

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE AUTHORS GUILD, INC., et al.,	:
	:
Plaintiffs,	:
	:
- against -	:
	:
HATHITRUST, et al.,	:
	:
Defendants.	:
	:
-----X	

Index No. 11 Civ. 6351 (HB)

DECLARATION OF KELLY DUFFIN

I, Kelly Duffin, hereby declare as follows:

1. I am the Executive Director of The Writers’ Union of Canada (“TWUC”), one of the plaintiffs in the above-captioned action.

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.

The Writers’ Union of Canada

3. TWUC has approximately 2,000 members who earn their living from writing books. Since its inception in 1973, TWUC has been an advocate for effective copyright law, protection of freedom of expression, fair publishing contracts, and other issues that affect authors. TWUC’s objects include uniting authors for the advancement of their common interests and fostering writing in Canada. Certified by the Canadian Artists and Producers Professional Relations Tribunal, TWUC is the national voice of professional book writers in Canada in the English language.

The Works At Issue

4. Upon information and belief, members of TWUC own the copyrights in hundreds or thousands of works that were digitized and are being used by Defendants without authorization (collectively, the “Member Works”).

5. One such member is Greg Hollingshead, who is a former Chair of TWUC and the author of the Governor General’s Award-winning book *The Roaring Girl* (1995/Toronto: Somerville House). Upon information and belief, *Roaring Girl* was digitized by Defendants and incorporated into the HathiTrust Digital Library. See <http://catalog.hathitrust.org/Record/007138321>. As the author and copyright owner of *The Roaring Girl* (see U.S. Copyright Reg. No. TX0004415789), it is my understanding that Mr. Hollingshead could bring a lawsuit in his own right against Defendants for digitizing and using his work without authorization.

6. In addition to filing this lawsuit to protect the rights of its members, TWUC itself owns the copyrights in and to a number of works that were scanned and incorporated into HathiTrust without TWUC’s knowledge or consent. Attached as Exhibit A is a schedule of works whose copyrights are owned by TWUC and have been infringed by Defendants (the “TWUC Works”). Attached as Exhibit B is a copy of the Will showing the bequest of her copyrights from deceased TWUC member Edith Fowke to TWUC.

Harm Resulting From Defendants’ Use Of The Works

7. The TWUC agreed to join this lawsuit as an associational plaintiff after learning that print copies of the TWUC Works, Member Works and millions of other copyright books were digitized and being used as part of the Google Library Project, and that Defendants planned to begin making digital copies of purported “orphan works” available for free.

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

9. 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.

10. *First*, each digital copy of a TWUC or Member Work that is created by Defendants without purchase or license represents a lost sale to the associated rightsholder. Defendants could have purchased a copy but instead had it scanned without compensating the copyright owner.

11. *Second*, Defendants' storage of the TWUC and Member Works in an online digital repository exposes that property to security risks for which the rightsholders receive no commensurate remuneration. Unauthorized access to copyright books leading to widespread piracy would gravely impact the market for those works.

12. *Third*, Defendants' various uses of the TWUC and Member Works undermine various licensing opportunities for rightsholders. For example, authors routinely grant or authorize their publishers to grant online distributors like Amazon a license to scan and make portions their books viewable online as part of a commercial arrangement targeted at promoting book sales. Defendants also scan and make books searchable but without a license and without being 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.

13. *Fourth*, Defendants' mass digitization and orphan works programs undercut opportunities for authors to receive royalties. If permitted to proceed, the Orphan Works Project is likely to negatively impact revenues for authors generated through a system established in Canada to address orphan works. Section 77 of the Canadian Copyright Act permits the Copyright Board of Canada (the "Board") to issue licenses to users whose reasonable efforts to locate a copyright holder have been unsuccessful. The Board sets a licensing fee for each permitted use, which compensation is generally directed to a designated collective society authorized by Canada's *Copyright Act* to license a repertoire of authors' works. In the case of a print publication in languages other than French, the user pays the fee or royalties to the collective society known as Access Copyright, which holds the payment in trust for the unlocatable author or may use the payment for the benefit of the rightsholders whose works it represents, provided that the author may claim the payment from Access Copyright within five years of the expiry of the license. Attached as Exhibit C is an example of a license issued by the Board to the University of Athabasca to digitally reproduce and distribute certain newspapers in exchange for a \$5,000 licensing fee. Defendants' Orphan Works Project allows people to make uses of orphan works but without any system to compensate rightsholders.

