



Orphan Works Discussion with Victor Perlman of ASMP

Q: Welcome to another episode of *Beyond the Book*. My name is Christopher Kenneally. I'm Director of Author and Creator Relations for Copyright Clearance Center, which is the underwriter for the *Beyond the Book* series.

My special guest today is Victor Perlman, who is the Managing Director and General Counsel of the American Society of Media Photographers. Welcome, Victor.

A: Thank you, Chris, and thank you for having me.

Q: We're here today to discuss a topic that's especially of interest to photographers, but I believe should be of interest to anyone in the media business, and content creators of all kinds – illustrators, authors, and so forth – and that's the subject of orphan works. But before we dive down into where things stand in the US Congress, it would be helpful to start with some basic definitions. And this is a subject you've been following for some time, so you're really our expert here. Would you tell us, what is an orphan work?

A: Orphan works is actually a term that I dislike, because it is so connotative of works that have been abandoned and are unwanted. The actual term would be an unlocated copyright owner's work.

The situation with orphan works is, when somebody has a copyrighted work, or work that appears that might be in copyright, and is unable to locate the copyright owner – sometimes because the copyright owner can't be identified, sometimes because the copyright owner is known but can't be found – and therefore there is no way for a potential user to get permission to use a copyrighted work.

Q: But the issue is that, with these kinds of works, people do want to use them. And so what happens in the normal course of events? And from the ASMP's viewpoint, what should be happening? What's the ideal situation for photographers, when someone has a work and would like to use that photograph of London Bridge or the Eiffel Tower, and just cannot identify – or can't locate, as you point out – the copyright owner?

A: There is no ideal answer, because the situation that you just described is far from ideal. The ideal situation is where the copyright owner can be found, and a license can be worked out. Sometimes that license can be for no fee, or sometimes it can be a substantial fee, depending on the nature of the use and the nature of the work.

Frequently we receive phone calls and e-mails from people who are trying to locate copyright owners, and they come to us to see whether the photographer is in fact a member of ASMP and if we have contact information for him. And often publishers will refer inquiries like that to us.

The way those situations get resolved vary all over the map. Often publishers or other users who are very risk-intolerant will simply choose to use a different work instead of one where permission cannot be granted. Sometimes people will use a work without permission, and sometimes people will use a work without permission without even trying to get permission.

Q: Well, as we know at Copyright Clearance Center, that it really does cover a multitude of sins, from the permission granters to the permission deniers to those who don't think they need permission. And the argument among librarians and others is that this is stifling fair use and free speech and so forth. How do you respond to those charges?

A: Well, if, in fact, it's fair use, then whether someone can be located or not is really irrelevant. If the use is fair, the use is fair. As far as stifling creativity, in fact what we're talking about is using someone else's work. It's not creating a new work. It's not creating an original work. It's a use of an existing work. And that, to me, can have aspects of creativity, but is not truly creative.

Q: And clearly, what ASMP is after, and Copyright Clearance Center well, of course, is encouraging an atmosphere where people understand the importance of copyright, the importance of getting permission, and the importance of making their works available to that community that wants to trade images for fees and so forth, correct? I mean, that's really the overriding concern here.

A: Oh, absolutely. The copyright office sometimes takes the position that suggests that photographers don't try hard enough to be found. I think the contrary is absolutely the truth, that photographers desperately want to be found in order to make a living.

Q: Right, so with all of that in mind, it was a few years ago that the copyright office asked everyone in the world, frankly, for their opinion on the topic. They got an earful, and some legislation was proposed. Well, Victor, what are some scenarios for photographers and the community of users today that they can use to obtain the permission, to find photographers, to make this work in a way that's equitable on both sides? Tell us about some of those.

A: Sure, and it'll have to be some of them, because there's a vast panoply of research tools that are available, both in terms of the conventional print analog world and in the new digital Internet world. Certainly, if you have the name of the author or photographer or copyright owner, everything is vastly simplified, and at that point the issue becomes trying to locate him. There are numerous registries online that are starting to pop up, as well as the very basic Internet search function using Google or Yahoo or Microsoft Search Tool or something like that. Certainly contacting organizations like ASMP, like CCC, are good starting points. The CCC's recent initiative, DiscoverWorks, looks to be a potentially very helpful tool for photographers to be able to have themselves be found. In the recent developments in the Internet world, there are starting to be companies that have viable search – image recognition based search tools, companies like Idée, PicScout, and others that – Attributor, that are really created so that copyright owners can upload copies of their works, and then those works are scanned by the service provider's software. From that, a digital thumbprint is created, and robots then go out and crawl the Worldwide Web looking for matches. And the idea originally was that copyright owners could then find people who were using their works without permission. There's no reason why the reverse approach can't be used, so that someone with a copy of a work could use the same technology to then trace it back to the original copyright owner in order to identify and locate him and get permission to use the work.

Q: Right, kind of reengineering that, reverse engineering that. It's interesting, you have an article that you co-wrote with Gene Mopsik, who's the Executive Director at ASMP, that's appearing in the latest edition of a publication called *Against the Grain* that reaches librarians and publishers around the United States. And you can find that at against-the-grain.com. And in there you describe that reverse engineering of thumbnails and so forth so that you can find the owner and the owner can be found. And I believe as well you call for the Copyright Office to take a role in this too.

