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Copyrights/Orphan Works

Photographers' Representative Doubts Likely Progress of Orphan Works Legislation

■ **Key Development:** *A photographers association official says it seems unlikely that orphan works legislation has much of a chance to make progress before the next election.*

The prospects for enactment of orphan works legislation, which is a priority policy goal of the Copyright Office, might not be very bright for the near future, according to Victor S. Perlman, general counsel of the American Society of Media Photographers.

"I'm not sure how able Congress is going to be in moving this kind of legislation along," Perlman said during a Dec. 12 panel discussion presented by the Copyright Clearance Center. The panel, titled "Copyright and Commerce: Orphan Works and Fair Use in a Digital Age," was moderated by Christopher Kenneally and included Register of Copyrights Maria A. Pallante and *The Washington Post's* Cecilia Kang.

Perlman noted the scant time available in the current legislative session, as well as the 2012 elections, which will become the focus of the next session.

HathiTrust Incident Pollutes the Waters. Furthermore, Perlman said that consensus around the entire idea of giving users of orphan works some degree of protection once they have conducted a "reasonably diligent search" has been "potentially damaged" by the events surrounding the HathiTrust Digital Library.

In September, the Authors Guild initiated a copyright infringement action against HathiTrust, a collective project of several major libraries aimed at making scanned works available online (82 PTCJ 642, 9/16/11).

Perlman said that copyright owners had expected large research libraries and archives, such as those participating in HathiTrust, to use their resources to ensure that they did indeed conduct "reasonably diligent" searches before declaring orphans the works they wanted to use.

HathiTrust's position was "We did . . . all the things that were reasonably possible, and we came up empty," Perlman said. However, when copyright owners put that to the test—with one person using an internet connection and a telephone line—they "came up with vast numbers of owners in minutes" for many of the works claimed by HathiTrust to be orphaned.

Mass Digitization Needs Serious Thought. Pallante outlined the problem of orphan works and the Copyright Office's efforts over the past decade to secure legislation in the area.

A problem with the provisions at 17 U.S.C. § 108 allowing reproduction of orphan works by libraries and archives is that they apply largely to the nonprofit sector, she said. Even commercial actors must have some ability to use orphan works if the goal is to ensure that the public has access to them, according to Pallante.

"It's not enough to give to the nonprofit sector certain uses if the real purpose is to get this stuff out," she said.

Pallante also said that the mechanisms of orphan works legislation must be seriously considered in the face of mass digitization projects, such as the Google Book Search project, which was not a consideration when the issue was originally addressed.

Pallante also cast doubt on the mindset that "presupposes we all think that scanning entire libraries is a national goal."

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