
Hughes Hubbard & Reed

Google Settles E-Library Class Action

Client Advisories

Hughes Hubbard & Reed LLP • A New York Limited Liability Partnership
One Battery Park Plaza • New York, New York 10004-1482 • +1 (212) 837-6000

Attorney advertising. Readers are advised that prior results do not guarantee a similar outcome. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. For information regarding the selection process of awards, please visit <https://www.hugheshubbard.com/legal-notices-methodologies>.

In my post dated August 26th, 2008, I discussed the potential encroachment upon the established doctrine of fair use as it relates to evaluating, on a case-by-case basis, the digital use and publication of copyrighted works. The recent news about the settlement agreement reached between Google, the Authors Guild and the Association of American Publishers may just be adding more fuel to the proverbial fire in terms of turning the doctrine on its head.

Google's primary objective has been to organize the world's information and make it universally useful. Specifically, their focus to make copyrighted books available digitally to the general public without explicit permission to do so from the respective authors and publishers has been getting a lot of attention in the past few years.

On Tuesday, in what is being referred to as a landmark decision, Google Inc., the Authors Guild and the Association of American Publishers settled a class-action lawsuit dating back to 2005 over Google's book-scanning project, which would result in the creation of, and free, public access to, a massive online library. Google has now agreed, among other things, to pay \$125 million to resolve the copyright infringement claims brought by the authors and publishers involved in the class action. According to the settlement administration website for the class action, the settlement, if approved, will authorize Google to (1) continue to scan copyrighted works, (2) develop an electronic books database, (3) sell subscriptions to the books database to schools, corporations and other institutions, (4) sell individual books to consumers and (5) place advertisements adjacent to pages of books. Through the establishment of a not-for-profit "book rights registry", Google will pay rights holders 63% of all revenues earned from these uses, and the registry will distribute those revenues to the rights holders who register their works. Google will also pay \$34.5 million to establish the registry and for other costs of administering the settlement.

Ultimately, the settlement agreement will afford Google the ability to expand public access to millions of books, including books that are out of print, as well as offer subscriptions to universities and other organizations. Many

public and university libraries (including the Universities of California, Michigan and Stanford) will make their full inventory available digitally to the public through Google's online library.

The parties involved describe the settlement as a victory, particularly for the copyright holders that will be compensated through the registry. However, there is concern that the settlement could have a significant impact on the success of a fair use defense, particularly in the digital space. By Google's abandonment of its fair use argument, and the precedent that will be set vis-à-vis payment of royalties to copyright holders, it will be much harder for competitors in this space to claim fair use – meaning, now that a major player in the market like Google is going to begin paying license fees to copyright holders, courts will be less likely to rule that others can do what Google is doing for free under the fair use doctrine. Some also say that by not seeing a judgment on fair use in this case is a downside for copyright law, particularly with respect to advising technology companies about what is protected fair use. A University of Baltimore Law School professor has even been quoted as saying that the settlement is like “the Brown v. Board of Education of copyright”. Now that's a bold statement. There will be more to come as we wait to see if the settlement is approved.

Related Areas of Focus

Media, Technology & Commercial Transactions