

Copyright & Commerce: Orphan Works & Fair Use in a Digital Age

From the perspective of copyright, 2011 has been a year like so many others in the Digital Age. Suits and counter-suits over copyrighted text, music, film and video continue to fly in and out of court. The long-standing [“Google Books” case](#) is, for now, scheduled for trial in 2012, while the [HathiTrust](#) – a consortium of university libraries – has drawn a new lawsuit from authors for announcing plans to post online copyrighted texts that may or may not be “orphan works.”

A panel of IP experts and commentators offered their answers and insights into these compelling issues on Monday, December 12, 2011 at the [Newseum](#) in Washington, DC., in a conversation with [spoke](#) with CCC’s Chris Kenneally.

- **Maria A. Pallante:** *The 12th Register of Copyrights and Director of the [United States Copyright Office](#);*
- **Cecilia Kang:** *National technology reporter for the [Washington Post](#);*
and
- **Victor Perlman:** *General Counsel, [American Society of Media Photographers](#).*

KENNEALLY: And finally, I want to turn now to Cecilia Kang. Cecilia, welcome.

KANG: Thank you.

KENNEALLY: We should tell people you are the Technology Policy Reporter for the *Washington Post*, and write about the intersection of technology and Washington. You also blog at Post Tech. Cecilia Kang came to the *Post* in 2006, after covering technology and demographics for the *San Jose Mercury News*, where she followed the dot com world of Silicon Valley, from boom to bust, and I thought briefly about the dot com boom and one of those phrases from that time, content is king. And that’s kind of gotten a little bit worn at the edges at the moment, but the relationship between some of the major technology companies that we think of, the Googles, the Amazons, Apples and so forth, and content itself is really critical, I think. Their business models require content of the kinds of works that are produced by photographers, writers, all sorts of people. Isn’t that so?

KANG: That’s right. And there is the same tensions that existed from when I was covering this back in the late ‘90s and early 2000. Back then though, the distributors were cable and movies houses, and now it’s Facebook, Google, Apple, and Amazon. The players have changed and the methods have changed a little bit, but it’s still the same tension inherently between those



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who create the content and those who distribute it. And that sort of brings us to where we are today, which is sort of the big questions circulating around Washington of how to protect intellectual property, given the new gateways that consumers are using to access that content, and ensuring that there aren't big losses for the content creators, and not just content, but those who create intellectual property at large. So these are some of the biggest debates that are having a lot more voice and getting a lot more of a bigger audience, in the last few months, frankly, than they have in really years.

KENNEALLY: And these issues, of course, have a lot of competition for air time, given the situation on the Hill and just nationally. Our economy is a concern, jobs are a concern. We have an election year coming up. In less than a month, we'll begin. How much attention is all of this getting, considering that kind of competition?

KANG: Well, it certainly is getting a lot of attention. On the Hill, there are right now two bills circulating, one in the House, and one in the Senate. And another House bill that will be introduced later this week, probably as soon as tomorrow. They all try to achieve the same goal, which is to protect intellectual property, anti-piracy, and anti-counterfeiting. And you're also seeing federal law enforcement step up their efforts to stop the illegal trade of copyrighted and protected material and goods. So there's definitely more attention, I think. Since the administration came in, there's just been a general – there's an IP Czar that was appointed. There's more interest. That's helped those who have tried to fight for anti-piracy bills, such as the Motion Picture Association, the songwriters' record labels, the US Chamber of Commerce too, to push for legislation and proposals. But getting there and actually finding out solutions that will get agreement from lots of different parties – and so any more parties have stepped up to voice opposition or support for the different bills – it's going to be a lot harder than I think a lot of people thought.

KENNEALLY: Well, let's talk about that just a bit. And one of the things I thought was interesting, there is this third bill. There is SOPA, there's PIPA, and there's this new one called OPEN.

KANG: That's right.

KENNEALLY: And I like that acronym, but what I found intriguing was it hasn't even been introduced yet, it's been talked about, but yet not really published, but they have a website and they're getting public input on that website, and I found that fascinating that this was really an issue – to get to the earlier question about how important this is, how much airtime is it



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getting? When the public is contributing on a website about this, something's going on.

