

EXHIBIT 78

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Attorneys for Defendants

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

THE AUTHORS GUILD, INC., ET AL.,

Plaintiffs,

v.

HATHITRUST, ET AL.,

Defendants.

Case No. 11 Civ. 6351 (HB)

RESPONSES TO PLAINTIFFS'
FIRST SET OF
INTERROGATORIES TO
DEFENDANT KEVIN REILLY

Defendant Kevin Reilly (“Defendant”), in his official capacity as President of The University of Wisconsin System (the “University”) states the following objections and responses to Plaintiffs’ First Set of Interrogatories to Defendant Kevin Reilly pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure (“FRCP”) and the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York (the “Local Rules”) and based upon information provided to him by employees of the University with personal knowledge of the relevant facts.

A. GENERAL OBJECTIONS AND LIMITATIONS

1. Defendant’s discovery and investigation of the facts of this proceeding are continuing. These Interrogatory responses are based on information gathered as of the date of these responses. Defendant reserves the right to amend or supplement his responses when and if additional information is obtained, as required by the FRCP.

2. Defendant objects to each of Plaintiffs’ definitions and instructions to the extent they impose burdens and requirements on Defendant that are inconsistent with or beyond those set forth in the FRCP or the Local Rules.

3. Defendant objects to the Interrogatories in their entirety and to each Interrogatory to the extent they impose burdens and requirements on Defendant that are inconsistent with or beyond those set forth in the FRCP or the Local Rules.

4. Defendant objects to the Interrogatories in their entirety and to each Interrogatory to the extent that the information sought is protected from disclosure by (a) agreements with other parties, including, but not limited to, confidentiality agreements, (b) court order, or (c) statute, regulation, administrative order or case law.

5. Defendant objects to the Interrogatories in their entirety and to each Interrogatory

to the extent that the information sought is commercially sensitive proprietary and/or confidential information and trade secrets (“Confidential Information”). Defendant will provide non-privileged, responsive Confidential Information only pursuant to the Protective Order in place in this litigation.

6. Defendant objects to the Interrogatories in their entirety and to each Interrogatory to the extent that the information sought was prepared in anticipation of litigation, constitutes attorney work product, discloses mental impressions, conclusions, opinions, or legal theories of Defendant’s attorneys, contains privileged attorney-client communications (including but not limited to those subject to the common interest or joint defense privilege) or is otherwise protected from disclosure under applicable privileges, law, or rules, or because such information is not properly discoverable under the FRCP or the Local Rules. Any disclosure of such protected or privileged information in any response is inadvertent and shall not constitute a waiver of such privilege, protection or immunity.

7. Defendant objects to the Interrogatories in their entirety and to each Interrogatory to the extent that the information sought is (a) not in Defendant’s, the University’s, and/or the Library’s possession, custody, or control, (b) in the possession, custody, or control of Plaintiffs, (c) publicly available, or (d) as equally available and/or readily accessible to Plaintiffs as it is to Defendant. These interrogatory responses are based on a reasonably diligent search for and review of information in those areas within Defendant’s, the University’s, and/or the Library’s direct knowledge, custody, or control where information of the type requested would be expected to be found, and Defendant disclaims any obligation to solicit information from any other parties in responding to the Interrogatories.

8. Defendant objects to the Interrogatories in their entirety and to each Interrogatory to the extent they are vague, ambiguous, and/or contain terms that are undefined or otherwise unclear.

9. Defendant objects to the Interrogatories in their entirety and to each Interrogatory to the extent that the information sought is irrelevant to the subject matter of this action and to the extent that the Interrogatories are not reasonably calculated to lead to the discovery of admissible evidence.

10. Defendant objects to the Interrogatories in their entirety and to each Interrogatory to the extent that they prematurely call for the disclosure of information that Defendant may obtain through discovery.

11. Defendant objects to the Interrogatories in their entirety and to each Interrogatory insofar as they assume disputed facts or legal conclusions. To the extent any interrogatory assumes disputed facts or legal conclusions, Defendant denies such disputed facts or legal conclusions. Any response or objection by Defendant with respect to any such Interrogatory is without prejudice to this objection and Defendant's right to dispute facts and legal conclusions assumed by the Interrogatories.

