 21.12.2001 no. 1563 (§ 1-3)). The contract applies to Norwegian and foreign publications whose rightsholders are represented by Kopinor, cf Act no. 2 of 12 May 1961 (the Norwegian Copyright Act) and competition law rules.

The provision stated in the first paragraph means, pursuant to section 16a, cf section 36 (extended collective licence) of the Norwegian Copyright Act, that published materials created by rightsholders that Kopinor does not represent are also covered by the contract.

HOW THE MATERIAL CAN BE MADE AVAILABLE

§ 3

The material is to be made available on the National Library of Norway's webpages for users with Norwegian IP addresses.

§ 4

The material is to be made available as individual pages in a digital format to be viewed on a computer screen. The users will be able to search in the text and search for covers, title pages and tables of contents, as well as to browse sequentially through individual pages. No arrangements are to be made for downloading or printing the material until the copyright-protected period has expired.

The material will be made searchable via search engines, and solutions to provide information on where the material can be borrowed or bought will be implemented.

CREDITING OF AUTHORS BY NAME, ETC.

§ 5

The name of the creator of the work and the work's title and source are to be stated in the manner required by proper usage, cf section 3, section 43a, third subsection and section 11 of the Norwegian Copyright Act.

RIGHT TO WITHDRAW WORK

§ 6

Kopinor may withdraw individual work from the scope of the contract during the contract period.

REMUNERATION

§ 7

An annual amount of NOK 0.56 (in 2009) per page made available is to be paid.

§ 8

The payment per page is to be adjusted by Kopinor annually on 31 December in accordance with changes in Statistics Norway's consumer price index or any other consumer price index that replaces this. The adjustment is to be made on the basis of the change in the consumer price index from 15 October of last year until 15 October of this year, and correspondingly for future years.

§ 9

The National Library of Norway is to be invoiced for the prevailing number of pages that have been made available. The parties are to agree further on the date for reporting and invoicing the pages that must be paid for. For 2009, a payment is to be made for 8/12 of the year.

BREACH OF THE CONTRACT AND DAMAGES

§ 10

Should the contract be breached, a period of 30 days from the date when written notification of this is received is allowed for rectification.

§ 11

Should a party fundamentally breach the contract and the matter not be rectified pursuant to § 10, the other party may terminate the contract with immediate effect. Termination is to be declared in writing, stating the grounds for the termination. Damages for breach of contract may be claimed irrespective of whether or not the contract is terminated.

§ 12

By entering into this contract, the rightsholders have not renounced their right to claim damages and bring a civil action against the National Library of Norway for copying that is not permitted by this contract. If the National Library of Norway has paid a claim from Kopinor relating to such copying, Kopinor undertakes to pay the rightsholders' claims regarding this utilisation.

§ 13

Should this contract be terminated or expire, the National Library of Norway is obliged to remove from the National Library of Norway's open webpages all copyright-protected materials that cannot, pursuant to the law or a separate contract with rightsholders, be made available.

OTHER PROVISIONS

§ 14

Kopinor is obliged to pay any claims for payment or damages that the National Library of Norway receives from Norwegian or foreign rightsholders in so far as the claims relate to a copying or making available of materials that has been paid for and carried out in accordance with this contract's provisions, cf otherwise section 37 of the Norwegian Copyright Act. The National Library of Norway is not obliged to pay such claims and Kopinor shall indemnify the National Library of Norway for any claims regarding costs incurred by the National Library of Norway in connection with such a claim. Should a claim be received, the National Library of Norway is to reject the claim and refer the claimant to Kopinor. Claims are not to be paid without consultation with Kopinor. In the case of any dispute regarding the claim, Kopinor is entitled to intervene.

§ 15

The National Library of Norway and Kopinor are entitled to publish this contract.

§ 16

The parties will continue to cooperate on information about the service. Any external costs resulting from this are to be agreed on between the parties.

§ 17

Pursuant to further agreement, the National Library of Norway will, if requested by Kopinor (on behalf of a specific rightsholder or a representative of this rightsholder), make available high-resolution digital copies of the material covered by the contract.

§ 18

The National Library of Norway will, in so far as possible, give Kopinor access to the necessary statistics for use in distributing the remuneration.

EVALUATION**§ 19**

The parties agree to appoint a common committee that is to evaluate the Bokhylla project during the contract period and upon the expiry of the contract. The costs of any external evaluation will be divided 50/50 between the parties.

DISPUTE RESOLUTION**§ 20**

During the contract period, attempts are first to be made to resolve through negotiations between the parties any dispute between the parties to the contract regarding its interpretation or existence, a breach of the contract or a claim that in some other way is based on a contract between the parties relating to copying.

Should such negotiations fail to succeed, either party may demand that the dispute be resolved through arbitration. The Arbitration Tribunal is to be composed of three members. The parties are each to appoint one member and are to jointly appoint a chair. Should the parties fail to agree on a chairman, this person is to be appointed by the president of the Norwegian Bar Association. Otherwise, the provisions stipulated in the Norwegian Arbitration Act shall apply.

The parties may each petition for mediation pursuant to section 38 of the Norwegian Copyright Act.

THE DURATION OF THE CONTRACT**§ 21**

The contract is valid until 31 December 2011 inclusive, unless the parties agree that the contract is to be prolonged.

Two – 2 – copies of this contract have been prepared and each of the parties is to retain one copy.

Oslo, 23 April 2009

For the National Library of Norway

For Kopinor

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Vigdis Moe Skarstein
National Librarian

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Yngve Slettholm
Executive Director