

No. 12-3200

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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THE AUTHORS GUILD, INC., et al.,  
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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**DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO FILE AN  
AMENDED SEALED AMICUS BRIEF AND SUPPLEMENTAL APPENDIX**  
**[REDACTED VERSION]**

Mark A. Berube hereby declares as follows:

1. I am a partner in the law firm of Mishcon de Reya NY LLP, attorneys for *Amici Curiae* American Society of Media Photographers, Inc., Graphic Artists Guild, Inc., Picture Archive Counsel 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*”). I submit this Declaration in support of the *Amici Curiae*’s motion (“Motion”) for leave to file

an amended sealed *Amicus* Brief (“Sealed Brief”) and to submit a supplemental appendix (“Supplemental Appendix”) in support thereof consisting of three (3) 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”).

2. *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.

3. 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.

4. The *Amici Curiae* sought consent from all parties to file this subsequent Sealed Brief and Supplemental Appendix. Plaintiffs-Appellees consent to the filing and Google opposes.

5. In support of the Sealed Brief, the *Amici Curiae* move for leave to submit three (3) documents that were recently 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. True and correct copies of the Sealed Brief and Supplemental Appendix containing these three documents are annexed hereto as Exhibits A and B, respectively.

6. 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). The *Amici Curiae* have reviewed the AG Production and have confirmed that none of the documents in the Supplemental Appendix were produced in the AG Action.

7. On or about December 2, 2005, Google served [REDACTED]  
[REDACTED]  
[REDACTED], a true and correct copy of which is annexed as Exhibit C.

8. On or about February 2, 2012, Google served [REDACTED]  
[REDACTED]  
[REDACTED], a true and correct copy of which is annexed as Exhibit D.

9. Because of the Protective Order in the ASMP Action, the *Amici Curiae* could not provide these documents to Plaintiffs-Appellees.

10. In accordance with the Protective Order, the *Amici Curiae* submitted a letter request to Judge Chin for permission to submit the documents in the

Supplemental Appendix to the Second Circuit under seal in connection with the Motion.

11. 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.

12. 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.

13. 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.

I declare that the foregoing is true and correct, in accordance with 28 U.S.C. § 1746.

Executed this 27th day of February.

*/s/Mark A. Berube*  
Mark A. Berube

## **EXHIBIT A**

# 12-3200-cv

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IN THE  
**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,

—against— *Plaintiffs-Appellees,*

GOOGLE INC., *Defendant-Appellant.*

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ON APPEAL 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

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**AMENDED BRIEF FOR *AMICI CURIAE* THE AMERICAN SOCIETY  
OF MEDIA PHOTOGRAPHERS, INC., GRAPHIC ARTISTS GUILD, INC.,  
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 IN SUPPORT OF APPELLEES AND AFFIRMANCE  
[REDACTED VERSION]**

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Nature Photography Association, Professional  
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Al Satterwhite, Morton Beebe, Ed Kashi,  
John Schmelzer, Simms Taback, Leland Bobbe,  
John Francis Ficara and David W. Moser*

February 27, 2013

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## **CORPORATE DISCLOSURE STATEMENT**

In accordance with Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure, *amici curiae*, the American Society of Media Photographers, Inc., Graphic Artists Guild, Inc., Picture Archive Counsel of America, Inc., North American Nature Photography Association, and Professional Photographers of America, certify as follows:

None of these entities has a parent corporation, and no publicly held corporation owns 10% or more of their respective stock.

*Amici curiae* Leif Skoogfors, Al Satterwhite, Morton Beebe, Ed Kashi, John Schmelzer, Simms Taback, Leland Bobbe, John Francis Ficara, and David W. Moser are all natural persons.



**TABLE OF CONTENTS**

CORPORATE DISCLOSURE STATEMENT .....i

REQUEST FOR ORAL ARGUMENT.. ..... viii

INTEREST OF AMICI CURIAE..... 1

SUMMARY OF ARGUMENT .....4

STANDARD OF REVIEW .....6

ARGUMENT .....7

I THE DISTRICT COURT PROPERLY FOUND THAT THE INDIVIDUAL  
NAMED PLAINTIFFS ADEQUATELY REPRESENT THE CLASS  
BECAUSE THERE EXISTS NO CONFLICT OF INTEREST.....7

A. Even If There Was Evidence That GBS Benefits Some  
Class Members, The Illegality Of The Program Renders  
Any Potential Conflict Irrelevant As A Matter Of Law.....8

II THE DISTRICT COURT PROPERLY  
CERTIFIED THE CLASS UNDER RULE 23(B)(3). ..... 13

A. Common Questions Predominate With  
Respect To Google’s Fair Use Defense. .... 14

B. The District Court Properly Found That Individual  
Ownership Issues Do Not Predominate. ....24

CONCLUSION .....29

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<u>A&amp;M Records, Inc. v. Napster, Inc.</u> , 239 F.3d 1004 (9th Cir. 2001) .....	20
<u>Am. Geophysical Union v. Texaco Inc.</u> , 60 F.3d 913 (2d Cir. 1995) .....	22
<u>Apple Inc. v. Psystar Corp.</u> , 673 F. Supp. 2d 943 (N.D. Cal. 2009).....	27
<u>Bresson v. Thomson McKinnon Sec. Inc.</u> , 118 F.R.D. 339 (S.D.N.Y. 1988) .....	12
<u>Brooklyn Ctr. for Independence of the Disabled v. Bloomberg</u> , No. 11 Civ. 6690(JMF), 2012 WL 5438849 (S.D.N.Y. Nov. 7, 2012).....	11
<u>Brown v. Kelly</u> , 609 F.3d 467 (2d Cir. 2010) .....	6
<u>Campbell v. Acuff-Rose Music, Inc.</u> , 510 U.S. 569 (1994).....	15, 17, 20
<u>Columbia Pictures Indus., Inc. v. Fung</u> , No. CV 06-5578 SVW, 2010 U.S. Dist. LEXIS 91169 (C.D. Cal. May 20, 2010) .....	27
<u>Conn. Bar Assoc. v. United States</u> , 620 F.3d 81 (2d Cir. 2010) .....	13
<u>Engel v. Scully &amp; Scully, Inc.</u> , 279 F.R.D. 117 (S.D.N.Y. 2011) .....	13
<u>Fonar Corp. v. Domenick</u> , 105 F.3d 99 (2d Cir. 1997) .....	26
<u>Freeland v. AT &amp; T Corp.</u> , 238 F.R.D. 130 (S.D.N.Y. 2006) .....	8, 21

