

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

THE AUTHORS GUILD, INC., et al.,

Plaintiffs,

v.

HATHITRUST, et al.,

Defendants.

Case No. 11-cv-6351(HB)

**DEFENDANT INTERVENORS'
JOINT ANSWER AND DEFENSES**

Defendant Intervenors National Federation of the Blind, Georgina Kleege, Blair Seidlitz, and Courtney Wheeler hereby state the following for their JOINT ANSWER AND DEFENSES to the First Amended Complaint filed by the Plaintiffs in the above-captioned action (“Plaintiffs”). Defendants respond to the paragraphs of the First Amended Complaint (“FAC”) in correspondingly numbered paragraphs. Defendant Intervenors deny each allegation in the FAC unless expressly admitted.

1. Defendants admit that Plaintiffs, in the FAC, seek prospective injunctive and declaratory relief but deny that Plaintiffs are entitled to such relief. Defendants admit that “the Regents of the University of Michigan/University Library, Ann Arbor Campus”; “The Regents of the University of California on behalf of its California Digital Library”; “the Board of Regents of the University of Wisconsin System, d/b/a the University of Wisconsin-Madison, General Library System”; and Cornell University entered into agreements with Google Inc. (“Google”) regarding the digitization of works in their libraries' collections, and that The Board of Trustees of the University of Illinois, on behalf of the Committee on Institutional Cooperation (“CIC”)

and its member universities (the "CIC Universities"), entered into an agreement with Google regarding the digitization of works in the CIC Universities' library collections. Defendant Intervenor further admit that "HathiTrust" is the name of a service of the University of Michigan in which the Universities and other institutions participate under agreements with the University of Michigan. Defendant Intervenor admit that they and Defendants have engaged in uses of and activities with respect to the works, which uses are permitted under the United States Copyright Act (the "Copyright Act"). Defendant Intervenor lack knowledge or information sufficient to form a belief about whether Plaintiffs hold a copyright in any work used by Defendant Intervenor and thus deny such allegations. Defendant Intervenor deny the remaining allegations in Paragraph 1 of the FAC.

2. Defendant Intervenor admit that pursuant to Google's various agreements with the Regents of the University of Michigan/University Library, Ann Arbor Campus; The Regents of the University of California on behalf of its California Digital Library; the Board of Regents of the University of Wisconsin System, d/b/a the University of Wisconsin-Madison, General Library System; Cornell University; and The Board of Trustees of the University of Illinois, on behalf of the CIC and the CIC Universities, Google has provided digital copies of books from a University's library's collections either to that University or, at the University's request, to the University of Michigan Library in Ann Arbor (the "MLibrary"), and that the Universities store these digital copies in a repository called the HathiTrust Digital Library ("HDL"), which contains at least 9.7 million volumes. Defendant Intervenor also admit that the Universities participate in the HathiTrust Service along with more than fifty other institutions. Defendants lack knowledge or information sufficient to form a belief about whether seventy-three percent (73%) of these

volumes are protected by copyright and thus deny such allegations. Defendants deny the remaining allegations in Paragraph 2 of the FAC.

3. Defendant Intervenors admit that UM and UC have announced their participation in the Orphan Works Project (“OWP”), an initiative to, *inter alia*, identify "orphan works"-in-copyright works for which the copyright holder cannot be found-and eventually to make lawful uses of these works. Defendant Intervenors also admit that Cornell and UW have announced plans to participate in the OWP and that IU has not announced plans to participate in the OWP. Defendants deny the remaining allegations in Paragraph 3 of the F AC.

4. Defendant Intervenors admit that the Universities have asserted that their activities are beneficial to society and permissible under a variety of sections of the Copyright Act, including as fair use, which received statutory recognition in Section 107 of the Copyright Act. Defendant Intervenors deny the remaining allegations in Paragraph 4 of the FA C.

5. Defendant Intervenors admit that, in a separate case, Google and The Authors Guild, Inc. (among other parties) filed a motion for approval of a proposed settlement agreement that was denied by the court. The referenced proposed settlement agreement and court order denying approval speak for themselves. Defendants deny the remaining allegations in Paragraph 5 of the FAC.