12. Defendant objects to the Interrogatories in their entirety and to each Interrogatory to the extent they fail to contain defined time periods or limits, or seek information outside of the relevant time period. In particular, Defendant objects to all demands in the Interrogatories that require Defendant to search for, produce, disclose or identify information without any limitation as to time. Unless otherwise indicated in a particular Interrogatory or the response thereto, Defendant's responses refer only to the time period between October 6, 2008 and October 6, 2011.

13. No objection or limitation, or lack thereof, made in these responses and objections shall be deemed an admission by Defendant as to the existence or nonexistence of information.

14. Defendant's responses to the Interrogatories are made without prejudice to the assertion of additional objections and responses by him at a later date or to Defendant's right to supplement, modify, or amend his responses as appropriate, and to rely upon and produce evidence during trial or at any other proceeding that may be held in this action.

15. Defendant reserves the right to object on any ground at any time to a demand for further response, and reserves the right to revise, supplement, correct, or add to these responses. Defendant expressly reserves any and all rights and privileges under the FRCP, the Local Rules, and any other law or rule, and the failure to assert such rights and privileges shall not constitute a waiver thereof, either with respect to these responses or with respect to any future discovery responses or objections.

16. Defendant incorporates by reference these General Objections into each of the Responses and Specific Objections set forth below, as if fully set forth in each of them.

B. SPECIFIC OBJECTIONS AND LIMITATIONS

DEFINITIONS

1. Defendant objects to Plaintiffs' definition of "University" as overly broad and unduly burdensome in that it includes "each of its subsidiaries, divisions and affiliates, principals, officers, directors, members, employees, agents and attorneys," which refers to thousands of individuals, the vast majority of which have no knowledge of and have had no involvement in the activities that are the subject of Plaintiffs' claims in this action.

2. Defendant objects to Plaintiffs' definition of "Library" on the ground that it is vague and ambiguous.

3. Defendant objects to Plaintiffs' definition of "Master Print Copy" and to each Interrogatory including that term as vague and ambiguous in that Plaintiffs' definition of "Master Print Copy" refers to each "original print copy" without identifying the meaning of "original." As used in Plaintiffs' Interrogatories and these responses, Defendant understands "Master Print Copy" to refer to a print copy of a Work purchased or otherwise acquired through lawful means by the University.

4. Defendant objects to Plaintiffs' definition of "Master Digital Copy" and to each Interrogatory including that term on the ground that they presume the existence of certain digital copies that may not exist, or that may exist in the possession, custody, or control of third parties and without Defendant's, the University's, or the Library's knowledge. Defendant further objects to Plaintiffs' definition of "Master Digital Copy" and to each Interrogatory including that term to the extent that they seek information in the possession, custody, or control of third parties and not in the possession, custody, or control of Defendant, the University, or the Library. Defendant states that upon information and belief Google prepared a "Master Digital Copy" of each Work listed on Schedule A to Plaintiffs' First Set of Interrogatories to Defendant Kevin Reilly ("Schedule A") based on Master Print Copies, but further information concerning such Master Digital Copies lies with third parties and is not in Defendant's possession, custody, or control.

5. Defendant objects to Plaintiffs' definitions of "Master University Copy" and "Secondary University Copies" on the ground that they presume the existence of certain digital copies that do not exist. Defendant states that the University did not receive from Google a digital copy of any of the Works listed in Schedule A.

6. Defendant objects to Plaintiffs' definition of "HathiTrust Digital Copies" and to

each Interrogatory including that term on the ground that they presume the existence of certain digital copies that may not exist, or that may exist in the possession, custody, or control of third parties and without Defendant's, the University's, or the Library's knowledge. Defendant further objects to Plaintiffs' definition of "HathiTrust Digital Copy" and to each Interrogatory including that term to the extent that they seek information in the possession, custody, or control of third parties and not in the possession, custody, or control of Defendant, the University, or the Library. Defendant states that the Library requested that Google provide to the University of Michigan library digital copies of each of the Works listed on Schedule A based on Master Print Copies and, on information and belief, these digital works are now a part of the HathiTrust Digital Library, but further information concerning such digital copies lies with third parties and is not in the possession, custody, or control of Defendant, the University, or the Library.

