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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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PLAINTIFFS’ COUNTER-STATEMENT IN RESPONSE TO DEFENDANT INTERVENORS’ STATEMENT OF UNDISPUTED FACTS

Pursuant to Local Rule 56.1 of the Local Rules of the United States District Court for the Southern District of New York, Plaintiffs submit the following counter-statement in response to Defendant Intervenors’ Local Rule 56.1 Statement. Except where specifically defined in the chart below, capitalized terms shall have the meanings ascribed to them in the “Definitions” set forth in Appendix A to Plaintiffs’ 56.1 Statement filed in support of Plaintiffs’ motion for summary judgment (“UF”).

No.	INTERVENORS' ASSERTED UNDISPUTED FACT	RESPONSE
	Background on HathiTrust Digital Library	
1.	The HathiTrust Digital Library (HDL) is a service run by the University of Michigan that stores and preserves the digital library collections of over sixty institutions worldwide, including the University of California, Indiana University, University of Wisconsin, and Cornell University, to provide more secure, long-term storage for the works, more comprehensive research and discovery tools, improved access to works in the public domain, and improved access to works for students and faculty with print disabilities. (Decl. of John Wilkin, June 28, 2012, (hereinafter "Wilkin Decl.") ¶¶ 55-56.)	Controverted to the extent that the statement implies that the HDL provides access only to works in the public domain and only to students and faculty with print disabilities. Otherwise, uncontroverted but immaterial because Congress addressed the balance between the rights of copyright owners and those of academic and other users in the Copyright Act, 17 U.S.C. § 101 et seq. and specifically addressed the rules and requirements for preservation and replacement of books by Libraries and Archives in Section 108 of the Copyright Act, 17 U.S.C. § 108. and for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
2.	The combined corpus of the HDL now totals more than 10 million works and is growing daily. (Wilkin Decl. ¶¶ 57.)	Uncontroverted.
3.	The HDL contains works in dozens of subject matters, written in more than forty languages, and spanning a time period from before the Fifteenth Century to today. The vast majority of the works in the HDL were published before 2000. (Wilkin Decl. ¶¶ 60-62.)	Uncontroverted except to the extent that the word "vast" in the Statement is vague. Plaintiffs' concede that the majority of the works in the HDL were published before 2000, but note that the majority of the works in the HDL still are protected by copyright.
4.	The vast majority of works in the HDL corpus are out of print and have been out of print for decades. (Wilkin Decl. ¶ 66.)	Controverted as a misstatement of the declaration cited. Professor Wilkin stated that the vast majority of "older works" are out of print. Wilkin Decl ¶ 66. Further controverted with respect to the use of the term "vast majority" as vague.

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5.	In 2008 the University of Michigan completed the infrastructure to begin to make the HDL available to blind students, making it the first library collection that is fully accessible to the blind. (Decl. of Dr. Marc Maurer, June 27, 2012, (hereinafter "Maurer Decl.") ¶ 14.)	Controverted to the extent that the declaration cited does not support the statement, particularly with respect to the allegation that the HDL was the first library collection fully accessible to the blind. Otherwise uncontroverted but immaterial because Congress because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
6.	A large portion of the titles included in the HathiTrust have been digitized through the University Defendants' collaboration with Google, in which Google converted the hardcopy books from each library into digital formats and provided copies of those files to the participating universities. (Wilkin Decl. ¶¶ 46, 52.)	Uncontroverted.
	Background on the Defendant Intervenors	
7.	The National Federation of the Blind, a civil rights organization founded in 1940, believes that there are effective nonvisual alternatives for most educational, quotidian and workplace tasks and that with equal opportunity, the blind can be full participants in all aspects of society. Today, the National Federation of the Blind, with affiliates in all 50 states, Puerto Rico, and the District of Columbia, consists of more than 50,000 blind people, their family and friends. (Maurer Decl. ¶ 6.)	Uncontroverted.

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8.	<p>Georgina Kleege is legally blind. She is a Lecturer in Creative Writing and Disability Studies and a member of the English Department at the University of California, Berkeley. She previously was an Adjunct Professor at the Ohio State University. When she wishes to read books from the Berkeley library, she must scan each page and run it through optical character recognition software. As a result, she rarely borrows print materials from the library. The lack of accessible print materials has affected her education and career. Although she was very successful as an undergraduate student at Yale University, she spent a significant amount of time searching for human readers to help her complete her coursework. Because of the time constraints involved with finding readers, her professors discouraged her from pursuing a Ph.D. (Decl. of Georgina Kleege, December 5, 2011, ¶¶ 2, 3, 5, 6. (Abelson Decl. Ex. D))</p>	<p>Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>
9.	<p>Blair Seidlitz is legally blind and is pursuing a degree in Engineering Physics at the University of Wisconsin, Madison. To borrow books from the Wisconsin Library, he must photocopy all the pages he wishes to read and scan them with his Kurzweil scanner. Because this process is time consuming, he avoids borrowing books from the library. He cannot access the supplemental materials for his classes that his sighted classmates can access. (Decl. of Blair Seidlitz, December 6, 2011, ¶¶ 3-7 (Abelson Decl. Ex. E).)</p>	<p>Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>

