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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](#).*

SENDER: My name is Craig Sender and on behalf of Copyright Clearance Center, I would like to welcome you today to our panel, Copyright & Commerce. Just a couple of things. A reminder to silence your cell phones. Would also like to welcome those who are watching online around the world. Everybody here in studio and online will have an opportunity to ask questions at the end of the panel. For those watching online, ask your questions via Twitter and the hashtag is #CopyrightandCommerce2011. And right now, I’d like to introduce you to Copyright Clearance Center’s CEO, Tracey Armstrong. (applause)

ARMSTRONG: Thank you very much. And thank you for joining us here. The issues we are here to discuss today are at the heart of discussions among rights holders and user communities, and that is the unique space where Copyright Clearance Center exists. We are very pleased at CCC to be facilitating this discussion today, and others like it, such as our day long OnCopyright symposium, scheduled for March 30th, 2012, at the Kernochan Center at Columbia Law School in New York. We are very honored to have this group of distinguished panelists here with us, moderated by Christopher Kenneally of Copyright Clearance Center. And at this point, I’d like to thank you for joining us and turn it over to Chris.



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KENNEALLY: Well, thank you, Tracey. Thank you, everyone, for joining us today and welcome again, on behalf of everybody at Copyright Clearance Center. I want to kind of set the stage a bit and think about those two words. Copyright and commerce. They make an intriguing pair, and maybe not such an obvious one. Copyright is about intellectual property. It's about inspiration and creativity. Commerce, well, it's all about getting down to business. Counting up the beans, calculating the return on investment. And of course, more than ever, they intersect in our time. Increasingly, the creative economy dominates and dictates the direction of our nation's fortune. For the next hour or so, we will check on that direction with our panel. Success today will come if we engage you in that discussion. So as you've heard, we invite you to join us at the end here in the studio, or online via our Twitter feed, which is again #Copyright&Commerce2011.

I want to begin first by welcoming Maria Pallante. Maria, welcome.

PALLANTE: Thank you, Chris.

KENNEALLY: On June 1st, the Library of Congress appointed you as the 12th Register of Copyrights and Director of the United States Copyright Office. You are an attorney, and have had wide ranging experience in copyright transactions, policy, and litigation in the government and private sectors, and I want to start by giving you a chance to talk about your priorities. Just about six weeks ago, the office released a report that talks about where you're going over the next couple of years, and I want to call out a certain quote from that report. You said, "Copyright law is the engine of free expression and a major building block in the world economy." Can you expand on that, make that connection for us between creativity and the marketplace?

PALLANTE: Absolutely. And I also just want to thank Tracey Armstrong for holding this forum today because orphan works and fair use are obviously priorities for the office, and everything, as you said, is interrelated at some point. So what better institution than the Copyright Office and the Library of Congress to connect the dots between copyright protection and cultural works being held for posterity for the public, right? So to the extent one lives in a country where there are strong copyright laws, one has the satisfaction of knowing that they can spend their lives or part of their lives creating works that are historically or culturally important, that those works will be protected, that they can license them, that a publisher can pick up a novel, the novel can be translated into foreign languages, the novel can be adapted by a filmmaker in Hollywood. The filmmaker in Hollywood may turn to a songwriter, may commission music, and the chain of copyright moves on from there. So it's all very exciting.



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KENNEALLY: And you haven't even exhausted all the possibilities. There are many more.

PALLANTE: It's endless. And I think we should just start from the premise that we're all very fortunate to live in the United States when it comes to copyright law because we have not only strong protections for copyright owners, but we have a very flexible and forward thinking law, in that we also have exceptions and limitations that are in part the envy of foreign countries as well.

KENNEALLY: Well, then let's go dive into that report just a bit. What are some of the top priorities that you have in the next couple of years?

PALLANTE: Well, I appreciate the opportunity to talk about it, Chris. So we released a report on October 25th, the report you're referring to. And in that, we highlighted 17 priorities, about half of which refer to administrative practice at the office. So things that relate to us as the custodian of the registration and recordation systems for the United States. The other half relate to policy, both domestic and international. So we have people who work with Congress very closely on legislation, and we have people who work on international issues with USTR, with the State Department, with the Commerce Department. In addition to those things, which are really things that by statute, we're required to work on, we also have ten special projects that are really designed to allow us to think about the future. So we're operating really on two planes. We're doing all kinds of things right now. We're very busy.

And within 24 months, we'll have resolved some of those issues. The projects are really designed to see where should the office be going, how good can the registration be in our electronic age? What kinds of educational opportunities should we be offering? What kinds of things should we be doing with our public records? How do we think about copyright going forward? What kinds of research should we be doing? So within those, let me just point to two that I think will be of interest to this audience. At a policy level, our two priorities are really anti-piracy legislation, and we're working very closely with the Senate and the House on this, and really are excited about getting that through. And on the other side, we're really excited about orphan works, and we've begun talking with stakeholders about that. We have a long history in the Copyright Office of researching this issue, teeing up legislative solutions, working with stakeholders, and in 2012, it will be a major priority for my office.



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KENNEALLY: Well, you mentioned the international aspect of all of this. One of the positions you held at the office was a kind of international affairs role. Can you talk about the global perspective that you gained from that?

