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April 13, 2009

The Honorable Denny Chin
United States District Judge
U.S. Courthouse, 300 Pearl Street
New York, NY 10007-1312

RE: Case No. 05-cv-8136-DC, *The Authors Guild Inc. et al. v. Google Inc.*

Dear Judge Chin:

Pursuant to your Individual Practice 2(A), we write to request a pre-motion conference in *Authors Guild v. Google*. We seek to file a motion for leave to intervene on behalf of Lewis Hyde, Harry Lewis, and Open Access Trust Inc., a Massachusetts nonprofit corporation dedicated to promoting access to knowledge, worldwide.

We also seek to file motions for our counsel, K.A.D. Camara of Camara & Sibley LLP and Charles Nesson of Harvard Law School to appear *pro hac vice* in association with Nathan Z. Dershowitz, a member of the bar of this Court.

Lewis Hyde, Harry Lewis, and the Open Access Trust represent the community of readers, scholars, and teachers who use orphaned works. Orphaned works are works under copyright, but with a copyright holder who has died, cannot be found, or otherwise has abandoned his work. In the status quo, users like us and commercial users like Google can and do use orphaned works, although we do so against a backdrop of potential legal liability should the owner of an orphaned work later emerge.

The parties in this case propose to change this status quo by clarifying that the use of orphaned works is, indeed, actionable copyright infringement; vesting in Google a monopoly in the lawful use of orphaned works; and dividing between themselves the proceeds of this monopoly. The Authors and Publishers, with Google's consent, purport to represent a class of copyright holders that includes the owners of orphaned works, even though neither the Authors nor the Publishers are such owners. Having turned the Authors and Publishers into legal representatives of the owners of orphaned works, Google will buy from these representatives a global license.

The proposed settlement will make Google the only company in the world with a license to use orphaned works. No other company will be able to buy a similar license because, outside the context of the proposed class-action settlement in this case, there is no one from whom to buy such a license. The Authors and Publishers join in this scheme because Google proposes to

divide with them, pursuant to the proposed settlement agreement, the revenue that the orphaned works will generate. The settling parties plot a cartel in orphaned works.

We seek intervention to defend our interest in orphaned works — to defend the public domain's claim to free, fair use. The purpose of copyright is to promote authorship and learning. Copyright does this by giving authors exclusive rights for limited times so that authors can profit from their writing by selling licenses to others. This mechanism breaks down in the case of orphaned works because, with respect to these works, there is no one from whom to buy a license. The public can buy no license; the author can reap no reward. Because exclusive rights in orphaned works do not serve the ultimate purpose of copyright, the public domain has a claim to free, fair use of orphaned works.

We have the right to intervene to present the public domain's claim to free, fair use of orphaned works. None of the present parties will present our claim. It is inconsistent with the settlement they propose. If the use of orphaned works is free and fair, then there is no exclusive license to give Google and no claim on the part of Google, the Authors, and the Publishers to the proceeds of that exclusive license. We must press our claim in this case because it is only in this case that there is a party that purports to represent the owners of orphaned works with whom we, like Google, can negotiate. Our interest in orphaned works, put in jeopardy by the proposed settlement and adverse to the interests of the settling parties, gives us the right to intervene under Rule 24.

Our request to intervene is timely. It comes shortly after the terms of the proposed settlement became public and made our interest concrete. And it comes well before the June 11, 2009, fairness hearing on approval of the settlement. The settling parties claim that class notice was mailed on January 5, although many authors did not receive notice until much later. Lewis Hyde, for example, received notice by mail dated February 20. Our intervention comes, at most, three months after notice.

We believe that the proposed settlement worked out by Google, the Authors, and the Publishers is a landmark achievement and an historic event. But the settlement currently proposed cannot be approved because it does not respect the interest of the public domain in the free, fair use of orphaned works or the revenue that these works will generate — nor was it arrived at through a process in which that interest was represented. We think that this case and the constitutional issues of national moment that it presents will be better resolved if the public domain has a seat at the table.

Lewis Hyde is Richard L. Thomas Professor of Creative Writing at Kenyon College and was formerly director of the creative-writing program at Harvard University. Harry Lewis is Gordon McKay Professor of Computer Science at Harvard University and was formerly Dean of Harvard College. Open Access Trust Inc. is a Massachusetts charitable corporation dedicated to the creation, encouragement, and maintenance of institutions that serve the goal of open access to knowledge, worldwide.

We respectfully request leave to file our motion to intervene and motions for leave for our counsel, K.A.D. Camara and Charles R. Nesson, to appear *pro hac vice*, in association with Nathan Z. Dershowitz, a member of the bar of this Court.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'K.A.D. Camara', with a long horizontal stroke extending to the right.

K.A.D. Camara
Camara & Sibley LLP

Charles R. Nesson
for internet & society

Nathan Z. Dershowitz
Dershowitz, Eiger & Adelson PC