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10.	<p>Courtney Wheeler is legally blind and is a student at the University of Wisconsin, Stout. She is pursuing a bachelor's degree in Psychology. To access books from the University of Wisconsin Library, she brings her husband or a friend as a reader. As a result of this time-consuming process, she chooses not to take elective classes that require research papers. She has petitioned unsuccessfully in the past for exemptions from conducting library research as an accommodation for her disability, but she would prefer to have the opportunity to have access to library materials to the same extent and at the same time as her sighted classmates. (Decl. of Courtney Wheeler, December 6, 2011, ¶¶ 3,4, 6-8 (Abelson Decl. Ex. F).)</p>	<p>Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>
	<p>What makes a Digital Book Accessible to the Blind</p>	
11.	<p>Prior to the development of accessible digital books, the blind could access print materials only if the materials were converted to braille or if they were read by a human reader, either live or recorded. These alternative formats were only available through separate libraries for the blind. (Decl. of George Kerscher, June 28, 2012, (hereinafter "Kerscher Decl.") ¶ 19; Maurer Decl. ¶ 8.)</p>	<p>Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>
12.	<p>The technology of accessible books has advanced far past the capabilities offered by human narration, making human narration alone substantially inferior to use of accessible digital books. (Kerscher Decl. ¶ 20.)</p>	<p>Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>
13.	<p>To use a live human reader is expensive or burdensome for a family member or friend. Moreover, live readers' orations cannot be reproduced, giving the blind reader only one opportunity to hear the material. Live readers also cannot increase their speed – they are inherently limited to the pace they can reasonably read aloud. (Kerscher Decl. ¶ 20.)</p>	<p>Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>

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14.	Recorded human narration resolves some of these issues, like repetition and speed (and reader exhaustion), but presents its own problems. Typically, it will take six months to more than a year for a blind person to receive a requested recording of a textbook. Moreover, even recorded human narration cannot be navigated like an accessible digital book and will not allow a reader to hear each character to discern spelling. (Kerscher Decl. ¶ 20.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
15.	Today, blind readers access digital books with a screen reader or built-in text-to-speech software, both of which can output information either as a computerized vocalization of the text or as braille, through a refreshable braille pad. Unlike books narrated by human readers, accessible digital books can be read as quickly as the reader wants, or even skimmed. Further, they provide significant search and navigation capabilities, allowing readers to jump from chapter to chapter, paragraph to paragraph, and sentence to sentence, as well as to discern spelling. This allows blind readers to re-read certain sections of a work they might not grasp on the first pass, just as a sighted reader may re-read a complicated passage. (Kerscher Decl. ¶ 21.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
16.	The proliferation of digital information and technology held great promise for the blind. But, not all digital information is accessible. For example, scanning a copy of print material usually results in a file in portable document format (PDF). PDFs are created essentially by taking a picture of the page. This gives a sighted person enough to read on a computer screen, but it does not allow screen reader software to recognize the text. (Kerscher Decl. ¶ 22; Maurer Decl. ¶ 18.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.

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17.	<p>To take this next step toward accessibility, the scan must be run through optical character recognition software (OCR) and optical structural recognition software (OSR). OCR/OSR software takes a high resolution image of the page and recognizes the image of characters and even structural data like columns and images. Character recognition software looks at the characters and compares them to a database of what it knows. For example, the software will match an image of the letter "c" to image of the letter "c" in its database. The software will also check spelling, to ensure it has matched the image correctly to images of characters in known words. The OSR component will recognize word boundaries, text block boundaries, and, on occasion, headings. The software then identifies the x/y coordinates of all the characters on a page and attempts to identify the correct reading order for each page, when there are columns or images that alter the usual reading order. The OCR process also allows the text to be searched. (Kerscher Decl. ¶ 23.)</p>	<p>Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>
18.	<p>A further step called "tagging" provides additional metadata about the content, such as the existence of tables in a work or the existence of headings and other document structures. Although the OCR engine will try to add meaningful style information, no existing software can recognize document structures perfectly and this final step must be completed manually. Only materials that are originally created for digital books, or "born digital," rather than scanned from print material do not have to be manually tagged. Tagged works provide to blind readers the closest equivalent to the experience of a sighted person reading the material in its print form, but the labor required to create them has made them very rare. (Kerscher Decl. ¶ 24.)</p>	<p>Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>

