Symposium: Collective Management of Copyright: Solution or Sacrifice?

Panel: Collective Licensing for Digitizing Analog Materials

Questions and Answers

Question: Dick Riddick, Copyright Clearance Center ("CCC"). Both Pam Samuelson and Lois Wasoff referred to differences between the United States and Europe—small countries versus large countries. Maybe this is a question for Alain Strowel, but also for anybody. Are you aware of any examples of a successful extended collective licensing system where there is not a group of well organized author and publisher communities in some sort of an umbrella organization that brings those people together so that there can be a comprehensive rights offering? And are you aware of any successful examples where there is more than one such umbrella, or where there is a licensing mechanism that is divided into fractions as opposed to one comprehensive solution?

Alain Strowel: I think you put your finger on an important issue. I think extended collective management can work in a special context and it is not just by chance that it works quite well in Nordic countries—in Europe—because I think we have societies based on consensus. There is a high level of homogeneity. You have strong collective management organizations ("CMOs"), which are partly ruled by transparency and other standards which are rather high there, so you have good management. In addition, I think there is a consensus among the users that they should contribute. I think those societies are partly based on the notion of solidarity. And it is not by chance, again, that those extended collective licenses ("ECLs") have been introduced first in favor of broadcasters. But in the 1960s, of course, those were public broadcasters; they were more willing to pay something. And it is the same with the other ECLs—for museums, for national libraries—you do not have purely commercial operators there, as well. So, it becomes a little bit different in another context where the users have a different philosophy. That is my problem in relation to the Internet and the expansion of the ECL model outside those rather homogeneous contexts where solidarity plays some role and parties have accepted the rule of the game, and the rule of the game is to remunerate the authors. It is not that easy in another context.

Jonathan Band: I think part of your question was going to the viability of an ECL-type model in this country and, just to turn that to the Book Rights Registry, it is important to note a couple of things. One is that the settlement would require Google to provide thirty million dollars upfront to the registry to get up and

running.[1] Now, I do not know if that is enough money, but it is thirty million dollars and that sounds like a lot of money to me. The second thing is that Google is already doing this; it is not like you were going to set up a registry and hope that the consumers are going to show up and pay. Google is already offering the service, or aspects of the service, and now would be providing more aspects. I think that because it is, to some extent, up and running, the likelihood that there would be more revenue flowing in is more certain than in another model where you first build the registry and then hope that the customer shows up. Here, to some extent, the customer is already there. As a result, there might be a slightly greater likelihood that there would be revenue coming in that then could help the registry work.

Dick Riddick: Well, except that a number of people have pointed out that it is not just about money—there are other issues, especially for authors.

Lois Wasoff: Talking about money for just one second—thirty million is less the cost of the notification and certain other costs associated with it. And the notification program had to be repeated on a somewhat reduced level when the amended settlement agreement was done. I bet that money got eaten into pretty quickly.

Audience Member: It is half gone.

Lois Wasoff: So half of it is still there. There is still fifteen million dollars left, but—as we heard this morning—it is enormously difficult to create this database, and then to manage it and maintain it. So, I think that the individuals and companies that are looking to get revenue from that Book Rights Registry—if it ever gets up and running—are going to be paying those costs pretty soon because the Book Rights Registry, when it burns through the first money, will be deducting that from its revenues and no one has ever said what that is anticipated to be.

Eugene Mopsik[2]: In regard to orphan works, I just wanted to make it clear that American Society of Media Photographers ("ASMP") was, in fact, a supporter of the House version of the orphan works legislation with the diligent search and notice of use provisions.[3] We did not oppose that, and, in fact, we lobbied for it and worked for it. Beyond that: Lois, you say that you feel our pain, but it is our pain. So, it is nice that you feel it, but we live with it. And I listen to you and Pam comment on the problems of academic authors, the burdens that they have and their need to use materials and their desire to have these materials available to them for fair use or no fee. And I guess that is great for academic authors, who, I presume, while they are doing God's work are being compensated by their universities. And simultaneously, I presume that—for these publications that they create—the printers, the distributors and the paper companies are not donating their services. So, I find it hard to understand why image producers or illustrators should be

1. *See* Amended Settlement Agreement, Authors Guild, Inc. v. Google, Inc., 93 U.S.P.Q.2d 1159 (S.D.N.Y. 2009) (No. 05 CV 8136 (DC)).

2. Eugene Mopsik, ASMP, participated as a panelist for *Panel 1: Challenges for Collective Licensing Organizations*.

3. *See* Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008).

making their contributions.

