

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

**REPLY DECLARATION IN FURTHER SUPPORT OF EMERGENCY
MOTION FOR EXTENSION OF TIME TO FILE *AMICUS* 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 Reply Declaration in further 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 (“Brief”) in the above-captioned matter.

2. Appellant-Defendant Google Inc. (“Google”) argues that the submission of the three (3) documents identified by the *Amici Curiae* would be improper because “[s]uch documents are not part of the record in this appeal, nor has any party to this case sought to add them to the record.” Opposition to ASMP Motion for Extension of Time to File Amicus Brief (“Oppn.”) at ¶1.

3. To be clear, these documents could not have been part of the record below because they were not produced by Google to the Plaintiffs-Appellees in the related case. Accordingly, Google is theoretically the only party who could have sought leave to admit them on Appeal, which it obviously would not seek to do.

4. In the event the Honorable Denny Chin grants the *Amici Curiae*’s request to submit these three documents under the existing Protective Order, they will move this Court for leave to submit this newly discovered evidence in support of their Brief and for leave to file a Brief that includes reference to these documents. Simply put, the *Amici Curiae* are simply seeking an extension of time to allow Judge Chin to issue his ruling.

5. Google’s suggestion that the *Amici Curiae*’s request should not be granted because the Court did not grant the motion for extension of Electronic Arts, Inc., Pinterest, Inc., and Yahoo! Inc. (“Appellant’s *Amici*”) to file their

amicus brief is not germane to the present Motion. Oppn. at ¶3. The Appellant's *Amici* sought leave for an extension of time, without ever seeking prior consent, the day before their *amicus* brief was due, on the wholly different ground that it was "[o]nly after Google filed its opening brief on November 9, 2012 . . . did these *Amici Curiae* coalesce around a decision to furnish their own perspectives, although they first contemplated the possibility of an *amicus* brief in late October 2012." See Docket No. 43-2 at ¶5.

6. Here, the *Amici Curiae* advised the parties of their intention to file the Brief and sought their consent months prior to today's filing deadline. As Google itself notes, see Oppn. at ¶3, the "sole reason" for seeking an extension now is so that the newly discovered evidence may be considered.

7. Assuming Google obtains the extension it seeks, it will still have two (2) weeks to respond to the other *amicus* brief in support of Plaintiffs-Appellees and will still have one (1) week to respond to the Brief. Therefore, in the event the

Amici Curiae's present Motion is granted, Google will suffer no prejudice.

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

§ 1746.

Dated: February 15, 2013

Respectfully submitted,

/s/Mark A. Berube

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