

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)

**NOTICE OF MOTION  
TO INTERVENE**

**ORAL ARGUMENT  
REQUESTED**

PLEASE TAKE NOTICE that upon the annexed Declarations of Daniel F. Goldstein, sworn to December 6, 2011; Dr. Marc Mauer, sworn to December 6, 2011, Georgina Kleege, sworn to December 5, 2011, Blair Seidlitz, sworn to December 6, 2011, and Courtney Wheeler, sworn to December 6, 2011; the accompanying Memorandum of Law in Support of the Motion of the National Federation of the Blind, Georgina Kleege, Blair Seidlitz and Courtney Wheeler (collectively, "Proposed Intervenors) to Intervene as Defendants in this action; and all prior pleadings herein, Proposed Intervenors will move this Court, before the Honorable Harold Baer, United States District Court Judge, in Courtroom 23B, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, NY 10017-1312, on the date and time to be set by the Court, for an order pursuant to Rule 24 of the Federal Rules of Civil Procedure permitting Proposed Intervenors to intervene as defendants in this action.

PLEASE TAKE FURTHER NOTICE that answering papers, if any, shall be served upon the undersigned no later than December 23, 2011.





# Exhibit A

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 DR. MARC MAURER

I, Marc Maurer, do hereby declare that:

1. I am over eighteen years of age and am competent to make this Declaration.
2. My business address is 200 East Wells Street at Jernigan Place, Baltimore, Maryland 21230.
3. I am legally blind.
4. I am the President of the National Federation of the Blind, a position I have held since 1986.
5. I am also an attorney, licensed to practice in Maryland, Indiana, Ohio, Iowa and am a member of the bar of the Supreme Court of the United States.
6. The National Federation of the Blind is the oldest and largest membership organization of blind people in the United States, with more than 50,000 members. Through our affiliates in each of the fifty states, the District of Columbia, and Puerto Rico, and our 700 local chapters, we seek to advance the rights of blind people by helping both the blind and the

sighted to understand that blindness, in and of itself, need not be a tragedy. The real problem of blindness is not loss of eyesight, but misunderstandings and misconceptions about it that are prevalent in society. With proper training and opportunity, blindness can be reduced to the level of a mere physical nuisance.

7. Unlike the NFB, most other organizations that advocate on behalf of people with print disabilities are not membership organizations. Of those groups that are membership organizations, the NFB is one of the few that chooses to use litigation as an advocacy tool or has the resources to do so.

8. A person with a print disability is someone who cannot effectively read print because of a visual, physical, perceptual, developmental, cognitive, or learning disability.

9. Because of its unique position among peer organizations, the NFB has taken the lead in promoting the creation of accessible digital technology and information. NFB has long espoused creating the same access to information that other Americans enjoy on functionally equal terms. For example, in the 1970's, NFB financed Ray Kurzweil's development of a reading machine for the blind—a machine that converted printed text into digital text that could be read aloud by a synthetic voice. In 1998, NFB member George Kerscher developed Talking Books, the first commercially available digital books for the blind.

10. Equal access to all of the same information is technologically within reach. Because digital information is simply a series of zeros and ones, it is not inherently visual. If the creators of digital information are conscious of accessibility, it becomes no more difficult to create digital information that can be manifest audibly or tactilely than to create information that is only visual.

11. To access print material, I use all of the tools available to me and other blind people. Although I read conventional braille, I also use screen access software, which transmits textual information on a computer screen into an audio output or a refreshable braille display pad. When digital text is coded properly with metadata, that provides organizational information about the text, my screen reader will also read that information, which allows me more complete information and a way to navigate within a document.

12. There are a very limited number of print works that are available to be borrowed by blind Americans either in braille or in a digital format that can be accessed by a screen reader. The primary source of reading material for most blind Americans is the National Library Service for the Blind and Physically Handicapped of the Library of Congress. While this service has done an outstanding job of providing books to the blind within budgetary constraints, it only has approximately 52,000 circulating titles in its collection and can only create approximately 2,000 new titles each year. Bookshare®, another authorized entity under the Chafee Amendment, has a collection of tens of thousands of titles, according to its website: [www.bookshare.org](http://www.bookshare.org).

13. The lack of print information available to blind Americans has devastating effects. Fewer than fifty percent of blind Americans graduate from high school. Those who do graduate and matriculate at colleges and universities are blocked, as a practical matter, from taking many courses of their choosing.

14. The HathiTrust Digital Library stands to change the landscape of access to information and education for blind Americans. The more than 9,000,000 million titles in that collection are a far cry from the tens of thousands of titles available from the National Library

Service or Bookshare®. To serve the most people, and given the time constraints and expense of creating accessible copies of print materials, both of those entities must choose titles that have wide popular appeal. Consequently, those collections contain few academic books or journals. By contrast, the HathiTrust's collection includes academic works, which are critical educational tools for blind college and university students and faculty.