7. Defendant objects to Plaintiffs' definition of "Third Party Digital Copies" and to each Interrogatory including that term on the ground that they presume the existence of certain digital copies that may not exist, or that may exist in the possession, custody, or control of third parties and without Defendant's, the University's, or the Library's knowledge. Defendant further objects to Plaintiff's definition of "Third Party Digital Copies" and to each Interrogatory including that term as overly broad to the extent Plaintiffs' definition includes digital copies created from the Master Digital Copy or digital copies thereof because, as described above, the Master Digital Copy and information concerning the Master Digital Copy are with third parties and are not in the possession, custody, or control of Defendant, the Library, or the University.

INSTRUCTIONS

8. Defendant objects to Paragraph 1 of Plaintiffs' "Instructions" to the extent that it impermissibly seeks to impose burdens and requirements beyond those set forth in the FRCP 26

and 33 by requiring responses to the Interrogatories based upon the knowledge of, and information available to, parties other than the party upon which the Interrogatories are served, and Defendant disclaims any obligation to solicit information from any other parties in responding to the Interrogatories. Defendant further objects to this definition because it could potentially refer to thousands of individuals, the vast majority of which have no knowledge of and have had no involvement in the activities that are the subject of Plaintiffs' claims in this action, and in this regard is overly broad, unduly burdensome, seeks irrelevant information and is not reasonably calculated to lead to the discovery of admissible evidence.

RESPONSES TO INTERROGATORIES

1. For each Work listed on Schedule A, separately identify the total number of (i) print and (ii) digital copies the Library created of each Master Print Copy it owns.

RESPONSE: Defendant objects to Interrogatory No. 1 on the ground that it is vague and ambiguous in that it requests information without specifying the time or time period for which the information is sought. Subject to the foregoing general and specific objections, and without waiving the same, Defendant responds that as of February 8, 2012, the Library has not created any print or digital copies from a Master Print Copy of any Work listed on Schedule A. Defendant further responds that the Library prepared for shipment to one of Google's scanning centers a Master Print Copy of each Work listed in Schedule A and, upon information and belief, Google prepared one or more digital copies of each Work listed on Schedule A based on Master Print Copies.

2. For each Master Print Copy of a Work listed on Schedule A that the University caused to be digitized, (i) describe the method by which the Library selected, identified, collected and transported the Master Print Copy for digitization, and (ii) identify the individuals (a) who directed or performed each of the foregoing actions, and (b) to whom the Master Print Copy was delivered for digitization.

RESPONSE: Defendant objects to Interrogatory No. 2 on the ground that it is vague and ambiguous in that “caused to be digitized” is not defined and the meaning of this phrase is not clear in the context of the Interrogatory. Defendant further objects to Interrogatory No. 2 to the extent it seeks the identity of individuals who directed or performed actions that were not directed or performed by Defendant, the University, or the Library. Subject to the foregoing general and specific objections, and without waiving the same, Defendant responds as follows:

(i) Google Inc. (“Google”) provided the Library with a list of candidate works for digitization, which included the Works listed on Schedule A. The Library’s staff retrieved the Master Print Copy of each Work on Schedule A and prepared them for shipment to one of Google’s scanning centers. Google arranged for transportation of the Master Print Copies from, and back to, the Library.

(ii) (a) For each of the foregoing actions that was directed or performed by the Library, the individual who was primarily responsible for such actions is Ed Van Gemert, Deputy Director of Libraries for the University. For each of the foregoing actions that was directed or performed by Google, the individuals who were primarily responsible for such actions are, upon information and belief, Irene Zimmerman, Interim Associate Director for Central Technical Services, Google Project Manager, and Jeanne Witte, Google Operations Manager.

(b) A Master Print Copy of each Work on Schedule A was delivered to Google for digitization.

3. For each Work listed on Schedule A, provide the following information with regard to the Master Digital Copy, Master University Copy, and all Secondary University Copies, HathiTrust Digital Copies and Third Party Digital Copies of the Work:

(a) the title and author of the Work;

- (b) the date the digital copy was created;
- (c) the identity of the source of the digital copy;
- (d) a description of the equipment and method used to create the digital copy;
- (e) a description of the means by which the digital copy was transferred from its source;
- (f) the type of media (e.g., DVD, flash drive, internal/external hard drive, tape backup, etc.) on which the digital copy is stored;
- (g) the identity of any computer system connected to media on which the digital copy is stored;
- (h) the identity of any computer network to which a device storing the digital copy is connected;
- (i) the Physical Location of the digital copy;
- (j) the Virtual Location of the digital copy;
- (k) the identities of the individual(s) who authorized, directed, supervised, facilitated and/or participated in the creation of the digital copy, including each such individual's name and current address, as well as his or her employer (at the time of the digitization), job title and role in the creation of the digital copy;
- (l) the identities of the individual(s) who currently have authorized access to the Physical Location and/or Virtual Location of the digital copy, including each such individual's name and current address, as well as his or her current employer, title and job description.

