Digital Content Can Travel Anywhere: Your Copyrights Should Travel With It

Panel discussion with
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Recorded at the 2011 Publishing Business Conference & Expo

For podcast release
Monday, April 18, 2011

KENNEALLY: I want to welcome you. My name is Christopher Kenneally. I'm director of business development at Copyright Clearance Center. Welcome to a program looking at the variety of aspects of the copyright issue. I appreciate your joining us today and look forward to a discussion. We will talk with the panelists first and then invite you to join us in that discussion, so be prepared with questions.

As I mentioned before, if you are tweeting from this session – and we encourage you to do so – the hashtag is hashtag PBC2011. You might want to add hashtag Copyright for that as well, because I know many people do follow that in the business.

And I should start by saying that when you work for a company called Copyright Clearance Center, with copyright the first word in the name, you immediately know where you stand, because people are on either side of that issue and very much engaged in our business by the very word copyright.

And mostly, copyright divides along the lines that the great sage Stewart Brand gave us many years ago. He said, information wants to be free. But I'm not sure how many of you know he continued, information also wants to be expensive. And in that quote, I believe you get the notion of how the digital age, the DNA of media, has a kind of inherent tension in it. We'll talk about some of that today.

Before the publishing business became the technology business, copyright was something that only an elite few needed to worry about, but today, the tools of the digital age make all of us publishers and authors and creators. That clearly has changed what we think of when we think of copyright. And moreover, it's not simply that we can create all of these various works with the touch of a button, but that we can distribute them just as easily. So thereby hangs a tale and I'm looking forward to engaging our panel with it.

I also want to point out that this is so timely and it's not just timely to the industry, but to the consumer. In today's *Boston Globe*, which I read on the way down, a column from Alex Beam, a former business columnist, now a general columnist for the *Globe,* it's called Steal This E-Book, and he talked to a variety of lawyers, actually, with some of the major trade publishers and he got these kinds of reactions from them.

So just to get a sense of how people are thinking about their concerns around piracy and copyright, Alex writes, I needed no convincing that piracy had gone mainstream with regard to music and film, but books? "'It's not something we think most customers want to do,' says Maja Thomas, senior vice president for digital products at Hachette Book Group."

And then associate general counsel for Random House adds that customers who pay the hundred dollar plus for e-readers are especially loyal to authors and their rights. Those are the last people who are going to get involved in piracy, he says.

And Alex says, maybe yes, maybe no.

Joining me to discuss all of that right now and much more, I'll introduce our panel first. Christoph Brem is vice president of sales for Attributor where he leads Attributor's sales efforts on a global basis and has extensive experience building and leading presales and sales teams. He has an aeronautical and engineering background and has previously held position at Lufthansa and Precision Castparts. Christoph, welcome.

BREM: Thank you.

KENNEALLY: Joining Christoph, beside him, is Brian O'Leary, who is the founder and principal of Magellan Media. He's also an adjunct professor at New York University's publishing program. Extensive experience in publishing as well with Hammond and previous to that, Time Inc. Brian, nice to see you.

O'LEARY: Thanks for having me.

KENNEALLY: And finally, at the very far end of the table, I want to welcome Dev Chatillon. Dev is in private practice and an in-house counsel at Callaway Digital Arts where she handles general counseling work as well as IP transactional and general litigation work. She's worked in a variety of aspects of the media and entertainment industry, recently as a senior vice president and general counsel at Scholastic. I'm looking forward to talking with her about some of her experiences there. And she's written and presented on copyright and First Amendment issues around the country. Dev, welcome.

CHATILLON: Thank you. Glad to be here.

KENNEALLY: I want to start by chatting with Christoph first about the view from Attributor. What I think is worth pointing out – and we see this more and more and more at conferences like this and just generally – is that the publishing business is more than ever a technology business. And you come to us with an engineering background and a sense of what the relationship is becoming between publishing and technology. Can you talk about that and how it relates to rights, specifically?

BREM: Sure. Thank you, first of all, Chris, for the introduction and thank you to the audience for attending the seminar.

You probably, when you hear my bio, you're asking what is this guy doing up here. I haven't worked in publishing for the last 20 years. A big part of my career has been left out. In fact, 25 years ago, I was a professional hockey player. Twenty years ago, I fixed Boeing 747s at Lufthansa, but at some point, I came to my senses and I got an MBA in the mid-'90, and since then, I had really one job and that was finding a technology solution for a business problem.

I have gone through the dot-com boom and bust in Silicon valley. I've worked for startup companies ever since. And this is really why I'm here. This is why they've invited me to this panel because I think there's a paradigm shifting happening in the publishing industry. As Chris was rightly pointing out, it is a technology industry, for at least a big chunk of it and more so today than a year ago and there will be more in two or three or five years or 10 years.

And this is really what my main focus is and this is what Attributor is focused on. We are a technology company. And for the most part, people know us as an anti-piracy company. We take that credit. That is very well true and this is a very big part of our solution. But we have a bigger picture in mind.

When people write about piracy today, a lot of times, it's black and white. People say, well, first of all, I don't want to have anybody pirating my book. I need to monetize that. The second thing is, well, it's fine if you pirate this because you're never going to convert these people into buyers anyways.

We see it a little bit different. Our main focus is to control your content, and that's really, I think, a paradigm shift in this whole notion of piracy and IP protection. And this is what Attributor is about as a company. We are a technology solution, a), to provide anti-piracy solutions to understand where content is, but we want to spin this further. We want for you to better control your content, better understand your content, and better ways of monetizing your content.

