

Symposium: Collective Management of Copyright: Solution or Sacrifice?

Panel: Blanket Licensing and Beyond

Questions and Answers

Michael Heller: With our amended format we now have about fifteen minutes for your questions and discussion, and then we will have the second half of the discussion. The floor is open.

Scott Martin: Just one thing. I am not sure we did this at the beginning, but did we define DRM? DRM is “digital rights management.” And it just means that there is something in the digital file that in some way tracks or limits or counts. And I think that it is very important that as we talk about DRMs—as with everything else we have talked about. DRMs can do anything, so they can be good or bad. But that is what a DRM is.

Michael Heller: The floor is open.

Question: Hi, Rebecca Giblin from Monash University Law School in Australia. I just have a question for Scott Martin. I thought that UltraViolet sounded like a really interesting idea with a lot of potential for solving the undeniable problems with digital content access. And I noticed that a really impressive list of established media partners had been gathered—which obviously is a fantastic start—but what I was wondering was, what sort of plan is there for adding new partners in the future? Is this a club that anyone will be able to join? Or is there maybe some potential here for established players to use this kind of scheme to, maybe, make it harder for new hardware and content companies to get a foothold in the future? I am really interested in that.

Scott Martin: UltraViolet is owned and run by an organization called DCSS, which is a consortium of most, but not all, of those members and it is a completely open system. So any content provider, any independent studio, any equipment manufacturer or any retailer of online or hard goods can join in. It is completely open, and I suspect for antitrust grounds it would have to be. But yes, it is set up as an open system.

Tracey L. Armstrong¹: I just wanted to ask John Palfrey, in terms of the digital library, are you familiar with Europeana? And can you relate that to your comments because it seems to me that they are directly related.

John Palfrey: They are directly related and there is a smiling woman named

1. Tracey L. Armstrong, Copyright Clearance Center, was a panelist for *Panel 1: Challenges for Collective Licensing Organizations*.

Maura Marx who is about to press her mic, and who just read the Europeana report, with a view towards pointing in this direction.² So, they are meant to be complementary endeavors. Maura, are you willing to take the mic on this score?

Maura Marx: I think that we want to look to Europeana to see how they have started and how we can emulate the good things they have done. And I think we were just reading the report that said they started with the easy, cultural heritage things, and will then move out in circles—as John talked about, in tiers—to the more difficult things. And I think that makes a lot of sense for us. But we are also going to get that big tent of people together and see how the community wants to move forward.

John Palfrey: And Tracey, that is also an invitation to CCC and to others to participate in that to the extent that is attractive.

Maura Marx: And on that point, the online art portal in Europe is something that I think has great potential, but it has no transaction mechanism. So, I think of that as an example of where creators have come together. They have put together a framework that is quite good, frankly, and I think CMOs could help with the functional aspects of that, the transactional pieces, for example.

Lois Wasoff³: This is primarily for John Palfrey. When we were working on the § 108 library exemptions, we had some interesting conversations about the relationship between libraries and content creators, and how that has changed over time.⁴ There used to be a much more complementary relationship. If you wanted to have permanent, unfettered access to a particular work, at any hour that you wanted to get that access, you acquired it. If you wanted access for only a short period of time, or only wanted to use it for a particular purpose, the library was a resource that met that need. Obviously, when you talk about the kind of project you are talking about, that balance changes. Because what you are talking about is providing access in a way that really could substitute for the kinds of sales and licenses that publishers now rely on.

I know that you talked a bit about works currently under copyright being out, but I would be interested to hear what your preliminary thoughts are on approaching that issue because it begins to sound to me as though the digital library can become the centralized single distributor and I doubt that is your goal. And I do not think that is ultimately in the interest of our society because that is not going to permit future creation, future development, to be funded, and there are important creative works that require funding. There is a lot of great work that is done without external investment, but you do not make a movie without the ability to make the investment and recoup. You do not create a basal reading program unless you can invest fifty or sixty million dollars into that development and employ

2. NEW RENAISSANCE REPORT OF THE COMITÉ DES SAGES (Jan. 10, 2011), available at http://ec.europa.eu/information_society/activities/digital_libraries/doc/reflection_group/final-report-cdS3.pdf.