15. Recognizing the transformative effect of such a large digital collection, the NFB collaborated with Google and the libraries of the University Defendants, among others, over the last several years to ensure that the HathiTrust Digital Library will be accessible and made available to blind Americans.

16. In December 2004, the NFB learned of the Google scanning project and contacted Google to inquire whether the scans would be created in such a way that they would include the metadata necessary to make them accessible to the blind. In January 2005, Google responded that it did not intend to include the coding necessary to make the scans accessible.

17. Throughout 2005 and 2006, the NFB lobbied Google to change this decision and include the necessary metadata. In 2006, the NFB, together with Peter Jaszi, met with representatives from the University of California, the University of Michigan, and the University of Wisconsin, to recruit their support in convincing Google to commit to producing accessible scans. This effort was ultimately successful, and as I discussed above, the Google books scans that comprise the HathiTrust are accessible to the blind.

18. In October 2008, the University of Michigan held a demonstration for the NFB of the procedure and software it had developed to make the HathiTrust collection's digital information accessible to the print disabled.



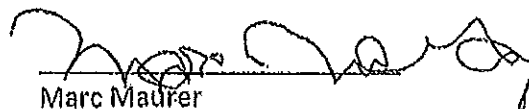
19. In September 2009, I testified before the Committee on the Judiciary of the United States House of Representatives about the importance of the Google books/HathiTrust collection for the education of the blind.

20. Also in 2009, the NFB organized the Reading Rights Coalition, which is composed of 32 groups representing individuals with print disabilities (including neurological and physical conditions as well as learning disabilities) in response to the Authors Guild's attempt to convince Amazon to disable the text to speech function on the Kindle, another digital book technology. Through this effort, we successfully persuaded Amazon to maintain its text-to-speech function.

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

Executed on:

12/6/11



Marc Maurer

# **Exhibit B**

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 BLAIR SEIDLITZ

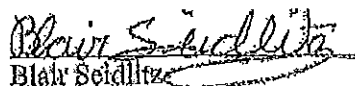
I, Blair Seidlitz, do hereby declare that:

1. I am over eighteen years of age and am competent to make this Declaration.
2. My home address is 11829 West Tesch Avenue, Greenfield, Wisconsin 53228.
3. I am legally blind.
4. I currently am a junior at the University of Wisconsin, Madison. I am pursuing a degree in Engineering Physics and I intend to apply to Ph.D. programs when I graduate.
5. Currently, when I wish to borrow books from the Wisconsin library, I must photocopy the books and scan each page with my Kurzweil™ scanner.
6. This process is very time consuming and I try to avoid borrowing print materials from the library.
7. To complete my reading for class, I purchases accessible copies of required texts, but I do not access supplemental materials that my sighted classmates borrow from the library. If I had access to digital copies of the library's collection, I would be able to access these supplemental materials.

8. If I had access to the Hathitrust collection, I would be able to explore any topic I wanted at any time, with ease, like my sighted classmates. My education would not be confined to the limited number of topics covered in the books I purchase.

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

Executed on: 12/6/11

  
Blair Seidlitz

# **Exhibit C**

**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 COURTNEY WHEELER**

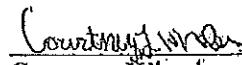
I, Courtney Wheeler, do hereby declare that:

1. I am over eighteen years of age and am competent to make this Declaration.
2. My home address is 3919 Sterling Drive, Eau Claire, Wisconsin, 54701.
3. I am legally blind.
4. I currently am a junior at the University of Wisconsin, Eau Claire. I intend to transfer to the University of Wisconsin, Stout, for the spring 2012 semester. I am pursuing a bachelor's degree in Psychology.
5. I prefer to access print materials using the screen reader on my computer.
6. When I purchase textbooks for my classes, I am usually able to obtain an accessible copy of those books from Learning Ally, a service that provides audio recorded versions of purchased texts for blind readers. Learning Ally, however, is not available for books I wish to borrow from the University of Wisconsin Library.
7. To get access to print library books, I bring my husband or a friend as a reader. This process is very time consuming and dependent on the availability of a reader.

8. As a result, I choose not to take elective classes that require research papers. In the past, I have unsuccessfully petitioned the University of Wisconsin to exempt me from conducting library research as an accommodation for my disability, and from courses that require specific books and reading materials that are not available in accessible formats. However, I would prefer the opportunity to have access to library materials to the same extent and at the same time as everyone else, because I would like to take advantage of all of the educational opportunities available to my peers.

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

Executed on: 12/6/11

  
\_\_\_\_\_  
Courtney Wheeler

# **Exhibit D**



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 GEORGINA KLEEGER**

I, Georgina Kleege, do hereby declare that:

1. I am over eighteen years of age and am competent to make this Declaration.
2. I am legally blind.
3. I am a Lecturer in Creative Writing and Disability Studies and a member of the English Department at the University of California, Berkeley. I have served in this position since 2003. Previously, I was an Adjunct Professor at the Ohio State University from 1991-2002.
4. To access print materials, I use JAWS, a screen reader. Although I read braille, the paucity of titles in braille and the expenses and delays in creating a braille book cause me to rely mostly on digital copies of books and journals for work and pleasure reading. I obtain digital books from Bookshare when they are available.
5. Currently, when I wish to read books from the Berkeley library, I must scan each page and run it through optical character recognition software. This process is very time consuming. As a result, I rarely borrow print materials from the library.

