National Film Preservation Foundation

Created by the U.S. Congress to Preserve America's Film Heritage

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Comment submitted by the National Film Preservation Foundation
In response to the Notice of Inquiry regarding "Orphan Works"
Federal Register (January 26, 2005), vol. 70, no. 16
www.copyright.gov/fedreg/2005/70fr3739.html

March 16, 2005

Mr. Jule L. Sigall, Esq.
Associate Register
Copyright Office
Library of Congress
101 Independence Avenue SE
Washington, D.C. 20540

Dear Mr. Sigall:

Thank you for the opportunity to comment on the copyright issues surrounding orphan works. This letter addresses the Copyright Office's first question on the nature of problems faced by subsequent creators and users of orphan works.

The National Film Preservation Foundation, the congressionally chartered nonprofit organization created by *The Film Preservation Act of 1996*, focuses our preservation programs on exactly these sorts of film materials. We provide preservation grants to American archives, libraries, and museums, and plan and manage cooperative projects that enable organizations to preserve and improve public access to their films.

For the purposes of our national programs, we define orphan films as works that fall outside the scope of commercial motion picture preservation programs, lack a clear copyright holder, and/or fail to have the commercial potential to pay for their continued preservation. Most commonly, the film types that fall into this category are regional documentaries, industrial films, avant-garde works, ads, silent-era titles, amateur works, and scientific and anthropological footage. These films often exist as one-of-a-kind copies in public and nonprofit institutions. Because orphan films may document subjects and viewpoints not shown in the mainstream media of their period, the works can take on special historical and cultural value today. American film archives hold thousands of such films.

The U.S. copyright law includes a far-sighted provision allowing public institutions to store, copy, and preserve films that are protected, or

possibly protected, by copyright. However, in an environment of scarce resources, archivists must make difficult choices of where to allocate preservation copying dollars. Copyright status becomes part of the preservation decision-making process. Copyrighted materials require permission to screen publicly, use in museum exhibits, post on the Internet, or reuse in archival publications, making them more challenging and time-consuming to incorporate in public programs. Rights holders that are difficult to locate or identify make these tasks even more daunting. Given this extra layer of complexity, it should come as no surprise that many institutions place first priority on preserving film for which they hold the rights or have a good working relationship with the rights holder. As documentation of the institutional investment required to preserve film, I have enclosed two copies of *The Film Preservation Guide: The Basics for Archives, Libraries, and Museums*, a primer published by the NFPF in 2004 and distributed to preservation organizations throughout the country.

For film fragments and works lacking screen credits and supporting documentation on paper, identifying the copyright holders with certainty can prove virtually impossible, particularly for unpublished works. The NFPF encountered several such problem films in preparing our two DVD sets, *Treasures from American Film Archives* and *More Treasures from American Film Archives, 1894-1931*. Produced with grant funding in collaboration with the archival community, both sets were honored with Film Heritage Awards from the National Society of Film Critics and are regularly used in university film and history classes.[1] In the first *Treasures* set, we included at the request of the West Virginia State Archives, some remarkable amateur footage showing children playing at a one-room schoolhouse in the mid-1930s. The film was found by the donor among her father's personal papers and presumed to be shot by a relative. However, without documentation we could not verify the attribution and copyright status with 100% certainty. The four-disc set includes several similar examples. We worried that an allegation of infringement might block distribution of the entire anthology, particularly as we lacked the production funds necessary to remaster and package the four DVDs without a disputed item. As a protection from alleged rights infringements, we took out insurance—a costly precaution for a nonprofit.

For our second set, we learned from our experience. Because we knew the level of effort required to research orphan films, we decided to present primarily published materials released before 1923 (and therefore clearly in the public domain the United States) as well as a few items that had, or appeared to have, rights holders. It was more feasible to secure permission for films with apparent rights holders than to research the status of questionable materials.

We are now exploring production of a new DVD set of avant-garde films from the period 1945-1985, a subject difficult to teach since the decline of 16mm film distribution. While the contributing archives believe they can obtain the necessary rights from the filmmakers and their heirs, we are concerned by the level of effort and expense required to determine the underlying rights of music included as soundtracks. If there are no

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[1] The sets are commercially distributed and the net proceeds split among contributing nonprofit and public organizations. Free copies were given to all state libraries.

credits, how can we identify the composer and performers? Films showing an excerpt from a television program pose a similar challenge. If we are able to secure grant support for this new anthology, we will probably have to exclude such problem films.

With the convenience of DVD and the Internet, the study of film has become both easier and more difficult. Students and scholars now have ready access to many Hollywood sound features. Early films and works owned by archives are increasingly available on institutional Web sites, such as the Library of Congress's widely acclaimed American Memory site. But for orphan films whose rights holders are unknown or impossible to locate viewing possibilities are quite limited. These films can only be seen by specialists who can afford to travel to archives to do on-site research. All other uses require rights clearances.

When searching for the elusive rights holders of orphan works, it is now difficult to know when to stop. The current environment is so confusing and complex, particularly for nonprofit organizations without legal staff, that many avoid using orphan works because of the remote possibility of litigation. I believe that important parts of America's film heritage will become lost to educators and the general public unless some simpler, more structured and cost-effective system can be developed for ascertaining the rights status of orphan works. Ideally, this system should allow users who have completed well-defined steps to be able to reuse orphan films in new works and exhibition without fear of costly and time-consuming legal action.

Thank you again for the opportunity to comment on the public access and copyright issues surrounding orphan works. Please contact the National Film Preservation Foundation if we can be of further help.

Sincerely,

Annette Melville