A Bridge Too Far?
The Google Books Settlement and the Limits of Class-Action Law

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In this talk

• How we got here

• Where the settlement would take us

• Whether we should go there
Resources

- Our site on the settlement: http://thepublicindex.org
- My blog (frequently GBS-related): http://laboratorium.net
Simplified history

- 2004–05: scanning, indexing, and snippets, with opt-out
  - Background: orphan works problem
- 2005: class-action lawsuit subject to fair-use defense
- 2006–08: settlement negotiated
- 2008–10: settlement debated
Essential terms

✦ Scanning, indexing, and snippets continue
✦ Consumer Purchase, Institutional Subscription, etc.
✦ Google pays $125 million up front and 63% thereafter
✦ Book Rights Registry (including Unclaimed Works Fiduciary)
✦ Temporal and geographic limits; internal opt-outs
Some salient objections

- Information policy: privacy, pricing, censorship, etc.
- Copyright limits, domestic and international
- Orphan works subject to *de facto* exclusivity
- Antitrust concerns, in various flavors
- Curable (in theory) class-action mistakes: notice, etc.
The settlement is forward-looking

- It clearly differs from a “typical” cash-payment settlement.
- And yet are there class-action precedents to meet every objection?
  - All settlements are in a sense “commercial transactions.”
  - A settlement can award what a court can’t (e.g. quotas).
  - Some toxic tort settlements include releases of “future claims.”
  - Structured settlements (e.g. medical monitoring) pay out over time.
Forward-looking settlement = release of future-conduct claims

- The Google Books settlement would release class members’ claims based on the defendant’s future conduct.

- This point distinguishes most of the class-action precedents:
  - Releases by the class raise issues that promises to the class don’t.
  - Future-conduct claims ≠ “future claims” based in past conduct.
  - Structured settlements pay out over time for a one-time release.

- To be precise, it’s the release of claims based on conduct unlike anything the defendant has already done that’s truly distinctive.
Future-conduct releases matter

- The Google Books settlement itself is a big deal, but what about …
- … a pre-Deepwater Horizon settlement for any future BP oil spills?
- … a settlement to build a skyscraper on class members’ land?
- … an insurer-patient settlement on future health coverage rules?
Why are forward-looking settlements so worrisome?

- Informational problems for class members and judges
- Settlement design problems, especially moral hazard
- Threats to class members’ autonomy and property rights
- Aggregation of rights means concentration of power
- Separation of powers at risk
Ends, means, and the end

- Substantively, there are strong arguments in favor of the settlement.
  - And pragmatically, don’t hold your breath waiting for Congress.
- But procedurally, forward-looking settlements are Pandora’s box.
  - Perhaps this settlement can be distinguished from the general case.
- The safer course: declare forward-looking settlements off-limits.
Questions and conversation
A few thoughts about legality

- The specific Article III case-or-controversy issue is *ripeness*.

- There are at least two Due Process issues:
  - *Hansberry*: what representation, if any, is adequate for orphans?
  - Personal jurisdiction: the assumptions behind *Shutts* may fail!

- The “identical factual predicate” test draws on adequacy of representation, substantive fairness, and preclusion concerns.