6. The lack of accessible print materials has affected my education and career.

Although I was very successful as an undergraduate student at Yale University, I spent a significant amount of time searching for human readers to help me complete my coursework. Because of the time constraints involved with finding readers, my professors discouraged me from pursuing a Ph.D.

7. In addition, I know that the Berkeley Student Disability Services Office cannot timely process all requests for accessible print materials. Although the people in that office are highly skilled and educated to provide training and counseling for students, they spend the majority of their time scanning books for print-disabled students. For blind Berkeley students and faculty to have immediate access to millions of books through the HathiTrust collection would elevate those students' and my own ability to function and would give us access to the same trove of information available to our sighted peers. Moreover, the time I spend searching for or making accessible copies could be devoted to my academic pursuits. Immediate access to electronic versions of millions of literary works would be, for me, transformative.

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

Executed on: 12/5/11

  
Georgina Kleege

# **Exhibit E**

**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 DANIEL F. GOLDSTEIN**

I, Daniel F. Goldstein, do hereby declare that:

1. I am over eighteen years of age and am competent to make this Declaration.
2. I am a member in good standing of the bars of the Maryland Court of Appeals, the United States District Court for the District of Maryland, and the Supreme Court of the United States, the United States Courts of Appeal for the District of Columbia, Second, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits as well as the United States Court of Federal Claims.
3. I have been a partner at the firm of Brown, Goldstein & Levy, LLP, a Baltimore law firm, since its founding in 1984. Brown, Goldstein & Levy, LLP is a leading private plaintiff's law firm, with extensive practice in the areas of disability civil rights, race discrimination, gender discrimination, wage and hour violations, and actions brought on behalf of consumers under both state and federal law. Prior to forming Brown, Goldstein & Levy, I worked as a law clerk to the Honorable Frank Kaufman in the U.S. District Court for the District of Maryland and as an Assistant United States Attorney in the District of Maryland. I have practiced law for more than 35 years.

4. I anticipate that any discovery the Proposed Intervenors will take in this case will largely overlap with the discovery the Defendants will take. Any additional discovery will be very minimal.

5. I have seen the scheduling order in this case and believe that our participation, should the Court grant the motion, would not cause any delays.

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

Executed on: *December 6, 2011*

  
Daniel F. Goldstein

# **Exhibit F**

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

THE AUTHORS GUILD, INC., et al.,

*Plaintiffs,*

v.

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*Defendants.*

Case No. 11-cv-6351(HB)

**DEFENDANT INTERVENORS'  
JOINT ANSWER AND DEFENSES**

Defendant Intervenors National Federation of the Blind, Georgina Kleege, Blair Seidlitz, and Courtney Wheeler hereby state the following for their JOINT ANSWER AND DEFENSES to the First Amended Complaint filed by the Plaintiffs in the above-captioned action ("Plaintiffs"). Defendants respond to the paragraphs of the First Amended Complaint ("FAC") in correspondingly numbered paragraphs. Defendant Intervenors deny each allegation in the FAC unless expressly admitted.

1. Defendants admit that Plaintiffs, in the FAC, seek prospective injunctive and declaratory relief but deny that Plaintiffs are entitled to such relief. Defendants admit that "the Regents of the University of Michigan/University Library, Ann Arbor Campus"; "The Regents of the University of California on behalf of its California Digital Library"; "the Board of Regents of the University of Wisconsin System, d/b/a the University of Wisconsin-Madison, General Library System"; and Cornell University entered into agreements with Google Inc. ("Google") regarding the digitization of works in their libraries' collections, and that The Board of Trustees of the University of Illinois, on behalf of the Committee on Institutional Cooperation ("CIC")

and its member universities (the "CIC Universities"), entered into an agreement with Google regarding the digitization of works in the CIC Universities' library collections. Defendant Intervenor further admit that "HathiTrust" is the name of a service of the University of Michigan in which the Universities and other institutions participate under agreements with the University of Michigan. Defendant Intervenor admit that they and Defendants have engaged in uses of and activities with respect to the works, which uses are permitted under the United States Copyright Act (the "Copyright Act"). Defendant Intervenor lack knowledge or information sufficient to form a belief about whether Plaintiffs hold a copyright in any work used by Defendant Intervenor and thus deny such allegations. Defendant Intervenor deny the remaining allegations in Paragraph 1 of the FAC.

