

EXHIBIT 40

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE AUTHORS GUILD, INC., et al,	:	
	:	Index No. 11 Civ. 6351 (HB)
Plaintiffs,	:	
	:	
- against -	:	
	:	
HATHITRUST, et al.	:	
	:	
Defendants.	:	
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**OBJECTIONS AND RESPONSES OF PLAINTIFF JAMES SHAPIRO
TO DEFENDANTS’ SECOND SET OF INTERROGATORIES AND REQUESTS
FOR THE PRODUCTION OF DOCUMENTS**

Plaintiff James Shapiro (“Plaintiff”) hereby submits, pursuant to Rules 26, 34 and 36 of the Federal Rules of Civil Procedure and Rules 26.3 and 33.3 of the Local Rules for the United States District Court for the Southern District of New York (the “Local Rules”), Plaintiff’s objections and responses to Defendants’ Second Set of Interrogatories and Second Set of Requests for the Production of Documents (“Requests”).

GENERAL STATEMENTS

A. Plaintiff incorporates by reference each and every General Objection set forth below into each and every specific response. From time to time a specific response may restate a

General Objection for emphasis or some other reason. The failure to include any General Objection in any specific response shall not constitute a waiver of any General Objection with respect to that request.

B. No incidental or implied admissions are intended by the responses herein. That Plaintiff has answered or objected to any interrogatory or document request should not be taken as an admission that Plaintiff accepts or admits the existence of any fact set forth or assumed by such interrogatory or document request. The fact that Plaintiff has answered part or all of any interrogatory or document request is not intended to be, and shall not be construed to be, a waiver by Plaintiff of any part of any objection to that interrogatory or document request.

C. These responses are made solely for the purpose of this action. Each response is subject to all objections as to competence, relevance, materiality, propriety, and admissibility, and to any and all other objections on any grounds that would require the exclusion of any documents produced or information provided by Plaintiff at time of trial. By responding to Defendants' interrogatories or document requests, Plaintiff does not waive any objection that may be applicable to: (1) the use, for any purpose, by Defendant of any documents, things or information provided in response to Defendants' interrogatories or document requests; or (2) the admissibility, privilege, relevancy, authenticity, or materiality of any of such documents, things or information to any issue in the case. Plaintiff expressly reserves the right to object to the use of documents or things produced, or information provided, in connection herewith during any subsequent proceeding, including the trial of this or any other action.

D. Plaintiff has not completed an investigation of all of the facts relating to this case, has not completed discovery in this action, and has not completed Plaintiff's preparation for trial. The documents and things produced, or information provided, in response to Defendants'

interrogatories or document requests are without prejudice to Plaintiff's rights to produce additional documents and things, or provide further information. Plaintiff's responses to Defendants' interrogatories and document requests are made based on Plaintiff's present information and belief predicated upon information and writings presently available to and located by Plaintiff and Plaintiff's attorneys. Accordingly, these responses are subject to supplementation and amendment should future investigation indicate that to be appropriate. Plaintiff also reserve the right to produce or use any documents or information produced and/or discovered after service of this response in support of or in opposition to any motion, in depositions, or at trial.

GENERAL OBJECTIONS

A. Plaintiff objects to each of the requests seeking confidential, trade secret, or proprietary business, technical, marketing, or financial information, or any other confidential material. Plaintiff will disclose confidential information only pursuant to the terms of the Stipulated Protective Order entered or to be entered in this case.

B. Plaintiff objects to each of the requests seeking information covered by the attorney-client privilege, work product immunity, joint defense privilege, or otherwise covered by any other applicable privilege, immunity, or other protection.

C. Plaintiff objects to each of the requests to the extent it seeks documents or information that are already in Defendants' possession, are a matter of public record, or are otherwise equally available to Defendants.

D. Plaintiff objects to each of the requests with respect to which any benefit of the production to Defendants is outweighed by the burden and expense to Plaintiff, taking into account the needs of the case.

