

**AMERICAN FILM HERITAGE ASSOCIATION
MOVIECRAFT INC.**

**Larry Urbanski, Chairman AFHA
President, Moviecraft Inc.
3-20-05**

**Jule L. Sigall, Associate Register for Policy & International Affairs
Copyright Office, Library of Congress
Washington, DC 20540**

RE: Orphan Works-Motion Pictures

1. Nature of the Problems Faced by Subsequent Creators and Users

In our comments we are referring to motion picture orphan works.

Our archive deals primarily with filmmakers, broadcasters, and individuals requiring film footage from the 1920's to the 1970's in documentaries, amateur films, feature films, or for corporate use. We "pre-clear" through public domain our film footage before offering the clip to the client, so it is ready for instant access. We also distribute pre-recorded home video.

Clearance difficulties are especially problematic for films after 1964. We have encountered companies that did not retain production records or film prints of their educational films in the 1960's. These companies feel they cannot offer clearances for any uses whatsoever. There is one company that has this policy on licensing, even though all their educational films prior to 1964 are in the public domain. It is obvious the automatic copyright renewal has created a group of orphan works that cannot be accessed since they are under copyright, even though the company that produced the work no longer retains records of creating the motion picture!

Mergers and acquisitions can take a film library and it's copyrights along to the new company. In the educational film production community there are companies that have acquired older educational film producers. They no longer retain film elements from the 1940's to the 1980's. However, they own the copyrights. Clearing films with these new companies is expensive and difficult. In some cases film makers and DVD companies release the copyrighted films without clearances, with no repercussions. It is obvious the new company does not know what they acquired. The film maker or archive that recognizes the owners copyright and wants to get proper clearances for his work are at an unfair, if not impossible, disadvantage.

There are films made 1964 or later that have a copyright notice, but were never registered. Trying to find a company such as "The New York World Fair 1964-1965

Corporation” is impossible. The corporation was as short lived as the films it produced. For proper clearance, however, these films are in a nether land, as they can be registered at any time. Film makers and production companies will not incorporate historical footage in their work they cannot clear. It would be devastating to the film maker if claims were made on the footage after the documentary is completed. Therefore, films in this copyright category remain unused and unpreserved.

2. Nature of “Orphan works”: Identification and Designation

An Orphan Work can be defined as a motion picture that has been abandoned with no owner maintaining the work. An Orphan Work can presently be copyrighted, or in the public domain.

We favor the Formal Approach. The 1992 legislation abolishing the registration process created the problem recognized today. The copyright extension exasperated the problem.

As an archive we need a Formal Approach. We need to “pre-clear” footage to survive. Presently a copyright search at the LOC accomplishes that goal. We can have the film ready for the client after we do our research.

Simplicity is the key. New copyright legislation destroyed the natural transition of Orphan Works into the public domain. Common sense dictates a new system is not needed. New copyright legislation has simplified the copyright process for new authors.

We now need new legislation to simplify the recognition of Orphan Works. The “ad hoc” or “Case-by-case” approach is not better or simpler than the Formal Approach. The Formal system easily defined an Orphan Work in the past, and it must be reinstated again. If easily recognizing an Orphan Work is the goal of this study, there is no other solution.

Registration similar to the renewal process will cleanly and simply define Orphan Works. This would cover works that have been previously registered. Those works that have not been registered can be registered for the first time so they would not be “Orphaned”. The time period for this registration can be a 3 year window. If the work is not registered in that window the work is “Orphaned” and falls into the public domain. Orphan status should be permanent and non reversible. The system must be mandatory.

Registration will help both “commercial” and “non profit” archives. Any legislation must be beneficial to both types of archives preserving and using Orphan Works.

The Library of Congress should incorporate Orphan registration into the normal renewal process which is presently followed, so it is searchable on line with the rest of the renewals through LOCIS.

The present copyright system created orphan works and it’s definition. Going back to the Formal Approach will alleviate the problem.