Lois Wasoff: So do I. I have negotiated college textbook contracts with some academic authors; they want to get paid. Those people want to get paid. And the journal articles—which is the part of the Google corpus where the academic authors have assigned their rights and have no further interest at all—you can discuss that business model. There are pros and cons to that. They are excluded from the settlement. What is in the settlement are books. Now, with respect to out-of-print books, if that is what you are referring to then, yes, I see your point; but with respect to in-print books, my experience is that academic authors want to get paid. And I believe creators should be paid. So, when I said I feel your pain, I was not being facetious. I do agree; I understand your position completely. I think you are in a particularly difficult position because of the nature of what you do.

Eugene Mopsik: I am not interested in being punitive and I am not interested in hammering my clients; obviously, the people that you do that to are not your clients for long. I am interested in some reasonable level of compensation for use. It is really simple. I am not trying to hammer anybody. I am not trying to be unrealistic. I understand limitations of remedies. I get it all. But free? Free is hard to compete with.

Pamela Samuelson: Just so we are clear, I wasn't arguing for free for everything. I was talking about the out-of-print works that are still in copyright as possibly being covered by some sort of extended collective license, which would lead to remuneration. And I have no objection to the photographers and graphic people getting part of that remuneration. So, I just want you to be clear on that. I am not arguing for free on everything.

Eugene Mopsik: I do not mean to misinterpret your statements.

Lois Wasoff: And, with respect to out-of-print works that are still in copyright, you cannot conflate those with orphans. Very often, there are owners of those rights who have a particular personal interest in them because—at least in book publishing—the way the work went out of print probably resulted in the rights reverting to the author. And we only barely touched on it, but I think it is a very important point. In this country—regardless of what we are telling WIPO—we do not have much of a moral rights regime. And copyright becomes the tool that is used by creators, by authors, to protect some of the interests that—in a country with a strong moral rights regime—they might be able to protect through other means. One thing that worries me about collective licensing is that it reduces copyright to a purely financial right; the money matters, but it really is not all about the money. Individual creators and authors, and publishers who are responsible and want to manage those creations properly after having acquired rights grants from creators and authors, do care about more than just the money.

Daniel Gervais: Just a couple of comments. First of all, it is very clear outside the United States that many collectives have a mandate that is far broader than just dealing with money. Actually, a case came out on Wednesday of this week in the Court of Appeal of Paris, where Google was sued by a collective representing photographers—at least one of the collectives representing photographers—and the collective lost the case, because Google found some sort of safe harbor somewhere

in French law that no one knew existed.[4] But the fact is, the court says that this collective has a duty to protect the moral interests of its members in addition to their economic interests, so there is a cultural significance. In addition, it is not because there is an ECL that there is a payment. I can think of several examples, but here's one. There is a functional equivalent of an ECL in Canada. The Copyright Board of Canada issued a decision in which it covered educational uses for photocopying, essentially, and other types of uses.[5] The Copyright Board covered these uses under the tariff, or under this license, but it considered that a certain number of those uses would be fair dealing, so fair use essentially. The Board said it was zero-rating a number of uses because of that; so it is covered under the license, but not paid for. So, it actually removes the doubt as to whether or not it is fair dealing. And I thought it was a fairly elegant solution to cover it under the license without having it paid for specifically. And then, of course, they imposed a payment on the rest, and now it is in court.

Jonathan Band: I would like to comment on some of the other questions that were just asked, or comments that were made. It seems that the legitimacy of an ECL approach to some extent turns on whether there is a justification for the opt out model, which is sort of the basic premise or the basic operating principal of an ECL. And I think—at least in the Google Books case—there is a pretty compelling argument for an opt out approach. The large number of works, the enormous transaction costs—we are also talking about the way the registry was structured under the settlement—applies to these books that are out of print, or not commercially available. At the same time, there is a compelling reason, from an academic perspective, to have access those works because of their enormous utility. It is really useful to have access to all of those books that are otherwise not being used and not generating any revenue for anyone. In this situation, taking an opt out approach is important because otherwise there really is a high likelihood that you would have a very incomplete database. It is entirely possible that in other situations there is much less of a justification for an opt out approach. It could very well be that in the music world (although I am certainly no expert in music) it would be much harder to justify an opt out ECL approach because you do not necessarily have the same kind of compelling social need to a comprehensive database that can only be accomplished in an opt out model. That is an important thing if we are talking about ECL and we are talking about an opt out model; it really could make a big difference depending on the nature of the material at issue.