<u>Goto.com, Inc. v. Walt Disney Co.,</u> 202 F.3d 1199 (9th Cir. 2000) .....	27
<u>Hyderi v. Wash. Mut. Bank,</u> 235 F.R.D. 390 (N.D. Ill. 2006).....	12
<u>In re Enron Corp.,</u> 419 F.3d 115, 126 (2d Cir. 2005) .....	13
<u>In re Flag Telecom Holdings, Ltd. Sec. Litig.,</u> 574 F.3d 29 (2d Cir. 2009) .....	6
<u>In re Potash Antitrust Litig.,</u> 159 F.R.D. 682 (D. Minn. 1995) .....	11
<u>In re Visa Check/MasterMoney Antitrust Litig.,</u> 280 F.3d 124 (2d Cir. 2001) .....	8, 14, 25
<u>Infinity Broad. Corp. v. Kirkwood,</u> 150 F.3d 104 (2d Cir. 1998) .....	22, 23
<u>Iowa State Univ. Research Found., Inc., v. Am. Broad. Cos.,</u> 621 F.2d 57, 61 (2d Circ. 1980).....	23
<u>Jacobi v. Bache &amp; Co., Inc. et al.,</u> No. 70 Civ. 3152, 1972 WL (S.D.N.Y Feb. 8, 1972).....	10
<u>Jermyn v. Best Buy Stores, L.P.,</u> 276 F.R.D. 167 (S.D.N.Y. 2011) .....	13
<u>JP Morgan Chase Bank v. Altos Hornos De Mexico, S.A. DE C.V.,</u> 412 F.3d 418 (2d Cir. 2005) .....	13
<u>L.A. Printex Indus., Inc. v. Le Chateau, Inc.,</u> No. 11 CIV. 4248 LTS, 2012 WL 987590 (S.D.N.Y. Mar. 23, 2012).....	27
<u>Marisol A. v. Giuliani,</u> 126 F.3d 372 (2d Cir. 1997) .....	21
<u>Maywalt v. Parket &amp; Parsley Petroleum Co.,</u> 147 F.R.D. 51 (S.D.N.Y. 1993) .....	25

<u>Merkos L’Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.,</u> 312 F.3d 94 (2d Cir. 2002) .....	22
<u>Music v. Heiman,</u> No. 09-cv-341-bbc, 2010 WL 1904341 (W.D. Wis. May 11, 2010) .....	27
<u>Nowalk Care v. Norwalk Redevelopment Agency</u> 395 F.2d 920, 937 (2d Cir. 1968) .....	10
<u>Olan Mills, Inc. v. Linn Photo Co.,</u> 23 F.3d 1345 (8th Cir. 1994) .....	28
<u>Perfect 10, Inc. v. Amazon.com, Inc.,</u> 508 F.3d 1146 (9th Cir. 2007) .....	28
<u>Princeton Univ. Press v. Mich. Document Servs.,</u> 99 F.3d 1381 (6th Cir. 1996) .....	28
<u>Ruggles v. Wellpoint, Inc.,</u> 272 F.R.D. 320 (N.D.N.Y. 2011) .....	10
<u>Shahriar v. Smith &amp; Wollensky Rest. Group, Inc.,</u> 659 F.3d 234 (2d Cir. 2011) .....	6
<u>Shelter Realty Corp. v. Allied Maint. Corp.,</u> 574 F.2d 656 (2d Cir. 1978) .....	11
<u>Trautz v. Weisman,</u> 846 F. Supp. 1160 (S.D.N.Y. 1994) .....	25
<u>Triad Sys. Corp. v. Se. Express Co.,</u> 64 F.3d 1330 (9th Cir. 1995) .....	27
<u>UMG Recordings, Inc. v. MP3.com, Inc.,</u> 92 F. Supp. 2d 349 (S.D.N.Y. 2000) .....	20
<u>Wal-mart Stores, Inc. v. Dukes,</u> 131 S. Ct. 2541 (2011).....	13, 14
<u>Warner Bros. Entm’t Inc. v. Carsagno,</u> No. 06 CV 2676(NG)(RLM), 2007 WL 1655666 (E.D.N.Y. June 4, 2007) .....	28

<u>Weber v. Goodman</u> , 9 F. Supp. 2d 163 (E.D.N.Y. 1998) .....	12
<u>Weissmann v. Freeman</u> , 868 F.2d 1313 (2d Cir. 1989) .....	22
<u>Wilder v. Bernstein</u> , 499 F. Supp. 980 (S.D.N.Y 1980) .....	10
<u>Wu v. Pearson Educ., Inc.</u> , 277 F.R.D. 255 (S.D.N.Y. 2011) .....	12
<b>STATUTES</b>	
17 U.S.C. § 117(c) .....	27
17 U.S.C. § 501 .....	4
17 U.S.C. § 502(a) .....	28
17 U.S.C.A. § 107(1-4) .....	15
<b>RULES</b>	
Fed. R. Civ. P. 23(a)(2) .....	13
Fed. R. Civ. P. 23(a)(4) .....	5, 7, 8, 12
Fed. R. Civ. P. 23(b)(3) .....	13, 14
Fed. R. Civ. P. 23 (c)(1)(C) .....	21
Local Rule 29.1 .....	1
<b>OTHER AUTHORITIES</b>	
1 A. Conte, Herbert Newburg, NEWBERG ON CLASS ACTIONS §3:30 (4th ed.) .....	10
5 James William Moore et al., MOORE’S FEDERAL PRACTICE § 23.25[2][b][ii] (3d ed.1998) .....	8
5 James William Moore et al., MOORE’S FEDERAL PRACTICE § 23.25[2][b][iii] (3d ed.1998) .....	10

Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1124  
n.84 (1990).....23

## **REQUEST FOR ORAL ARGUMENT**

The *amici curiae* respectfully request oral argument on this Appeal. Oral argument will allow the *amici curiae* to explain to this Court the postures of the various interested parties, the issues in dispute, and to address the applicable law in that context.

