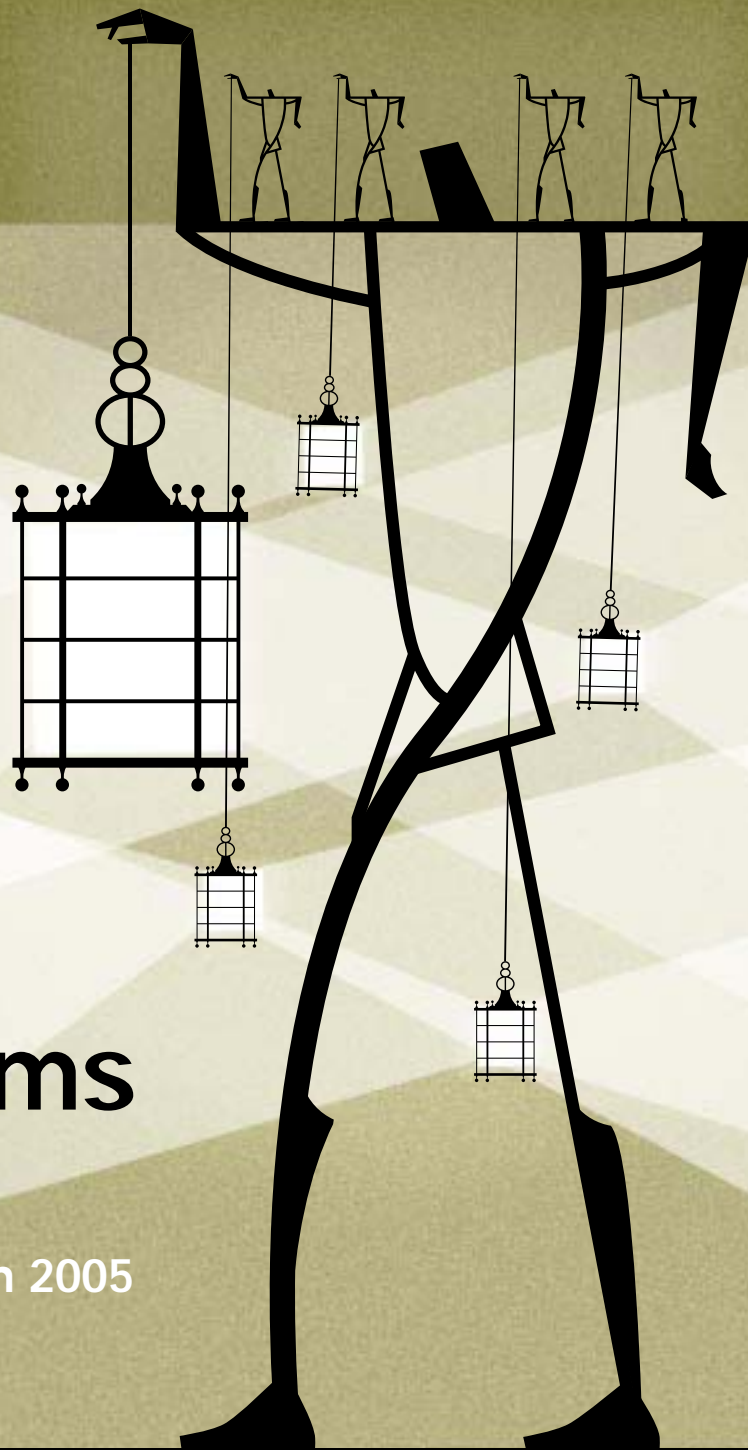


Access to Orphan Films

submission to the
Copyright Office -- March 2005

Center for the Study of the
Public Domain. Duke Law School

<http://www.law.duke.edu/cspd>



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Introduction

Thank you for your invitation in FR Doc. 05-1434 to address the question of problems in access to orphan works and to suggest ways in which the copyright system might be adjusted to deal with these problems. The Duke Center for the Study of the Public Domain welcomes this initiative. The Center is devoted to study of the balance between intellectual property and the public domain, and of the ways in which both realms contribute to innovation, cultural vitality, education, free speech and scientific progress. Its “Arts Project” specializes in the effects, positive and negative, that intellectual property has on the arts. This submission focuses on one of the key areas of concern our research has identified: access to orphan films.¹

Though there are many general problems in access to textual, photographic and musical orphan works, some of the most pressing lie in access to orphan films. Orphan films make up the overwhelming majority of our cinematic heritage, and are a vital part of the culture and cultural record of the twentieth century. Indeed, the Library of Congress declared that it is in the task of restoring these orphan films that “the urgency may be greatest.”² They include a vast treasure trove of newsreels, documentaries, anthropological films, portraits of minority life in the U.S., instructional films, and even some Hollywood studio productions. While it is both a tragic shame and an unnecessary loss to our culture that scholars and citizens are hampered in making use, for example, of orphan books and musical scores, the difficulty of access to orphan films is a matter of crisis because these works are *literally disintegrating*. At a time when digital technologies allow for more sophisticated and cheaper restoration and distribution of old films, uncertainty about copyright status has impeded restoration efforts. Worse still, in most cases the films are completely unavailable to the public even for simple viewing. These unfortunate results are the exact opposite of the goal the copyright system is supposed to serve. “[C]opyright law ultimately serves the purpose of enriching the general public through access to creative works.”³ And the clock is ticking. If the Copyright Office does not take prompt action in this case, it may literally be too late for much of the film record of the twentieth century.