Lois Wasoff: Jonathan, just to be clear, what you are talking about is opt out, as opposed to opt in?

Jonathan Band: Right.

4. *See* Jean François Bretonnière & Thomas Defaux, *Online Copyright Infringement: When Google Images Finally Meets French Law*, INTELL. ASSET MGMT. (Mar. 9, 2011), http://www.iam-magazine.com/reports/Detail.aspx?g=f112ad59-3dda-407e-8e7c-6d06018842a8 (discussing French case decided by the Paris Court of Appeals on January 26, 2011).

5. *See* Statement of Royalties to Be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire (Can.), *available at* http://www.cb-cda.gc.ca/decisions/2009/Access-Copyright-2005-2009-Schools.pdf.

Lois Wasoff: OK. Not opt out as opposed to not being able to opt out?

Jonathan Band: Right.

Lois Wasoff: OK. That is what I thought.

Jonathan Band: Well, that is an option too, I suppose.

Jane Ginsburg: Anybody want to rise to that bait?

Question: I did not want to rise to that bait, but I had a question. Maria Pallante from the Copyright Office. Just following up on that, to the extent an opt out model might be appropriate for some circumstances—if everybody were to stipulate that for a moment—does the panel have views on the relative burden that can be placed on the opt out mechanics? And, for example, how difficult can it be on the authors who would have to opt out? And how does that work in other countries? What examples do we have of good opt out mechanisms that authors can live with?

Alain Strowel: That is a question for which I did not prepare. Opt out mechanisms that have worked well? I mean, apart from the ECL models that I presented, I do not see anything which comes to mind there.[6] Well, we can talk about cable retransmission. I presented it, but I do not have a specific example which comes to mind.

Jonathan Band: One thought on the ease of opt out. Initially, prior to the litigation, when Google started the library project, it did not have any kind of opt out feature at all. Then the rights holders, especially the publishers, complained, and so they started having an opt out. Google basically said, "If a right holder asks us not to scan the work, we will not scan the work," and so forth. But, they kept on modifying that. I think initially, they asked for a pretty high degree of proof. I forget the details regarding whether Google required a copyright registration or some kind of affirmation on penalty of perjury that the person was the right holder. Then the rights holders pushed back and Google adjusted the proof requirement. However, I think there were ongoing complaints even after that that it was more difficult to opt out than it should be. Therefore, I think you are absolutely right that the opt out needs to be pretty easy for people who are not copyright specialists and that you should be able to opt out without having to hire a lawyer.

Jane Ginsburg: I would like to pursue this fact question. Does anybody have information responsive to the question of comparative opt out mechanisms? Giuseppe? And can you introduce yourself, even though we will introduce you momentarily?

Giuseppe Mazziotti[7]: Yes, I am Giuseppe Mazziotti from the University of Copenhagen. Denmark has been mentioned quite often; I am not Danish, but I have some familiarity with the Danish system. I do not speak Danish either, but there is a very good English version of the Danish Copyright Act that I can make available. It is interesting, since it is so crucial in this debate. While being there, I

6. *See* Alain Strowel, *The European "Extended Collective Licensing" Model*, 34 COLUM. J.L. & ARTS 497 (2011).

7. Giuseppe Mazziotti, Assistant Professor in Intellectual Property Law, University of Coppenhagen, Denmark, participated as a panelist for *Panel 3: Blanket Licensing and Beyond*.

had the impression that this opt out mechanism is more of a theoretical thing than a practical thing because nobody opts out at the end of the day and because it is also—as Professor Strowel emphasized several times—the social context which matters in my view. So, in bigger systems, this mechanism could create problems in my view. So, I think it is more of a theoretical thing and not a practical thing. I do not know how much it is used in actuality.

Lois Wasoff: I think also—this follows from your point—that the decision to opt out is partly fed by what are the advantages of opting out. And that was certainly one of the considerations in the minds of a lot of people in considering what to do about the Google Book settlement. What do you get if you opt out? Well, you get the right to sue Google. Wouldn't that be a wonderful way to spend the next few years of your life? So, for a lot of smaller, individual authors, and for small, specialized publishers opting out—even if they were not happy with many aspects of the settlement—there did not seem like a realistic alternative. So, you have to think about what opt out means in terms of the right holder's future activities.

Giuseppe Mazziotti: It would be interesting—and I can ask my colleagues—to see how often it is used in actuality, because that is the crucial point. Otherwise, it becomes a theoretical issue merely to make the system viable from a purely legal perspective without understanding how feasible it is. And, as you said, leaving the author with the opportunity to sue the infringer is theoretical. Yes, it can be done, but it is not convenient for the single right holder, at the end of the day.

