

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	:	
THE AUTHORS GUILD, INC., et al.,	:	
	:	
Plaintiffs,	:	
	:	
- against -	:	Index No. 11 Civ. 6351 (HB)
	:	
HATHITRUST, et al.,	:	
	:	
Defendants.	:	
	:	
-----X	:	

DECLARATION OF PAUL AIKEN

I, Paul Aiken, hereby declare as follows:

1. I am the Executive Director of the Authors Guild, Inc. (the “Guild”), one of the plaintiffs in the above-captioned action. I have been employed by the Guild since April 1993, first as a staff attorney, then as Assistant Director, and finally in my current position since 1996. I am 1985 graduate of Cornell Law School and an attorney licensed to practice in New York.

2. I submit this declaration in support of Plaintiffs’ motion for summary judgment. I have personal knowledge of the facts set forth in this Declaration and could testify competently at a hearing or trial if called upon to do so.

3. The Guild participated in bringing this lawsuit to stop the Defendant universities and their shared digital repository HathiTrust from systematically usurping authors’ rights to their literary properties by, among other things: (a) authorizing and participating in the unlawful conversion of millions of copyright-protected books into machine-readable digital formats; (b) authorizing and participating in the reproduction and distribution of those millions of unlawfully prepared digital books; (c) taking upon themselves the right to make decisions as to appropriate investments in technology, staff, and enforcement measures to secure those millions of

unlawfully prepared digital books; (d) establishing rules by which Defendants would purport to determine whether the authors of those millions of unlawfully prepared digital books should be further deprived of their literary property rights; (e) purporting to use such rules to decide whether authors were not findable without undue effort and therefore subject to Defendants' "Orphan Works Program"; and (f) authorizing Google, Inc. ("Google") to convert into machine-readable digital formats, then reproduce, store, and profit from, millions of copyright-protected books, all while Defendants avoided financial responsibility for their unlawful actions through their sovereign immunity status.

4. The Guild participated in bringing this lawsuit for another vital reason: to reduce or eliminate the risk of catastrophic economic harm -- a "Napster event" (in which digital privacy and distribution of copyrighted works became rampant) -- posed by Defendants' storage in online databases, offline databases, and backup tapes tens of millions of unauthorized reproductions of copyright-protected books, by seeking an order requiring Defendants to take the unlawfully created digital books offline until Congress takes appropriate action regarding the digitized literary works.

The Authors Guild

5. The Guild and its predecessor organization, the Authors League of America (the "League"), have been leading advocates for authors' copyright and contractual interests since the League's founding in 1912. With more than 8,500 published authors as members, the Guild is the largest advocacy group for book authors in the United States. Our members represent the broad sweep of American authorship, including literary and genre fiction, nonfiction, trade, academic, and children's book authors, textbook authors, freelance journalists, and poets. Guild members have won countless honors and all major literary awards. (Every American winner of

the Nobel Prize for Literature was a Guild members.) Our members include published authors in 38 countries.

6. The Guild had its beginnings as the Authors League of America, which was founded in 1912 by a group of book authors (including Theodore Roosevelt, who served as the League's founding vice-president), short story writers, freelance journalists, and dramatists. In the 1920s, the League broke into two groups: the Guild and the Dramatists Guild of America.

7. Virtually since the day it was founded, the Guild has been a leading advocate for published authors in the United States, pursuing its mission of promoting fair book and freelance journalism contracts, effective copyright protection and freedom of expression. As part of that mission, the Guild has participated in litigation, generally as *amicus curiae*, but occasionally as a direct party to legal actions. The activities of the Guild include reviewing members' publishing and agency contracts; intervening in disputes involving authors' rights; providing advice to members regarding developments in the law and publishing industry that affect their rights; and advocating regarding legislation in matters affecting copyright, freedom of expression, taxation and other issues of concern to professional writers.

The Challenges Facing Print Media

8. Never in the Guild's long history has its straightforward mission – to maintain writing as a viable livelihood – been so daunting. The digital environment has been brutal for print media. The newspaper industry has been devastated, with many publication shuttered and many more on the brink. The magazine industry has not fared much better, as venerable publications shrink in size and ambition. The loss to our society from the collapse of these industries is immeasurable.

9. Although the book industry has fared somewhat better than our colleagues in print media, our industry is challenged as well. Finding a sustainable business model for creative work in digital form seems nearly impossible: if piracy doesn't get you, the aggregators will. In this complex, shifting environment, in which technology has the ability to both foster and decimate markets within months, it is crucial that authors have a place at the table when institutions seek to rewrite the rules governing the uncompensated uses of their literary properties, and whether and under what conditions those properties will be placed at digital risk.

The Google Books Case

10. Because of its potential effects on our members' and the Guild's own copyright interests, the Guild followed with great interest and concern Google's 2004 announcement of its Google Library Project. The Guild was particularly concerned by Google's December 14, 2004, announcement that it was working with major academic institutions in the United States to digitize millions of books, including books protected by copyright.