E. Plaintiff objects to each of the requests seeking through definitions and instructions to impose obligations beyond what is required in accordance with the Federal Rules of Civil Procedure, the Local Rules, applicable court orders, or stipulations or agreements of the parties (collectively, the “Rules”). Plaintiff will respond to Defendants’ requests only to the extent required by the Rules.

F. Plaintiff objects to each of the requests seeking material that Plaintiff is under an obligation to any third-party not to disclose, including documents that would require breach of a contract, protective order, settlement, or other duty to maintain confidentiality.

G. Plaintiff objects to each of the requests seeking the same information requested by one or more of Defendants’ requests for production or any interrogatory served by Defendants at any time in this case. Plaintiff will provide information or documents only once, regardless of the number of requests to which the same may be responsive.

H. Plaintiff objects to each of the requests to the extent that it seeks information not relevant to any claim or defense and/or not reasonably calculated to lead to the discovery of admissible evidence, including but not limited to, information beyond the relevant temporal and/or geographic scope of this matter.

I. Plaintiff objects to each of the requests that purports to attribute any special or unusual meaning to any technical terms or phrases.

J. Plaintiff objects to each of the requests, and to the incorporated definitions and instructions contained in such request, that purports to alter the plain meaning and/or scope of any specific request and thereby renders such request vague, ambiguous, overbroad, or uncertain.

K. Plaintiff objects to each of the requests as overbroad and unduly burdensome to the extent that it can be interpreted in such a way as to require Plaintiff to search for documents beyond Plaintiff’s possession, custody, or control.

L. Plaintiffs object to each of the requests to the extent they seek legal opinions that are not properly the subject of rule 26 discovery.

SPECIFIC OBJECTIONS AND RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1: For each work, if any, listed on Schedule A to your Objections and Responses to Defendants' First Set of Interrogatories and Requests for the Production of documents ("Schedule A"), indicate whether that work is in-print or out-of-print, and the criteria and facts relied upon in reaching that conclusion.

RESPONSE: Plaintiff objects to this Interrogatory on the ground that the terms "in-print" and "out of print" are not defined and therefore are ambiguous. Subject to and without waiving the foregoing objection or any General Objections, Plaintiff agrees that the following work(s) on Schedule A may be considered "in print" for the purposes of this litigation because (a) the work(s) generate royalties from the publisher, (b) according to searches conducted at Bookfinder.com and Amazon.com, unused print copies and/or electronic copies of the work(s) may be purchased at a fair price, and/or (c) the work(s) are under contract to be brought back into print:

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INTERROGATORY NO. 2: For each work, if any, listed on Schedule A, identify all author royalties and/or other income generated by such work from 2001 to the present and itemized by source, as well as documents sufficient to substantiate such royalties and/or income.

RESPONSE: Plaintiff objects to this Interrogatory on the ground that the request for documents and information from 2001 through the present is overbroad and the request that Plaintiff "itemize" the revenue type by source is unduly burdensome. Moreover, the information sought by this request is likely to be in the possession or custody of third parties over whom Plaintiff does not exercise control. Subject to and without waiving the foregoing objections or any General Objections, Plaintiff will conduct a reasonable search and produce documents, if any, concerning royalties generated from the work(s) listed on Schedule A.

INTERROGATORY NO. 3: For each work, if any, listed on Schedule A, identify a) the number of hardback and/or paperback copies printed for each year from 2001 to the present; b) the number of hardback and/or paperback copies remaining in the inventory of any publisher or publisher's agent at the end of each year from 2001 to the present; c) the number of hardback and/or paperback copies remaining in the inventory of any wholesaler or wholesaler's agent at the end of each year from 2001 to the present; d) the number of hardback and/or paperback copies remaining in the inventory of any retailer or retailer's agent at the end of each year from 2001 to the present; e) the number of hardback and/or paperback copies returned by any retailer for each year from 2001 to the present and f) documents sufficient to substantiate such numbers.

