

No. 12-3200

IN THE UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE AUTHORS GUILD, INC., et al.,

Plaintiffs-Appellees,

v.

GOOGLE, INC.,

Defendant-Appellant.

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 Before the Honorable Denny Chin

**OPPOSITION TO AMICI MOTION TO FILE AMENDED AMICUS
BRIEF AND TO SUPPLEMENT THE APPELLATE RECORD**

The sole purpose of Amici’s motion is to place documents before this Court that Amici obtained in a different case and that were not submitted below or in this appeal by Plaintiffs-Appellees. Amici Mot. 5-6. Amici concede that these documents were not part of the record below, and are therefore not part of the appellate record. *Id.*; *see also* Fed. R. App. P. 10(a) (“[T]he record on appeal” includes “the original papers and exhibits filed in the district court[.]”). Amici concede as well that their request is “unusual” and that appellate courts grant such requests only in “exceptional circumstances.” Amici Mot. 6 (quoting *Wiggins*

Bros., Inc. v. Department of Energy, 667 F.2d 77, 83 (Temp. Emer. Ct. App. 1981); *see also id.* (“in the absence of exceptional circumstances, amicus curiae is not entitled to introduce additional evidence (particularly evidence offered in another action after entry of the judgment which is the subject of this appeal)”). Amici do not, however, identify anything remotely exceptional about the circumstances here.

Ordinarily, this Court will allow parties to supplement the record only with “material” documents that were “omitted from or misstated in the [district court] record by error or accident,” which is the sole circumstance described in the Federal Rules of Appellate Procedure. Fed. R. App. P. 10(e)(2); *see, e.g., Gasser v. Amboy Nat’l Bank*, No. 11-3773, Doc. No. 216, at 2 (2d Cir. Jan. 3, 2013) (“Motions to supplement the record are governed by Rule 10(e)[.]”); *Tehan v. Sacred Heart Univ.*, 388 F. App’x 42, 45 (2d Cir. 2010) (A party seeking to supplement the record “must satisfy the requirements of Fed. R. App. P. 10(e)(2) by demonstrating that such evidence was erroneously or accidentally omitted from the record.”); *Jeffreys v. United Techs. Corp.*, 357 F. App’x 370, 372-373 (2d Cir. 2009) (denying motion to supplement for failure to show that the supplemental documents “were omitted from or misstated in the record”); *Leibowitz v. Cornell Univ.*, 445 F.3d 586, 592 n.4 (2d Cir. 2006) (declining to supplement the record with new evidence where appellant did not “provide evidence of an erroneous or

accidental omission of material evidence”). Amici do not contend that any error or accident occurred here.

Instead, Amici argue that their request is “exceptional” because the documents at issue are “highly relevant,” and were produced in a related case, but not below. Amici Mot. 7. But that hardly makes their request exceptional. Parties regularly attempt to expand the appellate record with documents they believe are relevant to issues raised on appeal, and this Court regularly rebuffs those attempts. *See, e.g., United States Polo Ass’n v. PRL USA Holdings, Inc.*, 2013 WL 490796, at *5 (2d Cir. Feb. 11, 2013); *DeBoe v. Du Bois*, 2012 WL 5908447, at *3 n.1 (2d Cir. 2012); *Weaver v. Indymac Fed. Bank, FSB*, 488 F. App’x 522, 523 (2d Cir. 2012); *Weisshaus v. Port Auth. of N.Y. & N.J.*, 2012 WL 4123185, at *3 (2d Cir. Sept. 20, 2012). That includes cases in which the documents were obtained in another case. *See Gasser*, Doc. No. 216, at 2 (denying motion to add transcript from a deposition taken in another case); *United States v. Allen*, 472 F. App’x 35, 37 (2d Cir. 2012) (denying motion to add trial transcripts from a different proceeding). Given how regularly such attempts are made, it is difficult to imagine any request less “exceptional” than the one Amici now make.

Moreover, Amici are incorrect that the documents they seek to present are relevant to the issues on appeal. Amici first claim (at 8-9) that the documents are relevant because they purportedly prove that Google Books does not provide

market benefits to authors, which is relevant to the fourth fair use factor. But that is not what the documents show, and in any event, Amici's claim confuses the merits of Google's fair use defense with class certification. At issue in this appeal is *how* fair use will be adjudicated, not *whether* Google's fair use defense should be upheld. In its opening brief, Google pointed to considerable evidence (at 30-32)—including testimony from the Executive Director of the Authors Guild—that different authors benefit in different ways and to different extents from Google Books. Amici's documents could not in any way relieve the district court of the need to consider such individual evidence before rejecting Google's fair use defense. Accordingly, the documents are irrelevant to the only fair use-related question the Court must answer in this appeal: whether individual fair use issues preclude a finding of predominance under Rule 23(b)(3).

Amici also contend (at 9-11) that the documents are relevant to Google's argument that Appellees-Plaintiffs cannot adequately represent class members who benefit from Google Books and do not want to see it undone. But in their own amended amicus brief, Amici do not even refer to or cite these documents in connection with the adequacy issue. *See* Berube Decl., Ex. A, at 4, 7-12 (discussing adequacy without referencing or citing new documents). It is therefore difficult to see what relevance the documents could have to the Court's consideration of the adequacy issue.

Finally, Amici accuse Google (at 3-5, 7-8) of improperly withholding these documents from Plaintiffs-Appellees in discovery. Even putting aside the propriety of non-parties raising a supposed discovery dispute and asking an appellate court to adjudicate it, there is absolutely no merit to Amici’s accusation. Amici claim (at 3-4) Google should have produced these documents in response to four document requests. But the first three of those requests were made during the initial period of document discovery, which ended in 2007 (*see* Gratz Decl. ¶ 2), before any of Amici’s documents were created (in 2008 and 2011) (*see* Berube Decl., Ex. B). And when discovery resumed in 2011, the parties agreed that Google would not be required to supplement its responses to earlier document requests. *See* Gratz Decl. ¶ 3. As for the fourth request, Google only agreed to “produce formal corporate analyses responsive to th[at] request,” and none of Amici’s documents meet that description. *See* Berube Decl., Ex. D, at 7. In short, Amici have their facts wrong—unsurprisingly, since they were not involved in any of the relevant discovery in this case.

Amici are free to submit an amicus brief that does not refer to these documents, which in fact, they have already done with Google’s consent (*see* Doc. No. 107). It would, however, be fundamentally unfair to allow Amici to inject new documents into the closed record of this appeal, without Google having had an

opportunity to respond with new documents of its own. Amici's motion should be denied.

Dated: March 11, 2013

Respectfully submitted,

/s/ Seth P. Waxman

SETH P. WAXMAN

WILMER CUTLER PICKERING

HALE AND DORR LLP

1875 Pennsylvania Avenue, N.W.

Washington, D.C. 20006

(202) 663-6000

seth.waxman@wilmerhale.com

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on March 11, 2013. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Seth P. Waxman

SETH P. WAXMAN

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that I electronically filed a pdf version of the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on March 11, 2013. Prior to transmittal, the pdf was scanned for viruses and no viruses were detected.

/s/ Seth P. Waxman

SETH P. WAXMAN