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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)

**LIBRARIES' RESPONSE TO PLAINTIFFS'
STATEMENT OF UNDISPUTED MATERIAL FACTS**

Pursuant to LR 56.1(b), the Defendants in the above captioned action (the “Libraries”) respectfully submit the following responses to each numbered paragraph in Plaintiffs’ Statement of Undisputed Material Facts.

I. GOOGLE LIBRARY PROJECT ORIGINS

1. Marybeth Peters, formerly the Register of Copyrights of the United States, submitted a statement to the Committee on the Judiciary of the United States House of Representatives at 111th Congress, 1st Session on September 10, 2009 which included the following:

“The Copyright Office has been following the Google Library Project since 2003 with great interest. We first learned about it when Google approached the Library of Congress, seeking to scan all of the Library’s books. At that time, we advised the Library on the copyright issues relevant to mass scanning, and the Library offered Google the more limited ability to scan books that are in the public domain. An agreement did not come to fruition because Google could not accept the terms.”

Statement of Marybeth Peters, The Register of Copyrights, before the Committee on the Judiciary, United States House of Representatives, 111th Congress 1st Session, September 10, 2009, *Competition and Commerce in Digital Books: The Proposed Google Book Settlement*, <http://www.copyright.gov/docs/regstat091009.html>.

RESPONSE: This statement is immaterial and irrelevant to the issues raised in Plaintiffs’ Motion for Summary Judgment, namely whether the Libraries’ uses of Plaintiffs’ works constitute copyright infringement or are permitted under Section 107 and/or Section 108 of the Copyright Act. Subject to this response, the Libraries admit this statement.

2.  Wilkin Tr. 35:20 – 36:3, 43:18 – 25.

RESPONSE: This statement is immaterial and irrelevant to the issues raised in Plaintiffs’ Motion for Summary Judgment, namely whether the Libraries’ uses of Plaintiffs’ works

constitute copyright infringement or are permitted under Section 107 and/or Section 108 of the Copyright Act. Subject to this response, and solely for purposes of this motion, the Libraries admit this statement.

3. [REDACTED] Wilkin Tr. 54:8-21;
see also Courant Tr. 38:14-39:5.

RESPONSE: Denied. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

4. [REDACTED] Wilkin Tr. 137:12-138:18.

RESPONSE: Deny in part on the ground that the statement is vague and ambiguous. Mr.

Wilkins testimony [REDACTED]

[REDACTED] (Wilkin Tr. 137:12 – 135:18.)

5. Wilkin “heard that Harvard publicly asserted that they didn’t allow Google to digitize in-copyright works.” Wilkin Tr. 119:12-14.

RESPONSE: This statement is immaterial and irrelevant to the issues raised in Plaintiffs’ Motion for Summary Judgment, namely whether the Libraries’ uses of Plaintiffs’ works constitute copyright infringement or are permitted under Section 107 and/or Section 108 of the Copyright Act. Subject to this response, and solely for purposes of this motion, the Libraries admit this statement in part, admitting that Mr. Wilkin testified that he has “heard that Harvard publicly asserted that they didn’t allow Google to digitize in-copyright works” (Wilkin Tr. 119:12 – 14), but denying that Mr. Wilkin has any knowledge regarding whether Harvard did not allow Google to digitize in-copyright works. (*Id.*)

6. On December 14, 2004, Google issued a press release announcing “that it was working with the libraries of Harvard, Stanford, the University of Michigan and the University of Oxford as well as The New York Public Library to digitally scan from their collections so that users worldwide can search them in Google.” Wilkin Tr. 33:24-34:16, JW2.

RESPONSE: Denied in part, on the ground that Paragraph 6 misquotes the December 14, 2004 press release that Plaintiffs’ counsel downloaded from the Google website, which the Libraries admit states “Google Inc. (NASDAQ: GOOG) today announced that it is working with the libraries of Harvard, Stanford, the University of Michigan, and the University of Oxford as well as The New York Public Library to digitally scan books from their collections so that users worldwide can search them in Google.” (Rosenthal Dcl., Ex. 96 at 2.)

7. James Hilton, who at one time held the position of UM’s Associate Provost for Academic Information and Instructional Technology Affairs, told Wilkin that he had been warned by Dale Flecker, who at one time held the position of Associate Director for Planning and Systems at the Harvard University Library, that UM had not “done much deep thinking on copyright issues” in connection with UM’s decision to allow Google to digitize in-copyright works. Wilkin Tr. 122:7-124:15.

RESPONSE: This statement is immaterial and irrelevant to the issues raised in Plaintiffs' Motion for Summary Judgment, namely whether the Libraries' uses of Plaintiffs' works constitute copyright infringement or are permitted under Section 107 and/or Section 108 of the Copyright Act. Further, the Libraries deny this statement in part, on the ground that use of the word "warned" mischaracterizes Mr. Wilkin's testimony. Mr. Wilkin testified that James Hilton told him that Dale Flecker "had said" that the University of Michigan ("UM") "hadn't done much deep thinking on copyright issues." (Wilkin Tr. at 123:12 – 124:16.) In addition, Mr. Wilkin did not testify about the context of the secondhand statement he was told about by Mr. Hilton, and the transcript does not support Plaintiffs' characterization that the statement was made "in connection with UM's decision to allow Google to digitize in-copyright works." (*Id.* 122:7 – 124:15.)

8. Microsoft funded a mass digitization project at several university libraries that intended to scan only public domain books. Christenson Tr. 24:9-17; Hirtle Tr. 50:24-52:16; Farley Tr. 11:16-14:14.

RESPONSE: This statement is immaterial and irrelevant to the issues raised in Plaintiffs' Motion for Summary Judgment, namely whether the Libraries' uses of Plaintiffs' works constitute copyright infringement or are permitted under Section 107 and/or Section 108 of the Copyright Act. Further, the Libraries deny this statement in part, on the ground that the meaning of "mass digitization project" is not clear and is not a phrase used in the portions of the deposition transcripts to which Plaintiffs cite. In addition, the use of "several university libraries" is unclear in that the cited testimony discusses multiple libraries within two universities (the University of California and Cornell University), not libraries of "several" universities. (*See* April 11, 2012 Deposition of Heather Christenson, Rosenthal Decl., Ex. 5 ("Christenson Tr."))

24:9-17; April 18, 2012 Deposition of Peter Hirtle, Rosenthal Decl., Ex. 8 (“Hirtle Tr.”) 50:24-52:16; April 12, 2012 Deposition of Laine Farley, Rosenthal Decl., Ex. 7 (“Farley Tr.”) 11:16-14:14.)

II. GOOGLE BOOK SEARCH PROJECT

9. [REDACTED]
[REDACTED] Clancy Tr. 17:5-11.

RESPONSE: The Libraries admit the statement with the clarification that [REDACTED]
[REDACTED]
[REDACTED]

10. [REDACTED]
[REDACTED] Clancy Tr. 20:24-21:5.

RESPONSE: Solely for purposes of this motion, the Libraries admit this statement in part, admitting that [REDACTED]
[REDACTED]
[REDACTED] but denying that [REDACTED]
[REDACTED]

11. [REDACTED]
[REDACTED] Clancy Tr. 17:12-18:6.

RESPONSE: Solely for purposes of this motion, the Libraries admit this statement.

12. [REDACTED]
[REDACTED]

[REDACTED]

RESPONSE: The Libraries admit the statement with the clarification that [REDACTED]

[REDACTED]

[REDACTED]

III. GOOGLE COOPERATIVE AGREEMENTS

13. [REDACTED] Answer
¶ 34; UM ROG No. 3(k); Rosenthal Decl., Ex. 80 (UM-Google Cooperative Agreement).

RESPONSE: Denied in part. Solely for purposes of this motion, the Libraries admit that

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Libraries deny that [REDACTED]

[REDACTED]

14. [REDACTED] Answer ¶ 35; Christenson Tr. 39:19-40:4; Rosenthal Decl., Ex. 82 (UC-Google Cooperative Agreement).

RESPONSE: Solely for purposes of this motion, the Libraries admit that [REDACTED]

[REDACTED]

[REDACTED]

15. [REDACTED] Answer ¶ 36; Rosenthal Decl., Ex. 85 (UW-Google Cooperative Agreement).

RESPONSE: Denied in part. Solely for purposes of this motion, the Libraries admit that

[REDACTED]

[REDACTED] (Answer ¶ 36; Rosenthal Decl., Ex. 85.) The Libraries deny that [REDACTED] [REDACTED] (*Id.*)

16. [REDACTED] Answer ¶ 37; Rosenthal Decl., Ex. 83 (CIC-Google Cooperative Agreement).

RESPONSE: Solely for purposes of this motion, the Libraries admit that [REDACTED]

[REDACTED]

[REDACTED] (Answer ¶ 36; Rosenthal Decl., Ex. 85.)

17.

[REDACTED] Answer ¶ 38; Rosenthal Decl., Ex. 84 (Cornell-Google Cooperative Agreement) at ¶ 3; Hirtle Tr. 71:2-6.

RESPONSE: Solely for purposes of this motion, the Libraries admit that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Answer ¶ 38; Rosenthal Decl., Ex. 84.)

IV. SCOPE OF PROJECT

18. In 2004, Google announced that it planned to create an online database of all the world's books, beginning with agreements with major universities in the United States. Rosenthal Decl., Ex. 96 (Clancy Exhibit No. 3).

RESPONSE: Denied. As an initial matter, the document marked as Exhibit No. "3" during the deposition of Daniel Clancy on June 1, 2012 is Exhibit 99 to the Rosenthal Declaration, not Exhibit 96. The Libraries admit that Mr. Clancy's testimony in Exhibit 99 includes the following statement: "In 2004, Google announced that it planned to create an online database of all of the world's books, beginning with agreements with major university research libraries in the United States." (Rosenthal Decl., Ex. 99 ¶ 3.) The Libraries deny that Mr. Clancy's statement is an exact description of Google's December 14, 2004 announcement, included as Exhibit 96 to the Rosenthal Declaration, and which actually describes the program as one "to digitize the collections of these amazing libraries," referring to the libraries of Harvard, Stanford, the University of Michigan, and the University of Oxford, and The New York Public Library. (Rosenthal Decl., Ex. 96 at 2.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(Clancy Tr. 110:23 – 111:23.)

19. [REDACTED] Clancy Tr.
54:10-20.

RESPONSE: Denied in part, on the ground that the deposition of Daniel Clancy in this case was taken on June 1, 2012, not in May 2012, and on the ground that Mr. Clancy's testimony states [REDACTED]

[REDACTED] (Clancy Tr. 54:3 – 20.)

20. [REDACTED] Clancy Tr. 54:21-55:1.

RESPONSE: Denied. [REDACTED]

[REDACTED]

[REDACTED] (Clancy Tr. 54:21 – 55:1.)

21. [REDACTED] Wilkin Tr. 100:8-13.

RESPONSE: Denied in part, on the ground that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Wilkin Tr. 100:8 – 13.)

22. As of December 20, 2011, UM had incorporated into the HDL 4,490,155 digitized volumes. UM RFA No. 32.

RESPONSE: The Libraries admit the statement.

23. With the exception of digitizing books to make them available to people with print disabilities, the University Librarian of UM was not aware of any instance prior to entering into the UM-Google Cooperative Agreement in which UM digitized works that were still protected by copyright. Courant Tr. 31:12-25.

RESPONSE: This statement is immaterial and irrelevant to the issues raised in Plaintiffs' Motion for Summary Judgment, namely whether the Libraries' uses of Plaintiffs' works constitute copyright infringement or are permitted under Section 107 and/or Section 108 of the Copyright Act. Further, the Libraries deny this statement on the ground that Paragraph 23 mischaracterizes Dr. Courant's testimony. Dr. Courant stated that he "did not know of any specific instances" other than making works accessible to people with print disabilities, but that "[I]t would not surprise me if there were some." (Courant Tr. 31:12 – 25.) Further, Dr. Courant's testimony also makes it clear that he did not hold the position of University Librarian during the relevant period "prior to entering into the UM-Google Cooperative Agreement," but rather "was appointed university librarian and dean of libraries during 2007." (Courant Tr. 10:4 – 7.) Moreover, Mr. Wilkin, who has served as Associate University Librarian for Library Information Technology since 2002, testified that "[s]ome of our [UM's] activities digitizing works prior to digitization with Google did involve digitizing works that we believe to be in copyright" and that "[t]he library routinely digitized works that were damaged or deteriorating," including works believed to be in copyright. (Wilkin Tr. 61:23 – 63:1.)

24. As of December 9, 2011, UC had provided Google with 3,105,945 printed volumes that were digitized by Google and are now in the HDL. UC RFA No. 26; Farley Tr. 63:14-18.

RESPONSE: Solely for purposes of this motion, the Libraries admit the statement in part, admitting that as of December 9, 2011, the University had provided Google with 3,105,945 printed volumes that, upon information and belief, were digitized by Google and are now in the HDL. (Rosenthal Decl., Ex. 74 at 18-19.)

25. [REDACTED]
Christenson Tr. 103:10-11.

RESPONSE: Solely for purposes of this motion, the Libraries admit the statement in part, admitting that Ms. Christenson, who was deposed in this case as a fact witness and not as a representative of the University of California, stated [REDACTED]

[REDACTED] (Christenson Tr. 103:10-11.) The Libraries deny that [REDACTED]

[REDACTED] It is clear from the Responses to Plaintiffs' First Requests for Admission to Defendant Mark G. Yudof, President of the University of California, that the number is in fact lower. (*See* Rosenthal Decl., Ex. 74 at 18-19.) Indeed, Ms. Farley testified in her deposition that [REDACTED]

[REDACTED] (Farley Tr. 63:14-18.)

26. UC was prepared to provide up to five million books for digitization, including works protected by copyright. Farley Tr. 90:13-91:6.

RESPONSE: This statement is immaterial and irrelevant to the issues raised in Plaintiffs' Motion for Summary Judgment, namely whether the Libraries' uses of Plaintiffs' works constitute copyright infringement or are permitted under Section 107 and/or Section 108 of the Copyright Act. Denied on the ground that Paragraph 26 mischaracterizes Ms. Farley's testimony.

Ms. Farley did not testify that “UC was prepared to provide up to five million books for digitization, including works protected by copyright.” (Farley Tr. 90:13-91:6.) Rather, when asked whether “it was the intention of the University of California or CDL to contribute up to five million volumes,” Ms. Farley testified that “it was a projection that we might do as much as five million, so we just used that as a—in order to construct this estimate.” (*Id.* 90:13 – 20.) Moreover, Ms. Farley was deposed in this case as a fact witness, not as a representative of the University of the California.