Question: I do not pretend to be an expert on this, but I think German copyright law has this kind of an example for digitization of periodicals, where there is a notice requirement and an opportunity for underlying authors to opt out. They can still get royalties if they do not opt out, but Germany really transformed its "no new media" provision by introducing this kind of concept. So, it has allowed digitization projects to go forward with an opt out model.

Jane Ginsburg: It might be worth clarifying your reference to "no new media." Until very recently, the German copyright law had a provision that said that authors could not grant modes of exploitation unknown at the time of entering into the contract.[8]As a result, the standard "all rights now known or later developed" kind of grant that is all too common in the United States—and in some other countries is permissible, if made explicitly—was until recently, in Germany, just null. So, even if a contract said "unknown future rights," that was ineffective until the publishers lobbied heavily for a change in the law. And I guess this sounds, at least formally, like a bit of a tradeoff, even if not in fact. Tracey?

Tracey Armstrong[9]: Does Mark want to clarify that?

Mark: I believe that the law in Germany does require that the work be available

8. *See* SILKE VON LEWINSKI, ALAI EXECUTIVE COMMITTEE—SHORT REPORT ON AMENDMENT TO GERMAN COPYRIGHT ACT (2007), *available at* http://alai.org/index.php?option=com_content&task=view&id=41&Itemid=19 (follow "Germany" hyperlink) (discussing amendment to section 31(4) of the 1965 German Copyright Act).

9. Tracey Armstrong, Copyright Clearance Center ("CCC"), participated as a panelist for *Panel 1: Challenges for Collective Licensing Organizations*.

online or in digital form before you can opt out of being exploited through that collective license.

Tracey Armstrong: I was going to talk about a different country, Jane. I was going to talk about the United Kingdom, where the collective licensing organization for texts does have an opt out to this question for digital rights. And actually, I think it is an example of an opt out that is not working very well at all. That is why I wanted to raise it; it is the opposite of Maria Pallante's question. She is asking: where is the opt out method working well? In the United Kingdom, it is not really working well. There is a provision for it. Any type of rights holder, such as authors and publishers, can opt out, but there is not much transparency regarding what they are opting out of. It is related to digital licensing, digital rights for corporate licensing. And when you think you are opting out of one small sector of uses, you are actually opting out of a larger sector. That is somewhat unclear, and you do not realize the results until much further down the line. We are dealing with this right now with many of our clients and that is an enormous market for corporate licensing, particularly digital licensing. Therefore, this is a concern.

Jane Ginsburg: Is that a market which could otherwise effectively be exploited by individual rights holders?

Tracey Armstrong: To some degree. But to a large degree, there is already quite a bit of licensing going on by individual rights holders. But I think, more realistically, that is able to be done more practically by a commercial company than by an individual person. As a result, for those rights holders who are individuals, it makes it much harder. So, the equilibrium just is not there. That collective licensing organization is representing both in this particular case; it is governed by a group of publishers: the Publisher's Licensing Society ("PLS") and the Author's Licensing Society, as well. And those two are kind of the parent organizations of this collective licensing body. So, I think that you do have licensing in the market—to address your point—from individual rights holders, but that is usually commercials.

Jane Ginsburg: David, you had your hand up. Did you want to speak to this question?

David: Sure. In the performance rights organizations' ("PROs") consent decrees, there is a form of opt out, but of course, the members of the PROs have voluntarily opted in in the first place. But they do have the ability to directly license; the members can directly license their works as long as they give the PROs notice. And that can work in particular circumstances if there is a good reason to directly license. But the initial decision, of course, is the right holder's decision to opt in rather than an opt out system. But you can opt out after the fact and that may be something that ought to be considered in other contexts.

Jane Ginsburg: I think one of the concerns is the relationship of collective to noncollective exploitation. I think a premise of ECL is that you cannot effectively, individually—and by individual, I include corporate owners—license those rights. So, an ECL is better than nothing. But if things change—particularly if the technology that created the problem also provides, later on, a solution to the problem—then one might be nervous about being locked in to an ECL. So, if you

cannot get out of it at a later date, that might also be a cause for some reluctance to go into it in the first place. Maria, have we been helpful?

Maria Pallante: Very much so, thank you.

Jane Ginsburg: June?

June Besek[10]: I just wanted to add something to the point about the ease of opting out. At least in some circumstances, the courts have taken into account the ease of licensing in deciding the scope of fair use.[11]So if, in fact, you decide to opt out, then you could be exposing yourself to broader fair use unless you have a good Plan B for licensing on your own. And that is something that you have to take into account. So, it might be easy as a mechanical matter, but there may be other ramifications to consider.