*Amici curiae* respectfully submit this *Amicus* Brief in support of Appellees, the Authors Guild, Inc., Betty Miles, Joseph Goulden, and Jim Bouton, and request that the Court affirm the District Court’s Order Granting Plaintiffs’ Motion for Class Certification, dated June 11, 2012 (“Order”). All parties originally consented to the submission of a brief by *amici curiae*. However, Defendant-Appellant Google (“Google”) now opposes *amici curiae*’s submission of the Supplemental Appendix (“SA”) and argument concerning those documents.<sup>1</sup>

### **INTEREST OF AMICI CURIAE**

The American Society of Media Photographers, Inc. (“ASMP”) is a not-for-profit corporation that since its 1944 founding has been the leading advocate for copyright and contractual rights of freelance published photographers. ASMP, through its 39 nationwide chapters, represents more than 7,000 members, including some of the world’s foremost photographers. ASMP’s activities on behalf of its members include participating in significant copyright cases in U.S. Courts, policy discussions and testimony before the Copyright Office, consideration of copyright reform legislation in Congress, and educational campaigns providing useful information to its members about copyright law, contractual issues, and good business practices.

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<sup>1</sup> Pursuant to Local Rule 29.1, no party’s counsel authored this Brief in whole or part. No party and no party’s counsel contributed money intended to fund preparing or submitting the Brief. No person other than the *amici curiae* herein and their counsel contributed money intended to fund preparing or submitting this Brief.



Graphic Artists Guild, Inc. (“GAG”) is a not-for-profit corporation and national union of graphic artists dedicated to promoting and protecting the social, economic, and professional interests of its members. GAG’s members include graphic designers, web designers, digital artists, illustrators, cartoonists, animators, art directors, surface designers, and those working in various combinations of these disciplines. Founded in 1967, GAG has established itself as the leading advocate for the rights of graphic artists on a wide range of economic and legislative issues from copyright to tax law.

Picture Archive Counsel of America, Inc. (“PACA”) is a not-for-profit corporation representing the vital interests of stock archives of every size, from individual photographers to large corporations, licensing images for commercial reproduction. Founded in 1951, its membership includes over 100 companies in North America and over 50 international members. Through advocacy, education, and communication, PACA strives to foster and protect the interests of the picture archive community. Accordingly, PACA strives to develop useful business standards, promote ethical business practices, and actively advocate copyright protection.

North American Nature Photography Association (“NANPA”) is a not-for-profit corporation committed solely to serving the field of nature photography.

NANPA promotes the art and science of nature photography and provides information, education, and opportunity for those interested in such photography.

Professional Photographers of America (“PPA”) is the world’s largest not-for-profit association for professional photographers, with more than 20,000 members in 54 countries. The association seeks to increase its members’ business savvy as well as broaden their creative scope, and is a leader in the dissemination of knowledge in the areas of professional business practices and creative image-making.

Leif Skoogfors, Al Satterwhite, Morton Beebe, Ed Kashi, Leland Bobbe, John Francis Ficara, and David W. Moser are published photographers, and John Schmelzer and Simms Taback are published illustrators, whose works are contained in books and periodicals in the libraries of the Universities of California, Michigan, Virginia, and Wisconsin, Stanford University, and/or other libraries whose books and periodicals Google has reproduced or indicated its intention to reproduce, as well as books and periodicals published by Google’s publishing partners.

The Google Books Search program (“GBS”) involves the en masse scanning and electronic display and distribution of the associational members’ and individual *amici*’s photographs, illustrations, graphic art, and other visual images not in the public domain (collectively, “Visual Works”) and contained in the

aforementioned books and periodicals. The individual *amici* and associations (collectively, “*Amici Visual Artists*”) share a strong interest in protecting the copyright in their or their members’ Visual Works in general, and as a direct result of Google’s unlawful practices. To that end, the *Amici Visual Artists* are similarly-situated plaintiffs in a related copyright infringement class action lawsuit brought against Google, pursuant to 17 U.S.C. § 501, now pending before the Honorable Denny Chin, styled The American Society of Media Photographers, Inc. v. Google Inc., Civil Action No. 10 Civ. 2977 (DC) (S.D.N.Y. filed Apr. 7, 2010) (“ASMP Action”). Because this Court’s decision may well have a bearing on the *Amici Visual Artists*’ ability to certify their class in the ASMP Action, the *Amici Visual Artists* also have a strong interest in seeing that this Court affirm the District Court’s decision below certifying the class.

### **SUMMARY OF ARGUMENT**

First, Google’s argument that there exists a conflict of interest between class representatives and certain members of the class, precluding class certification under Federal Rule of Civil Procedure 23(a)(4), fails for a host of reasons. As the District Court correctly found, Google’s survey “evidence” is wholly unreliable and irrelevant. Further, the purported position of opposed class members would amount to advocating that Google’s unlawful infringement continue -- a position that the law will not countenance in determining whether a conflict exists.

Second, Google's own actions in copying and distributing plaintiffs' works en masse without performing the individualized analysis it now avers is required undercuts its position that common questions do not predominate because the District Court must conduct a book-by-book inquiry to determine fair use. The fact that Google itself has moved for summary judgment on fair use, arguing that this defense can be adjudicated on a classwide basis, further undercuts its position. As Google has previously argued, and as the District Court correctly determined, fair use can be addressed through generalized proof and analysis.

Finally, the District Court properly concluded that ownership issues can be addressed at the remedies stage without undue difficulty, and that individualized issues do not predominate for this reason. Indeed, the necessary information is largely publicly available from Copyright Office records.

## **STANDARD OF REVIEW**

This Court reviews the District Court's determination of class certification for abuse of discretion. Brown v. Kelly, 609 F.3d 467, 475 (2d Cir. 2010) (affirming lower court's decision to certify); Shahriar v. Smith & Wollensky Rest. Group, Inc., 659 F.3d 234, 250 (2d Cir. 2011) (same). Under the abuse of discretion standard, this Court reviews factual findings underlying the determination for clear error. See id. This Court also provides greater deference to the District Court in its review of a decision granting certification -- as here -- as opposed to one denying certification. Brown, 609 F.3d at 485; In re Flag Telecom Holdings, Ltd. Sec. Litig., 574 F.3d 29, 34 (2d Cir. 2009) (affirming class certification; where certification granted, "we accord the district court noticeably more deference than when we review a denial of class certification.").

