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**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)

**DECLARATION OF P. BERNT HUGENHOLTZ IN OPPOSITION
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I, P. Bernt Hugenholtz, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am Professor of Copyright Law at the University of Amsterdam, Faculty of Law, and Director of its Institute for Information Law (IViR). I am also Professor of Law at the University of Bergen (Norway). I submit this declaration in opposition to Plaintiffs' motion for

summary judgment. Unless otherwise noted, I make this declaration based upon my own personal knowledge.

A. Background

2. In 1989 I received my doctor's degree *cum laude* from the University of Amsterdam. I have written numerous books, studies and scholarly articles on a variety of topics involving copyright, information technology, new media and the Internet. At the Universities of Amsterdam and Bergen I teach courses in copyright law, international copyright law and (occasionally) industrial property law. I also regularly lecture or have lectured regularly at the University of Helsinki, Monash University (Melbourne, Australia), Charles University (Prague), and the Munich IP Law Centre of the Max Planck Institute for Intellectual Property (Munich).

3. I was a member of the Amsterdam Bar and partner of the law firm of Stibbe between 1990 and 1998. Since 2003 I have been a deputy judge at the Court of Appeal in Arnhem.

4. I am a member of the Dutch Copyright Committee that advises the Minister of Justice of the Netherlands, and have regularly acted as a consultant to the World Intellectual Property Organisation (WIPO), the European Commission, and several national governments. I have been on international missions in several countries representing WIPO, and am a regular speaker at international conferences, including the annual Fordham conference on International IP Law and Policy.

5. I am the co-author with Professor Paul Goldstein (Stanford University) of *International Copyright* (2nd edition, Oxford University Press, 2010), which is one of the leading treatises on international copyright law. I am the co-author and co-editor with Professor Thomas Dreier (Technical University of Karlsruhe) of *Concise European Copyright* (Kluwer Law

International, 2006), one of the leading commentaries on European copyright law. I am the General Editor of the academic Information Law Series, which is published by Kluwer Law International, and member of the board of editors of the Journal of World Intellectual Property, which is published by Blackwell.

6. I am a member of the Advisory Boards of the Max Planck Institute for Intellectual Property Law (Munich) and the Centre for Intellectual Property and Information Law (CIPIL) of Cambridge University. A true and correct copy of my *curriculum vitae* is attached hereto as Exhibit A.

7. I have been asked by the defendant libraries (the "Libraries") to address certain statements by Professor Daniel Gervais in his June 28, 2012 declaration ("Expert Report"). In particular, I have been asked to comment upon whether the European collective licensing regimes identified by Professor Gervais have any application to a service such as that offered by the Libraries in connection with their HathiTrust Digital Library or "HDL." I have also been asked to provide additional background on the legal status quo of mass digitization of library book holdings in Europe. I am being compensated for my time at the rate of €250.

8. My understanding is that the Libraries engage in the following limited activities with respect to the in-copyright works in the HDL:

- **Full-Text Search.** The Libraries' patrons may search for one or more terms or phrases across all works within the HDL. For those works that are not in the public domain or for which the copyright holder has not expressly authorized use, the search results indicate only the page numbers on which a term is found within a particular book and the number of times it appears on each page. Search results do not show sentences, "snippets," or other selections of text, and patrons do not have electronic access to any copyrighted content within such works (unless they are users with certified print disabilities). In other words, there is no copyrighted text displayed on the computer screen or available for print.

- **Preservation.** The HDL is a safeguard against the on-going loss of print books and enables the Libraries to make copies for, *inter alia*, replacing a work that is damaged, deteriorated, lost, or stolen, and a replacement copy cannot be obtained at a fair price.

- **Access for persons with print disabilities.** The Libraries, by digitizing works, enable them to be converted into alternative formats for the blind and other persons with disabilities enabling such persons to have equal access to the works within the Libraries' collections.

B. Opinion

9. Professor Gervais states in his declaration, in paragraph 11, that “the type of copying involved in this case (mass digitization of library books) is already licensed in a number of other countries.” Professor Gervais then concludes in this same paragraph that this fact suggests that “there are alternatives to Defendants’ (and Google’s) unilateral decision to digitize copyrighted works.”

10. Professor Gervais’ reference to the practices of other countries (he principally focuses on Europe, which falls within my area of expertise) with respect to library digitization is, in my view, incomplete. First, Professor Gervais does not mention those countries whose laws directly authorize, without permission of rights holders, the digitization of library materials for the uses made by the Libraries in this action. Ignoring this issue makes it seem like the trend in Europe is to adopt a licensing regime for the types of uses made by the Libraries when this is, in fact, not the case.