RESPONSE: Plaintiff objects to this Interrogatory on the ground that the request for documents and information from 2001 through the present is overbroad and the request that Plaintiff collect this data is unduly burdensome. Moreover, Plaintiff objects that information sought by this request is likely to be in the possession or custody of third parties over whom Plaintiff does not exercise control. Subject to and without waiving the foregoing objections or any General Objections, Plaintiff will conduct a reasonable search and produce documents, if any, responsive to this request.

INTERROGATORY NO. 4: For each work, if any, listed on Schedule A, indicate whether that work has been distributed, pursuant to your authorization, in digital, electronic or other machine-readable format at any time since 2001 and, if so, identify for each such work a) the specific digital, electronic or other machine-readable format(s) in which it was distributed; b) the number of copies of the work distributed in such format(s); c) the publisher(s) of the work in such format(s); and d) the specific royalties accruing to the author with respect to such distribution in each such format.

RESPONSE: Plaintiff objects that this Interrogatory on the ground that it is duplicative, as Plaintiff already identified whether any of Plaintiff's works on Schedule A have been distributed in electronic format and the publisher of any such works. Moreover, Plaintiff objects that the request to identify "the specific digital, electronic or other machine-readable format" is vague and ambiguous. Subject to and without waiving the foregoing objections or any General Objections, Plaintiff identifies the following as work(s) on Schedule A that have been distributed, pursuant to Plaintiff's authorization, in digital, electronic or other machine-readable format at any time since 2001:

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Plaintiff will conduct a reasonable search and produce documents, if any, concerning royalties generated from distribution of the work(s) in electronic format.

INTERROGATORY NO. 5: For each work, if any, listed on Schedule A, identify with specificity any alleged harm you have suffered or will suffer arising solely by virtue of each of the following, and identify all documents related to the same: a) the inclusion of the work in Defendants' digital archives; b) the availability of a digital version of the work for use purely in connection with non-consumptive research; c) the availability of a digital version of the work for use purely in connection with full-text searching; d) the availability of a digital version of the work for use by the blind or others with disabilities that restrict their use of standard printed works.

RESPONSE: Plaintiff objects to this Interrogatory on the ground that it is impossible to predict, and therefore to identify, the harm that Plaintiff "will suffer" in the future as a result of Defendants' various unauthorized uses of Plaintiff's work(s). In addition, to the extent this Interrogatory is being used in connection with Defendants' fair use defense under 17 U.S.C. §

107, the correct standard, to the extent it is relevant, is “the effect of the use upon the *potential* market for or value of the copyrighted work.” Plaintiff further objects that the phrase “solely by virtue of . . . the inclusion of the work in Defendants’ digital archives” is vague and ambiguous.

Subject to and without waiving the foregoing objections or any General Objections, Plaintiff responds that to date, Plaintiff has not identified any specific, quantifiable past harm, or any documents relating to any such past harm, that Plaintiff has suffered solely by virtue of (a) Defendants’ uploading and archiving of a digital version the work(s) on Schedule A to the HathiTrust Digital Library but without making such work(s) available to others to view, print or download, (b) the availability of a digital version of the work for use purely in connection with non-consumptive research but without making such work(s) available to others to view, print or download; (c) the availability of a digital version of the work for use purely in connection with full-text searching but without making such work(s) available to others to view, print or download; or (d) the availability of a digital version of the work for use by the blind or others with disabilities that restrict their use of standard printed works.