RESPONSE: Defendant objects to Interrogatory No. 3 on the ground that it presumes the existence of certain digital copies that may not exist, or that may exist in the possession, custody, or control of third parties and without Defendant's knowledge. Defendant further objects to Interrogatory No. 3 to the extent that it seeks information in the possession, custody, or control of third parties and not in the possession, custody, or control of Defendant, the University or the Library. Defendant further objects to Interrogatory No. 3 on the grounds that subparts (c) and (e) are vague and ambiguous in that "source" and "transferred from its source" are not defined and the meaning of such terms is not clear in the context of the Interrogatory. Defendant also objects

to Interrogatory No. 3 on the grounds that subparts (g), (h), (i), and (j) seek Confidential Information regarding the identity of computer systems and computer networks and regarding the “Physical Location” and “Virtual Location” of digitized works, and the disclosure of such Confidential Information would compromise the security of the HDL. Defendant also objects to Interrogatory No. 3 on the grounds that subpart (k) is vague and ambiguous in that “authorized,” “directed,” “supervised,” “facilitated” and “participated” are not defined and the meaning of such terms is not clear in the context of the Interrogatory. Defendant further objects to Interrogatory No. 3 on the grounds that subpart (l) seeks private and confidential information protected from disclosure by agreements with other parties, and by federal statutes and regulations.

Subject to the foregoing general and specific objections, and without waiving the same, Defendant responds that no Master University Copy or Secondary University Copies exist of any of the Works listed on Schedule A, and that Defendant has no knowledge or information concerning the existence of any Third Party Digital Copies of any Work listed on Schedule A. Defendant further responds that, upon information and belief, Google prepared a Master Digital Copy of each Work listed on Schedule A based on Master Print Copies, but further information concerning such Master Digital Copies lies with third parties and is not in Defendant’s possession, custody, or control. Defendant further responds that, upon information and belief, a HathiTrust Digital Copy exists for each Work listed on Schedule A, but any information concerning such HathiTrust Digital Copies lies with third parties and is not in Defendant’s possession, custody, or control.

Based, in part, on information provided to the Library by Google, Defendant provides the following further response only as to the Master Digital Copy of each Work listed on Schedule A, and disclaims any knowledge concerning any other digital copies of such Works:

(a) the title and author of the Works are:

Oss målvakter emellan, by Erik Grundström (Alba)

Den umuligen friheten: Henrik Ibsen og moderniteten, by Helge Rønning (Gylendal)

Je cours plus vite que la lycose: poèmes, by Danièle Simpson (Naaman)

(b) upon information and belief, Master Digital Copies of each Work listed on

Schedule A were created on the following dates:

Oss målvakter emellan – January 10, 2010

Den umuligen friheten: Henrik Ibsen og moderniteten – November 6, 2009

Je cours plus vite que la lycose: poèmes – April 15, 2010.

(c) Defendant reiterates his objection to this sub-part on the ground that “source” is not defined and the meaning of such term is not clear in the context of the Interrogatory. Subject to this objection, and without waiving the same, Defendant understands that the Master Digital Copies of the Works on Schedule A were prepared by Google based on Master Print Copies.

(d) This subpart calls for information in the possession, custody, or control of third parties, including Google, and that is not known to Defendant, the University or the Library.

(e) Defendant reiterates his objection to this subpart on the ground that “transferred from its source” is not defined and the meaning of such phrase is not clear in the context of the Interrogatory. Subject to this objection, and without waiving the same, Defendant responds that this subpart calls for information in the possession, custody, or control of third parties, including Google, and that is not known to Defendant, the University or the Library.

(f) This subpart calls for information in the possession, custody, or control of third parties, including Google, and that is not known to Defendant, the University or the Library.

(g) Defendant reiterates his objection to this sub-part on the ground that it calls for Confidential Information. Subject to this objection, and without waiving the same, Defendant responds that this subpart calls for information in the possession, custody, or control of third parties, including Google, and that is not known to Defendant, the University or the Library.

