

March 25, 2005

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Orphan Works Notice of Inquiry: Submission of the UCLA Film and Television Archive

Dear Mr. Sigall:

On behalf of the UCLA Film and Television Archive, we are pleased to submit the following comments pertaining to the Copyright Office's Notice of Inquiry ("NOI") of January 26, 2005 regarding the treatment of "Orphan Works."¹ We appreciate this opportunity to provide comments and suggestions to improve access for so-called "orphan" works, particularly film and television materials, and we commend the Copyright Office and Members of Congress for addressing these difficult problems and for seeking workable solutions.

This submission has three parts:

- (1) A description of the UCLA Film and Television Archive and its commitment to making its collections accessible, including orphan works; and
- (2) A description of archival problems relating to orphan works and examples of specific UCLA orphan work issues; and
- (3) Recommendations for improving access to orphan works.

1. UCLA Film and Television Archive – Background and Collections Status

A. History of the UCLA Film and Television Archive

The UCLA Film and Television Archive (hereafter "UCLA") is the second largest film and television archive in the United States after the Library of Congress, and the world's largest university-based media archive. In 1965 the Academy of Television Arts and Sciences (ATAS) joined forces with the UCLA Theater Arts Department to create the ATAS/UCLA Television Library. Three years later, Film Department faculty founded the Film Archive, and the two eventually joined forces in 1976 to establish the UCLA Film and Television Archive. In the intervening decades, UCLA's collections have grown to include more than 250,000 individual films, newsreels and television programs, encompassing the history of each medium from its early years to the present day. As its collections grew, UCLA's activities expanded to include major initiatives in the areas of:

¹ See Notice of Inquiry, 70 Fed. Reg. 3739 (Jan. 26, 2005).

- Preservation and restoration of a wide assortment of media productions, including Hollywood feature films, short subjects, independent films, television programs and newsreels;
- Cataloging (UCLA helped establish national standards for cataloging moving images);
- Research and study services including classroom screenings, individual research viewing, educational workshops and symposia, and participation in UCLA's Moving Image Archive Studies program;
- Services to the community through public film and video programs, film print loans to other cultural institutions, and production of DVDs, VHS cassettes, and CD-ROMs drawn from materials in the UCLA collections;
- Services to filmmakers and the commercial entertainment industry through the licensing of newsreels and other motion picture and television footage for production use.

Over the years, UCLA has benefited greatly from the close ties it has established with the American entertainment industry. Donors and depositors of film and video materials have included major motion picture studios and television networks—such as Paramount, Warner Bros., Twentieth Century Fox, Sony (Columbia), ABC, NBC Universal, and PBS—along with hundreds of independent production companies and private individuals. These producer/distributors have collaborated financially and technically with UCLA on preservation projects, and encouraged the distribution and exhibition of preserved works to home and theater audiences. In return, UCLA has scrupulously respected their legitimate claims to copyright and other intangible rights.

B. Copyright Status of Materials at the UCLA Film and Television Archive

Like most U.S. archives, UCLA does not hold the copyright on the vast majority of material in its collection. About 70% of the collection is still copyright protected under the original studio or producer's rights. About 15% of the collection, chiefly older motion pictures, has fallen into the public domain in the United States. UCLA does own the copyright to about 5% of its holdings, including several important collections such as the Hearst Metrotone Newsreel Collection and television series such as "Mr. Peepers" and "The U.S. Steel Hour." UCLA relies on the commercial revenue from licensing these assets to help fund preservation and access activities. The archive's current annual operating budget of approximately \$4 million comes from University allocations (45%); foundation grants, endowment income, and private philanthropy (30%); and revenue from licensing fees, ticket sales, service charges, home video, etc. (25%). In 2005, the archive expects to earn approximately \$500,000 – half of its revenue – from licensing footage for which it either holds the copyright or which has fallen into the public domain.

Lastly, the UCLA collection also contains orphan works whose ownership status is uncertain or unknown, about 10% of its holdings or 25,000 films and television programs. Because their status is undetermined, they are currently considered off limits: UCLA cannot make them accessible to the public (other than for individual on-site "fair use" purposes), nor utilize them as licensable footage.²

A film or TV program may become an orphan for a variety of reasons: the original production company may have gone out of business; partnerships may have been dissolved without a clear division of assets; the owners may have moved, leaving no forwarding address, or died without their heirs'

² UCLA's percentage of orphan films and programs is relatively small because the majority of its holdings are works produced by the commercial entertainment industry. Other archives that specialize in collecting non-theatrical media such as home movies and videos, educational films and documentaries, independent films, avant-garde and industrial films hold a much higher percentage of orphans.

knowledge of the materials; or the work may have been out of distribution for so long that it is impossible to identify or locate the current rights holders. Whatever the reason, the result is that the public is denied access to potentially important motion picture and television works.

