12-2402

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE AUTHORS GUILD, INC., Associational Plaintiff, BETTY MILES, JOSEPH GOULDEN, and JIM BOUTON, on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents,

v.

GOOGLE INC.,

Defendant-Petitioner.

From an Order Granting Certification of a Class Action, Entered on May 31, 2012, by the United States District Court for the Southern District of New York, No. 1:05-cv-08136-DC Before the Honorable Denny Chin

REPLY IN SUPPORT OF THE PETITION OF DEFENDANT-PETITIONER FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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I. CLASS PLAINTIFFS CANNOT ADEQUATELY REPRESENT CLASS MEMBERS WHO WANT GOOGLE BOOKS TO CONTINUE

Class Plaintiffs' suit seeks to dismantle the Google Books project from which many absent class members clearly benefit. This stark divergence of interests precludes a finding of adequacy under Rule 23(a). Pet. 9-12.

1. Plaintiffs contend (Opp. 9) that any conflict "regarding the speculative potential impact of a perceived future remedy" should be "disregarded at the class certification stage." That is not the law: "Adequacy" is not met where the class plaintiffs' litigation objectives conflict with basic interests of other class members. *See* Pet. 11-12; *see also Gilpin v. AFSCME*, 875 F.2d 1310, 1313 (7th Cir. 1989) (Posner, J.) (no adequacy where one part of class of nonunion workers seeking monetary "restitution" from union desired to weaken the union for political reasons and another part wished merely to shift the cost of representation to union members); *Alston v. Va. High Sch. League*, 184 F.R.D. 574, 579-80 (W.D. Va. 1999) (refusing to certify class where majority of purported class opposed disruption of status quo that would result from injunctive relief sought by plaintiffs). Plaintiffs' brief simply ignores the ample case law for that proposition—including decisions from multiple courts of appeals. *See* Pet. 10-11.

Nor is Google's argument here based only on speculation about absent class members' "feelings" about Google Books. Opp. 11. Many authors plainly benefit concretely from Google Books—from the greater access to, and demand for, their

books made possible by the project—and would not seek to assert copyright interests to put a stop to Google Books. *See* A36, A49 (only 14% of surveyed authors objected when queried, "[H]ow strongly [do] you approve of or object to Google scanning *your copyrighted books* so that they can be searched online and short excerpts displayed in search results?" (emphasis added)). Courts have regularly denied class certification in the face of similar conflicts. *See, e.g.*, *Bieneman v. City of Chicago*, 864 F.2d 463, 465 (7th Cir. 1988) (no adequacy where homeowners differed as to whether they benefited from increased operations at nearby airport); *Peterson v. Oklahoma City Hous. Auth.*, 545 F.2d 1270, 1273 (10th Cir. 1976) (no adequacy where tenants disagreed about the benefit of authority's deposit requirement).[1]

Plaintiffs further argue that it is somehow "premature" to consider issues of equitable relief at the certification stage, and suggest that other "types of equitable relief" may be available beyond an injunction. Opp. 10. But Plaintiffs' complaint expressly seeks to enjoin Google's allegedly unlawful uses of class members'

[1] In *Freeland v. AT&T*, 238 F.R.D. 130 (S.D.N.Y. 2006), on which Plaintiffs rely (Opp. 11), the court found no "divergence of interests" (and thus no adequacy problem) because four of the named plaintiffs shared the perspective of some absent class members that "the inclusion of additional features in their [cellphone] handsets" was beneficial. *Id.* at 141. Here, by contrast, the "divergence of interests" could not be more stark, *id.*: Many absent authors benefit from and approve of Google Books whereas the named Plaintiffs, who seek to block the program altogether, have testified that Google Books is in no way beneficial, *see* Bouton Dep. (Ex. 2 to Gratz Decl. [ECF No. 1003]) at 20:2-9, Goulden Dep. (Ex. 3) at 39:2-8, Miles Dep. (Ex. 5) at 11:20-13:3.

books. *See* Fourth Am. Compl. ¶¶ 45-52 (ECF No. 985). Plaintiffs cannot run away from that request simply to ease class certification. *See Alston*, 184 F.R.D. at 580 ("Regard for the interests of all members includes … regard for the specific remedies sought by class representatives as compared to the remedies favored by other members of the class."). Indeed, Plaintiffs have themselves explained that they declined to opt out of Google Books individually because their principal interest is to see the whole project undone through litigation. *See, e.g.*, A101 (Miles Dep.) (explaining that she did not opt out because "[i]t is not the problem of my books. It is the problem of the principle of doing this for all books."). Even assuming the possibility of other relief, class Plaintiffs could not adequately represent authors who benefit from Google Books in the litigation or negotiations over that relief.

2. Plaintiffs also attack the evidence that many class members benefit from Google Books, and argue that Google's survey deserves "no weight." Opp. 4-8. But it is *Plaintiffs'* burden to prove the *absence* of any fundamental conflict that would defeat Rule 23(a)'s "adequacy" requirement—not Google's burden to prove that many class members have different objectives. *See Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010). And the survey merely reinforced what was clear without it: Many authors benefit from (and would not wish to dismantle) a search index that makes it possible for potential readers to find their books. *See*

Alston, 184 F.R.D. at 579 ("adequacy" requirement not met where "[c]ommon sense" suggested that many class members "would not favor the relief requested by plaintiffs"); *cf. Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 378 (2000) ("The quantum of empirical evidence needed … will vary up or down with the novelty and plausibility of the justification raised.").