27. As of December 9, 2011, UW had provided Google with 511,432 printed volumes that, upon information and belief, were digitized by Google and are now in the HathiTrust Digital Library. UW RFA No. 26.

RESPONSE: The Libraries admit the statement.

28. [REDACTED] Hirtle Tr. 123:25-124:13; 178:20-179:10.

RESPONSE: Solely for purposes of this motion, the Libraries admit this statement in part, admitting that Mr. Hirtle, who was deposed in this case as a fact witness and not as a representative of Cornell University, testified that [REDACTED]

[REDACTED] (Hirtle Tr. 123:25 – 124:8.)

V. OPERATIONS

Selection/Collection

29. Pursuant to the UM-Google Cooperative Agreement, UC-Google Cooperative Agreement, UW-Google Cooperative Agreement, CIC-Google Cooperative Agreement and Cornell-Google Cooperative Agreement (collectively, the “Google Cooperative

Agreements”), each Defendant cooperates with Google to identify works from its individual collection to be digitized. Answer ¶ 50.

RESPONSE: Denied in part on the ground that Paragraph 29 is vague and ambiguous.

Solely for purposes of this motion, the Libraries admit that pursuant to the UM-Google Cooperative Agreement, UM cooperates with Google to identify books from UM’s collection to be digitized; that pursuant to the UC-Google Cooperative Agreement, UC cooperates with Google to identify books from UC’s collection to be digitized; that pursuant to the UW-Google Cooperative Agreement, UW cooperates with Google to identify books from UW’s collection to be digitized; that pursuant to the CIC-Google Cooperative Agreement, each of the CIC Universities, including IU, cooperates with Google to identify books from their individual collections to be digitized; and that pursuant to the Cornell-Google Cooperative Agreement, Cornell cooperates with Google to identify books from Cornell’s collection to be digitized. The Libraries deny that “each Defendant” acts pursuant to all of the agreements identified above (collectively, the “Google Cooperative Agreements”). (Answer ¶ 50.)

30. The books selected for digitization pursuant to the Google Cooperative Agreements are not limited to works in the public domain, unpublished works or deteriorating published works that cannot be replaced, and include in-print books that are commercially available and books that are protected by copyright. Answer ¶ 50.

RESPONSE: The Libraries admit the statement.

31. It was UM’s and MLibrary’s intent to digitize essentially all of the collections of the library except for works that were fragile, not of the size that would fit the digitization process or unable or difficult to be copied for one reason or another. Courant Tr. 64:15-25.

RESPONSE: Denied in part on the ground that Paragraph 31 mischaracterizes Dr.

Courant’s testimony, which identifies “[w]orks that are fragile, works that were not of the size

that would fit the digitization process, works that were unable to be copied or difficult to copy for one reason or another” as works in the University of Michigan Library that were not a part of UM and the MLibrary’s digitization plans, but Dr. Courant did not state that these were the only works that would not be digitized (nor was Dr. Courant asked whether this list was exclusive, or whether there were any other types of works that were not a part of UM and the MLibrary’s digitization plans.) (Courant Tr. 64:15 – 25.)

32. [REDACTED] Farley Tr. 41:2-19.

RESPONSE: Denied in part on the grounds that Paragraph 32 mischaracterizes Ms. Farley’s testimony. Ms. Farley, who testified as a fact witness and not as a representative of the University of California, testified that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Farley Tr. 39:7 –

9.) Ms. Farley further testified that the NRLF, where the manner of selection for digitization described in Paragraph 32 took place, is a facility for “high density storage of library materials that the libraries determine to be of lower use than ones they keep on campus.” (Farley Tr. 19:7 – 20:8.)

Moreover, Ms. Christenson testified that that [REDACTED]

[REDACTED]

[REDACTED] (See Christenson Tr. 65:17 – 68:5.)

33.

[REDACTED]
[REDACTED] Wilkin Tr. 148:9-149:7; Christenson Tr. 68:6-11; Hirtle Tr. 153:12-18; Farley Tr. 44:20 45:2, 49:5-18; 52:21-53:17.

RESPONSE: The Libraries admit the statement.

34.

[REDACTED]
[REDACTED] Hirtle Tr. 153:12-18.

RESPONSE: The Libraries admit the statement.

35.

[REDACTED]
[REDACTED] Clancy Tr. 47:16-49:8; Christenson 68:18-70:15; Hirtle Tr. 152:16-153:9.

RESPONSE: Denied in part, on the ground that the cited testimony does not support the statement. The Libraries admit that Mr. Clancy testified that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Clancy

Tr. 47:16 – 49:8.) The Libraries deny that the cited testimony supports the proposition that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

36. [REDACTED] Clancy Tr. 49:9-50:21.

RESPONSE: Denied. Mr. Wilkin testified that the MLibrary “routinely digitized works that were damaged or deteriorating.” (Wilkin Tr. 61:23 – 63:1; *see also* June 28, 2012 Declaration of John Wilkin in Support of Defendants’ Motion for Summary Judgment (“Wilkin Decl.”) ¶ 41.)

37. [REDACTED] Christenson Tr. 76:3-77:12.

RESPONSE: Denied on the ground that Paragraph 37 mischaracterizes Ms. Christenson’s testimony. Ms. Christenson, who testified as a fact witness and not as a representative of the University of California, testified only that [REDACTED]

[REDACTED]

38. [REDACTED] Hirtle Tr. 135:2-16.

RESPONSE: Denied on the grounds that Paragraph 38 mischaracterizes Mr. Hirtle's testimony. As Mr. Hirtle stated during his deposition, [REDACTED]

[REDACTED]

39. Witnesses from UC and Cornell were not aware of any person at any time analyzing any of the four fair use factors set forth in 17 U.S.C. § 107 with respect to any particular book that was digitized from their library collections. Christenson 145:20-149:14; Hirtle Tr. 227:13-229:14.

RESPONSE: Denied on the grounds that Paragraph 39 mischaracterizes the cited testimony. The extent of Ms. Christenson and Mr. Hirtle’s testimony is that they are not aware whether others at UC or Cornell did or did not analyze the fair use factors. (Christenson Tr. 149:1 – 13 (“ . . . I don’t see how I could be aware of all those individual people’s thought processes, so I would say no.”); Hirtle Tr. 229:9 – 14 (“Q.: Do you know whether anyone ever examined those factors with respect to any particular work that was digitized as part of the Google project? A.: Someone may have, but I’m not aware of that.”). Their testimony on this point does not indicate that no one conducted such an analysis, [REDACTED] [REDACTED] (See Christenson Tr. 148:19 – 21 (“Q.: You were the one managing the pulling of the books from the shelves, correct? A.: No.”); [REDACTED] [REDACTED]

40. [REDACTED] [REDACTED] UM/UC ROG No. 2; Christenson Tr. 65:8-65:24.

RESPONSE: This statement is immaterial and irrelevant to the issues raised in Plaintiffs’ Motion for Summary Judgment, namely whether the Libraries’ uses of Plaintiffs’ works constitute copyright infringement or are permitted under Section 107 and/or Section 108 of the Copyright Act. Further, the Libraries deny the statement. Neither the cited interrogatory responses nor the cited testimony from Ms. Christenson’s deposition supports the assertion that [REDACTED] [REDACTED] (See Rosenthal

[REDACTED] The cited interrogatory responses identify certain works that were collected shelf by shelf, selecting every work on each shelf, for digitization through the Google Library project. (*See* Rosenthal Decl., Exs. 73 & 75 (responses to Interrogatory No. 2).) [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] the interrogatory responses speak only to the works identified in the schedules to Plaintiffs' requests, and the schedules did not include all of the works Plaintiffs have defined as the "Infringed Books" (*See* Rosenthal Decl., Exs. 73 & 75 (responses to Interrogatory No. 2); July 20, 2012 Declaration of Joseph Petersen in Support of the Libraries' Opposition to Plaintiffs' Motion for Summary Judgment ("Petersen Opp. Decl."), Exs. D & F (Schedule A)) [REDACTED]

[REDACTED]

[REDACTED]

41. [REDACTED] Clancy Tr. 42:19 – 43:5; Christenson Tr. 67:8-14.

RESPONSE: This statement is immaterial and irrelevant to the issues raised in Plaintiffs' Motion for Summary Judgment, namely whether the Libraries' uses of Plaintiffs' works constitute copyright infringement or are permitted under Section 107 and/or Section 108 of the Copyright Act. Further, the Libraries deny the statement on the ground that Paragraph 41 mischaracterizes the cited testimony. [REDACTED]

[REDACTED]

42.


[REDACTED] M/UC/UW ROG No. 2;
Wilkin Tr. 143:6-145:18; Farley Tr. 45:10-47:17.

RESPONSE: This statement is immaterial and irrelevant to the issues raised in Plaintiffs' Motion for Summary Judgment, namely whether the Libraries' uses of Plaintiffs' works constitute copyright infringement or are permitted under Section 107 and/or Section 108 of the Copyright Act. Subject to this response, the Libraries admit the statement in part, as it applies to UM, UC, and UW, but the Libraries deny the statement as applied to IU and Cornell because the evidence cited by Plaintiffs does not at all address the selection of books for digitization at IU or Cornell. (*See* Rosenthal Decl., Exs. 73, 75, & 78 (response to Interrogatory No. 2); Wilkin Tr. 143:6-145:18; Farley Tr. 45:10-47:17.)

43.

[REDACTED] Hirtle Tr. 128:12-129:3.

RESPONSE: The Libraries admit the statement in part, admitting that Mr. Hirtle testified

, but deny that Mr. Hirtle was testifying as a representative of Cornell. (Hirtle Tr. 128:12 – 18; 133:10 – 12.)

Shipment/Delivery

44. Library staff at each of the University prepared print copies of works from the University’s library collection, including the Infringed Books, for shipment to one of Google’s scanning centers. UM/UC/UW RFA No. 12.

RESPONSE: This statement is immaterial and irrelevant to the issues raised in Plaintiffs’ Motion for Summary Judgment, namely whether the Libraries’ uses of Plaintiffs’ works constitute copyright infringement or are permitted under Section 107 and/or Section 108 of the Copyright Act. Further the Libraries deny the statement in part on the ground that the evidence cited by Plaintiffs does not support the statement. The discovery responses cited by Plaintiffs address only the books identified in schedules attached to Plaintiffs’ discovery requests, and the schedules did not include all of the books Plaintiffs have defined as the “Infringed Books.” (*See* Rosenthal Decl., Exs. 74, 77, 79 (response to Request No. 12); Petersen Opp. Decl., Exs. A – C (Schedule A).) The Libraries further deny the statement as applied to IU and Cornell, as Plaintiffs have cited no evidence about IU or Cornell that supports the statement.

45. 
Christenson Tr. 77:19-78:25.

RESPONSE: This statement is immaterial and irrelevant to the issues raised in Plaintiffs’ Motion for Summary Judgment, namely whether the Libraries’ uses of Plaintiffs’ works constitute copyright infringement or are permitted under Section 107 and/or Section 108 of the

Copyright Act. Subject to this response, the Libraries admit the statement in part, admitting that Ms. Christenson's cited testimony states that, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (See Christenson Tr. 77:13 – 78:25.)

46. Google arranged for transportation of print copies of works in the Universities' collection, including the Infringed Books, from, and back, to the library that prepared the print copies for shipment. UM/UC/UW RFA No. 12.

RESPONSE: Denied in part on the ground that the evidence cited by Plaintiffs does not support the statement. The discovery responses cited by Plaintiffs address only the books identified in schedules attached to Plaintiffs' discovery requests, and the schedules did not include all of the books Plaintiffs have defined as the "Infringed Books." (See Rosenthal Decl., Exs. 74, 77, 79 (response to Request No. 12); Petersen Opp. Decl., Exs. A – C (Schedule A).) The Libraries further deny the statement as applied to IU and Cornell, as Plaintiffs have cited no evidence about IU or Cornell that supports the statement.

47. Pursuant to the Google Cooperative Agreements, the works selected for digitization are delivered to a facility that is located either on or off the Defendant's campus and that is occupied by Google personnel and scanning equipment. Answer ¶ 50.

RESPONSE: The Libraries admit the statement.

Scanning

48. Google prepared a digital copy of each Infringed Book based on a print copy of the work obtained from one of the Universities (each such copy, a “Master Digital Copy”). UM/UC/UW RFA Response No. 13.

RESPONSE: Denied in part on the ground that the evidence cited by Plaintiffs does not support the statement. The discovery responses cited by Plaintiffs address only the books identified in schedules attached to Plaintiffs’ discovery requests, and the schedules did not include all of the books Plaintiffs have defined as the “Infringed Books.” (*See* Rosenthal Decl., Exs. 74, 77, 79 (response to Request No. 13); Petersen Opp. Decl., Exs. A – C (Schedule A).)

49. Each Master Digital Copy created by Google includes an image component representing photographic reproductions of the pages of the Work (“Image File”) and a Unicode text component representing text in machine-readable format (“Text File”). UM RFA Response No. 14; Answer ¶ 52; Clancy Tr. 64:13-16; Christenson Tr. 91:12-23; Hirtle Tr. 109:10-15.

RESPONSE: This statement is immaterial and irrelevant to the issues raised in Plaintiffs’ Motion for Summary Judgment, namely whether the Libraries’ uses of Plaintiffs’ works constitute copyright infringement or are permitted under Section 107 and/or Section 108 of the Copyright Act. Digital copies created and retained by Google, such as the “Master Digital Copy” defined by Plaintiffs, are not the subject of this litigation. Subject to this response, and solely for purposes of this motion, the Libraries admit that [REDACTED] [REDACTED] (Clancy Tr. 64:13 – 16.) The Libraries deny that the cited paragraph of the Answer and the cited discovery response address the components of the “Master Digital Copy” as Plaintiffs have defined that term. (*See* Answer ¶ 52; Rosenthal Decl., Ex. 77 (response to Request No. 14).)

50.

[REDACTED]

[REDACTED] Courant

Tr. 68:14-69:23.

RESPONSE: The Libraries admit that the statement is an accurate quote of Dr.

Courant's

[REDACTED]

[REDACTED]

[REDACTED] (See

Courant Tr. 68:14-69:23.)

51.

[REDACTED] Clancy Tr. 64:17-65:9.