KENNEALLY: Let's try to break that down then and I think one way to start is about understanding the audience. You have a neat way of sort of breaking the audience into

four different types of personalities. As I remember, it was like the black hats, the white hats –

BREM: This is really when we talk about the piracy ecosystem. The standard distribution chain in the publishing industry is obviously yourself as a publisher, you have the standard online and retail book outlets, and then you have the good citizen who is buying the book.

But then there's the whole piracy ecosystem. And there is the supply side and there's the demand side that we need to understand in order to address the whole issue.

On the supply side, there's not only people who scan a book at home and put it out there on the Web. There's people who do that. There's people who crack DRMs, which by the way, is probably one of the easiest things to do. You find even instructions online to do that. There is refiners who refine content and reuse the content. There's posters who – kind of the marketing play of piracy. So there's different roles within the piracy ecosystem.

And then it goes through these distribution channels of piracy that are equivalent to a retail store, an online store in the legitimate world. It's the cyberlock, the file-sharing sites, the P-to-Ps, the Torrents, the feeder pages. And it eventually gets to the demand side who is using this content. And again, there we differentiate three different groups.

One is the black hats, and this is what we really identify as the true criminals. Those are the ones you really probably are never going to convert to users. They do it out of fun, they do it out of being counter-society, whatever their idea is and wherever they're going to do it.

But then there's the casual infringer, where – except Chris promised me he's not one of them, but almost every single one of us at some point in their life has taken a picture or a piece of text and then maybe has reused it in some shape or form without thinking of the copyright protection. So those are the people, if you just tap them on the shoulder and say, hey, this is protected. You can't do this. Oh, yeah, of course not. I'm going to pay for this. I'm going to remove this content.

And then there's the group in between, what we call the gray hats. Those, you know – college students, for example, they become popular to be in that group. They know it's not right but as long as nobody's telling them you can't really do this or slapping them on the wrist or giving them a better and easier way, maybe, to acquiring that content. A big part of them can also be converted into actual customers. And we have evidence and proof finally, which took many years to find out, but we finally have statistics that prove that.

KENNEALLY: And so there's the convenience issue, there's an authenticity. These are the things that help to convert, as you say, some of the customers.

I think it's interesting to tell people about what happens. I mean, Attributor has been written about in the *Los Angeles Times* about some of the anti-piracy programs you've put into place for some publishers. And one of the things you do isn't to take them to court, but to get them to either take the content out or to pay for it, and you get a response rate, a positive response rate that's remarkably high.

BREM: Right, right. This is really our philosophy. And we are not a law firm. We do not take somebody to court. We experimented a lot and we have found a more velvet-glove approach, much more effective than what, for example, the music industry or the movie industry has done.

We all have see that slapping a college student with a multi-million dollar lawsuit in the music industry was not all that effective. What in a lot ways was effective was iTunes coming out with a different distribution model and selling songs instead of a CD, for example.

What we consider the first step in this whole ecosystem that you're trying to address is pure and simply, take-down notices following the DMCA, following new Copyright Directive and other global legislation. And again, I'm not a lawyer. Dev probably can talk much better about that. But just following that from a non-legal perspective and, as I said, tapping people on their shoulder or slapping their wrist in a different way is very, very effective.

Just last month, just to give you one statistic, one of our clients, one of the top-10 U.S. publishers, for this one client in the month of March alone, we sent 4,800 take-down notices and we had a 95 percent removal rate, just by sending them a text and saying, you can't do this, remove this content. And it is removed.

Some of these sites, actually, some of these cyberlockers now go as far as – they get hundreds if not thousands of take-down notices from us a month. And you know that 4shared and others are fighting for their reputations. They have a legitimate file-sharing site. We want to place ads. We are not a piracy site. So they're now going as far as providing or working with us through our APIs, through our interface technology, that when we identify pirated content, we can immediately remove the content instead of even sending a take-down notice.

So it's a completely different approach of working with these sites that before reacted very slowly, to say the least, about letters from maybe lawyers or from the publisher themselves. The evidence that we have created through our crawling mechanism, which is so compelling and has become so standardized – and this is maybe another thing to talk about, is the standards in the industry – that they're responding very well to it.

And the next step that we're trying to do with these sites, without trying to legitimize them too much and putting lipstick on a pig, I guess, is the right saying – I'm German, so I don't know all the American sayings, and I might not be always politically correct.

But some of these sites that go to this point, OK, we're going to remove this infringed content, but at the same time, we might even be able to reuse it or reuse that user of that site and put legitimate content there instead. So if they go on the feeder page, it leads to pirated content where they expect the pirated copy, and all of a sudden they land at a page that's officially sanctioned by the publisher, and it leads them to buttons where they can actually purchase that content.

Just one of the ideas that we are playing with, that we have experimented with, that we are working with that we have a couple publishers that give you a whole different way of looking at piracy and infringed content.

KENNEALLY: Well, I guess a good place to end this part is to remember the story of Pandora's box was that it let out all of the evils of the world, but hope remained inside. So there is some hope here, and if I can ask you to sort of sketch out the future, the immediate future that Attributor sees in this ecosystem, as you call it. How is it evolving?

BREM: We see a three-step approach, and to be honest, we haven't figured out the details yet, either, but we are very close. Some of it I cannot talk about and some of it, I can.

But the first step for us is to control your content with the means that we have today. Controlling the content means – again, we can't make this argument that the piracy is good or bad for the industry, but one thing is, you lose half of your audience by not knowing what your pirated content does. Everybody who uses your content is a user. Just some are paying for it and some are not. So controlling your content is the first step.

This is what our crawling mechanism does. Right? We crawl 150 million pages a day. We have 2,700 of these cyberlockers – P-to-Ps – that's identified that host your content. To get that information is very, very valuable to a publisher. So that's our first step.