3. Lois Wasoff, Attorney at Law, was a panelist for *Panel 2: Collective Licensing for Digitizing Analog Materials*.

4. See Copyright Act, 17 U.S.C. § 108 (2006); see also THE SECTION 108 STUDY GROUP, <http://www.section108.gov> (last visited Mar. 16, 2011).

hundreds of people in the process. And that is a benefit to society; those products provide a benefit to society. So, I am just curious to hear, at least, your preliminary thinking on that.

John Palfrey: That is wonderful, Lois. I heard about seventeen important questions that we should try to run down; so let me take a few of them and react. I should say that we are in extraordinarily early days. We are in the process of, for over four months, trying to define what might be a digital public library and I welcome your direct involvement. The Section 108 Study Group in particular has done a lot of the background thinking and work that many of us benefit from broadly and I would love to think through these unintended consequences.⁵

One initial reaction is, I know that very often an idea like this is upsetting or worrying to librarians for a variety of reasons. One is that it might replace lots of great things that libraries have done historically. I know that very often librarians are worried—I am worried as a library director—about moving to a model where everything is a license and nothing is actually kept in a physical sense. So the traditional mode is: we pay twenty dollars, for instance, for a monograph; we catalog it and bring it in, hold it, preserve it, give it to people. And we have all these mechanisms around § 108—and in the broader sense, the first sale doctrine—which allow us to have greater control over the material. I actually think that is very important and I would not want to see that entirely replaced by all of this. So, I get the concern.

What I think is important, though, is that we surface these issues as the trends in the digital space and different practices, particularly of youth, are changing so quickly with respect to these materials, and that we get in front of these concerns rather than have them hit us on the backend. So, part of what I am arguing for is a design process—a series of design principles—that might identify this exact issue and say that this is something we care about, that this is a set of interests we want to vindicate in this process and not have it just sort of emerge. One of the things I think those of us in the library business know is that increasingly, our users are starting to ask for e-books. And we are trying to figure out if you want Pam Samuelson's new book. Do you buy it as a hardcopy? Do you buy it as an e-book? Do you buy it as both? Or do you buy it as part of a database? How do you think this through? And the answer is not that tomorrow we are only going to be providing e-books on two-week digital lending deals. But it is really happening very quickly. And I think it is very important that we think through what this mechanism is and other things that libraries can and should do.

I think that that is one big point that I would emphasize. A second is that I cannot imagine a world in which this particular digital public library approach would become so massive as to replace all the other mechanisms of distributing cultural heritage information. It just seems to me to be totally implausible that that is where things are, given that it has been totally impossible to do it even with public domain materials to date. So even with things that do not have copyright

5. See SECTION 108 STUDY GROUP, THE SECTION 108 STUDY GROUP REPORT (2008), available at <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>.

restrictions on how we do it, we have not been able to pull off any version of this. It seems to me a very remote outcome.

I think that it is much more likely that it is a mode of distributing a certain amount of information, to a certain amount of people who are delighted to have it in that format. And it reduces a bunch of transaction costs between people and information at the simplest level. It also has a pro-democratic effect at the end and people get paid in full for what they do. That is a short-form version. And I think this goes back to Maura Marx's note about the approach to this: the point here is not to design the world's hugest system that will do all digital lending for all digital materials and replace everything libraries do at once. No, it is to say if we work together in an interesting fashion and actually come together as a series of stakeholders and design something that is a sort of "plus one" (in that it helps), and build from there, then we might actually get something that will be helpful along the way and would be a complement to these other things that are developing.

I think a variant of that is, if the Google Books settlement is approved by Judge Chin and then survives on appeal, do you need this? My view is: sure, you still might need this for things that are outside of that zone. You still might need it as a counterbalance. There might be a number of reasons why you do it and this goes to the nonexclusive quality of it. I do not see it as replacing CCC and all these other things that are in the business of doing something similar. I see it as a complement where we are actually getting our act together and doing something in the public interest that is complementary. And that is why it is such a hard definitional problem.

