

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT  
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 12-3200

Caption [use short title]

Motion for: leave to file sealed Amicus Brief & Appendix The Authors Guild, et al. v. Google, Inc.

Set forth below precise, complete statement of relief sought:

Movants (Amici Curiae) respectfully seek leave to  
file an amended sealed amicus brief and  
supplemental appendix

MOVING PARTY: A.S.M.P., et al.

OPPOSING PARTY: N/A

☐ Plaintiff

☐ Defendant

x -- Non-parties (Amici Curiae)

☐ Appellant/Petitioner

☐ Appellee/Respondent

MOVING ATTORNEY: Mark A. Berube

OPPOSING ATTORNEY: \_\_\_\_\_

[name of attorney, with firm, address, phone number and e-mail]

Mishcon de Reya New York LLP  
750 Seventh Ave., Floor 26, NY, NY 10019  
(212) 612-3270  
mark.berube@mishcon.com

Court-Judge/Agency appealed from: \_\_\_\_\_

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):

☒ Yes

☐ No (explain): \_\_\_\_\_

Opposing counsel's position on motion:

☐ Unopposed

☒ Opposed

☐ Don't Know

Does opposing counsel intend to file a response:

☒ Yes

☐ No

☐ Don't Know

Appellees

consent;

Appellants

oppose.

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND  
INJUNCTIONS PENDING APPEAL:

Has request for relief been made below?

☐ Yes

☐ No

Has this relief been previously sought in this Court?

☐ Yes

☐ No

Requested return date and explanation of emergency: \_\_\_\_\_

Is oral argument on motion requested?

☒ Yes

☐ No

(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?

☐ Yes

☒ No

If yes, enter date: \_\_\_\_\_

Signature of Moving Attorney:

Mark A. Berube

Date: 2/27/2013

Service by: ☐ CM/ECF

☐ Other [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED** **DENIED**.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: \_\_\_\_\_

By: \_\_\_\_\_

Case No. 12-3200

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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THE AUTHORS GUILD, INC., Associational Plaintiff,  
BETTY MILES, JOSEPH GOULDEN and JIM BOUTON,  
individually and on behalf of all others similarly situated,  
*Plaintiffs-Appellees,*

v.

GOOGLE, INC.,  
*Defendant-Appellant.*

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

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**MOTION OF AMICI CURIAE**

**THE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., GRAPHIC  
ARTISTS GUILD, PICTURE ARCHIVE COUNCIL OF AMERICA, INC., NORTH  
AMERICAN NATURE PHOTOGRAPHY ASSOCIATION, PROFESSIONAL  
PHOTOGRAPHERS OF AMERICA, LEIF SKOOGFORS, AL SATTERWHITE,  
MORTON BEEBE, ED KASHI, JOHN SCHMELZER, SIMMS TABACK, LELAND  
BOBBE, JOHN FRANCIS FICARA AND DAVID W. MOSER FOR LEAVE TO FILE AN  
AMENDED SEALED AMICUS BRIEF AND SUPPLEMENTAL APPENDIX  
[REDACTED VERSION]**

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MISHCON DE REYA NEW YORK LLP  
James J. McGuire  
Mark A. Berube  
750 Seventh Avenue, 26th Floor  
New York, New York 10019  
Telephone: 212-612-3270  
Facsimile: 212-612-3297

*Attorneys for Amici Curiae The American  
Society of Media Photographers, Inc.,  
Graphic Artists Guild, Picture Archive  
Council of America, Inc., North American  
Nature Photography Association,  
Professional Photographers of America,  
Leif Skoogfors, Al Satterwhite, Morton  
Beebe, Ed Kashi, John Schmelzer, Simms  
Taback, Leland Bobbe, John Francis Ficara  
and David W. Moser*

*Amici curiae* The American Society of Media Photographers, Inc., Graphic Artists Guild, Picture Archive Council of America, Inc., North American Nature Photography Association, Professional Photographers of America, Leif Skoogfors, Al Satterwhite, Morton Beebe, Ed Kashi, John Schmelzer, Simms Taback, Leland Bobbe, John Francis Ficara and David W. Moser (collectively, “*Amici Curiae*”), appearing through the undersigned counsel, respectfully submit this Motion for leave to file an amended *Amicus* Brief under seal (“Sealed Brief”) and to submit a supplemental appendix (“Supplemental Appendix”) in support thereof consisting of three documents that were produced in a companion copyright infringement lawsuit to the one at issue on this Appeal against Defendant-Appellant Google, Inc. (“Google”), currently pending before the Honorable Denny Chin. *See The Am. Soc’y of Media Photographers, et al. v. Google, Inc.*, No. 10 CV 02977 (DC) (S.D.N.Y.) (“ASMP Action”). For all of the reasons set forth herein, in the Declaration of Mark A. Berube, Esq., dated February 27, 2013 (“Berube Declaration”) and the exhibits annexed thereto submitted in support of the Motion, and in the remainder of the record of this matter, *Amici Curiae* respectfully request that the United States Court of Appeals for the Second Circuit (“Second Circuit”) grant the Motion in its entirety.

