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

James Grimmelmann
The Google Books lawsuit and settlement in one slide

- Google scanned, indexed, and displayed short “snippets” from books
  - This would have been the subject of a major fair use fight
- Under the settlement, these uses continue
  - Google also sells *full* books (individually and blanket subscription)
  - 63% of revenues to rightsholders, via Book Rights Registry
  - For out-of-print books, all of this is on an opt-out basis
Key Rule 23 innovation: release of future-conduct claims

- The settlement is clearly forward-looking, but how?
  - *It releases class members’ claims based on Google’s future conduct*

- This characterization distinguishes 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
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* on the defendant’s part

• Threats to class members’ *autonomy* and property rights

• Aggregation of rights means *concentration of power* …
  
  • … which can have *third-party effects*

• *Separation of powers* at risk
Ends and means

✦ 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, perhaps not
    ✦ Either way, a limiting principle is needed
A limit: *unfamiliar* future conduct

- Proposal: settlements involving future-conduct releases allowed only for the continuation of the defendant’s past conduct
- Addresses many information and design issues
- Natural parallel to preclusion doctrine
- Rationalizes class action caselaw (“identical factual predicate”)
- Required by Article III, Due Process, and the Rules Enabling Act?
Discussion