RESPONSE: This statement is immaterial and irrelevant to the issues raised in Plaintiffs' Motion for Summary Judgment, namely whether the Libraries' uses of Plaintiffs' works constitute copyright infringement or are permitted under Section 107 and/or Section 108 of the Copyright Act. Further, the Libraries deny the statement on the grounds that it misrepresents Mr. Clancy's testimony. Mr. Clancy testified that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED] (Clancy Tr. 64: 17 – 65:13.)

Digitization Costs

52. [REDACTED] Clancy Tr. 57:20-58:5.

RESPONSE: Denied on the ground that Paragraph 52 mischaracterizes Mr. Clancy’s testimony. Mr. Clancy testified, after his counsel had designated the testimony highly confidential under the protective order, that [REDACTED]

[REDACTED] (Clancy Tr. 57:20-58:5.)

53. Some libraries have estimated their costs of performing the act of digitization at approximately \$100 per volume. Answer ¶ 53.

RESPONSE: The Libraries admit the statement.

54. UM estimates it costs somewhere between \$35 and several hundred dollars per volume and that an estimate of \$60 per book sounds “a bit low.” Wilkin Tr. 99:4-8; 102:11.

RESPONSE: Denied in part. The testimony cited for Paragraph 54 makes clear that Mr. Wilkin is stating his own opinions, and Mr. Wilkin testified as a fact witness, not as a representative of UM. Mr. Wilkin testified regarding his own “professional sense” of the estimate of the range of costs of digitization per book, stating that he “suspect[s] that it may have been as low as \$35 and as high as several hundred dollars per book.” (Wilkin Tr. 98:22 – 99:8.) Wilkin’s testimony that estimating \$60 as the average cost of digitization a single volume “seems a bit low” was specifically characterized as his “personal opinion.” (*Id.* 102:5 – 11.)

55. [REDACTED] ilkin Tr. 156:3-10; Rosenthal Decl., Ex. 92.

RESPONSE: Denied on the ground that the statement is vague and ambiguous. Solely for purposes of this motion, the Libraries admit that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (See Rosenthal Decl., Ex. 92; Wilkin Tr. 156:3 – 157:11.)

56. [REDACTED] Wilkin Tr. 156:16-157:3.

RESPONSE: Denied on the ground that Paragraph 56 mischaracterizes Mr. Wilkin's testimony. Mr. Wilkin first testified only that [REDACTED]
[REDACTED] (Wilkin Tr. 156:21-24.)

57. [REDACTED] Hirtle Tr. 146:7-136:22 [sic]; 140:16-25.

RESPONSE: Solely for purposes of this motion, the Libraries admit the statement.

58.

[REDACTED]
Farley Tr. 36:21-37:19, 64:3-18.

RESPONSE: Solely for purposes of this motion, the Libraries admit that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] (See Farley
Tr. 64:3-18.)

59.

[REDACTED] Hirtle Tr. 149:21-151:9.

RESPONSE: The Libraries admit the statement.

60.

[REDACTED] Farley Tr. 63:19-64:1.

RESPONSE: The Libraries admit the statement.

61. For 2011 the general fund budget for UM's libraries was between \$50 and \$55 million.
Courant Tr. 25:3-25.

RESPONSE: Denied. Mr. Courant testified that the approximate budget for the University of Michigan's University Library, specifically, was between \$50 and \$55 million. (Courant Tr. 25:21-25). He made clear that his estimate did not apply to all of the University of Michigan's libraries generally. (*Id.* 23:20-24:25.)

University Copy

62. Pursuant to the Google Cooperative Agreements, after digitizing a book from the collection of a Defendant, Google has provided digital copies of books from a Defendant's library collections either to that Defendant or, at the Defendant's request, to MLibrary. Answer ¶¶ 2, 52.

RESPONSE: The Libraries admit the statement.

63. Google provided one or more digital copies of each of the Infringed Books to UM. UM RFA No. 19.

RESPONSE: Denied in part on the ground that the evidence cited by Plaintiffs does not support the statement. In the discovery response cited by Plaintiffs, UM admits that Google provided to UM one or more digital copies of each of the works identified on Schedule A to Plaintiffs' requests, which did not include all of the books Plaintiffs have defined as the "Infringed Books." (*See* Rosenthal Decl., Ex. 77 (response to Request No. 19);); Petersen Opp. Decl., Ex. A (Schedule A).)

64. [REDACTED]

[REDACTED] C/UW RFA No. 20; Farley Tr. 70:6-18.

RESPONSE: Denied in part on the ground that the evidence cited by Plaintiffs does not support the statement. In the discovery responses cited by Plaintiffs, UC and UW admit that Google provided one or more digital copies to UM of each of the works identified on Schedule A to Plaintiffs' requests, which did not include all of the books Plaintiffs have defined as the "Infringed Books." (*See* Rosenthal Decl., Exs. 74 & 79 (responses to Request No. 20); Petersen Opp. Decl., Exs. B & C (Schedule A).)

VI. GOOGLE COMMERCIAL PURPOSES

65. [REDACTED]

[REDACTED] Courant Tr. 52:3-25.

RESPONSE: Denied. The statements made by Mr. Courant in the testimony cited by Plaintiffs were based entirely on his personal speculation, as is clear when the statements are

read in context. Mr. Courant testified only that he [REDACTED]

66. [REDACTED]

[REDACTED] Wilkin Tr. 131:2-8.

RESPONSE: Denied. The statement made by Mr. Wilkin in the testimony cited by Plaintiffs was based entirely on his personal speculation, as is clear when the statement—and the question that preceded it—is read in context. Mr. Wilkin was asked [REDACTED]

[REDACTED] (Wilkin Tr. 131:2-4.) Mr. Wilkin, after his counsel objected to the form of the question, testified only that “[REDACTED]

[REDACTED] (*Id.* 131:5-8.)

67. [REDACTED]

[REDACTED] Wilkin Tr. 131:24-132:22.

RESPONSE: Denied. The statement made by Mr. Wilkin in the testimony cited by Plaintiffs was based entirely on his personal speculation, as is clear when the statement is read in context: [REDACTED]

[REDACTED]

68.

[REDACTED] Christenson Tr. 98:3-99:12.

RESPONSE: Denied. The statements made by Ms. Christenson in the testimony cited by Plaintiffs were based entirely on her personal speculation, as is clear when the statements are read in context. [REDACTED]

[REDACTED]

69. If a user conducts a search on the website books.google.com for the phrase “secure cheap advertising,” which appears in the text of page 287 in the book Good Troupers All by Gladys Malvern, the copyright in which is owned by Plaintiff ALF, the search results page includes a link to the work (without displaying the content), as well as various advertisements from which Google will earn revenue if the user clicks on one of the advertisements. Clancy Tr. 87:17 – 89:23; Rosenthal Decl. ¶ 88, Ex. 86 (6/4/12 Printout of Google Books Search Results).

RESPONSE: This statement is immaterial and irrelevant to the issues raised in Plaintiffs' Motion for Summary Judgment, namely whether the Libraries' uses of Plaintiffs' works constitute copyright infringement or are permitted under Section 107 and/or Section 108 of the Copyright Act. Further, the Libraries deny the statement in part. The Libraries deny that Plaintiff ALF has sufficiently demonstrated its ownership of the copyright in the book "Good Troupers All" by Gladys Malvern (*see* Response to No. 151, below). Further, [REDACTED]

70.

[REDACTED]
[REDACTED] Clancy Tr. 108:11-22.

RESPONSE: Denied. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (Clancy Tr. 108:11-22 (emphasis added).)

71.

[REDACTED]
[REDACTED] Clancy Tr. 117:4-20.

RESPONSE: Solely for purposes of this motion, the Libraries admit that the statement is an accurate representation of Mr. Clancy's testimony, made after the objections of his counsel that the questions lacked foundation and called for speculation. (Clancy Tr. 117:4-20.)

72.

[REDACTED]
[REDACTED] Clancy Tr. 121:19-122:10.

RESPONSE: Denied. Plaintiffs have not accurately characterized the testimony of Mr. Clancy. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

VII. HATHITRUST

73. *HathiTrust Overview*

RESPONSE: Denied on the ground that Paragraph 73 is not a statement of material fact.

74. On October 13, 2008, the thirteen universities comprising the CIC, led by UM; UC's libraries, led by the CDL; and the University of Virginia announced the launch of the HathiTrust Service and the HathiTrust Digital Library ("HDL"), the shared digital repository of digital collections of institutions participating in the HathiTrust Service. Answer ¶ 62.

RESPONSE: The Libraries admit the statement.

75. Defendants store digital copies of the books that were provided to them by Google in the HDL. Answer ¶ 2.

RESPONSE: Denied in part on the grounds that Paragraph 75 is vague and ambiguous.

The Libraries admit that the Libraries store in the HDL digital copies of books, many of which digital copies were provided to them by Google. (Answer ¶ 2.)

76. As of October 5, 2011, the HDL contained 9,709,348 volumes, amounting to 435 terabytes of data. Answer ¶ 39.

RESPONSE: The Libraries admit the statement.

77. As of June 25, 2012, the HDL included 10,405,889 total volumes, 5,519,596 book titles, 272,002 serial titles, 3,642,061,150 pages, 466 terabytes of data, the equivalent of 123 miles and 8,455 tons of printed materials. Of the 10,405,889 volumes, 3,097,761 volumes (— 30%) are considered as being in the public domain, meaning that 7,308,128 (— 70% of the total) are protected by copyright. Rosenthal Decl., Ex. 105.

RESPONSE: Denied on the ground that the document proffered by Plaintiffs as a printout of a screenshot dated June 28, 2012 does not on its face include any information dated June 25, 2012.

78. HathiTrust receives the “overwhelming” majority of its revenues from participating academic libraries that “contribute” to HathiTrust. Courant Tr. 119:5-20.

RESPONSE: Solely for purposes of this motion, the Libraries admit that the statement is an accurate representation of Mr. Courant’s testimony, made after the objections of his counsel as to the vague form of the question. (Courant Tr. 119:5-20.)

HathiTrust Revenues

79.

[REDACTED]

Wilkin Tr. 204:10-19; Rosenthal Decl., Ex. 93.

RESPONSE: The Libraries deny the statement in part, on the ground that Mr. Wilkin testified that [REDACTED]

[REDACTED] (Wilkin Tr. 206:11 – 21.) The Libraries admit that [REDACTED]
[REDACTED] (Rosenthal Decl., Ex. 93.)

80. “[T]here are years in which HathiTrust has brought in more than it spent” to cover “the expectation of future equipment upgrades” and “to be able to develop new projects and such.” Courant Tr. 127:20-129:4.

RESPONSE: Solely for purposes of this motion, the Libraries admit that the statement is an accurate representation of Mr. Courant’s testimony, made after the objections of his counsel as to the form of the questions asked. (Courant Tr. 127:20-129:4.)

81. [REDACTED] Wilkin Tr. 205:8-206:21; Rosenthal Decl., Ex. 93.

RESPONSE: The Libraries deny the statement in part, on the ground that Mr. Wilkin testified that [REDACTED]
[REDACTED] (Wilkin Tr. 206:11 – 21). The Libraries admit that [REDACTED]
[REDACTED] (Rosenthal Decl., Ex. 93.)

HathiTrust Architecture

82. The architecture for storing the HDL and operating the HathiTrust Service employs two synchronized instances of server farms (each including at least two web servers, a database server and a storage cluster), with the primary site located at UM’s Ann Arbor, Michigan campus where incorporation into the HDL occurs, and a mirror site located at IU’s Indianapolis campus. Answer ¶ 66.

RESPONSE: The Libraries admit the statement.

83. The incorporation of digital works and their associated metadata into the HDL is performed at MLibrary. Answer ¶ 64.

RESPONSE: The Libraries admit the statement.

84. The digital works and associated metadata incorporated into the HDL are replicated to an active mirror site located on IU's Indianapolis campus. Answer ¶ 64.

RESPONSE: The Libraries admit the statement.

85. The HathiTrust Service includes routine tape backups of all data in the HDL, which are stored at a facility on UM's campus and are replicated to create a second backup stored at a separate location on UM's campus. Answer ¶¶ 64, 66.

RESPONSE: The Libraries admit the statement.

86. Four "HathiTrust Digital Copies" of each of the Infringed Books are maintained in the HDL: (1) the "Initial HathiTrust Digital Copy" received from Google, (2) the "Mirror Site HathiTrust Digital Copy," (3) the "First Backup Tape Digital Copy," and (4) the "Second Backup Tape HathiTrust Digital Copy." UM/HathiTrust/UC/UW ROG No. 3.

RESPONSE: Denied in part on the ground that the evidence cited by Plaintiffs does not support the statement. In the discovery responses cited by Plaintiffs, UM, UC, and UW discuss "HathiTrust Digital Copies" of works identified in schedules attached to Plaintiffs' discovery requests, but the schedules did not include all of the books Plaintiffs have defined as the "Infringed Books." (*See* Rosenthal Decl., Exs. 73, 75, & 78 (responses to Request No. 3); *id.*, Ex. 71 (response to Request No. 2); Petersen Opp. Decl., Exs. D – G (Schedule A).) The Libraries also deny that there is a "ROG No. 3" in the Responses to Plaintiffs' First Set of Interrogatories to Defendant HathiTrust, as cited by Plaintiffs above. (*See* Rosenthal Decl., Ex. 71.)

87. Each Initial HathiTrust Digital Copy received from Google includes an Image File and Text File. UM RFA Response No. 14.

RESPONSE: Solely for purposes of this motion, the Libraries admit the statement in part, with the clarification that the term “Initial HathiTrust Digital Copy” as used in the discovery response cited by Plaintiffs refers only to copies of works identified in the Schedule A attached to Plaintiffs’ requests. (*See* Rosenthal Decl., Ex. 77 (response to Request No. 14); Petersen Opp. Decl., Ex. A (Schedule A).)

88. The Initial HathiTrust Digital Copy is stored on a server (a) connected to the HathiTrust private computer network and the UM campus computer network and (b) physically located at Michigan Academic Computing Center, Room 100, 1000 Oakbrook Drive, Ann Arbor, Michigan. HT/UM ROG Nos. 3(h) & (i).

RESPONSE: Solely for purposes of this motion, the Libraries admit the statement in part, with the clarification that the term “Initial HathiTrust Digital Copy” as used in the discovery responses cited by Plaintiffs refers only to copies of works identified in the schedules attached to Plaintiffs’ requests. (*See* Rosenthal Decl., Ex. 71 (response to Request No. 2(h) & (i)); *id.*, Ex. 75 (response to Request No. 3(h) & (i); Petersen Opp. Decl., Exs. D & E (Schedule A).) The Libraries deny that there is a “ROG No. 3(h) & (i)” in the Responses to Plaintiffs’ First Set of Interrogatories to Defendant HathiTrust, as cited by Plaintiffs above. (*See id.*, Ex. 71.)