The second step then is to better understand what that means by those files being out there. Tie this into all your publishers' data. You have sales marketing data. There's a lot of other data. Every other industry has figured out business intelligence tools. And the gentleman from Simba reports in the presentation in this room before said that one thing that bothered him about the book industry for years is that data is always used in silos, and I think that's one of the issues that the publishing industry needs to understand, and a big part of that, unfortunately – or however you want to take it – is the piracy industry or piracy ecosystem.

And the third part, then, is after you understand all that, how to monetize that, how to react on data. You see today individual self-publishers start doing that. They price their content according to what the audience does. Do book publishers today know what their audience does on a daily basis? These people know. It's a small group. They maybe have a blog. They maybe have one outlet chain. It's much easier to gauge then. But if you have thousands of publications, then it's very, very difficult to understand that ecosystem and this is one of the problems we're trying to solve.

KENNEALLY: Well, thank you Christoph Brem from Attributor. I want to turn now to Brian O'Leary from Magellan Media. And Brian, start, if I can get you to, with reviewing some of the surveys and studies you've done on piracy and its impact or lack of on the book business.

O'LEARY: First, I think that maybe I'm 90 degrees to where you are, because I really wanted to know what piracy might mean when it occurred, which is kind of the middle piece of where you're looking down the road.

And what happened was, almost four years ago, O'Reilly Media, which is a tech publisher that does not use DRM on any of its digital content, asked me if I could figure out a way to measure the impact of piracy on their books, essentially how much they were losing in sales.

If you're familiar with the book business and cooperative marketing, there's a methodology that typically you take four weeks before a cooperative marketing effort, four weeks after, and you look at the sales both before and after to judge the lift. And we thought we'd take that approach with piracy, so we started to look for instances of piracy for O'Reilly titles.

And what we really were trying to figure out were were there titles and/or categories of books that O'Reilly published for which piracy was a direct loss, and then were there other categories or titles, types of books, where it might be a net gain, or at least not as direct a loss. And the only thing we were trying to do in the research was not – we weren't that dichotomy you outlined at the beginning of saying pro- or anti-copyright, but simply, what was happening to paid sales.

So what we looked at were these four weeks before and four weeks after for a cross-section of a fall list for O'Reilly. And what we found was, for the books that were pirated in the period of time that we were looking at it, they actually were – the sales followed a natural curve after a sell-in. The piracy occurred on average about five months after the books were published, and after the piracy occurred, sales increased between 90 and 108 percent.

The thing I want to underline is, that's correlation, not causality. I mean, tThere's not enough of a sample set here and not enough of a history to be able to say that it's one thing

or another. But it would suggest that, for example, in the case – if you had books for whom pirated content was being used to eventually spur paid sales, you'd be making a mistake to take it down. I mean, it's essentially a marketing mechanism.

That's not universally true, I don't think, and so figuring out which cases it made sense for was one of the reasons we expanded the study and we started to look at Thomas Nelson titles. Thomas Nelson is a religious publisher.

KENNEALLY: A very different kind of publisher from O'Reilly, obviously.

O'LEARY: Yes, and they're really tough to find books that were pirated, so their sample set's really small. People are not stealing Thomas Nelson books.

KENNEALLY: Good Christians.

O'LEARY: Perhaps.

KENNEALLY: Because they know what would happen to them.

CHATILLON: They fear a higher authority, yes, exactly.

(laughter)

KENNEALLY: I think that's why. It's like they're afraid of meeting the publisher in the sky, when it comes down to it.

O'LEARY: Yes, and I think that this led me to start thinking about a broader set of issues, which is when does enforcement make sense and when does it not make sense? How would you know the difference? Where could we collect data?

And the lament that publishing in general is a data light business could not be truer. We've tried really hard to get publishers to take a look at both this study and to join in and expand it, and there's been very, very little interest. It's not a data-driven business at this point.

And yet, I think that the future of content is probably less in the area of control. I think it's more in the spirit of what you were describing, which is, how do we find out where people are using the content? What are they doing with it? What might it signal?

So I went on initially a world tour of piracy presentations, and my favorite was actually at a Novelists, Inc. convention last fall. There's nothing like standing in front of a group of novelists who feel morally that piracy should never occur and trying to tell them that, in effect, it might help.

But one story that was told was a particular author who'd sold 100,000 copies, 100,000 in the United States and had had – the number that was quoted to me was 40,000 downloads. So they said, how can you stand there and tell us this? And the question I had was, where did the downloads occur? Because if they occurred in the United States, you would say direct loss, clearly costing you money that you otherwise would have gained. But if it occurred in a market – and there are many markets where essentially rights have not yet been cleared, it could be that somebody sees the book in the United States, cannot buy it, it's unavailable to them wherever they live, and having tried a legitimate means, they pursue a different path.

And I think this is where the data that you're talking about can begin to better inform us.

KENNEALLY: Well, in fact, I think that's exactly where I wanted to take the discussion, Brian. So looking at it from a global perspective, rights matter more than ever right now. Copyright is a more important piece of the publishing business than ever because everything is published globally the minute it's published today.

O'LEARY: I don't know that people – publishers universally understand that. I think that if it were clear that any book that you publish digitally – and now, because scanning exists, any book that can be distributed digitally – effectively is available to anyone in the world, either through legitimate means, if you've cleared the rights quickly and effectively, or through other means. I think we have globalized the market for content.

KENNEALLY: You gave a presentation recently in Italy talking about some of this, and I had a look at it, and you were suggesting that this is the moment then for publishers to think about how the existing models are actually hindering growth and that some changes need to take place on that rights transactional side of things in order to move the business forward. Can you talk about that?

O'LEARY: Sure. You're thinking about the Bologna?

KENNEALLY: Right.