## **ARGUMENT**

### **I**

#### **THE DISTRICT COURT PROPERLY FOUND THAT THE INDIVIDUAL NAMED PLAINTIFFS ADEQUATELY REPRESENT THE CLASS BECAUSE THERE EXISTS NO CONFLICT OF INTEREST.**

Rule 23(a)(4) of the Federal Rules of Civil Procedure requires that class representatives “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). Here, the District Court concluded that they do. See SPA30-32. Indeed, Google itself, when its interests were different and it was advocating that the District Court approve the Amended Settlement Agreement, filed Nov. 13, 2009, Docket No. 770-2 (“Settlement Agreement”), reached the same conclusion -- “[n]o one could seriously question that plaintiffs are adequate representatives of the class members’ interests.” Brief of Google Inc. in Support of Motion for Final Approval of Amended Settlement Agreement, dated February 11, 2010, Docket No. 941 (“Brief in Support of Final Approval”) at 24.

Google now argues that because some class members purportedly feel that they benefit from GBS, the class representatives’ objectives are “fundamentally at odds with a significant portion of the proposed class.” Thus, Google contends the District Court erred in finding that they adequately represent the class. Brief for Appellant, dated November 9, 2012, Docket No. 37 (Case No. 12-3200)

(“Google’s Brief”) at 18-25. Google’s argument -- as the District Court properly found -- is without merit and fails as a matter of law.

“[T]he conflict that will prevent a plaintiff from meeting the Rule 23(a)(4) prerequisite must be fundamental, and speculative conflict should be disregarded at the class certification stage.” In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 145 (2d Cir. 2001) (affirming class certification) (superseded on other grounds); Freeland v. AT & T Corp., 238 F.R.D. 130, 141 (S.D.N.Y. 2006) (same); 5 James William Moore et al., MOORE’S FEDERAL PRACTICE § 23.25[2][b][ii] (3d ed.1998) (to find inadequacy of representation “the conflict must be more than merely speculative or hypothetical”). Here, not only is there no fundamental conflict, there is no legally cognizable one.

**A. Even If There Was Evidence That GBS Benefits Some Class Members, The Illegality Of The Program Renders Any Potential Conflict Irrelevant As A Matter Of Law.**

Google argues as follows:

While Plaintiffs object to [GBS] and seek to enjoin Google’s searchable index and its display of snippets, many absent class members benefit from [GBS] and want to see it continue, because it makes their books more widely known and accessible. That clash of interests between Plaintiffs and a large portion of the class precludes certifying a class here. If Plaintiffs were to prevail, they would deprive many authors of the benefits they obtain from [GBS].

See Google’s Brief at 14.

The library associations who filed an *amicus* brief in support of Google (“*Amici* Libraries”) argue that the scope of statutory damages for which Google could be responsible -- should the District Court ultimately decide in plaintiffs’ favor -- might be so astronomical that GBS may need to be shut down, resulting in a *de facto* injunction and impairing some authors’ interests. See Brief for *Amici Curiae* the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries in Support of Defendant-Google and Reversal, dated November 16, 2012, Docket No. 55 (Case No. 12-3200) (“Libraries’ *Amicus* Brief”) at 7-9.

These conflict challenges are untenable. As an initial matter, the survey “evidence” Google relies upon, as the District Court found and as demonstrated upon this appeal, is fatally flawed. See SPA31-32; Brief for Appellees, dated February 8, 2013, Docket No. 81 (Case No. 12-3200) (“AG’s Brief”) at 21-33. However, even if there was legally sufficient evidence of a conflict, Google’s and the *Amicis* Libraries’ arguments still miss the mark for a host of reasons. First, Google mischaracterizes the scope of injunctive relief sought by Appellees. Appellees do not seek to “dismantle” the GBS program as Google contends. See AG’s Brief at 22-24 (clarifying scope of remedy).

Moreover, as the District Court properly found, a Court cannot, as a matter of law, countenance alleged beneficial unlawful conduct, such as copyright



infringement, in evaluating whether a conflict of interest exists. SPA31 (“[t]hat some class members may prefer to leave the alleged violation of their rights unremedied is not a basis for finding the lead plaintiffs inadequate”). “Adequacy is not undermined where the opposed class members’ position requires continuation of an allegedly unlawful practice.” Ruggles v. Wellpoint, Inc., 272 F.R.D. 320, 338 (N.D.N.Y. 2011); Wilder v. Bernstein, 499 F. Supp. 980, 993 (S.D.N.Y. 1980) (“The fact that some members of the class may be personally satisfied with the existing system and may prefer to leave the violation of their rights unremedied is simply not dispositive of a determination under Rule 23(a)”); 5 James William Moore et al., MOORE’S FEDERAL PRACTICE § 23.25[2][b][iii] (3d ed. 1998) (“[a] court will not refuse to certify a class solely because some of the class members prefer to leave their rights unremedied”); 1 A. Conte, Herbert Newburg, NEWBERG ON CLASS ACTIONS §3:30 (4th ed.) (“[t]he class member who wishes to remain a victim of unlawful conduct does not have a legally cognizable conflict with the class representative”) (citing Jacobi v. Bache & Co., Inc. et al., No. 70 Civ. 3152, 1972 WL 560, \*2 (S.D.N.Y. Feb. 8, 1972) (“[t]he fact that some members of the class may differ as to the desirability of a particular remedy for the anti-trust violation, or even desire the maintenance of the status quo, does not preclude their being included within the class bringing the action”) and Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920, 937 (2d Cir. 1968) (“The fact that some

members of the class were personally satisfied with the defendants’ [alleged unlawful activity] is irrelevant.”)); In re Potash Antitrust Litig., 159 F.R.D. 682, 692 (D. Minn. 1995) (rejecting defendant’s argument regarding inadequacy, where illegally controlled market tended to favor interest of class members; “[t]his is not an interest the law is willing to protect.”).