Question: Thank you. My name is Barry Massarsky, and I come from the music industry. I do not know if your digital library had in mind using music as one element of intellectual property that would be covered. My experience is that the record companies have very different ideas about the value of digital libraries, as well as different price points, and it is very hard to create price harmony in terms of there being exponential value to covering a new license. We have been trying to license mobile DJs and videographers and all kinds of smaller uses of music. It seems so obvious that you would take on the small gulp because it would only add to a license culture. In fact, it creates new problems for them to deal with, relative to old models that they had in place. Sometimes the issues are more complicated in the end than remains to be seen. My question really is: is your contemplation to include music or not?

John Palfrey: So, we go back to this tiering question. Tiering not just in terms of who pays or how much, but also tiering in terms of how you look at more difficult and easier problems. The first step here is to say: how about we talk about this as an idea? Let us think about what would be easy, as the Europeana group has, and what would be reasonable. We as libraries are scanning a whole lot of public domain stuff and we do not have our act together about how people can get access to that. So, just for starters: if we were to connect just the stuff that libraries are scanning with absolutely every right to do it and make it available, why not connect that? That is a starting point.

That has all manner of requirements associated with it, technically and others.

There is a ton of work to do between here and there. My guess is, just given your point, Barry, music may be the last thing we get to. In big label, newly created music, maybe that is the most difficult thing to do, and if this is successful it comes seventeenth on the list. And it probably comes about by saying to people who are publishing music, “Would you like to have it in? Would you like to have this offered to libraries or others who are going to take this license as an option within the mix?” And you know, if the large labels find it unlikable or too difficult or whatever, my sense is their response will be, “Okay, we will stay out.”

Is it just about books? No, I think the answer is that we are thinking about this as a cultural heritage thing. At my library, we license music all the time—the Harvard University library does, at least. So absolutely, I would see music plausibly in. But are we going to go after something that requires knocking a bunch of heads together? No, right? We have got all sorts of much easier, but still very hard, problems to solve in the first instance.

Jonathan Band⁶: This is a question for Scott Martin. You certainly made a very compelling case that collective licensing does not make a lot of sense for current movies. But what about the preservation problem? You have a lot of older films and other sorts of audiovisual works in lots of archives in this country that are deteriorating. And you can say that maybe we need to amend § 108 to fix that problem.⁷ Could collective licensing be a solution with respect to older films?

Scott Martin: Having said that, it is important to distinguish between books and music and photography and film. I think it is also very important to distinguish between different kinds of film because if you are talking about a major studio feature film, that is being preserved. In the new digital era, it has become more available. But we have some films that are just not available on DVD because there is not enough demand. In the digital era, there is no cost associated with keeping it available.

Leaving all of that aside, you have a whole realm of video works—either independent works or documentaries or home films—that are extremely important to preserve because they are very much a part of the culture. There is a lot of valuable information. I am on the board of the National Film Preservation Foundation, and we spend a lot of time looking at non-studio films that need to be preserved. I am not sure collective licensing is as problematic there, but I am also not sure it is much of a solution because while it is important to preserve those—maybe have them in libraries—there is never going to be much of a commercial demand for them.

So, I do not see it as necessary, or working in the commercial film world, and I am not sure I see a role for it in the noncommercial world. But in the Internet era, where we are looking at doing things with our silent films, for which there is no DVD market, but for which there is a very passionate, very small market, online distribution can be justified.

6. Jonathan Band, Jonathan Band PLLC, was a panelist for *Panel 2: Collective Licensing for Digitizing Analog Materials*.

7. 17 U.S.C. § 108.

Question: I am Jenny Sheridan, and this is a question for Scott Martin. I am interested in the traditional first sale doctrine of copyright and digital media and I think you started your presentation by discussing some of the closed systems that, as we are seeing, the manufacturers are designing their own versions of first sale rights.⁸ I am interested in how yours would work and maybe how you got to that place of deciding that was what you would introduce. Because if I got this right, and please correct me, but it sounded like there would be this household license for streamed copies for six family members and twelve devices. So, are there time limits? Are there price points? And can someone have it permanently or indefinitely? How did you arrive at that construction?

Scott Martin: The pricing is set by each content owner, so there is no agreement on pricing. It is not even the iTunes ninety-nine cent model. When you buy the DVD, wherever you bought it, and at whatever price point you bought it at, it comes with this additional benefit. What was the other question?

