

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: 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,



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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.

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



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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.

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 there 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



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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?



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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 extant 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.



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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 awry. 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 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



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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.

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.



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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 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.



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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.

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