

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

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

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

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

KENNEALLY: And 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.

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?



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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.

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.



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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.

KENNEALLY: 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



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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 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 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?



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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.

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