Jane Ginsburg: I think we have time for a couple more questions.

Question: I would like to stay on that point. Regarding Tracey Armstrong's answer to your question, Professor Ginsburg, something is missing. There is an effective opt in regime for collective licensing. And so, getting back to Maria Pallante's question—which was where does it work and where does it not work, the best example is Copyright Clearance Center ("CCC"), which it is purely opt in and has an effective corporate licensing structure. So, opt in does work. You do not always need opt out. And from a right holder point of view, we collect a lot more money from CCC—which is an opt in organization—than we do from any other opt out organizations. Admittedly, it is a larger market, as well. The issue, again, from a right holder perspective, with opt out, is that you sit there and you say: "There is this ECL in country X, and I have a choice: I can stay in and get something, or I could opt out and get nothing. And it is really not much of a choice. It seems much better if I have an opt in because then there is a little bit more control and a little bit more responsiveness to rights holders."

Audience Member: Barry Massarsky. One of my clients, SoundExchange, has a very interesting take on this, if I understand it correctly. You can opt in to be a member of SoundExchange by virtue of the compulsory license and, therefore, labels and artists could benefit from that relationship. However, if you do not opt in, you are not a member even though those royalties are being collected as statutory licenses on your behalf. SoundExchange has to distribute them anyway, as a nonmember. In other words, it is not clear what the member benefit is, but you still get—whether it is an opt out or opt in—the same relative share of distribution because the Copyright Office did not want anybody left out of the distribution model and wanted to preserve the right of people deciding to be members. But it is

10. June Besek, Executive Director, Kernochan Center for Law, Media and the Arts, Columbia Law School, served as the moderator for *Panel 1: Challenges for Collective Licensing Organizations*.

11. *See, e.g.*, BMG Music v. Gonzalez, 430 F.3d 888, 891 (7th Cir. 2005) (noting, after listing several legitimate means of obtaining music, including licensed broadcasts: "[w]ith all of these means available to consumers who want to choose where to spend their money, downloading full copies of copyrighted material without compensation to authors cannot be deemed 'fair use.'"); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930 (2d Cir. 1994) ("[S]ince there currently exists a viable market for licensing these rights for individual journal articles, it is appropriate that potential licensing revenues for photocopying be considered in fair use analysis.").

way too difficult for the licensees to have to pay directly. So, I guess the agency became an intermediary for both the ins and the outs of this particular base.

Jonathan Band: I would like to respond to the previous comment. From a user perspective, obviously an opt out is infinitely preferable to an opt in. Especially when you are dealing with a situation like I was describing with the Book Rights Registry, where you are dealing largely with a legacy problem, and are dealing with works already in existence, rather than a kind of forward-looking model. So, in that situation, when you know that it is highly likely that many rights holders will not opt in—largely because it is not worth it to them or they do not even know what is going on—then an opt out model is much more preferable from a user perspective.

Audience Member: Victor Pearlman from American Society of Media Photographers. Expanding on what Jonathan Band just said: opt in systems work great for corporate entities. The reality is, individual creators will not take any action, if that means opting in or opting out. They are not going to do—by and large—anything that requires an action.

Dick Riddick: That is true of a lot of things in life, but with respect to what Jonathan said, about a legacy situation, I actually agree with that. The big problem with Google is that the nature of the settlement transformed a legacy situation, and a subject that might indeed have been plausible under Rule 23. Rule 23 did not exist when I studied the Federal Rules of Civil Procedure; I only dimly understand it, but since neither the plaintiffs nor the defendants did, I do not see what difference that makes. And you talked, Jonathan, about this being a legacy situation; it would be fine if it were, but it has been transformed into something else.

Jonathan Band: What do you mean? In what way is it not a legacy situation?

Dick Riddick: Well, as the proposed Book Rights Registry now stands, as the Google settlement now stands, it is a very audacious, forward-looking business model, developed without the consent of many affected parties who have very diverse interests and views. So, it is not a legacy situation; it is more forward-looking than my former employer's business plans are.

Jonathan Band: Well that might say more about your plans. But when I used the term "legacy," it was basically focusing on works already in existence with a hard cut-off date, as opposed to works that would be contributed in the future.

Dick Riddick: Maybe I misunderstand it, but I do not think so.

Jane Ginsburg: I do not think we can relitigate the Google Book settlement. And we have started to invade the coffee break time.