

From:
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To the Copyright Office:
Orphan Film Discussion
Via e-mail

I am a motion picture producer, director and writer of theatrical motion pictures, documentary films and television programming. I lecture on motion picture history at a university level. I am the director and founder of an international film festival. Finally, I'm a member of the motion picture viewing public with a great interest in the preservation and subsequent viewing of rare, historical motion pictures. Indeed I have found previously unknown physical copies of such films and am currently hampered in their ultimate disposition.

My purpose is to discuss briefly the following:

- 1) Practical problems in determining ownership
- 2) The disincentive to film preservation
- 3) The "roach motel" phenomena
- 4) The erosion of fair use and its impact on orphan films
- 5) Support of several remedies

PRACTICAL PROBLEMS IN DETERMINING OWNERSHIP

Over the years I've had occasion to do detailed copyright research on both literary and motion picture topics and have hit many a dead end in tracing a line of succession. The final result is always a hideous sense of being caught between a rock and a hard place.

Here is the main conundrum: If there is no one alive to claim a copyright on some arguably obscure snippet of surviving old motion picture film, who is hurt by making the filmed image available for viewing? If there *is* someone alive and they are completely out of touch and/or inaccessible until one unpredictable day when they catch wind of their rights and my interest, what vicious action will be taken by some greedy attorney who concludes that a work of minor historical significance has suddenly become worth more than the combined grosses of all

six Star Wars movies? What horror will descend if the film is shown in public to the tiny group or huge group of people who have interest in viewing it?

The person hurt is the altruistic individual or institution who has preserved the film and made it available for the ages. And the public at large is hurt through deprivation. Even proving some ill-informed, Machiavellian money grabber to be totally wrong is so costly as to obviate the value of saving, printing, digitizing and projecting some a small piece of footage that would have shed light on an intriguing aspect of human history. One can escrow what one believes is a reasonable payment for use against that dark day when the "mystery owner" suddenly reappears, but what if you guess wrong?

DISINCENTIVE TO FILM PRESERVATION

The disincentive toward film preservation and, especially, film exhibition -- even for educational purposes -- is blatantly obvious.

I've attempted to support the preservation and reconstruction of early film only to meet resistance and downright hostility from archives who -- facing this knotty problem -- are reluctant to spend a penny of my or anyone else's money to fix something that they believe they are at risk of being sued over. It's bad enough that American film archives are ill-funded and managed with an eye to all sorts of paranoid thoughts about the unpredictable and spurious actions of legitimate copyright holders, but to ham-string them when we all want to save as many examples of chemically unstable motion picture film as possible seems to obscenely add insult to injury.

And further still, the recent extension of copyright expirations to benefit a very small number of corporations who maintain holdings that are still commercially viable brings more and more motion pictures under the umbrella of purported "protection" that have only "orphan" status. It is not my purpose here to debate whether a large, still viable motion picture studio should be able to profit from films made more than 75 years ago when the original human "creators" are all deceased. It is my purpose to point out that protecting that tiny number of items puts virtually thousands of other historically significant and physically endangered motion pictures into limbo.

In the unfolding era of digital preservation, who will foot the cost of transferring from film to digitized form for anything besides that handful of motion pictures that (like "*The Wizard of Oz*") have proved to be reliable money makers?

Consider for a moment a legitimately public domain film like "The Great Train Robbery." Here is a genuine historical gem treasured, if not beloved, by anyone with the vaguest sense of film history. Yet, how much money can one make from this film? Not much. Archives attempt to recoup some of their storage and

preservation costs by charging exorbitant “usage” fees. Assuming even that these fees are justified, how many people are knocking down archival doors for the privilege of exhibiting such a film? And how many people in the general public really want to see it?

The notorious case of the last existing print of the Thomas Edison “Frankenstein” film demonstrates how a single individual can virtually hold film history hostage for a quarter of a century for a film of infinite historical, literary, and intellectual value and a miniscule commercial value.

THE “ROACH MOTEL” PHENOMENA

Rare motion picture film has, from time to time, come into my possession. Because of the climate of fear and distrust created by all of these factors and others outside the scope of this discussion, I am now reluctant to place them with any existing film archive, library, or commercial institution.

This is because of what I have come to call the “roach motel” phenomena. The term originates in a notorious set of television commercials for a roach trap product which highlighted the slogan: “The roaches move in, but don’t move out.” Obviously, this implied that the trap worked well at killing all those nasty critters in your kitchen, but in film preservation it has a more insidious meaning.

I have in good conscience and with high hopes donated rare film, photographs and documents of various types to leading, publicly funded film archives. My thought was that they would be 1) preserved and 2) made available to the public.

The result? The films and other materials are to all intents and purposes totally lost.

Because of the climate created by all of the factors discussed, the archives: 1) will not always verify if they have the films any longer, 2) will not always allow free access to the films, 3) rarely or never exhibit the films in public, 4) place severe obstacles in the way of interested donors who wish to preserve specific films, 5) create egregious, non standardized and exploitative fees for the rare use or exhibition of certain films that amounts, in practice, to extortion or blackmail.

“The films go in, but they don’t come out.”

The origin of these practices is comprehensible: the archive fears all of the forms of entanglement, retribution, and sanction created by the uncertain climate surrounding orphan films. Discounting for purposes of this discussion the unknown, but contributing factor of archivist personalities, there is a strong motivation to shuffle preservation funding from rare and disintegrating film of

“dubious” provenance to the “exciting” or “commercially exploitable” material on a risk-taking basis. That is to say, if a particular piece of orphan film may create income for an archive, someone may take a bigger chance on that one and siphon preservation funding away from another equally important but potentially riskier piece of film. “Sophie’s Choice” if you will.