PALLANTE: Yes, so the Associate Register for Policy and International Affairs, which is a position that was started for the first time by my predecessor, Marybeth Peters, who is in the audience here, is I think – I think it's the best position in the office, to be perfectly honest. It's a position that works on domestic policy, works with an array of stakeholders, works on immediate pressing issues with Congress, thinks about future issues and where the law should be headed. And at the same time, has clients in other government agencies. So my current Associate Register for Policy and International Affairs is also in the audience, Michelle Woods, and some of her team are with her. So they, on any given day, are in any part of the world, supporting USTR or the Commerce Department or the State Department, serving on delegations, working on anti-piracy bilateral agreements, United States to foreign country. Working at the World Intellectual Property Organization, on the agenda there, with the entire system of member states that belongs to that. Works on domestic legislation, responds to calls, along with our general counsel's office, from staff on the Hill.

And more and more, I think that people would agree generally that what is international will eventually be domestic, and what's domestic may be of interest internationally, and orphan works legislation is a great example of that. We did – and I can say I wasn't at the office at the time – but the office put out in 2006 a tremendous report on orphan works, and that report was picked up by foreign countries in is of great interest and something that my staff gets asked about on a regular basis when traveling.

KENNEALLY: OK. Well, and we should talk about orphan works because you've brought it up in a way that probably leaves a few people in audience wondering exactly what an orphan work is. It sounds rather sad. What –

PALLANTE: It's very sad. Yeah. (laughter) Poor orphans.

KENNEALLY: But who are these or what are these poor orphans, and why is the Copyright Office involved?

PALLANTE: Well, the Copyright Office is involved because it involves interpreting existing copyright law and trying to figure out if we need to revise the law to go forward, which is a legislative role.

KENNEALLY: Can you give us the definition though, for the people in the audience here?

PALLANTE: So an orphan work, well, the definition is actually part technical and part policy. So we would say that an orphan work is a work for which a good faith user is trying to obtain permission to use, but can't after going through a series of steps. So right away, you're taking off the table exceptions like fair use, or limitations like fair use, and you're starting from the premise that you need permission to use that work. In trying to get permission, you look for the owner. You take a series of diligent good faith steps. Some of this is intuitive for users who are not copyright experts. They'll say to their lawyers or their in-house counsel or their advisors, I've done this, this, and this, what else can I do before I can use it?

And there's no such provision in US law, or in any law at the moment, that would allow you to go through the system of copyright law and say, I would like to use this, I'm a good faith user, I would really like to get permission. I would not mind negotiating a fee, although you may have differences of opinion about what that fee should be, and I just can't find the owner. And the question from a policy perspective is, is that a good outcome for copyright law? If the term of copyright is life plus 70, we have to expect that some copyright owners or their heirs will go missing at some point. So the question is, how can we frame a legislative solution that is narrow enough that it will allow good faith users to go through some steps and have some cover under the law?

KENNEALLY: So the concern is that these orphan works, if you will, kind of disappear from use, from view, because someone can't get the proper permission for it, and to some commentators, that's a loss to the culture.

PALLANTE: That's right. And I think that for the stakeholders who came together in basically 2005 to 2008, it was a very intense period of discussion on this issue. For those that came together, I think that that was a theme everybody could agree on. There are lots and lots of really important works that are held lovingly by archives and museums and libraries. That's not the only place that those works reside. Private collectors have works like that. All kinds of commercial entities have vaults where they have footage and photographs and things that are sitting there and one could start from the premise that we have to wait for copyright to expire, but if we already know that for some of those works, the owners are just never going to emerge, how can you craft a balanced system to allow some of that to see the light of day?

And within that, Chris, there are all kinds of issues. So who do you let use them, and for what purpose? So let's say we decide that certain archives should be able to take the only extent copy of a work and make it available for the public. Then a publisher comes along and says, that's a fantastic

photograph. My apologies to Vick. (laughter) We would really like to publish that, but we need the archive to not have the only exception under the law. We, the publisher, also need to benefit from that. Or a documentary filmmaker comes along and says, I would really like to build a documentary film around this period of time and use some of these incredible works and get them out there. If the archive can put it out, but then I can't use it without having great liability under the law, I'm not going to use it, and therefore the chain's not going to work.

And I'm making this distinction very carefully because you will hear a discussion about nonprofits versus the commercial sector, and the report that the Copyright Office prepared addressed this squarely and stakeholders responded to it squarely, and their decision, and I think the conclusion of the office is it's not enough to just give to a nonprofit sector certain uses if the real purpose is to get this stuff out and to allow others to build on it.

KENNEALLY: Well, you referred to the process that began with the report the Copyright Office wrote, and then kind of culminated in 2008 with a bill in the Senate, which was passed unanimously.

PALLANTE: It was.

KENNEALLY: But apparently has languished, or did in fact languish as a result of various factors, the election, the financial crisis, and so forth. Tell us about what that bill proposed and how you viewed it at the time.