14. *Fifth*, making books available through the Orphan Works Project will directly undermine efforts to revive out-of- print books and will impact future sales of such books.

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

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: Toronto, Ontario
June 28, 2012

A handwritten signature in black ink that reads "Kelly Duffin". The signature is written in a cursive, flowing style.

KELLY DUFFIN

EXHIBIT A

EXHIBIT A

AUTHOR(S)	TITLE	FIRST PUBLICATION	SUBSEQUENT PUB(S).	MOST RECENT PUB. HARDCOPY OR ELECTRONIC?	U.S. COPYRIGHT REGISTRATIONS OR RENEWALS
Edith Fowke and Carole Carpenter	A Bibliography of Canadian Folklore	1976/Ontario: York University.	1981/Toronto: University of Toronto Press 1986/Penguin	Hardcopy	N/A – Foreign Work
Edith Fowke and Jay Rahn	A Family Heritage	1994/Calgary: University of Calgary Press		Hardcopy	N/A – Foreign Work
Edith Fowke	Canada's Story in Song	1960/Toronto: W. J. Gage	c1965/Toronto: W. J. Gage	Hardcopy	N/A – Foreign Work
Edith Fowke	Canadian Folklore	1988/Toronto: Oxford University Press		Hardcopy	N/A – Foreign Work
Edith Fowke	Folk songs of Canada	1954/Waterloo: Waterloo Music Co.	1955/Waterloo: Waterloo Music Co. 1958/Waterloo: Waterloo Music Co. 1967/Waterloo: Waterloo Music Co. 1970/Waterloo: Waterloo Music Co.	Hardcopy	N/A – Foreign Work
Edith Fowke	Folk Songs of Quebec	1957/Waterloo: Waterloo Music Co.		Hardcopy	N/A – Foreign Work
Edith Fowke	Folklore of Canada	1976/Toronto: McClelland & Stewart	1979-01-01/Toronto: McClelland & Stewart 1990-04-01/Toronto: McClelland & Stewart	Hardcopy	N/A – Foreign Work

AUTHOR(S)	TITLE	FIRST PUBLICATION	SUBSEQUENT PUB(S).	MOST RECENT PUB. HARDCOPY OR ELECTRONIC?	U.S. COPYRIGHT REGISTRATIONS OR RENEWALS
Edith Fowke	Lumbering Songs from the Northern Woods	1970/Austin: University of Texas Press	1985/Toronto: NC Press	Hardcopy	N/A – Foreign Work
Alice Kane; Edith Fowke (editor)	Songs and Sayings of an Ulster Childhood	c1983/Toronto: McClelland & Stewart		Hardcopy	N/A – Foreign Work
Edith Fowke	Songs of Work and Freedom	1960/Chicago: Roosevelt University	1961/New York: Doubleday	Hardcopy	N/A – Foreign Work
Edith Fowke	Songs of Work and Protest	1973/New York: Dover		Hardcopy	N/A – Foreign Work
Edith Fowke	Tales Told in Canada	1986/Toronto: Doubleday		Hardcopy	N/A – Foreign Work
Edith Fowke	The Penguin Book of Canadian Folk Songs	1973/Harmondsworth: Penguin	1974-07-30/Harmondsworth: Penguin	Hardcopy	N/A – Foreign Work
Edith Fowke	Traditional Singers and Songs from Ontario	1965/Ontario: Burns & MacEachern	1965/Hatboro, PA: Folklore Associates	Hardcopy	N/A – Foreign Work
Edith Fowke	Folktales of French Canada	1979/Toronto: N.C. Press	1981/Toronto: N.C. Press 1982/Toronto: N.C. Press 1993/Toronto: N.C. Press	Hardcopy	N/A – Foreign Work

EXHIBIT B

Court File No. 01-2529/96

ONTARIO COURT
(GENERAL DIVISION)
at Toronto

IN THE ESTATE OF EDITH MARGARET FOWKE, deceased,
late of the Borough of East York
occupation writer/folklorist
who died on March 28, 1996

CERTIFICATE OF APPOINTMENT
OF ESTATE TRUSTEE WITH A WILL

Applicant	Address	Occupation
Franklin George Fowke	5 Notley Place East York, Ontario M4B 2M7	Retired Engineer

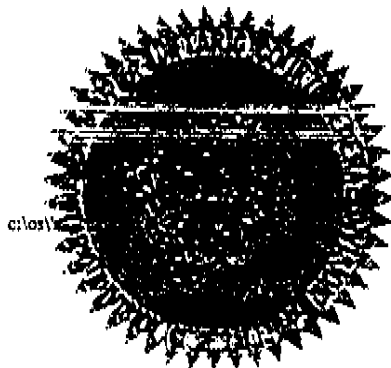
This CERTIFICATE OF APPOINTMENT OF ESTATE TRUSTEE WITH A WILL is hereby issued under the seal of the court to the applicant named above. A copy of the deceased's last will (~~and codicil(s) if any~~) is attached.