With respect to the effect of Defendants’ aforementioned uses upon the potential market for or value of the copyrighted work, Plaintiff identifies the following:

- Loss or potential loss of revenue from sale or licensing of digital copies of Plaintiff’s copyrighted work(s) for inclusion in a digital archive for preservation purposes;
- Loss or potential loss of revenue from sale or licensing of digital copies of Plaintiff’s copyrighted work(s) for use purely in connection with non-consumptive research;

- Loss or potential loss of revenue from sale or licensing of digital copies of Plaintiff's copyrighted work(s) for use purely in connection with full-text searching;
- Loss or potential loss of revenue from sale or licensing of derivative uses, including derivative uses made possible by artificial intelligence and other technologies to create translations, anthologies, abridgments and versions suited for new and emerging platforms and devices;
- Loss or potential loss of revenue from sale or licensing of digital copies of Plaintiff's copyrighted work(s) due to the availability of such work(s) for others to view, print and download on Defendants' websites as a result of the accidental or mistaken identification of such work(s) as public domain or "orphan works";
- Exposure of Plaintiff's copyrighted works to virtually unlimited piracy due to breaches in security;
- Loss or potential loss of control over the reproduction and distribution of Plaintiff's copyrighted works; and
- Loss or potential loss of revenue from sale and/or licensing of hardcopies and digital copies of Plaintiff's copyrighted works to libraries and/or archives.

INTERROGATORY NO. 6: For each work, if any, listed on Schedule A, identify with specificity all physical, logical/technical, administrative and/or other controls used to ensure the safety and security of each such work when stored, distributed, sold and/or licensed in any format, including without limitation hardback, paperback, and electronic digital formats, and identify documents sufficient to substantiate the use of such controls, by a) you; b) any publisher; c) any printer; d) any distributor; e) any warehouse; f) any wholesaler; g) any retailer; h) any Internet host, website and/or online retailer in connection with digital or electronic formats; and/or i) any purchaser of such work.

RESPONSE: Plaintiff objects to this Interrogatory on the ground that the security of Plaintiffs' works that are or have been stored, distributed, sold and/or licensed *with* Plaintiff's

authorization is relevant to neither Plaintiffs' claims nor Defendants' valid defenses, which concern Defendants' digitization, reproduction and distribution of Plaintiff's work(s) *without* Plaintiff's authorization, and are therefore beyond the scope of discovery pursuant to Fed. R. Civ. P. 26. Plaintiff further objects that this Interrogatory on the ground that most of the information sought by this Interrogatory is in the possession or custody or third parties over whom Plaintiff does not exercise control.

INTERROGATORY NO. 7: For each work, if any, listed on Schedule A, identify with specificity all physical, logical/technical, administrative and/or other controls, used to prevent and/or detect unauthorized access to printed or electronic works, that you have requested in any licensing, publishing distribution and/or other agreements related to such work, and identify all documents related to such requests.

RESPONSE: Plaintiff objects to this Interrogatory on the ground that the security of Plaintiffs' works that are or have been stored, distributed, sold and/or licensed *with* Plaintiff's authorization is relevant to neither Plaintiffs' claims nor Defendants' valid defenses, which concern Defendants' digitization, reproduction and distribution of Plaintiff's work(s) *without* Plaintiff's authorization, and are therefore beyond the scope of discovery pursuant to Fed. R. Civ. P. 26. Plaintiff further objects that this Interrogatory on the ground that most of the information sought by this Interrogatory is in the possession or custody or third parties over whom Plaintiff does not exercise control.

SPECIFIC OBJECTIONS AND RESPONSES TO DOCUMENT REQUESTS

REQUEST NO. 1: For each work, if any, listed on Schedule A to your Objections and Responses to Defendants' First Set of Interrogatories and Requests for the Production of Documents ("Schedule A"), documents sufficient to identify whether that work is or has ever been part of any effort to reprint out-of-print works in any form, including without limitation the Author Guild's "BackinPrint.com" service.

RESPONSE: Plaintiff objects to this Request on the ground that the term "in-print" is not defined and therefore is ambiguous. Subject to and without waiving the foregoing objections

or any General Objections, Plaintiff responds that, for the reasons set forth in response to Interrogatory No. 1 hereto, none of the work(s) listed on Schedule A are “out-of-print.”