“Access” to UCLA film and television materials takes several forms:

- Public programs at theaters on the archive’s premises (i.e., the UCLA campus);
- Loaning materials to other institutions for public screenings and/or individual research;
- Individual research viewing on UCLA premises;
- DVD or other mass media production;
- Digital content delivery (Internet access and/or streaming sites);
- Licensing of all or portions of materials for new commercial or educational uses.

Copyright law is relatively clear on some uses, less so on others. Preservation copying is clearly permissible as “fair use”³ or consistent with public library and archive exceptions (17 U.S.C. § 108).⁴ So too is individual research viewing on archive premises; and some interlibrary loan activities are explicitly dealt with in section 108 as well. However, copyright restrictions and uncertainty prohibit many uses of orphan materials. These limitations apply even to free screenings on the premises of a library or archive that owns the physical material.⁵

2. Archival Problems Relating to Orphan Works

Without a parent company to care for orphan works, archives, libraries and museums have stepped up to safeguard these valuable resources. In doing so, archives absorb the costs of all or most of the following: (1) acquiring the physical elements (2) cataloging the material; (3) storing the material in specially constructed temperature- and humidity-controlled facilities; (4) preserving the material by transferring it to stable media; and (5) restoring the material including often expensive and meticulous restoration of found material from various sources. Beyond these costs are the legal expenses of verifying that the materials can be made accessible, and producing actual copies for public access.

There is a practical relationship between preservation and access, especially for orphan materials. Securing funds needed for preservation is often difficult, since the uncertain copyright status of orphan materials means that they cannot be made available for many types of uses.⁶ Clearer rules about the use

³ For example, “fair use” permits the making of so-called “safety” elements (transferring entire films to more stable elements), as noted in the 1976 Act House Report: “...the making of duplicate copies for purposes of archival preservation certainly falls within the scope of ‘fair use’.” H.R. REP. NO. 94-1476, at 73 (1976).

⁴ The public library and archives exceptions permit duplication of published (17 U.S.C. § 108(c)) and unpublished (17 U.S.C. § 108(b)) materials to preserve or replace lost, damaged, or deteriorating copies without permission of the copyright owner, under certain limited circumstances, including copying entire works from nitrate to safety stock or safety stock to back-up safety stock.

⁵ Although the Copyright Office NOI is limited to questions about access to “orphan” material, we believe that public libraries and archives (as defined in 17 U.S.C. § 108) should be able to screen all films that they have in their collections which they have paid to preserve and/or restore, provided such screenings are “on-site” (in the case of UCLA, on-campus).

⁶ While the focus of the Copyright Office’s NOI is copyright law as a bar to access of “orphan” or, for that matter, other film material, it is not the only restriction confronting archives and libraries. Other legal restrictions include contracts, such as donor grants limiting or establishing rules for public access to certain gifted material, or rights of film subjects under state and common law (e.g., the rights of publicity/privacy). There are also financial limitations

of orphan materials would help libraries and archives raise the private funds needed for their preservation.⁷

Securing funding to care for and make the material accessible is not the only problem associated with orphans. Here are four specific examples that illustrate the types of problems UCLA has encountered with orphans in its collection:

