

March 24, 2005

Mr. Jule L. Sigall  
Associate Register for Policy & International Affairs  
U.S. Copyright Office  
The Library of Congress  
Washington, D.C. 20004

Re: Comments in response to the Notice of Inquiry regarding Orphan Works posted by the Copyright Office in the Federal Register, January 26, 2005.

Dear Mr. Sigall,

The following statement is submitted in response to the Notice of Inquiry publicly announced by the U.S. Copyright Office concerning motion pictures described as “orphan works,” for which the George Eastman House believes there are compelling serious problems and issues of sufficient concern to major segments of American society to warrant legislative and regulatory actions by the U.S. Congress.

The George Eastman House was chartered in 1947 and is today a major international museum dedicated to the history and technology of photography and motion pictures, with post graduate educational programs on conservation and museum management for professionals in those fields of endeavor. GEH is also one of the world’s leading motion picture preservation archives, with more than 23,000 motion pictures of great historic, aesthetic and cultural importance in all genres and physical formats, dating from the 19<sup>th</sup> century to the latest digital creations of the present.

Since its inception the GEH motion picture department has raised and spent millions of dollars on the cataloging, preservation, archival storage and public exhibition of its film collections. The majority of that collection documents the history of the American feature and independent film production and the copyrights and other intellectual property rights relating to those works are clearly established and respected by GEH. In those instances, no public exhibition, copying or other use of the original film materials is made without the permission of the rights holders. However, nearly fifty percent of the films in the GEH collection, mostly but not exclusively relating films of the silent era, exist in a neverland of uncertain or unknown

copyright status. They are the “orphan motion pictures” in GEH; works for which long but fruitless good faith efforts have been made to locate non-existent companies, to seek out producers who have died or moved with no forwarding address or otherwise faded entirely from the public marketplace. In all these accumulated instances GEH holds a large and varied collection of unique archival film elements which it has cared for and preserved at great expense because of their historical and cultural importance. The inability of GEH to learn who the owners may be or to determine clearly the copyright status of those “orphan works” has a detrimental effect on their long term preservation and availability to the public for research, analysis and interpretation.

Hundreds of such “orphan movies” in the GEH collection have been locked away for decades because their copyright status has proved to be ultimately unknowable. Many important and unknown films have been permanently lost to history because of the confused and highly restrictive nature of the current legal situation and many more will be lost in the future if no responsible legislative and regulatory actions are taken. The only practical solution to the problem is the creation of responsible legislation which will both define an appropriate middle ground that will ultimately allow GEH and similar archival institutions the necessary latitude to recoup the private and public funds invested in their preservation, as well as protect the rights of such owners who may emerge at a later date, stemming directly from the acquisition and conservation activities of GEH and other curatorial organizations.

Taking in order the specific questions posed by the Copyright Office in its Notice of Inquiry, these are the responses of the George Eastman House:

1) Nature of the Problems Faced by Subsequent Creators and Users:

a) In the present circumstance the onus of responsibility for identifying rights holders for motion pictures not available through any of the traditional modes of commercial or non-commercial distribution falls entirely on the museums, archives and other holders of the physical elements of “orphan motion pictures.” Even for films from the first half of the 20<sup>th</sup> century, for which remain in copyright status, it is a common for a museum staff to be unable to identify or locate the appropriate owner because the originating company has been out of business for many years, the owner has died, leaving no locateable heirs; or, another corporate entity has acquired the rights but has no current record or memory of a chain of ownership established decades in the past.

b) In other instances many of the successor companies no longer possess any physical film elements for the “orphan work” work in question, because they have deteriorated completely or become lost, except for the film elements rescued from third party sources and preserved by GEH.

c) GEH is a prime example of a not-for-profit institution that has many “orphan motion pictures” which it has preserved for decades, but has not been able to make them more widely available to the public due to their unresolved copyright status or the disinterest on the part of known rights holder who refuse to allow them to be publicly disseminated.

2) Nature of “Orphan Works”: Identification and Designation:

There are essentially two types of “orphan work” motion pictures:

a) the first type includes those for which the copyright status or trail of legal ownership is unknown or cannot be established through traditional methods of seeking and locating verifiable information. “Orphan works” can also be described as physical film elements, e.g., 35mm or 16mm film prints and negatives, that have been donated or discovered by a museum or archive, whose historical origins are known through institutional provenance records, but which have no discernible connection to any person, estate or corporate entity in the modern era.

a) the second covers those for which the copyright remains in force in the possession of an individual or company that does not own or possess any physical elements of the film(s) in question, particularly the original 35mm or other film elements generated at the time of original production and distribution. The responsibility for the conservation of this type of “orphan work” has been left entirely to a non-for-profit museum, i.e., GEH, and the existing rights holder has no interest in its preservation or upkeep. However, the existing rights holders, sometimes acting many decades after the loss, neglect or outright destruction of original film elements in their possession, will assert their rights to obtain copies from the preserving museum: not for full preservation to archival standards but merely to obtain lesser quality copies for distribution on video or DVD formats.

3) Nature of “Orphan Works”: Age:

The passage of considerable time should not be the sole criteria for determining whether or not a film is an “orphan work.” It is an important factor, especially in the case of theatrical feature films of the silent and pre-WWII era, but does not readily apply to avant garde or independent cinema works, or theatrical newsreels, home movies, educational and industrial films and other categories of motion pictures that were often not regularly copyrighted and which traditionally suffer high rates of neglect and deterioration outside of the museum and archive environment.

4) Nature of “Orphan Works”: Publication Status:

Publication status should not be a major determining factor in considering whether or not a film is an “orphan work.” Close study of how motion pictures have been copyrighted over the past one hundred years reveals an inconsistency in how motion pictures were selected, by the copyrighting entity, for registration as either “published” or “unpublished” works. In relation to how motion pictures have been collected for preservation by museums and film archives, the “published” versus “unpublished” status of “orphan” films has had virtually no important meaning over the years. “Unpublished” and “published” films stand an equal chance of becoming “orphan works” due to the vagaries of time and neglect after they are produced.

5) Effect of a Work Being Designated “Orphaned”:

The effect of a work being declared an “orphan work” should not have any effect on whether copyright is in force or any such rights are found to exist after a work has been preserved, publicly exhibited or made more widely available by a museum or film archive through other means of distribution. After a reasonable good faith effort has been made to

determine copyright status or locate other potential owners, protection in the form of limited “fair use” or protection from punitive or unreasonable litigation should be accorded to a museum or film archive that has preserved a film, using private or public funding, as part of its mission to conserve and exhibit historically and culturally important materials for the greater public good. GEH does not seek to negate any legitimate rights that may be discovered or revealed in relation to any of the “orphan works” in its collection, but it does call for legislative recognition of its rights to preserve, exhibit and distribute such works in recognition of its efforts as a publicly supported museum to rescue those works for posterity.

6) International Implications:

The problem of “orphan” motion pictures crosses all international boundaries. They exist in a legal limbo that encourages their neglect, eventual deterioration and resulting loss to the human record of creativity. Museums and film archives in all countries of the world are concerned with this problem. Regulatory solutions can be created that will bring U.S., Berne Convention and other copyright and intellectual property laws into agreement on how to create “fair use” and other “safe haven” rights for individuals and organizations involved in the conservation of these works.

Thank you for the opportunity to comment on these matters of vital concern to me, the George Eastman House and the many film archives and other motion picture preservation organizations across America.

Signed:

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