

**Comments of the Library of Congress
In Response to the
Copyright Office Notice of Inquiry
“Orphan Works and Mass Digitization”**

Submitted February 4, 2013

The Library of Congress appreciates the opportunity to comment upon the long-standing, recurring issue of orphan works. This issue permeates the Library and impacts the Library’s ability to provide the fullest possible access to its unparalleled collections. As the Copyright Office notes, “For good faith users, orphan works are a frustration, a liability risk, and a major cause of gridlock in the digital marketplace.” The Library supports a legislative initiative on orphan works.

The Office asked specifically for comments on developments since 2005, and on issues relating to mass digitization.

1. Developments Since 2005

In some ways, very little has changed since the Copyright Office’s 2005 Inquiry and the subsequent Report and proposed legislation. Dealing with orphan works continues to require substantial expenditures of Library staff time and resources, and still results in diminished service to Library patrons and reduced preservation efforts. Curatorial divisions throughout the Library have prepared case studies documenting how orphan works issues affect them.

If anything, in the past eight years it has become clear that orphan works problems and the challenges and expenses of the search process are more extensive and intractable than was generally recognized. See Case Study 1 (Prints & Photographs) and Case Study 2 (American Folklife Center). The ongoing exponential explosion in the creation of content, and the fragmentation of rights in that content, make copyright clearance even for contemporary materials a greater challenge than envisioned eight years ago. Continuing corporate reorganization and consolidation create a maze of further uncertainty. Pre-1972 sound recordings, in particular, are subject not only to many of the same concerns as other types of works, but also to potentially longer copyright terms under state law. See Case Study 3 (Emerson Phonograph Company).

The layers of copyrights in a particular work and uncertainties about who controls rights also make orphan works determinations more complex than initially acknowledged. For example, a sound recording may have separate copyrights for the composer, lyricist, arranger, each performer, and sound recording; unless all layers of ownership can be identified, it may still be an orphan work. See Case Study 3 (Emerson Phonograph Company). Similarly, a collective work such as a newspaper may contain hundreds of separately copyrighted components for which the publisher may not have the power to convey permissions. See Case Study 4 (Newspapers). Getting permission from a poet is of little help if his publisher holds the rights. Getting permission from a webmaster to archive a website has no legal effect if she doesn't have the authority. The Library's standard practice is to obtain warranties from sellers, and whenever possible donors, regarding rights in the materials that they convey, but even a warranty is not a guarantee that rights will not be disputed.

Major developments since 2005 have included the employment of fair use in the orphan works arena; the advent of social media and crowdsourcing; a shift in expectations by patrons and donors; and an expansion in search and database capabilities. However, none of these developments obviate the need for a solution to the orphan works problem.

a. Fair Use and Orphan Works

The Library sometimes relies on fair use, based upon the application of the fair use factors to the particular circumstances, to support the online presentation of works when the Library is unable to identify or to locate a rightsholder despite a reasonable search. For example, a statement in the Library's website on the Hannah Arendt Collection specifies:

Despite extensive research (see [About the Collection](#) for more information), the Library has been unable to identify or locate all possible rights holders in the materials in this collection. Thus, some of the items provided here online are made available under an assertion of fair use (17 U.S.C. 107). Therefore, we stress that this collection and the materials contained therein are provided strictly for noncommercial educational and research purposes. Again, responsibility for making an independent legal assessment and independently securing any necessary permissions ultimately rests with persons desiring to use particular items in the context of the intended use.

<http://memory.loc.gov/ammem/arendthtml/res.html>. Similar statements appear on the Library's site for other collections, particularly in American Memory and the Performing Arts Encyclopedia.

The fair use and Section 108 exemptions provide critical copyright flexibility for the Library. Even were orphan works legislation adopted, there may be circumstances where the use of an individual item or an instance of mass digitization might not meet the requirements of the orphan works safe harbor, but may fall within another copyright exemption. But reliance on fair use can be a risky, inadequate, and expensive solution, particularly if litigation ensues. Furthermore, some uses of orphan works – for example, in commercial settings – might not qualify as fair use. The Library supports orphan works legislation as a separate safe harbor from Section 107 fair use and Section 108 library and archives exemptions.

b. Advent of Crowdsourcing

One development since 2005 has been the advent of “crowdsourcing,” where an online community is invited to provide additional information about collection materials. Crowdsourcing provides a means to identify orphaned works and their owners. It might include posting an entire collection, thumbnail images, or simply a catalogue. For example, posting the extensive catalogue for the James Madison Carpenter folklife collection online has led to inquiries from families and descendents, allowing identification of previously orphaned works. Case Study 2 (AFC).