6. Defendant Intervenors deny the allegations in Paragraph 6 of the F AC.

7. Defendant Intervenors deny the allegations in Paragraph 7 of the F AC.

8. Defendant Intervenors admit that the FAC seeks injunctive relief and purports to state claims for copyright infringement under the United States Copyright Act, 17 U.S.C. 101 et seq. and seeks declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202, but Defendant

Intervenors deny that any such infringement has occurred, deny that Plaintiffs are entitled to the relief sought, and otherwise deny the remaining allegations in Paragraph 8 of the FAC.

9. Paragraph 9 of the FAC is a legal assertion that does not require an Answer.

10. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 10 of the FAC and thus deny such allegations.

11. Paragraph 11 of the FAC is a legal assertion that does not require an Answer

12. Upon information and belief, Defendant Intervenors admit that The Authors Guild, Inc. is a corporation with a place of business at 31 East 32nd Street, New York, New York, 10016. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 12 of the FAC and thus deny such allegations.

13. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 13 of the FAC and thus deny such allegations.

14. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 14 of the FAC and thus deny such allegations.

15. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 15 of the FAC and thus deny such allegations.

16. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 16 of the FAC and thus deny such allegations.

17. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 17 of the FAC and thus deny such allegations.

18. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 18 of the FAC and thus deny such allegations.

19. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 19 of the FAC and thus deny such allegations.

20. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 20 of the FAC and thus deny such allegations.

21. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 21 of the FAC and thus deny such allegations.

22. Defendant Intervenors admit that the book identified in Exhibit A to the FAC that is referred to is included in the HDL, but Defendant Intervenors otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 22 of the F AC and thus deny such allegations.

23. Defendants admit that the books identified in Exhibit A to the F AC that are referred to in Paragraph 23 of the FAC are included in the HDL, but Defendant Intervenors otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 23 of the F AC and thus deny such allegations.

24. Defendant Intervenors admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 24 of the FAC is included in the HDL, but Defendant Intervenors otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 24 of the FAC and thus deny such allegations.

25. Defendant Intervenors admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 25 of the FAC is in the HDL, but Defendant Intervenors otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 25 of the FAC and thus deny such allegations.

26. Defendants admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 26 of the FAC are included in the HDL, but Defendant Intervenors otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 26 of the FAC and thus deny such allegations.

27. Defendant Intervenors admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 27 of the FAC are in the HDL, but Defendant Intervenors otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 27 of the FAC and thus deny such allegations.

28. Defendant Intervenors admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 28 of the FAC were digitized and included in the HDL, and Defendants otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient

to form a belief about the truth of the remaining allegations in Paragraph 28 of the FAC and thus deny such allegations.

29. Defendant Intervenors admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 29 of the FAC are included in the HDL, but Defendant Intervenors otherwise deny the allegation that such books were “unlawfully reproduced, digitized and distributed” by Defendants. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 29 of the FAC and thus deny such allegations.

30. Defendant Intervenors admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 30 of the FAC is included in the HDL, but Defendant Intervenors otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 30 of the FAC and thus deny such allegations.

31. Defendant Intervenors admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 31 of the FAC is included in the HDL, but Defendant Intervenors otherwise deny the allegation that such book was “unlawfully reproduced, digitized and distributed” by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 31 of the FAC and thus deny such allegations.

32. Defendant Intervenors admit that the book identified in Exhibit A to the FAC that is referred to in Paragraph 32 of the FAC is included in the HDL, but Defendant Intervenors otherwise deny the allegation that such book was “unlawfully reproduced, digitized and

distributed" by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 32 of the FAC and thus deny such allegations.

33. Defendant Intervenors admit that the books identified in Exhibit A to the FAC that are referred to in Paragraph 33 of the FAC are included in the HDL, but Defendant Intervenors otherwise deny the allegation that such books were "unlawfully reproduced, digitized and distributed" by Defendants. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 33 of the FAC and thus deny such allegations.