¹ The analysis presented here is derived from published sources in books, scholarly journals and governmental reports – including the Library of Congress’s key studies of the issue – and from informal consultations with prominent film preservationists. An earlier version of this research provided the basis for an *amicus curiae* brief on film preservation cited by Justice Breyer in *Eldred v. Ashcroft*, 537 U.S. 186, 253 (2003) (citing Brief for Hal Roach Studios et al. as *Amici Curiae*). While this comment focuses on research regarding orphan films, the concerns and solutions discussed also apply to orphan videos, which can decay even more rapidly than film. As with film, a huge legacy of video – from educational productions to tapes containing examples of now obsolete medical procedures to depositions – is literally falling apart. We hope the Copyright Office will also examine issues raised by orphan videos, which may be described in more detail in other submissions.

² Report of the Librarian of Congress, *Film Preservation 1993: A Study of the Current State of American Film Preservation*, 5 (1993) (hereinafter “Librarian of Congress Report”).

³ *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994).

Decay and Preservation in Orphan Films

Due to their volatile physical properties, thousands of films created in the early twentieth century have decayed beyond repair. The majority of the remaining films from the era are in a precarious position: many films are on the edge of decay yet the copyright owners are unlocatable. Film archives contain hundreds of thousands of films, which even when restored using public funds, are unavailable to the public because copyright owners could not be located. For example, the Museum of Modern Art contains 13,000 films, more than half of which are orphan works unavailable to the public.⁴ To a public denied access to the films in the nation's archives, a public whose tax-dollars are spent restoring movies they are forbidden *even to view*, archivists can look "as if they are perversely saving films for a posterity that never quite arrives."⁵ The Copyright Office can, and should, do something about this challenge.

The Film Preservation Emergency

Film preservationists strive to maintain, restore, and digitize motion pictures. The physical properties of early twentieth century film guarantee eventual destruction of all motion picture films from this era. The volatile cellulose nitrate base used on most pre-1950 films is prone to shrinkage, to outgassing that destroys the film's emulsion and even to spontaneous combustion. Of the tens or hundreds of thousands⁶ of movies made before 1950, fully 50% are already irretrievably lost.⁷ For films made before 1929, the loss rate is far worse: over ten years ago, the Librarian of Congress estimated that 80% of films from the 1920's, and 90% of films from the 1910's had already decayed beyond any hope of restoration.⁸ Some of those works might *now* be in the public domain. But by this point, of course, they are dust. At each stage, legal uncertainty, and the strict liability scheme laid down by the current copyright system operate to discourage exactly those acts copyright should be encouraging: restoration, exhibition, use in teaching, the presentation of new edited versions and so on. Yet in the case of orphan works, they do so without the normal benefits of the copyright system – the provision of incentives, and the encouragement of commercialization and distribution.

The cost of copying unique reels of pre-1951 nitrate film alone was estimated ten years ago to be \$243 million.⁹ But nitrate film is far from alone in needing restoration; so-called "safety" film is also subject to acetate-base decay,¹⁰ and "virtually all of the images captured on film [are] susceptible to similar loss

⁴ Library of Congress Report at 26-27.

⁵ *Id.* at 47.

⁶ By 1917, over 30,000 films had been made. Charles H. Tarbox, *Lost Films: 1895-1917* 3 (1983).

⁷ Library of Congress Report at 3.

⁸ Redefining Film Preservation: A National Plan; Recommendations of the Librarian of Congress in Consultation with the National Film Preservation Board, 23 (Annette Melville & Scott Simmon eds., 1994) (hereinafter "Librarian of Congress Recommendations"). See also Frank Thompson, *Lost Films: Important Movies That Disappeared* ix (1996).

⁹ Librarian of Congress Report at 56.