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19.	<p>Accessible digital texts present a further benefit for low vision readers over human narration alone. These users often will use print and sound at the same time. They may be able to visually discern paragraphs or chapters while using sound to read characters and words. Human narration therefore is substantially inferior for low vision readers who have some usable vision. (Kerscher Decl. ¶ 25.)</p>	<p>Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>
20.	<p>Even what are commonly referred to as “audiobooks” do not provide the benefit of accessible digital books. While having Jim Dale or Stephen Fry read <i>Harry Potter and the Order of the Phoenix</i> is ideal for entertainment purposes, it does not provide equal access for academic or scholarly pursuits. The ability to access text at high-speed is crucial for students and researchers alike—accessible digital books make high-speed access possible, where audiobooks cannot. Digitally accessible books make it possible for readers with print disabilities to “virtually” bookmark a page, to electronically jot notes in the margin, and to digitally riffle through pages to “scan” for just the right passage. While there was a time where a book read dramatically or even non-dramatically by a human was the best users with print disabilities could hope for, advances in technology mean audiobooks do not equal (and are vastly inferior to) OCR’ed books in the modern era. (Kerscher Decl. ¶ 26.)</p>	<p>Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>

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21.	The DAISY Consortium, an international association that develops, maintains and promotes international DAISY (Digital Accessible Information System) Standards for authorship and distribution, and the International Digital Publishing Forum (IDPF), which is the global trade and standards organization dedicated to the development and promotion of electronic publishing and content consumption, have established standards to ensure that "born digital" material is accessible. Any digital copy of print material that is created to meet the DAISY standard will be fully accessible to the blind. (Kerscher Decl. ¶¶ 14, 27.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
22.	The IDPF develops and maintains the EPUB content publication distribution standard, which is a generally available open standard, available without royalty, for the next generation of commercial and non-commercial digital books. The standardization of a distribution file means that publishers can design their print materials using any authorship tool, convert them to an EPUB file, and then provide that file to any e-book distributor, which will be able to publish the content on whatever platform it uses. (Kerscher Decl. ¶ 28.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
23.	The latest EPUB standard, EPUB 3, incorporates the current DAISY requirements for distribution, which ensures that all documents published using EPUB 3 that follow the accessibility guidelines will be distributed in an accessible format, unless publishers then convert the EPUB files to platforms that are themselves inaccessible. (Kerscher Decl. ¶ 29.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
	Historical Lack of Access for the Blind to Library Collections	

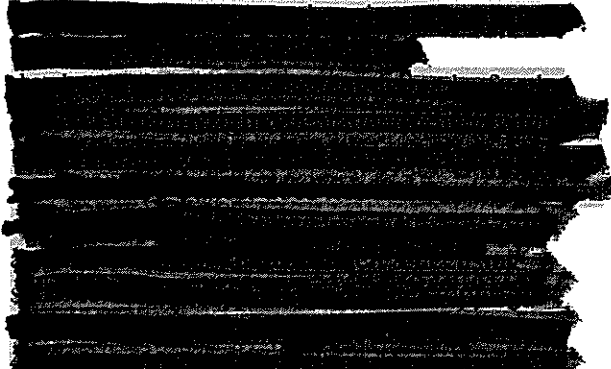

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24.	It is virtually impossible for blind students to conduct library research in a traditional print-based library. A university's disability student services office (DSS) is responsible for scanning print materials and converting them into accessible digital copies for blind students, but the vast majority of these offices will only provide the works listed on the students' syllabi. DSS offices generally do not have the resources to create copies of books that are not required reading, and certainly not do so in a timely manner. As a practical matter, this means it is impossible for blind students to conduct independent library research. Even when a student switches classes or a professor adds a reading to the syllabus after the fact, DSS offices are often overwhelmed and unable to fill the requests. It may take weeks or even months for the student to receive the scanned materials. (Kerscher Decl. ¶ 32; Maurer Decl. ¶ 10.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
25.	The quality of the copies made by the DSS offices varies substantially from university to university. In the vast majority of cases, the scans will only be run through very basic OCR software, without any of the structural recognition in the HathiTrust Scans. (Kerscher Decl. ¶ 33.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
26.	Indexes and tables of contents are not available in an accessible format in almost any university library. Thus, blind students cannot view the index or table of contents of a book to see if it contains relevant information. (Kerscher Decl. ¶ 34.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
27.	At the universities with the best DSS offices, a graduate student may be able to provide a list of materials for research that the office then will have the capacity to digitize. The office, however, is limited to the books the student initially identifies as relevant. Blind students cannot do what sighted students do, that is, browse through many books to find the chapters or sections that are relevant. (Kerscher Decl. ¶ 35.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.