11. Second, Professor Gervais does not mention that in many instances European collective rights management organizations (CMO’s) lack the legal mandate to grant licenses permitting digitization and digital uses of entire library holdings (*i.e.*, the authority of such CMO’s is limited to only a small portion of the library’s collection). In such instances, such CMO’s could not possibly license the uses made by the Libraries in this action because those uses necessarily depend on the Libraries having digitized the entirety of their collections.

12. Third, Professor Gervais does not mention that the countries that have adopted a licensing regime for large scale digitization have done so for the purpose of enabling full access

view of the digitized works. Such regimes are in fact not concerned with the types of very limited uses made by the HDL of in-copyright works. I discuss each of these points in further detail below.

1. European Law Authorizes Libraries to Digitize Their Collections for Purposes of Preservation, Access to Individuals With Print Disabilities and Search.

13. Article 5(2)(c) of the EU Directive on Copyright in the Information Society allows EU Member States to provide for limitations and exceptions “in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage.”¹ In line with the quoted provision the laws of copyright in a majority of Member States allow libraries and other cultural heritage institutions to digitize their holdings for preservation and conservation purposes. Such countries include, inter alia, Germany, France, Spain, and the Netherlands. See Westkamp report, http://www.ivir.nl/publications/guibault/InfoSoc_Study_2007.pdf, p. 22 ff. *In countries where such limitations or exceptions exist, libraries are free to engage in digitization subject to the conditions stated in the law; no copyright licenses and/or remuneration are therefore required.*

14. Article 5(3)(n) of the EU Directive on Copyright in the Information Society similarly allows EU Member States to provide for limitations and exceptions permitting libraries, educational establishments and archives to make their holdings accessible online by way of dedicated terminals on premises for the purpose of research or private study. This provision has been implemented by most Member States. *Again, exempted uses will not be licensed, nor is*

¹ Directives are legal instruments adopted by the European Union that oblige EU Member States to transpose the rules of a directive within the time limits specified therein. Directives are not directly binding upon the citizens of the EU, and implementation into national law need not be done literally.

remuneration required. See Westkamp report,

http://www.ivir.nl/publications/guibault/InfoSoc_Study_2007.pdf, p. 45 ff.

15. Article 5(3)(b) of the EU Directive on Copyright in the Information Society additionally allows EU Member States to provide for limitations and exceptions permitting “uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability.” Article 5(3)(b) has been implemented in some form in the copyright laws of all EU Member States. See Westkamp report, http://www.ivir.nl/publications/guibault/InfoSoc_Study_2007.pdf, p. 35 ff.

16. While the EU Directive on Copyright in the Information Society harmonizes the basic economic rights protected under copyright (i.e. the rights of reproduction, communication to the public and distribution), the Directive does not address the specific question of whether enabling (library) users to search the digitized library holdings constitutes a separate restricted act. However, two recent decisions of the Court of Justice of the European Union (*Infopaq International A/S v. Danske Dagblades Forening*, Court of Justice EU, 16 July 2009, Case C-5/08; *Infopaq International A/S v. Danske Dagblades Forening*, 17 January 2012, Case C-302/10) offer some guidance on this issue.

17. In these cases, the Court of Justice opined on whether an information search and retrieval service that involved the scanning of published news articles, and which produced output in the form of 11-word keyword-in-context extracts, amounted to unauthorized reproduction. According to the Court, this was the case, “if the elements thus reproduced are the expression of the intellectual creation of their author.” However, the mere technical acts of ‘data capture’ were deemed to be exempted pursuant to Article 5(1) of the EU Directive on Copyright in the Information Society, which exempts certain “temporary acts of reproduction [...] which

are transient or incidental [and] an integral and essential part of a technological process.” Note that Article 5(1) of the Directive is a mandatory limitation to copyright, and therefore has been implemented in all copyright laws of the EU Member States.

18. From the holdings in these cases one might infer that an information search and retrieval service that does not produce (potentially copyright-relevant) extracts, but limits search results to bibliographic references (e.g. page numbers and occurrence) that do not qualify as ‘intellectual creations’, as does the HDL, would not be deemed by the Court of Justice to infringe the reproduction right.

19. Given the scope of the limitations and exceptions to copyright set out above (pars. 13--17), it is in my opinion unlikely that a library operating in an EU Member State where these limitations and exceptions exist in national law, would agree to a collective license for the activities and services that the HDL restricts itself to, *i.e.* full-text search, preservation, and providing access to the visually handicapped. This is because in these EU Member States the libraries would appear to have the right to make such uses without authorization of the copyright holder.

