

Symposium: Collective Management of Copyright: Solution or Sacrifice?

Panel: Challenges for Collective Licensing Organizations

Questions and Answers

Question: Mark Seeley, Elsevier. I am coming from a publishing background and am a little confused about models for collective management organizations (“CMOs”). The way that I think about the continental European models is that it is typically, at least for publishing, based on a statutory right to authorize and derive some revenue from activity taking place in the territory. I think we heard about going from territory to repertoire in the music space. But I think in publishing, it is still mostly territorial, and it is still mostly about the statutory mandates that are provided by law, and that obviously seems like a very different model. My impression was that there was a collective model that was more of a singular model, and at least in publishing, I still see that there are two very different regimes, which, as we heard in the Spanish music scenario, give very different results, and I just wondered if you could comment about that.

Daniel Gervais: Thanks, Mark. Your question really seems to focus on Europe as an example. First of all, repertoire and territory are two different things, in my paper at least. Repertoire is the bundle of works or rights that are licensed, whereas territory is the footprint of the license.¹ What was going on in Europe was that if you publish a book in one of the twenty-seven member states, you cannot really prevent its circulation.² So, even if you have given territorial rights, it is going to be essentially impossible to enforce those rights as a matter of exhaustion within the European Union. Exhaustion rules are not set internationally. Exhaustion basically means once you have printed a book or journal and put it on the market in a particular country with your authorization, then the question is: can another country consider that that particular book is authorized in this other territory because it is a legal copy but not made for this other country? Within the European Union, again, the rule is: one territory. Now, some countries have so called international exhaustion, so that would trump a contract in which you are trying to create an exclusive right because that country is allowed to consider that the book that you have published and put on the market legally in country A is legal in their country and in their territory. Territory is complicated; the default rule of the Berne

1. See, e.g., Daniel Gervais, *Collective Management of Copyright: Theory and Practice in the Digital Age*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 1, 7 (Daniel Gervais ed., 2d ed. 2010).

2. *Id.* at 6.

Convention is country by country, but it is always subject to this exhaustion. I am not sure I am answering your question, but that's the way I would look at it.

Question: The question was not really about exhaustion. The question was about how traditionally, in a continental European rights organization for publishing text based works, essentially the rights organization had a statutory right to collect and to authorize copying activities taking place in that territory. I think, as Adriana Moscoso was talking about, that used to be the case for music as well. Now the focus in music perhaps follows more of a CCC model, where there are rights holders that are granting rights to a CMO to then further authorize copiers; but, at least traditionally in text based publishing, those are two very different models. From your perspective, are we seeing a move from one model to the other, particularly in Europe? Perhaps Adriana could comment about what is happening in the music space because it seems as if it has happened there.

Daniel Gervais: The problem is that we have got twenty-seven member states and they are all looking at this somewhat differently—which is also why this antitrust model in Europe doesn't work so well—but a pan-European model regulatory regime might actually help. So, for the book and text based reproduction, what is happening is you have got a number of market factors and then regulatory factors. The market factors are that the reproduction rights organizations in Europe have traditionally tended to focus on government and educational uses.³ In the United States, I believe—although I have not seen the latest numbers—that CCC's market share or numbers would be higher in corporate licensing.⁴ And that is a voluntary system set up by rights holders and accepted by users. What happens then in Europe, on the regulatory side, is that you have got some countries like France where the government basically has decided that there is a certain number of users that a reprography collective can and should license, and they have given them the authority by statute to do so. Other countries have different regimes, but these are necessarily territorial as things stand right now in Europe, so the regimes would be country by country; the exception in France for private copying, for example, which comes with this statutory regime, is obviously just in France. So, if you are a company operating in Europe, that becomes enormously difficult because if your company is operating in several territories, it is probably looking for a single solution. I think that is what Tracey was trying to describe when she suggested that users do not necessarily think about their email having to stop at the Belgian or Dutch border to check whether their license goes with it, whereas if you are the right holder, you can carve the rights however you want.⁵

Adriana Moscoso: There are two different systems for music distribution and

3. See, e.g., Brad Holland, *First Thing About Secondary Rights*, 29 COLUM. J.L. & ARTS 295, 317–18 (2006) (describing reproduction rights organizations in the United Kingdom and other European countries that collect most royalties from schools and universities, whereas CCC in the United States only targets business and government sectors).

4. *Id.*

5. See Tracey L. Armstrong, *The Practical Difficulties of Implementing Collective Management Schemes*, 34 COLUM. J.L. & ARTS 423 (2011).

publishing distribution, and collective rights societies work on the distribution of music rights, but there is not an equivalent system for books. It is also true that the distribution right expires with the first distribution of a given book. So far, the transfer from the offline world to the online world for the distribution of books in Europe has not been addressed by the authorities. It is hard to compare both systems because they really are different, and collective rights societies for books and for reprographic works, at this point, do not deal with distribution rights outside of their national territories.