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28.	At the vast majority of universities, where the DSS offices do not have the capacity to honor requests for research materials, a blind student's only option is to use a scanner in the library to scan individual books of possible interest one page at a time, listening to each, until he or she finds the tables of contents. It is an impossible task for a blind student to use a library in this way; the time it would take to complete this process prohibits blind students from completing any library research at a pace at which they can compete with their sighted peers. (Kerscher Decl. ¶ 36.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
29.	Besides universities' DSS offices, the only accessible digital books available are those available for purchase as iBooks or Blio books, and the collections of Learning Ally, Bookshare, and the National Library Service for the Blind and Physically Handicapped (NLS), three non-profit entities that create accessible books for the blind on an ad hoc basis. (Kerscher Decl. ¶¶ 13, 37; Maurer Decl. ¶ 9.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
30.	Learning Ally, Bookshare, and the NLS have a very limited capacity to make new books. Learning Ally and the NLS focus their limited resources on particular titles with the greatest appeal. NLS focuses on novels and other current popular works. Learning Ally and Bookshare place an emphasis on K-12 education. Although they do digitize some books for higher education, both have very limited budgets. (Kerscher Decl. ¶ 38; Maurer Decl. ¶ 10.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
31.	Learning Ally has approximately 70,000 titles in its collection, Bookshare has approximately 150,000 titles, and the NLS has approximately 20,000 titles. These include many that overlap. In total these organizations have approximately 200,000 titles available to blind readers. (Kerscher Decl. ¶ 38; Maurer Decl. ¶ 10.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.

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32.	<p>The vast majority of new books in the Bookshare collection now come directly from publishers in digital formats such as XML. Close to 200 publishers share these digital files with Bookshare. To make these books accessible can be done automatically in a few minutes. The books that are available in XML formats are heavily weighted to trade books, including genre fiction, New York Times best sellers, romance novels, science fiction, mysteries, political commentary, religious books, and other books with mass-market appeal. They also typically include only books published in the last ten years, since e-books have become widely available, because publishers have focused on digitizing only that part of their backlist they think can sell enough books to justify the effort. (Decl. of James Fruchterman, June 28, 2012, (hereinafter "Fruchterman Decl.") ¶ 16.)</p>	<p>Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>
33.	<p>For books that are not available in digital formats directly from the publishers, Bookshare obtains the books in physical form and will chop, scan, OCR, and proofread them to make accessible copies. Bookshare used to do this for any books sent to it by members with disabilities, but Bookshare does not currently have the resources to do this kind of labor-intensive work for books that are not directly used in the classroom, because of the priorities of our funders. (Fruchterman Decl. ¶ 17.)</p>	<p>Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>

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34.	Although Bookshare gets requests from university students and scholars to scan print books for their research, but it is not able to fulfill these requests because it does not have the resources to scan their books. Bookshare will only process requests for students in accredited programs in the United States who are working toward degrees, and currently only then if the books requested are assigned or required classroom reading. Bookshare does not have the capacity to make university library books more generally accessible because they are rarely assigned. It does not have the resources to honor requests for digitization of books that a student or scholar wants to use as background research for a research paper or article. (Fruchterman Decl. ¶ 20.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
35.	The largest part of Bookshare's budget comes from the United States Department of Education, which funds Bookshare's efforts to create accessible copies books for students with print disabilities, with the highest priority on K-12 textbooks. (Fruchterman Decl. ¶ 21.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
36.	Bookshare's average cost of creating an accessible book is \$40 per book. This average cost includes the proofreading for scanned books and creating the metadata for all books, including those that provided to us in digital form. (Fruchterman Decl. ¶ 23.)	Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.

