Second Circuit Tells Defense Bar to Put Up Its "Dukes" in Copyright Class Actions: Google Scores Rule 23 Victory in Authors Guild Litigation

July 2, 2013

The Roberts Supreme Court era continues to prove rough going for the plaintiffs' class action bar as the court's reasoning percolates down to the lower courts. Relying in part on the high court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011), the Second Circuit yesterday forecast further tempest-tossed seas for plaintiffs' lawyers navigating copyright class actions.

Taking a page from the Supreme Court's analysis of Rule 23 in the employment context in *Dukes*, the Second Circuit ruled that the United States District Court for the Southern District of New York erred in granting class certification in litigation related to Google's scanning and indexing of books and making snippets available for public display in response to Google search queries. *The Authors Guild, Inc., et al. v. Google, Inc.*, 2013 WL 3286232 (2nd Cir. July 1, 2013). According to the Second Circuit: "[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." *Id.* at *1.

The notion that the individual issues surrounding fair use could undermine class certification is not new. What is new, however, is the leading copyright circuit court in the country citing *Dukes* in finding in the copyright context that fair use may pose an insurmountable hurdle to copyright class plaintiffs. The ramifications for class actions in both the Second Circuit and nationwide could be far-reaching, foreclosing class certification in not only copyright cases, but also a whole host of other kinds of cases requiring analysis of individualized doctrines and defenses.

For instance, I have written in our law firm's blog about my dim view of the Telephone Consumer Protection Act, 47 U.S.C. § 227. *See* Media, Privacy & Beyond at www.media-privacy.com. How does the fair use analysis in a copyright case differ from the established business relationship analysis under the TCPA with regard to the individualized nature of the inquiry? From this writer's point of view, it does not.

As reflected by the Second Circuit's decision in the Google case, *Dukes* — as well as the Supreme Court's more recent decision in *Comcast v. Behrend*, 133 S. Ct. 1426 (2013) — continues to provide wonderful

opportunities in numerous areas of the law for class action defendants to defeat class certification. Thank you, Roberts Court, and we in the class action defense bar eagerly await your next analysis of Rule 23.