PALLANTE: So I would say – we're talking about Senate Bill 2913 from 2008, and there was a companion bill in the House, 5889, I think, and they both had a lot of the same provisions. They had some differences that would have had to be reconciled. I wouldn't say that they've languished. The Senate bill passes unanimously. We went into a presidential election. There was a lame duck period in Congress. And the House bill came very close, but we just ran out of time. And I think that if you walk to the leadership of the House, that's how they would frame it. And it's true. So what did those bills do? Those bills provided, and lots of stakeholders were involved in this, including the photographers, filmmakers, the publishers, the libraries, the archives, the museums. It was really quite satisfying to the Copyright Office, in that everybody came together to try to figure out what the right balance would be.

So if ever there was an example of legislation that has a vested balance between users and copyright owners, this is it, because you don't want to send a work prematurely into orphan status. You don't want to send a work permanently into orphan status. But you do want to allow good faith users to make some productive uses. So there was search criteria that was very

carefully crafted with lots and lots of input from people who actually are used to doing searches and know how to go about that and where those go away. And from the copyright owners who really wanted to make sure that certain minimum steps were in the legislation. And at a high level, I'll just say that both the House and the Senate bill prescribed a series of steps one would have to take, no matter what, and then went into a best practices setting where you would do certain things, depending on the kind of work that was at issue.

So you would, for example, no matter who you are or what work was at issue, you would search the online records of the Copyright Office. It's easy to do that. Of course you would have to do that. You would take a series of other steps that are prescribed in the statute. Then you'd say, I'm really looking at a book that was published during a certain period. It's fiction. I don't know what to do. I'm going to go now to the best practices that the Copyright Office is publishing, which they have put out based on materials they've received from the publishers, and from people who are used to searching publishing materials, and you would then go into that and you would navigate. So your search would be different than the person searching for a songwriter. It wasn't a finite list, and this is something I also just wanted to underscore. If you get to the end of nine steps and the ninth step points you to a tenth step, you probably need to take that tenth step because at a certain point, a search becomes like a missing persons search, and it takes on a life of its own.

So in that respect, the legislation was very flexible. It prescribed enough criteria, but didn't dictate every step along the way. And if you did all that, you could go forward with your use and you could make a productive use with the cover of law essentially. But if after you made that use, the copyright owner emerges, and maybe it's an heir, maybe it's nine heirs, maybe it's one heir of one co-author of part of the work – I mean it can get complicated – the question is then what would be your exposure under the law? Well, outside an orphan's regime, your exposure could be statutory damages. If the work had been registered, your exposure could be many thousands of dollars. \$30,000. It could even be more. If under an orphan's regime, you've proceeded in good faith, the way the statute requires you to, then you're limited to what we would say is reasonable compensation, and reasonable compensation is really meant to be an objective standard, what would the work have been licensed for had you found the copyright owner in the first place? And that's really the structure of the bills and how they would have worked.

KENNEALLY: Right. And the notion of a copyright work that has its owner lost, or this orphan notion, isn't new necessarily, but it's been brought to the fore by digitization really. We are all now copyright holders because every time



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we click on the iPhone camera, we create a copyrighted image, we blog, we write. There's going to be an explosion of work. It's happening right now.

PALLANTE: Yes.

KENNEALLY: And the concern is only going to grow over time, if we don't solve this issue.

PALLANTE: Yes, that's for sure. The other side of that is we have to be very careful that we're not labeling works as orphans when they're really not orphans, but they are somehow the subject of nefarious users. So a user has taken the photograph or the text or the lyrics of a very much alive and easy to find copyright owner and stripped their identifying information. So what do you do in that circumstance? Well, again, legislation really anticipated trying to keep a good faith user honest, so that if you did enough of the things prescribed by the bill, you would eventually get back to the owner. Part of that though is that the copyright owner community has to also step up, and was very willing to do this during the discussion of orphan works, and be part of the solution.

So it's hard, but a copyright owner couldn't say, for example, I did nothing to help make myself available. I think we've reached a point where we really do expect copyright owners to participate by sending users to registries, sending users to a list of steps that makes sense, and helping to get them to the owner because the end use – and this was very clear from both the Senate and the House when members of Congress spoke about orphan works legislation – the end goal is to connect the user with the owner and to facilitate some kind of transaction where everybody's happy.

KENNEALLY: Right. We don't want to see the chain broken, we want to connect it all together.

PALLANTE: That's right.

KENNEALLY: You mentioned in the relationship you've had with copyright offices around the world, and what is called within the business, national treatment, and one of the special aspects of national treatment in the United States is something called fair use. I'm not sure if we're the only ones that have it, but we're among a very select club that do.

PALLANTE: That's right.

KENNEALLY: Why do you feel it's so important that fair use be protected and preserved? Tell us about that.



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PALLANTE: Well, fair use in our country is really connected to the First Amendment and freedom of expression. So it is a way for there to be a limitation on the exclusive rights of copyright owners. So for example, with the press, it's not always possible or plausible or meaningful enough to make the press go and get permission every single time they want to use a copyrighted work. If they're reporting for democratic purposes, that's one use. There are other applications of fair use, but that's really the history in our country. So when crafting orphan works legislation, and this is something that you'll find in general when Congress is amending the law, they want to be very careful to have a savings provision, so to speak, for fair use. And both bills did. Nothing in orphan works legislation would affect the application of fair use, for example.