O'LEARY: O'Reilly Media had a Tools of Change one-day session and I gave a presentation on new and emerging digital business models that certainly would be available on the O'Reilly site. You can grab me if it's not.

But one of the core things in it is that, in effect, because the market is global and because the lead times are increasingly a significant issue – can engender piracy if somebody wants a copy of a book that's not cleared locally, the publishers need to be thinking about either working immediately with local partners as they have for print, but on a much more

accelerated schedule, or distributing globally and essentially retaining digital rights and distributing globally from the beginning.

KENNEALLY: Well, the whole notion of copyright traveling, which is part of the title of this program. Copyright travels around the world faster than anything these days. It's instantaneously global.

O'LEARY: And there are authors, like Paulo Coelho, who are looking at instances of piracy. I separate the instance of piracy, which is when you see content that is not an authorized copy available for distribution from the impact of piracy, the actual sales. Paulo Coelho will look at instance of piracy, look at a market, see significant interest, and either try to get a book released there or try to get a translation released in that market to take advantage of what might be growing interest in his content.

KENNEALLY: Right. And another really interesting point that a lot of your research has led you to is to begin to think outside the container, think outside the box, the book as a box. Now that content and copyright have gone digital, we are in a new world where things are available in chunks or components, and this changes everything in the box.

O'LEARY: Sure. Well, this is certainly less true for long form fiction than it would be for a lot of the other type of books, whether it's cookbooks or scientific – scholarly papers. But essentially, because we think of the physical object as also the digital object, that we actually sometimes miss what you were alluding to. How is the content being used? Are people actually picking up specific components of it?

And what I described in part in the presentation that you were thinking about was my notion that piracy, in effect, is the consequence of a bad API, that in effect, the inability to get the content you need in the way and the form that you want it when you want it, is the kind of thing that engenders, more often than not, a workaround.

KENNEALLY: That's what I call convenience. If you can get it in a way – I think that's the iTunes. The success of the iTunes model is primarily about convenience. All those songs for 99 cents right there.

O'LEARY: I believe that, but I think – and if I had one closing thought for all of this, it's just publishing, as a whole, we don't know the answers, and we really should be developing through all of our channels, including the kind of data that Attributor products can generate, a better sense of what actually is going on.

KENNEALLY: Well, I want to turn to Dev Chatillon because you have an interesting experience and one that does give us a better sense of what's going on in a way I think everybody's going to find fascinating. We'll talk about your current work in a minute, but a few years ago, you were general counsel at Scholastic.

CHATILLON: Correct.

KENNEALLY: Which is the publisher of the Harry Potter books.

CHATILLON: And I had the privilege and burden of being there when Scholastic published the very last volume of Harry Potter, and it picks up a lot what both Christoph and Brian were talking about.

What we found – when I got there, the task that was handed was, put out 15 million copies of *Harry Potter* and have not one copy appear on the Internet in 2007.

(laughter)

KENNEALLY: And the reason, though, if I can just point out, is not because Scholastic was particularly anti-pirate, but they were concerned about their audience.

CHATILLON: As was the author, Jo Rowling, who is – I just was reading something on the way up here in *Publishers Weekly* or *Publishers Marketplace* about she might finally authorize e-books. There were no e-books. We didn't have them.

But she really wanted – we really wanted – the audience – largely children or like my children, who are now some of them in their 20s – had grown up with *Harry Potter*, to come to the experience of reading the book as a book at the same time, at midnight on July 21, 2007, not that that's burned into my brain or anything.

So I responded to this by saying, that's not possible. Let's figure out Plan B. And a lot of it involved preparation, as Christoph said. There are things, and I would recommend to anyone who has a big release of any kind, and is worried about prepublication piracy, which is really a different animal, I think, than what has been discussed up here today.

We had virtual PIs who were on the Internet, knew both the pirate sites. There are known pirate sites. Pirate Bay was a big one then, Mega Upload was a big one then. But there are also discussion groups on piracy. They shift from time to time and they focus on different kinds of both media and subject matter. But we're humans. We tend to act in pretty predictable ways. It's a findable thing. It's a knowable thing. So that was one component, sort of be aware of what was going on, where it was going on.

Another was, from the lawyer's standpoint, was getting in contact with what were all the big sites at the time to say, this is an upcoming release. We had the advantage of saying it's *Harry Potter*. It makes everyone smile and get all kind of wistful. And we expect this to come out. We'll send you the appropriate legal notices, but we'd like to work with you to make sure we can take it down in real time.

One of the unfortunate things because Congress refuses to update any of our laws in a way that's rational, is you have up to four days to take down things under the DMCA. So if I send Christoph a DMCA notice saying that is pirated, it's illegal, it's whatever, he can keep it up for four days. Well, if you're talking about release of did Voldemort kill Harry or did Harry kill Voldemort, four days is an eternity. We've lost the entire war by then.

So we worked with people proactively ahead of time to say, if we get in contact with you, can we take it down in real time? And that turned out to be very effective, because sure a shoot, someone with a digital camera got an early copy. I'm happy to say that it did not come from the printing plant. It did not come from the warehouse. It did not come from any of the places you would think, but because we had to ship out physical copies ahead of time for distribution purposes, a copy had been leaked early in connection with that. Someone took photographs digitally and put them up on the Internet.

And there were a number of things that were interesting about that. One is, we had a few of those pop up. I could be on the phone with their father within literally hours of when it appeared on the Internet, and we could have a private investigator or a lawyer in their driveway, which we did, knocking on the door saying, hi, I'm from Scholastic.

And again, we didn't want to sue people. It wasn't about the market. It wasn't about lost sales. It was about we wanted to keep the basically audience for the children together and out of the mainstream so that they could get to that midnight moment, which everyone really loved.