## **FACTUAL BACKGROUND**

*Amici Curiae* are plaintiffs in the ASMP Action, a companion copyright infringement lawsuit to the *Authors Guild v. Google Inc.*, Civil Action No. 05 CV 8136 (DC) (“AG Action”), the lawsuit at issue in the instant Appeal. Berube Decl. at ¶ 2. In the AG Action, Plaintiffs-Appellees are class representatives who own copyrights in books (as do the class members) that were copied, distributed, and/or displayed by Google in connection with the Google Book Search Program (“GBS”) and who seek damages for Google’s en masse copyright infringement. See A119-121, 125, 128-133. In the ASMP Action, *Amici Curiae* similarly seek damages for violations of 17 U.S.C. § 501 on behalf of a putative class consisting of all persons and entities that own the copyrights and/or the relevant exclusive rights in original visual works published in the books and/or periodicals that were scanned and/or displayed by Google in connection with GBS.<sup>1</sup> ASMP Action Docket No. 29 at 2-4, 17-24.

The *Amici Curiae* sought and obtained consent from all parties to file an *Amicus* Brief (“Brief”) in support of Plaintiffs-Appellees’ request that the Second Circuit affirm the District Court’s Order granting Plaintiffs’ Motion for Class Certification, dated May 31, 2012. Berube Decl. at ¶ 3. The *Amici Curiae* sought consent from all parties to file this subsequent Sealed Brief and Supplemental

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<sup>1</sup> The parties’ in the ASMP Action are currently actively engaged in discovery, which is scheduled to close on July 15, 2013. See ASMP Action Docket No. 82.

Appendix. *Id.* at ¶ 4. Plaintiffs-Appellees consent to the filing and Google opposes. *Id.*

In support of the Sealed Brief, the *Amici Curiae* move for leave to submit three (3) documents that were produced by Google to *Amici Curiae* in the related ASMP Action and designated as “Confidential” or “Highly Confidential” pursuant to the Protective Order (Docket No. 68) in that case. Berube Decl. at ¶ 5.

Specifically, [REDACTED]  
[REDACTED]. *Id.* Ex. B at SA1-22, 23-24, 25-28. As set forth herein, these documents are relevant to the AG Appeal because [REDACTED]

[REDACTED].

As part of its production in the ASMP Action, Google produced the entirety of its production in the AG Action (“AG Production”) to *Amici Curiae* (the ASMP plaintiffs). *Id.* at ¶ 6. The *Amici Curiae* have reviewed the AG Production and have confirmed that these three documents were not produced in the AG Action. *Id.* These three documents were all subject to requests for production in the AG Action for which Google agreed to produce documents. For example, Google agreed to produce:

- [REDACTED]

[REDACTED] Berube Decl. Ex. C at 9 ([REDACTED])  
[REDACTED]);

- [REDACTED]  
[REDACTED] *Id.* at 9 ([REDACTED]);

- [REDACTED]  
[REDACTED] *Id.* at 10 ([REDACTED])  
[REDACTED]); and

- [REDACTED]  
[REDACTED] *Id.* Ex. D at 7 ([REDACTED]).

Because of the Protective Order, the *Amici Curiae* submitted a letter request to Judge Chin for permission to submit these documents to the Second Circuit under seal in connection with this Motion. Berube Decl. at ¶ 10. On February 14, 2013, the *Amici Curiae* filed a motion for extension of time to file the Sealed Brief from February 15, 2013 to February 22, 2013, in order to allow Judge Chin time to consider *Amici Curiae*'s request. See Docket No. 88. On February 15, 2013, the original deadline for the Brief, Judge Chin granted the *Amici Curiae*'s request in the ASMP Action and a copy of Judge Chin's Order was submitted to the Second Circuit on February 20, 2013. See Docket No. 116-2. Since the Second Circuit did not rule on the *Amici Curiae*'s motion for extension of time to file before the Brief was due, the *Amici Curiae* filed the Brief on February 15, 2013. See Docket No. 107.



On February 22, 2013, the Second Circuit granted the *Amici Curiae*'s request for a one-week extension of time. *See* Docket No. 126. Since the *Amici Curiae* could not have the Sealed Brief printed in time by a vendor to meet the February 22, 2013 extended deadline they requested and obtained a three (3) business-day extension, until February 27, 2013, to file the Sealed Brief and this Motion. Berube Decl. at ¶ 13; Docket No. 136.