Pamela Samuelson⁶: I would love to get comments from a number of people on the panel about the Google Books Book Rights Registry model. First to Daniel Gervais: you made a comment about having some concerns about the establishment of that registry, and I would love to hear what you have to say about that. To Scott Hemphill: I would be interested in your thoughts about whether there might need to be some antitrust oversight of the Book Rights Registry. To Tracey Armstrong: I would like to know if you have any advice for anyone who is trying to set up a Book Rights Registry. And to Gene Mopsik: would you trust the Book Rights Registry to manage the rights of the photographers?

Daniel Gervais: I have an international law concern, but I am going to answer that very quickly by saying that the issue just came up in the Stanford Technology Law Review.⁷ My comment in my talk was really just about setting up a collective.⁸ So, if you look at SoundExchange, and if you look at a number of European collectives that were set up recently, there is a ramp up period of several years before they have the data and a distribution system that is really functioning. In the meantime, two things are happening: money is piling up—which may sound good, but actually, it is usually not good because then litigation might happen, or other things like that might happen, and obviously, rights holders are not getting paid. The second thing that happens is that there is enormous effort, money, time and so on spent on actually getting the system up and running, which is money that is again not going to the rights holders. I would not underestimate the difficulty of getting the metadata that Tracey Armstrong was describing, or in getting the necessary personal data for rights holders. Even just keeping track of the rights holders must be almost a full time job. There are an enormous number of small details that you need to set up for a collective. You have to set up the system; you have to do a lot of things that are just not obvious at all.

C. Scott Hemphill: On antitrust oversight: I think my bottom line would be not yet, at least. Given that the Google Books case is at the stage of class action approval, I do not think that the judge is well positioned, given his statutory mandate under the rules, to act with respect to antitrust concerns. On the merits, thinking about a later government suit, so that sixty years from now, we can look

6. Pamela Samuelson, Berkley Law School, was a panelist for *Panel 2: Collective Licensing for Digitizing Analog Materials*.

7. See Daniel Gervais, *The Google Book Settlement and the TRIPS Agreement*, 2011 STAN. TECH. L. REV. 1 (2011).

8. See Daniel Gervais, *The Landscape of Collective Management Schemes*, 34 COLUM. J.L. & ARTS 423 (2011).

back on the commencement of the antitrust consent decree with the Book Rights Registry, there are the two concerns that I mentioned. As for horizontality, I think the amendments to the agreement have moderated some of the central issues that the Department of Justice (“DOJ”) was rightly concerned about. I think we are going to need to see how that plays out in practice (if the settlement is approved) before getting too far ahead of ourselves. As for the concerns about de facto exclusivity on orphan books, aside from my “let’s wait and see what happens” approach, there is a real issue for antitrust. This does not mean that there is no public policy question. But for antitrust’s somewhat limited tools, one has to be able to tell a story not just about how it is hard for Amazon or Microsoft, but rather how Google’s actions themselves had the effect of making rivals’ costs higher. I’m not saying that argument cannot be developed; I just have not thought of it yet and I have not seen it, and I do not think the DOJ’s brief told that piece of the story, which I think is needed to really make out an antitrust claim.

Tracey L. Armstrong: I guess my advice would be: do not underestimate how difficult this is going to be. I think one of the most difficult things for any organization like the Book Rights Registry is getting rights holders to opt in to the system, or in the instance of the registry, for rights holders to come in and actually identify their works. It really takes time. And as much as I made the comment that one of the obligations of CMOs is really to help with copyright education, you are educating your rights holders as much as anything else. We spend as much time educating the staff of commercial publishers and running sessions for authors and creators as we do with users. So that is a big piece. The other thing I guess I would say to your point, Pam, is: do not reinvent the wheel. There are many other places out there that you can look at to see models that are effective or to see elements that could be used.

Eugene Mopsik: I will go to the old axiom that says, “trust and verify.” On the one hand, while I would look forward to some settlement down the road that does include photographers and visual works, I have been skeptical of the compensation schemes that I have seen in the original settlement agreement and that have a hard time coming up with a reasonable valuation for images, given the compensation that was established for literary works. That may be one of the reasons we wanted to participate in the original suit; and for whatever reason, we were denied. And I have probably said too much already.

Question: My question goes to Daniel Gervais, Joan McGivern and even perhaps to Scott Hemphill. My question goes to the music users, or users of the collective rights system. In the United States, we have seen some pushback from the responsibility of music users to use licensed copies, and from exploring alternative means of a blanket license, such as per segment license, per program license and now, something called a carve out, which is actually a subset of a smaller part of a blanket license. We also have a situation in Washington, D.C. in which the broadcasters have defeated the record companies’ quest for the moment for performance rights for terrestrial radio broadcast. Are you concerned, in the scheme of collective rights, that the bigger issue might be the power that has transferred over to the broadcaster or music user, somehow constraining the future

vitality of collective rights?