It's complicated though, Chris, because we also have case law on the books that would say part of a fair use analysis requires looking at the market for the copyrighted work, and if there is a registry and a licensing schedule out there, it will affect the fourth factor of fair use. That's how fair use works. So again, the more copyright owners come to the table and participate in creating solutions and markets and fee schedules and registries and ways to find people, the easier it is for a user to find them. The harder it is to say there is no affect on the market because there's no market. It really depends.

KENNEALLY: Well, finally, Maria Pallante, I wanted to ask you about the scanning of library collections. When we chatted before the program, you were telling me that some aspects of that have potential concerns. Can you tell us about those?

PALLANTE: Sure. I think it's fair to say that scanning entire libraries raises some copyright concerns, yes. (laughter) So we –

KENNEALLY: But there's specific activities that –

PALLANTE: Yes.

KENNEALLY: – happen as a result that you are especially concerned about.

PALLANTE: So the interesting thing for this discussion, I think, is to say that when we were talking about orphan works legislation in the past, no one really was talking about mass digitization. So we were talking about orphan works uses on a one off basis. There was a discussion about libraries and archives and museums and possibly public radio stations using collections of works in a smaller way. So putting up, for example, 200 Historical Society photographs at one time, and there was some concern that even if the exposure was limited to reasonable compensation, that would be too



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much. Reasonable compensation times 200 photographs might be too much because they might all be owned by the same heir, and it would still be too much of a chilling effect to propel those kinds of uses that we were trying to propel.

So there was an exception built into the legislation that was kind of a take down provision, where museums and libraries acting for non-commercial purposes could choose, rather than to pay the copyright owner, just to take the stuff down. Very little harm was sort of the analysis. What wasn't discussed is what happens, and how does one construct an orphan works definition, search process, compensation scheme, if one is talking about thousands, tens of thousands or 15 million scans of library works, and I think it's fair to say that might require a different kind of solution than the one off search solution that we've been discussing. However, it also presupposes that we all think that scanning entire libraries is a national goal in the public interest. It's very hard to get to that with one giant jump. One could get to a discussion of it might be appropriate for certain institutions who have research agendas and preservation missions and statutory responsibilities under the law, to preserve for posterity all kinds of works. That's the preservation piece.

Then there's an access piece. Who gets to make available those works? And what are the terms of availability? And is that fair use? Is it an exception? Or is it a licensing regime for those kinds of institutions? So that's the piece that we haven't really discussed. How does one put together a licensing system if we're going to agree that libraries should be able to in some ways distribute works to the public? So I'll just say that we, on top of the orphan works report of 2006, which started our discussion on orphan works, have just put out, The Office of Policy and International Affairs, this document, which is Legal Issues in Mass Digitization. It's on our website. And this is really the overlay to orphan works about the mass digitization piece, and how all of the issues come together. But the issues are fair use, orphan works, preservation, and licensing. All four of those have to work together.

KENNEALLY: All right. Well, we'll make that report required reading for everybody here in the audience today. Maria Pallante, Register of Copyrights, thank you very much indeed.

PALLANTE: My pleasure.

KENNALLY: I want to remind the audience watching online that if you have any questions for anyone following our discussion, you can tweet them. That would be to #CopyrightandCommerce2011. And I want to turn now to Victor Perlman, who if the orphan works issue has a foster parent, Victor, I think it might be you. Victor, welcome.



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PERLMAN: Thank you, Chris. And thank you and the other folks at CCC for having me here today.

KENNEALLY: Well, we're delighted to see you and we should tell people that Victor Perlman is the General Counsel to the American Society of Media Photographers. ASMP represents more than 7,000 professional publication photographers across the US, and Victor has served as a member of the steering committee of the Conference on Fair Use, convened by the US Patent and Trademark Office, and he was also a facilitator of the Digital Image Archive Working Group under CONFU, as it's known, the Conference on Fair Use. So you've got some real insights on all of the questions that Maria was just raising for us, and you've devoted a great deal of time to the issue. You were in Washington more than not around 2008.

PERLMAN: Yeah.

KENNEALLY: What is the particular concern photographers have about orphan works, and why are they so keen to see the right kind of solution?

PERLMAN: Well, let me start out by doing what lawyers do best, and that's give a disclaimer. (laughter) All of my comments today are my personal views. They are not necessarily those of ASMP or any other photographic group. If I do talk about an ASMP position, I'll label it as that. My view is that, number one, orphan works is a real and legitimate problem, and it requires a real, legitimate, and workable solution. Once you get past that, as in so many things, the devil is in the details. And unlike books, photographs are so easily taken out of context and removed from the information base that would allow someone to be able to figure out who the owner is and how to contact him or her or it. That can happen in print simply by having the photograph removed from the context in which it was published. A huge body of photographs exist without even that. They may have, at the most, a stamp on the back. And if that photograph is then copied, usually only the front, only the image itself gets copied. So the –

KENNEALLY: Copied digitally, you mean?

PERLMAN: Yeah.

KENNEALLY: I'm thinking, how quaint a notion. I remember it myself in the old newsrooms, in the (inaudible), all of those photos in the files, they had a stamp on the back, you knew who the photographer was, you knew how to contact them. Digitally, it doesn't go away entirely, but it escapes a lot of people.