(h) Defendant reiterates his objection to this subpart on the ground that it calls for Confidential Information. Subject to this objection, and without waiving the same, Defendant responds that this subpart calls for information in the possession, custody, or control of third parties, including Google, and that is not known to Defendant, the University or the Library.

(i) Defendant reiterates his objection to this subpart on the ground that it calls for Confidential Information. Subject to this objection, and without waiving the same, Defendant responds that this subpart calls for information in the possession, custody, or control of third parties, including Google, and that is not known to Defendant, the University or the Library.

(j) Defendant reiterates his objection to this sub-part on the ground that it calls for Confidential Information. Subject to this objection, and without waiving the same, Defendant responds that this subpart calls for information in the possession, custody, or control of third parties, including Google, and that is not known to Defendant, the University or the Library.

(k) Ed Van Gemert, Deputy Director of Libraries for the University, supervised the transfer to Google of the Master Print Copies of each Work listed on Schedule A, with the assistance of Irene Zimmerman, Interim Associate Director for Central Technical Services, Google Project Manager, and Jeanne Witte, Google Operations Manager. Mr. Van Gemert was not directly involved in the creation of the Master Digital Copy nor, upon information and belief, were Ms. Zimmerman or Ms. Witte.

(l) Defendant reiterates his objection to this subpart on the ground that it seeks private and confidential information protected from disclosure by agreements with other parties, and by federal statutes and regulations. Subject to this objection, and without waiving the same, Defendant responds that neither Defendant, the University nor the Library have any knowledge

of the identities of any individuals with authorized access to the Physical and/or Virtual Location of any digital copies made from the Master Print Copy.

4. Identify the number of books the University contributed to HathiTrust and the estimated number of those books the University believes are protected by copyright.

RESPONSE: Defendant objects to Interrogatory No. 4 on the ground that the phrase “books the University contributed” is not defined and the meaning of such phrase is not clear in the context of the Interrogatory. Subject to the foregoing general and specific objections, and without waiving the same, Defendant responds that the University has contributed no “books” to the HathiTrust. Defendant further responds that, as of December 9, 2011, the University had provided Google with 511,432 volumes that, upon information and belief, were digitized by Google and are now in the HDL. Defendant does not have an estimate of the number of such works are protected by copyright under the United States Copyright Act.

5. Describe in detail the process followed by the University between May 16, 2011 and September 16, 2011 in connection with the Orphan Works Project to determine whether a work would be designated as an “orphan candidate.”

RESPONSE: Subject to the foregoing general objections, and without waiving the same, Defendant responds that, aside from generally indicating its support for the initiative on April 25, 2011, the University has not participated in, nor taken any actions whatsoever in connection with, the University of Michigan library’s 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, which the University of Michigan library calls the “Orphan Works Project.”

6. Identify the individual(s) who authorized, directed, supervised, facilitated and/or participated in the Orphan Works Project between May 16, 2011 and September 16, 2011,

including each such individual's name and current address, as well as his or her employer (at the time the individual was involved with the Orphan Works Project), job title and role in the Orphan Works Project.

RESPONSE: Defendant objects to Interrogatory No. 6 on the ground that the terms "authorized," "directed," "supervised," "facilitated" and "participated" are not defined and the meaning of such terms is not clear in the context of the Interrogatory. Defendant further objects to Interrogatory No. 6 to the extent it seeks the identity of individuals who were involved in performing actions that were not instructed, overseen, and/or performed by Defendant, the University, or the Library. Subject to the foregoing general and specific objections, and without waiving the same, Defendant responds that, aside from generally indicating its support for the "Orphan Works Project" on April 25, 2011, the University has not participated in, nor taken any actions whatsoever in connection with, the "Orphan Works Project."

DATED: February 8, 2012

Respectfully Submitted,



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Attorneys for Defendants

VERIFICATION

I, Kevin Reilly, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am President of The University of Wisconsin System (the "University").

2. All of the information provided in the attached Responses to Plaintiffs'

First Set of Interrogatories to Defendant Kevin Reilly has been gathered from various employees of the University.

3. I am informed and believe that the best efforts of those employees have been employed in procuring the information, and on that basis I am informed and believe that the information is true and correct.

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

Executed this 8th day of February, 2012.



Kevin Reilly