

No. 12-3200

**IN THE UNITED STATES 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, 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

**DECLARATION IN SUPPORT OF EMERGENCY MOTION FOR
EXTENSION OF TIME TO FILE *AMICI CURIAE*'S BRIEF**

Mark A. Berube hereby declares as follows:

1. I am a partner in the law firm of Mishcon de Reya NY LLP. I submit this Declaration in support of the emergency motion of *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 Bobb, John Francis Ficara and David W. Moser ("*Amici Curiae*") for a seven (7) day extension of

time, until February 22, 2013, to file their *Amicus* brief in the above-captioned matter.

2. The *Amici Curiae* have not previously requested an extension of time to file the Brief.

3. Plaintiffs-Appellees do not oppose the requested extension of time.

4. Defendant-Appellant does oppose the requested extension of time.

5. The *Amici Curiae* respectfully submit that good cause exists for the short extension of time requested for the following reasons:

6. The *Amici Curiae* sought and obtained consent from Plaintiffs-Appellees and Defendant-Appellant (“Google”) to file an *Amicus* Brief (“Brief”) in support of Plaintiffs-Appellees’ request that the United States Court of Appeals for the Second Circuit (“Second Circuit”) affirm the District Court’s Order granting Plaintiffs’ Motion for Class Certification, dated May 31, 2012, which is due to be filed this Friday, February 19, 2013.

7. In support of the Brief, the *Amici Curiae* would like to submit three (3) documents that were produced by Google to *Amici Curiae* in the related action *American Society of Media Photographers, Inc., et al. v. Google, Inc.*, Civ. Action No. 10-CV-2977 (DC) case (“ASMP Action”) and designated as “Confidential” or “Highly Confidential” pursuant to the Protective Order (Docket No. 68) in that case. The *Amici Curiae* believe these documents are relevant to the Appeal

because they refute certain arguments advanced by Google, and the *Amici* supporting Google, and support Appellees' brief.

8. None of these documents were produced in the *Authors Guild v. Google Inc.*, Civil Action No. 05 CV 8136 (DC) ("AG Action").¹ Given the volume of Google's production, the *Amici Curiae* only recently reviewed and identified these documents among the hundreds of thousands of documents produced.

9. When these documents were brought to my attention, I contacted counsel to Google in the ASMP Action concerning the issue on Saturday, February 9, 2013. Google's counsel was unable to meet and confer until Monday, February 11, 2013. On the evening of February 12, 2013, Google's counsel advised me that it did not consent to the submission of these documents in connection with the Brief, necessitating a request by the *Amici Curiae* to the Honorable Denny Chin.

10. I submitted a letter request to the Judge Chin the evening of February 12, 2013. On February 13, 2013, my office confirmed with his chambers that it had received the letter and was advised that the Court would be instructing Google to respond to the letter forthwith.

¹ As part of its production in the ASMP Action, Google produced the entirety of its production in the AG Action ("AG Production") to Plaintiffs. Plaintiffs have reviewed the AG Production and have confirmed that these three documents were not produced in the AG Action.

11. At 2:20 p.m. E.S.T. this afternoon I received a copy of the letter Google submitted, dated February 14, 2013, in opposition to the *Amici Curiae's* letter request to Judge Chin.

12. The parties are awaiting a decision from Judge Chin.

13. The *Amici Curiae* are trying to ensure that the Second Circuit has a complete record before it in deciding the AG Appeal. Since Plaintiffs-Appellees do not have these documents in their possession -- because they were not produced by Google in the AG Action -- they could not have been submitted below or on this Appeal by Plaintiffs-Appellees. If no extension to file the Brief is granted, Judge Chin will not have an opportunity to determine whether the *Amici Curiae* may move the Second Circuit for leave to submit these documents.

14. On February 11, 2013, Google filed an unopposed motion for a seven (7) day extension of time, to March 1, 2013, to file its reply brief. Therefore, in the event the *Amici Curiae's* present Motion is granted, Google will still have seven

(7) days to respond to the Brief and will suffer no prejudice.

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

Dated: February 14, 2013

Respectfully submitted,

/s/

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