34. Defendant Intervenors admit that UM is a state university comprising three campuses with a principal place of business in Ann Arbor, Michigan. Defendants also admit that UM is governed by its Board of Regents. Defendants further admit that UM owns, operates, and controls MLibrary and that, upon information and belief, MLibrary is one of the largest university library systems in the United States, holding more than 8.5 million volumes and with more than 3 million patron visits per year to its facilities and its website. Defendants also admit that on or about December 14, 2004, "the Regents of the University of Michigan/University Library, Ann Arbor Campus" entered into a Cooperative Agreement with Google to digitize works from the MLibrary collection (the "UM-Google Cooperative Agreement"). Defendant Intervenors further admit that UM is a co-founder, host, and primary administrator of the HathiTrust Service and is the largest contributor to the HDL, which contains the collection of digital works with respect to which the HathiTrust Service operates. Defendant Intervenors deny the remaining allegations in Paragraph 34 of the FAC.

35. Defendant Intervenors admit that UC is a public trust comprising ten campuses with a principal place of business in Oakland, California. Defendant Intervenors also admit that UC is governed by its Board of Regents. Defendant Intervenors further admit that UC owns, operates, and controls the UC library system, that the UC library system consists of more than 100 libraries, and that, upon information and belief, the UC library system collectively is the largest research/academic library in the world. Defendant Intervenors also admit that on or about August 3, 2006, “The Regents of the University of California on behalf of its California Digital Library” entered into a Cooperative Agreement with Google to digitize works from UC’s libraries (the “UC-Google Cooperative Agreement”). Defendant Intervenors further admit that UC is a co-founder of the HathiTrust Service and is the second largest contributor to the HDL. Defendant Intervenors also admit that UC announced on August 24, 2011 its intention to join the OWP. Defendant Intervenors deny the remaining allegations in Paragraph 35 of the FAC.

36. Defendant Intervenors admit that UW is a state university system comprising twenty-six campuses with a principal place of business in Madison, Wisconsin. Defendant Intervenors also admit that UW is governed by its Board of Regents. Defendant Intervenors further admit that UW owns, operates, and controls the UW library system, holding more than 8 million volumes. Defendant Intervenors also admit that on or about October 12, 2006, the “the Board of Regents of the University of Wisconsin System, d/b/a the University of Wisconsin-Madison, General Library System” entered into a Cooperative Agreement with Google to digitize works from UW’s libraries (the “UW-Google Cooperative Agreement”). Defendant Intervenors further admit that UW is a co-founder of the HathiTrust Service and is the third largest contributor to the HDL. Defendant Intervenors also admit that UW’s intention to

participate in the OWP became public on June 23, 2011. Defendant Intervenors deny the remaining allegations in Paragraph 36 of the FAC.

37. Defendant Intervenors admit that “the trustees of Indiana University” governs IU, which is a body politic of the State of Indiana, a State institution of higher education comprising eight campuses with a principal place of business in Bloomington, Indiana. Defendant Intervenors further admit that IU owns, operates, and controls the IU library system, holding more than 7.8 million books in over 900 languages. Defendant Intervenors also admit that IU's Bloomington campus is a member of the CIC, a consortium of Big Ten universities plus the University of Chicago. Defendant Intervenors further admit that on or about June 6, 2007, The Board of Trustees of the University of Illinois, on behalf of the CIC and the CIC Universities, entered into a Cooperative Agreement with Google to digitize works from CIC Universities’ libraries (the “CIC-Google Cooperative Agreement”). Defendant Intervenors further admit that IU’s Bloomington campus is the seventh largest contributor to the HDL. Defendant Intervenors admit that a fully operational, synchronized, and live "mirror site" of the HDL is located on IU's Indianapolis campus. Defendant Intervenors deny the remaining allegations in Paragraph 37 of the FAC.

38. Defendant Intervenors admit that Cornell is a corporation and private land-grant university with its principal place of business in Ithaca, New York. Defendant Intervenors also admit that Cornell owns, operates, and controls the Cornell library, holding more than 8 million volumes. Defendant Intervenors further admit that on or about August 6, 2007, Cornell entered into a Cooperative Agreement with Google to digitize works from the Cornell library (the “Cornell-Google Cooperative Agreement”). Defendant Intervenors also admit that Cornell is the fourth largest contributor to the HDL. Defendant Intervenors further admit that Cornell

announced on August 24, 2011 its intention to join the OWP. Defendant Intervenors deny the remaining allegations in Paragraph 38 of the FAC.