Question: Maybe I am not quite understanding how the system works. Is it for content to be provided into the home? Because you mentioned six family members, twelve devices.

Scott Martin: If you buy a hard goods copy, along with that hard goods copy comes access to a streamed copy. So, the idea is basically that right now you buy media. In this realm, you are not buying the media; you are buying the right to the content, and then you can access this content in different ways, and play it on different devices. The model that is being talked about now is a straight ownership model, so it does not expire with time. Once you have it, you will always have it.

Audience Member: Kind of like your Kindle then. You purchase a book, and it is in the cloud, but in theory, you can access it any time.

Scott Martin: I also think that one real value that DRM brings is differential pricing for differential ownership rights. For example, when I flew here yesterday, I could download a movie onto my computer from iTunes, and I could download it to own or I could download it for twenty-four hours, and there was a price differential. And to me that has increased consumer choice. And even in this UltraViolet era, you might only get the digital copy, but you would always have the option of buying the DVD. So, if you wanted to have the hard good copy, you could. Or with libraries (this is not limited to individuals) libraries could take one of these licenses, or the library could just buy the traditional DVD as they do today.

Séverine Dusollier: Just a quick question about what he just said. I wanted to ask you: so you get rid of the first sale doctrine? Because if you buy rights of using content it means that once you do not want that film anymore you cannot resell it on the secondary market because you cannot resell the rights. Am I right?

Scott Martin: If you bought the hard good copy, then yes, first sale doctrine would apply. I think there is litigation going on now about the extent to which first sale doctrine applies to a purely digital copy. There are some real concerns about that because when you have a hard good you only have one hard good. So, if I sell

8. See Scott Martin, *Alternatives to Collective Management: DRMs and Other Business/Technology Options*, 34 COLUM. J.L. & ARTS 675 (2011).

it to you, I no longer have it. If you start applying first sale to digital copies, if I transfer it to you, how does anyone know that it is not still on my computer? I have a copy, I have given you a copy and you give someone else a copy. I think there are some real practical problems with extending first sale to digital copies. You definitely cannot have first sale apply to a limited-time right. Then you only get it for twenty-four hours, and at the end of twenty-four hours, you do not have anything to pass on to anyone else. But I think we will always have hard goods. So, for people who want to be able to sell, who want the physical ownership experience which is sort of our generation's, but may not be the next generation's desire, you will still have that option.

Séverine Dusollier: Yes, but in your system you could introduce a sort of digital first sale if you are registered somewhere with the right to use. That person can say, "I do not want the right to use anymore," and can then resell it because you will deal directly with the person granting them rights to use.

Michael Heller: Let me interrupt for one second. I can see interest in first sale; let us come back to it. First, let us go to our next two panelists to put their presentations on the table and then do another sweep on this issue.

Question: Mark Seeley with Elsevier. If I think about levies, obviously some of the advantages you have talked about are very strong. The idea is that money is collected up front. Certainly, if folks are doing stuff without paying anything then that is really an attractive proposition. But if we think about levies and connect it to a legal market for electronic products—if I think about my own downloading of legal products over the past month, I think I downloaded a television show, at least four books on my Kindle and about twenty songs from iTunes, so I probably spent at least 100 dollars on electronic products. We think of the practical difficulties in terms of doing levies through ISPs; how practical do you think it would be to expect that ISPs would be prepared to manage or collect levies on that order when the actual cost of providing the Internet services is significantly lower?

Séverine Dusollier: Actually, of course you are right. Levies can be received on media, on devices or on ISP. But there are difficulties in each situation. On ISPs, I think it is true they are very well protected under legal regimes. They have safe harbor privileges; they say they are not responsible, so why should they take this administrative burden, this technical burden, of collecting this fee from users? They are really reluctant to accept that new role.