### **ARGUMENT**

Pursuant to Rule 10(a) of the Federal Rules of Appellate Procedure, the record on appeal includes “(1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk.” FED. R. APP. P. 10(a). In addition, the appendix to the briefs may contain “other parts of the record to which the parties wish to direct the court’s attention.” FED. R. APP. P. 30(a)(1)(D).

On this Appeal, the documents in the Supplemental Appendix were not part of the original exhibits filed in the District Court or even a part of the record below for a simple reason -- they were not produced by Google in the AG Action to Plaintiffs-Appellees (despite the fact that they were called for by discovery in that action) and were only recently produced by Google in the companion ASMP Action. Berube Decl. at ¶¶ 5-6. Moreover, given the Protective Order in the ASMP Action, the *Amici Curiae* could not provide these documents to Plaintiffs-

Appellees. *Id.* at ¶ 9. Consequently, the Plaintiffs-Appellees could not have submitted this evidence to the District Court in support of their motion for class certification or to the Second Circuit in connection with this Appeal. Absent the grant of this Motion, there is no other way these documents could be considered on Appeal.

**A. Circumstances Are Present On Appeal To Entitle The *Amici Curiae* To Introduce Additional Evidence.**

*Amici Curiae* acknowledge that the relief they seek is unusual and generally only granted in “exceptional circumstances.” *See Wiggins Bros., Inc. v. Dep’t of Energy*, 667 F.2d 77, 83 (Temp. Emer. Ct. App. 1981) (explaining that *amici curiae* only permitted to introduce additional evidence where exceptional circumstances present). Although there does not appear to be any clear standard on what constitutes “exceptional circumstances” or when such circumstances are found, Circuit Courts -- including this one -- do permit *amici curiae* to submit supplemental appendices in support of their *amicus* briefs. *See, e.g.,* Brief for Respondent-Appellee, *Levine v. Meniffee*, No. 05-2590-pr(L), 2005 WL 6143902, \*19-\*20 (2d Cir. July 12, 2005) (noting *amici* submitted documents in special appendix); *Amicus* Brief in Support of Plaintiff/Appellant for Reversal of the Lower Court Decision, *Kielczynski v. U.S. Cent. Intelligence Agency*, No. 01-6103, 2002 WL 32304158, \*3 n.4 (2d Cir. Mar. 29, 2002) (noting *amicus* submitted supplemental appendix); *United States v. Microsoft Corp.*, No. 95-5037 (D.C. Cir.



1995) (permitting *amici* to submit joint supplemental appendix and revised joint supplemental appendix); *United States v. Hinds Cnty. Sch. Bd.*, 560 F.2d 619, 621 n.4 (5th Cir. 1977) (noting that panel granted *amicus curiae* permission to supplement record with new evidence); see also *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 105-106 (2d Cir. 2004) (noting *amicus* SEC provided “additional evidence” concerning material issue in case); Revised Brief of *Amici Curiae* National Wildlife Federation, *Utah v. Norton*, No. 03-4147, 2004 WL 3551718, \*3-4 (10th Cir. June 14, 2004) (*amici*’s supplemented record with additional exhibits providing general background and evidence of *amici*’s interest in case).

Here, *Amici Curiae* respectfully submit that exceptional circumstances warranting leave to submit the Supplemental Appendix exist. Specifically *Amici Curiae* (i) are plaintiffs in a related case to the one on Appeal in which Google is also defendant, and (ii) seek to support their Sealed Brief with documents which Google produced to them in the ASMP Action but not to Plaintiffs-Appellees in the AG Action despite their responsiveness to Plaintiffs-Appellees’ document requests. These documents are highly relevant because [REDACTED]

[REDACTED]. However, since Google failed to produce these documents to the Plaintiffs-Appellees in the

AG Action in response to their document requests, they could not have been submitted to the District Court or the Second Circuit.

In these premises, leave to introduce the Supplemental Appendix should be granted.

**1. The Documents Are Highly Relevant  
To Central Issues In The Appeal.**

**(a) The Supplemental Appendix is Central  
to the Fair Use Analysis as a Whole.**

As Google correctly contends, “[t]he central disputed issue in this case is whether Google Books’ uses constitute fair use.” Brief for Appellant, dated November 9, 2012, Docket No. 37 (“Appellant’s Brief”) at 26 (citations and internal quotations omitted). Accordingly, evidence relevant to the fair use issue is central to the AG Action and this Appeal.