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PERLMAN: No, and theoretically, a digital environment should guarantee the ability to be able to find the copyright owner because you can embed metadata into the digital file that would tell you everything from who the copyright owner is and what contact information you need to what rights have been licensed elsewhere and what's available and pricing and, you know, the whole body of necessary information. The problem is that at least with professional images, the photographers embed all of that information, but then once it gets placed on the web, that information can be lost, either intentionally by somebody who decides to strip it out, or very often unintentionally. A lot of the defaults in the programs that people use to design webpages and to place content on the web will actually have default settings that strip out that information, and we've been working closely with Adobe and others to try to create a workflow that will maintain that information, but it's an ongoing problem.

KENNEALLY: That's obviously quite a challenge. A challenge for an organization like ASMP and for individual photographers, as well as for the software developers. But is there evidence at this point that commercial uses of orphan works are taking place, and so the concern that photographers have isn't just an imaginary one, but a real one?

PERLMAN: Let me start out by talking about the words orphan works because you said they were sad. I despise the phrase orphan works because it has a connotation of something that is kind of a second rate citizen that has been abandoned and isn't cared for. And in fact, what we're talking about is –

KENNEALLY: That's the old definition of orphans.

PERLMAN: Yeah.

KENNEALLY: Like Little Orphan Annie.

PERLMAN: Yeah, exactly. What we're really talking about is either unattributed or unlocatable copyright owners. As to the commercial use of orphan works, right now there is widespread unauthorized use of all works, at least in the photographic world, whether orphan works or not. One of the vast problems facing photographers is that they create vast bodies of work over short periods of time. The requirement of registration can sometimes be very burdensome, and for that reason, these works are often unregistered, which means that when they can find an infringing use, their practical ability to litigate is extremely limited and in most cases, virtually non-existent, which is one of the reasons why I'm so delighted that Maria's game plan for the next couple of years includes a study of small claims alternatives, in which we will be happy to comment.

But it's not just orphan works. It's certainly all works and orphan works, since there is no way – in a true orphan works sense, there is no way to contact the photographer or the copyright owner. Most of the time, the copyright owner isn't even aware of the use. Technology is allowing a change in that. When you have visual search engines that are based on visual recognition and comparison, that allows more and more people to essentially plug an image into the search engine and have it go crawl the web and look and find out where it appears, and there are private companies that provide that service. PicScout is certainly one of the leading ones, and PicScout tells us that of all of the images that appear on the internet now, they estimate that approximately 80% are unauthorized.

KENNEALLY: You know, the point you made about not liking the term orphan works, would be to kind of throw it back onto the owner, onto the copyright holder. And in this case, for the organization that you represent, the ASMP, all of those photographers, it seems to me that that's a fairly important point. That the attention ought to be on the concerns of the photographers and less about the works, which seem somehow sort of disembodied.

PERLMAN: Yeah. I think that at least the last time that we dealt with this legislation, that Congress, especially on the House side, was very sensitive to the issues facing photographers in particular and visual artists in particular.

KENNEALLY: Do you want to tell us what the situation is today for visual artists, for photographers? Not only because of the internet, but certainly in the wake of the rise of the digital world.

PERLMAN: Situation?

KENNEALLY: Well, I mean just, you know, the business has gotten tough because of the digital revolution. Is that fair to say?

PERLMAN: Oh, yeah. These are very difficult times for professional photographers for a vast array of reasons. Consolidation on the buyer's side has resulted in essentially fewer and fewer possible places to license your work, and each of those has far more market power and more ability to control pricing. I think culturally, our standard of quality requirement for a professional reproduction image is not as good as it was, or not as high as it was, going back to the '60s and '70s or so. I think we as a population want it fast, easy, and cheap, and the image just has to be good enough, not great, or not spectacular. You can open up publications like *US Weekly* or some of the celeb mags. Those are not great photos, but they're there, and they are very widely purchased, used, and viewed.



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KENNALLY: Well, I should say when it comes to *US Weekly*, it's all in the eye of the beholder, and I'm sure for plenty of people, those are great pictures. Maria Pallante mentioned the bills in 2008, which you worked very closely with various representatives and Senators on developing. Was ASMP happy at the end of all of that? And if things were to come back, can you suggest some directions you would like the people on the Hill to be thinking about?

PERLMAN: Yeah. You know, happy is a relative word, and among lawyers, there's a general concept that when you have a negotiated deal, if everybody walks away unhappy, it was probably a fair deal. I think that we were –

KENNEALLY: Well, that's sad.

PERLMAN: (laughter) But not orphaned. I think that obviously we were satisfied with the House version because we publically supported it. The House version had a couple of elements that were not present in the Senate version that we felt provided some additional protections for image owners and copyright owners generally, like the requirement before a user could make use of an orphan work. The necessity of filing a notice of intended use. And for that reason, we were happier with the House version than the Senate version. I'm not sure where we go from here. I'm not sure how able Congress is going to be to actually move legislation like this along, particularly in face of competing and far more significant issues. I think that the underlying concept, that orphan work protection gets triggered for the user by a reasonably diligent search, has potentially been damaged by the recent actions and the HathiTrust situation.