Contrary to Plaintiffs' suggestion (Opp. 5), other courts *have* treated surveys offered by defendants as relevant to determining adequacy. In *Alston*, the court rejected class certification in a Title IX sex discrimination suit where "[a] majority of the female public school athletes surveyed [by the defendant] expressed a desire to preserve the status quo" regarding athletic scheduling. 184 F.R.D. at 579 (concluding that "[t]he results of the survey … indicate that plaintiffs do not adequately represent the interests of all the members of their class"); *see also Lanzarone v. Guardsmark Holdings*, 2006 WL 4393465 (C.D. Cal. Sept. 7, 2006) (adequacy requirement not met where defendant's survey demonstrated "that a sizeable segment of the absent class members … [did] not want the validity of their agreements challenged").[2]

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[2] The survey rejected in *In re Fedex Ground Package Sys., Employment Practices Litig.*, 2007 WL 3027405 (N.D. Ind. 2007), on which Plaintiffs rely, bears no resemblance to Google's survey. The issue in that case was whether FedEx drivers were appropriately classified as employees or independent contractors. The survey simply asked drivers, "Would you prefer to perform your pick-up and delivery services as an employee or an independent contractor?"—a pure question of law on which the inclinations of the drivers could not have any bearing. *Id.* at *7.

Plaintiffs' attacks on the survey itself are also unavailing. Their brief trumpets (Opp. 7) that "only" 19% of surveyed authors said they financially benefit from the project—but that figure is far larger than the 8% who said they are harmed. A50. And benefiting "financially" is hardly the only benefit of having one's book read: A majority (58%) approved of the project and a significant portion (45%) had seen or expected to see demand for their books improve (versus 4% who expected demand to be harmed). A49, A51. Plaintiffs also complain (Opp. 6) that the script did not disclose to authors that they may be absent class members or ask them whether they wanted to participate in litigation. *Accord* Add. 28a-29a. But the survey was not an opt-out notice; it was an effort to learn whether class members generally shared the class Plaintiffs' objectives of having the Google Books project potentially shut down. A great many do not. In certifying a class despite that basic conflict, the court's decision was at a minimum "questionable." *In re Sumitomo Copper Litig.*, 262 F.3d 134, 139 (2d Cir. 2001).

II. GOOGLE'S FAIR USE DEFENSE RAISES INDIVIDUAL ISSUES THAT PRECLUDE A FINDING OF PREDOMINANCE

Plaintiffs do not dispute that Google's "fair use" defense is "the central issue in this case." Pet. 2. They contend only that "any assessment" of fair use in this case "must be based on . . . common evidence." Opp. 16-17. That is wrong.

Cambridge University Press v. Becker, 2012 WL 1835696 (N.D. Ga. May 11, 2012), well illustrates the individual issues. In that case, notwithstanding the

defendant University's "uniform, widespread practice" of providing digitized book excerpts as course readings (Add. 29a) and substantial similarities among the excerpted books, the district court assessed fair-use based on facts specific to each work. For example, the court reached different conclusions with respect to 37-page excerpts from two different books—finding one instance not to be fair use because the book earned significant digital licensing income (relevant to the fourth factor), but finding the other use to be fair because it did not. *See id.* at *62, *67. In other instances, the court reached different conclusions based on the amount copied (relevant to the third factor)—use of 41 pages equaling 5.8% of the book was fair because the portion "was decidedly small," but use of a shorter excerpt from a shorter book was not fair in part because the excerpt comprised 8.28% of the total work (which the court found "not decidedly small"). *Id.* at *76, *161. This is the kind of individual, "case-by-case" analysis fair use ordinarily requires but that the district court in this case erroneously thought unnecessary.

Plaintiffs nevertheless contend that Google is somehow constrained by *their* choice to "rely on common evidence as to fair use." Opp. 14, 15. Plaintiffs are, of course, free to frame their proof as they wish, but they may not impose that choice on Google. A class may not be certified "on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *See Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2561 (2011).

Plaintiffs also contend that because Google follows uniform guidelines, only common evidence need be considered. Opp. 13, 17-18. Those guidelines, however, include individualized analysis: The decision whether to place a book in snippet view is made following a human review of the book; for example, Google does not display snippets of reference works such as dictionaries and cookbooks, where small snippets might substitute for purchasing the books. A108 ¶ 9. Indeed, this kind of book-by-book analysis is exactly how a court would evaluate whether the amount and substantiality of the work used (the third factor) supports a finding of fair use.

Plaintiffs next argue that Google's opposition to class certification is inconsistent with Google's position on the merits that Google Books "is a fair use as to all books." Opp. 16. As explained in the petition, however, there are common *and* individualized reasons for finding fair use, and Google relies on both. *See* Pet. 12-13. Google should not be deprived of one defense simply because another defense is strong. That Google believes it *could* prevail even if forced to defend itself with one arm tied behind its back does not mean that Plaintiffs may *require* Google to do so—especially given the high stakes of this litigation.