89. The Mirror Site HathiTrust Digital Copy is stored on a server (a) connected to the HathiTrust private computer network and the IU – Purdue University Indianapolis campus computer network and (b) physically located at Informatics & Communications Technology Complex, Room IT 024, 535 West Michigan Street, Indianapolis, Indiana. HT/UM ROG Nos. 3(h) & (i).

RESPONSE: Solely for purposes of this motion, the Libraries admit the statement in part, with the clarification that the term “Mirror Site HathiTrust Digital Copy” as used in the discovery responses cited by Plaintiffs refers only to copies of works Plaintiffs identified in the

schedules attached to Plaintiffs' requests. (*See* Rosenthal Decl., Ex. 71 (response to Request No. 2(h) & (i)); *id.*, Ex. 75 (response to Request No. 3(h) & (i); Petersen Opp. Decl., Exs. D & E (Schedule A).) The Libraries deny that there is a "ROG No. 3(h) & (i)" in the Responses to Plaintiffs' First Set of Interrogatories to Defendant HathiTrust, as cited by Plaintiffs above. (*See* Rosenthal Decl., Ex. 71.)

90. The Initial HathiTrust Digital Copy and Mirror Site HathiTrust Digital Copy are stored on media connected to World Wide Web servers. HT/UM ROG No. 3(g).

RESPONSE: Solely for purposes of this motion, the Libraries admit the statement in part, with the clarification that [REDACTED]

[REDACTED]
[REDACTED] (July 20, 2012 Declaration of Cory Snavelly, ("Snavelly Decl.") ¶ 14), and that the terms "Initial HathiTrust Digital Copy" and "Mirror Site HathiTrust Digital Copy" as used in the discovery responses cited by Plaintiffs refer only to copies of works identified in the schedules attached to Plaintiffs' requests. (*See* Rosenthal Decl., Ex. 71 (response to Request No. 2(g)); *id.*, Ex. 75 (response to Request No. 3(g); Petersen Opp. Decl., Exs. D & E (Schedule A).) The Libraries deny that there is a "ROG No. 3(g)" in the Responses to Plaintiffs' First Set of Interrogatories to Defendant HathiTrust, as cited by Plaintiffs above. (*See id.*, Ex. 71.)

91. The First Backup HathiTrust Digital Copy is stored on a server (a) connected to the UM campus computer network and (b) physically located at Michigan Academic Computing Center, Room 100, 1000 Oakbrook Drive, Ann Arbor, Michigan. HT/UM ROG Nos. 3(h) & (i).

RESPONSE: Denied in part, on the ground that the statement mischaracterizes the storage of the “First Backup HathiTrust Digital Copy.” [REDACTED]

[REDACTED] (Snively Decl. ¶ 17.) In addition, the term “First Backup HathiTrust Digital Copy” as used in the discovery responses cited by Plaintiffs refers only to copies of works Plaintiffs identified in the schedules attached to Plaintiffs’ requests. (*See* Rosenthal Decl., Ex. 71 (response to Request No. 2(h) & (i)); *id.*, Ex. 75 (response to Request No. 3(h) & (i); Petersen Opp. Decl., Exs. D & E (Schedule A).) The Libraries also deny that there is a “ROG No. 3(h) & (i)” in the Responses to Plaintiffs’ First Set of Interrogatories to Defendant HathiTrust, as cited by Plaintiffs above. (*See id.*, Ex. 71.)

92. The Second Backup HathiTrust Digital Copy is stored on a server (a) connected to the UM campus computer network and (b) physically located at Arbor Lakes Data Facility, Room 9100, Arbor Lakes Building 1, 4251 Plymouth Rd., Ann Arbor, Michigan. HT/UM ROG Nos. 3(h) & (i).

RESPONSE: Denied in part, on the ground that the statement mischaracterizes the storage of the “Second Backup HathiTrust Digital Copy.” [REDACTED]

[REDACTED] (Snively Decl. ¶ 17.) In addition, the term “Second Backup HathiTrust Digital Copy” as used in the discovery responses cited by Plaintiffs refers only to copies of works Plaintiffs identified in the schedules attached to Plaintiffs’ requests. (*See* Rosenthal Decl., Ex. 71 (response to Request No. 2(h) & (i)); *id.*, Ex. 75 (response to Request No. 3(h) & (i); Petersen Opp. Decl., Exs. D & E (Schedule A).) The Libraries also deny that there is a “ROG No. 3(h) & (i)” in the Responses to Plaintiffs’ First Set of Interrogatories to Defendant HathiTrust, as cited by Plaintiffs above. (*See id.*, Ex. 71.)

HathiTrust Uses

93. The HathiTrust Service includes a search tool that permits users to conduct full-text searches of the works in the HDL to determine the number of times a searched term appears, and the page numbers on which the searched term appears, in books in the HDL (including public domain and in-copyright works). Answer ¶ 68.

RESPONSE: The Libraries admit the statement.

94. It is theoretically possible to “reverse engineer” a search index to display snippets, meaning to display the words in a book that precede and follow the queried text. Wilkin Tr. 234:3-236:13.

RESPONSE: Denied on the ground that the statement is vague and ambiguous. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Wilkin Tr. 232:25 – 235:10.)

95. The HathiTrust Service permits certain users to view, search, print, and download full copies of certain volumes in the HDL, with the level of access determined in part by the identity of the user and the copyright status of the work. Answer ¶ 69.

RESPONSE: The Libraries admit the statement with the following clarifications:

(a) The HathiTrust Services permits all users to conduct searches over the corpus of the all of the works in HDL, although the manner in which the search results are presented (whether the text of the work may be viewed or not) is determined in part by the identity of the user and in part by whether the work is treated as in-copyright or in the public domain.

(b) The HathiTrust Service permits all users to view, print, and download (one page at a time) full copies of works treated as public domain works in the HDL;

(c) UM students and faculty certified as having print disabilities that prevent them from being able to read and use the print collections of UM's library are permitted to view, print, and download works in the HDL, including works treated as in-copyright; and

(d) There is a small number of works in UM's library collection that have—as a result of certain activities—been determined to be out of print and to be lost, stolen, or damaged and deteriorating beyond use, and one authenticated UM user per hardcopy work is permitted simultaneous access to view, print, and download these works one page at a time.

(Answer ¶ 69; Wilkin Decl. ¶¶68, 76-91, 98; Wilkin Tr. 222:23 – 223:13.)

96. The “HathiTrust Rights Database” includes categorizations of copyright status for each work in the HDL, as determined through processes conducted as part of the HathiTrust Service or through other resources. Answer ¶ 70.

RESPONSE: The Libraries admit the statement.

97. A work stored in the HDL may be assigned the attribute “OPB” (an acronym standing for Out of Print and Brittle) – in the HathiTrust Rights Database, which indicates that the work has been determined to be out of print and unusable or no longer in the library's collection because it is missing. Wilkin Tr. 85:6-88:23.

RESPONSE: Solely for purposes of this motion, the Libraries admit the statement.

98. The “OPB” attribute is typically assigned after digitization. (Wilkin Tr. 88:7-20.)

RESPONSE: The Libraries admit the statement in part, with the clarification that Mr. Wilkin also testified that the “OPB” attribute “could be applied at any time prior to digitization, after digitization.” (Wilkin Tr. 88:7 – 19.)

99. The “OPB” attribute are made available to UM authenticated users and users of the UM library to view, print and download. Wilkin Tr. 222:2-227:17; JW7 at 7, No. 2.

RESPONSE: Denied on the ground that the statement is vague and ambiguous and mischaracterizes the cited testimony. The “OPB” attribute is a label associated with certain digital works in the HDL, it is not something that is “made available to UM authenticated users and users of the UM library to view, print and download.” (Wilkin Tr. 85:23 – 87:15; 226:2 – 9; *see also id.* 222:23 – 223:13.) Moreover, Plaintiffs have not filed with the Court a copy of the document cited as “JW7 at 7, No. 2.”

HathiTrust User Access and Security

100. Ninety-three (93) individuals located in Michigan, New York, Minnesota, Wisconsin and California have “privileged access” to materials stored in the HDL. HT ROG No. 3(1); Wilkin Tr. 190:21-23, 192:11-19.

RESPONSE: Solely for purposes of this motion, the Libraries admit the statement in part, with the clarification that “privileged access” in this context refers to specific permission that has been granted to allow a particular user the ability to read works treated as in-copyright in the HDL under certain circumstances and for a particular purpose (Wilkin Tr. 191:11 – 194:13.), and the clarification that other restrictions apply to the access and use specifically granted to these users. (*See* Snavely Decl. ¶ 17.)

101. Authenticated users with “privileged access” to the HDL can view and download any work that is stored in the HDL one page at a time. Wilkin Tr. 192:21-194:9.

RESPONSE: Solely for purposes of this motion, the Libraries admit the statement in part, with the clarification that “privileged access” in this context refers to specific permission that has been granted to allow a particular user the ability to read works treated as in-copyright in the HDL under certain circumstances and for a particular purpose. (Wilkin Tr. 191:11 – 194:13.) After a person who has been granted “privileged access” authenticates to the system under the circumstances required for that user (e.g., from a UM staff member’s specific work station), only then is the person permitted to read or download (one page at a time) works treated as in-copyright in the HDL, and only for the purpose for which the person has been specifically granted permission (e.g., in order to complete the staff member’s work). (*Id.*)

102. Approximately five (5) users and thirty-two students (32) or faculty with print disabilities may obtain “privileged access” to the HDL without authenticating onto the system from a particular workstation. HT ROG No. 3(1); Wilkin Tr. 193:20-194:6.

RESPONSE: Solely for purposes of this motion, the Libraries admit the statement in part, with the clarification that other restrictions apply to the access and use specifically granted to these users. (*See* Snavelly Decl. ¶ 17.)

103. Fourteen (14) different individuals located in Michigan and Indiana have physical access to one or more of the servers or backup tapes comprising storing the digital content in the HDL. HT ROG No. 3(1).

RESPONSE: Solely for purposes of this motion, the Libraries admit the statement in part, with the clarification that all of the individuals’ access is subject to various restrictions, and

[REDACTED]

[REDACTED] (*See* Snavelly Decl. ¶ 17.)

104. [REDACTED] Clancy Tr. 94:1-99:20,
104:2- 18.

RESPONSE: Solely for purposes of this motion, the Libraries admit that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Clancy Tr. 99:12-17.)

105. [REDACTED] Christenson Tr. 120:14-24.

RESPONSE: Denied, on the ground that Paragraph 105 mischaracterizes Ms.
Christenson's testimony. Ms. Christenson testified [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

106. [REDACTED]

RESPONSE: Solely for purposes of this motion, the Libraries admit the statement with the clarification that [REDACTED]

[REDACTED]

107. [REDACTED]

RESPONSE: Denied in part, on the ground that [REDACTED]

[REDACTED]

[REDACTED]

108. [REDACTED] Wilkin Tr. 174:23-178:17.

RESPONSE: Denied on the ground that the statement mischaracterizes Mr. Wilkin's testimony. Mr. Wilkin testified that [REDACTED]

109. [REDACTED] Wilkin Tr. 174:23-178:17.

RESPONSE: Denied on the ground that the statement mischaracterizes testimony. [REDACTED]

VIII. BOOK EXAMINATION

110. UM evaluated the physical condition of the Infringed Books that came from MLibrary and conducted searches of the databases it uses to identify the availability and price of a

new book in response to Plaintiffs' discovery requests. Wilkin Tr. 74:16-75:5; 78:24-79:5.

RESPONSE: Denied. Plaintiffs' discovery requests, and UM's evaluation and responses, regarding the physical condition of certain books and their availability for purchase new addressed only works identified in the schedule attached to Plaintiffs' requests, and the schedule did not include all of the books Plaintiffs have defined as the "Infringed Books" in this motion. (Rosenthal Decl., Ex. 77 (responses to Requests Nos. 5 & 8); Petersen Opp. Decl., Ex. A (Schedule A).)

111. When, in response to Plaintiffs' discovery requests, UM and UC performed a search to determine whether unused replacement copies of the Infringed Books from their libraries could be obtained at a "fair price," they reported that new copies of identical versions of many Infringed Books were advertised for sale for under \$20 a copy. UM/UC RFA No. 5 (admitting that new copies of identical versions of many Infringed Books could be purchased for under \$20).

RESPONSE: Denied. Plaintiffs' discovery requests, and UM's and UC's searches and responses, regarding the availability of unused replacements of certain books addressed only works identified in the schedules attached to Plaintiffs' requests, and the schedules did not include all of the books Plaintiffs have defined as the "Infringed Books" in this motion. (Rosenthal Decl., Exs. 74 & 77 (responses to Requests Nos. 5 & 8); Petersen Opp. Decl., Exs. A & B (Schedule A).)

112. When, in response to Plaintiffs' discovery requests, UM, UC and UW evaluated the physical condition of the Infringed Books, only six were identified as "damaged" and only twenty-six were identified as "deteriorating or at substantial risk of deteriorating in the near future." UM/UC/UW RFA No. 8

RESPONSE: Denied. Plaintiffs' discovery requests, and UM, UC, and UW's evaluations and responses, regarding physical condition of certain books addressed only works identified in

the schedules attached to Plaintiffs' requests, and the schedules did not include all of the books Plaintiffs have defined as the "Infringed Books" in this motion. (Rosenthal Decl., Exs. 74, 77, & 79 (response to Request Nos. 5 & 8); Petersen Opp Decl., Exs. A – C (Schedule A).)

113. Works published between 1850 and 1990 were typically printed with acid content in the paper and that he considers any such works to be "deteriorating with the natural process of decay." Wilkin Tr. 66:8-67:25; see also Courant Tr. 43:11-44:10.

RESPONSE: Denied on the ground that the statement is vague and ambiguous in that there is no antecedent of "he."

