A Bridge Too Far:
Google Books and the Limits of Class Action Law

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In a decision this March, Judge Denny Chin rejected the proposed settlement in the Google Books case, *Authors Guild v. Google*. His opinion touches on many issues, but at the center of it is his holding that the settlement "contemplates an arrangement that exceeds what the Court may permit under Rule 23." Like the Department of Justice and other objectors, Judge Chin was troubled by the use of a class-action settlement to establish a "forward-looking business arrangement[]," one that would "release claims well beyond those contemplated by the pleadings." The opinion's support for this holding, however, is thin: it does not even attempt to rebut or distinguish the cases cited by Google and the plaintiffs when arguing this precise issue.

This paper argues that this holding is broadly correct, and fills in the missing reasoning. It does so by isolating the legal feature that makes the settlement truly distinctive: its release of class members' claims based on the defendant's *future conduct*. Drawing on class-action law, preclusion doctrine, Due Process jurisprudence, and the limits of the federal judicial power under Article III, the paper draws a line separating permissible from impermissible future-conduct settlements: whether the conduct to be released is a continuation of the defendant's past conduct. If so, ordinary tests of the the settlement's fairness to class members apply; if not, the settlement is categorically impermissible.

This approach has the virtue of explaining why so many observers of the Google Books case share the intuition that a narrower settlement, one that allowed Google to continue scanning and indexing books, would be permissible. Although this, too, would be a future-conduct settlement, it would be one that involved only a continuation of Google's past conduct. The difference matters because had Google won at trial on its argument that such activities constitute a fair use, it would have been able to continue engaging in them anyway. Thus, the line the paper proposes corresponds to the limits of what a a class could have lost at trial – and does so in a way that validates common beliefs about copyright law and copyright lawsuits.