

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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THE AUTHORS GUILD, INC., et al.,	:	
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Plaintiffs,	:	
	:	
- against -	:	11 Civ. 6351 (HB)
	:	
HATHITRUST, et al.,	:	
	:	
Defendants.	:	
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**DECLARATION OF EDWARD H. ROSENTHAL**

EDWARD H. ROSENTHAL hereby declares as follows:

1. I am a member of Frankfurt Kurnit Klein & Selz, P.C., attorneys for the Plaintiffs in the above-captioned action.
2. I submit this declaration in opposition to Defendants’ and Intervenors’ applications for awards of costs and attorneys’ fees. I have personal knowledge of the facts set forth herein.
3. On May 16, 2011, the University of Michigan (“UM”) announced the launch of the OWP. See Plaintiffs’ Statement of Undisputed Material Facts (“UF”), No. 117 and supporting evidence cited therein. Other defendant universities quickly followed suit, announcing their intention to join the OWP between June 13 and August 24, 2011. *Id.*, No. 118-120. The first set of orphan works candidates were listed by the UM on July 15, 2011, meaning that such works were scheduled to be made available on October 13, 2011. At the time that this lawsuit was commenced, on September 12, 2011, neither the UM nor any of the other Defendants had agreed to postpone or suspend implementation of the OWP.

4. Attached as Exhibit A to this declaration are a series of emails exchanged between Jan Constantine, counsel for the Authors Guild, and Jack Bernard, counsel for UM, prior to the commencement of this lawsuit concerning the Orphan Works Project (“OWP”). From the very outset, the Authors Guild suggested that UM postpone the OWP to give the parties time to talk, but this was never accepted by UM. See email from Ms. Constantine to Mr. Bernard dated July 13, 2012 and response from Mr. Bernard that same day. Despite telling the Authors Guild that UM was taking its concerns about the OWP seriously, UM did not get back to the Authors Guild, necessitating the attached August 18, 2011 email from Ms. Constantine to Mr. Bernard. By the time UM offered to schedule a telephone meeting for early September (again without offering to postpone the OWP), the release date for the designated orphan works was approaching.

5. On about October 14, 2011, following correspondence with Defendants’ counsel about Plaintiffs intention to seek a preliminary injunction to prevent future implementation of the OWP, Defendants’ counsel confirmed that it would provide Plaintiffs with at least 120 days notice before making any work available through the OWP, obviating the need to seek immediate injunctive relief. A copy of this correspondence and the confirming letter from Defendants’ counsel is set forth as Exhibit B.

6. Throughout this litigation, Defendants took the position that they intended to proceed with the OWP and to list orphan works candidates on the HathiTrust website and/or other locations. UF No. 127 and supporting evidence cited therein.

7. Attached as Exhibit C to this declaration are a small sampling of the many articles that have been published about the HathiTrust’s mass digitization program and this lawsuit as

well as about conferences and programs that have been held about the issues raised by this case and the Google Books case.

8. I have reviewed the bills sent to the Authors Guild with respect to this matter, and have calculated that our firm billed a total of approximately 1600 hours of attorney plus about 150 hours of law student time. This can be compared with the nearly two and a half times as many (4000) attorney billable hours for which Defendants seek reimbursement and the more than 1200 sought by Intervenors (who did not attend any of the depositions of the parties and who were not the subject of any document requests or interrogatories from the Plaintiffs).

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

Dated: New York, New York  
November 20, 2012



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EDWARD H. ROSENTHAL