39. Defendant Intervenors admit that “HathiTrust” is the name of a service through which more than fifty institutions, which include universities, libraries, educational institutions, and consortia, are collaborating with UM to create a reliable and increasingly comprehensive digital repository of books. Defendant Intervenors also admit that UM's principal place of business for purposes of providing the HathiTrust Service is in Ann Arbor, Michigan. Defendant Intervenors further admit that as of October 5, 2011, the HDL contained 9,709,348 volumes, amounting to 435 terabytes of data. Defendant Intervenors deny the remaining allegations in Paragraph 39 of the FAC.

40. Defendant Intervenors admit that libraries and archives provide a tremendous societal value in preserving and securing works of art, literature, and science. Defendant Intervenors also admit that Section 108 of the Copyright Act is one of many limitations on copyright holders’ rights. Defendant Intervenors deny the remaining allegations in Paragraph 40 of the FAC.

41. Defendant Intervenors admit that Section 108(b) permits a library to make three copies of an unpublished work for preservation and security purposes (among other purposes). Defendant Intervenors also admit that Section 108(c) permits a library to make three copies of a published work. Defendant Intervenors deny the remaining allegations in Paragraph 41 of the FAC.

42. Defendant Intervenors respond to Paragraph 42 by stating that Section 108 of the Copyright Act, as it has existed at various times, speaks for itself. Defendant Intervenors further

respond that Plaintiffs' description of Section 108 is incomplete and therefore mischaracterizes the statute. Defendant Intervenors thus deny the allegations in Paragraph 42 of the FAC.

43. Defendant Intervenors admit that Paragraph 43 appears to be an accurate quote of selected text (with Plaintiffs' emphasis) from Senate Report No. 105-190 (1998), which speaks for itself, and therefore is an incomplete and inaccurate representation of the legislative history. Defendant Intervenors deny the remaining allegations in Paragraph 43 of the FAC.

44. Defendant Intervenors respond to Paragraph 44 by stating that Section 108 of the Copyright Act, as it has existed at various times, speaks for itself. Defendant Intervenors further respond that Plaintiffs' description of Section 108 is incomplete and therefore mischaracterizes the statute. Defendant Intervenors thus deny the allegations in Paragraph 44 of the FAC.

45. Defendant Intervenors respond to Paragraph 45 by stating that Section 108 of the Copyright Act, as it has existed at various times, speaks for itself. Defendant Intervenors further respond that Plaintiffs misquote Section 108 and that Plaintiffs' description of Section 108 is incomplete and therefore mischaracterizes the statute. Defendant Intervenors thus deny the allegations in Paragraph 45 of the FAC.

46. Defendant Intervenors admit the allegations in Paragraph 46 of the FAC.

47. Defendant Intervenors deny the allegations in Paragraph 47 of the FAC.

48. Defendant Intervenors deny the allegations in Paragraph 48 of the FAC.

49. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 49 regarding an announcement made by Google; regarding whether, when, and with whom Google has formed partnerships; and regarding whether Google and "its partners" have digitized more than 12 million books and thus deny such allegations.

50. Defendant Intervenors 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. Defendants admit that the books selected for digitization pursuant to these 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. Defendant Intervenors further admit that pursuant to the terms of these various agreements, the works selected for digitization are delivered to a facility that is located either on or off the University's campus and that is occupied by Google personnel and scanning equipment. Defendant Intervenors deny the remaining allegations in Paragraph 50 of the FAC.

51. Defendant Intervenors admit that Google has digitized books owned by the Universities libraries. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations regarding "Google Books" and Google's actions with respect to "Google Books" and thus deny the remaining allegations in Paragraph 51 of the FAC.

52. Defendant Intervenors admit that pursuant to Google's various agreements with the Regents of the University of Michigan/University Library, Ann Arbor Campus; The Regents of the University of California on behalf of its California Digital Library; the Board of Regents

of the University of Wisconsin System, d/b/a the University of Wisconsin-Madison, General Library System; Cornell University; and The Board of Trustees of the University of Illinois, on behalf of the CIC and the CIC Universities, after digitizing a book from the collection of a University, Google may provide a digital copy of the book to the University library or, at the University's request, to MLibrary to be incorporated into the HDL, and Defendant Intervenors admit that the terms of these various agreements provide that the digital copy include a set of image and OCR files and associated meta-information about the files. Defendant Intervenors also admit that books that leave the premises of the Universities' libraries to be digitized are returned to the libraries. Defendant Intervenors deny the remaining allegations in Paragraph 52 of the FAC.