2. Defendant Intervenor admit that pursuant to Google's various agreements with the Regents of the University of Michigan/University Library, Ann Arbor Campus; The Regents of the University of California on behalf of its California Digital Library; the Board of Regents of the University of Wisconsin System, d/b/a the University of Wisconsin-Madison, General Library System; Cornell University; and The Board of Trustees of the University of Illinois, on behalf of the CIC and the CIC Universities, Google has provided digital copies of books from a University's library's collections either to that University or, at the University's request, to the University of Michigan Library in Ann Arbor (the "MLibrary"), and that the Universities store these digital copies in a repository called the HathiTrust Digital Library ("HDL"), which contains at least 9.7 million volumes. Defendant Intervenor also admit that the Universities participate in the HathiTrust Service along with more than fifty other institutions. Defendants lack knowledge or information sufficient to form a belief about whether seventy-three percent (73%) of these



volumes are protected by copyright and thus deny such allegations. Defendants deny the remaining allegations in Paragraph 2 of the FAC.

3. Defendant Intervenors admit that UM and UC have announced their participation in the Orphan Works Project ("OWP"), an initiative to, *inter alia*, identify "orphan works"-in-copyright works for which the copyright holder cannot be found-and eventually to make lawful uses of these works. Defendant Intervenors also admit that Cornell and UW have announced plans to participate in the OWP and that IU has not announced plans to participate in the OWP. Defendants deny the remaining allegations in Paragraph 3 of the F AC.

4. Defendant Intervenors admit that the Universities have asserted that their activities are beneficial to society and permissible under a variety of sections of the Copyright Act, including as fair use, which received statutory recognition in Section 107 of the Copyright Act. Defendant Intervenors deny the remaining allegations in Paragraph 4 of the FA C.

5. Defendant Intervenors admit that, in a separate case, Google and The Authors Guild, Inc. (among other parties) filed a motion for approval of a proposed settlement agreement that was denied by the court. The referenced proposed settlement agreement and court order denying approval speak for themselves. Defendants deny the remaining allegations in Paragraph 5 of the FAC.

6. Defendant Intervenors deny the allegations in Paragraph 6 of the F AC.

7. Defendant Intervenors deny the allegations in Paragraph 7 of the F AC.

8. Defendant Intervenors admit that the FAC seeks injunctive relief and purports to state claims for copyright infringement under the United States Copyright Act, 17 U.S.C. 101 et seq. and seeks declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202, but Defendant

Intervenors deny that any such infringement has occurred, deny that Plaintiffs are entitled to the relief sought, and otherwise deny the remaining allegations in Paragraph 8 of the FAC.

9. Paragraph 9 of the FAC is a legal assertion that does not require an Answer.

10. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 10 of the FAC and thus deny such allegations.

11. Paragraph 11 of the FAC is a legal assertion that does not require an Answer

12. Upon information and belief, Defendant Intervenors admit that The Authors Guild, Inc. is a corporation with a place of business at 31 East 32nd Street, New York, New York, 10016. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 12 of the FAC and thus deny such allegations.

13. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 13 of the FAC and thus deny such allegations.

14. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 14 of the FAC and thus deny such allegations.

15. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 15 of the FAC and thus deny such allegations.

16. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 16 of the FAC and thus deny such allegations.

17. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 17 of the FAC and thus deny such allegations.

18. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 18 of the FAC and thus deny such allegations.

19. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 19 of the FAC and thus deny such allegations.

20. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 20 of the FAC and thus deny such allegations.

21. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 21 of the FAC and thus deny such allegations.

22. Defendant Intervenors admit that the book identified in Exhibit A to the FAC that is referred to is included in the HDL, but Defendant Intervenors otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 22 of the F AC and thus deny such allegations.

23. Defendants admit that the books identified in Exhibit A to the F AC that are referred to in Paragraph 23 of the FAC are included in the HDL, but Defendant Intervenors otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 23 of the F AC and thus deny such allegations.

24. Defendant Intervenors admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 24 of the FAC is included in the HDL, but Defendant Intervenors otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 24 of the FAC and thus deny such allegations.

25. Defendant Intervenors admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 25 of the FAC is in the HDL, but Defendant Intervenors otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 25 of the FAC and thus deny such allegations.

26. Defendants admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 26 of the FAC are included in the HDL, but Defendant Intervenors otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 26 of the FAC and thus deny such allegations.

27. Defendant Intervenors admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 27 of the FAC are in the HDL, but Defendant Intervenors otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 27 of the FAC and thus deny such allegations.

28. Defendant Intervenors admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 28 of the FAC were digitized and included in the HDL, and Defendants otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient

to form a belief about the truth of the remaining allegations in Paragraph 28 of the FAC and thus deny such allegations.

29. Defendant Intervenors admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 29 of the FAC are included in the HDL, but Defendant Intervenors otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 29 of the FAC and thus deny such allegations.

30. Defendant Intervenors admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 30 of the FAC is included in the HDL, but Defendant Intervenors otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 30 of the FAC and thus deny such allegations.