IX. ORPHAN WORKS PROJECT

114. The Orphan Works Project ("OWP") is an initiative to, inter alia, identify amongst the in-copyright works in the HDL so-called "orphan works" – in-copyright works for which the copyright holder cannot be found. "[U]nder the OWP pilot process, OWP staff undertook a multistep due diligence process to check whether a work is commercially available for sale and, if it is not, to attempt to locate and contact the copyright holder. If the OWP staff were unsuccessful in identifying the copyright holder, the bibliographic information for the work would have been listed on the HathiTrust Service for ninety days." Furthermore, "under the pilot process, if no copyright holder emerged during the ninety days, and if UM owned a physical copy of the work in its collection, UM, through the HathiTrust Service, planned to make the work available on a limited basis to UM students, professors, and other authenticated users and visitors to the libraries at UM's campuses, to view the work in full, print the work one page at a time, and download the work one page at a time in single-page PDF files." Answer ¶¶ 3, 73, 74.

RESPONSE: The Libraries admit the statement, but deny that the quotation marks denote exact quotes from the cited paragraphs of the Answer.

115. UM decided to engage in the OWP in the months following, and in light of, Judge Chin's rejection of the Amended Settlement Agreement ("ASA") in the Google Books case because the ASA had provided "a mechanism whereby orphan works could be used without negative consequences . . . [a]nd when the settlement didn't go through, that avenue for making these works useable was blocked off and we asked ourselves the question, is there some way we can get some benefit out of these works for digital uses." Courant Tr. 141:22-144:20.

RESPONSE: Solely for purposes of this motion, the Libraries admit that the statement is an accurate representation of Mr. Courant’s testimony, made after the repeated objections of his counsel as to the form of the questions asked. (Courant Tr. 141:22-144:20.)

116. Books determined to be orphan works under the OWP will be made available to “tens of thousands” of people, including currently registered UM students, faculty, staff and people who walk into the MLibrary facilities. Courant Tr. 146:7-20.

RESPONSE: Denied. Mr. Courant did not testify that books determined to be orphan works under the OWP “will” be made available to anyone; rather, he testified as to the persons that “would have had” specified access to the works, had the OWP not been suspended indefinitely. (Courant Tr. 1145:7-14; 59:8-19; 161:6-13.)

Further, Mr. Courant made clear that no orphan work would have been made available to “tens of thousands” of people at any given time. Rather, authenticated users of University of Michigan Library services would have limited access to an orphan work on a “one-to-one” basis, under which only one digital copy may be viewed at any given time for each print copy currently existing in the library’s collection. In other words, if the University of Michigan Library owned only one print copy of the orphan work, only one authenticated user may view the digital copy at any given time. (*Id.* 145:7-14; 155:19-24.) Moreover, such users would only be able to view a single page of the book at a time; authenticated users of the digital copy “would have exactly the same access as authenticated users in the library, you could turn one page at a time and read the book electronically. But that would be all you could do with it” (*Id.* 168:19-169:3.)

117. On May 16, 2011, MLibrary announced the launch of the OWP. FAC ¶ 73; Answer ¶ 73.

RESPONSE: The Libraries admit the statement.

118. On June 23, 2011, UW's intention to participate in the OWP became public. Answer ¶ 36.

RESPONSE: The Libraries admit the statement.

119. On August 24, 2011, UC announced its intention to join the OWP. Answer ¶ 35.

RESPONSE: The Libraries admit the statement.

120. On August 24, 2011, Cornell announced its intention to join the OWP. Answer ¶ 38.

RESPONSE: The Libraries admit the statement.

121. A book entitled *Good Troupers All: The Story of Joseph Jefferson* by Gladys Malvern was digitized and included in the HDL and was preliminarily identified as a book that UM planned to make available on a limited basis contemplated as part of the OWP if the copyright holder were not identified. Answer ¶ 13.

RESPONSE: The Libraries admit the statement.

122. A book entitled *Lost Country* by Jack Salamanca was digitized and included in the HDL and was preliminarily identified as a book that UM planned to make available on a limited basis contemplated as part of the OWP if the copyright holder were not identified. Answer ¶ 29.

RESPONSE: The Libraries admit the statement.

123. On September 16, 2011, UM announced that there were "number of errors, some of them serious," in the process that had been used to identify orphan candidates as part of the Orphan Works Project. Rosenthal Decl., Ex. 94 (9/16/11 UM Library Announcement); Answer ¶ 78; Wilkin Tr. 241:24-242:14.

RESPONSE: The Libraries admit the statement, with the clarification that none of the errors referred to in the statement resulted in any works being made available through the Orphan Works Project. (Wilkin Tr. 240:24 – 241:3; Courant Tr. 155:19 – 24; Wilkin Decl. ¶ 114.)

124. UM suspended work in the OWP. Courant Tr. 159:8-11.

RESPONSE: Denied on the grounds that the statement is vague and ambiguous. UM suspended plans to provide access to any works identified through the OWP, but UM continues research to identify potential orphan works and to evaluate its research process. (Courant Tr. 159:22 – 160:15; Wilkin Tr. 241:13 – 23.)

125. Under the OWP, several books whose authors should have been easily locatable but were not located were wrongly identified as orphan candidates. Wilkin Tr. 241:24-242:14; Courant Tr. 159:12-19, 173:8-23.

RESPONSE: Denied. The cited testimony does not support the statement and nowhere states that authors “should have been easily locatable.” (See Wilkin Tr. 241:24-242:14; Courant Tr. 159:12-19, 173:8-23.)

126. Wilkin characterized the “errors” in the OWP process as “errors of execution of management” – meaning that steps that had been designed were not followed, so “closer management” is required. Wilkin Tr. 241:24-242:14.

RESPONSE: Solely for purposes of this motion, the Libraries admit the statement.

127. UM intends to proceed with identifying prospective orphan works and expects to list candidate orphan works on a website and plausibly other locations. Courant Tr. 158:20-25, 161:6-10. Answer ¶ 78.

RESPONSE: The Libraries admit that UM has stated that it intends to proceed with identifying prospective orphan works, and that it may at some point identify a list of orphan works candidates to post publicly to gather more information about the works, but it is unclear whether or when that will happen. (Courant Tr. 158:23 – 25, 161:9 – 18.)

X. MARKET HARM

128. Defendants' unlicensed digitization and use of the Infringed Books has harmed or threatens to harm Plaintiffs' interests in the Infringed Books in several ways, including those described below. In addition to the evidence cited below, descriptions of the various harms to the Individual Plaintiffs are set forth at: Stiles Decl. ¶¶ 10-19; Andreassen Decl. ¶¶ 6-10; Cummings Decl. ¶¶ 6-13; Grundström Decl. ¶¶ 6-12; Robinson Decl. ¶¶ 6-10; Ronning Decl. ¶¶ 6-11; Shapiro Decl. ¶¶ 6-10; Simpson Decl. ¶¶ 6-10; Weldon Decl. ¶¶ 6-10; and White Decl. ¶¶ 7-10, 12-17. Descriptions of the various harms to the Associational Plaintiffs are set forth at: AG Decl. ¶¶ 27-34; ALF Decl. ¶¶ 5-18; NFF Decl. ¶¶ 5-12; SFF ¶¶ 5-12; TWUC Decl. ¶¶ 7-15; and UNEQ Decl. ¶¶ 5-12.

RESPONSE: Denied. As to any extant harm, Plaintiffs have twice admitted in discovery responses that they cannot identify “**any** specific, quantifiable past harm” of any kind, (Petersen Decl., Exs. A-T, Response No. 5), and that they “have to date not been able to quantify **any** specific revenues lost as a result of Defendants’ infringing conduct and [are] not aware of any documents in [Plaintiffs’] possession, custody or control that could be employed to quantify any specific damages incurred as a result of Defendants’ infringing conduct” (Rosenthal Decl., Exs. 11, 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44 (responses to Interrogatory Nos. 6-7); *Id.*, Exs. 47, 50, 53, 56, 65 (responses to Interrogatory Nos. 8-9)).¹

As to any potential loss of revenue, Plaintiffs have not identified “any revenue or other earnings of any kind generated or expected to be generated in whole or in part” for digital

¹ The only Plaintiffs who did not expressly indicate that they have suffered no harm are SFF, NFFO, and UNEQ, each of whom expressly admitted they do not own the copyrights to any works allegedly infringed by the Libraries. (Rosenthal Decl., Exs. 59, 62, 68 (responses to Interrogatory Nos. 8-9).)

archiving. (Petersen Decl. ¶¶ 2 -18, Exs. A – Q (responses to Request No. 8); ¶¶ 19 – 21, Exs. R – T (responses to Request No. 4 (misnumbered in Plaintiffs’ responses)).)

Responses to Plaintiffs’ more particularized assertions of harm are detailed below.

129. (a) Loss or potential loss of revenue from sale or licensing of digital copies of Plaintiffs' copyrighted works to Defendants for inclusion in a digital archive for preservation or other purposes;
Andreassen/Cummings/Grundström/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC ROG II No. 5; Stiles Decl. ¶¶ 11-12, Exs. B-D; Stiles Tr. 22:25-23:3; 104:14-22, 105:4-9; 163:6-9, 166:4-23; Cummings Tr. 63:25-64:19.

RESPONSE: Denied. As to any extant loss of revenue, Plaintiffs have twice admitted in discovery responses that they cannot identify “**any** specific, quantifiable past harm” of any kind, (Petersen Decl., Exs. A-T, Response No. 5), and that they “have to date not been able to quantify **any** specific revenues lost as a result of Defendants’ infringing conduct and [are] not aware of any documents in [Plaintiffs’] possession, custody or control that could be employed to quantify any specific damages incurred as a result of Defendants’ infringing conduct” (Rosenthal Decl., Exs. 11, 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44 (responses to Interrogatory Nos. 6-7); *Id.*, Exs. 47, 50, 53, 56, 65 (responses to Interrogatory Nos. 8-9).) In any event, there is no ready market for the licensing of written works for inclusion in a digital archive for preservation or other purposes, as [REDACTED]

[REDACTED] (June 4, 2012 Deposition of Frederic L. Haber, Petersen Opp. Decl., Ex. H, (“Haber Tr.”) 14:13-18; 19:14-17; 57:19-58:15). Indeed, John White, a literary agent currently representing Plaintiff J.R. Salamanca, testified at deposition that he is unaware of any copyright holder anywhere who has ever been paid a fee solely for digitization of

their written work, and is “not aware of any specific licensing for simply digitizing a book.” (June 8, 2012 Deposition of John White, Rosenthal Decl., Ex. 4 (“White Tr.”) 101:20-23; 102:14-15.)

As to any potential loss of revenue, Plaintiffs have not identified “any revenue or other earnings of any kind generated or expected to be generated in whole or in part” for digital archiving. (Petersen Decl. ¶¶ 2 -18, Exs. A – Q (responses to Request No. 8); ¶¶ 19 – 21, Exs. R – T (responses to Request No. 4 (misnumbered in Plaintiffs’ responses)).) Similarly, [REDACTED] [REDACTED] [REDACTED] (Haber Tr. 24:5-23.) Moreover, in his expert declaration, Dr. Joel Waldfogel conservatively estimates that it would cost a staggering \$569 million just to identify and seek a license from each of the rights holders to the works in the HDL, and this does not even include any license fees such rights holders might demand. (Waldfogel Decl. ¶ 24.) Accordingly, Dr. Waldfogel concludes that “that the creation and offering of a service with the functionality of the HathiTrust, but with licensed content, is not a commercially viable endeavor.” (*Id.* ¶ 7.) Finally, John White, Plaintiff J.R. Salamanca’s literary agent, testified at deposition that he has never received nor solicited “any offers to sell or license digital copies of Mr. Salamanca’s works for preservation purposes,” that he knows no copyright holder who has, and that he is generally unaware of any entity anywhere who would even offer such a license. (White Tr.89:14-90:16.)

130. (b) Loss or potential loss of revenue from sale or licensing of digital copies of Plaintiffs' copyrighted works for use in connection with non-consumptive research; Andreassen/Cummings/Grundström/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC ROG II No. 5; Stiles Tr. ¶ 13; Stiles Tr. 35:15-20; 168:6-19.

RESPONSE: Denied. As to any extant loss of revenue, Plaintiffs have twice admitted in discovery responses that they cannot identify “**any** specific, quantifiable past harm” of any kind, (Petersen Decl., Exs. A-T, Response No. 5), and that they “have to date not been able to quantify **any** specific revenues lost as a result of Defendants’ infringing conduct and [are] not aware of any documents in [Plaintiffs’] possession, custody or control that could be employed to quantify any specific damages incurred as a result of Defendants’ infringing conduct” (Rosenthal Decl., Exs. 11, 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44 (responses to Interrogatory Nos. 6-7); *Id.*, Exs. 47, 50, 53, 56, 65 (responses to Interrogatory Nos. 8-9).) In any event, there is no ready market for the licensing of written works for use in connection with non-consumptive research, as [REDACTED]

[REDACTED]

[REDACTED]

(Haber Tr. 14:6-12; 22:17-23:4; 57:19-58:15).

As to any potential loss of revenue, Plaintiffs have not identified “any revenue or other earnings of any kind generated or expected to be generated in whole or in part” for non-consumptive research. (Petersen Decl. ¶¶ 2 -18, Exs. A – Q (responses to Request No. 9); ¶¶ 19 – 21, Exs. R – T (responses to Request No. 5 (misnumbered in Plaintiffs’ responses)).) Similarly,

[REDACTED]

[REDACTED] (Haber Tr. 22:17-23:4.) Moreover, in his expert declaration, Dr. Joel Waldfogel conservatively estimates that it would cost a staggering \$569 million just to identify and seek a license from each of the rights holders to the works in the HDL, and this does not even include any license fees such rights holders might demand. (Waldfogel Decl. ¶ 24.) Accordingly, Dr. Waldfogel concludes that “that the creation and offering of a service with the functionality of the HathiTrust, but with

licensed content, is not a commercially viable endeavor.” (*Id.* ¶ 7.) Finally, John White, a literary agent currently representing Plaintiff J.R. Salamanca, testified at deposition that he has never received nor solicited “any offers to sell or license copyrights of Mr. Salamanca’s works for purposes of non-consumptive research,” that he knows no copyright holder who has, and that he is generally unaware of any entity anywhere who would even offer such a license. (White Tr. 90:23-91:16.)

131. (c) Loss or potential loss of revenue from sale or licensing of digital copies of Plaintiffs' copyrighted works for use purely in connection with full-text searching, including disruption of commercial licenses granted to online booksellers such as Amazon, whereby authors (or their publishers) authorize their books to be indexed and made fully searchable in order to promote sales. Andreassen/Cummings/Grundström/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/A LF/ASA/TWUC ROG II No. 5; Stiles Decl. ¶ 14; Rosenthal Decl., Ex. 104 (Amazon Search Inside License); Stiles Tr. 180:10-182:11, 184:18-23, 189:14-191:17.