DATE OCTOBER 1ST, 1996


J. W. KERSAUD

Registrar

Address of Court Office:
439 University Avenue
Suite 301
Toronto, Ontario
M5G 1Y8



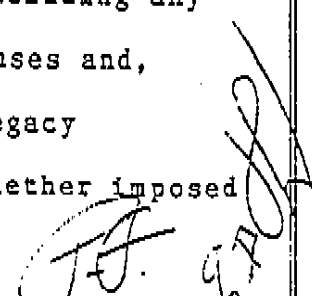
THIS IS THE LAST WILL AND TESTAMENT of me, EDITH MARGARET FOWKE, of the Borough of East York, in the Municipality of Metropolitan Toronto, in the Province of Ontario, Writer.

I. I HEREBY REVOKE all former Wills or other testamentary dispositions heretofore made by me and declare this only to be and contain my last Will and Testament.

II. I NOMINATE, CONSTITUTE AND APPOINT my husband, FRANKLIN GEORGE FOWKE, to be the sole Executor and Trustee of this my Will, provided that if my said husband dies either before or after me and either before or after obtaining Letters Probate of this my Will or is or becomes at any time unable or unwilling to act or to continue to act as the Executor and Trustee of this my Will, then I NOMINATE, CONSTITUTE AND APPOINT my lawyer, MARIAN DINGMAN HEBB, of Toronto, Ontario, to act as Executrix and Trustee of this my Will in the place of my said husband, and I refer to him or her as my Trustee.

III. I GIVE, DEVISE AND BEQUEATH all the assets of my estate, both real and personal, of whatsoever kind and wheresoever situate, including any property over which I may have a general power of appointment, to my Trustee upon the following trusts:

(a) I DIRECT my Trustee to pay out of and charge to the capital of my general estate my just debts (including any taxes payable), funeral and testamentary expenses and, except as hereinafter provided, all estate, legacy succession and inheritance taxes or duties, whether imposed



by or pursuant to the law of this or any other jurisdiction whatsoever, that may be payable in connection with any property passing on my death or any gift or benefit given or provided by me, either in my lifetime or by survivorship or by this my Will or any Codicil hereto.

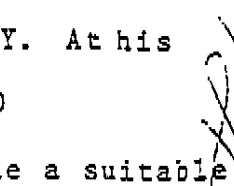
(b) I DIRECT my Trustee to donate to the University of Calgary, my folklore books, folk music records, tapes, manuscripts and my other literary papers (excluding all of my copyrights therein).

(c) I DIRECT my Trustee to give my jewelry to my niece, DARLENE SMITH, of Moose Jaw, Saskatchewan.

(d) I DIRECT my Trustee to give to my friend, MRS. DORIS SANGSTER, currently residing at 43 Brule Crescent, Toronto, any of my clothing which she wishes to have.

(e) I DIRECT my Trustee to give the sum of TWENTY THOUSAND (\$20,000.00) DOLLARS to each of my nieces, MRS. JEAN KNOUREK, of Esterhazy, Saskatchewan, DARLENE SMITH of Moose Jaw, Saskatchewan, and my nephew, JAMES MILLHAM, of Esterhazy, Saskatchewan.

(f) If any dog or dogs belonging to me survive both myself and my husband, I DIRECT my Trustee to find a home for the dog or dogs and, for this purpose, suggest to my Trustee that he may wish to consult with MADELINE KRONBY. At his discretion my Trustee may pay up to TEN THOUSAND (\$10,000.00) DOLLARS to a person who will provide a suitable



home for the dog or dogs.