11. The Guild soon learned that the University of Michigan, a defendant in this case, was allowing Google to digitize vast numbers of books from its libraries. The Guild obtained a copy of the Cooperative Agreement between Google and the University of Michigan, confirming the "win-win" arrangement the two entities had reached: Michigan would allow Google to convert books from its libraries' vast collections into digital form and retain a digital copy of each book it converted, so long as Google provided the University of Michigan with an unauthorized digital copy of each book Google converted to digital form. The Cooperative Agreement made no mention of making efforts to seek permission from authors or their licensees to conduct these digital conversion and reproduction activities.

12. On September 20, 2005, representative plaintiffs and the Guild filed a class action lawsuit against Google for copyright infringement arising from its program to convert into digital format millions of copyright-protected books as part of the Google Library Project, and then display “snippets” from those books at Google’s web site. *See The Authors Guild, Inc. et al. v. Google Inc.*, No. 05 Civ. 8136 (S.D.N.Y.) (the “Google Books case”). At that time, the Guild elected to take legal action against only Google, which was providing the technology, money, and labor to convert the books into machine-readable formats, and not against any of Google’s other library partners.

13. In the spring of 2006, the Guild and Google had their first settlement meeting. By that fall, settlement negotiations formally began between and among Google, book publishers, and the Guild. Approximately two years later, on October 28, 2008, the parties filed a motion for preliminary approval of a settlement agreement reached with Google, which motion Judge John E. Sprizzo granted on November 17, 2008. On November 13, 2009, the parties executed an Amended Settlement Agreement (the “ASA”) and filed a motion for final approval. A copy of the ASA is attached as Exhibit A hereto. The ASA was preliminarily approved on November 19, 2009, by Judge Chin, who assumed responsibility for the Google Books case after Judge Sprizzo’s passing.

The Amended Settlement Agreement

14. Several features of the ASA are critically important to the instant litigation.

15. *First*, the ASA provided a mechanism to compensate the millions of authors whose copyrighted works had been digitized by Google without authorization. Under the ASA, the class of affected authors and rightsholders would have granted a license to Google to digitize works and sometimes sell, display, and make certain non-display uses of the works it had

scanned. The ASA expressly authorized Google and its partner libraries (which would have included the University of Michigan and other Defendants in this litigation) to index the contents of the digitized works for search purposes and to allow researchers to conduct “non-consumptive research” using the digitized corpus. The ASA would have covered both in-print and out-of-print works, including so-called “orphan works.” In exchange for these and other rights that would have been granted as part of the ASA, Google agreed to pay \$45 million into a settlement fund to make cash payments to rightsholders – at least \$60 per principal work. The ASA would also have provided a revenue share in which rightsholders would have received most of the subscription, sales, reproduction, and advertising revenue generated by the digitized books.

16. *Second*, the ASA included a comprehensive security protocol that Google and any partner institutions would be required to follow if they were to store digital copies of the copyright-protected works obtained through the Google Library Project. I was directly involved in some of the negotiations that led to the security protocols ultimately agreed to and incorporated into the ASA. Those protocols included contractually binding security requirements, subject to audit procedures and contractually enforceable financial penalties, to help protect against the risk of catastrophic loss of the digital book databases.

17. On March 22, 2011, the court declined to approve the ASA. An aspect of the ASA that particularly concerned Judge Chin was the ASA’s treatment of “orphan works” – books that are still in-copyright but whose author or rightsholder cannot be located. Judge Chin ruled that “the establishment of a mechanism for exploiting unclaimed books is a matter more suited for Congress than this Court. . . . The questions of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards are matters more

appropriately decided by Congress than through an agreement among private, self-interested parties.” *The Authors Guild, Inc. v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

Orphan Works Project

18. Fewer than two months after Judge Chin rejected the ASA, on or about May 16, 2011, I heard the stunning news that the University of Michigan was launching its own “Orphan Works Project” – an initiative that purported to seek to identify so-called orphans among the copyright-protected works that had been digitized through the Google Library Project and were being stored in the HathiTrust Digital Library. It was my understanding that a work identified as an “orphan” by the project would be made available for the university’s students, professors, and other users to view online, print, and download for free.

19. Incredibly, the procedures for determining whether or not the author of a copyright-protected book could be found, were unilaterally established by the University of Michigan. Moreover, the University of Michigan took unto itself the task of implementing the rules it had devised. The result of this was that if the University of Michigan determined a book was an orphan, as the University of Michigan itself defined that term, then the University of Michigan would be the beneficiary, reproducing and distributing the copyright-protected work without limit to students and faculty at the University of Michigan’s campuses. It seemed a recipe for disaster, likely to deprive countless authors of their literary property rights.

20. In July and August 2011, other universities, including Defendants the University of California, the University of Wisconsin and Cornell University, announced their participation in the Orphan Works Project and their intent to make works in their collections identified as “orphans” through the rules devised, implemented, and overseen by the University of Michigan, available to their respective students, faculty and library visitors.

The Instant Lawsuit

21. In light of Judge Chin's rejection of the ASA, the breakdown in settlement talks with Google, and the announcement of the Orphan Works Project, the Guild filed the instant action to enjoin Defendants from further infringing and jeopardizing authors' rights by scanning, storing, and using copyright-protected books without permission or accountability, as well as to put an end to the Orphan Works Project.