RESPONSE: Denied. As to any extant loss of revenue, Plaintiffs have twice admitted in discovery responses that they cannot identify “**any** specific, quantifiable past harm” of any kind, (Petersen Decl., Exs. A-T, Response No. 5), and that they “have to date not been able to quantify **any** specific revenues lost as a result of Defendants’ infringing conduct and [are] not aware of any documents in [Plaintiffs’] possession, custody or control that could be employed to quantify any specific damages incurred as a result of Defendants’ infringing conduct” (Rosenthal Decl., Exs. 11, 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44 (responses to Interrogatory Nos. 6-7); *Id.*, Exs. 47, 50, 53, 56, 65 (responses to Interrogatory Nos. 8-9).) In any event, there is no ready market for the licensing of written works for use in connection with full-text searching, as [REDACTED]

[REDACTED]

[REDACTED] (Haber Tr. 13:23-14:5; 17:23-18:15; 22:17-23:4; 57:19-58:15).

As to any potential loss of revenue, Plaintiffs have not identified “any revenue or other earnings of any kind generated or expected to be generated in whole or in part” for full-text searching. (Petersen Decl. ¶¶ 2 -18, Exs. A – Q (responses to Request No. 10); ¶¶ 19 – 21, Exs. R – T (responses to Request No. 6 (misnumbered in Plaintiffs’ responses)).) Similarly, [REDACTED]

[REDACTED] (Haber Tr. 22:17-23:4.)

Moreover, in his expert declaration, Dr. Joel Waldfogel conservatively estimates that it would cost a staggering \$569 million just to identify and seek a license from each of the rights holders to the works in the HDL, and this does not even include any license fees such rights holders might demand. (Waldfogel Decl. ¶ 24.) Accordingly, Dr. Waldfogel concludes that “that the creation and offering of a service with the functionality of the HathiTrust, but with licensed content, is not a commercially viable endeavor.” (*Id.* ¶ 7.) Additionally, John White, a literary agent currently representing Plaintiff J.R. Salamanca, testified at deposition that he has never received nor solicited “any offers to sell or license digital copies of Mr. Salamanca’s works . . . for purposes of full text searching,” that he knows no copyright holder who has, and that he is generally unaware of any entity anywhere who would even offer such a license. (White Tr. 91:22-92:16.)

Finally, Defendants’ conduct does not, and cannot, disrupt commercial licenses granted to online booksellers whereby rights holders authorize their books to be indexed and made fully searchable in order to promote sales. By helping researchers discover relevant works they would otherwise never find, but prohibiting the display of the text of these works (except for those with

certified disabilities), the HDL is complementary to, not disruptive of, Plaintiffs' efforts to increase sales of their works. Waldfogel Decl. ¶ 50; Wilkin Decl. ¶ 71; Leary Decl. ¶ 15. Nor can there be any impairment of such licenses when Plaintiffs are not even aware they have granted them. Pat Cummings, an officer of Plaintiff Authors Guild, testified at deposition that she was unaware Amazon had made digital copies of her works available for full-text searching. (Rosenthal Decl., Ex. 1,² 68:9-69:18; 106:1-19; 107:15-108:7 .)

132. (d) Loss or potential loss of revenue from sale or licensing of derivative uses, including derivative uses made possible by artificial intelligence and other technologies to create translations, anthologies, abridgments and versions suited for new and emerging platforms and devices;
Andreassen/Cummings/Grundström/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/A LF/ASA/TWUC ROG II No. 5.

RESPONSE: Denied. As to any extant loss of revenue, Plaintiffs have twice admitted in discovery responses that they cannot identify “**any** specific, quantifiable past harm” of any kind, (Petersen Decl., Exs. A-T, Response No. 5), and that they “have to date not been able to quantify **any** specific revenues lost as a result of Defendants’ infringing conduct and [are] not aware of any documents in [Plaintiffs’] possession, custody or control that could be employed to quantify any specific damages incurred as a result of Defendants’ infringing conduct” (Rosenthal Decl., Exs. 11, 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44 (responses to Interrogatory Nos. 6-7); *Id.*, Exs. 47, 50, 53, 56, 65 (responses to Interrogatory Nos. 8-9).) In any event, there is no ready market for the licensing of written works for “derivative uses,” as [REDACTED]

[REDACTED]

[REDACTED] (Haber Tr. 14:19-15:19; 57:19-58:15).

² Note that Mr. Rosenthal’s declaration identifies Ms. Cummings’ transcript as Exhibit 3, but it was actually filed as Exhibit 1 to the declaration.

As to any potential loss of revenue, [REDACTED]

[REDACTED] (Id. 24:5-23.) Moreover, in his expert declaration, Dr. Joel Waldfogel conservatively estimates that it would cost a staggering \$569 million just to identify and seek a license from each of the rights holders to the works in the HDL, and this does not even include any license fees such rights holders might demand. (Waldfogel Decl. ¶ 24.) Accordingly, Dr. Waldfogel concludes that “that the creation and offering of a service with the functionality of the HathiTrust, but with licensed content, is not a commercially viable endeavor.” (Id. ¶ 7.) Finally, John White, a literary agent currently representing Plaintiff J.R. Salamanca, testified at deposition that he has never received “any offers to sell or license digital copies of Mr. Salamanca’s works for the purposes of creating such derivative uses.” (White Tr. 92:17-94:19.)

133. (e) Loss or potential loss of revenue from sale or licensing of digital copies of Plaintiffs' copyrighted works due to the availability of such works for tens of thousands of people to view, print and download as a result of the accidental or mistaken identification of such works as public domain or "orphan works"; Andreassen/Cummings/Grundström/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/A LF/ASA/TWUC ROG II No. 5; White Decl. ¶¶ 7-10, Exs. C & D; ALF Decl. ¶¶ 12-18, Exs. D & E; UNEQ Decl. ¶ 10, Ex. A; White Tr. 98:2-18; Stiles Tr. 188:1-189:13.

RESPONSE: Denied. As to any extant loss of revenue, Plaintiffs have twice admitted in discovery responses that they cannot identify “**any** specific, quantifiable past harm” of any kind, (Petersen Decl., Exs. A-T, Response No. 5), and that they “have to date not been able to quantify **any** specific revenues lost as a result of Defendants’ infringing conduct and [are] not aware of any documents in [Plaintiffs’] possession, custody or control that could be employed to quantify any specific damages incurred as a result of Defendants’ infringing conduct” (Rosenthal Decl.,

Exs. 11, 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44 (responses to Interrogatory Nos. 6-7); *Id.*, Exs. 47, 50, 53, 56, 65 (responses to Interrogatory Nos. 8-9.) Moreover, the Plaintiffs have expressly confirmed that **none** of their copyrighted works have been infringed by the Libraries Orphan Works Project. (Rosenthal Decl., Exs. 12, 15, 18, 21, 24, 27, 30, 33, 36, 39, 42, 45, 48, 51, 54, 57, 60, 63, 66, 69 (responses to Request Nos. 3-5).)

As to any potential loss of revenue, not a single person has ever been granted access to any work through the Orphan Works Project (“OWP”), and at present the Libraries do not know whether or how the OWP will continue. (Wilkin Decl. ¶ 116.) In the event that the OWP does go forward, the Libraries would seek to comply with the requirements of Section 108(e) of the Copyright Act. (*Id.* ¶ 117). Nor does the mere publication of an author’s name as a *potential* orphan-work candidate even impact Plaintiffs’ licensing efforts. During the execution of Plaintiff J.R. Salamanca’s digital license agreement, Tantor Media, upon learning directly that Mr. Salamanca’s work had recently been misidentified as potential orphan (but was never made available to anyone to view), “had not much of a reaction,” and executed the license anyway. (White Tr. 33:4-34:10.)

134. (f) Exposure of Plaintiffs' copyrighted works to virtually unlimited piracy due to breaches in security without providing Plaintiffs any contractual protections or financial remuneration in exchange for that risk; Edelman Decl., *passim*; Stiles Decl. ¶ 16; Stiles Tr. 130:4-14, 167:1-4; Cummings Tr. 63:25-64:19; Cummings Tr. 108:13-20; 110:19-11:2; Rønning Tr. 102:11-18; Andreassen/Cummings/Grundström/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon ROG Nos. 6-7; AG/ALCS/ALF/ASA/TWUC ROG Nos. 8-9; Andreassen/Cummings/Grundström/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC RFA Nos. 9-11; Andreassen/Cummings/Grundström/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC ROG II No. 5.

RESPONSE: Denied. The HDL maintains rigorous security protocols, and has been certified as a trustworthy digital repository after an in-depth audit by the Center for Research Libraries. (Wilkin Decl. ¶¶ 91-99, Ex. C; Snavely Decl. ¶¶ 9, 14, 17, 19.)

135. (g) Loss or potential loss of control over the reproduction and distribution of plaintiffs' copyrighted works.
Andreassen/Cummings/Grundström/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon ROG Nos. 6-7; AG/ALCS/ALF/ASA/TWUC ROG Nos. 8-9; Andreassen/Cummings/Grundström/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC RFA Nos. 9-11; Andreassen/Cummings/Grundström/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC ROG II No. 5.

RESPONSE: Denied. As to any extant loss of control, Plaintiffs have admitted in discovery responses that they cannot identify “**any** specific, quantifiable past harm” of any kind, (Petersen Decl., Exs. A-T (responses to Request No. 5). Further, Plaintiff J.R. Salamanca’s literary agent testified at deposition that if the Libraries had not transmitted a digital copy of Mr. Salamanca’s works to anyone (which they have not done, and there is no evidence to the contrary), then this harm has not occurred. (White Tr. 67:19-68:10.) As for any potential harm, the “loss of control over the reproduction and distribution of . . . copyrighted works” is not a cognizable harm under the fair use analysis, as any fair use has by definition denied a rights holder control over the specific reproduction at issue.

136. (h) Loss or potential loss of revenue from sale and/or licensing of hardcopies and digital copies of Plaintiffs' copyrighted works to libraries and/or archives.
Andreassen/Cummings/Grundström/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon ROG Nos. 6-7; AG/ALCS/ALF/ASA/TWUC ROG Nos. 8-9; Andreassen/Cummings/Grundström/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC RFA Nos. 9-11; Andreassen/Cummings/Grundström/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC ROG II No. 5; Christenson Tr. 136:25-139:4 (existence of digital copy in HDL may impact library’s decision whether to

acquire print copy of book), Rosenthal Decl., Ex. 103 (Christenson article discussing cost-savings by libraries resulting from HathiTrust); Cummings Tr. 64:10-19 (lost library book sales); Rønning Tr. 106:4-10.

RESPONSE: Denied. As to any extant loss of revenue, Plaintiffs have twice admitted in discovery responses that they cannot identify “**any** specific, quantifiable past harm” of any kind, (Petersen Decl., Exs. A-T, (responses to Request No. 5), and that they “have to date not been able to quantify **any** specific revenues lost as a result of Defendants’ infringing conduct and [are] not aware of any documents in [Plaintiffs’] possession, custody or control that could be employed to quantify any specific damages incurred as a result of Defendants’ infringing conduct” (Rosenthal Decl., Exs. 11, 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44 (responses to Interrogatory Nos. 6-7); *Id.*, Exs. 47, 50, 53, 56, 65 (responses to Interrogatory Nos. 8-9).) Further, Plaintiff J.R. Salamanca’s literary agent testified at deposition that if the Libraries had not transmitted a digital copy of Mr. Salamanca’s works to anyone (which they have not done, and there is no evidence to the contrary), then this harm remains only potential. (White Tr. 70:3-71:19.)

Nor is there any potential loss of revenue, as the Libraries continue to purchase books, even books that have already been digitized. (Wilkin Decl. ¶¶ 72-74.) Last year alone, the University of Michigan spent over 24 million dollars on library hardcopy and electronic acquisitions. (*Id.* ¶ 14.)

137. (i) Loss or potential loss of revenue from entering into collective licensing agreements for mass digitization of works, including disruption of existing programs to digitize library collections. Gervais Decl., *passim*; NFF Decl. ¶¶ 7, 10, Ex. A; SFF Decl. ¶¶ 7, 10, Ex. A¶.

RESPONSE: Denied. As to any extant loss of revenue, Plaintiffs have twice admitted in discovery responses that they cannot identify “**any** specific, quantifiable past harm” of any kind,

(Petersen Decl., Exs. A-T, Response No. 5), and that they “have to date not been able to quantify **any** specific revenues lost as a result of Defendants’ infringing conduct and [are] not aware of any documents in [Plaintiffs’] possession, custody or control that could be employed to quantify any specific damages incurred as a result of Defendants’ infringing conduct” (Rosenthal Decl., Exs. 11, 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44 (responses to Interrogatory Nos. 6-7); *Id.*, Exs. 47, 50, 53, 56, 65 (responses to Interrogatory Nos. 8-9).) In any event, there is no ready market for the collective licensing of written works for inclusion in a mass digital archive, as [REDACTED]

[REDACTED]

[REDACTED] (Haber Tr. 14:13-18; 19:14-17; 57:19-58:15). Indeed, John White, an experienced literary agent currently representing Plaintiff J.R. Salamanca, testified at deposition that he is unaware of any copyright holder anywhere who has ever been paid a fee solely for digitization of their written work, and is “not aware of any specific licensing for simply digitizing a book.” (Rosenthal Decl., Ex. 4, 101:20-23; 102:14-15.)

As to any potential loss of revenue, Plaintiffs have not identified “any revenue or other earnings of any kind generated or expected to be generated in whole or in part” for digital archiving. (Petersen Decl. ¶¶ 2 -18, Exs. A – Q (responses to Request No. 8); ¶¶ 19 – 21, Exs. R – T (responses to Request No. 4 (misnumbered in Plaintiffs’ responses)).) Similarly, [REDACTED]

[REDACTED]

[REDACTED] (Haber Tr. 24:5-23.) Moreover, in his expert declaration, Dr. Joel Waldfogel conservatively estimates that it would cost a staggering \$569 million just to identify and seek a license from each of the rights holders to the works in the HDL, and this does not even include any license fees such rights holders might demand. (Waldfogel Decl. ¶ 24.) He

further concludes that it would cost an additional [REDACTED] just to digitize the books. (*Id.* ¶ 16.) Accordingly, Dr. Waldfoegel concludes that “that the creation and offering of a service with the functionality of the HathiTrust, but with licensed content, is not a commercially viable endeavor.” (*Id.* ¶ 7.)

