

# COMMERCIAL & BUSINESS LITIGATION

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## Second Circuit Vacates Class Certification in *Google* Case

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As appellate courts have made abundantly clear over the last decade, district courts must consider the merits of a case when deciding whether to certify a class, if necessary to deciding the certification question. But is a district court ever *required* to formally adjudicate the merits of a claim or an affirmative defense *before* reaching the issue of class certification? The Second Circuit recently answered, “Yes,” in *The Authors Guild, Inc., et al. v. Google Inc.*, 721 F.3d 132 (2d Cir. 2013), a case claiming that Google’s “Google Books” project constitutes copyright infringement. In a rather unusual move, the Second Circuit vacated the district court’s order certifying a class, not because the district court used the wrong standard or applied the right standard incorrectly, but because the Second Circuit wanted the district court to rule on the merits of Google’s fair use defense first.

The case started in 2005 when several individual authors and an authors guild sued Google on behalf of themselves and a proposed class of copyright holders. The plaintiffs claimed that Google infringed their copyrights with its Google Books project, which involves scanning books in their entirety to create a complete, searchable index of every book that Google scans. Google then displays snippets from those books online in response to user search queries and lists stores and libraries where the books can be found. To date, Google has scanned more than 20 million books.

After the district court rejected a settlement the parties had proposed, *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011), the plaintiffs filed a motion to certify a class. Google opposed class certification, arguing, among other things, that the case did not satisfy either Federal Rule of Civil Procedure 23(a)(4)’s adequacy requirement because a majority of authors it surveyed approved of Google Books, or Rule 23(b)(3)’s predominance requirement because Google’s fair use defense required a book-by-book analysis. The fair use analysis, Google argued, would bog the case down in individual issues that would overwhelm any common issues.

The district court rejected Google’s arguments, and as to predominance concluded that any individual issues could be avoided through the creation of subclasses based on the type of book. *The Authors Guild v. Google Inc.*, 282 F.R.D. 384 (S.D.N.Y. 2012). The court held that Rule 23(a) and 23(b)(3) were satisfied, and it granted the plaintiffs’ motion for class certification. The

Second Circuit granted Google’s petition for an interlocutory appeal under Rule 23(f) and stayed the proceedings in the district court while the appeal was pending.

The Second Circuit has long said that “[a] district court’s decision to certify a class will be overturned only if the district court abused its discretion” and that “even greater deference” is required when the district court certifies a class than when it rejects one. *Marisol A. v. Giuliani*, 126 F.3d 372, 375 (2nd Cir. 1997). Moreover, Rule 23(c)(1)(A) requires the district court to decide the issue of class certification “[a]t an early practicable time.” Notwithstanding these standards, which the Second Circuit did not mention in its opinion, the Second Circuit vacated the district court’s order certifying the case as a class action. Notably, the Second Circuit didn’t hold that the motion for certification should have been denied (although it did suggest that Google’s Rule 23(a)(4) argument “may carry some force”). Instead, it concluded, in essence, that it couldn’t tell whether certification should have been denied because the question depended largely on the validity of Google’s fair use defense.

Taking a pragmatic, substance-over-form approach, the Second Circuit concluded that the district court should decide Google’s fair use defense first, and then reach the question of class certification if necessary (i.e., if Google’s fair use defense lacked merit). As the Second Circuit stated: “[W]e believe that the resolution of Google’s fair use defense in the first instance will necessarily inform and perhaps moot our analysis of many class-certification issues, including those regarding the commonality of plaintiffs’ injuries, the typicality of their claims, and the predominance of common questions of law or fact.” *Google Inc.*, 721 F.3d at 134. The Second Circuit then remanded the case to the district court for consideration of the fair use issues.

Although the Court cited a string of cases that stand for various propositions regarding class certification — that fact specific inquiries into affirmative defenses can lead to denial of class certification; that courts should consider individual issues raised by affirmative defenses in deciding class certification; that class-certification questions often overlap with merits questions; that defendants are entitled to litigate their defenses to individual claims; and that courts must understand the claims and defenses to make meaningful class-certification decisions —none of the cases cited actually held that a district court must adjudicate the validity of an affirmative defense before addressing a motion for class certification. *Id.* at 134-35.

Before Google had petitioned the Second Circuit for an interlocutory appeal, the parties had filed cross-motions for summary judgment regarding Google’s fair use defense. Those motions were put on hold when the Second Circuit stayed the case pending the appeal. After the Second Circuit remanded the case, the parties finished briefing their motions for summary judgment, and on November 14, 2013, the district court ruled. *Authors Guild, v. Google, Inc.*, 2013 WL 6017130 (S.D.N.Y. Nov. 14, 2013). The district court held that Google’s use of copyrighted materials in its Google Books project constituted fair use and granted Google summary judgment. In doing so, the district court rendered moot the question of class certification. Although this ruling technically binds only the named plaintiffs because it was made pre-certification and any other member of the putative class is free to bring his or her own claim

against Google, as a practical matter the district court's ruling will make others think twice before filing their own lawsuits.

In this case, the Second Circuit's pragmatic, if unusual, approach to the timing of class certification paid off, at least in terms of judicial economy. But the district court's ruling granting Google summary judgment undoubtedly will not be the end of the road for this long-pending litigation. The plaintiffs are likely to appeal the case back to the Second Circuit, where it will end up before the same panel, which ended its prior opinion with an instruction that, “[i]n the interest of judicial economy, any further appeal from the decisions of the District Court shall be assigned to this panel.” *Google, Inc.*, 721 F.3d at 135. The Second Circuit's next opinion in the case, however, will be purely about copyright law and won't present any interesting issues about class certification.

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