- a) *Works that cannot be exhibited because rights reverted to the authors of the underlying literary or dramatic work on which the film was based, and the authors or their heirs cannot be located.* The 1930 Paramount musical “Follow Thru” was based on a stage musical by the songwriting and producing team of Da Sylva, Brown and Henderson. In order to produce its film version, Paramount agreed that rights would revert to Da Sylva, Brown and Henderson after a specified length of time. With the cooperation of Universal Pictures, which now owns the Paramount film library from that period, UCLA preserved “Follow Thru.” Universal claims, however, that it has been unable to locate the current owners of the stage version in order to negotiate a new contract. Today, the studio allows UCLA to exhibit “Follow Thru” in its own theater, and to loan prints to other archives, but at its own risk. To protect itself, UCLA requires that borrowers sign a letter of indemnification, but it is uncertain how much protection this would actually afford if a copyright claimant came forward and objected to UCLA distributing the film.
- b) *Films for which the current copyright holder(s) cannot be identified without a time-consuming and expensive copyright search.* Rights to the 1940 Republic serial “Drums of Fu Manchu” and the 1943 feature-length version are believed to have reverted to the estate of Sax Rohmer, author of the “Fu Manchu” novels; however, the film is currently being distributed as if it were in the public domain. UCLA retains the original nitrate negatives to both the serial and the feature, but has been unable to confirm the current rights holders, if any.
- c) *Studio productions that may be owned by other companies, but whose actual ownership is uncertain or unknown.* One example is the 1933 Paramount feature “Eight Girls in a Boat.” As noted above, Universal now owns most of the Paramount library for this period; however, Universal claims that the film is still owned by the original studio, though Paramount disputes it. Until ownership is resolved, UCLA cannot make use of its only copy, a nitrate film print, except for research viewing at UCLA. In the case of this film and “Drums of Fu Manchu,” it is very difficult to raise funding to produce new safety film elements if the film cannot be publicly exhibited or accessed via DVD.

that may limit access to certain material, such as the costs associated with duplicating material or making it available and concerns for the physical material, for example, harm that may be done duplicating or handling fragile elements.⁷ One misstatement made in the NOI deserves correction. In a footnote, the NOI cites a letter by Larry Urbanski, Chairman of the American Film Heritage Association to Senator Strom Thurmond stating that “as much as 75% of motion pictures from the 1920s are no longer clearly owned by anyone, and *film preservationists as such cannot obtain the necessary permissions to preserve them.*” NOI, *supra* note 1, at 3739 n.3. (Emphasis added). That is not true. Public film archives and libraries strive to preserve material for future generations regardless of the copyright status of the material; they can make preservation copies, even for protected material because of the § 107 and § 108 exceptions. Whether and how these materials are then made accessible to the public, if at all, is the focus of the Copyright Office’s inquiry and our filing.

d) *Abandoned works*. Examples of such works include:

1. Hundreds of feature film titles that were not produced by the major studios. In many cases, the companies that produced these films have since gone out of business, leaving ownership of the films uncertain or unknown.
2. Production elements and prints unclaimed by their owners in laboratories, and subsequently donated to UCLA by the lab. Such works may be of research interest, and if unreleased or undistributed, could earn revenue as stock footage. However, use of the material without the original owners' permission could expose UCLA to potential liability.
3. UCLA student films for which the filmmaker can no longer be located. Because students retain ownership of their films and video works, use of the work is limited to on-campus study screenings, unless additional permissions can be secured.

Pooling their limited resources, archives and libraries are working together to address the issue of orphan works and other copyright challenges. Organizations that represent these institutions, including the International Federation of Film Archives (FIAF) and the Association of Moving Image Archivists (AMIA), have created initiatives and task forces to try to develop solutions to these issues.

Many of these efforts have been undertaken in cooperation with the National Film Preservation Foundation (NFPF). The NFPF was established as an outgrowth of the National Film Preservation Board (NFPB), which was established by the National Film Preservation Act of 1988.⁸ A foundation to assist in preserving the nation's moving image heritage, including a focus on "orphan" works, was one of the key recommendations in a 1994 NFPB-sponsored report from the Librarian of Congress titled "Redefining Film Preservation: A National Plan." Since its founding in 1996, the NFPF has filled an important void by providing much-needed funding for orphan materials. UCLA participated in the NFPF's most visible means of supporting orphan films: the release of its two highly successful "Treasures from American Film Archives" DVD sets. Free copies of the DVDs were supplied to each of the 50 state libraries for free public access, and copies were also sold online.

Such efforts among archival organizations have helped to focus public and congressional attention on the problems of the preservation and access of orphan works. The archival community alone, however, cannot resolve these issues. Further action from governmental agencies, including the Library of Congress/U.S. Copyright Office, is imperative.

3. Recommendations for Providing Additional Access to Orphan Works

The Copyright Office should continue to work with archives, museums, and libraries, and copyright owners individually and collectively (for example through the Association of Moving Image Archives) on resolving the problems pertaining to access of orphan works.⁹ The recommendations

⁸ Pub. L. No. 100-446, 102 Stat. 1774 (1988).