The other thing we did which I talked to Chris about on the phone is in the pre-pub process, we kept the book away from the Internet. So instead of having someone e-mail or do a drop box or something with the manuscript, if someone flew to England, got a disk and a paper copy and they flew back. When it was edited at Scholastic headquarters, it was edited in a standalone computer that had absolutely no connection to the Internet.

Even four years ago, this was tougher than it sounds. We were Xeroxing it one night at midnight and had this sudden, oh, my God! We think this Xerox machine might be hooked up to the intranet of the company, which of course is hooked up to the Internet, and we had to get the IT guys on the phone to get it disconnected.

And talking to the printing plants, a lot of the way that they do printing these days is you send a high-res file down to the printer and they use machines connected to the Internet to either make plates or a film, depending on what their particular process is, so we had to go through fairly elaborate ways of figuring out how to disconnect those machines from the Internet and then make sure we had purged all copies before we hooked them back up.

KENNEALLY: And Dev, if I could say, that's fascinating to me because it shows that though we've conceded that the publishing business is a technology business, it's a digital business, it still is a print business, and that relationship of print technology, if you will, and the digital world is a fascinating one, and trying to keep it off the Internet must have been a tremendous struggle.

CHATILLON: It was. And also really – I had never been in a book printing plant before. I don't know if any of you have. It's a Dr. Seuss place. I mean, literally, to put the binding on a hardcover, the hand comes up with a sort of paintbrush of glue and slaps it on the manuscript and another hand comes and – it's fascinating.

So you had to go through every single step of the printing and distribution process trying to figure out where the holes were and how you could wrap them up, which was really interesting.

KENNEALLY: And though Potter is a very exceptional case, there are many examples where – because *New York Times Book Review* appears before the official pub date – where books are getting out there and spoiler opportunities are rife.

And you said to me when we chatted beforehand that there is now – you've talked about a Plan B. There's a Plan C.

CHATILLON: There's a Plan C. Well, first of all, the *New York Times* seems to have some clerk somewhere that they get all their pre-review copies of and for some reason, they do not like to abide by on-sale dates even when a book has been embargoed.

I had a conversation which I told Chris about with one of my friends there – I've known many of them there for many years – who said, well, but if it's in the *New York Times*, even if it's a week before, that's good for the book. And I said, the book was supposed to be on *60 Minutes*. They cancelled. You guys don't sell many books in Iowa. I mean, you know? You sell a lot of books in New York, but you would have reviewed it anyway.

I'm sorry.

KENNEALLY: Plan C?

CHATILLON: Oh, Plan C, yes, which no one's done yet. You could print the e-book early or you can distribute the e-book early. I mean, in the old days, if you wanted to get a book out and the *New York Times* had jumped pub date with some guy from the warehouse, you really could try and scramble and get the physical books to a bookstore. Now, if you want to put a book on sale, you can simply flip the switch.

KENNEALLY: And the relationship there that we want to just sort of underline, is that if the book weren't available – and this goes back to points that Christoph and Brian have made – if the book weren't available, that might encourage piracy, but if you make it available in an E form while you're still getting them in the trucks to get to the stores, you're going to help to circumvent it. That's the theory.

CHATILLON: Yes. That at least would be one way of having a legitimate copy available at the time of publicity, because another thing that publishers I think worry about and should worry about is how do people find books, how do people decide to pick up or buy a book. And at the time of publication, the time of maximum publicity, is really your best window for either print or e-books for that. If you miss that because someone's played around with your pub date in one way or another, the question is how do you scramble and do it?

I mean, ideally, you want them both available in bookstores, which still tend to be a fairly significant marketing tool even if not a sales tool. And I don't know what the bookstore owners do with that, but it's an interesting problem.

But I think better to have an e-book than to have nothing, although no one has agreed with me so far on that.

KENNEALLY: It's a good theory. And, you know, though Scholastic is very much a digital company like the major trades are, the company you're working with now is solely a digital company. It's got digital in its name, Callaway Digital Arts, and indeed the founder there has entirely abandoned print publishing, I read, even though he's a very successful publisher of everything from *Miss Spider's Tea Party* to *Sex* by Madonna. So there's quite a range.

But he has moved. He's got all of his money, as it were, in the app development world. And how do you think that is going to complicate all of these questions about rights and copyright moving forward?

CHATILLON: In a number of ways. I want to stray for a second though back to Christoph. One of the startling differences from being part of a publishing company and being part of a startup digital company is we have management meetings. There were management meetings at both. And at the digital companies, the first thing you look at is the data.

And the thing that's amazing is, the data is instantaneous. The data is continuing. You can tell not only how many downloads you have but how much time people are spending with it. You can change the price by going like this and see what happens to sales. You can chart that against other prices and other things.

And one of the things again, Callaway has Kleiner Perkins VC financing, so they're very tied into the whole technology, Silicon Valley.

KENNEALLY: Remind people who they first financed.

CHATILLON: They're a series A financer.

KENNEALLY: Right, but I think they also provided funding to another company we might have heard of.

CHATILLON: Apple? Google?

KENNEALLY: Google, I think it was, yes.

CHATILLON: Yes, Google. They have a number of very famous success stories in their portfolio. But they are very oriented toward, again, data and looking at consumer data in a way that publishing seems – this was, I think, a theme at the conference – seems really not to have adopted, that you're in a consumer business. Publishing used to be wholesale. It isn't. It's consumer.

And now, of course, I've forgotten what the question was I was supposed to answer.

KENNEALLY: Well, I wanted you to tell me how being a digital-only publisher, one that's thinking about apps and therefore when you're speaking about apps, you're speaking about not simply text but video, images, all sorts of elements that –

CHATILLON: And don't forget music.