Moreover, it is not true, as Plaintiffs suggest, that Google has abjured work-specific analysis. *See* Opp. 15-16. Certainly that contention finds no support in the interrogatory answers that Plaintiffs cite, which state that (1) the nature of the

work (factor two) "tilts more [or less] strongly" in favor of a finding of fair use the more or less factual is the book or the snippet displayed; (2) the nature of the work "tilts more [or less] strongly" in favor of a finding of fair use depending on whether the book is in- or out-of-print; and (3) the amount and substantiality of the use (factor three) "tilts more [or less] strongly" in favor of a finding of fair use depending on what percentage of the book appears in snippet view. Opp. 15 (citing SA204-215). All three analyses turn on facts unique to each book.

As for the fourth fair use factor, Plaintiffs appear to confuse Google's common conclusion—that Google Books benefits all authors by making their books searchable, *see, e.g.*, SA214—with the variety of individualized evidence that proves that conclusion. An author might benefit from Google Books because it helps the author "get [her] book reissued or reprinted," A71 (resp. 10024); or because it attracts readers to a self-published, online book, *see, e.g.*, A71 (resp. 95); or because it generates interest in the author's "online drawing classes," A71 (resp. 188); or because it helps scholars more easily navigate books that lack an index, *see User Stories, available at* http://books.google.com/googlebooks/testimonials.html (last visited July 4, 2012); or because it is especially effective for reaching certain types of readers, such as those interested in "academic books," books of "poetry," "mysteries," or books about "mathematic[s]," the "civil rights era," "Russia," or the "lower east side." *See* A73 (resp. 100572), A78 (resp.

100422), A79 (resp. 162), A82 (resps. 100251, 100279), A83 (resp. 100489), A84 (resp. 100617), A85 (resp. 100715, 100723, 100762). Moreover, factor four also tilts more or less strongly in favor of a finding of fair use depending on the *extent* to which an author benefits from Google Books, which will also vary widely across authors and works. Far from disavowing interest in these work- and author-specific market effects, Google has specifically sought discovery about such effects from the only authors to have affirmatively put their individual experiences at issue—the class representatives. *See, e.g.*, A96 (Bouton Dep.).

Finally, Plaintiffs are wrong that subclasses for fiction, non-fiction, in-print, and out-of-print works can "'obviat[e] the need to evaluate each book individually.'" Opp. 17 (quoting Add. 30a). Below, Plaintiffs argued that the fact that a book is non-fiction should not favor a finding of fair use, *see* Pls.' Reply ISO Class Cert. 23-24 n.19 (ECF No. 1008), but surely that cannot be true for all non-fiction books, even those that are almost entirely informational, *see, e.g.*, Selby, *Standard Mathematical Tables* (1974), A105 (containing standard mathematical tables); *cf. Feist Publ'ns v. Rural Tel. Serv.*, 499 U.S. 340, 358 (1991). There is thus no avoiding the need to determine where each non-fiction book falls on the spectrum between, for example, "sparsely embellished maps and directories" and "elegantly written biography." *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 563 (1985). A sub-class of out-of-print books is no more useful, since

Plaintiffs presumably will not concede that that fact *always* favors a finding a fair use. Most important, neither Plaintiffs nor the district court have identified any manageable set of sub-classes that would permit the court to evaluate positive or negative markets effects, which will vary book-by-book.

III. THERE IS A COMPELLING NEED FOR IMMEDIATE APPELLATE REVIEW

As Google's petition explained (Pet. 18-20), the fair use and adequacy issues in this case present important recurring legal questions at the intersection of copyright law and class action law and call out for immediate review. Plaintiffs dismiss (Opp. 20 n.12) these considerations as "a merits issue," but "[t]he fact that an issue is relevant to both class certification and the merits … does not preclude review of that issue" under Rule 23(f). *Regents of Univ. of California v. Credit Suisse First Boston (USA)*, 482 F.3d 372, 380 (5th Cir. 2007). Furthermore, Google Books is a project of immense potential value to users and the public, and the district court's ruling creates the potential for billions of dollars in liability and an injunction shutting it down. Given the pressures created by class certification, this court may not have another opportunity to review the district court's decision.

CONCLUSION

For the foregoing reasons and those presented in Google's initial brief, the Court should grant Google's petition for review.

Dated: July 4, 2012

Respectfully submitted.

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that on this 4th day of July 2012, I caused a pdf version of the foregoing Reply in Support of the Petition of Defendant-Petitioner for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f) to be filed electronically using the CM/ECF system. Prior to transmittal, the pdf was scanned for viruses and no viruses were detected.

/s/ Seth P. Waxman
SETH P. WAXMAN

CERTIFICATE OF SERVICE

I certify that on this 4th day of July 2012, I caused the foregoing Reply in Support of the Petition of Defendant-Petitioner for Permission to Appeal to be filed electronically using the CM/ECF system, which will send notification of such filing to counsel of record.

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