31. Defendant Intervenors admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 31 of the FAC is included in the HDL, but Defendant Intervenors otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 31 of the FAC and thus deny such allegations.

32. Defendant Intervenors admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 32 of the FAC is included in the HDL, but Defendant Intervenors otherwise deny the allegation that such book was “unlawfully reproduced, digitized and

distributed" by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 32 of the FAC and thus deny such allegations.

33. Defendant Intervenors admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 33 of the FAC are included in the HDL, but Defendant Intervenors otherwise deny the allegation that such books were "unlawfully reproduced, digitized and distributed" by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 33 of the FAC and thus deny such allegations.

34. Defendant Intervenors admit that UM is a state university comprising three campuses with a principal place of business in Ann Arbor, Michigan. Defendants also admit that UM is governed by its Board of Regents. Defendants further admit that UM owns, operates, and controls MLibrary and that, upon information and belief, MLibrary is one of the largest university library systems in the United States, holding more than 8.5 million volumes and with more than 3 million patron visits per year to its facilities and its website. Defendants also admit that on or about December 14, 2004, "the Regents of the University of Michigan/University Library, Ann Arbor Campus" entered into a Cooperative Agreement with Google to digitize works from the MLibrary collection (the "UM-Google Cooperative Agreement"). Defendant Intervenors further admit that UM is a co-founder, host, and primary administrator of the HathiTrust Service and is the largest contributor to the HDL, which contains the collection of digital works with respect to which the HathiTrust Service operates. Defendant Intervenors deny the remaining allegations in Paragraph 34 of the FAC.

35. Defendant Intervenors admit that UC is a public trust comprising ten campuses with a principal place of business in Oakland, California. Defendant Intervenors also admit that UC is governed by its Board of Regents. Defendant Intervenors further admit that UC owns, operates, and controls the UC library system, that the UC library system consists of more than 100 libraries, and that, upon information and belief, the UC library system collectively is the largest research/academic library in the world. Defendant Intervenors also admit that on or about August 3, 2006, "The Regents of the University of California on behalf of its California Digital Library" entered into a Cooperative Agreement with Google to digitize works from UC's libraries (the "UC-Google Cooperative Agreement"). Defendant Intervenors further admit that UC is a co-founder of the HathiTrust Service and is the second largest contributor to the HDL. Defendant Intervenors also admit that UC announced on August 24, 2011 its intention to join the OWP. Defendant Intervenors deny the remaining allegations in Paragraph 35 of the FAC.

36. Defendant Intervenors admit that UW is a state university system comprising twenty-six campuses with a principal place of business in Madison, Wisconsin. Defendant Intervenors also admit that UW is governed by its Board of Regents. Defendant Intervenors further admit that UW owns, operates, and controls the UW library system, holding more than 8 million volumes. Defendant Intervenors also admit that on or about October 12, 2006, the "the Board of Regents of the University of Wisconsin System, d/b/a the University of Wisconsin-Madison, General Library System" entered into a Cooperative Agreement with Google to digitize works from UW's libraries (the "UW-Google Cooperative Agreement"). Defendant Intervenors further admit that UW is a co-founder of the HathiTrust Service and is the third largest contributor to the HDL. Defendant Intervenors also admit that UW's intention to

participate in the OWP became public on June 23, 2011. Defendant Intervenors deny the remaining allegations in Paragraph 36 of the FAC.

37. Defendant Intervenors admit that “the trustees of Indiana University” governs IU, which is a body politic of the State of Indiana, a State institution of higher education comprising eight campuses with a principal place of business in Bloomington, Indiana. Defendant Intervenors further admit that IU owns, operates, and controls the IU library system, holding more than 7.8 million books in over 900 languages. Defendant Intervenors also admit that IU's Bloomington campus is a member of the CIC, a consortium of Big Ten universities plus the University of Chicago. Defendant Intervenors further admit that on or about June 6, 2007, The Board of Trustees of the University of Illinois, on behalf of the CIC and the CIC Universities, entered into a Cooperative Agreement with Google to digitize works from CIC Universities’ libraries (the “CIC-Google Cooperative Agreement”). Defendant Intervenors further admit that IU’s Bloomington campus is the seventh largest contributor to the HDL. Defendant Intervenors admit that a fully operational, synchronized, and live "mirror site" of the HDL is located on IU's Indianapolis campus. Defendant Intervenors deny the remaining allegations in Paragraph 37 of the FAC.

38. Defendant Intervenors admit that Cornell is a corporation and private land-grant university with its principal place of business in Ithaca, New York. Defendant Intervenors also admit that Cornell owns, operates, and controls the Cornell library, holding more than 8 million volumes. Defendant Intervenors further admit that on or about August 6, 2007, Cornell entered into a Cooperative Agreement with Google to digitize works from the Cornell library (the “Cornell-Google Cooperative Agreement”). Defendant Intervenors also admit that Cornell is the fourth largest contributor to the HDL. Defendant Intervenors further admit that Cornell



announced on August 24, 2011 its intention to join the OWP. Defendant Intervenor deny the remaining allegations in Paragraph 38 of the FAC.