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37.	<p>Once Bookshare has a digital copy of a book, the cost of making it accessible varies enormously based on the complexity of the layout of the books. Bookshare must proofread the text to ensure it is correct and books that have headers, footers, footnotes or other graphic features that change the reading order of the page must be tagged and properly structured to make them understandable and functional for a blind person using screen access software. Lastly, books that have images that are important for educational purposes should have image descriptions added, something that we don't have the budget to create for any but the most widely used K-12 textbooks. Because the U.S. Department of Education has made image descriptions in K-12 textbooks a policy priority, Bookshare must devote a significant portion of the Department of Education resources to adding image descriptions to this subset of the books in its collection. (Fruchterman Decl. ¶¶ 24, 28.)</p>	<p>Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>
38.	<p>Bookshare divides books into six levels based on their complexity. Level 1 books have no headers, footers, or pictures. Level 2 books have headers or footers and low-level formatting, such as chapters. Level 3 includes books that have images, footnotes, or line breaks, including children's chapter books, plays, and poems. Level 4 books have many images or charts, resource listings like bibliographies, insets, many foreign language words. Level 4 includes textbooks that are mainly text but have chapters. Level 5 books have complex layouts, including text in margins or text printed on image backgrounds. Level 6 includes the most complicated books, such as math or science texts, cookbooks or dictionaries. (Fruchterman Decl. ¶ 25.)</p>	<p>Uncontroverted but immaterial.</p>

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39.	<p>Level 1 books cost, on average \$50 per book to make accessible. Level 3 and Level 4 books average more than \$350 per book and Level 5 and Level 6 books cost progressively more to make accessible. The majority of books available in a university library would qualify as Level 3, 4 or 5 under Bookshare's complexity classifications. (Fruchterman Decl. ¶¶ 26-27.)</p>	<p>Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>
40.	<p>The AccessText Network, a membership exchange network that is intended to facilitate and support sharing of textbooks for students with diagnosed print-related disabilities, has had limited success and has only focused on textbooks identified in the syllabi of students. The Network is intended to connect DSS offices directly with publishers to receive electronic files and facilitate the sharing of scanned copies between DSS offices at different universities. (Kerscher Decl. ¶ 39.)</p>	<p>Uncontroverted but immaterial.</p>
41.	<p>The AccessText Network involves voluntary participation and neither have publishers joined as expected, nor have DSS offices shared their files at the rates the founders of the network had hoped. Further, the network does not have a quality control mechanism to ensure that texts scanned by different DSS offices have the necessary structure and content. In addition, it is limited to textbooks and required items in syllabi, and therefore does not include the vast majority of titles available in a university library. (Kerscher Decl. ¶ 39.)</p>	<p>Uncontroverted but immaterial.</p>
42.		

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43.	<p>Since it began creating a digital library in 2004, the University of Michigan has maintained a commitment to enabling students and scholars with print disabilities to make unprecedented and meaningful use of the library's vast collection. As early as 2005, the University of Michigan had envisioned a system in which blind and print-disabled students would have full access to a digital library through a process in which the university certified their disabilities. (Kerscher Decl. ¶ 30; Maurer Decl. ¶ 13; Wilkin Decl. ¶¶ 103-04.)</p>	<p>Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>
44.	<p>One of the primary goals of HathiTrust has always been to enable people who have print disabilities to access the wealth of information within library collections. The University of Michigan constructed the archive with the objective of making the world's first accessible research library. Access for people who have print disabilities is a part of HathiTrust's agreements with HathiTrust members and it is one of the core services around which the archive is built, along with preservation and search. (Wilkin Decl. ¶ 100.)</p>	<p>Controverted to the extent that the evidence does not support the statement that one of University of Michigan's "primary goals" has always been to provide specialized services to the blind or other persons with disabilities. [REDACTED] [REDACTED] [REDACTED] [REDACTED] In addition, only 32 blind University of Michigan students and faculty have requested and obtained privileged access. UF 102. Otherwise uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>
45.	<p>The HathiTrust scans are high resolution images that have been digitized very sophisticated OCR/OSR. Although images are not described and tables are not tagged, the table text is present, and the scans include the vast majority of metadata necessary to make them fully accessible to the blind. They can be navigated by chapter, page, line, and character. (Kerscher Decl. ¶ 30.)</p>	<p>Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>