Google’s and *Amici* Libraries’ entire position is inappropriately premised on the assumption that GBS is lawful. See also Brief of Amici Curiae Academic Authors in Support of Defendant-Google And Reversal, dated November 16, 2012, Docket No. 57 (Case No. 12-3200) at 16 (“There is, in our view, no infringement that requires the grant of injunctive or monetary relief.”) Indeed, it is hard to imagine how anyone could argue straight-faced that should GBS be found unlawful, Google should not be subject to damages and an injunction. Nearly every argument advanced by Google and its supporters, as will be discussed further below, flows from this defective premise -- that the merits have already been decided in Google’s favor.<sup>2</sup> However, at the class certification stage, the truth of plaintiffs’ allegations must be assumed. See Shelter Realty Corp. v. Allied Maint. Corp., 574 F.2d 656, 661 n.15 (2d Cir. 1978) (“it is proper to accept the complaint allegations as true in a class certification motion”); Brooklyn Ctr. for Independence

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<sup>2</sup> Indeed, the *Amici* Libraries’ argument concerning the breadth of potential statutory damages is particularly misplaced. This is not the proper forum to attack the scope of statutory damages available under the Copyright Act. If the *Amici* Libraries feel that the legislated statutory damages are too high, they should raise this matter with Congress.

of the Disabled v. Bloomberg, No. 11 Civ. 6690(JMF), 2012 WL 5438849, \*6 (S.D.N.Y. Nov. 7, 2012) (certifying class; same). Hence, the fact of infringement (unlawful activity) must be assumed at this stage, simply because plaintiffs have pleaded infringement. Accordingly, the purported interest of certain authors in perpetuating an illegal policy for their own benefit -- namely copyright infringement -- is simply not a cognizable reason to find a conflict and deny class certification.

For the foregoing reasons, this Court should affirm the District Court's finding of adequacy pursuant to Rule 23(a)(4).<sup>3</sup>

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<sup>3</sup> Google also incorrectly contends that there are "superior" ways to resolve the issues than through class litigation, such as by "separate cases involving smaller groups of works whose owners really do want their books excluded" or through "individual suits." Google's Brief at 25, n.6. Google fails to explain how either of these alternatives could actually work as a practical matter or how such alternatives would be "superior" as compared to a class action. Google further claims that there is a "sufficient incentive to bring individual suits given the availability of statutory damages and the ability to recover attorneys' fees and costs under the Copyright Act." *Id.* Google is wrong. First, it is preposterous to suggest that individual plaintiffs would sue to recover \$750 in statutory damages on the off chance that the District Court might exercise its discretion under the Copyright Act and award them 100% of their legal fees and costs (as almost any lower award would make the litigation unprofitable). See Weber v. Goodman, 9 F. Supp. 2d 163, 170-71 (E.D.N.Y. 1998) (class action superior method, where only small damages award available to individual plaintiffs under Fair Debt Collection Practices Act); *cf.* Bresson v. Thomson McKinnon Sec. Inc., 118 F.R.D. 339, 345 (S.D.N.Y. 1988) (class action superior method, where average investment amounted to \$8600 in investors' action against brokerage firm). Further, Google fails to cite a single case in the copyright context. Google's Brief at 25, n.6 (citing Hyderi v. Wash. Mut. Bank, 235 F.R.D. 390, 404 (N.D. Ill. 2006)) (discussing availability of statutory damages under Real Estate Settlement Procedures Act). Moreover, even as Hyderi indicates, "the availability of attorneys fees and costs is not a *per se* bar against class certification." 235 F.R.D. at 404; see also Wu v. Pearson Educ., Inc., 277 F.R.D. 255, 271 (S.D.N.Y. 2011) (rejecting defendant's argument, in copyright infringement action, superiority not met due to "availability of attorney fees and statutory damages," because "[t]his fact alone does not determine the issue of superiority.").

## II

### **THE DISTRICT COURT PROPERLY CERTIFIED THE CLASS UNDER RULE 23(B)(3).**

Certification is permissible under Rule 23(b)(3), where “questions of law or fact common to class members predominate over any questions affecting only individual members.” See Fed. R. Civ. P. 23(b)(3).<sup>4</sup> Predominance is established,

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<sup>4</sup> The *Amici* Libraries also take issue with the District Court’s finding of commonality under Rule 23(a)(2). See Libraries’ *Amicus* Brief at 9-17. However, this argument is waived because Google not only failed to raise it in its opening brief, but agreed below that commonality was satisfied. See SPA29 (“Google does not dispute that the proposed class satisfies the numerosity, commonality, and typicality requirements of Rule 23(a).”); Conn. Bar Assoc. v. United States, 620 F.3d 81, 88 n.7 (2d Cir. 2010) (challenge to statutory provision waived because not raised at district court level) (citing In re Enron Corp., 419 F.3d 115, 126 (2d Cir. 2005) (“federal appellate courts will generally not consider an issue or argument not raised in the district court”)); JP Morgan Chase Bank v. Altos Hornos De Mexico, S.A. DE C.V., 412 F.3d 418, 428 (2d Cir. 2005) (“[a]rguments not made in an appellant’s opening brief are waived even if the appellant pursued those arguments in the district court or raised them in a reply brief”).

However, even if this Court were to consider the *Amici* Libraries’ argument -- which it should not -- the commonality prong has been met. To meet the requirement of commonality, class members must “have suffered the same injury” and “their claims [must] depend on a common contention . . . that is capable of classwide resolution.” SPA23-24 (citing cases). “Even a single question of law or fact common to the members of the class will satisfy the commonality requirement.” Wal-mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2562 (2011); Engel v. Scully & Scully, Inc., 279 F.R.D. 117, 128 (S.D.N.Y. 2011) (commonality met, where “[t]he critical questions of the defendant’s business practices and willfulness are common to all class members, and are likely to generate common answers which drive the resolution of the litigation”; “A single common issue of law may be sufficient to satisfy the commonality requirement . . .”).