39. Defendant Intervenor admit that "HathiTrust" is the name of a service through which more than fifty institutions, which include universities, libraries, educational institutions, and consortia, are collaborating with UM to create a reliable and increasingly comprehensive digital repository of books. Defendant Intervenor also admit that UM's principal place of business for purposes of providing the HathiTrust Service is in Ann Arbor, Michigan. Defendant Intervenor further admit that as of October 5, 2011, the HDL contained 9,709,348 volumes, amounting to 435 terabytes of data. Defendant Intervenor deny the remaining allegations in Paragraph 39 of the FAC.

40. Defendant Intervenor admit that libraries and archives provide a tremendous societal value in preserving and securing works of art, literature, and science. Defendant Intervenor also admit that Section 108 of the Copyright Act is one of many limitations on copyright holders' rights. Defendant Intervenor deny the remaining allegations in Paragraph 40 of the FAC.

41. Defendant Intervenor admit that Section 108(b) permits a library to make three copies of an unpublished work for preservation and security purposes (among other purposes). Defendant Intervenor also admit that Section 108(c) permits a library to make three copies of a published work. Defendant Intervenor deny the remaining allegations in Paragraph 41 of the FAC.

42. Defendant Intervenor respond to Paragraph 42 by stating that Section 108 of the Copyright Act, as it has existed at various times, speaks for itself. Defendant Intervenor further

respond that Plaintiffs' description of Section 108 is incomplete and therefore mischaracterizes the statute. Defendant Intervenors thus deny the allegations in Paragraph 42 of the FAC.

43. Defendant Intervenors admit that Paragraph 43 appears to be an accurate quote of selected text (with Plaintiffs' emphasis) from Senate Report No. 105-190 (1998), which speaks for itself, and therefore is an incomplete and inaccurate representation of the legislative history. Defendant Intervenors deny the remaining allegations in Paragraph 43 of the FAC.

44. Defendant Intervenors respond to Paragraph 44 by stating that Section 108 of the Copyright Act, as it has existed at various times, speaks for itself. Defendant Intervenors further respond that Plaintiffs' description of Section 108 is incomplete and therefore mischaracterizes the statute. Defendant Intervenors thus deny the allegations in Paragraph 44 of the FAC.

45. Defendant Intervenors respond to Paragraph 45 by stating that Section 108 of the Copyright Act, as it has existed at various times, speaks for itself. Defendant Intervenors further respond that Plaintiffs misquote Section 108 and that Plaintiffs' description of Section 108 is incomplete and therefore mischaracterizes the statute. Defendant Intervenors thus deny the allegations in Paragraph 45 of the FAC.

46. Defendant Intervenors admit the allegations in Paragraph 46 of the FAC.

47. Defendant Intervenors deny the allegations in Paragraph 47 of the FAC.

48. Defendant Intervenors deny the allegations in Paragraph 48 of the FAC.

49. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 49 regarding an announcement made by Google; regarding whether, when, and with whom Google has formed partnerships; and regarding whether Google and "its partners" have digitized more than 12 million books and thus deny such allegations.

50. Defendant Intervenors admit that pursuant to the UM-Google Cooperative Agreement, UM cooperates with Google to identify books from UM's collection to be digitized; that pursuant to the UC-Google Cooperative Agreement, UC cooperates with Google to identify books from UC's collection to be digitized; that pursuant to the UW-Google Cooperative Agreement, UW cooperates with Google to identify books from UW's collection to be digitized; that pursuant to the CIC-Google Cooperative Agreement, each of the CIC Universities, including IU, cooperates with Google to identify books from their individual collections to be digitized; and that pursuant to the Cornell-Google Cooperative Agreement, Cornell cooperates with Google to identify books from Cornell's collection to be digitized. Defendants admit that the books selected for digitization pursuant to these agreements are not limited to works in the public domain, unpublished works, or deteriorating published works that cannot be replaced, and include in-print books that are commercially available and books that are protected by copyright. Defendant Intervenors further admit that pursuant to the terms of these various agreements, the works selected for digitization are delivered to a facility that is located either on or off the University's campus and that is occupied by Google personnel and scanning equipment. Defendant Intervenors deny the remaining allegations in Paragraph 50 of the FAC.

51. Defendant Intervenors admit that Google has digitized books owned by the Universities libraries. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations regarding "Google Books" and Google's actions with respect to "Google Books" and thus deny the remaining allegations in Paragraph 51 of the FAC.