And in Europe, it is very strong there. At the moment, they are seen as completely privileged and do not want to be involved. But in the last years we have seen a change because in most countries in Europe those ISPs are also increasingly providing content. Films, music, mostly film on video-on-demand services. So, because file sharing starts to compete with their own business models, they are more ready to talk. But my experience with levies on media and equipment—because we know that in Europe, in private copy, that it is very difficult to administer and it is very unpopular. There was a European Court of Justice decision saying that the levy should not be paid by companies who are not

supposed to do private copying with the devices, and this decision is completely revolutionizing the organization of levy.⁹

Also, I am not in favor of a compulsory licensing system because the amount of the levy has to be decided mostly—it depends on the country—but in some countries it is the rights owners in negotiations with the payers of that levy and it can take ages to find a solution. Or, it is the government and the government says, “The levy will be that.” So, in Europe we have a very difficult and fragmented situation in which, on the same device, you can pay 200 euros of levy in Belgium and three euros in Germany. It is very confusing and it creates gray markets. But the European Commission does not want to harmonize this because they know it is too complicated. So, I am really not in favor of a levy system because it has proved very difficult to administer for the collective management organizations, with a lot of administrative cost, and it proves to just be a mess.

Scott Martin: I would also note that the Internet service providers (“ISPs”) are very fragmented in Europe. Taking the United Kingdom for example, you have BSKYB, which has a lot of pay-per-view content interests; you have Carphone Warehouse, which is a major ISP that does not; you have TalkTalk.¹⁰ You have a whole range of business interests within ISPs that I think would make it very difficult—as difficult as it is with collecting societies—to get any kind of agreement on anything.

Séverine Dusollier: Actually, for ISPs in Europe, we are waiting for a decision from the European Court of Justice that will decide whether the filtering that has been imposed on the Belgian ISPs is against the safe harbor principles of the E-commerce Directive.¹¹ And the result of that decision might also change the position of the ISPs, although I doubt it will because of the way the questions have been asked to the European Court of Justice, and the court will probably answer in a very strict sense, even though in the last month the European Court of Justice has taken a lot of liberties.

Giuseppe Mazziotti: As it normally does. The European Court of Justice always replies very narrowly depending on what the national courts ask. This is a limitation of our system.

Question: Daniel Garvey from Vanderbilt. I want to comment on two things. I have been doing quite a bit of work on whether we could license peer-to-peer and, for what it is worth, I think we should really separate music from film.

I do not see peer-to-peer licensing for film for a number of reasons. Very quickly, one is that the consumption patterns are fundamentally different. I think

9. Case C-467/08, *Padawan SL v. Sociedad Gen. de Autores y Editores de España (SGAE)*, 2010 O.J. (C 346) 5.

10. See *CARPHONE WAREHOUSE*, <http://www.carphonewarehouse.com/> (last visited Apr. 8, 2011); *SKY*, <http://www.sky.com/> (last visited Apr. 8, 2011); *TALKTALK*, <http://www.talktalk.co.uk/> (last visited Apr. 8, 2011).

11. See Case C-70/10, *Scarlet Extended SA v. Société Belge des Auteurs, Compositeurs et Éditeurs (SABAM)*, 2010 O.J. (C 113) 20; see also Directive 2000/31/EC, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), 2000 O.J. (L 178) 1.

also about the role of music from the sixties to the late seventies compared to films from that period in terms of percentages of what people actually watch. Plus, we know that people do not actually make copies of video files anywhere close to the number of times they make copies of music files. And in addition, you have things like the UltraViolet system that was explained, but you also have Netflix. You have a number of services out there that really address many of the needs. So, I do not see it at all for film. I do see it for music.

And the other comment was: why would ISPs sign up? Two reasons. One—I agree with Séverine Dusollier—is that they increasingly are getting into content as a way to compete because there is a point where you do not need an increased speed of bandwidth. So, they have to compete somewhere else.

In addition, if you have a peer-to-peer license of music—the only cost of an ISP once it is already established is to get content from point A to point B, but if it is on their own network, that cost is close to zero. Whereas, if they have to get the file from some other server, especially when that is quite far, there is a cost. So, if there was licensed peer-to-peer, they could actually do what they are not supposed to do, which is to have the content on their servers for their own subscribers, and they would lower their costs. So, there is actually something in it for them. And if anyone would like to comment on that I would certainly like to hear more. Thank you.