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46.	<p>In the HDL, most of the tables of contents have been manually tagged, allowing blind students to recognize them and navigate to them with a screen reader the way a sighted person would open the book and flip to the table of contents. (Kerscher Decl. ¶ 34.)</p>	<p>Uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>
47.	<p>The HDL is currently available to students and faculty at the University of Michigan who have print disabilities. It works in the following way:</p> <ul style="list-style-type: none"> • A person who has a print disability seeks certification from a qualified expert. • The expert informs the library when a particular patron has a print disability for which digital access is a reasonable accommodation. • The University of Michigan Library explains the digital library to the patron, describes appropriate uses of the service (including warnings about copyright infringement), and enables the patron to get secure access to the accessible library. • If the University of Michigan has a digital copy of a work, the authorized patron with a print disability will have immediate access to that work in a format that can be made accessible through a variety of adaptive technologies. For example, the disabled user can enable software that translates the text into spoken words. (Wilkin Decl. ¶ 105.) 	<p>Controverted to the extent that the statement suggests that the format referred to is a "Specialized Format" within the meaning of Section 121 of the Copyright Act. Otherwise, uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>
48.	<p>Today, for scholars and students with print disabilities, the best promise of meaningful access to an academic library exists at the University of Michigan through the HDL. It is the kind of access, at the minimum, that should be available to all in the academy. (Kerscher Decl. ¶ 40; Wilkin Decl. ¶ 106).</p>	<p>Controverted to the extent that the terms "best promise" or "meaningful access" are vague and also because the cited declarants are not competent or qualified to make the statements attributable to them and because the word "academy" is vague. Otherwise uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>

NO.	INTERVENORS' ASSERTED UNDISPUTED FACT	RESPONSE
49.	The HathiTrust scans would do far more than increase exponentially the textual information available to the blind; it would transform the opportunities for blind students and scholars to conduct research independently—a critical aspect both of modern education and the development of new ideas. (Maurer Decl. ¶ 11.)	Controverted to the extent that the cited declarant is not competent or qualified to make the statements attributable to him. Otherwise, uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
50.	[REDACTED]	[REDACTED]
Market for accessible university library books		
51.	For more than 20 years, the National Federation of the Blind has vigorously worked to ensure that digital information is rendered accessible on devices that are accessible. (Maurer Decl. ¶ 15.)	Uncontroverted.
52.	Learning Ally, Bookshare and the NLS all struggle to find charitable funding because there simply is no market for accessible books for the blind. These organizations exist because of this market failure. (Kerscher Decl. ¶ 41; Maurer Decl. ¶ 9).	Controverted because there is a market for large print and audio books for the blind. <i>Statement of the Association of American Publishers on the NII Copyright Protection Act of 1995 before the House Subcommittee on Courts and Intellectual Property</i> , Feb. 8, 1996, available at http://judiciary.house.gov/legacy/441.htm (testifying that one of the key changes to the original proposed bill was to “avoid impairing large-type” publishing).

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53.	<p>In the 1980s, when DOS was first introduced, equal access by the blind to digital information was simpler. In those days, computer screens displayed text and screen access software simply read aloud the text information and navigational markers, such a paragraphs and page numbers, behind the screen. When DOS was overtaken by Windows, the blind lost much of the access they had previously achieved. The NFB fought and worked with developers to ensure that Windows technology would be compatible with screen access and, though Windows is now accessible, the blind continue to face barriers when developers create inaccessible websites, software programs, and now, mobile applications. (Maurer Decl. ¶¶ 15-16.)</p>	<p>Uncontroverted but immaterial.</p>
54.	<p>Authors and publishers have not only ignored accessibility concerns related to digital texts, but actively worked to prevent the market from reaching the blind. When Microsoft created the first commercially available e-reader device in the late 1990's, Microsoft and its competitors, Adobe, Gem Star, Sony, and others, ignored persons who are blind or print disabled. They did not build in any accessibility features that a blind person could use. While the underlying content was accessible, the user interfaces did not cater to the disabled community. (Kerscher Decl. ¶ 43; Maurer Decl. ¶ 20.)</p>	<p>Controverted. Second Declaration of Paul Aiken ("Aiken Second Decl.") ¶¶ 3-25. Further controverted because the cited declarants are not competent or qualified to make broad generalized statements about the motives and actions of "authors and publishers" or of the corporations referred to.</p>
55.	<p>All the companies that were developing e-books in the 1990's indicated that the effort to make the products accessible did not justify the return on investment. They consciously decided that the work to modify software to make it accessible to the blind was not economically worthwhile in light of the perceived small incremental addition of the blind to the market. They recognized that people with disabilities would be left out, but they were not willing to develop mechanisms for the blind to access the underlying information. (Kerscher Decl. ¶ 44).</p>	<p>Controverted because the statement uses the vague term "all the companies that were developing e-books" and makes unsupported, blanket conclusions about the intentions of such companies, and because the cited declarant is not competent or qualified to make this statement. Otherwise uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>