¹⁰ *Id.* at 8-9.

within the next century or two.”¹¹ The various video formats are no more resistant to the ravages of time, indeed they may be more at risk. In the words of one expert, “videotape has much more serious longevity issues than Film. Video and videotape has been used for an extremely wide base of production types including art and independent production. A great deal of it is low budget by nature (historically film has been much more expensive to shoot) and as a result there is a huge population of Orphan materials. From Educational productions to tapes containing examples of now obsolete medical procedures to depositions taken on video – there is a huge legacy that is literally falling apart much faster than film.”¹²

According to the Library of Congress’s own report, the ongoing preservation crisis primarily affects precisely the class of works at issue in our submission, “orphan” films—“films of long-term cultural and historical value that are not being protected by commercial interests.”¹³ These are some of the most culturally valuable films ever created. They include “newsreels, documentaries, experimental or avant-garde films, anthropological and regional films, advertising and corporate shorts, dance documentation, and even amateur home videos.”¹⁴ Also of cultural significance are rare historic footage documenting daily life for ethnic minorities, “certain Hollywood sound films from now defunct studios,”¹⁵ and other commercial works “who[se] owners are unwilling or unable to provide long-term preservation.”¹⁶ Without identifiable or locatable owners from whom rights to use may be secured, this entire generation of American culture is sequestered as the films continue to rot on the shelf.

In the ten years since that report by the Library of Congress, the state of things has worsened in two ways. The progress of deterioration has continued, and the copyright term has been extended by twenty years – stretching out even further the length of time over which a film must survive. One declared goal of the Copyright Term Extension Act was “creating incentives to preserve existing works” to encourage the owners of commercial films still under active copyright management to invest in transferring the films to new media.¹⁷ The Senate argued that “extending the current copyright term for works that have not yet fallen into the public domain” would further preservation by “providing copyright owners at least 20 years to recoup their investments.” This shows a clear Congressional interest in access, preservation and media migration.

But famous and marketable Hollywood features constitute a tiny proportion of the surviving film population.¹⁸ There is absolutely no doubt that term extension *cannot* help the numerical majority of the movies at risk of

¹¹ Michael Friend, *Film/Digital/Film*, 24 J. Film Preservation 36, 36 (1995).

¹² E-mail Communication: James Lindner founder of the National Television and Video Preservation Foundation. On file with the CSPD.

¹³ Library of Congress Recommendations at 25.

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 5.

¹⁶ *Id.* at 26.

¹⁷ S. Rep. No. 315, at 13, 104th Cong. 2d Sess. (1996).

¹⁸ Library of Congress Report at 16.

permanent destruction – works without identifiable owners.¹⁹ The increased term does nothing to encourage the non-existent owner, nor the owner who has lost track of his copyrighted works. Indeed, in those cases, term extension exacerbates rather than solves the crisis, for it denies those others who do care the ability to restore or display the work. It does so against the background of an ominous countdown to complete physical dissolution of most of the works that remain. Works already on the edge of disintegration, which in all likelihood have no objecting copyright holders, are nevertheless simply too risky for most archival facilities to restore, or even display. Indeed, our study showed that in many cases, archives simply imposed a flat rule that only works which *must* now be in the public domain are to be available for restoration and in many cases even for viewing. Thus for orphan works, a different solution is needed.

Specific Barriers to Preservation and Access

To understand what needs to be done to help save orphan films, one must first understand the magnitude and the complexity of the problem. Over 100 million feet of film remains unrestored.²⁰ Studios hold only a small fraction of the endangered films.²¹ Most is held in large public archives.²² The 1993 figures show the Library of Congress holding over 150,000 titles, the UCLA Film & Television Archive 46,000, and the Museum of Modern Art 13,000.²³ Untold numbers of films are scattered in private hands or small public collections – one expert estimates that some 1,750 separate small collections hold unique or difficult-to-find footage.²⁴

The physical guardians of a film, however, are often not the owners of the film's copyright. The separation of physical control and copyright control increases the difficulty of both preservation and public access.²⁵ In the numerous cases where the copyright owner has abandoned interest in the film and cannot be located, private parties in possession of the endangered film cannot copy, restore, digitize, or share the film. To make matters worse, there are often multiple copyrights over the same film—covering the film itself, the script – if any – and the soundtrack. Each of these copyright owners needs to be tracked down. The resulting burden is at least massively time-consuming, and often simply overwhelming. All the while, the films decay.

Libraries and archives do have limited rights to copy deteriorating works, but still cannot allow the public to use the works, even when public funds paid for the costly copying.²⁶ Library budgets are stretched tight. It is hard to justify paying for costly copies that no one but specialists can even see. In addition,

¹⁹ *Id.* at 5.

²⁰ Anthony Slide, *Nitrate Won't Wait: A History of Film Preservation in the United States*, 3 (1992); Doug Herrick, *Toward a National Film Collection: Motion Pictures and the Library of Congress*, 13 *Film Library Quarterly* 5, 9 (1980).

²¹ Librarian of Congress Report at 18 fig.4.

²² *Id.* at 26-27 fig.5.