REQUEST NO. 2: All agreements concerning iUniverse.com, or any other service offering per-order printing in a hardback, paperback or electronic format, that involve any work listed on Schedule A.

RESPONSE: Subject to and without waiving the foregoing objection or any General Objections, to date no documents have been identified that are responsive to this Request.

REQUEST NO. 3: All documents concerning the grant of electronic and/or digital reproduction, distribution and/or display rights to any person or entity, including without limitation all correspondence and agreements concerning the grant of such rights in any work listed on Schedule A.

RESPONSE: Plaintiff objects to this Request on the ground that it is duplicative, as Plaintiff already produced and will continue to produce in response to Defendants’ first set of discovery requests any agreements concerning the grant of electronic and/or digital reproduction, distribution and/or display rights of the work(s) listed on Schedule A. Plaintiff further objects on the ground that the request for “all correspondence” concerning the grant of any such rights is overbroad, unduly burdensome and seeks information that is relevant to neither Plaintiffs’ claims nor Defendants’ valid defenses and are therefore beyond the scope of discovery pursuant to Fed. R. Civ. P. 26.

REQUEST NO. 4: All documents concerning the criteria used to determine whether a given work is in-print or out-of-print under any publishing agreement or other agreement, including without limitation any such documents referring to any work listed on Schedule A.

RESPONSE: Plaintiff objects to this Request on the same grounds as set forth in response to Interrogatory No. 1. Subject to and without waiving the foregoing objections or any General Objections, Plaintiff will produce documents, if any, concerning royalties generated from the work(s) on Schedule A, printouts from Bookfinder.com and Amazon.com and contracts under which the work(s) are being brought back into print.

REQUEST NO. 5: All documents concerning any physical, logical/technical, administrative and/or other controls used to prevent and/or detect unauthorized access to printed or electronic works generally, including without limitation any such documents referring to any work listed on Schedule A.

RESPONSE: Plaintiff objects to this Request on the same grounds as set forth in response to Interrogatory No. 7.

REQUEST NO. 6: All documents concerning any physical, logical/technical, administrative and/or other controls used to ensure the safety and security of any work listed on Schedule A when stored, distributed, sold and/or licensed in any format, including without limitation hardback, paperback, and electronic and digital formats by any person or entity, including without limitation you and any publisher; printer; distributor; warehouse, wholesaler, retailer, Internet host, website and/or online retailer in connection with digital or electronic formats; and/or any purchaser of such work.

RESPONSE: Plaintiff objects to this Request on the same grounds as set forth in response to Interrogatory No. 6.

REQUEST NO. 7: All documents concerning the existence or non-existence of a specific market or potential market for the digitization and further reproduction, distribution and/or display of printed works for the purpose of a) electronic archiving; b) non-consumptive research; c) full-text searching; and/or d) use by the blind or others with disabilities that restrict their use of standard printed works.

RESPONSE: Plaintiff objects to this Request on the ground that it is vague, ambiguous, overbroad and unduly burdensome in several respects. For example, the request to produce “[a]ll documents concerning the . . . non-existence of a . . . potential market” for various uses of “printed works” is unintelligible, and the term “electronic archiving” is undefined and could be interpreted as encompassing retail electronic book distributors. The Request is further objectionable in that it is not limited to documents relating to Plaintiff’s works, but to “printed works” in general. Subject to and without waiving the foregoing objections or any General Objections, Plaintiff will conduct a reasonable search and produce documents, if any, responsive to this Request.

REQUEST NO. 8: For each work, if any, listed on Schedule A, documents sufficient to identify any revenue or other earnings of any kind generated or expected to be generated in whole or in part by the inclusion of such work in a digital archive.