52. Defendant Intervenors admit that pursuant to Google's various agreements with the Regents of the University of Michigan/University Library, Ann Arbor Campus; The Regents of the University of California on behalf of its California Digital Library; the Board of Regents

of the University of Wisconsin System, d/b/a the University of Wisconsin-Madison, General Library System; Cornell University; and The Board of Trustees of the University of Illinois, on behalf of the CIC and the CIC Universities, after digitizing a book from the collection of a University, Google may provide a digital copy of the book to the University library or, at the University's request, to MLibrary to be incorporated into the HDL, and Defendant Intervenors admit that the terms of these various agreements provide that the digital copy include a set of image and OCR files and associated meta-information about the files. Defendant Intervenors also admit that books that leave the premises of the Universities' libraries to be digitized are returned to the libraries. Defendant Intervenors deny the remaining allegations in Paragraph 52 of the FAC.

53. Defendant Intervenors admit that some libraries have estimated their costs of performing the act of digitization at approximately \$100 per volume. Defendant Intervenors deny the remaining allegations in Paragraph 53 of the FAC.

54. Defendant Intervenors admit that certain Universities, including UM, have digitized works in their library collections. Defendant Intervenors deny the remaining allegations in Paragraph 54 of the FAC.

55. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 55 of the FAC and thus deny such allegations.

56. Defendant Intervenors admit that The Authors Guild, Inc. and others filed a purported class action lawsuit against Google in the Southern District of New York, *Authors Guild, Inc. v. Google, Inc.*, Case No. 05 Civ. 8136 (S.D.N.Y. filed Sept. 20, 2005), involving Google's digitization of books (the "Google Books Lawsuit"). The complaint in the Google

Books Lawsuit speaks for itself, and therefore Defendant Intervenors deny the remaining allegations in Paragraph 56 of the FAC.

57. Defendant Intervenors admit that Google and The Authors Guild, Inc. (among other parties) filed a motion for approval of a proposed settlement agreement in the Google Books Lawsuit. The proposed settlement agreement speaks for itself, and therefore Defendant Intervenors deny the remaining allegations in Paragraph 57 of the FAC.

58. Defendant Intervenors admit that the motion for approval of the proposed settlement agreement was denied on March 22, 2011. Defendants also admit that Paragraph 58 of the FAC accurately quotes from Judge Denny Chin's decision. Judge Chin's decision speaks for itself, and therefore Defendant Intervenors deny the remaining allegations of Paragraph 58 of the FAC.

59. Defendant Intervenors admit that Paragraph 59 of the FAC accurately quotes from Judge Denny Chin's decision, which speaks for itself. Defendant Intervenors deny the remaining allegations in Paragraph 59 of the FAC.

60. Defendant Intervenors admit that Judge Denny Chin's decision noted efforts by Congress to pass orphan works legislation. Defendants also admit that the decision discussed international law concerns raised by foreign authors and entities regarding the ASA. Judge Chin's decision speaks for itself. Defendant Intervenors deny the remaining allegations in Paragraph 60 of the FAC.

61. Defendant Intervenors admit that the Google Books Lawsuit is still pending in the Southern District of New York.

62. Defendant Intervenors admit that on October 13, 2008, the thirteen universities comprising the CIC, led by UM; UC's libraries, led by the CDL; and the University of Virginia

announced the launch of the HathiTrust Service and the HDL, the shared repository of digital collections of institutions participating in the HathiTrust Service. Defendant Intervenors also admit that there are currently more than fifty institutions, including universities, libraries, educational institutions, and consortia, from around the world participating in the HathiTrust Service. Defendant Intervenors further admit that the website for the HathiTrust Service states that the mission of the HathiTrust Service is “to contribute to the common good by collecting, organizing, preserving, communicating, and sharing the record of human knowledge. Defendant Intervenors deny the remaining allegations in Paragraph 62 of the FAC.

63. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 63 of the FAC and thus deny such allegations.

64. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 64 of the FAC and thus deny such allegations.

65. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 65 of the FAC and thus deny such allegations.

66. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 66 of the FAC and thus deny such allegations.

67. Defendant Intervenors admit that this is an accurate quote from the HathiTrust Service website. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 68 of the FAC and thus deny such allegations.

68. Defendant Intervenors admit that the HathiTrust Service includes a search tool that permits users to conduct full-text searches of the works in the HDL to determine the number of times a searched term appears, and the page numbers on which the searched term appears, in

books in the HDL (including public domain and in-copyright works). Defendant Intervenors deny the remaining allegations in Paragraph 68 of the FAC.

69. Defendant Intervenors admit that the HathiTrust Service permits certain users to view, search, print, and download full copies of certain volumes in the HDL, and Defendant Intervenors admit that the level of access to a work is determined in part by the identity of the user and the copyright status of the work, and deny the remaining allegations in Paragraph 69 of the FAC.

70. Defendant Intervenors admit that the HathiTrust Rights Database includes categorizations of copyright status for each work in the HDL, as determined through processes conducted as part of the HathiTrust Service or through other resources. Defendant Intervenors also admit that the HDL allows users to view books identified as being in the public domain on the HathiTrust Service website, wherever the users may have access to the website. Defendant Intervenors deny the remaining allegations of Paragraph 70 of the FAC.