22. We filed the initial complaint on September 12, 2011. Since the books scanned as part of the Google Library Project and the purported orphan works that Defendants were threatening to distribute affected the rights of authors worldwide, authors' rights associations based in Australia (Australian Society of Authors) and Quebec (UNEQ), as well as eight individual authors from around the world joined the Guild as plaintiffs in the lawsuit.

23. Due in part to publicity surrounding the filing of the lawsuit, the Guild was able to identify several authors and copyright holders whose works were scheduled to become available for "full view" as part of the Orphan Works Project.

24. I was personally able to locate one such author, J.R. Salamanca, simply by searching "book author salamanca" at Google's search engine. Within minutes I was in contact with the wife of John White, Mr. Salamanca's literary agent. She confirmed that her husband represented Mr. Salamanca, who was alive and living in Maryland. In a conversation later that day, Mr. White told me that Mr. Salamanca's works were certainly not "orphaned," and that Mr. White had, in fact, signed a contract earlier that month to publish an e-book edition of one of Mr. Salamanca's novels. I understand that Mr. White is submitting a declaration which describes this in more detail.

25. On October 5, 2011, the Guild filed a First Amended Complaint, adding as plaintiffs Mr. Salamanca and the Authors League Fund, as well as authors' rights groups in the United Kingdom (ALCS), Sweden (SFF), Norway (NFF), and Canada (TWUC), and three additional individual authors.

The Works at Issue

26. In addition to filing this lawsuit to protect the rights of its members whose copyrighted works have been digitized and are being used by Defendants without authorization (the "Member Works"), the Guild itself owns the copyrights in and to several works that were scanned and incorporated into HathiTrust without the AG's knowledge or consent. Attached as Exhibit B is a schedule of works whose copyrights are owned by the Guild and have been infringed by Defendants (the "AG Works"). Attached as Exhibit C is documentation evidencing the transfer of the relevant copyrights from each respective author to the Guild. A copyright registration certificate for each AG Work is attached hereto as Exhibit D.

Harm Resulting From Defendants' Use of the Works

27. I have reviewed the declarations of several individual authors who are plaintiffs in this litigation, including the declarations of Pat Cummings, T.J. Stiles, James Shapiro, and Roxana Robinson, all of whom are members of the Guild. I believe that the works written by those authors provide a fair sampling of the types of works authored by members of the Guild.

28. I agree with and incorporate by reference the description in those declarations of the various harms and potential harms that result from Defendants' unauthorized digitization and use of copyrighted works. Those descriptions need not be repeated here in full, but can be summarized as follows.

29. *First*, each digital copy of a Member Work or AG Work that is created by Defendants without purchase or license represents a lost sale to the corresponding author or rightsholder. Defendants could have purchased a copy, but instead had it scanned without compensating the rightsholder.

30. *Second*, Defendants' storage of the Member Works and AG Works in an online digital repository exposes that property to security risks for which the rightsholders receive no commensurate remuneration. Unauthorized access to copyrighted books leading to widespread piracy would gravely affect the market for those works. Professor Benjamin Edelman's expert report contains additional detail concerning the security risks posed by Defendants' unauthorized activities.

31. *Third*, Defendants' various uses of the Member Works and AG Works undermine licensing opportunities for rightsholders. For example, rightsholders routinely grant online distributors a license to index their books and make them searchable as part of a commercial arrangement intended to promote book sales. Defendants do the same thing, but without a license and not as part of an effort to sell the books and provide revenue to the author. Defendants also permit the books to be used for non-consumptive research, an emerging field that represents another potential licensing stream for authors.

32. *Fourth*, Defendants' mass digitization and orphan works programs undercut opportunities for authors to generate royalty streams by entering into collective licensing agreements – a topic addressed in more detail by in Professor Daniel Gervais's expert report. For example, I am aware of existing or proposed agreements in Sweden and Norway entered into by authors' rights organizations, on the one hand, and the national libraries of those countries, on the other hand, to digitize, archive, and make various uses of their national library collections.

Unlike Defendants, the libraries in those countries agreed to compensate authors and rightsholders for the right to use their works. Had the ASA been approved, it would have provided the same function.

33. *Fifth*, making books available through the Orphan Works Program will directly undermine efforts to revive out-of-print books and will affect future book sales. It is impossible to know what is going on with authors' and their representatives' efforts to republish their out-of-print works if one never asks, as demonstrated by the story of J.R. Salamanca. Defendants believed the rights to Mr. Salamanca's books were unclaimed, when in fact Mr. Salamanca's agent was negotiating a contract to make one of his novel's available as an e-book. The Guild itself has operated the Backinprint.com program, which now makes more than 1,400 formerly out-of-print works available through online bookstores and the nation's largest book wholesaler. Defendants should simply not be permitted to usurp an author's decision to revive an older work.

34. In short, Defendants' activities have harmed or have the potential to cause enormous harm to the rights of authors.

[THIS SPACE INTENTIONALLY LEFT BLANK]

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

Dated: New York, New York
June 28, 2012



PAUL AIKEN