

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. | : |
| | : |
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Index No. 11 Civ. 6351 (HB)

DECLARATION OF FRANCIS FARLEY-CHEVRIER

I, Francis Farley-Chevrier, hereby declare as follows:

1. I am the Directeur General of Union des Écrivaines et des Écrivains Québécois (Quebec Union of Writers) (“UNEQ”), 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.

3. UNEQ is a professional union of writers with its principal place of business located in Montreal, Québec. UNEQ’s mission is to defend writers’ socio-economic interests and promote Québec’s literature. With a membership of 1,400 writers of fiction, poetry, drama, nonfiction, children’s and other books, UNEQ is the primary representative for writers in Québec, a status recognized by a 1990 Québec Act (RSQ, chapter S-32.01), and for authors throughout Canada of original French language literary or dramatic works, as certified by the Canadian Artists and Producers Professional Relations Tribunal in 1996.

The Works at Issue

4. Upon information and belief, Defendants have digitized without authority many books by UNEQ members (the “UNEQ Works”), including at least two books by Daniele Simpson and Andre Roy, plaintiffs in the instant action and the President and Vice President of UNEQ.

Harm Resulting From Defendants’ Use Of The Works

5. UNEQ agreed to join this lawsuit as an associational plaintiff after learning that print copies of UNEQ Works and millions of other copyrighted 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.

6. I have reviewed the declarations of T.J. Stiles, Daniele Simpson and Andre Roy, who are authors and plaintiffs in this litigation. 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.

7. *First*, each digital copy of a UNEQ 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. For example, Defendants could have sought a digitization license from Copibec, a collective rights society that manages reproduction rights for many authors in Quebec and has bilateral agreements with foreign collective rights societies such as the Copyright Clearance Center in the United States. UNEQ is a co-founder of Copibec and occupies three seats on its Board of Directors.

8. *Second*, Defendants' storage of the UNEQ 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 impact the market for those works.

9. *Third*, Defendants' various uses of the UNEQ Works undermine various licensing opportunities for rightsholders. For example, authors routinely grant online distributors like Amazon a license to index their books and make them searchable as part of a commercial arrangement targeted at promoting book sales. Defendants do the same thing, but without a license and without the search function 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.

10. *Fourth*, Defendants' mass digitization and orphan works programs undercut opportunities for authors to generate royalty streams by entering into collective licensing agreements. For example, if permitted to proceed, the Orphan Works Project is likely to negatively impact author revenues 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 price for each permitted use, which compensation is generally directed to a designated collective management organization. Attached as Exhibit A 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.

11. *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.

12. 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 under the laws of the United States of America that the foregoing is true and correct.

Dated: Montreal, Québec
June 26, 2012



FRANCIS FARLEY-CHEVRIER

EXHIBIT A

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.

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- (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