⁹ See, for example, Librarian of Congress, *Redefining Film Preservation: A National Plan*, Recommendation 4.7: Rights Clearances (Aug. 1994), available at <http://www.loc.gov/film/plan.html> ("Begin discussions on simplifying rights clearances for the reuse of film images and sequences in educational and scholarly applications.").

offered below are meant to stimulate discussion on ways to increase access to orphan material while balancing the rights of copyright owners, archives, libraries, and the user community.¹⁰

Before addressing our recommendations, here are a few comments on what we would not recommend: UCLA would not support the proposals for additional registration requirements noted in the NOI. Such proposals would likely run afoul of international treaties (Berne, Art. 5.2), or if limited to U.S. works, result in unfair treatment of U.S. versus foreign works. Moreover, complying with the proposed registration requirements might place an unreasonable burden on public libraries and archives that own copyrights on some of the materials in their collections, with valuable resources spent on compliance in lieu of preservation activities. Nor should government “licensing” systems (such as the “Canadian model” referred to in the NOI) be implemented. Government intervention or compulsory licensing schemes would likely slow, not speed, the broader dissemination of material to the public. And having to pay mandated licensing fees on top of preservation and access costs could impose a heavy financial burden on many libraries and archives with extensive holdings of orphan material.

In furtherance of the goal of increasing access to orphan films and television programs, UCLA recommends the following actions to be undertaken by the Copyright Office, the Library of Congress, and where necessary, by Congress:

- 1) Enactment of S. 167 (Family Entertainment and Copyright Act of 2005) which includes amendments to improve § 108(h)(Title IV: Preservation of Orphan Works) that will allow public libraries and archives to make available works, including films, that are no longer commercially available and that are in their last 20 years of copyright protection;
- 2) Placement of the Copyright Office database of registrations and recordings before 1978 onto the existing on-line database (www.loc.gov/copyright). This step alone will make it much easier for archives and other users to search the copyright status of older materials;
- 3) The Library of Congress/Copyright Office should convene copyright owners, public libraries, archives and other appropriate parties to establish “best practices” for users of orphan materials to follow. These practices would begin as private agreements, and lead to legislative changes as necessary. To be effective, such “best practices” should:
 - Include a set of clear steps, with reasonable timetables, that public libraries and archives would take to show due diligence in locating copyright owners before making orphan works available for use;
 - Specify what uses public libraries and archives could make of orphan materials if no copyright owner is located;

¹⁰ While the focus of our filing and recommendations concern the problems associated with “orphan” film materials, UCLA and other archives house related materials whose legal status and rules pertaining to access are equally complicated. These include, for example, production materials such as still photographs, publicity kits, outtakes and deleted scenes. It is often difficult to determine the ownership or date of creation for some of these materials, as well as the nature of the material (for example, whether it is published or unpublished which is an important consideration to ascertain its legal status).

- Not be so complicated that practicing due diligence would impose an undue financial burden on organizations with limited resources; and
- Protect public libraries and archives from liability and other financial loss if a copyright owner surfaces after the due diligence process has been completed. So, the best practices (and, if necessary, legislative changes) would provide certainty about what consequences, if any, a public library or archive could expect if and when a previously “orphaned” work’s owner surfaced.

With regard to financial loss, a public library or archive should be permitted a reasonable chance to recoup its investment in orphan materials, including the costs of preservation and access, as long as it exercises due diligence as established by “best practices”. For example, if a copyright owner emerges after the library or archive has expended funds preserving, creating access copies and/or scheduling screenings of previously thought-to-be orphan materials, the institution should be allowed to exhaust its existing stock or proceed with scheduled events without liability.

Critical questions would need to be addressed in these “best practices” such as the treatment of older versus newer material, and published versus unpublished material. We think it best to get the process started to develop “best practices” and to address these issues in due time. But the goal should be clear: to establish “best practices” that will permit and encourage public libraries and archives to undertake preservation and greater dissemination of orphan works without risk of monetary loss, while at the same time protecting the rights of any copyright owners who emerge after a use has commenced.

In sum, public film archives, libraries, and museums perform a unique and invaluable service by preserving, restoring, cataloging, and maintaining films and television programs for the public benefit. The Copyright Office and Congress need to find ways to ensure that public libraries and archives can extend access to films and television programs whose ownership status is uncertain or unknown – so-called “orphans” – without exposing themselves to legal liability or the risk that they may be unable to recoup their costs if a copyright owner eventually emerges. The goal should be to promote preservation and to expand the public’s access to moving image materials while protecting the rights and interests of copyright owners and the archival community.

Respectfully,



Timothy W. Kittleson
Director

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cc: Rep. Howard Berman, Rep. Adam Schiff, Sen. Dianne Feinstein, Sen. Barbara Boxer