2. Most European CMO’s Lack Legal Mandate to License the Digitization of a Libraries’ Entire Collection.

20. Whereas many public libraries, broadcasting and film archives, museums and other cultural heritage institutions in Europe are currently engaged in mass digitization of their holdings (which by necessity include large volumes of orphan works), or are taking concrete steps towards mass digitization, few of these projects operate under a collective license. While in some of these cases libraries will rely on statutory exceptions that allow them to digitize and make available digitized holdings to library patrons (see above, at par. 14), in other cases – where statutory exception are not available or do not provide sufficient latitude – collective

licensing initiatives have not occurred or are highly problematic, because existing collective rights management organizations (CMO's) lack the legal mandate to grant licenses permitting digitization and digital uses of entire library holdings.

21. In most EU countries, CMO's that operate in the field of print-related uses, such as the Reprographic Rights Organizations ("RRO's") mentioned in the Expert Report, generally operate under a contractual mandate the scope of which is determined by the terms of the standard contracts of adherence signed by authors and/or publishers. Until recently, these terms allowed these CMO's merely to license and collect monies for non-digital print-related uses, such as library photocopying.

22. Whereas some CMO's have recently expanded their contractual mandate to include certain digital uses, this enhanced mandate will usually not extend to most of the older, but still in-copyright works in the holdings of the libraries, since most CMO's that operate in the print-related field were established in the 1970's or onwards, and therefore most likely will not have signed up the authors of these older works.

23. This lack of contractual mandate is particularly critical in the field of scientific publication. While under the copyright laws of many European countries digital rights in older (pre-digital era) publications will generally belong to the authors (not the publishers), few scientific authors have actually entrusted their rights to CMO's operating in this field. *With CMO's incapable of offering digitization licenses that cover even a substantial part of the entire corpus of in-copyright works that have been (or are to be) digitized by the libraries, voluntary collective licensing of complete library holdings is destined to fail.*

24. As the examples given in the Expert Report illustrate, such collective licensing approaches will develop only in countries that have special legislation in place that allows

CMO's to negotiate licenses without adequate legal mandate. This is notably the case in the Nordic countries, such as Denmark, Norway and (soon) Sweden, where the system of extended collective licensing (ECL) described in the Expert Report on p...15 ff., was invented, and is now being applied to some mass digitization projects in these countries.

3. **ECL's Have Been Created By Legislation For the Purpose of Authorizing Access to the Text Itself.**

25. In his report, Professor Gervais describes various recent or on-going initiatives towards an ECL model of collective licensing of mass digitization of library book holdings in European countries. Such initiatives, although still rare, indeed exist in respect of a small number of library book digitization projects, such as the projects mentioned in the Expert Report, paras. 44-46. Such licensing – whether collective or individual – will as a matter of course arise only for uses that are either not exempted by national copyright laws, or that exceed the boundaries of existing copyright exemptions.²

26. The ECL system described in the Expert Report as an example of successful collective licensing of mass digitization projects is in fact a largely regulatory solution that requires a solid statutory basis in the law. The copyright laws of the Nordic countries enumerate several specific uses by non-profit entities, such as libraries and public broadcasters, for which extended collective licenses may be granted by eligible CMO's.

27. For example, eligible CMO's must adequately represent the right holders in the relevant field of licensing. Any ECL that a CMO will enter into with non-profit entities will be binding not only upon the right holders it represents, but upon non-represented (*e.g.*, foreign and/or 'orphaned') right holders as well. For these non-represented right holders the ECL will

² For instance, the Swedish Memorandum of Understanding mentioned in the Expert Report in para. 45 has been signed against a background of Swedish copyright law that does not provide for a copyright exception allowing libraries to digitize their own holdings. See Westkamp report, http://www.ivir.nl/publications/guibault/InfoSoc_Study_2007.pdf, p. 24.

have legal effect similar to that of a compulsory license. For these and other reasons, the ECL model remains controversial and is unlikely to be adopted in many EU countries outside the Nordic sphere.

28. As the examples of ECL's described in the Expert Report reveal, the scope of the ECL's currently in place in the Nordic countries well exceed the types of very limited uses made by the HDL of in-copyright works (i.e., preservation, search-only and access to the visually impaired). This is notably the case for the 'Bokhylla' book digitization project in Norway (Expert Report, par. 46), which allows full-text viewing of all books digitized, and also for the much older Danish agreement that allows the reproduction of copyright works for interlibrary loans and the reproduction of short excerpts (Expert Report, par. 47), The Swedish ECL initiative (Expert Report, par. 45) would also allow full-text access, but presently awaits amendment of the Swedish Copyright Act before it can become operational.