(g) I DIRECT my Trustee to assign to THE WRITERS' UNION OF CANADA, my copyrights and the right to receive all royalties and all other revenue arising from my published works, including but not limited to works published by my current publishers, McClelland & Stewart, W. J. Gage, the Waterloo Music Company, Penguin, NC Press and Doubleday, and from any works posthumously published. It is my wish in making this bequest, without imposing any legal restrictions, to benefit a special project or projects being carried on by THE WRITERS' UNION OF CANADA rather than to contribute to its general operating fund. If THE WRITERS' UNION OF CANADA is unwilling to accept this bequest, or if THE WRITERS' UNION OF CANADA requests that the bequest be offered to THE WRITERS' DEVELOPMENT TRUST before being offered to THE WRITERS' UNION, then my Trustee shall offer this bequest to THE WRITERS' DEVELOPMENT TRUST in place of the WRITERS' UNION, and if accepted, make such assignment to THE WRITERS' DEVELOPMENT TRUST.

(h) I DIRECT my Trustee to give to my husband, if he survives me for more than thirty (30) days, all articles of personal, domestic and household use or ornament belonging to me at my death, including consumable stores and any automobiles and accessories thereto then owned by me, such articles to be kept by him, given away or otherwise disposed of as he wishes.

RF

(i) I DIRECT my Trustee to hold all of my property not otherwise disposed of by this Will for the use and benefit of my husband until his death. My Trustee may at any time and from time to time pay to my husband or on his behalf such part or parts of the capital of the residue of my estate as my Trustee in his uncontrolled discretion may consider necessary or advisable for his benefit.

(j) Subject to sub-clause (i) herein, I DIRECT my Trustee to give the residue of my estate, with the exception of my copyrights and the bequest contained in sub-clause (g), to DR. ALAN NEWCOMBE and DR. HANNA NEWCOMBE, of Dundas, Ontario, in trust to be used for such charitable purpose or purposes as they in their uncontrolled discretion deem desirable. I DESIRE, without imposing any legal or other restrictions on the discretion of the NEWCOMBES as my trustees, to further the work of organizations such as Amnesty International, the Unitarian Service Committee and the Canadian Peace Alliance.

IV. IN ADDITION to all other powers by this my Will or by any Codicil hereto or by any statute or law conferred on him my Trustee shall have the following powers:

(a) My Trustee may use his discretion in the realization of my estate with power to my Trustee to sell, call in and convert into money any part of my estate not consisting of money and excluding my copyrights at such time or times, in such manner and upon such terms, and either for cash or

credit or for part cash and part credit as my Trustee in his uncontrolled discretion decides upon, or to postpone such conversion of my estate or any part or parts thereof for such length of time as he may think best, and I HEREBY DECLARE that my Trustee may retain any portion of my estate in the form in which it may be at my death (notwithstanding that it may not be in the form of an investment in which Trustees are authorized to invest trust funds) for such length of time as my Trustee may in his discretion deem advisable and my Trustee shall not be held responsible for any loss that may happen to my estate by so doing.

(b) My Trustee when making investments for my estate shall not be limited to investments authorized by law for Trustees but may make any investment which in his uncontrolled discretion he considers advisable and my Trustee shall not be liable for any loss that may happen to my estate in connection with any investment hereby authorized and made by him in good faith.

(c) My Trustee in making any division of my estate or any part thereof or in setting aside or paying any share or interest therein may either wholly or in part divide, set aside or pay over in specie the assets forming my estate at the time of such division, setting aside or payment of such of the said assets as he may deems advisable, and I expressly will and declare that my Trustee may in his absolute discretion fix the value of my estate and of the

[Handwritten signature]
P.F.

assets thereof and any part or parts thereof for the purposes of making any such division, setting aside or payment or for any other purpose in the administration of my estate and the decision of my Trustee shall be final and binding on all persons concerned.

(d) So long as any real or leasehold property forming part of my estate remains unsold my Trustee may let or lease the same from month to month, from year to year or for any term of years, and subject to such covenants and conditions as he shall think fit; may accept surrenders of leases and tenancies; may expend money on repairs and improvements and generally manage the property; and with a view to the sale thereof may give any option he may consider advisable.

IN TESTIMONY WHEREOF I have to this my last Will and Testament, written upon this and the five preceding pages of paper, subscribed my name this 7th day of

SIGNED, PUBLISHED AND DECLARED by the said Testatrix, EDITH MARGARET FOWKE, as and for her last Will and Testament in the presence of us both present at the same time, who at her request, in her presence and in the presence of each other have hereunto subscribed our names as witnesses

NAME: [Signature]

ADDRESS: 8 NOTLEY PLACE

Toronto M4B 2M4

OCCUPATION: DESIGNER

COPIE CERTIFIEE CONFORME AU
FILED IN THIS OFFICE
TESTAMENT DEPOSE DANS CE BUREAU

11 29 12
[Signature]
LEGAL REGISTRAR GREFFIER LOCAL
ONTARIO COURT (GEN. DIV.) TRIBUNAL D'ONTARIO (DIV. GEN.)