KENNEALLY: Right. Well, I was going to bring it up, and I think we should give people some background on that, and they may have heard about it, but we should say that the HathiTrust in September, which is a collection of libraries and others who are digitizing works of all kinds, announced they were going to begin to make available all sorts of material online, and they declared that these were orphan works. Well, right away, the Authors Guild and many others came in and looked and found out, lo and behold, there were plenty of parents to go with those orphans, and so I think the point there is this is again not an imaginary problem, but a real one, and from there, you could pick it up, Victor.

PERLMAN: Yeah.

KENNEALLY: And tell us why this has been an important example of the kind of concerns you have.

PERLMAN: Yeah. I think that when we were dealing with the concept of the reasonable diligent search in the abstract, we all sort of assumed that



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certainly the large institutions with skilled, experienced research librarians would be able to and would put in the kind of effort that would really say that we did all of the things that are reasonably possible and we came up empty. Now we have the same group of large institutions with skilled and experienced research librarians, who said, well, we did all that and we can't find anything, and then we have a couple of people in the Authors Guild office sitting there with the computer and a telephone and within a matter of minutes, able to identify vast numbers of the owners and contact them, of the owners' of the works that Michigan was claiming were orphaned.

KENNEALLY: Right. People very much alive.

PERLMAN: Yeah, absolutely. Absolutely.

KENNEALLY: Well, you know, with regard to orphan works, it is a global issue. Maria alluded to that in her comments. Driving us toward a solution are other efforts, in Europe, for example, to address all of these matters. As you see it yourself, or as ASMP sees it, is the US in danger of falling behind in addressing any of this? Should we maintain a kind of leadership role that would be important in shaping a global solution? Talk about that.

PERLMAN: I think that, well, certainly we had the leadership role because I think we were the group that first started to deal with the orphan works when the Copyright Office report came out in 2006, and as a result, most of the other countries of Europe and around the world started to watch what we were doing and started to have some proposals of their own, but to a great extent were playing a wait and see game, to see what we would do. After the efforts kind of ended in 2008, perhaps largely because we were all just so exhausted from the whole project, Europe has instead kind of picked up the issue and kept moving with it, with a number of different initiatives in different countries. I don't think that the European models are going to be of any particular impact in framing US copyright law for a number of reasons.

I think our Congress and our national pride makes us think that, you know, we're going to do what's right for the US, no matter what anybody else is doing. I spend a fair amount of time meeting with counterparts from European countries, and the mindset of Americans and Europeans is quite different in a lot of very subtle ways. I think that the fact is that we have grown up in a culture of the Wild Wild West and the rugged individualist and I think most of us don't like to be told what to do, particularly by government in what we consider our private matters. I think we have a sense of dealing with affronts and problems, and an affront in the sense of a copyright infringement, in a one-on-one approach. Again, the rugged



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individualist. We deal with disputes by suing. (laughter) That's why we have so many –

KENNEALLY: And you're a lawyer, so –

PERLMAN: – so many competing lawyers, you know?

KENNEALLY: Right.

PERLMAN: But that's the way we view it. In Europe, lawsuits have almost a negative connotation. There's something wrong when you have to sue. There's much more of a mindset of collective action, and I think there's much more of a mindset that it's OK for the government to tell us how to do this. And I think that those lead to solutions in many of the European countries that wouldn't be particularly appealing to members of Congress or the American public.

KENNEALLY: Well, finally, Victor, on that point, would perhaps some form of private registry be more satisfactory in this country? If we aren't so happy with the government solution, would we be better off or happier with a private one, do you think?

PERLMAN: Absolutely. I think that private registries of some sort would be an ideal answer, at least again on theoretical level. ASMP has had at least two formal concerted efforts to create some kind of collective licensing entity. They ultimately failed for different reasons. The first time, we were so far ahead of the curve that I think most photographers didn't understand the real value of it, and that effort was opposed by the stock photography aggregators and distributors because they saw it essentially as a dangerous competitor. The second one we started up around the summer of 2001, and then came September 11th of that year, and everything crashed, including the market for that, and including funding and the like.

KENNEALLY: Well, we'll keep an eye on that. Victor Perlman, General Counsel to the American Society of Media Photographers. Thank you very much. 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 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.



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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 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



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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.

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 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.



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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.

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: And now I want to turn to you, make it your task in the next ten, 15 minutes to ask some questions of our panel. You can do so if you're online, by tweeting to our hashtag, which is #CopyrightandCommerce2011. You can also do so by approaching a microphone that we have in our studio here. We'll be going up into the audience here at the Knight Studio, and as we get ready to do that, I want to ask Victor about the economic impact as well. You talked about the price that individual photographers are paying, but are you seeing a larger concern about the impact on our culture, on the professionalism of publication journalists and photographers? Are people concerned about that? You mentioned that the quality may have gone down, but are people looking at it as a kind of loss to the economy, if some of this is not addressed?

PERLMAN: Oh, there's no question that the economic impact of infringing use is horrific. Photographers are largely people who could probably be making a lot more money by doing something else, but they choose to make photographs because they love it, and what happens is that they don't have as big a financial cushion as some other folks do, and so when you start eroding the base that they actually do have, they are looking at their copyrights as essentially their 401(k). That's how they're going to be able to get compensated in the future, and when that gets affected, that really puts a terrific hurt on their economic position.