There are, apparently, private collectors with materials of crucial historical importance that are terrified to reveal them for fear of their potential seizure and loss. The status of the material is so ill-defined that they are paralyzed.

Clearly, the limited funding available for preservation, restoration, and exhibition are objectively compromised by all the dancing around the dangers of lawsuits.

With a clear set of guidelines to protect institutions and individuals more good work would be done.

EROSION OF FAIR USE IN THE CONTEXT OF ORPHAN FILMS

The erosion of “fair use” both as a concept and a practice regarding both literary and moving image works has had a chilling effect on both preservation and historical distribution and exhibition of rare motion pictures.. It only deepens the problem with regard to works of doubtful ownership.

Commercial film interests including the major motion picture studios are culpable here as well by using their massive legal resources to exploit both legitimately owned and dubiously claimed works. Hampered by ignorance, naiveté and greed in equal measures, employees of Hollywood studios attempt to control anything they can get their hands on if and only if it seems to be in the interest of their present day commercial concerns. Years ago, studios placed rare, one of a kind motion picture print with museums and archives – thinking them worthless – only to reclaim those same movies years later when commercial tides turned. In the same breath they have allowed the total disintegration of other early works in their own possession that had, arguably, passed into some orphan “limbo” due to conflicting claims. Some studios have done exemplary work in preservation and restoration (Disney and Ted Turner, for example), but not all of them.

One could in years past quote works briefly and with impunity. Intellectual property claims have eroded “fair use” even in apparently legitimate instances. What better way to muddy the water than to have the fear of lawsuit hanging over fair use of a work of totally unknown copyright status? That 15 second “quote” from an orphaned motion picture could bankrupt a documentary filmmaker should an unknown owner show up.

POSSIBLE REMEDIES

The Canadian system seems on its face to be a workable idea although the paucity of cases in actual practice may indicate either a lack of demand or a fear of the unwieldiness and complexity of the process. Although fair sounding in description, it may be time consuming, discouraging and expensive in practice.

A simple solution would be the creation of a “fund” with a blanket, pre-determined usage fee that would be deposited for a specific period of time against some unknown claim. At the end of this pre-determined time, the remaining funds would pass for usage by, for example, the Library of Congress definitively for targeted use in film preservation. A percentile fee collected on the analog and digital material used in preservation could also be channeled to such a fund. For example, each DVD could have a 4 cent fee built into its cost for the purposes of this fund.

The slippery slope would be any attempt to create “graded fees” for usage. A fixed, universally applied blanked amount is crucial. Any other system would lend itself to vested interests, taste, and politics in determining which film was worth more than which other film. Who is to say, for example, that a previously unknown “orphaned” Greta Garbo film is worth more than equally rare and unknown footage of Buster Keaton? One could argue that more people would want to see Garbo in a commercial motion picture theater than equally rare historical footage of every day families eating lunch, but who is to decide which long deceased star is worth more money?

Inherent in this remedy is a limitation of the duration of the “orphan” status. It cannot be forever! Because of corporate interests, the normal copyright law seems to be moving in the direction of eternity! Since a corporation is non-human, its business interests could potentially last as long as the human species itself. The benefit of this, of course, is limited to a finite number of employees and stockholders under our current society and system of government. It is not my intention to argue here about the morality of this, but rather to point out the average citizen as the intended beneficiary of any future legislation relevant to orphaned films. A suggestion might be 25 years from the date of “creation” or “discovery” of the work.

“Creation” and “discovery” are, under these circumstances, crucial factors. A normal, modern copyrightable work is expected to follow certain benchmarks of notices and registration. Older works – because of their fragmentary nature – may no longer retain notices at the time of their physical “discovery” and the historical provenance surrounding them may have vanished. I have encountered just this problem in scholarly pursuits of information about motion pictures produced within the last 50 years! It has occurred that virtually none of the people who made a given film have survived or left oral histories about their work on such a film and the paper records have either disintegrated or passed into hermetic obscurity.

The large motion picture corporations who have benefited from various recent copyright extensions should be compelled to contribute some percentage of their revenues from these extensions toward the preservation of both "orphan" films and public domain materials that are disintegrating for lack of funding. "Survival of the fittest" should not apply to materials of objective historical importance; else we will have a world in which history is composed only of distorted and abbreviated historical facts that suit the revenue models of 21st Century corporations.

CONCLUSION

If we are to prevent the unique record of human civilization that began in 1894 with the commercial availability of motion picture film, we must take serious steps to bring all existing materials both in the United States and the rest of the world into a status where they can be cared for, preserved, restored and exhibited without unnecessary and burdensome standards of proof.

The ripple effect of the current gap in legislation is to directly contribute to the destruction of priceless material. It also encourages bureaucratic and private secrecy and the concealment of great treasures from the public eye of the everyday citizen.

Citizens of this country and the world should ultimately benefit from the work of thousands of film makers, actors, cinematographers and the myriad skilled and sometimes un-skilled individuals who produced this precious record of the last century of human history. Unintended technicalities and snarls in copyright law should lead to enlightenment and not to concealment and callous destruction.

The current situation is intolerable.

Thank you for your attention.

Signed:

Edward Summer