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

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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
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