

A Bridge Too Far:
Future Conduct and the
Limits of Class-Action Settlements

James Grimmelmann

Orphan Works & Mass Digitization

Berkeley Center for Law & Technology

April 12, 2012

In the next ten minutes

- What made the Google Books settlement so remarkable?*
- Future-conduct releases in class-action settlements*
 - Normative problems*
 - A doctrinal limit*
- Implications for orphan works*

Authors Guild v. Google

- A project to scan, index, archive, and snippetize ...*
 - ... triggering lawsuits by publishers and by the Authors Guild*
 - Authors' lawsuit is a putative class action*
 - Fair use at center stage*
- A settlement for full-book sales, subscription, and preview*
 - Opt-out for out-of-print books*

Releases from Authors Guild

- Past: "(A) any of the following actions taken on or before the Effective Date . . . (ii) any Google Releasee's Digitization of such Books and Inserts and any Google Releasee's use of Digital Copies of Books and Inserts for Google's use in Google Products and Services . . ."
- Future: "(B) after the Effective Date, any act or omission authorized by this Amended Settlement Agreement . . ."

Two important distinctions

- Future conduct, not future claims or future claimants
- "Future claims" in mass tort cases involve past conduct
- Watch for releases by classes, not by individuals
- Individuals can act via contract; classes cannot

Higher stakes

- Baseline: 23(b)(3) damages action for defendant's past conduct:*
 - Class can lose its right to compensation, but no more*
- Future-conduct releases can result in fresh harms to the class*
 - Releases give the defendant more scope for action*

Other dangers

- *Future-conduct releases are harder to design and review*
 - *"It's hard to make predictions, especially about the future."*
 - *Endemic moral-hazard problems for the defendant*
- *Future-conduct releases concentrate power in the defendant*
 - *Possible threats to the class and to third parties*
- *Future-conduct releases require courts to act as legislatures*
 - *Insert standard competence and accountability arguments here*

A bright-line rule

- *Tie settlement to the underlying lawsuit:*
 - *A class can give up a claim in settlement only if it was at stake in the underlying lawsuit*
 - *Defining "at stake in the underlying lawsuit" requires doctrinal care about the scope of preclusion, pleading, ripeness, etc.*
- *It's not just a good idea, it's the law*
 - *No Article III "case or controversy"*
 - *No authorization in Rule 23*

Back to Google Books

- Past conduct: scanning and searching were plausibly fair use*
- Future conduct: selling whole books en masse is not fair use*
 - I.e. no possibility of preclusion against class members*
- This is exactly the sort of settlement we should be worried about*
- A scanning-and-searching settlement would be another story:*
 - If Google wins at trial, it will be allowed to continue scanning*
 - Close scrutiny required, but potentially permissible*

Orphan works after Authors Guild

- Courts can and should continue to issue § 107 and § 108 decisions
 - Results will be broadly applicable via ordinary stare decisis
 - Some cases will be suitable for class treatment
- Congress can and should consider orphan works legislation
 - The political process is ugly, but it's the only one we've got

Discussion