KANG: Absolutely. I think it's hard to get the general public interest, consumer groups really jazzed up about a policy issue when it comes to technology and this whole space, but this one has. This is sort of the big one these days that has anti-piracy that has really brought together, brought voices from consumer group communities in the public interest, and I think that there is a lot of empathy for both sides of, yes, we need to protect content, but how can we get there in a way where the right people are liable for when there is illegal trade of copyrighted and protected content? And those are the big questions and then you have very powerful companies that normally don't care. As Victor said, they have sort of this libertarian view from Silicon Valley. We actually don't really care about a lot of issues, as long as you don't infringe on us, and their fear is that some of these proposals, specifically the Stop Online Piracy Act in the House, and to an extent, the Protect Intellectual Property Act in the Senate, would make them liable. That they would not have the same safe harbors that the Digital Millennium Copyright Act affords them, but the DMCA and the safe harbor that it affords some of these websites is exactly what a lot of those in Hollywood, a lot of those in the record industry, a lot of those in the photography industry and the news industry will say has done nothing to really change or move the needle, that they're still seeing a lot of their content being distributed illegally and no money going to the right places.

So there's this problem that everybody agrees that what's working now is not really working, but how to get to a place where there is real protection and legislation that puts the liability in the right places, on the right people, and the right companies is the real question. So again, there's an agreement that piracy is bad, and there's an agreement that maybe some of the worst, the most nefarious or the worst perpetrators are the foreign rogue websites, but how do you protect, make sure that that content doesn't go to those websites, when the internet is really borderless in some ways, and the same search engines, the same social networks are providing content in the same way, or using content in the same way that these foreign websites are as well potentially? And how do you define terms like dedicated, sites that are dedicated to piracy? There's a lot of blurring of language that gets these Silicon Valley companies frankly a little freaked out.

KENNEALLY: Well, and it also gets the users freaked out, and I think it's because the importance of these companies is just growing in our lives. I mean so many people of any age would feel lost without Facebook, without Google, without their Apple iPhone, without their Amazon Kindle and so forth. And the questions go well beyond intellectual property.



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KANG: Yes.

KENNEALLY: We start talking about anti-trust. We start talking about privacy concerns. It makes it fascinating, and it really makes it a kind of inclusive subject for the lives of everybody in this country.

KANG: Certainly. And I think a lot of people can relate to this. Normal people can relate to this very complicated, wonky issue that's being debated on the Hill, with the particulars being very, very, again, wonky, and specific and technologically specific because it cuts across so many larger issues. Freedom of expression is evoked, this idea that it cuts across First Amendment rights. Again, privacy. And this later argument that's being espoused by some consumer groups in Silicon Valley companies, this idea that the internet can be broken if certain legislation goes through, and these are big proclamations that aren't necessarily defined very well, but are being evoked in these larger debates.

KENNEALLY: Well, they make great bumper stickers, they make great hashtags on Twitter. I want to look at one particularly that was just recently addressed by the FTC, and that was some privacy complaints against Facebook. And there was a quote from John Leibowitz, who is the Chairman of the FTC, that I thought was intriguing. It was in your report. He said when they settled these various violations, and you can tell us about the particulars there, but John Leibowitz said, "Facebook is obligated to keep the promises about privacy that it makes to hundreds of millions of users. Facebook's innovation does not have to come at the expense of consumer privacy. The FTC action will ensure it will not." And I think that's an interesting quote. I mean the idea that innovation, which drives so much of Silicon Valley, seems to run rampant, not only by people's privacy, but sometimes over their intellectual property and so forth. And maybe you can tell us more about that decision.

KANG: Sure. And I think that goes back to what I was trying to say earlier about – when I say Silicon Valley doesn't care about these issues that Washington – they do. I think a lot of the companies do care about many of the issues here, but there is a view also in Silicon Valley that these companies, the companies that they're creating every day, are really creating very new, innovative products and services that are distinguishing the country globally, and our economy, that are really changing the way consumers behave. They're providing a service, and people there are very focused on technology. And so when I say that Silicon Valley doesn't care, what it is that Silicon Valley cares very much about engineering and innovation and the next new thing. And a lot of the issues, unless it really infringes on their ability to continue doing that, that's when you hear people piping up. That's

why it's interesting that big web companies, tech firms alike, have become so vocally against some of these legislative proposals.

And when it comes to Washington though, and how this relates to consumers, the concern that Chairman Leibowitz is that, OK, we get that. That is very important, and it is important for our economy to have these new innovations, but what about the basic rights of consumers to feel that they're getting up front truth when a company says that we're going to do certain things with your information? That we are providing you copy content that is legal or not. These basic truths and protection of consumers is what Washington regulators right now are trying to grapple with and trying to understand if these web companies are keeping that as high on the priority list as the next string of codes that are going to produce the new Facebook service.