53. Defendant Intervenors admit that some libraries have estimated their costs of performing the act of digitization at approximately \$100 per volume. Defendant Intervenors deny the remaining allegations in Paragraph 53 of the FAC.

54. Defendant Intervenors admit that certain Universities, including UM, have digitized works in their library collections. Defendant Intervenors deny the remaining allegations in Paragraph 54 of the FAC.

55. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 55 of the FAC and thus deny such allegations.

56. Defendant Intervenors admit that The Authors Guild, Inc. and others filed a purported class action lawsuit against Google in the Southern District of New York, *Authors Guild, Inc. v. Google, Inc.*, Case No. 05 Civ. 8136 (S.D.N.Y. filed Sept. 20, 2005), involving Google's digitization of books (the "Google Books Lawsuit"). The complaint in the Google

Books Lawsuit speaks for itself, and therefore Defendant Intervenors deny the remaining allegations in Paragraph 56 of the FAC.

57. Defendant Intervenors admit that Google and The Authors Guild, Inc. (among other parties) filed a motion for approval of a proposed settlement agreement in the Google Books Lawsuit. The proposed settlement agreement speaks for itself, and therefore Defendant Intervenors deny the remaining allegations in Paragraph 57 of the FAC.

58. Defendant Intervenors admit that the motion for approval of the proposed settlement agreement was denied on March 22, 2011. Defendants also admit that Paragraph 58 of the FAC accurately quotes from Judge Denny Chin's decision. Judge Chin's decision speaks for itself, and therefore Defendant Intervenors deny the remaining allegations of Paragraph 58 of the FAC.

59. Defendant Intervenors admit that Paragraph 59 of the FAC accurately quotes from Judge Denny Chin's decision, which speaks for itself. Defendant Intervenors deny the remaining allegations in Paragraph 59 of the FAC.

60. Defendant Intervenors admit that Judge Denny Chin's decision noted efforts by Congress to pass orphan works legislation. Defendants also admit that the decision discussed international law concerns raised by foreign authors and entities regarding the ASA. Judge Chin's decision speaks for itself. Defendant Intervenors deny the remaining allegations in Paragraph 60 of the FAC.

61. Defendant Intervenors admit that the Google Books Lawsuit is still pending in the Southern District of New York.

62. Defendant Intervenors admit that 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 HDL, the shared repository of digital collections of institutions participating in the HathiTrust Service. Defendant Intervenors also admit that there are currently more than fifty institutions, including universities, libraries, educational institutions, and consortia, from around the world participating in the HathiTrust Service. Defendant Intervenors further admit that the website for the HathiTrust Service states that the mission of the HathiTrust Service is “to contribute to the common good by collecting, organizing, preserving, communicating, and sharing the record of human knowledge. Defendant Intervenors deny the remaining allegations in Paragraph 62 of the FAC.

63. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 63 of the FAC and thus deny such allegations.

64. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 64 of the FAC and thus deny such allegations.

65. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 65 of the FAC and thus deny such allegations.

66. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 66 of the FAC and thus deny such allegations.

67. Defendant Intervenors admit that this is an accurate quote from the HathiTrust Service website. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 68 of the FAC and thus deny such allegations.

68. Defendant Intervenors admit that 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). Defendant Intervenors deny the remaining allegations in Paragraph 68 of the FAC.

69. Defendant Intervenors admit that the HathiTrust Service permits certain users to view, search, print, and download full copies of certain volumes in the HDL, and Defendant Intervenors admit that the level of access to a work is determined in part by the identity of the user and the copyright status of the work, and deny the remaining allegations in Paragraph 69 of the FAC.

70. Defendant Intervenors admit that 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. Defendant Intervenors also admit that the HDL allows users to view books identified as being in the public domain on the HathiTrust Service website, wherever the users may have access to the website. Defendant Intervenors deny the remaining allegations of Paragraph 70 of the FAC.