The *Amici* Libraries misinterpret and misapply Wal-mart. In Wal-mart, the Supreme Court found commonality was not satisfied because of lack of proof of a “general policy of discrimination.” Id. at 2553; see also id. at 2547 (“Pay and promotion decisions at Wal-mart are generally committed to local managers’ broad discretion, which is exercised in a largely subjective manner.”) (internal quotations and citation omitted); Jermyn v. Best Buy Stores, L.P., 276 F.R.D. 167, 172 (S.D.N.Y. 2011) (denying motion to decertify class; “[h]ad the [Wal-mart] plaintiffs actually alleged a general, non-discretionary corporate policy disfavoring women and offered some proof that such a policy existed, then obviously the case could have and would have proceeded as a class action.”). Here, Google’s GBS policies are as global as can be imagined. Further, as discussed in Section IIA, *infra*, it is absurd for the *Amici* Libraries to

if the legal or factual questions that can be resolved through generalized proof “predominate over those issues that are subject only to individualized proof.” In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d at 136. For the reasons discussed below, the District Court properly certified the class pursuant to Rule 23(b)(3).

**A. Common Questions Predominate With Respect To Google’s Fair Use Defense.**

The District Court correctly found that Google’s affirmative defense of fair use can be resolved on a classwide basis. SPA32-33. For purposes of determining whether the use of a copyrighted work is “fair,” a Court must consider four statutory factors:

- (i) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (ii) the nature of the copyrighted work;
- (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

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suggest that the fair use inquiry can be decided on a classwide basis by only analyzing factor one, and at the same time argue that such a classwide resolution of the transformative use question under factor one is not a common answer. How could an across the board finding as to fair use not be a common answer? In any event, common questions capable of generating common answers include, for example, whether Google’s use is a fair use (as all four factors can be analyzed on a classwide basis, a position Google itself has taken, see Defendant Google Inc.’s Memorandum of Points and Authorities In Support of Its Motion For Summary Judgment or in the Alternative Summary Adjudication, dated July 27, 2012, Docket No. 1032 (“Fair Use Brief”) at 2-3), whether Google’s use is commercial (which Google continues to deny, see Defendant Google Inc.’s Answer to Plaintiffs’ Fourth Amended Complaint, Docket No. 985, at ¶¶ 5, 33), and whether Google’s other asserted statutory defenses are applicable (Id., Fifth Defense).

(iv) the effect of the use upon the potential market for or value of the copyrighted work.

See 17 U.S.C. § 107(1-4). This test requires that all four factors be considered and weighed together. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994) (“Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”).

Google’s stance on fair use and that of the *amici* supporting it is filled with internal inconsistencies and is a paradigm of seeking to have one’s cake and eat it, too. First, they acknowledge that all four factors of the fair use test must be independently evaluated. See Fair Use Brief at 20 (citing four factors “to be considered”); Google’s Brief at 26-27, 35 (same; “fair use analysis requires the district court to balance each factor in combination”); Libraries’ *Amicus* Brief at 12-13 (“The Copyright Act requires *all* four factors to be considered together in determining whether the use made of a work in any particular case is fair. No single factor may be considered in a vacuum ... . A single fair use factor viewed in isolation, even if it could be decided on a classwide basis, has no independent significance and will not generate common *answers* to the question of fair use.”). They then assert, upon this Appeal that factors two through four must be evaluated on a book-by-book basis and cannot be evaluated based upon generalized proof. See Google’s Brief at 29 (“Three of the four statutory fair use factors require

careful individual analysis before Google’s fair use defense can be denied: ‘the nature of the copyrighted work’ (factor two), ‘the amount and substantiality of the portion used’ (factor three), and ‘the effect of the use upon the potential market for or value of the copyrighted work’ (factor four).”).

Thereafter, Google’s and its supporters’ arguments are rife with inconsistencies. Initially, after having argued that all four factors must be evaluated together, and for individual, book-by-book review, they contend in the same breadth that the District Court could find the entire GBS project a fair use by considering factor one in isolation -- the transformative nature of the use.<sup>5</sup> See Google’s Brief at 28, 29-30 (“Google has argued, in turn, that the transformative nature of [GBS] and the significant public benefits of the project render the entire project fair use and defeat the infringement claim of every member of the proposed class. . . . If Google’s argument based on the first factor (along with the overall, beneficial nature of the project) does not uniformly prevail, its fair use defense also turns on book specific reasons why its uses of individual books are fair.”); Libraries’ *Amicus* Brief at 14, n.5 (“Of course, if the District Court were to find that the entire GBS project is legitimate based on the transformative purpose and

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<sup>5</sup> Mirabile dictu, Google and its supporting *amici* somehow ignore that under their own reasoning the District Court could find that the entire GBS project is *not* fair use by deciding it is *not* transformative. They assume that the District Court would necessarily have to evaluate the last three factors on a book-by-book basis, giving GBS a second bite at the apple. As noted previously, the arguments advanced by Google and its supporters arrogantly assume victory on the merits at every turn.



character of the use, then it could find fair use without having to consider each individual work.”). Such audacity is breathtaking. So contending, they somehow ignore when convenient both their own prior arguments and the most recent and controlling decision of the Supreme Court on fair use in Campbell, which counsels that no factor can be evaluated in isolation. 510 U.S. at 578.

Further, Google, in its pending motion before the District Court seeking summary judgment as to its fair use defense, avers that all four factors can be *analyzed generally on a classwide basis*. See Fair Use Brief at 2-3. For instance, factor two (the nature of the work), which Google argues here requires a book-by-book analysis (Google’s Brief at 33-34), can, when convenient for Google upon its motion for summary judgment, be evaluated generically: “the Google Books corpus contains works of every type, and thus the nature of the works does not weigh one way or the other on a classwide basis.” Fair Use Brief at 2.

Remarkably, Google attempts to obfuscate this point and contend that only plaintiffs have taken the position that fair use can be decided in a global, generalized manner: “[p]laintiffs have nonetheless sought to litigate their claims on an all-or-nothing basis, arguing that [GBS] is a ‘single program’ that is either unlawful or not. Dkt. No. 1008, at 2.” Google’s Brief at 28. Google neglects to inform this Court that it has taken the precisely same position in its own summary judgment papers filed with the District Court on the same day as plaintiffs’. It is



ludicrous for Google to suggest that fair use can be decided on summary judgment on a classwide basis, and in the same breath argue that the existence of individualized factual issues as to this same fair use defense precludes class certification. Otherwise put, Google's position upon this Appeal as to the need for individualized proof and a book-by-book evaluation, entirely undercuts its competing stance that the District Court can grant it summary judgment on fair use on a classwide basis. Google cannot have it both ways. Either a book-by-book inquiry is required, or it is not.