Jonathan Band: One of the hesitations in this country, at least towards CMOs, is that there is a (maybe incorrect) perception that CMOs tend to become sort of bloated bureaucracies. Certainly not the American CMOs, but the European ones are sort of these bloated bureaucracies and I guess that that is a concern. To some extent that part of the point of this discussion is to say, “Is this something we should be thinking more of in this country? What is the experience?” And again, is our perception of these sort of bloated bureaucracies with people who are supposedly collecting money for cultural heritage and they are just spending it on their vacations and such—I mean, to what extent is that accurate?

Giuseppe Mazziotti: That is a bit of an exaggeration. Mismanagement is in every kind of business, unfortunately. In Southern Europe and Continental Europe, these bodies were literally hybrid organizations. For instance, the degree of supervision that the government retained, or the parliament retained, can still be very high. And even the appointment of the management is normally complex. But the point is that the societies were not designed initially to merely manage music rights or copyright in order to maximize the revenues of the members.

They historically played, effectively—distortions or mismanagement can be there—additional roles. When I mentioned the fact that there is a sort of union model, every collecting society in the Continental European system has historically developed ways to protect the authors. And the reason why the authors normally retain fifty percent—half of the revenues from the exploitation of their works—is mainly due to the fact that the collecting societies were there and made sure that this kind of split, this equal share, was effectively grounded. I agree with you that there has been a lot of mismanagement, but this is also due to a governance problem.

I do not think that the Commission is fair enough when it wants these entities to compete with completely different entities which are companies, businesses, corporations, and they operate in a completely different way. If the Commission wants competition, it would be much fairer, in my view, to harmonize how collective management works on a national basis, and then see who is best.

But now you cannot pretend that the Baltic collecting society competes with PRS, or assume that the Portuguese collecting society is going to compete with GEMA in terms of means, in terms of equipment—with technological equipment you think how granular and how sophisticated the management of music rights must be in an online environment.¹² Can you really compare the equipment and the tools that GEMA and PRS have to those which are used by the Greek society? I understand there is a problem with management. The recommendation of the European Commission addressed these points identifying good practices.¹³ So, this is a point the Commission acknowledges. But from my perspective, the tool is wrong because collecting societies at a national level try to preserve cultural diversity.

I was invited one year ago by the European Parliament, together with a few colleagues of mine, to prepare a study to deliver to the legislative committee of the European Parliament because a number of European Parliament representatives from small countries objected strongly to the European Commission action.¹⁴ There was an unusual, very strong political clash. It is normal in Brussels; clashes are everywhere and fights are everywhere, but I did not remember such an open and strong clash. And the European Parliament in the last year has always replied in an official way through two resolutions. And lastly, in December 2009 as authors of this study we were free to say whatever we wanted.

We did a lot of research in six European countries trying to combine the analogy of big countries with that of small countries. But we came out with the conclusion that this system paved the way for the overcentralization of management at the European level to the benefit of big music publishing conglomerates. It raised very high risks of marginalization of local repertoires. And it did not address in any way the issue of cultural diversity, which should be an advantage of Europe—not a disadvantage. We have twenty-three languages. When you speak of music, you speak of lyrical tradition, you speak of songs. Obviously, now we do not realize how important this is because, as I put in my first slide, digital music sales are just fifteen percent of the total. But this is a process which is going on quickly. As soon as the quantity of music which is sold legally on the Internet grows, we will have this risk of marginalization. And copyright should not be enacted and

12. See PRS FOR MUSIC, www.prsformusic.com (last visited Mar. 16, 2011); GEMA, <https://www.gema.de/en/> (last visited Apr. 8, 2011).

13. See Commission Recommendation of 18 October 2005 on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services, 2005 O.J. (L 276) 54, 55.

14. EUROPEAN PARLIAMENT STUDY ON COLLECTING SOCIETIES AND CULTURAL DIVERSITY IN THE MUSIC SECTOR (June 2009), available at <http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=28328>.

enforced only to the benefit of big players. Let me say that—because we discussed a lot about Google—copyright is also about the benefit of the small players who invest a lot, small publishers or medium-sized publishers. Copyright should be to the benefit of all society, not just to the benefit of the biggest players in the arena.

