

To: Copyright Office, Library of Congress

These comments are drawn from my experience working at the Library of Congress from 1958 to 1993 in the Motion Picture Section, the the Motion Picture, Broadcasting and Recorded Sound Division. I retired in 1993 as Assistant Chief of that Division.

Orphan films: Persons using the Library's collections regularly had to confront the problem of a work which either had been registered for copyright by an owner who could not be found or whose title had either been changed or lost, leaving it in a sort of limbo. We often had to discourage persons who wanted to obtain copies of such works. For a number of years the upper levels of management asked us to take a very conservative approach to such cases primarily because they did not want the Library to be a party to a possible infringement no matter how remote that might be. During the 1970's and 1980's this policy was relaxed to a degree, primarily because of sympathetic consideration by the Register of Copyrights and the Library's General Counsel, but they continued to advise us to be very cautious. What we usually did was advise potential users to: 1) obtain their own legal advice and 2) document a careful search for potential owners and only use the material commerc!

ially if they their efforts were thorough and failed to identify a reasonable claimant.

Needless to say, only those who could afford to pay the expenses involved complied. Individuals with limited resources generally avoided the process.

One of the problems with "reasonable search" was that it was not clearly defined and a definition with some legal basis would have helped.

There were a couple of other problems that clouded the use of "orphan" material.

One was the registration of versions of motion pictures that had gone into "public domain" because the work was either never registered or had become "public domain" because the copyright was not renewed during the period when the term was 28 years and renewal was an option. In the past there were a number of rather unscrupulous exploiters who would use the new registration or the re-registration of a work as the basis of threatened law suits. Operators like Raymond Rohauer knew that the threat of a law suit would often frighten a user into paying royalties because that would appear cheaper than a prolonged court case.

While this is probably less of a concern today since the term of copyright keeps being extended and extended and extended, there is a need to tighten the legislation so that the Copyright Law does not protect exploiters rather than interested users.

This raises an issue that troubled me for the entire time I worked with the Library's film collection: The continual changes in ownership and management of the major Hollywood companies. The company names remain essentially the same and are traceable to the 'teens, but they have been sold and resold time and again. These companies exercise more influence copyright legislation than the creative public. Copyright was created to protect intellectual property

--- the creative skills of the individual, primarily. Commercial motion pictures are rarely the product of an individual so they become the property of the organization that sponsors and funds the creative effort of a team. The Hollywood corporations actually create a product, a commodity, and they also want to control the artistic aspect as well. This has led to continual friction, particularly between film directors and the companies employing them but it bleeds over into other creative fields: writers, musicians,!

etc. While these people are almost always under a contract that defines their rights, as the years pass the rights of the creators become less important and their works fall more and more into the commodity category.

This is particularly true as blocks of films are sold from one company to another --- to organizations that had nothing to do with creating the work originally. A particular case that bothered me was the purchase of all of Paramount's pre-1948 film by Universal Pictures in the 1950's. The package was bought for exploitation on television. The Paramount films were quickly copied from their 35mm originals to a 16mm format and since the quality of the black and white television image was very poor, little attention was paid to the quality of the copies. Many of the 35mm originals were destroyed or only poor quality 35mm masters were maintained. As a result a number of master works by creative artists like Joseph von Sternberg, Roubin Mamoulian and others were seriously degraded.

Films from the silent era also suffered from neglect and deliberate destruction by their commercial owners. As sound took over the market, the companies viewed their silent films as commercial liabilities and deliberately destroyed them. As a result the percentage of silent films that survive is pathetically small.

While older films have become an important asset since the advent of cable channels, video and DVD, it is well to remember that those who destroyed films in the past did it as a protection of their copyrighted commercial property with no consideration of the cultural, historical or artistic importance of their "property."

I firmly believe that the ownership of a copyrighted work should bear with it the responsibility to maintain and protect it. This should particularly apply to works that were created through the contributions of skilled and artistic employees.

This protection should particularly apply to corporations and businesses that are no longer owned by the same parties that created the original work.

Finally, my years of working with newsreels, news broadcasts and other documentary records of the persons, places and events of our time made me particularly conscious of a dual relationship between the public and those recording images and sounds that will be part of the historical record. I believe that the public has a particular relationship to these records and companies should not be able to unreasonably withhold the material from the public. I also believe that those creating the historical record have a responsibility to keep, maintain and preserve that record. No commercial organization should exclusively own historic events like the assassination of President Kennedy or Martin Luther King, Pearl Harbor, V-E and V-J Day, the explosion and burning of the Hindinberg, etc., etc., etc.

Recommendations:

1. There is a need to clearly define what an "orphan" film is.
2. Potential users, particularly those contemplating commercial use, should be given a clearly defined method of identifying ownership or lack of ownership of a work.
3. The copyright law should charge copyright owners with responsibility for maintaining and preserving their work and if they fail to maintain and preserve, then they should forfeit rights at some defined moment. This should particularly apply to works involving creative contributions of employees for hire.
4. Persons or companies registering or reregistering "orphan" works created by someone else should be required to clearly state both in registration and on publicly distributed versions the contribution that they are claiming as their own.
4. Copyright owners should not be allowed to unreasonably withhold a previously publicly distributed copyrighted work. A work distributed, then put into limbo should be made available after a defined period of time provided there is a legitimate demand for the work.
5. News broadcasts and other visual and sound records of public events, well-known personages and other things of potential historical interest should have limits on the term of ownership. (Japanese law at one time set a limit of ten years on a news photograph.) The creators and rights owners of potential historical records should have a particular responsibility for maintaining them.

I hope this is of use in your considerations.

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