KENNEALLY: With regard to the Hill itself, how do these questions divide people on the Hill? It's not purely a question of Democratic, Republican, blue state, red state. Even within single states, there's divisions. Can you tell us about those?

KANG: It's definitely bipartisan, this issue, and it should be noted that both of these bills, particularly the one in the Senate, has a lot of support. I think there's 40 co-signers. The one in the House, SOPA, right now has something like 20 co-signers, 25. And it's bipartisan for sure. And in fact, the newest bill that'll come out this week, OPEN, is a bipartisan co-authored bill from Representative Ron Wyden and Darrell Issa, one from California, one from Oregon. And what you see is there is not – not to put too much of a fine point on it – you do see some pushback from lawmakers from Northern California that represent some of the web companies, but not to put too much of a fine point on it, these are bills that are generally fairly well supported. As to whether they will go through, particularly by the end of this session, which is we're running out of time, and going into 2012 with an election year, I think there are big questions as to what will in fact really turn out to be a true law from any of these.

And I think also this third bill that's coming up is sort of a curveball, the idea of the liability or the responsibility lying on an international organization, the International Trade Commission, and instead of taking down domain names, the idea is to remove links on sites, to try to counter piracy. So that's sort of curveball in that it introduces a whole new idea and solution, but there is interest. It started and has tremendous backing, these legislative pushes, from many companies. The US Chamber has been a big proponent of both the Senate and the House bills. And just now, only in the last month or so have you seen Silicon Valley really come out and voice opposition to the particulars of these bills and but really light a fire, and



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you're getting venture capitalists come out, and they've formed these coalitions with public interest groups. So it'll be interesting to see how much that actually has an effect on putting the brakes on any of this.

KENNEALLY: Well, it's getting some people's attention. I read that Nancy Pelosi, who's a Northern California lawmaker, has tweeted about SOPA in the negative, and yet the bill is co-written, I guess, by John Conyers, who is a ranking member in the Judiciary Committee.

KANG: That's right.

KENNEALLY: So these are people even within the Democratic Party who see things quite differently.

KANG: That's right. And I think also the trouble with getting these passed is that they're technical. These are technical bills that require a lot of thought on what sort of the greater implications are. What does it mean to take down a domain name? You know, those who are against the bill would say that that disrupts the whole architecture of the internet and makes it very difficult to find websites. It puts a lot of burden on domain name services, as well as search companies, etc. What does it mean for a third party transaction company to be associated and potentially liable? Credit card companies, when they hear that, that raises a lot of alarm bells to them. Does it mean that Visa and MasterCard could be responsible in some way? And what would the liability be? So there's lots of big questions and a lot of the technical, and the devil is in the detail always on these things. So there's –

KENNEALLY: And the impact on the economy, that must certainly come up as well.

KANG: Sure.

KENNEALLY: Whether this is not simply a matter of a cost to an individual company, but a cost to the economy at large if things aren't done in a balanced way, for example.

KANG: Sure. Sure. And you hear that argument over and over again, and it's a very compelling one. When you hear the Chamber of Commerce say that \$165 billion in revenue is lost from pirated copy every year, that's a big figure, and in an economy like this, in such a stubborn downturn, with jobs the way they are and you have folks who are testifying on the Hill who are the concession stand, you know, vendors, to the unions, and janitors, and the ripple effect when Hollywood's hurting and publications are hurting, and what that means for the economy at large. It's an important question for the federal government right now.



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KENNEALLY: Well, we will follow it all on your blogs, Cecilia Kang, who is the Technology Policy Reporter for the *Washington Post*, and blogs at Post Tech. Thank you very much indeed.

KANG: Thank you.

KENNEALLY: So if you can make a note and join us, if you will, at the Kernochan Center for Law, Media and the Arts in New York City on Friday, March 30th, 2012 when Copyright Clearance Center presents its third biannual forum on Copyright 2012, Advancing the Creative Economy. This day long event will focus on the health and future of the global creative economy in a time of changing technology. CCC plans to bring together thought leaders, creators, and policymakers for presentations and panel discussions about the vital roles of copyright and creativity in the progress of knowledge. Portions of that event coming up again at the Kernochan Center for Law, Media and the Arts in New York on Friday, March 30th, will be webcast live, but we hope if you're in the area, you can make it. To learn more or to register, please go to oncopyright2012.com. And remember to follow Copyright Clearance Center on Twitter and on Facebook. Again, thank you all very much for joining us today, and look forward to seeing you back again very soon. (applause)

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