[Signature]
EDITH MARGARET FOWKE

NAME: [Signature]

ADDRESS: 12 Vallermaude Rd

Toronto

OCCUPATION: Sci. Educ.

ESTATE OF EDITH MARGARET FOWKE

(Short title of Proceeding)

(Court file no.) 01-2529/96

ONTARIO COURT (GENERAL DIVISION)
Proceeding commenced at: TORONTO

CERTIFICATE OF APPOINTMENT OF
ESTATE TRUSTEE WITH A WILL

Olto Robert Siebenmann
179 John St., Suite 404
Toronto, Ont.
M5T 1X4

Tel: (416) 971 6617

Solicitor for the Estate of
EDITH MARGARET FOWKE

EXHIBIT C

Copyright Board
Canada



Commission du droit d'auteur
Canada

Ottawa, April 30, 2010

FILE: 2009-UO/TI-22

UNLOCATABLE COPYRIGHT OWNERS

Non-exclusive licence issued to the University of Athabasca for the digital reproduction and communication to the public of community newspapers

Pursuant to the provisions of subsection 77(1) of the *Copyright Act*, the Copyright Board grants a licence to the University of Athabasca as follows:

(1) The licence authorizes the digital reproduction and the communication to the public of the complete contents of the following community newspapers, in their original format, published between the dates shown, for non-commercial purposes only and subject to the limitations set out in this licence:

- *Novosti* (1944-1948) - Croatian
- *Vaba Estlane* (1952-1987) - Estonian
- *Liekki* ((1944-1973) - Finnish
- *Canadian Uutiset* (1919-1927 / 1982-1987) - Finnish
- *Isien Usko* (1936-1978) - Finnish
- *Vapaus Sana* (1921-1930 / 1932-1977 / 1979) - Finnish
- *Viikkosanomat* (1975-1986) - Finnish
- *Kanadai Magyarsae* (1951-1977) - Hungarian
- *Magyar Elet* (1957-1997) - Hungarian
- *Zwilazkowiec Alliancer* (1933-1987) - Polish
- *Serbian Herald* (1946-1948) - Serb
- *Edmonton Ukrainian News* (1928-1971) - Ukrainian
- *Vilne Slovo* (1934-1977) - Ukrainian
- *Jedinstvo* (1948-1970) - Yugoslavian
- *Nasa Novine* (1971-1986) - Yugoslavian
- *Bavarijas Latviesu Vestnesis* (1945-1946) - Latvian
- *Brivais Latveitis* (1948-1949) - Latvian
- *Liaudies Balsas* (1937-1976) - Lithuanian

(2) The licence applies only to issues that are not part of the public domain when this licence is issued.

- 2 -

- (3) The licence does not authorize
- (a) the reproduction of individual works;
 - (b) the translation of the publications.
- (4) The issuance of this licence does not release the licensee from the obligation to obtain permission for any other use not covered by this licence.
- (5) The licence expires in respect of each issue at the time the issue joins the public domain.
- (6) The licence is non-exclusive and valid only in Canada. For other countries, it is the law of that country that applies.
- (7) The licensee shall pay \$5,000 to Access Copyright, The Canadian Copyright Licensing Agency, who may dispose of this amount as it sees fit for the general benefit of its members. Access Copyright undertakes, however, to reimburse 6 ¢ per page to any person who establishes, within five years of an issue joining the public domain, ownership in that issue. Should the total amount of claims exceed the licence fee, each claim shall be reduced on a pro rata basis.
- (8) The licensee shall ensure that the following notices are prominently displayed on the web site:
- “Some of the content shown is used under a non-exclusive licence issued by the Copyright Board of Canada in cooperation with Access Copyright, pursuant to subsection 77(1) of the *Copyright Act*.”
- “A user may not reproduce or otherwise use any of the content found on this website unless the contemplated use is authorized by the *Copyright Act* or the content is in the public domain.”
- (9) The owner of copyright in an issue is entitled to end the licence with respect to future uses of that issue.
- (10) The coming into force of this licence is conditional on Access Copyright filing with the Board a notice of receipt which confirms that the royalties, as specified in paragraph (7) above, have been received and that Access Copyright undertakes to comply with the conditions set out in same.



Gilles McDougall
A/Secretary General