

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 ASMP MOTION FOR EXTENSION
OF TIME TO FILE AMICUS BRIEF**

1. The sole reason for ASMP's requested extension is to file documents with this Court that *Amici Curiae* ASMP, et al. ("ASMP") obtained in a different case and that were not "submitted below or on this Appeal by Plaintiffs-Appellees." Berube Decl. ¶ 13. Such documents are not part of the record in this appeal, nor has any party to this case sought to add them to the record. Their submission by ASMP would therefore be improper. *See* Fed. R. App. Proc. 10(a) ("[T]he record on appeal" includes "the original papers and exhibits filed in the district court[.]"); *Wiggins Bros., Inc. v. Dep't of Energy*, 667 F.2d 77, 83 (Temp.

Emer. Ct. App. 1981) (“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)”). Because ASMP identifies no other reason why an extension is necessary, its motion should be denied.

2. Although Appellant-Defendant Google Inc. (“Google”) has consented to ASMP filing an amicus curiae brief in this appeal, Google has informed counsel for ASMP that its consent does not extend to a brief that seeks to add, include, or reference evidentiary materials beyond the materials that were before Judge Chin when he decided the motion for class certification. Although Google does not oppose ASMP filing a timely and procedurally proper amicus brief, *see* Berube Decl. ¶ 6, it does object to the instant motion and to ASMP’s efforts to depart from the record below and the issues raised by the parties to this case.

3. Prior to the deadline for filing an amicus curiae brief in support of Google, Electronic Arts, Inc., Pinterest, Inc., and Yahoo! Inc. sought an extension of time to file such a brief. *See* Docket No. 43. Appellees-Plaintiffs opposed, and this Court denied, that motion. *See* Docket No. 78. There is no basis for providing an extension of time to Appellees-Plaintiffs’ amici when a similar extension was denied Appellant-Defendant’s amici.

4. Google has sought (but not yet obtained) a one-week extension of time to file a reply brief so that it will have two weeks, rather than only one week, to respond to arguments raised by Appellees-Plaintiffs' amici. *See* Docket No. 84. As of this filing, Google is aware of three sets of amici who plan to file such briefs. Granting ASMP's requested extension would unduly burden Google in responding to multiple briefs over a short period of time. It would also unnecessarily complicate further proceedings in this appeal.

Dated: February 15, 2013

Respectfully submitted,

/s/

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 Ninth Circuit by using the appellate CM/ECF system on February 15, 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