The type of collective licensing agreements discussed in the declarations of the NFF and the SFF were brokered by the national governmental libraries of Norway and Sweden, respectively, which were parties to those agreements. (Helmlí Decl., ¶10; Hedberg Decl., ¶10). These regulatory agreements, which require a solid basis in statutory law, were adopted with the purpose of enabling full view of the digitized works, and do not concern the types of very limited uses made by the HDL of in-copyright works. (Hugenholtz Decl., ¶¶ 12, 25-28.) Moreover, and notwithstanding the Plaintiffs’ obligation to produce all documents “concerning the existence or non-existence of a specific market or potential market for the digitization and further reproduction, distribution, and/or display of printed works for the purposes of a) electronic archiving; b) non-consumptive research; c) full-text searching; and/or d) use by the blind,” (Petersen Decl. ¶¶ 2 -18, Exs. A – Q (responses to Request No. 7); ¶¶ 19 – 21, Exs. R – T (responses to Request No. 3 (misnumbered in Plaintiffs’ responses))), Plaintiffs have produced no documents suggesting any such potential collective licensing agreement in the United States.

Moreover, the existence of such collective licensing agreements is very limited, even in Europe. (Hugenholtz Decl., ¶ 10). Many European countries—including Germany, France, Spain, and the Netherlands—directly authorize the digitization of library materials for the uses made by the Libraries in this action, without having to obtain permission of rights holders, and thus in these countries there is no need for a collective licensing agreement for such uses. (*Id.* ¶¶ 10, 13-19.) Also, in many instances, collective rights management organizations—which would

ostensibly act on behalf of rights holders in negotiating a collective licensing agreement—lack the legal mandate to offer digitization licenses for many of the works in a library’s collection, so no collective licensing agreements could apply to the digitization of a library’s complete corpus. (*Id.*, ¶¶ 11, 20-24.)

XI. COPYRIGHT OWNERSHIP

138. Andreassen owns the copyright in and to the Andreassen Works. Andreassen Decl. ¶ 3.

RESPONSE: Denied. Mr. Andreassen has provided absolutely no proof of ownership of the copyright in and to the work “Bok-Norge: En Litteratursosiologisk Oversikt (Norwegian Books: A Sociological Overview of Literature)” identified in Rosenthal Decl., Ex. 11 (Schedule A) (the “Andreassen Work”), and he is not qualified to declare and establish the legal conclusion of copyright ownership under Norwegian law. At most, Mr. Andreassen has established that he claims to own copyright in the Andreassen Work.

139. Cummings owns the copyright in and to the Cummings Work. Cummings Decl. ¶ 3, Exs. A & B.

RESPONSE: Solely for purposes of this motion, the Libraries admit that Ms. Cummings owns the copyright in and to the works identified in Rosenthal Decl., Ex. 14 (Schedule A) (the “Cummings Works”).

140. Grundström owns the copyright in and to the Grundström Works. Grundström Decl. ¶ 3.

RESPONSE: Denied. Mr. Grundström has provided absolutely no proof of ownership of the copyright in and to the work “Oss Målvakter Emellan (Goalkeeper Between Us)” identified in Rosenthal Decl., Ex. 17 (Schedule A) (the “Grundström Work”), and he is not qualified to

declare and establish the legal conclusion of copyright ownership under Swedish law. At most, Mr. Grundström has established that he claims to own copyright in the Grundström Work.

141. Loukakis owns the copyright in and to the Loukakis Works. Loukakis ROG No. 1, Schedule A.

RESPONSE: Solely for purposes of this motion, the Libraries admit that Mr. Loukakis owns the copyright in and to the work “Vernacular Dreams” identified in the schedule included in Rosenthal Decl., Ex. 20 (Schedule A) (the “Loukakis Work”).

142. Robinson owns the copyright in and to the Robinson Works. Robinson Decl. ¶ 3, Exs. A & B.

RESPONSE: Denied in part. Solely for purposes of this motion, the Libraries admit that Ms. Robinson owns the copyright in and to the works “Asking for love and other stories,” “Georgia O’Keefe: a life,” “Summer light,” and “Sweetwater: a novel” identified in Rosenthal Decl., Ex. 23 (Schedule A) (the “Admitted Robinson Works”). The Libraries deny that Ms. Robinson owns the copyright in and to the remaining works identified in Rosenthal Decl., Ex. 23 (Schedule A) (the “Denied Robinson Works”). The copyright registrations provided for the works “A glimpse of scarlet and other stores” and “A perfect stranger: and other stories” identified in Rosenthal Decl., Ex. 23 (Schedule A) were not obtained within five years after first publication of the work and therefore do not constitute prima facie evidence of the validity of the copyright and the facts stated in the certificate. (*See* June 26, 2012 Declaration of Roxana Robinson, Exs. A & B.) At most, Ms. Robinson has established that she claims to own copyright in the Denied Robinson Works.

143. Rønning owns the copyright in and to the Rønning Works. Rønning Decl. ¶ 3.

RESPONSE: Denied. Mr. Rønning has provided absolutely no proof of ownership of the copyright in and to the works “Den Umulige Friheten: Henrik Ibsen Og Moderniteten (Impossible Freedom, Henrik Ibsen and Modernity),” and “Dodsom Over Et Folk?: Imperialismen Og Biafrakonflikten (Death Sentence Over a People, Imperialism and the Biafra Conflict)” identified in Rosenthal Decl., Ex. 26 (Schedule A) (the “Rønning Works”), and he is not qualified to declare and establish the legal conclusion of copyright ownership under Norwegian law. At most, Mr. Rønning has established that he claims to own copyright in the Rønning Works.

144. Roy owns the copyright in and to the Roy Works. Roy Decl. ¶ 3.

RESPONSE: Denied. Mr. Roy has provided absolutely no proof of ownership of the copyright in and to the work “Marguerite Duras à Montréal” identified in Rosenthal Decl., Ex. 29 (Schedule A) (the “Roy Work”). At most, Mr. Roy has established that he claims to own copyright in the Roy Work.

145. Salamanca owns the copyright in and to the Salamanca Works. White Decl. ¶ 5, Exs. A & B.

RESPONSE: Solely for purposes of this motion, the Libraries admit that Mr. Salamanca owns the copyright in and to the works identified in Rosenthal Decl., Ex. 32 (Schedule A) A (the “Salamanca Works”).

146. Shapiro owns the copyright in and to the Shapiro Works. Shapiro Decl. ¶ 3, Ex. A.

RESPONSE: Solely for purposes of this motion, the Libraries admit that Mr. Shapiro owns the copyright in and to the work “Oberammergau: The Troubling Story of the World’s Most Famous Passion Play” identified in Rosenthal Decl., Ex. 35 (Schedule A) (the “Shapiro Work”).

147. Simpson owns the copyright in and to the Simpson Works. Simpson Decl. ¶ 3.

RESPONSE: Denied. Ms. Simpson has provided absolutely no proof of ownership of the copyright in and to the work “Je Cours Plus Vite Que La Lycose: Poèmes” identified in Rosenthal Decl., Ex. 38 (Schedule A) (the “Simpson Work”). At most, Ms. Simpson has established that she claims to own copyright in the Simpson Work.

148. Stiles owns the copyright in and to the Stiles Works. Stiles Decl. ¶ 6, Ex. A.

RESPONSE: Solely for purposes of this motion, the Libraries admit that Mr. Stiles owns the copyright in and to the work “Jesse James: Last Rebel of the Civil War” identified in Stiles Rosenthal Decl., Ex. 41 (Schedule A) (the “Stiles Work”).

149. Weldon owns the copyright in and to the Weldon Works. Weldon Decl. ¶ 3, Exs. A & B.

RESPONSE: Denied in part. Solely for purposes of this motion, the Libraries admit that Ms. Weldon owns the copyright in and to the following works identified in Rosenthal Decl., Ex. 44 (Schedule A) (the “Admitted Weldon Works”):

- a. Affliction
- b. Auto da fay
- c. Big Women
- d. Darcy’s Utopia

- e. Flood warning: a play
- f. Leader of the band
- g. Life force
- h. Moon over Minneapolis, or, Why she couldn't stay
- i. Praxis: a novel
- j. Puffball: a novel
- k. Rhode Island blues
- l. She may not leave
- m. Splitting
- n. The cloning of Joanna May
- o. The heart of the country
- p. The hearts and lives of men
- q. The rules of life
- r. The Shrapnel Academy
- s. The spa Decameron
- t. Watching me, watching you
- u. Wicked women: stories
- v. Worst fears

The Libraries deny that Ms. Weldon owns the copyright in and to the remaining works identified in Rosenthal Decl., Ex. 44 (Schedule A) (the “Denied Weldon Works”) based on the failures of proof discussed below:

- a. For the work “A hard time to be a father: a collection of short stories,” Ms. Weldon has provided absolutely no proof of ownership of copyright. (*See* June 25, 2012 Declaration of Fay Weldon (“Weldon Decl.”), Exs. A – B.) At most, Ms. Weldon has established that she claims to own copyright in that work. Further, Ms. Weldon has not provided proof of registration (*see id.*, Ex. B) and has failed to establish that the work, which was purportedly first published December 7, 1998 in London and was published in New York in January 1999 (*id.*, Ex. A), is not a United States work for purposes of 17 U.S.C. § 411 based on simultaneous publication in the United States and the United Kingdom.
- b. For the work “Godless in Eden: A book of essays,” Ms. Weldon has provided absolutely no proof of ownership of copyright. At most, Ms. Weldon has established that she claims to own copyright in that work. (*See id.*, Exs. A – B.)
- c. For the work “Growing rich,” Ms. Weldon has provided absolutely no proof of ownership of copyright. At most, Ms. Weldon has established that she claims to own copyright in that work. (*See id.*)
- d. For the work “Little sisters,” Ms. Weldon has provided absolutely no proof of ownership of copyright. (*See id.*) At most, Ms. Weldon has established that she claims to own copyright in that work. Further, Ms. Weldon has not provided proof of registration (*see id.*, Ex. B) and has failed to establish that the work, which was purportedly first published in 1977 and was published in both Bath and New York that year (*id.*, Ex. A), is not a United States work for purposes of 17 U.S.C. § 411 based on simultaneous publication in the United States and United Kingdom.

- e. For the work “Mantrapped,” Ms. Weldon has provided absolutely no proof of ownership of copyright. (*See id.*, Exs. A – B.) At most, Ms. Weldon has established that she claims to own copyright in that work. Further, Ms. Weldon has not provided proof of registration (*see id.*, Ex. B) and has failed to establish that the work, which was purportedly first published in 2004 and was published in both London and New York that year (*id.*, Ex. A), is not a United States work for purposes of 17 U.S.C. § 411 based on simultaneous publication in the United States and the United Kingdom.
- f. For the work “Nothing to wear and nowhere to hide: stories,” Ms. Weldon has provided absolutely no proof of ownership of copyright. At most, Ms. Weldon has established that she claims to own copyright in that work. (*See id.*, Exs. A – B.)
- g. For the work “Remember me,” Ms. Weldon has provided absolutely no proof of ownership of copyright. (*See id.*) At most, Ms. Weldon has established that she claims to own copyright in that work. Further, Ms. Weldon has not provided proof of registration (*see id.*, Ex. B) and has failed to establish that the work, which was purportedly first published in 1976 and was published in both London and New York that year (*id.*, Ex. A), is not a United States work for purposes of 17 U.S.C. § 411 based on simultaneous publication in the United States and the United Kingdom.
- h. For the work “Sacred cows,” Ms. Weldon has provided absolutely no proof of ownership of copyright. At most, Ms. Weldon has established that she claims to own copyright in that work. (*See id.*, Exs. A – B.)

- i. For the work “Bulgari connection,” Ms. Weldon has provided absolutely no proof of ownership of copyright. (*See id.*) At most, Ms. Weldon has established that she claims to own copyright in that work. Further, Ms. Weldon has not provided proof of registration (*see id.*, Ex. B) and has failed to establish that the work, which was purportedly first published in 2001 and was published in both London and New York that year (*id.*, Ex. A), is not a United States work for purposes of 17 U.S.C. § 411 based on simultaneous publication in the United States and the United Kingdom.
- j. For the work “The fat woman’s joke,” Ms. Weldon has provided absolutely no proof of ownership of copyright. At most, Ms. Weldon has established that she claims to own copyright in that work. (*See id.*, Exs. A – B.)

150. AG owns the copyrights in and to the AG Works. AG Decl. ¶ 26, Ex. A.

RESPONSE: Denied. The ownership and registration evidence submitted by The Authors Guild, Inc. (the “AG”) fails to establish that AG owns the copyrights in and to the works identified in Rosenthal Decl., Ex. 47 (Schedule A) (the “AG Works”) and to meet the Copyright Act’s requirements. Specifically, the Libraries note the following defects in the proof submitted by Plaintiffs:

- a. For the work “Writers Roundtable,” jointly authored by Michael Drury and Helen Rose Hull, the proof of ownership submitted by the AG does not establish the full chain of title between the authors Michael Drury and Helen Rose Hull (June 29, 2012 Declaration of Paul Aiken (“Aiken Decl.”), Ex. D at 6-7), the original

copyright claimant Authors League of America, Inc. (*id.*), and the renewal claimant Michael Drury (*id.* at 8-9). (*See id.*, Exs. C – D.)