KENNEALLY: And music, right.

CHATILLON: The bane of everyone's existence. What you didn't say is in my prior life, I've worked for Miramax Films and ABC, so I'm familiar with things that move as well as the things that don't.

KENNEALLY: So if we thought things were bad before, it's going to get worse when it comes to rights.

CHATILLON: Well, yes and no. I think it will loosen things up. We've had a sort of bizarre sort of stratification, if you will, of rights in publishing where the publishers only have print, and they only have literal e-book rights, and no one else can touch anything else because heaven forbid, the one movie a decade that succeeds might not be made from my book.

And obviously, if you have the chance to do an e-book that sings and whistles and bubbles and does other fun things, you wouldn't want to give that up if that was the best possible

iteration of either that vision or that commercial product – and books are usually some combination of both – because somewhere down the road, you might possibly get a movie deal.

So I think you're certainly going to start to see a certain amount of softening around the edges of some of those very bright lines that have occurred in the past. At least, that's my hope.

But yes, you do have to clear more rights, and you have to clear them for anyplace where your product is available. And the sad thing that we haven't talked about is copyright is different in every country, and that means that if you have an English-language product that you want to have available in the U.S., Canada, Australia, England and the major English language countries, you're going to have to wrestle with what the movie companies have for many decades, which is, I've got to make sure I'm OK under those laws as well as under U.S. law.

KENNEALLY: Right. There was a very interesting case in a court here in New York that was decided just about 10 days ago that I think is a great way to stop our discussion and then let the audience join us. And that, of course, is the Google Book Settlement case, which the decision came down about 10 days ago, maybe two weeks now. And one of the important points the judge made was that the effort to settle that very protracted case where the authors and publishers were suing Google about the scanning of all their works, was not to find a judicial settlement or solution, but that, in his view, it needed to be solved by Congress, by legislative action.

CHATILLON: Yes, I can give you a very brief –

KENNEALLY: I guess the question is, how likely is that to happen?

CHATILLON: Unfortunately, not terribly, I'm afraid, but I look at what goes on in Washington with despair.

And for the few of you who don't know, briefly, Google decided to scan every book in four major libraries in the United States, including Stanford and the University of Michigan, whether or not they were in copyright, and originally to make them available as part of Google Search in snippets.

A bunch of publishers sued them for copyright infringement. The Authors Guild later joined. The settlement – the proposed settlement – which the judge just – I think appropriately – denied approval to, put in effect a very complex commercial going-forward proposition where Google would be able to sell full text of the e-books with various opt-ins and opt-outs and adjustments made by the rights holders.

One of the key issues was there's a chunk of rights holders for books and every other copyrighted content in this country who are simply missing in action. It's called orphan works. There's no parent available. And what happens when you can't find a rights holder?

Under current U.S. law, you can't use it, or if you do use it and the rights holder pops up, they can sue you for full copyright infringement. And we've all dealt with this. We've been in the content industry for many years where someone would say, well, can't I use a photograph? I've really tried to clear it. And the answer is, it worth $50,000 to you? Because as a practical matter, if someone pops out of the woodwork, you've printed the whole work. You have no defense to copyright infringement. And it will cost at least that much to hire someone like me to defend it.

So, the solution of the Google Book Settlement was that Google would, by default, get all the rights to the books that no one could find the authors to and be able to make full use of them with a variety of very elaborate hundreds of pages of descriptions of what happens to the proceeds and how it gets set out.

And that was the core of what disturbed the court because, appropriately, I think, the judge felt that that was a legislative, not a judicial solution. It went well beyond what had been the basis for the case to begin with.

There were objections from the Republic of France and Germany –

KENNEALLY: I was going to say, there was global aspect to it.

CHATILLON: - who appeared in court – which was really fun. I haven't seen that before – to say, this covers a lot of our books, even though the original settlement had been narrowed to try and avoid some of that, and it violates our law. And we think it also violates the U.S. obligations under the Berne Convention, which was something the Department of Justice, which opposed the settlement, mentioned as well, is the fact they thought other aspects of it were a per se violation of the antitrust laws. So there were a lot of issues with the settlement.

KENNEALLY: Right. I appreciate the three panelists here who've done a lot, I think, to unpack a very complicated issue, although as I remember as a reporter in Northern Ireland many years ago, we used to say if you're confused, you're beginning to understand the problem. There's a lot here that I think must be vexing every publisher, everyone in the publishing business, in this room and at this conference.

So I want to thank Dev Chatillon, Christoph Brem and Brian O'Leary for their participation, but now I'd like to ask you to participate and see if we have some questions from you about your own experiences, whether you've just heard something you want to

disagree with, or whether you want to follow up on any of the points made. So if anyone does have any questions here?

No questions on copyright? I see one there.

M: Over the past few years working for publishers, I spent a fair amount of time with the customs department where they've intercepted many popular content physical books coming into the country. Who is dealing – what part of the government deals with electronic file issues like this? Is it – can it be a customs – ?

KENNEALLY: I think it's a great question because it tells us that we are moving from that physical world where piracy was about a physical object to this digital world where piracy – call it what you will – is about this bits and bytes, this ephemeral issue.

CHATILLON: And actually, it's a different issue altogether, because what you're talking about is called gray market. Usually it happens most often with textbooks where you print one version in the U.S. and you have a cheaper version you print in India, for example. And then the Indian publisher, not being stupid, thinks, I'll take it. They bought it for a dollar, ship it to the United States and sell it for 10. Nice margin. And that's called gray market. It has been customs.

For digital files, it's not usually a sale. It's usually a license. It doesn't really – there've been a couple of cases on this about whether the whole sort of gray market and the first sale doctrine apply to digital. I think at the moment, it depends how it's sold, as a practical matter, but most of the time it doesn't.