KENNEALLY: Maria Pallante, you're nodding your head vigorously to all of that. Go back to that point about the creative economy, if you will.

PALLANTE: Yeah.



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KENNEALLY: And the impact that what we're talking about here has, not only on the Hill or for certain IP attorneys, or whatever, but really for the national economy here.

PALLANTE: Yeah. Copyright is just a tremendous factor in our economy. Not just our economy, the world economy. So when Congress sits down and tries to craft 21st century copyright legislation, anti-piracy provisions are a huge part of that, and I actually think that both the House and Senate have done a tremendous job in trying to be forward thinking enough so that they stay ahead of the problem. So the last thing we want to do is legislate behind the problem. So is it difficult to figure out which players in the ecosystem should play a role? Yes, it's difficult, but they can't afford not to do that. So when they sit down and they say, look, the Attorney General really needs to have 21st century tools, and unfortunately, that may include blocking websites at times. Why? Because those websites are selling or streaming works that are still in movie theaters, works that somebody just spent seven years producing with a major publishing house. A song that a small copyright owner will not be able to pursue in court.

So why should we allow those kinds of nefarious actors to build entire businesses around infringement, using good faith credit card companies and American brands to do so? If one thinks about that, it's really quite outrageous, right? So they sit down and they think about, who are the players? Well, the players are search engines. You're a user, you're looking for a movie. We don't want the search engine sending you to the site that's selling those movies illegally. We want them to send you to the good faith store where you can buy it or license it lawfully. We want the ISPs to play a role. We want them to also have cover. We may need them to have a court order so that they're acting with appropriate authority. We want the advertising networks to not make money in the wrong way, meaning they should be making money from the lawful uses and not the illegal uses. So all of those players have to play a role and then Congress sits down and they begin to look at what role is right for whom, how much of it should be legislated.

The Intellectual Property Enforcement Coordinator has been working with stakeholders also on voluntary solutions. It's all part of the mix in creating a solution. Is it in the details? Yes. Is it hard? Yes. But I would just say that Congress has been revising copyright law in this country since 1790. That's what they do. And this is not by any means the end of it. It's always difficult, but it's not impossible, and I think that they've been quite innovative in trying to craft a solution.

KENNEALLY: Well, words of optimism there from Maria Pallante. And I wonder if we have some words from our audience. I know you mentioned



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players in the ecosystem. I know there are a few here. And we have a question. I'm sorry. I couldn't see you.

CRUMP: Thank you. My name is David Crump. I'm with the Office of the General Counsel, National Association of Home Builders. A question for Mr. Perlman. You may be aware that this past summer, there was a US District Court decision in the southern district of New York, Getty Images vs. Advernet. Are you familiar with that case, sir?

PERLMAN: Not by that name, but if you tell me what it's about –

CRUMP: OK. Well, this was a copyright infringement suit brought by Getty Images involving the alleged illegal use of some 40 graphic images. The US District Court considered the pleadings and dismissed the copyright infringement suit on the grounds that Getty Images did not have sufficient standing as a purported owner of the copyright. Getty Images apparently was the possessor of a non-exclusive licensing agreements that the court described as typical of the industry, and the court ruled that those non-exclusive agreements were insufficient to establish the necessary ownership.

PERLMAN: OK.

CRUMP: Is this something you think is a true impediment to infringement actions, or do you think it's something that could be easily cured? If you know the case.

PERLMAN: It's something that's certainly curable. I'm not sure how easily. I think that the stock aggregators and the photographers who contribute to them are working on a lot of common problems like that that affect the paperwork. The related question of the decisions in the Corbis Copyright Registration case is another example where some courts have invalidated registrations of massive databases of images because of some technical flaws that are found to be in the system of registration. Some courts have upheld them. Maria has been working closely with all of the players to try to make that I guess a historical footnote. (laughter)

KENNEALLY: Thank you for that question.

PALLANTE: Thanks for your question.

KENNEALLY: I want to turn to my colleague, Craig Sender, who I think has a question from the Twittersphere.



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SENDER: We do. The question was tweeted to us. How do you find orphan works owners when it's not clear who owns the ebook rights for books published before the '90s.?

KENNEALLY: All right, and I guess we're going to lob that to you, Maria.

PALLANTE: Yeah.

KENNEALLY: I mean it's a question not only limited to ebooks, but that's a specific question around a growing marketplace.

PALLANTE: Right. I'm going to swap out ebooks for erights because I think that might be the purpose of the question. So that's a sophisticated question from that Twitter person. (laughter)

KENNEALLY: We have a sophisticated group of tweeps out there.

PALLANTE: That's right. And so it goes not so much to trying to find someone who may not exist, but ending with people who may not know the answer to whether they own the rights or not because they may not have thought about electronic rights at the time they first published their work. So in the context of books, it would be that a book author licensed certain rights for publication distribution, adaptation, etc. to a book publisher, and either ebook rights in particular were not addressed, or erights at all, at a higher level, were not addressed, and it may also depend what circuit you live in. So the New York courts may find that if you didn't grant it expressly, you reserved it, there's some case law to that effect. The 9th Circuit, which likes to be the 9th Circuit in copyright, may find that there's language that gets you there. There's broad enough language about publication that one can assume electronic rights are part of it.

