

Case No. 12-3200

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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.

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

**REPLY MEMORANDUM IN SUPPORT OF 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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Taback, Leland Bobbe, John Francis Ficara
and David W. Moser*

*Amici Curiae*¹ appearing through the undersigned counsel, respectfully submit this Reply Memorandum in further support of their Motion for leave to file an amended *Amicus* Brief under seal and to submit a Supplemental Appendix in support thereof consisting of three documents that were produced in the ASMP Action against Google. For all of the reasons set forth herein, in the Motion, in the 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 Court grant the Motion in its entirety.

ARGUMENT

I

COURTS OF APPEAL PERMIT AMICI TO SUPPLEMENT THE RECORD ON APPEAL WHERE EXCEPTIONAL CIRCUMSTANCES EXIST.

The Court should grant *Amici Curiae*'s requested relief because of the exceptional circumstances presented by the Motion, namely that the additional documents in the Supplemental Appendix are both highly relevant and could not have been originally included in the record because they were withheld from Plaintiffs-Appellees below despite being called for in discovery.

In opposition, Google claims that “[o]rdinarily, this Court will allow parties to supplement the record only with ‘material’ documents that were ‘omitted from

¹ Terms not defined herein shall have the meaning ascribed to them in the Motion for Leave to File an Amended sealed *Amicus* Brief and Supplemental Appendix (“Motion”) and the Declaration of Mark A. Berube, Esq., dated February 27, 2013.

or misstated in the (district court) record by error or accident'" Opp'n at 2. Google then goes on to correctly state that "*Amici* do not contend that any error or accident occurred here." *Id.* at 3. Google's insinuation that the Court will only permit supplementation of the record on appeal where an error or accident has occurred is incorrect. In fact -- and as recognized by Google's own authority -- the Court may also permit supplementation in "extraordinary circumstances." *See, e.g., Weaver v. Indymac Fed. Bank, FSB*, 488 F. App'x 522, 523 (2d Cir. Nov. 21, 2012) (noting absence of "extraordinary circumstances" as reason for refusing to permit supplementation of record); *Weisshaus v. Port Auth. of N.Y. & N.J.*, No. 11-4934, 2012 WL 4123185, *3 (2d Cir. Sept. 20, 2012) (same).

Here, and as explained in the Motion, *Amici Curiae* contend that the requisite "extraordinary circumstances" exist because the documents at issue are highly relevant to central issues in this Appeal and because they could not have been included in the record by Plaintiffs-Appellees since Google did not produce them during discovery. *See* Motion at 5-11. The present circumstances make this Motion different from all of the authorities cited by Google -- many of which deal with situations in which the new evidence did not even exist at the time of the District Court's decision and none of which deal with a situation where evidence was improperly withheld during discovery thereby precluding its inclusion in the record. *See U.S. Polo Ass'n v. PRL USA Holdings, Inc.*, No. 12-1346-cv, 2013 WL

490796, *5 (2d Cir. Feb. 11, 2013) (denying motion to supplement record with material not “even in existence” at time of district court’s decision); Order, *Gasser v. Amboy Nat’l Bank*, No. 11-3773 (2d Cir. Jan. 3, 2013) (Docket No. 216), at 2 (appellant sought to include deposition transcript in record that occurred seventeen months after hearing in district court); *Weaver*, 488 F. App’x at 523 (no extraordinary circumstances presented); *Weisshaus*, 2012 WL 4123185, at *3 (same); *U.S. v. Allen*, No. 10-4798-cr, 472 F. App’x 35, 37 (2d Cir. Mar. 30, 2012) (denying motion to supplement record with new material created at trial that took place after trial upon which appeal based “[b]ecause the proposed new materials could not have been part of the district court record”).

Google’s reliance upon *DeBoe v. Du Bois*, No. 12-53, 2012 WL 5908447 (2d Cir. Nov. 27, 2012), is similarly misplaced. *DeBoe* concerned a motion to strike where a party included material in its brief that was not in the record without first requesting and obtaining leave to do so. 2012 WL 5908447, at *3 n.1. In stark contrast, *Amici Curiae* timely filed the Brief and filed the present Motion to obtain leave from the Court to file the Sealed Brief and Supplemental Appendix.

Moreover, each of the cases upon which Google relies concerns a situation in which a *party* is attempting to supplement the record. Here, however, it is not a party seeking to supplement the record, but *Amici Curiae*. In opposition, Google entirely ignores all of the authority *Amici Curiae* presents showing that Circuit

Courts can and do permit *amici curiae* to submit supplemental appendices in support of their *amicus* briefs. See, e.g., Brief for Respondent-Appellee, *Levine v. Menifee*, 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 panel granted *amicus curiae* permission to supplement record with new evidence).

Where, as here, exceptional circumstances are present and the evidence existed but was unavailable to Plaintiffs-Appellees for inclusion in the record, the Motion should be granted in its entirety.

II

THE DOCUMENTS IN THE SUPPLEMENTAL APPENDIX SHOULD HAVE BEEN PRODUCED IN DISCOVERY.