Question: Nancy Kopans, JSTOR. I want to go back to the discussion that Séverine Dusollier was having earlier about first sale in a digital context. And I think there is an interesting provision of the U.S. Copyright Act to consider in this context, and that is § 117 about computer programs.¹⁵ And what is so interesting about that is that it presupposes ownership; it presupposes a sale, not a license. And yet, it says that for any sort of onward transfer, you have to delete the copy you have. It allows for the making of an archival copy, but that too has to be deleted if you decide to transfer your copy.

And computer programs are defined in the Copyright Act very broadly; it is just a set of instructions to bring about a certain result.¹⁶ Arguably, an e-book, anything digital, could be a computer program. I think that there is some room to think about first sale. It is not called first sale, but at least the U.S. Copyright Act contemplates this idea that you want to be able to allow onward transfer if you own a digital work, but you also have to insist on deletion of the original copy.

Séverine Dusollier: Yes, I agree with you. The problem is rising also on the political agenda in Europe. There was a court decision in Germany saying that even though you have bought—I think that was about computer programs also—although you have bought them online, they could be qualified as sales according to the circumstances of each case. I have not read the decision, but I read about the decision.

And there are other decisions pending in Europe, and the problem is very important right now because you have a revision of the consumer protection directives in Europe and they completely avoid the issue of digital product. They say, “We will just update consumer protection laws in Europe and we will also cover digital products, but it is too complicated, so we leave things as they are.” And if you systematically qualify what you have bought online as services and not as goods, it is not just the first sale doctrine that you get away. There are also a lot of protections for consumers that are not offered to them if they are buying services. And so this is a very big problem.

And if we are increasingly buying things digitally, it is not fair that the consumer will not get the counterpart: that if he buys something it becomes his property, and then at some point he may want to get rid of the property. I do not know about property law in the United States, but one of the things that I teach my students about property is that you can get rid of it. If you do not want the property anymore you can get rid of it. You can resell it, you can delete it, throw it away. Why would it then be applicable to a CD that I have bought online, but inapplicable when I have made a CD out of the songs that I have downloaded? Just because the

15. 17 U.S.C. § 117 (2006).

16. “A ‘computer program’ is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.” *Id.* § 101.

channel of transmission to me was digital I do not own anything and I cannot get rid of that thing; I have just bought a stream of bits. I think it is very strange and I think that there are a lot of things to do there.

Giuseppe Mazziotti: Unfortunately, the 2001 Copyright Directive went in that direction in many provisions.¹⁷

S  verine Dusollier: Yes, but the 2001 Directive made so many mistakes. It is just one amongst others.

Giuseppe Mazziotti: Yes.

Scott Martin: When we talk about first sale, we have to talk about why it is we are talking about first sale. We have been mentioning the ability to resell. But what also comes out of first sale in this country is the lending right, the rental right and library archival rights. And so, when we are talking about what the impact of digital copy is, I think that more than talking about first sale just as first sale, we should be talking about what might we lose. What are we trying to preserve? And to me, far more important than the consumer's resale right are those things like the rental right, the lending right and archival rights.

Audience Member: I think that those are very sacred and that it is very scary entering into this if everything becomes a license. But sometimes I wonder whether the CONTU Guidelines were created to address a problem.¹⁸ And does that problem exist to the same degree—and this is heretical I realize—if materials can be more readily accessed, if there is a short-term purchase option for a book or an article so that lending is not necessary?

Because if you want to replicate an interlibrary loan in an online environment, that becomes really hard. You have to develop all sorts of bells and whistles; you have to have automatically self-deleting content. You know, that is a huge investment. What if the conversation shifted a little bit to: "We do not need the same kind of CONTU Guidelines. Maybe we have different kinds of guidelines that allow for an interested library to access content on a short term basis." Because I agree, it touches on so many areas on what we lose. But there is also the question of whether times have changed and maybe it is not that we lose it, but that it gets recast.

Michael Heller: Does anyone want the last word on that before we wrap up? Great, so we are going to wrap up. Let us thank our panelists.

17. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10.

18. See LIBRARY OF CONG., FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS (1978), available at <http://digital-law-online.info/CONTU/PDF/index.html>.