²³ *Id.*

²⁴ *Id.* at 29-30.

²⁵ Librarian of Congress Report at 24-25, 32.

²⁶ 17 U.S.C. §108 (2000).

libraries must proceed not knowing if copyright will be retrospectively extended yet again – thus potentially setting at naught the result of their painstaking and expensive restorations. The cumulative result of all these factors is a strong disincentive to restore endangered films. Again, the copyright system’s goal of enabling access is hardly being served. Costs are being imposed, culture lost perhaps irretrievably – yet at least when it comes to orphan works, no copyright holder is receiving a benefit. *Ironically, in fact, undiscovered copyright owners of orphan works would actually be better off if the bonds of copyright were loosened slightly.* If, after engaging in defined due diligence searches, restorers and distributors were given a limited immunity, they would have much more incentive to restore the films they possess. In the few cases where there were in fact unidentified copyright owners who later emerged, they might well benefit from the resulting restorations, or from increased interest generated in a long-ignored director.

The Broad Contours of a Solution for Orphan Films

Media migration – the continued transition from older to newer media formats – is central to preservation efforts. No media, even modern film, will survive forever. Thus, while respecting the interests of any surviving copyright owner, we need to remove legal uncertainty and threat from those who wish to restore, copy or distribute apparently abandoned yet culturally valuable works.

In truth, there are many individuals and institutions who might play a role in such efforts. The contemporary Internet is a shining example of the power of distributed, non-profit, and volunteer labor to provide global information and culture. There are small companies specializing in public domain films and conspicuous public preservation programs. Fans and enthusiasts devote thousands of hours of volunteer labor to websites devoted to their favorite directors, actors, or films. The great research institutions, museums and archives already spend millions on restoration and copying, often with no immediate benefit to the public. Small commercial concerns seek “stock” footage. Talented amateur directors, film scholars and documentarians long to be able to use the footage they possess so fruitlessly. The Internet Archive offers public domain material to the world for free, and would be delighted to expand its offerings, if it could do so without threat of suit. These potential restorers and distributors need a solution with the following broad characteristics.

- 1.) A specified procedure for a good faith search for the copyright owner. The procedure might vary in several broad classes, according to the type of the intended use and the nature of the copyrighted material.
- 2.) A centralized and searchable online location in which all intended uses can be easily and conveniently registered. Such a location would further preserve the interests of the copyright owner by providing notice of an intended use, for a defined – and reasonably limited – period of time. If a copyright owner objected within this

period of time, then subsequent use would be treated like any other copyright infringement.

- 3.) After the expiry of the specified period of time without contact by the copyright owner, an absolute immunity for those who are later contacted by an objecting copyright owner and then agree to desist in restoring, distributing, displaying or reproducing the film.

There will be those who plan to invest significant resources of time and money in order to, for example, restore a film for educational distribution. While 1.) 2.) and 3.) are useful, they would not be adequate to encourage their efforts. It is of small consolation when I have spent hundreds of thousands of dollars or hours to tell me that I will not be sued provided I simply abandon my project or hand over the results of my work to a suddenly emerged copyright owner. (Indeed, there would be a danger that copyright owners would deliberately wait until resources had been invested before notifying so as to capture all of the benefits of the restorer's work.) Thus, there should be, in addition,

- 4.) A limit on liability for use, so that restorers or distributors know that, if they go through the defined steps and are not contacted during the prescribed period, they may then continue and be able to bring their projects to fruition, knowing that they will be liable at most for a particular and reasonably limited sum.

A more detailed description of this system is given in the Center's second submission, which reviews possible solutions to orphan works problems in general.

Conclusion

The current system locks up orphan films in a tangle of strict liability and legal uncertainty, thereby dooming thousands of films, imposing costs on citizens, researchers and the culture itself, when in the vast majority of cases there would be no objecting copyright owner. As mentioned earlier, the Supreme Court has been clear in pointing out that the constitutional goal of copyright lies ultimately in enabling access. Recent Congressional actions have overtly appealed to the goal of preventing decay and encouraging media migration. These facts, coupled to the sheer crying waste of allowing the filmic heritage of the twentieth century to rot *for no good reason*, all militate strongly in favor of the Copyright Office taking swift and decisive action here in order to provide practicable access to orphan works. An adjustment to the copyright system along the lines described in our proposal could help save the remaining legacy of American film. It would specify the proper methods of search for the owners of orphan works and limit the liability of restorers, while preserving and promoting the legitimate interests of copyright holders and fostering the constitutional goal of access. We commend it to you strongly.

This submission was researched, prepared and drafted with valuable assistance from Duke Law students Garrett Levin and Megan Ristau.

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Though they were not involved in its preparation, the following distinguished film scholars, archivists, and preservationists have been kind enough to endorse the broad conclusions of our study.

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