71. Defendant Intervenors deny the allegations in Paragraph 71 of the FAC.

72. Defendant Intervenors deny the allegations in Paragraph 72 of the FAC.

73. Defendant Intervenors admit the allegations in Paragraph 73 of the FAC.

74. Defendant Intervenors admit that to identify whether an in-copyright work in the HDL is an orphan work under its OWP pilot process, the OWP staff undertook a multi-step due diligence process to check whether the work is commercially available for sale and, if it is not, to attempt to locate and contact the copyright holder. Defendant Intervenors also admit that, under the pilot process, if the OWP staff were unsuccessful in identifying a copyright holder, the bibliographic information for the work would have been listed on the HathiTrust Service website for ninety days. Defendant Intervenors further admit that, under the pilot process, if no copyright

holder emerged during the ninety days, and if UM owned a physical copy of the work in its collection, UM, through the HathiTrust Service, planned to make the work available on a limited basis to UM students, professors, and other authenticated users and visitors to the libraries at UM's campuses, to view the work in full, print the work one page at a time, and download the work one page at a time in single-page PDF files. Defendant Intervenors admit that no works have been made available through the OWP and that the OWP pilot procedures are currently being reexamined. Defendant Intervenors deny the remaining allegations in Paragraph 74 of the FAC.

75. Defendant Intervenors admit that in July and August of 2011, other participants in the HathiTrust Service, including UC and Cornell, announced their intent to participate in the OWP and their intent to make works in their collections identified as orphan works available on a limited basis to their respective students, faculty, and library patrons. Defendant Intervenors deny the remaining allegations in Paragraph 75 of the FAC.

76. Defendant Intervenors admit that a list of orphan work candidates was posted on the HathiTrust Service website on or about July 15, 2011.

77. Defendant Intervenors admit that the initial complaint in this action was filed on September 12, 2011. Defendant Intervenors deny the remaining allegations in Paragraph 77 of the FAC.

78. Defendant Intervenors admit that on September 16, 2011, MLibrary issued a statement concerning the OWP. Defendant Intervenors deny the remaining allegations in Paragraph 78 of the FAC.

79. Defendant Intervenors deny the allegations in Paragraph 79 of the FAC.



80. Defendant Intervenors incorporate by reference their responses to Paragraphs 1 through 79 above.

81. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 81 of the PAC and thus deny such allegations.

82. Defendant Intervenors deny the allegations in Paragraph 82 of the PAC.

83. Defendant Intervenors deny the allegations in Paragraph 83 of the PAC.

84. Defendant Intervenors deny the allegations in Paragraph 84 of the PAC.

85. Defendant Intervenors deny the allegations in Paragraph 85 of the PAC.

86. Defendant Intervenors deny the allegations in Paragraph 86 of the PAC.

87. Defendant Intervenors deny the allegations in Paragraph 87 of the PAC.

**DEFENDANT INTEVENORS'  
AFFIRMATIVE DEFENSES AND OTHER DEFENSES**

In further answer to the FAC, and by way of affirmative defenses and other defenses, Defendant Intervenors state that they will rely upon the following defenses if applicable and if supported by the facts. Defendant Intervenors do not admit that they bear the burden of proof for any of these defenses.

A. Defendant Intervenors are entitled to access to the HDL because Defendants' use of and activities with respect to the works that are subject to copyright are non-infringing fair uses and do not require authorization pursuant to Section 107 of the Copyright Act.

B. Defendant Intervenors are entitled to access to the HDL because Defendants' use of and activities with respect to the works that are subject to copyright are non-infringing and do not require authorization pursuant to Section 108 of the Copyright Act.

- C. Defendant Intervenors are entitled to access to the HDL because Defendants use of and activities with respect to the works that are subject to copyright are non-infringing and do not require authorization pursuant to Section 109 of the Copyright Act.
- D. Defendant Intervenors are entitled to access to the HDL because Defendants use of and activities with respect to the works that are subject to copyright are permitted under Section 110 of the Copyright Act.
- E. Defendant Intervenors are entitled to access to the HDL because Defendants use of and activities with respect to the works that are subject to copyright are non-infringing and do not require authorization pursuant to Section 121 of the Copyright Act.
- F. Defendant Intervenors are entitled to access to the HDL because the collection provides them equal access to the Defendants' library collections as required under Titles II and III of the Americans with Disabilities Act.

Defendant Intervenors respectfully reserve the right to amend their answer to add additional or other defenses or to delete or withdraw defenses after a reasonable opportunity for appropriate discovery.

**WHEREFORE**, Defendant Intervenors request the following relief:

- (a) That Plaintiffs be denied all relief sought in the F AC;
- (b) That the claims asserted in the F AC be dismissed with prejudice;
- (c) Any such other and further relief as the Court deems just and proper.

Dated: December 9, 2011