- b. For *all* of the identified works authored by Mignon Eberhart, the will of Mignon Eberhart does not establish as an undisputed fact that the copyrights of Mignon Eberhart were bequeathed to the AG. The will includes two different provisions bequeathing “all of [the testator’s] right, title and interest in and to any literary property owned by me at the time of my death”: the *first*, to Mignon Eberhart’s nephew, William Vogelsang or, if he predeceased her, to his issue, per stirpes, and the second to “the Author’s Guild of the American League of Author’s of New York City.” (*id.*, Ex. C at 8-13.)
- c. For the work “While the Patient Slept,” by Mignon Eberhart, allegedly first published in the United States in 1931, no registration is identified in the name of Mignon Eberhart or AG, and no renewal of registration is identified in the name of Mignon Eberhart or AG. (*See id.*, Ex. D.)
- d. For the work “The Mystery of Hunting’s End,” by Mignon Eberhart, allegedly first published in the United States in 1930, no registration is identified in the name of Mignon Eberhart or AG, and no renewal of registration is identified in the name of Mignon Eberhart or AG. (*See id.*)
- e. For the work “Five Passengers from Lisbon,” by Mignon Eberhart, allegedly first published in the United States in 1946, no renewal of registration is identified in the name of Mignon Eberhart or AG. (*See id.*)
- f. For *all* of the identified works authored by Sax Rohmer, the document at Aiken Decl., Ex. C at 14 is insufficient to establish transfer of Sax Rohmer’s copyrights

in the identified works to the AG. The document at page 14 of Aiken Decl., Ex. C pertains to the distribution of copyrights held by Mr. Rohmer's wife, Elizabeth Sax Rohmer, at the time of her death and bequeathed in her will "in equal shares" to The Society of Authors (London) and The Authors League of America Inc. (*Id.*) This document does not establish what copyrights were bequeathed by Ms. Rohmer under her will, whether those copyrights included any copyrights inherited from her husband Sax Rohmer, or how the bequeathed copyrights (if they did include any copyrights in the identified Sax Rohmer works) were divided between The Society of Authors and The Authors League of America Inc. (*Id.*)

- g. For the works "The Dream Detective," "The Emperor of America," "The Day the World Ended," and "Grey Face," authored by Sax Rohmer, the proof of ownership submitted by the AG does not establish the full chain of title between the author Sax Rohmer, the original copyright claimant (which was not Sax Rohmer) (Aiken Decl., Ex. D Part 3 at 10-11, 14 – 17, 20 – 25), and the renewal claimant Sax Rohmer (*id.* at 20 – 25). (*See id.*, Exs. C – D.)

151. ALF owns the copyright in and to the ALF Works. ALF Decl. ¶ 4, Exs. A-C.

RESPONSE: Denied. The ownership and registration evidence submitted by The Authors League Fund (the "ALF") fails to establish that ALF owns the copyrights in and to the works identified in Rosenthal Decl., Ex. 53 (Schedule A) (the "ALF Works") and to meet the Copyright Act's requirements. Specifically, the Libraries note the following defects in the proof submitted by Plaintiffs:

- a. For *all* of the identified works authored by Vera Caspary, the assignment purportedly transferring Vera Caspary's copyrights from her heirs to the Authors

League Fund is not fully executed, lacking a signature from the Authors League Fund. (June 26, 2012 Declaration of Isabel Howe (“Howe Decl.”), Ex. B at 12 – 17.)

- b. For the work “The Husband,” identified in Rosenthal Decl., Ex. 53 (Schedule A), the proof of ownership submitted by ALF does not establish the full chain of title between the author Vera Caspary, the original copyright claimant for ad interim registration W. H. Allen & Co. Ltd. (Howe Decl., Ex. C at 2 – 3, 15 – 16), the copyright claimant for registration Vera Caspary (*id.* at 5 – 6), and the renewal claimant Vera Caspary (*id.* at 15 – 18). (*See id.*, Exs. B – C.)
- c. Plaintiffs have not provided registration certificates or renewal certificates for any of the Gladys Malvern works identified in Howe Decl., Ex. A. (*See id.*, Ex C.)

152. ASA owns the copyright in and to the ASA Works. ASA ROG No. 1, Schedule A.

RESPONSE: Denied. The Australian Society of Authors Limited (“ASA”) has provided absolutely no proof that ASA owns the copyrights in and to the works identified in Rosenthal Decl., Ex. 56 (Schedule A) (the “ASA Works”), having identified registrations and no evidence of any transfers of copyright or any other basis for ASA’s ownership of any copyrights in the ASA Works. The ASA Works are identified as being authored by Mouni Sadhu, Dal Stivans, and William Hart-Smith, and the ASA has not identified any basis for its ownership of copyright in those works. Moreover, the ASA has not provided proof of registration or renewal for the work “Concentration” identified in Rosenthal Decl., Ex. 56 (Schedule A), and has failed to establish that the work, which was purportedly first published in 1959 and was published in both London

and New York that year (*id.*), is not a United States work for purposes of 17 U.S.C. § 411 based on simultaneous publication in the United States and the United Kingdom.

153. TWUC owns the copyright in and to the TWUC Works. TWUC Decl. ¶ 6, Exs. A & B.

RESPONSE: Denied. The ownership and registration evidence submitted by The Writer's Union of Canada (the "TWUC") fails to establish that TWUC owns the copyrights in and to the works identified in Rosenthal Decl., Ex. 65 (Schedule A) (the "TWUC Works") and to meet the Copyright Act's requirements. Specifically, the Libraries note the following defects in the proof submitted by Plaintiffs:

- a. TWUC submits a will purporting to transfer Edith Fowke's copyrights to TWUC, (June 28, 2012 Declaration of Kelly Duffin ("Duffin Decl."), Ex. B.), but Plaintiffs have provided absolutely no proof that Edith Fowke owned the copyrights in and to the TWUC Works at her death (*id.*).
- b. TWUC has not provided proof of registration of "Lumbering Songs from the Northern Woods" identified in Rosenthal Decl., Ex. 65 (Schedule A), which was purportedly first published in Austin in 1970 (Duffin Decl., Ex. A) and is a United States work for purposes of 17 U.S.C. § 411.
- c. For the work "Songs of Work and Freedom" identified in Rosenthal Decl., Ex. 65 (Schedule A), TWUC has not established that the work is still protected by copyright. The work was first published in the Chicago in 1960 (Duffin Decl., Ex. A) and TWUC has provided no evidence of renewal of copyright.
- d. TWUC has not provided proof of registration of "Songs of Work and Protest" identified in Rosenthal Decl., Ex. 65 (Schedule A), which was purportedly first

published in New York in 1973 (Duffin Decl., Ex. A) and is a United States work for purposes of 17 U.S.C. § 411.

- e. TWUC has not provided proof of registration of “Traditional Singers and Songs from Ontario” identified in Rosenthal Decl., Ex. 65 (Schedule A), and has failed to establish that the work, which was purportedly first published in 1965 and was published in both Ontario and Hatboro, Pennsylvania that year (Duffin Decl., Ex. A), is not a United States work for purposes of 17 U.S.C. § 411 based on simultaneous publication in the United States and Canada.

XII. PUBLICATION

- 154. Each of the Infringed Books is published.
Andreassen/Cummings/Grundström/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALF/ASA/TWUC ROG No. 1, Ex. A.

RESPONSE: The Libraries admit the statement.

- 155. Only published works were digitized in the Google Library Project. UM/UC/UW RFA No. 4; Clancy Tr. 45:3 – 46:8; Hirtle Tr. 191:7-20.

RESPONSE: The Libraries admit the statement.

XIII. COPYING OF INFRINGED BOOKS

- 156. Pursuant to one or more of the Google Cooperative Agreements, the Andreassen Works were digitized and included in the HDL. Answer ¶ 22; <http://www.hathitrust.org/hathifiles>; UM RFA No. 35.

RESPONSE: Solely for purposes of this motion, the Libraries admit that, pursuant to one or more of the Google Cooperative Agreements, the Andreassen Work was digitized and included in the HDL.

157. Pursuant to one or more of the Google Cooperative Agreements, the Cummings Works were digitized and included in the HDL. Answer ¶ 23; <http://www.hathitrust.org/hathifiles>; UM RFA No. 35.

RESPONSE: Solely for purposes of this motion, the Libraries admit the statement.

158. Pursuant to one or more of the Google Cooperative Agreements, the Grundström Works were digitized and included in the HDL. Answer ¶ 24; <http://www.hathitrust.org/hathifiles>; UM RFA No. 35.

RESPONSE: Solely for purposes of this motion, the Libraries admit that, pursuant to one or more of the Google Cooperative Agreements, the Grundström Work was digitized and included in the HDL.

159. Pursuant to one or more of the Google Cooperative Agreements, the Loukakis Works were digitized and included in the HDL. Answer ¶ 25; <http://www.hathitrust.org/hathifiles>; UM RFA No. 35.

RESPONSE: Solely for purposes of this motion, the Libraries admit that, pursuant to one or more of the Google Cooperative Agreements, the Loukakis Work was digitized and included in the HDL.

160. Pursuant to one or more of the Google Cooperative Agreements, the Ronning Works were digitized and included in the HDL. Answer ¶ 26; <http://www.hathitrust.org/hathifiles>; UM RFA No. 35.

RESPONSE: Solely for purposes of this motion, the Libraries admit the statement.

161. Pursuant to one or more of the Google Cooperative Agreements, the Robinson Works were digitized and included in the HDL. Answer ¶ 27; <http://www.hathitrust.org/hathifiles>; UM RFA No. 35.

RESPONSE: Solely for purposes of this motion, the Libraries admit the statement.

162. Pursuant to one or more of the Google Cooperative Agreements, the Roy Works were digitized and included in the HDL. Answer ¶ 28; <http://www.hathitrust.org/hathifiles>; UM RFA No. 35.

RESPONSE: Solely for purposes of this motion, the Libraries admit that, pursuant to one or more of the Google Cooperative Agreements, the Roy Work was digitized and included in the HDL.

163. Pursuant to one or more of the Google Cooperative Agreements, the Salamanca Works were digitized and included in the HDL. Answer ¶ 29; <http://www.hathitrust.org/hathifiles>; UM RFA No. 35.

RESPONSE: Solely for purposes of this motion, the Libraries admit the statement.

164. Pursuant to one or more of the Google Cooperative Agreements, the Shapiro Works were digitized and included in the HDL. Answer ¶ 30; <http://www.hathitrust.org/hathifiles>; UM RFA No. 35.

RESPONSE: Solely for purposes of this motion, the Libraries admit that, pursuant to one or more of the Google Cooperative Agreements, the Shapiro Work was digitized and included in the HDL.

165. Pursuant to one or more of the Google Cooperative Agreements, the Simpson Works were digitized and included in the HDL. Answer ¶ 31; <http://www.hathitrust.org/hathifiles>; UM RFA No. 35.

RESPONSE: Solely for purposes of this motion, the Libraries admit that, pursuant to one or more of the Google Cooperative Agreements, the Simpson Work was digitized and included in the HDL.

166. Pursuant to one or more of the Google Cooperative Agreements, the Stiles Works were digitized and included in the HDL. Answer ¶ 32; <http://www.hathitrust.org/hathifiles>; UM RFA No. 35.

RESPONSE: Solely for purposes of this motion, the Libraries admit that, pursuant to one or more of the Google Cooperative Agreements, the Stiles Work was digitized and included in the HDL.

167. Pursuant to one or more of the Google Cooperative Agreements, the Weldon Works were digitized and included in the HDL. Answer ¶ 33; <http://www.hathitrust.org/hathifiles>; UM RFA No. 35.

RESPONSE: Solely for purposes of this motion, the Libraries admit the statement.

168. Pursuant to one or more of the Google Cooperative Agreements, the AG Works were digitized and included in the HDL. <http://www.hathitrust.org/hathifiles>; UM RFA No. 35.

RESPONSE: The Libraries admit the statement in part, admitting that the AG Works were digitized and included in the HDL, but denying that the evidence cited by Plaintiffs establishes that such digitization occurred pursuant to one or more of the Google Cooperative Agreements. (See <http://www.hathitrust.org/hathifiles>; Rosenthal Decl., Ex. 77 (response to Request No. 35).)

169. Pursuant to one or more of the Google Cooperative Agreements, the ALF Works were digitized and included in the HDL. Answer ¶ 13; <http://www.hathitrust.org/hathifiles>; UM RFA No. 35.

RESPONSE: The Libraries admit the statement in part, admitting that the ALF Works were digitized and included in the HDL, but denying that the evidence cited by Plaintiffs establishes that such digitization occurred pursuant to one or more of the Google Cooperative

Agreements. (See <http://www.hathitrust.org/hathifiles>; Rosenthal Decl., Ex. 77 (response to Request No. 35).)

170. Pursuant to one or more of the Google Cooperative Agreements, the TWUC Works were digitized and included in the HDL. <http://www.hathitrust.org/hathifiles>; UM RFA No. 35.

RESPONSE: The Libraries admit the statement in part, admitting that the TWUC Works were digitized and included in the HDL, but denying that the evidence cited by Plaintiffs establishes that such digitization occurred pursuant to one or more of the Google Cooperative Agreements. (See <http://www.hathitrust.org/hathifiles>; Rosenthal Decl., Ex. 77 (response to Request No. 35).)

171. Pursuant to one or more of the Google Cooperative Agreements, the ASA Works were digitized and included in the HDL. <http://www.hathitrust.org/hathifiles>; UM RFA No. 35.

RESPONSE: The Libraries admit the statement in part, admitting that the ASA Works were digitized and included in the HDL, but denying that the evidence cited by Plaintiffs establishes that such digitization occurred pursuant to one or more of the Google Cooperative Agreements. (See <http://www.hathitrust.org/hathifiles>; Rosenthal Decl., Ex. 77 (response to Request No. 35).)

172. Defendants admit that the Image File and Text File, which were generated through the digitization process for each Infringed Book and incorporated into the HDL, each “implicates the right of reproduction referenced in 17 U.S.C. § 106(1).” UM RFA No. 15.

RESPONSE: Denied. In response to Plaintiffs’ First Requests for Admission to Mary Sue Coleman, the Libraries admitted that the Image File (as defined in Defendant’s response to

Request No. 14) and the Text File (as defined in Defendant's response to Request No. 14) are both "component[s] of the digital copy of the Work that the Library received from Google and that *the digital copy* implicates the right of reproduction referenced in 17 U.S.C. § 106(1)." (Rosenthal Decl., Ex. 77, (response to Request Nos. 15 – 16).) (emphasis added).

173. Plaintiffs never authorized any of the Defendants to digitize, copy or make any other uses of any of the Infringed Books. Stiles Decl. ¶ 9; White Decl. ¶ 11; Andreassen/Cummings/Grundström/Loukakis/Robinson/Ronning/Roy/Shapiro/Simpson/Weldon Decl. ¶ 5; AG Decl. ¶ 26; ALF ¶ 4; TWUC ¶ 6; UM/UC/ UW RFA No. 7.

RESPONSE: Solely for purposes of this motion, the Libraries admit the statement.

174. Of the 116 Infringed Books, 77 are in print and 30 are available for purchase in digital format. Andreassen/Cummings/Grundström/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC ROG II No. 1; Andreassen/Cummings/Grundström/Loukakis/Robinson/Ronning/Roy/Salamanca/Shapiro/Simpson/Stiles/Weldon/AG/ALCS/ALF/ASA/TWUC ROG II No. 4

RESPONSE: Denied on the ground that although the Plaintiffs assert that 77 of the Infringed Books are in print and 30 are available for purchase in digital format, Plaintiffs have not proffered evidence to establish this fact, which the Libraries therefore dispute.

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New York, New York

Respectfully Submitted,

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