So this is part of what was at issue in the attempted Google Book Search settlement, where the parties to that suit, the publishers, the authors, and Google sat down and tried to figure out the next best thing to a definite answer, which would be some mechanism for deciding when no one can know, as a factual matter, who owns erights, what's the procedure for figuring out how that could work and move people forward. So in some respects, it's a finite question because there's a group of works that are still under copyright that may still be of interest to consumers, that people would still like to license and republish and get out, but we could experience gridlock just based on interpreting old contracts.

KENNEALLY: All right. And Craig, you said there was a second question from the Twittersphere.



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SENDER: Yes. Along similar lines, where does Section 108 Reform fit within the larger goal of orphan works legislation?

KENNEALLY: Well, we do have a sophisticated group of tweeps. Section 108 Reform. OK, can you address that in about a minute?

PALLANTE: Yeah. So section –

KENNEALLY: (laughter) Sorry.

PALLANTE: Sure. Section 108 needs to be updated. It does not anticipate the digital world.

KENNEALLY: Tell us what Section 108 is.

PALLANTE: OK. Section 108 is essentially our library exception for preservation and there was a major report – there's always a major report when something needs to be updated – sponsored by the Librarian of Congress and the Register of Copyrights, Marybeth Peters. And basically it just doesn't anticipate the digital world, and libraries need to make copies to get to preservation copies, and if you limit the number of copies or how they make those copies, you're basically not allowing preservation to happen in the way that it should. The complicated piece of it, of course, is what then happens with the preservation copies? What can a library do with those? Do they stay in dark storage? There are lots of preservation schools of thought, but dark storage is not really a way to keep a copy alive, so that if one is saving it for posterity, and one goes back 50 years later to open it, they're not going to be able to open it if they can't migrate it along the way, which will include copies. Can they also make it available to the public? Those are complicated questions.

So my office will be picking up, as one of our priorities, the Section 108 Report from 2008, and again, working in the context of mass digitization, but beyond that, just looking at where the stakeholders are on this and what Congress wants to do. Everybody agrees on the preservation piece. The access piece is harder.

KENNEALLY: Well, I have to say, if there's anything sadder or possibly even scarier than orphan works, it would be dark storage. (laughter) I mean I hope those orphan works don't end up in dark storage because that would be just terrible. Mary Pallante, thank you very much for that really fine answer to a sophisticated question. Do we have one quick question from the audience here in the Knight Studio at all?

PALLANTE: We need an easy question.



KENNEALLY: An easy question for anyone? (laughter) Craig, what about our Twittersphere?

SENDER: We have one more question. Do the panelists see any reason to be concerned about ICANN's plan to approve hundreds of new domains?

KENNEALLY: I'm going to start with Cecilia on that.

KANG: Well, I don't have an opinion on that because I'm dying to hear what you both think. (laughter)

KENNEALLY: But maybe you can tell me briefly what the issue is.

KANG: Let me explain. So ICANN, which is the non-governmental private but sort of non-government, quasi-governmental organization that assigns top level domain names has been rolling out new domain name suffixes. XXX was just released. In January, they'll do a whole new slew. The problem of how they're rolling this out and just rolling them out at all is that it's gotten much concern and consternation by people that – particularly companies, that they're going to have to defensively register their names under every new suffix, so that they aren't mistaken. So say you are under XXX, TheNewseum.XXX. You don't want somebody to get ahold of that domain name then, you know, a consumer find out that actually that really is an XXX site or something, you know? So it's become this big business issue. It's really a rights issue, trademark issues. There's lots of different concerns related to it, and but it's moving forward. So –

KENNEALLY: Maria Pallante, any comment?

PALLANTE: Yeah. That's one issue and then there's a second issue, I think, which is really law enforcement perspective.

KANG: Yeah.

PALLANTE: And certainly we are not a law enforcement agency, but I think if you asked ICE or the Department of Justice, they'd say that part of what ICE has been doing when seizing domain names in the United States from illegal actors is making the top three domain names, dot com, dot net, and dot org safe for consumers. So they can't protect everybody from everything, but they do try to make sure that good faith consumers aren't going to an illegal website that's a dot com, and part of it is brand recognition. So to the extent that there are many, many more of those, it just makes it harder for consumers to navigate what's safe, what's not.



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KENNEALLY: Well, thank you. And I just want to thank all three panelists. We've heard today from Cecilia Kang, the Technology Policy Reporter for the *Washington Post*, Victor Perlman, General Counsel to the American Society of Media Photographers, and directly to my right, the 12th Register of Copyrights and Director of the United States Copyright Office, Maria Pallante. Thank you all very much indeed. Appreciate you. (applause) I think I can say pretty well that my understanding of the intersection between copyright and commerce has grown in the last hour or so, and I appreciate not only your involvement, your coming here to visit with us today at the Knight Studio, to tweet online with us at #CopyrightandCommerce2011. It's been an important part of a conversation that we hope to continue, and indeed we will.

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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