In support of its claim that fair use cannot be determined on a class-wide basis, Google analyzes “the market benefit of the challenged use” arguing that “[t]here are many different ways Google Books may provide market benefits to an author that cannot be dismissed on a classwide basis.” *Id.* at 30. In support of its contention, Google relies upon a survey submitted to the District Court below in opposition to the Plaintiffs-Appellees’ motion for class certification. *See, e.g.*, Appellant’s Brief at 20. Putting aside whether the survey accurately evidences the views of author class members vis-à-vis GBS and Google’s systematic copyright

infringement in connection therewith -- a survey which the District Court rejected as flawed and which Plaintiffs-Appellees and the *Amici Curiae* vociferously dispute<sup>2</sup> -- unbeknownst to the Plaintiffs-Appellees and consequently the District Court in the AG Action, Google's own internal documents [REDACTED]

[REDACTED]. See Berube Decl.

Ex. B at SA11, 13, 26-28. [REDACTED]

[REDACTED]

[REDACTED]

Given their materiality to a central issue and Plaintiffs-Appellees' inability to include them in the Record, the Second Circuit should allow the Supplemental Appendix to be considered on this Appeal.

(b) [REDACTED]

On Appeal, the first issue raised by Google is whether the class plaintiffs can "adequately represent the many class members who benefit from Google Books and do not want to see it dismantled." Appellant's Brief at 17. Google states "[t]he class representatives object to the project and seek to enjoin Google's searchable index and its display of snippets." *Id.* Google claims that "[i]t stands to reason that an author benefits when a book can be found through an Internet search engine and when book excerpts are available for browsing online – benefits that

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<sup>2</sup> See, e.g., SPA30-32; Appellees' Brief at 21-33.

Google Books provides.” *Id.* at 21. Google argues that there is “a clash of interests preclud[ing] certifying a class here” and that dismantling the Library Project “would deprive many authors of the benefits they obtain from Google Books . . .” *Id.* at 20. Google further claims that “Google Books’ comprehensive index and search tool offers real benefits to a significant portion of the class, and if Plaintiffs prevail, those benefits will disappear or be greatly diminished because the project cannot continue in its present form.” *Id.* at 23.

Similarly, the brief for *Amici Curiae* the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries, dated November 16, 2012, Docket No. 55 (“Library Brief”) claims that:

there is real concern that infringement liability . . . will give rise to a massive damage award that will harm the public interest. Such an award could force the shutdown of parts or all of GBS, significantly limit the works available in the database and thereby reduce its usefulness, or restrict access to members of the public including researchers, scholars, and libraries who depend on GBS. None of these outcomes would benefit the public.

Library Brief at 8-9.

However, [REDACTED]

[REDACTED]

[REDACTED] See Berube Decl. Ex. B at SA13 ([REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]; *Id.* at SA26-27 ([REDACTED])  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED];  
*Id.* at SA28 ([REDACTED])  
[REDACTED]; *Id.* at SA11 ([REDACTED])  
[REDACTED].

In these unusual circumstances, this critical, newly discovered evidence,  
otherwise unavailable to Plaintiffs-Appellees, should be considered on this Appeal.

## **CONCLUSION**

For all of the reasons set forth herein and in the remainder of the record,  
*Amici Curiae* respectfully request that the Court grant the Motion and permit *Amici Curiae* to file the Sealed Brief and the Supplemental Appendix in support thereof.

Dated: New York, New York  
February 27, 2013

Respectfully submitted,

By: /s/Mark A. Berube  
JAMES J. MCGUIRE  
MARK A. BERUBE  
MISHCON DE REYA NEW YORK LLP  
750 Seventh Avenue, Floor 26  
New York, New York 10019  
Telephone: (212) 612-3270  
Facsimile: (212) 612-3297

*Attorneys for Amici Curiae The American  
Society of Media Photographers, Inc.,  
Graphic Artists Guild, Picture Archive  
Council of America, Inc., North American  
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Beebe, Ed Kashi, John Schmelzer, Simms  
Taback, Leland Bobbe, John Francis Ficara  
and David W. Moser*



## **CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of February, 2013, I caused the redacted version of the foregoing Motion for Leave to File an Amended Sealed Amicus Brief and Supplemental Appendix, redacted version of the Declaration of Mark A. Berube, Esq., dated February 27, 2013, and the redacted exhibits annexed thereto, to be filed electronically using the CM/ECF system, which will send notification of such filing to counsel of record.

I hereby further certify that on this 27th day of February, 2013, I caused the sealed version of the foregoing Motion for Leave to File an Amended Sealed Amicus Brief and Supplemental Appendix, sealed version of the Declaration of Mark A. Berube, Esq., dated February 27, 2013, and the sealed exhibits annexed thereto, to be filed by hand with the Court and upon counsel for Defendant-Appellant Google, Inc. Counsel for Plaintiffs-Appellees were notified that they would not be served with sealed versions of these documents because doing so would violate the Protective Order (Docket No. 68) in the companion lawsuit, *The Am. Soc'y of Media Photographers, et al. v. Google, Inc.*, No. 10 CV 02977 (DC) (S.D.N.Y.), governing the sealed documents.

/s/Mark A. Berube  
Mark A. Berube