

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE AUTHORS GUILD, INC., et al., :
: Plaintiff,
: :
- against - : Index No. 11 Civ. 6351 (HB)
:
HATHITRUST, et al., :
: Defendants.
: :
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DECLARATION OF ISABEL HOWE

I, Isabel Howe, hereby declare as follows:

1. I am the Director of the Authors League Fund, Inc. (the “ALF”), 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.

The Authors League Fund

3. Since its founding in 1917, the ALF, which provides assistance to professional writers and dramatists in severe financial need because of health problems, temporary loss of income or other misfortune, has drawn most of its support from authors, some of whom leave their literary estates to the ALF.

The Works At Issue

4. Unlike the other associations that are plaintiffs in this action, the ALF is not seeking to assert claims on behalf of any of “members.” Rather, the ALF itself owns the copyrights in and to several works that were scanned and incorporated into HathiTrust without

the ALF's knowledge or consent. Attached as Exhibit A is a schedule of works whose copyrights are owned by the ALF and have been infringed by Defendants (the "ALF Works"). Attached as Exhibit B is documentation evidencing the transfer of the relevant copyrights from each respective author to the ALF. A copy of the copyright registration certificate for each ALF Work is attached hereto as Exhibit C.

Harm Resulting From Defendants' Use Of The Work

5. I have reviewed the declarations of several individual authors who are plaintiffs in this litigation, including the declarations of T.J. Stiles, Pat Cummings and Roxana Robinson. 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.

6. *First*, each digital copy of an ALF Work that is created by Defendants without purchase or license represents a lost sale to the ALF. Defendants could have purchased a copy but instead had it scanned without compensating the ALF.

7. *Second*, Defendants' storage of the ALF 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.

8. *Third*, Defendants' various uses of the ALF Works undermine various licensing opportunities for the ALF. 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.

9. *Fourth*, Defendants' mass digitization and orphan works programs undercut opportunities for authors to generate royalty streams by entering into collective licensing agreements.

10. *Fifth*, as explained in more detail below, making books available through the Orphan Works Program will directly undermine efforts to revive out of print books and will impact future book sales.

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

The Orphan Works Project

12. In addition to the harms outlined above and discussed in the individual author declarations I reviewed, the ALF was directly impacted by Defendants' Orphan Works Project, as well as by mistakes in the HathiTrust database.

13. The ALF became the owner of the copyrights in and to the works of Gladys Malvern when she passed away in 1962, having left a Last Will and Testament designating ALF as the beneficiary of "all rights and royalties and revenues from any sale of rights of any of [her] books." *See Exhibit B.*

14. In the summer or fall of 2011, I became aware that one of Ms. Malvern's books, entitled *Good Troupers All*, had been listed as an "orphan candidate" in connection with HathiTrust's "Orphan Works Program." It was my understanding that HathiTrust intended to make a digital copy of the book available October 13, 2011, ninety days after the book was listed

as an orphan candidate. The book was to be made available on the Internet for students, faculty and users of the University of Michigan library to view, download, print and copy without providing any compensation to the ALF. Fortunately, after HathiTrust was informed that the copyright owners of *Good Troupers All* and other words could be found and objected to the HathiTrust's plans, the Orphan Works Project was "suspended.

15. I was particularly troubled by HathiTrust's plans to distribute electronic copies of *Good Troupers All* for free because I had recently been contacted by a publisher, Digital Pulse, which expressed an interest in republishing certain of Ms. Malvern's works, including *Good Troupers All*, in print and digital formats. Attached as Exhibit D is an email in which a representative of Digital Pulse recounts some of those discussions and reiterates his interest in bringing Ms. Malvern's works back into print. Defendants' missteps are indicative of a concerning lack of thoroughness on their part and an ineffective system of notice for authors whose works are listed as orphans.

16. Had Plaintiffs not intervened to stop the Orphan Works Program and, as Defendants had planned, digital copies of *Good Troupers All* were made available for others to view, print and/or download in full, the ALF may have lost the opportunity to license the work for print and digital distribution. In addition, it is likely that Defendants' unauthorized digital release of *Good Troupers All* would have adversely impacted the ALF's anticipated revenues from future sales of both the paper and electronic versions of the re-released novel.

17. While this lawsuit apparently caused HathiTrust to halt its Orphan Works Program and prevented Ms. Malvern's works from being distributed online, I am deeply concerned about the potential harm to the ALF and others if the program resumes, as Defendants have indicated that they plan to do so.

18. It is my understanding that Defendants' carelessness also led HathiTrust to misidentify two of Ms. Malvern's books – *Curtain Going Up!* and *Valiant Minstrel* – as works in the public domain. Before the ALF's attorneys advised HathiTrust of this error, these works were available in "full view" on HathiTrust's website, which I understand to mean that an electronic copy of the book could be viewed, downloaded and printed in full. *See Exhibit E.* I do not know what led HathiTrust to believe that these books were in the public domain, but they are still under copyright, as evidenced by the copyright registration renewal certificates for the works that are annexed as Exhibit C.

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I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
June 26, 2012

Isabel Howe

ISABEL HOWE