RESPONSE: Plaintiff objects to this Request on the ground that the phrase “inclusion of such work in a digital archive” is undefined, vague and ambiguous. Subject to and without waiving the foregoing objection or any General Objections, to date Plaintiff has identified no documents concerning revenues or other earnings of any kind generated or expected to be generated in whole or in part by the mere uploading and archiving of a digital version the work(s) on Schedule A to a “digital archive” in which such work(s) are not made available for purchase, viewing, printing or downloading.

REQUEST NO. 9: For each work, if any, listed on Schedule A, documents sufficient to identify any revenue or other earnings of any kind generated or expected to be generated in whole or in part by the use of such work in connection with non-consumptive research.

RESPONSE: Subject to and without waiving any General Objections, to date no documents have been identified that are responsive to this Request.

REQUEST NO. 10: For each work, if any, listed on Schedule A, documents sufficient to identify any revenue or other earnings of any kind generated or expected to be generated in whole or in part by the use of such work in connection with full-text searching.

RESPONSE: Subject to and without waiving any General Objections, to date no documents have been identified that are responsive to this Request.

REQUEST NO. 11: For each work, if any, listed on Schedule A, documents sufficient to identify any revenue or other earnings of any kind generated or expected to be generated in whole or in part by the use of such work by the blind or others with disabilities that restrict their use of standard printed works.

RESPONSE: Plaintiff objects to this Request on the ground that it is beyond the scope of discovery in this lawsuit. Subject to and without waiving the foregoing objection or any General Objections, Plaintiff responds that by tradition and industry practice, authors generally do not receive royalties for the licensing and sale of works distributed in specialized formats exclusively for use by the blind or other persons with disabilities. Furthermore, 17 U.S.C. § 121

specifically permits the reproduction of copyrighted literary works by one or more “authorized entit[ies]” in “specialized formats exclusively for use by blind or other persons with disabilities.” Accordingly, for the purposes of this litigation, Plaintiff is not claiming that any revenue or other earnings of any kind were generated or are expected to be generated in whole or part by the reproduction or distribution of copies of Plaintiff’s work(s) “for use by blind or other persons with disabilities” (as defined in 17 U.S.C. § 121(d)(1)).

REQUEST NO. 12: All non-privileged documents concerning the HathiTrust and/or Defendants’ alleged digitization of written works.

RESPONSE: Plaintiff objects to this Request on the ground that is overbroad and unduly burdensome. Subject to and without waiving the foregoing objection or any General Objections, Plaintiff will conduct a reasonable search and produce non-privileged documents, if any, responsive to this Request.

REQUEST NO. 13: All documents concerning the effect, if any, the HathiTrust has had or is expected to have on the value, revenue or earnings associated with printed and/or electronic written works.

RESPONSE: Plaintiff objects to this Request on the grounds that it is vague, ambiguous, overbroad and repetitive of prior requests, pursuant to which documents have been or will be produced.

REQUEST NO. 14: All documents identified by you in response to Defendants’ Second Set of Interrogatories.

RESPONSE: Subject to and without waiving the General Objections, any such documents will be produced.

Dated: New York, New York
April 10, 2012

FRANKFURT KURNIT KLEIN & SELZ, P.C.

By: /s/ Jeremy S. Goldman

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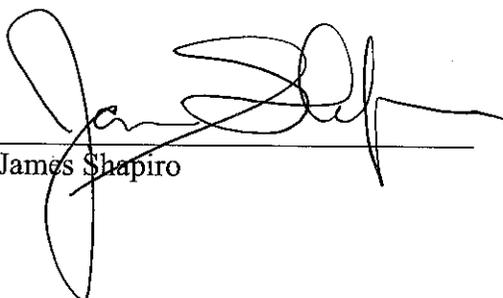
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VERIFICATION

I, James Shapiro, have read the foregoing Responses to Interrogatory Numbers 1 through 7 and know their contents. The responses provided therein are true to my knowledge, and as to those matters stated upon information and belief, I believe them to be true. I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April __, 2012.


James Shapiro