The trade – both the copyright office and I think it's the international trade representative have been involved in trying to deal with some of the piracy issues, including digital, around the world. I don't think terribly successfully. Brian, do you know?

O'LEARY: Well, you've also got the DMCA.

CHATILLON: And you've got the DMCA, but that doesn't have extraterritorial effect.

KENNEALLY: Christoph, I wonder whether you, in the work that Attributor does to track down people, ever find yourself just one step behind or ahead of a law enforcement person?

BREM: Well, there's a legal aspect and there's a practical aspect. One is obviously, the DMCA, the new copyright directive, other legislation that is – the liability is on the content owner to identify where the pirated content resides, alert the site of the fact that there is pirated content, and remove it.

The practical matter is exactly the approach that we're trying to take, is what can we do within that framework. As long as there is no other framework where these site holders are required to or be held liable for the content that they're hosting, this is the way to go about it.

And again, it goes to a big part, the question is, is this a good or a bad thing to have this pirated content on these sites. You can argue about that. At this point, we feel you need to control the distribution channel no matter how and the only way to do this right now is to remove that content. And we are very successful with that. We have 99 percent across-the-board removal rates with books, and that's just within the current legislation.

KENNEALLY: Brian, if I could follow up with you on that in terms of just trying to align one's business with the reality of the digital environment. Metadata becomes a very important part of it and preparing the proper data – we've talked a lot about data, but having your content identifiable so you can find it and know what's happened to it is an essential piece of this.

O'LEARY: It is. It's a little bit different from the observation about controlling the content, but specifically, if you're going to be trying to figure out do people want a specific chunk or a component of this particular work, is it being circulated widely, being able to essentially break down the content so that it has identifiable components is really important.

KENNEALLY: And you need to think ahead in terms of how you might want to break it down so that when the customer breaks it down that way, you've anticipated it.

O'LEARY: Yes. That goes back to the container metaphor that you asked me about in the first set of questions.

One of the things that – you started out with the *Boston Globe* piece from this morning. I don't actually get the *Globe*. I didn't come down, but I did read it online for free.

(laughter)

O'LEARY: And it was a legitimate source. But one of the things that's interesting, the author went on to say that essentially, piracy killed the record business. And I think one of the things that's really useful and with respect to Dev is that the music business is doing OK in a lot of different senses. Its revenue is down significantly from its peak, but its peak was fueled, in many people's view, by essentially replacement sales of CDs for vinyl, and that one of the things that really hurt was the long – five-year-long – period where music companies essentially refused to sell singles in digital form because it was not a good business for them. And I think that encouraged piracy.

The thing I'm sure you're reading the same thing with respect to *Harry Potter* and e-books is the general belief is that a lot of money was left on the table.

CHATILLON: Absolutely.

O'LEARY: By not – and essentially made your life harder because piracy gets encouraged when there are no legitimate digital sources.

CHATILLON: Yes. Not pre-publication, I don't think, but afterwards, luckily, we got to hand it back to her agents. I will say one thing about –

O'LEARY: Congratulations.

CHATILLON: Yes, thank you. It was a delightful day – is that one of the aspects of the Google Book Settlement that I think all of us thought was a terrific idea, and it goes right into, I think, what both Christoph and Brian have been saying, is some of the hundreds of millions of dollars that Google was throwing at this problem was going to be spent to construct a book rights registry that had authors and publishers and Google – no, not Google – on the board and that would be a central place for everyone, including people other than Google, to come to clear rights.

And I think one of the things I've seen in a lot of the commentary after the denial of the settlement – and this is not necessarily final. It can go to appeal. There can be further proceedings in the case – is efforts under way, either quasi government or some kind of governmental, private, for-profit, not-for-profit, whatever effort to put together something like that because the other problem –

We have a consumer problem because if I want to read it, if I want to consume it, and I can't find it, and it's easy to steal, well, we may steal. If I want to clear it and I can't clear it and I can't figure out how to clear it, am I going to go ahead and use it anyway? And that 99 cents tends to add up after a while. This would be a good addition.

KENNEALLY: Right. I've just been cued by my colleague here to point out that there is an letter to the editor in the *Washington Post* by the CEO of Copyright Clearance Center making this very point that Dev Chatillon just made on her own talking about –

CHATILLON: But I haven't read it. It was not pirated.

KENNEALLY: OK. Not at all, but it's a nice way for me to just direct you to that letter by Tracey Armstrong, which points out that such an organization already exists and it's called the Copyright Clearance Center. But it's a point that we are definitely very actively trying to encourage people to think about, which is a voluntary licensing solution, and the one

that was denied by the judge – without me providing any legal commentary as I'm not an attorney – is that essentially, because of the class action mechanism, it was an involuntary.

CHATILLON: Right. And actually, I would say there's another organization that already exists, but is, as most of the government is hopelessly behind the times, which is the Copyright Office. I mean, to register a work for copyright, you have to give them all the information that you're supposed to get, but for whatever reasons, that is barely accessible on the Internet and there's no way to license it. But part of it's just information, but it's just very hard to find sometimes who owns what and information would free up a lot of content, I think.

KENNEALLY: Right. Yes?

M: Is DRM a good idea? A bad idea? Or does it just depend on what kind of publisher you have?

BREM: It doesn't work.

O'LEARY: With respect to piracy?

M: Yes.

O'LEARY: It's irrelevant.

BREM: Yes, it doesn't work.

CHATILLON: For the gray area, does it help at all? For the people who might if tempted but probably won't?