A: Yeah, I have lost a lot of friends in the Copyright Office over the orphan works issue. It seems to me that, for as long as there have been photographs, people have been depositing copies of their works with the Copyright Office. And they have a large inventory of photographic and – photographic images and other visual images. It seems to me logical that, as a government agency that is intended to serve the public, that the storehouse of images that they have should be digitized and made available online for potential users to be able to try to use the technology that we were just talking about to try to identify the copyright owner and get permission. Obviously there are some potential problems with – or risks with doing that. The access will have to be in a way that images couldn't be easily appropriated and stolen by unscrupulous people. But those are technological issues that can be dealt with in a reasonable fashion.

I know that over the decades, that various portions of the inventory of images have been purged, but there still remains a large body of them. The Copyright Office, for obvious reasons, does not want to do that, would certainly need to have appropriations from Congress. I'm not sure Congress would want to do that. But it still seems to me to be the first and most logical place where a potential user of a copyrighted work would go to try to find an owner and get permission.

Q: Otherwise, as you point out in the article, it's a real burden for photographers to have to make all these files. And another point you make, which I thought was quite interesting – if you're my daughter who's 14 years old, you think that all the information in the world was created after about 1995, because that's all you can find on a Google search. But the point is that so many images that are being used, lawfully or not, exist in the pre-digital era. And most of these, almost – the great majority of them haven't been digitized. So if one's conducting searches, just searching online is not the end, is it?

A: That's exactly right. The – If you look at the inventory of images from just what people have been creating recently, everyone sort of assumes that, well, you've got the digital file, you simply make it available in a database. In fact, professional photographers have been using digital imagery for a relatively limited period of time, and because of that, there are decades worth of millions and millions of photographic images that are in film and negative and transparency form, and that do not exist digitally.

The process of digitizing those is not like walking into the neighborhood camera store, dropping off a copy of your old 8mm film, and then coming back the next day to pick up a VHS tape, particularly at the professional level. The process of scanning, refining, and editing images is extremely time-consuming, and therefore expensive. When you add to that the fact that most photographers are solo practitioners, or perhaps working in very small operations with just a couple of people, they are making a barely adequate living by making the photographs and selling their services. If you add the burden of going back and digitizing decades worth of images, they have a choice of either making a living or digitizing their inventory, and you know which one has to go.

Q: Right. Well, just to wind up here, we actually are having this conversation in London, attending a meeting of a working group from IFRRO, which is the International Federation of Reproduction Rights Organizations. It's an organization that concerns itself with a variety of questions around the copying of all kinds of media. Is orphan works more than just an American issue? Does it have a global perspective as well?

A: Oh, it absolutely has a global perspective to it. Even if various organizations and governments around the world weren't paying attention to it, the mere fact that the Internet is a world without borders would make it an international issue. I think, at this point, most countries are looking to the US to see what Congress ends up doing

for guidance. And that makes what happens in the US Congress of even more importance, because its effect will not be just upon the citizens and creators in the US.

In terms of what Congress is doing or not doing, as you know, we had legislation introduced in the last Congress, which ASMP participated in the negotiations that led to the drafting. We and the other illustrators' and photographers' group were not happy with some of the aspects of it, particularly the so-called safe harbor provisions, which allowed people to make potentially revenue-producing and very profitable uses of images and then not have to pay any royalties whatsoever. That legislation, which had been introduced by Representative Lamar Smith from Texas, ended up dying in the last Congress.

We had heard immediately after that, in the fall a year ago, that we would then be seeing new orphan works legislation, probably based on the failed draft, being introduced quite soon. We then heard that for literally all of last year. Most recently, what we have heard is that, starting some time this month, Congressional staff will be talking with various interest groups about a new piece of legislation.

As to what Congress actually does, compared to what it would like to do, there are all kinds of factors that impact whether and when things happen. Congress has had its hands full, particularly when you consider that the same committees, the judiciary committees that deal with copyright issues, are also dealing with a lot of national security issues, are also dealing with Attorney General issues. You can understand that fixing a portion of the Copyright Act would not be on it – of the highest priority for them.

Where things go from here only time will tell. The only thing that we know for certain is that orphan works has not gone away, and does not appear likely to go away, and what we're hoping that we'll be able to craft something that is fair to both users and copyright owners. One of the suggestions that we've made in that article in *Against the Grain* that you mentioned is that one relatively simple and apparently fair approach would be to make orphan works legislation, and basically the ability to use orphan works without fear of a lawsuit, and to take that protection and limit it to non-commercial uses that are non-revenue-producing, or to works that are nonfiction, whether they're documentary films or books. And it seems to us that that way there's at least some rough justice for everyone, and the huge amount of interest in using works for things like personal interest groups on the Internet, whether it's for scrapbooking or cigar smokers or whatever, would be protected. And I think that a lot of the interest of the public in having access to an unlimited range of works is exactly for that area.

Q: Well, Victor, thanks very much, and when you were describing the situation in Washington, it reminds me of what Mark Twain said, and it hasn't changed at all. He said, "No man is safe as long as Congress is in session." And that would apply at least to photographers today.

I want to thank Victor Perlman, who is the Managing Director and General Counsel for the American Society of Media Photographers for joining me, Christopher Kenneally, for this special program for the *Beyond the Book* series. You can learn more about the ASMP at asmp.org, and you can, of course, stay tuned to more programs from *Beyond the Book*, subscribe to our podcast series, and otherwise learn about issues of concern to people in the media business of all kinds at beyondthebook.com.

Again, thank you, and we look forward to having you back soon.

END OF INTERVIEW