Daniel Gervais: Someone talked to me during the break and said he did not agree with my statement that intermediaries will be more powerful than the content owners; that the real value is in the content. I will just say this: look at the market. How much is the market valuing companies like Google and Netflix, and how much is it valuing the record companies? It is not that they are valueless, but to say that the market really has rejected the intermediation function as being valuable is a bit of an overstatement. I think these intermediaries will have huge power. Now, the irony in response to your question is that typically, in the case of, say, Google, we will be looking for safe harbors. Google does not have a copyright role to play, even though there was YouTube and so on, but still, largely, Google has been absent from the main copyright equation for its main search engine function. And the thing that establishes the value is the connection that they are making, for which, again, they have been mostly outside of that picture. I think something needs to happen. This is why I am not sure that antitrust is the right vehicle to get to the right answers, and I think a more coherent framework would make sense, whether or not we get a performance bill and sound recording. And I know you would not agree with this, but that is almost an ancillary question to the real question of who is at the table, and how do we make the copyright equation actually work.

Joan M. McGivern: To answer your question on this new concept of going from ASCAP licensing on a per-segment or per-program basis, and where we presently have a ruling against us, as does BMI, on the issue on whether or not a performing rights organization (“PRO”) is obligated to provide what is known as a blanket carve out license. I am going to step back and define that, because I see eyes glazing over. In the background music industry, a particular service sought to and accomplished directly licensing certain catalogs of music publishers’ works, and then it said to the PROs: “Well, this is the price I want to pay, but I want to deduct from it the percentage of music that I am using that is directly licensed.” Both ASCAP and BMI took the position that a blanket license within the PRO world has a different value. It’s not a usage based license; it should be valued differently. I am a little constrained in what else I can say beyond that because we filed an amicus brief in BMI’s proceeding, as did the Songwriter’s Guild, and we will be briefing our own appeal on that shortly. But, yes, it is quite problematic because we feel it does devalue the repertory and what a PRO can bring to the world. We are not a rights clearance entity per se. We are a performing rights organization and we bring to you the collective access to a repertoire, in some ways where the antitrust laws butt up against how you value IP rights. I wanted to say one other point: you had asked a question about the broadcasters and the public performance and sound recording? I was not quite clear what you were asking.

Question: I think my point was that it seems the power of the equation is moving from the copyright owners to the users, and it was not just the legislation, but also the incumbent power that users seem to have over the equation.

Joan M. McGivern: Given that ASCAP and BMI both operate under consent decrees, and the fact that even our collective revenues pale in comparison to

broadcasters, and Google and all these other services are wonderful in many ways, but there is a disconnect that seems to be evolving between value and revenue, and where the rewards from either the value or the revenue are being directed. I think the balance is starting to go against creators, and that is troubling particularly from a constitutional, incentive-reward theory perspective. The U.S. economy, if it is going to have a future, is in the area of IP and creativity, and we maybe need to step back and think about that bigger concern.

Adriana Moscoso: I wanted to add something with regard to what you said about the switch of power from the copyright owners and the users and what Daniel Gervais said. In Europe, this is one of the issues that has really been on the table for the debates between the European Commission and the stakeholders, collective societies and authors and creators in general, who are saying to the Commission that antitrust regulation, which is very important and has helped societies make steps forward, needs to be balanced with other elements such as cultural diversity. We were trying to explain to the Commission that a day might arrive when users will reject small repertoires because they are not interesting for them for their business. This is something that we (the collective societies) are trying to make the Commission understand: that there are some other values to be preserved. And in Europe in particular, it is important to maintain cultural diversity, small repertoires and this solidarity that was characteristic of collective management, which obliged big repertoires and powerful repertoires to go along with the small repertoires to be kept in some way.

C. Scott Hemphill: The question for me here is: do some of the developments that you are talking about suggest that the value of a blanket license is declining over time as individual negotiations become more feasible, compared to the feasibility of that thirty or forty years ago? If so, there is at least an argument that the district court, as part of this consent decree, is in part—I say this with some reluctance—helping to manage a decline or a change in the way these things are negotiated, and that that might be a salutary development.

Question: My name is Roy Kaufman. I am an author and I work for a publishing company, John Wiley & Sons. My question is for Adriana Moscoso, and it really relates to both the fragmentation of the repertoire and the market. You have talked about why that is not good for CMOs, and I think that is pretty clear. And you have talked about why it is not good for users. I am curious: have you looked at or analyzed whether it is good for rights holders? Because when I look at that fragmentation, I assume, perhaps incorrectly, that the rights holders might be making *more* money because they might have a little more power vis-à-vis some of the others. Has it helped rights holders make more money, or has it hurt them, or do you not know yet?

Adriana Moscoso: That is a good question. I tend to think about rights holders organizations as equivalent to authors, so we try to defend authors' interests. So, I do not really know what to tell you. Your question is linked to the idea of having an individual organization of rights by authors, and this, of course, is possible online and much easier than it was in the offline world. And from my European Commission point of view, this really is horrible because what the Commission

2011] CHALLENGES FOR COLLECTIVE LICENSING ORGANIZATIONS 663

wants is to have as much diversity as possible in the market, and to have the possibility to license repertoires with some territory limitations. For example, to license some works to a collective rights society for southern Europe and through another for northern Europe, and even individually for authors. But I think that the real world makes this kind of licensing quite hard for authors because it is very hard to manage for collective rights societies. So, it is hard to imagine an author dealing with his repertoire and with the licenses by himself, and if you do that, you have less time for creation.