Google's explanation for its failure to produce the documents in the Supplemental Appendix is unconvincing and should be rejected.

In response to *Amici Curiae*'s assertion that Google should have produced the documents in the Supplemental Appendix in the AG Action, see Berube Decl.

Ex. C. at 9-10, and Ex. D. at 7, Google now claims that the parties limited the scope of production in the AG Action. *See* Opp'n at 5; Declaration in Opposition to Amici Motion to File Amended Amicus Brief and to Supplement the Appellate Record, dated March 8, 2013 ("Gratz Decl'") at ¶¶ 2-3.

Specifically, Google states that "the parties agreed that Google would not be required to Supplement its responses to earlier document requests . . . ," Gratz Decl. at ¶ 3, thereby obviating Google's obligation to continue producing documents responsive to Request Nos. 11, 12 and 14 of Plaintiffs' First Request for the Production of Documents and Things ("First Set of RFP").² *See* Berube Decl. Ex. C. Google further now claims that it only agreed to "produce formal corporate analyses responsive to [Request No. 6 of Plaintiffs' Third Request for the Production of Documents and Things upon the Plaintiffs-Appellees], and that none of Amici's documents meet that description." Opp'n at 5.

Even assuming that Google's portrayal of the parties' discovery agreement to produce a far more limited set of documents than originally requested is accurate, [REDACTED]

² At the time the Motion was filed, counsel to *Amici Curiae* had no knowledge of Google's and Plaintiffs-Appellees' purported agreement as described in the Gratz Declaration. *Amici Curiae* find it surprising that such an agreement, alleviating Google of its obligation to supplement its document production in response to the First Set of RFP, was not memorialized in a contemporaneous writing. Regardless, and as set forth below, two of the three documents in the Supplemental Appendix are called for by document requests Google admits it is obligated to produce documents in response to.

[REDACTED]

[REDACTED] See Berube Decl. Ex. B at SA1-22, 25-28. Google’s attempt to cast these documents as something other than what they plainly are -- and thus evade its purportedly already narrowed discovery obligations -- should not be countenanced.

III

THE DOCUMENTS IN THE SUPPLEMENTAL APPENDIX ARE HIGHLY RELEVANT TO THIS APPEAL.

The foundation of Google’s entire brief is premised upon the benefit Google Books offers to authors and the public at large. *See, e.g.*, Brief for Appellant (“Google’s Brief”) at 1 (“Google Books thus offers enormous benefits to authors and readers and to the progress and diffusion of human knowledge.”); 2 (“[t]he transformative nature of Google Books and the fact that, as a general matter, it makes books more accessible, more likely to be read and cited, and more likely to be sold render the entire project fair use.”); 9-11 (“Google Books Benefits Authors”); 14 (“many absent class members benefit from the Google Books project and want to see it continue, because it makes their books more widely known and accessible”); *id.* (“a survey of authors showed that a majority of those interviewed supported Google’s scanning of their books and the inclusion of their books in snippet view . . .”); 15; 17-18; 20-23; 25; 26-36.

Google categorically argues that its fair use defense should be found to defeat the claims of the class, without the need for any individual, work-by-work analysis, because Google Books is so transformative and beneficial to authors and the public. Google’s Br. at 28 (“the transformative nature of Google Books 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.”).

Relying upon its survey, Google further argues that even if its categorical assertion of fair use is rejected, its fair use defense should prevail under a factor-four analysis of market impact “which often carries the most weight” because “[t]here are many different ways Google Books may provide market benefits to an author that cannot be dismissed on a classwide basis.” Google’s Br. at 30.

[REDACTED]

[REDACTED] Berube Decl. Ex. A at 23-24. [REDACTED]

[REDACTED]

[REDACTED] *Id.* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³ Accordingly, these documents are plainly relevant to central issues on this Appeal as addressed in Google’s Brief, and the Court should consider these relevant documents.⁴

³ Google disingenuously argues that these documents are not relevant because “[a]t issue in this appeal is *how* fair use will be adjudicated, not *whether* Google’s fair use defense should be upheld” and further that the “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. *See* Opp’n at 3-4 (emphasis in original). [REDACTED]

⁴ Finally, as to Google’s argument that these documents are not relevant because *Amici Curiae* do not “cite to these documents in connection with the adequacy issue,” Opp’n at 4, Google relies upon the same “evidence” of the purported benefits of snippet view books, its survey, to support its arguments on adequacy and fair use. Accordingly, [REDACTED]

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
March 18, 2013

Respectfully submitted,

By: /s/Mark A. Berube

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 2013, I caused the redacted version of the foregoing Reply Memorandum in Support of *Amici's* Motion for Leave to File an Amended Sealed Amicus Brief and Supplemental Appendix 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 18th day of March, 2013, I caused the sealed version of the foregoing Reply Memorandum in Support of *Amici's* Motion for Leave to File an Amended Sealed Amicus Brief and Supplemental Appendix 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