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

Executed: July 19, 2012


P. Berni Hugenholtz

EXHIBIT A

Curriculum Vitae

- 1 Family Name:** Hugenholtz
2 First Name: P. Bernt
3 Date of Birth: 23 august 1955
4 Nationality: Dutch
5 Civil Status: not married
6 Education / Professional Studies:

1973-1980 Master of laws, University of Groningen
1983-1984 Visiting scholar, University of California, Los Angeles
1989 Doctor of law (cum laude), University of Amsterdam

7 Membership of Professional Bodies:

Vice-chairman, Vereniging voor Auteursrecht (Dutch chapter of ALAI) ; Founder, Vereniging voor Media- en Communicatierecht (Dutch Association for Media and Communications Law (VMC); General Editor, Information Law Series, Kluwer Law International; Member, Scientific Council, Max Planck Institute, Munich; Member, Advisory Committee, CIPIL, Cambridge University; Member, Board of Editors, Journal of World Intellectual Property (JWIP); Member, Association Internationale pour la Protection pour la Protection de la Propriété Industrielle (AIPPI) ; Member, Association for Teaching and Research in Intellectual property (ATRIP).

8 Present Position:

Director, Institute for Information Law, University of Amsterdam, Faculty of Law
Professor of Intellectual Property Law, University of Amsterdam, Faculty of Law
Professor II, University of Bergen, Faculty of Law

9 Key Qualifications:

Prof. Hugenholtz is a leading expert in the field of Information Law. He is the author of numerous books, published articles, book chapters, reports and studies, and the co-author of *European Copyright Law* (2006) and *International Copyright* (2010). He has acted as a consultant to the World Intellectual Property Organisation (WIPO), the European Commission, the European Parliament and several national governments, and has produced studies for the European Commission, the European Parliament, WIPO, UNESCO and various Dutch government agencies. He is a member of the Dutch Copyright Committee that advises the Minister of Justice of the Netherlands. He is a regular invited speaker at international conferences, including the annual Fordham Conferences on International Intellectual Property Law & Policy. Prof. Hugenholtz teaches courses on International and European copyright law at the University of Amsterdam, the Munich IP Law Centre, the University of Bergen (Norway), Monash University (Melbourne), and occasionally at other universities. Prof. Hugenholtz is also an adjunct-judge at the Court of Appeals in Arnhem.

10 Professional Experience Record:

1981-1983	Legal Advisor, Ministry of Culture, Dept. of Radio, Television and Press, Rijswijk (legal and policy matters in the field of media and copyright law)
1984 - present	Professor of Intellectual Property Law, University of Amsterdam, Institute for Information Law
1990 - 1998	Advocate (attorney, specialized in IP law), Stibbe, Amsterdam
1992 - present	Director, Institute for Information Law, University of Amsterdam,
2007	Fritt Ord Professor, University of Bergen, InfoMedia Institute
2008 - present	Professor II, University of Bergen, Faculty of Law

11 Publications¹

Books (English)

(with A. W. Hins) *The Law of International Telecommunications in the Netherlands*, Nomos, Baden-Baden 1988.

(with E.J. Dommering (eds.)), *Protecting Works of Fact: Copyright, Freedom of Expression and Information Law*, Information Law Series, Vol. 1, Kluwer, Deventer/Boston 1991.

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¹ More extensive listings of publications in Dutch and English are available at <http://www.ivir.nl/medewerkers/hugenholtz.html> and <http://www.ivir.nl/staff/hugenholtz.html>.

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'Copyright, document delivery and the information superhighway', in: *Nordic Conference on Copyright Issues*, Proceedings of a conference organised by NORDINFO, Espo (Finland) 1995, p. 119-129.

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Implementing the Database Directive, in: Jan J.C. Kabel and Gerard J.H.M. Mom (eds.), 'Intellectual Property and Information Law', The Hague/London/Boston: Kluwer Law International 1998, p. 183-200.

'Electronic Rights and Wrongs in Germany and The Netherlands', *Columbia - VLA Journal of Law and the Arts* 1998, Vol. 22, No. 2, p. 151-159.

'Code as Code, or the End of Intellectual Property as We Know It', *Maastricht Journal of European and Comparative Law* 1999, Vol. 6, no. 3, p. 308-318.

'Copyright and its Limitations in the Digital Environment', paper presented at UNESCO INFOethics 2000 Conference, Paris, 14 November 2000.

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