71. Defendant Intervenors deny the allegations in Paragraph 71 of the FAC.

72. Defendant Intervenors deny the allegations in Paragraph 72 of the FAC.

73. Defendant Intervenors admit the allegations in Paragraph 73 of the FAC.

74. Defendant Intervenors admit that to identify whether an in-copyright work in the HDL is an orphan work under its OWP pilot process, the OWP staff undertook a multi-step due diligence process to check whether the work is commercially available for sale and, if it is not, to attempt to locate and contact the copyright holder. Defendant Intervenors also admit that, under the pilot process, if the OWP staff were unsuccessful in identifying a copyright holder, the bibliographic information for the work would have been listed on the HathiTrust Service website for ninety days. Defendant Intervenors further admit that, 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. Defendant Intervenors admit that no works have been made available through the OWP and that the OWP pilot procedures are currently being reexamined. Defendant Intervenors deny the remaining allegations in Paragraph 74 of the FAC.

75. Defendant Intervenors admit that in July and August of 2011, other participants in the HathiTrust Service, including UC and Cornell, announced their intent to participate in the OWP and their intent to make works in their collections identified as orphan works available on a limited basis to their respective students, faculty, and library patrons. Defendant Intervenors deny the remaining allegations in Paragraph 75 of the FAC.

76. Defendant Intervenors admit that a list of orphan work candidates was posted on the HathiTrust Service website on or about July 15, 2011.

77. Defendant Intervenors admit that the initial complaint in this action was filed on September 12, 2011. Defendant Intervenors deny the remaining allegations in Paragraph 77 of the FAC.

78. Defendant Intervenors admit that on September 16, 2011, MLibrary issued a statement concerning the OWP. Defendant Intervenors deny the remaining allegations in Paragraph 78 of the FAC.

79. Defendant Intervenors deny the allegations in Paragraph 79 of the FAC.

80. Defendant Intervenors incorporate by reference their responses to Paragraphs 1 through 79 above.

81. Defendant Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 81 of the PAC and thus deny such allegations.

82. Defendant Intervenors deny the allegations in Paragraph 82 of the PAC.

83. Defendant Intervenors deny the allegations in Paragraph 83 of the PAC.

84. Defendant Intervenors deny the allegations in Paragraph 84 of the PAC.

85. Defendant Intervenors deny the allegations in Paragraph 85 of the PAC.

86. Defendant Intervenors deny the allegations in Paragraph 86 of the PAC.

87. Defendant Intervenors deny the allegations in Paragraph 87 of the PAC.

**DEFENDANT INTEVENORS'
AFFIRMATIVE DEFENSES AND OTHER DEFENSES**

In further answer to the FAC, and by way of affirmative defenses and other defenses, Defendant Intervenors state that they will rely upon the following defenses if applicable and if supported by the facts. Defendant Intervenors do not admit that they bear the burden of proof for any of these defenses.

A. Defendant Intervenors are entitled to access to the HDL because Defendants' use of and activities with respect to the works that are subject to copyright are non-infringing fair uses and do not require authorization pursuant to Section 107 of the Copyright Act.

B. Defendant Intervenors are entitled to access to the HDL because Defendants' use of and activities with respect to the works that are subject to copyright are non-infringing and do not require authorization pursuant to Section 108 of the Copyright Act.

- C. Defendant Intervenors are entitled to access to the HDL because Defendants use of and activities with respect to the works that are subject to copyright are non-infringing and do not require authorization pursuant to Section 109 of the Copyright Act.
- D. Defendant Intervenors are entitled to access to the HDL because Defendants use of and activities with respect to the works that are subject to copyright are permitted under Section 110 of the Copyright Act.
- E. Defendant Intervenors are entitled to access to the HDL because Defendants use of and activities with respect to the works that are subject to copyright are non-infringing and do not require authorization pursuant to Section 121 of the Copyright Act.
- F. Defendant Intervenors are entitled to access to the HDL because the collection provides them equal access to the Defendants' library collections as required under Titles II and III of the Americans with Disabilities Act.

Defendant Intervenors respectfully reserve the right to amend their answer to add additional or other defenses or to delete or withdraw defenses after a reasonable opportunity for appropriate discovery.

WHEREFORE, Defendant Intervenors request the following relief:

- (a) That Plaintiffs be denied all relief sought in the F AC;
- (b) That the claims asserted in the F AC be dismissed with prejudice;
- (c) Any such other and further relief as the Court deems just and proper.

Dated: December 9, 2011