3. Nature of "Orphan Works": Age

Orphan Works in many cases are films commercially released but short lived in the commercial market. They include industrial, medical, educational, independent documentaries, advertisements, newsreels, and so on. These would be published works. Orphan Works like home movies, kinescopes, out takes, raw footage, etc are unpublished works. In order to release Orphan Works into our culture through public domain we need to identify these works NOW. The fragility of film does not allow for more time to elapse. If we start with 1964 works we are referring to 41 year old film. If the original creator has not done anything with these orphan works in 41 years, and the footage is sitting in an archive, the issue of published or unpublished works is moot. If we are defining, and releasing Orphan Works from nether land so they can be preserved by commercial and non commercial archives, we must seek registration from the creator. This is too important an issue to be left to chance, as the present copyright law dictates. The creators of film have a responsibility for their preservation, either with their own dollars, or by releasing the work to be preserved by another entity.

The Orphan Film legislation should require works up to 1977 to be registered. The creator would have a 3 year window for registration. After this first registration, it should be yearly, with the same 3 year window.

Copyright holders already received an incentive...the copyright extension. The additional incentive is validation their work is not an Orphan Work. The present renewal registration process is already followed by all the major studios since it is to their benefit legally in case of infringement. This approach should be continued by all copyright holders of motion pictures.

This solution does not address copyrighted Orphan Works from 1924 to 1963, which may need a different approach since those authors already participated in the renewal registration process. However, this should not affect my proposal for works starting 1964, which is a different circumstance.

4. Nature of "Orphan Works": Publication Status

Orphan Works should be applied to unpublished works and published works equally. The responsibility of the creator is to preserve their work. In many cases, the creator is dead, disinterested, or no longer in business. An unpublished work (raw footage from a documentary, home movie, kinescope, etc.) needs to be defined as an Orphan Work for preservation just as much as a published work (educational film, industrial film, etc.). Film is fragile, and can be lost forever...both published and unpublished. We have an emergency the National Film Preservation Board cannot deal with alone. Film preservation traditionally is also accomplished by commercial and non profit archives. The volume of orphan works is staggering, and to eliminate a class of Orphan Works (unpublished) would be counterproductive to our goal, to preserve Orphan Works.

The Harper and Row case should not apply here as films are a different entity, with their own unique fragility and mortality. Recognize Orphan Films; they will be preserved, as they were before the copyright changes.

5. Effect of a Work Being Designated "Orphaned"

99.9% of works that have become public domain today are “Orphan Works”. Copyright legislation broke the system. The process, as before, should affect a permanent loss of rights to the work for all uses and users. It is extremely important that commercial and non profit archives be included in this legislation. This permanent loss (or public gain) will assure preservation of Orphan Works by all concerned organizations.

We underestimate copyright owners or individuals. If they are intelligent enough to create a work, they should be able to maintain it. The “widows and orphans” argument of lost copyrights is old. We must think of the creators who need the orphan works to promote the science and useful arts. The registration process need not be a burden to any copyright owners with more or less resources.

The Canadian approach is not the answer. It is complicated and not as efficient as the copyright system we had before the legislation changed. The “reasonable royalty” approach would have film makers avoid that footage. What is reasonable to one party is not reasonable to another. We need a clear definition of Orphan Works for preservation. Our system is broken, and it worked before. We must reinstitute a registration process.

Is there a “loss of rights” to large and small copyright holders? There is not a “loss of rights” if the work is abandoned, those involved in the production are deceased, and the company that produced the work is out of business. This is the nature of Orphan Works and since this is now defined any future legislation should recognize this.

6. International Implications

Harmonization seems to be something we adhere to only when it suits United States copyright interests. We do not have complete harmonization with our European counterparts. Corporate rights (works for hire) are not recognized in most European countries. Moral rights are NOT wanted by the studios or the music industry. Full compliance would change the structure and fiber of United States copyright law. We are not, and will never, be in full harmonization with our European counterparts. We can, and should, have a registration process to define Orphan Works. It can be implemented domestically. It can be implemented for motion pictures only. This study indicates there were errors in previous copyright legislation, which brought about this dilemma. The United States did not adhere to international obligations regarding moral rights and works for hire. Implementing an Orphan Works registration process domestically will not create international issues. Keep it simple and have a registration process to define orphan works.