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56.	As, over the years, the e-book marketplace grew, publishers and authors continued to exclude the blind by adding digital rights management software that further locked the content for use on inaccessible devices. Publishers and distributors have been more concerned about possible piracy if books were made accessible to screen access software than they have been about the benefits of making a mainstream e-book marketplace accessible. (Maurer Decl. ¶¶ 21, 23.)	Controverted because the statement includes unsupported, blanket conclusions about the intentions of "publishers and authors" as a collective and also includes statements beyond the competence or qualifications of the cited declarants. Otherwise uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
57.	New books can be made accessible with little expense to publishers. All new books are created digitally. However, the design software commonly used by publishers takes the accessible word processing files submitted by authors and converts them into an inaccessible format. (Kerscher Decl. ¶ 48.)	Controverted to the extent that the term "little expense" is vague and because the statement about "all new books" is outside of the competence or qualifications of the cited declarant. Otherwise uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.
58.	The development of popular e-book platforms that are inaccessible, like the Amazon Kindle and the Barnes & Noble Nook, also demonstrates that tech companies and publishers do not believe that there is sufficient economic benefit from making accessible books, or at least that their perceived concerns about possible piracy outweigh, from a business perspective, any monetary or societal benefits from creating accessible books. (Kerscher Decl. ¶ 45; Maurer Decl. ¶ 38.)	Controverted to the extent that the statement includes conclusions about the beliefs and perceptions of "tech companies and publishers," and also controverted because "tech companies and publishers" is a vague term and because the statements are outside of the competence and qualifications of the cited declarant. Otherwise uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.

No.	INTERVENORS' ASSERTED UNDISPUTED FACT	RESPONSE
59.	<p>The NFB attempted to lobby Amazon to make the Kindle 2 accessible, but encountered opposition from copyright owners and their allies. The NFB met with representatives from Amazon, presented statistics concerning the market for talking e-books for both blind and sighted computers, and demonstrated the minimal cost associated with making both the text of the books and the menus on the Kindle accessible for people with print disabilities. But, when Amazon announced that it had released the Kindle 2 with a text-to-speech function, the Authors Guild actively opposed Amazon's policy, and Amazon capitulated, allowing individual publishers to turn off text-to-speech on the Kindle for, at their selection, all or some of their booklist. (Kerscher Decl. ¶ 46; Maurer Decl. ¶¶ 25, 27-28.)</p>	<p>Controverted to the extent that the statement suggests or implies that the Authors Guild sought to restrict access to digitized books by the blind. Aiken Second Decl. ¶¶ 3-25.</p>
60.	<p>Even when Amazon activated the text to speech function on the Kindle, it only worked for the text of the book, not the menus that allow readers to turn on the text-to-speech function, purchase books, select the books they want to read, or start stop or otherwise navigate through a book. Blind users therefore cannot effectively use a Kindle book. Amazon's failure to make these minimal changes in its platform demonstrates that it does not consider the blind to be a significant market. (Kerscher Decl. ¶ 47; Maurer Decl. ¶ 26).</p>	<p>Controverted because it includes conclusions about the beliefs and perceptions of Amazon.com and also includes statements beyond the competence and qualifications of the cited declarants.</p>
61.	<p>After the Authors Guild protested Amazon's use of text to speech for Kindle content and Amazon announced that it would modify its system so that authors and publishers could turn off text to speech on a title-by-title basis, the NFB quickly worked to convene a coalition of disability groups, the Reading Rights Coalition, representing the more than 15 million Americans with print disabilities. The Coalition grew to include more than 30 national and international organizations. (Maurer Decl. ¶¶ 28-29.)</p>	<p>Controverted to the extent that the statement suggests or implies that the Authors Guild sought to restrict access to digitized books by the blind. Aiken Second Decl. ¶¶ 3-25.</p>

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62.	The Reading Rights Coalition initiated a dialogue with Paul Aiken, executive director of the Authors Guild, to discuss the effect of its actions on the print-disabled community and the market benefits that would flow to the authors if it welcomed the 15 million new customers who cannot consume or easily consume print books. (Maurer Decl. ¶ 31.)	Controverted to the extent that the statement suggests or implies that the Authors Guild sought to restrict access to digitized books by the blind. Aiken Second Decl. ¶¶ 3-25.
63.	In response Mr. Aiken proposed a separate registration system for people with print disabilities, whereby a blind or print-disabled person would register as disabled and receive a code that would override the disablement of text-to-speech on the Kindle 2. (Maurer Decl. ¶32.)	Controverted to the extent that the statement suggests or implies that the Authors Guild sought to restrict access to digitized books by the blind. Aiken Second Decl. ¶¶ 3-25.
64.	The Reading Rights Coalition explained to the Authors Guild why a registration system is an unworkable and unacceptable solution. Mr. Aiken responded, offering the possibility of making text-to-speech e-books available at an additional cost. The Coalition unanimously agreed that a "disability tax" was also not an acceptable solution and declined to offer any other proposals. (Maurer Decl. ¶ 33.)	Controverted to the extent that the statement suggests or implies that the Authors Guild sought to restrict access to digitized books by the blind. Aiken Second Decl. ¶¶ 3-25.
65.	After the NFB organized a protest of the Authors Guild's headquarters in New York and put together a petition with thousands of signatures demanding that text to speech remain available, the White House issued a statement with agreement from the NFB, the Authors Guild and AAP that digital books should be accessible. However, two publishers continued to keep the text to speech turned off for the content of their books. (Maurer Decl. ¶¶ 34-35.)	Controverted to the extent that the statement suggests or implies that the Authors Guild sought to restrict access to digitized books by the blind. Aiken Second Decl. ¶¶ 3-25.
66.	In 2007 the Association of American Publishers presented the results of a study that determined that there was no exploitable market for the creation of accessible print materials for the blind. (Kerscher Decl. ¶ 42.)	Controverted to the extent that the study referred to therein speaks for itself. Otherwise, uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.