The hypocrisy does not end with advancing conflicting positions on different motions for different purposes. Google's current position requiring a book-by-book analysis to adjudicate fair use is particularly incongruous, given that Google has copied and distributed plaintiffs' works en masse without performing the individualized analysis it now alleges is required. Indeed, Google's consistent position to date has been that its actions are categorically protected as fair use irrespective of the individual work at issue. Yet, as the District Court correctly found:

[G]iven the sweeping and indiscriminating nature of Google’s unauthorized copying, it would be unjust to require that each affected association member litigate his claim individually. When Google copied works, it did not conduct an inquiry into the copyright ownership of each work; nor did it conduct an individualized evaluation as to whether posting “snippets” of a particular work would constitute “fair use.” It copied and made search results available en masse. Google cannot now turn the tables and ask the Court to require each copyright holder to come forward individually and assert rights in a separate action. Because Google treated the copyright holders as a group, the copyright holders should be able to litigate on a group basis.

SPA21.

Further, at bottom, Google’s position here, like that on ownership issues addressed in the next section, is that if one engages in copyright infringement on a grand enough scale, copyright holders are left with no effective remedy. The combination of individualized issues, in large part the result of the scope of the infringement, renders class certification unworkable and individual rightsholders for all practical purposes powerless to obtain redress on their own. In sum, according to Google, had it infringed 100 books group redress would be possible. Because it has infringed millions, it is not. This cannot be the law.

While Google is correct to maintain that the fair use inquiry is a factual one that must be evaluated on a case-by-case basis, this does not mean the evaluation must occur on the micro, book-by-book level. It does not mean that the Court must separately analyze each work, any more than Google did when it copied them all

without discrimination. Campbell stands for the proposition that there are no “bright-line rules” in the fair use context, and that balancing the factors will vary with every situation. 510 U.S. at 577-79. That situation here is Google’s mass copying and display of copyrighted works through GBS. To be sure, Courts often engage in a general, categorical fair use analysis where defendant’s conduct is pervasive, as here. See, e.g., UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 350-52 (S.D.N.Y. 2000) (rejecting fair use defense after applying factors to entire website (and not individual CDs or songs) permitting users to download “tens of thousands of popular CDs” without permission); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015-19 (9th Cir. 2001) (same). The District Court correctly concluded that this is how GBS should be evaluated in this Action. See SPA32-33 (“Every potential class member’s claim arises out of Google’s uniform, widespread practice of copying entire books without permission of the copyright holder and displaying snippets of those books for search. Whether this practice constitutes copyright infringement does not depend on any individualized considerations.”).

Turning to Google’s discussion of the elements of the fair use defense, Google itself contends, as discussed above, that the first factor can be addressed through generalized proof. Google’s Brief at 29-30.

As to the second factor -- “the nature of the copyrighted work” -- the District Court rightly concluded that the use of subclasses could obviate the need for individualized determinations at the book-by-book level. See SPA33 (“[t]he question of ‘fair use’ may be evaluated on a sub-class-wide basis. The Court would determine whether the defense applies to a particular type of book, obviating the need to evaluate each book individually”). Google has failed to demonstrate why the District Court’s proposed use of sub-classes (such as by genre of book) would not work, and merely faults the District Court for failing to “explain” how the use of sub-classes would obviate the need for individual determinations. See Google’s Brief at 35-36. However, the District Court’s failure to define sub-classes at this stage is of no moment. See Fed. R. Civ. P. 23(c)(1)(C) (“An order that grants or denies class certification may be altered or amended before final judgment”); Marisol A. v. Giuliani, 126 F.3d 372, 379 (2d Cir. 1997) (affirming class certification but instructing District Court to define subclasses; “[t]he district court may allow additional discovery and hold evidentiary hearings in order to determine which classifications may be appropriate.”). “Rule 23 gives the district court flexibility to certify subclasses as the case progresses and as the nature of the proof to be developed at trial becomes clear.” Id. at 379; Freeland, 238 F.R.D. at 142 (same).

On the third factor -- the amount and substantiality of the portion used -- Google does not dispute that it copied entire books for its own use and distributed entire digital copies of books to libraries. This uniform practice of wholesale copying and distribution -- regardless of what was ultimately made publicly available on GBS -- weighs in favor of plaintiffs. See Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc., 312 F.3d 94, 99 (2d Cir. 2002) (“Though not an absolute rule, generally, it may not constitute a fair use if the entire work is reproduced”) (citing Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 109 (2d Cir. 1998)); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 926 (2d Cir. 1995) (same); Weissmann v. Freeman, 868 F.2d 1313, 1325 (2d Cir. 1989) (same).

Google attempts to cloud and misdirect the issue, arguing that the Court should compare the limited “snippets” text returned in response to a *single* search against that quantity of text in the book as a whole. See Google’s Brief at 32-33. This is an apples and oranges comparison. GBS is not a static device where only one search is performed returning only one group of snippets. The snippets displayed change in response to the search. Over time, GBS will display the vast majority of a book to the public in the form of different snippets generated by different searches.

As to the fourth factor -- market impact -- Google focuses almost exclusively on the purported benefits of GBS. See Google’s Brief at 30-32.

However, favorable market impact is not enough. Judge Leval, in his seminal work on fair use, provides the following example:

If, for example, a film director takes an unknown copyrighted tune for the score of a movie that becomes a hit, the composer may realize a windfall from the aftermarket for his composition. Nonetheless, if the taking is unjustified under the first factor, it should be considered infringement, regardless of the absence of market impairment.

Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1124 n.84 (1990) (internal citations omitted). Such purported benefits are insufficient in and of themselves, whether they inure to the benefit of copyright holders or the public at large. “The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance.” Iowa State Univ. Research Found., Inc., v. Am. Broad. Cos., 621 F.2d 57, 61 (2d Cir. 1980); see also Infinity Broad. Corp., 150 F.3d at 110 (“societal benefit does not guarantee a finding of fair use”).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See SA13 ([REDACTED])

[REDACTED]

[REDACTED]

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

**B. The District Court Properly Found That Individual Ownership Issues Do Not Predominate.**

The District Court properly concluded that ownership issues can be addressed at the remedies stage without undue difficulty, and that individualized issues do not predominate for this reason. See SPA17-18, 33. The submission of evidence to establish membership in a class is common in class actions. See AG’s Brief at 51-53, 56-59. Google offers no rationale for treating this case differently and requiring consideration of class membership issues at the certification, as opposed to the remedies, stage.

Further, Courts routinely consider far more complicated individualized issues at the remedies stage in class actions than any presented here, including individual damages assessments.<sup>6</sup> See In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d at 139 (collecting cases); Trautz v. Weisman, 846 F. Supp. 1160, 1167 (S.D.N.Y. 1994); Maywalt v. Parke & Parsley Petroleum Co., 147 F.R.D. 51, 56 (S.D.N.Y. 1993).

In another example of Google's inconsistency in support of its chameleon legal positions, Google itself did not view ownership issues as overly complicated when it negotiated and endorsed the Settlement Agreement later rejected by the District Court, which sets forth procedures for establishing ownership and submitting claims. See Settlement Agreement at Article XIII. When Google found such procedures beneficial in the context of a favorable settlement, Google did not view the sort of individualized ownership issues of which it now complains as copious or insurmountable. Now that the settlement is off the table, those issues have become so.

In addition, as Appellees argue at great length, proof of ownership is available from readily accessible objective evidence, vitiating the need for individualized determinations. See AG's Brief at 43-59. A copyright registration is *prima facie* evidence of ownership. In fact, when its interests were different and

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<sup>6</sup> Of course, such damages assessments are not implicated here, where the class has elected minimum statutory damages.



it was advocating approval of the Settlement Agreement, Google itself noted that copyright records are easily searchable and submitting claims not particularly burdensome or onerous. See Brief in Support of Final Approval at 61-63 (“For Books registered since 1978, registration records are easily searchable on the website of the United States Copyright Office, [www.copyright.gov](http://www.copyright.gov).” . . . [For Books registered prior to 1978], Google scanned the entirety of the *Catalog of Copyright Entries* . . . . Thus anyone - both Rightsholders and members of the public - can research the registration status of a pre-1978 book electronically.”).

Google mistakenly now contends, while acknowledging that this presumption arises and is thereafter rebuttable, that the burden remains on plaintiffs throughout. See Google’s Brief at 46-47, n.13. To the contrary, the burden shifts to defendant -- here Google -- to show that the facts contained in the certificate are not true and that ownership should not be presumed. Fonar Corp. v. Domenick, 105 F.3d 99, 104 (2d Cir. 1997) (“A certificate of copyright registration is prima facie evidence that the copyright is valid. Moreover, possession of a registration certificate creates a rebuttable presumption that the work in question is copyrightable. [Plaintiff’s] proffer of its certificate of copyright registration thus shifts to [defendant] the burden of proving the invalidity of the copyright, and there the burden rests, unless the presumptions are rebutted.”) (internal quotations and

citations omitted); L.A. Printex Indus., Inc. v. Le Chateau, Inc., No. 11 CIV. 4248 LTS, 2012 WL 987590, \*3 (S.D.N.Y. Mar. 23, 2012) (same).

The *Amici* Libraries make the additional argument that individual ownership issues would make an injunction prohibitively difficult to administer. See Libraries' *Amicus* Brief at 22-25. They are mistaken for a host of reasons. First, it is Google's burden, as the infringer, to find a way to comply with any injunction that might be issued. See Triad Sys. Corp. v. Se. Express Co., 64 F.3d 1330, 1337 (9th Cir. 1995), *superseded in part on other grounds by statute*, 17 U.S.C. § 117(c) ("Putting this burden on [defendant] is appropriate because [defendant] is the infringer."); Goto.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1211 (9th Cir. 2000) (same); Columbia Pictures Indus., Inc. v. Fung, No. CV 06-5578 SVW (JCx), 2010 U.S. Dist. LEXIS 91169, \*19 (C.D. Cal. May 20, 2010) (same).

Next, Courts around the nation have found that injunctive decrees -- in particular in the copyright context -- can extend beyond those parties before the Court. See Music v. Heiman, No. 09-cv-341-bbc, 2010 WL 1904341, \*5-\*6 (W.D. Wis. May 11, 2010) ("the majority of courts that have decided cases similar to this one have found that the broader injunction covering all ASCAP music is appropriate in cases in which the copyright infringer has demonstrated his unwillingness to obtain a license"); cf. Apple Inc. v. Psystar Corp., 673 F. Supp. 2d 943, 953 (N.D. Cal. 2009) ("an injunctive decree can reach beyond the four corners

of the litigated copyrighted works to cover non-litigated items of similar character”); Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1392 (6th Cir. 1996) (“The weight of authority supports the extension of injunctive relief to future works.”); Warner Bros. Entm’t Inc. v. Carsagno, No. 06 CV 2676(NG)(RLM), 2007 WL 1655666, \*5 (E.D.N.Y. June 4, 2007) (same, citing extensive authority); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1154 n.1 (9th Cir. 2007) (“[T]he Copyright Act gives courts broad authority to issue injunctive relief. See 17 U.S.C. § 502(a). Once a court has jurisdiction over an action for copyright infringement under section 411, the court may grant injunctive relief to restrain infringement of any copyright, whether registered or unregistered.”); Olan Mills, Inc. v. Linn Photo Co., 23 F.3d 1345, 1349 (8th Cir. 1994) (same).

**CONCLUSION**

For all of the reasons discussed herein and in the remainder of the record, this Court should affirm the District Court's Order certifying the class.

Dated: New York, New York  
February 27, 2013

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(A)**

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d), because this Brief contains 6,993 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6), because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman.

Dated: New York, New York  
February 27, 2013

*/s/Mark A. Berube*  
Mark A. Berube

**EXHIBIT B**  
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**EXHIBIT C**  
**[FILED UNDER SEAL]**

**EXHIBIT D**  
**[FILED UNDER SEAL]**