O'LEARY: Well, it's a business decision. It really is. Do you want to frustrate user demand? I think ultimately what it does is suppress price. The article that you pointed to, the author is saying that he didn't want to pay $12.99 for an e-book so he stole it. Well, DRM will prevent you from moving it from a Kindle to another device, for example. But Kindle is on DRM.

BREM: That's easily broken, is one thing, and another is there's these cases where within a few hours, a book comes out and whether it's a scanned version or whether it's an e-book, within a few hours, the DRM is cracked or the book is scanned, copied and made available on the Web multiple times.

We did some studies last year. We just took 1,000 titles across genres, all types of book titles, and we found nine million pirated copies out that are just files. Multiply that by the number of times each one of those files has been downloaded, that gives – this was last

year. This was before the iPad was out. This was before CES this year where 17 new e-readers and tablets came out where it makes it even so much easier to download.

So the problem is real and the DRM is not going to fix that. There's just too many sophisticated people out there.

KENNEALLY: Christoph, I'd like to follow up on that. When you do the tracking and you find these books online, what kind of books are we talking about? Are we talking about frontlist, backlist? Can you draw any conclusions around that?

BREM: That's also a very interesting topic. In the beginning, when we started pricing our services, we always assumed the frontlist titles, the new titles that are coming out, they're probably going to be the most infringed-upon, the most pirated titles. Forget about the backlist. There's probably not much work for us.

But there's two effects that you have. One is it depends certainly very much on the genre because some titles are more relevant than others, and then you have external events. Right now, probably titles about Japan, about nuclear reactors and about plutonium probably get a lot of attention even if they're two or three years old, and you will see the same increase in piracy as you would see in sales.

And so sometimes this is really hard to predict, and we had to adjust our technology to that fact, that now we have an automated mechanism, depending on the level of infringement, we pay more attention to certain titles. That's also something that if you try to do this manually or on your own, it's very difficult to understand and it goes back to the data points, to better understand of what the audience is.

Because some of these books might not even sell that much better now, but might be a high level of infringement where you're losing out on a big audience. People are saying, this is a five-year-old book. I'm not paying for this. But if I go on my iPad now and pull up a browser, I go on 4shared and I can download it just as easily as I can from Amazon, then a lot of people do that.

KENNEALLY: Brian, what about your research for O'Reilly? Does that dovetail with what we just heard or is it any different?

O'LEARY: With respect to DRM?

KENNEALLY: No, with respect to the kinds of titles that they were finding.

O'LEARY: The titles that were most likely to be uploaded were heavily – it's a small sample set, but they were heavily components and not illustrated in any detailed way. Many of the books or all of the books that O'Reilly has are published simultaneously in print, if they're

printed, and digital form, and generally PDF, Mobi and EPUB without any DRM protection or DRM restrictions.

KENNEALLY: But the titles were newer, older?

O'LEARY: We were only looking at frontlist titles.

KENNEALLY: Only looking at frontlist.

O'LEARY: The reason was, the purpose of our study was to identify the moment at which piracy occurred and then look at sales, so if we looked at backlist, we wouldn't necessarily know when that occurred.

But on an ongoing basis, you tend to see over time that all books that could be put up on the Internet – it's a particularly effective thing, the Internet, for sharing files. So they do it, it just occurs everywhere.

BREM: It's also an interesting level line, and Dev, you can probably talk a little bit about that. With e-book publishers now and how we've see titles that have now for many years have been bestsellers and now they're first to make modest e-publishers. So it's considered a frontlist for e-book, but it's an old title that all of a sudden, because the availability through an e-book becomes so much easier, all of a sudden it becomes a highly flinched title, *Fahrenheit 451* or titles like that that have been out there for quite some time but are still much read.

O'LEARY: Yes, I think the two things that I – this is when I think about price and also the orphan works issue. They're not two sides of the same coin, but these are all components of how we tend to think about piracy, because if a book is deemed to be expensive, if it's only you can use it and it can only be used on this device, it's unlikely that you're going to get a large number of people paying $13 for it or even $10 for it. So that's where the price test then becomes really interesting.

But I think a lot of people – I think probably 99 percent of the people in the country – don't understand what copyright changes occurred in the last 10, 15 years that dramatically increased the orphan works issue and made it harder rather than easier to solve the rights issues.

CHATILLON: And it's actually very simple. The old Copyright Act required renewal of the copyright every 26 years. You had to re-up, and if you didn't, it went into the public domain. So that was an easy default. You either found the person who owned the rights after 26 years or everyone could use it and it was in place for exactly this reason.

When the U.S. joined the Berne Convention – of course, revised the Copyright Act in 1978 but then joined the Berne Convention – one of the things – which is the international convention that applies to the U.S. and most of the world. It's over 100 countries that are members, and it provides a lot of protection to the U.S. works abroad.

But one of the things that Berne doesn't allow is what are called formalities, and that meant anything that required you to actually file forms with the government had to go. So the renewal process went away as did initial registration. You actually don't have to register a copyright anymore. There are advantages to doing it, and if you have a commercial work, you really, really should, but you don't have to. You don't lose the copyright anymore and you used to lose the copyright.

KENNEALLY: And of course the term's been extended so it's life plus 70 at this point.

CHATILLON: Life of the author plus 70 or 95 for corporate work for hire.

KENNEALLY: So something copyrighted today, 2011, could be –

CHATILLON: And Irving Berlin lived to be 102, so we're talking two centuries worth of Irving Berlin copyright.

KENNEALLY: Well, may we all live so long. Thank you all for staying so long as you did. That concludes our program today. I want to thank again Dev Chatillon, Christoph Brem from Attributor, Brian O'Leary from Magellan Media, and all of you for joining us today. My name's Chris Kenneally for Copyright Clearance Center. Thank you very much.

(applause)

END OF PANEL DISCUSSION