NO.	INTERVENORS' ASSERTED UNDISPUTED FACT	RESPONSE
67.	<p>The Access Text network was established because there was deemed to be no meaningful market in the blind and print-disabled community. That publishers are expected to give away the electronic files for free demonstrates that those involved do not believe there is any market for accessible books created for the blind. (Kerscher Decl. ¶ 39.)</p>	<p>Controverted because the assumption that there is no market for the blind or print disabled and the conclusions about the beliefs of "publishers," a vague and undefined term, are outside of the competence and qualifications of the cited declarant. Otherwise uncontroverted but immaterial because Congress provided the rules and requirements for making books available to the visually disabled in Section 121 of the Copyright Act, 17 U.S.C. § 121.</p>
68.	<p>In May 2009, Amazon released the Kindle DX without adding any accessibility for the blind. Amazon marketed the Kindle DX as an e-book reader for academic and student use. Six universities announced a pilot program in which they would deploy the inaccessible Kindle device to students. The NFB filed a federal court complaint against Arizona State University and administrative complaints against the other universities with the Departments of Justice and Education against the universities for violating their obligations under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. Five of these complaints and the lawsuit ended in agreements to terminate use of the Kindle DX and to prohibit future programs involving inaccessible e-book reading technology. (Maurer Decl. ¶ 36.)</p>	<p>Controverted to the extent that the statement refers to judicial filings and settlements the terms of which speak for themselves.</p>
69.	<p>While Amazon later released the Kindle 3 with some additional accessibility features, it still lacked the navigational facility required to make the device usable. Subsequent e-reader devices released by Amazon, including the Kindle Fire, are completely inaccessible to the blind. (Maurer Decl. ¶ 37.)</p>	<p>Uncontroverted but immaterial.</p>

No.	INTERVENORS' ASSERTED UNDISPUTED FACT	RESPONSE
70.	The DAISY standard and partnerships between advocates for the blind and the publishing industry have generated some progress in building accessibility into new e-books. Adobe Indesign 6, the premier electronic publishing design software, exports into EPUB 3, which makes the basic text accessible. But, these new EPUB materials may still be made inaccessible if they are transformed for use with inaccessible platforms, such as those used on the Amazon Kindle or the Barnes and Noble Nook. (Kerscher Decl. ¶ 49.)	Uncontroverted but immaterial.
71.	For the last three years, Benetech has employed one person whose full time job is recruiting new publishers to contribute digital books to Bookshare's collection. It has been Bookshare's experience that textbook publishers and commercial academic publishers are the most reluctant to contribute to the Bookshare collection; when they do agree to provide digital files, they place more restrictions on our access to the files than trade publishers do. (Fruchterman Decl. ¶ 29.)	Uncontroverted but immaterial.
72.	Given the lack of a market in the blindness community even for new popular books, and the publishers and technology companies' persistent refusal to make their products accessible to the blind, the access problems faced by blind readers with respect to academic library collections are unlikely to ever be solved unless the HathiTrust is permitted to continue providing accessible digital versions of the books in the university libraries' collections. (Kerscher Decl. ¶ 50.)	Controverted to the extent the statement includes the vague, unsupported and overbroad conclusion that the blinds' access problems are "unlikely to ever be solved unless the HathiTrust is permitted to continue," as well as the conclusion that there is no market in the blindness community and also controverted as outside of the competence and qualifications of the cited declarant. Further controverted because Section 121 of the Copyright Act, 17 U.S.C. § 121, includes the rules and requirements for making works available to the visually disabled and because any change in those rules and requirements must be made by Congress.

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