The Library has already successfully employed online crowdsourcing. In the Flickr Commons project, the Library has placed collection photographs with no known copyright restrictions onto a photosharing site. http://www.flickr.com/photos/library_of_congress/. While these photographs are not, per se, orphan works, members of the Flickr community have provided substantial information about the collection, allowing more than 5000 changes to the Library's catalogue records for these images.

c. Shifting Expectations

Since 2005, Library patrons and donors increasingly expect to find materials online. When different institutions hold related collections, the online availability of collections has a synergistic effect for scholarly research, enabling researchers to get the complete picture regardless of where the physical

collections may reside. Because of potential copyright restrictions, the length of copyright, and in some cases the impossibility of obtaining permissions, by far the bulk of the Library's online collections are in the public domain, limited to U.S. government works, pre-1923 publications, and 19th century unpublished works. As a result, critically important 20th century collections may remain undigitized by the Library despite a high demand for primary materials from K-12 teachers and other researchers. See, e.g., Case Study 4 (Newspapers); Case Study 6 (NAACP Collection).

In addition, many Library donors increasingly expect that the collections they fund or donate will be made available online. The Library advises donors that digitization of materials is subject not only to availability of resources, but also to legal constraints. Nevertheless, donors who generously contribute their own intellectual property to the United States are often frustrated that third-party materials in their collections, such as incoming correspondence, cannot be made freely available. In more than one instance, a donor has digitized a collection at private expense prior to the donation because the donor wished to make the correspondence immediately available online on a personal website.

d. Expanded Search Capabilities and Databases

A fourth development since 2005 is the wider availability of search engines and of online databases, including genealogical databases. These have substantially facilitated the search for copyright owners. A related forthcoming development is the Copyright Office's intention to make available online its registration, renewal, and transfer record databases. This availability will potentially be a boon for online searches for copyright records. In particular, it should enhance the ability to determine whether a particular published work is still under copyright by allowing users to find out whether the work was ever registered for copyright or was ever renewed. It will not, however, be a panacea: many orphan works were never registered; many that were registered cannot be identified from the registration forms; and many owners cannot be identified or located from the original records. See Case Study 7 (Drama copyright deposits).

2. Orphan Works and Mass Digitization

a. Book Digitization

The Library is keenly interested in book digitization. By allowing libraries to serve digital surrogates of books in their collections, book digitization projects

enhance public access, enable access for people with visual disabilities, protect fragile materials, and save space. The orphan works challenges in mass book digitization are important, and the Library appreciates the efforts of the Copyright Office to explore potential solutions.

b. Digitization of Manuscripts, Images, Sound Recordings, Film, and Broadcast Materials

“Mass digitization” is not simply an issue of books. Rather, as the Copyright Office notes, mass digitization issues also arise for images, films, sound recordings, and manuscripts. The Library faces a mass digitization challenge in clearing special collections of unpublished works, and in particular collections with multiple rightsholders. Excluding orphan works from an online collection may handicap researchers by removing the remainder of the collection from its full context.

For example, the Library’s most rigorous manuscript collection clearance process to date was the Hannah Arendt collection, described in the Library’s 2005 comments, <http://www.copyright.gov/orphan/comments/OW0630-LOC.pdf> at 6-7. Arendt donated her own unpublished works to the public domain, but her collection includes extensive unpublished correspondence from others. Pursuant to a generous grant, Library staff spent two years clearing rights in the collection. Where permission was obtained, the correspondence was posted. Where the correspondent could not be located, some items were posted pursuant to fair use. In only 14 instances (.7% of requests) was permission denied. The Library ultimately did not post 2,000 items – 28% of the collection – because it received no response from the identified rightsholders. It did, however, indicate in connection with the online collection that “The Library of Congress would like to learn more about these materials and to hear from individuals or institutions having any additional information.” In December 2011, more than ten years after the truncated Arendt collection was put online, the great-granddaughter of one of the correspondents contacted the Library to ask that those letters be released to the public.

In a second example, the Library has made selected portions of Calvin Coolidge’s papers and those of several of his contemporaries available online in American Memory, <http://memory.loc.gov/ammem/coolhtml/coolhome.html>. Much of the unpublished Coolidge site correspondence is under copyright, but it would have been extremely time-consuming, if not impossible, for the Library to clear 80-year old correspondence from ordinary citizens. The work has high historic and

cultural value; an item-by-item search would be both expensive and likely fruitless; and the underlying component works had minimal, if any, market value. In order to make much of the incoming correspondence available, the Library has relied on fair use, a specific request for additional information about the collection, and a caution that researcher use without permission should be limited to nonprofit educational and research purposes.

<http://memory.loc.gov/ammem/coolhtml/ccres.html>. In the more than ten years that the Coolidge collection has been available online, the Library has not received a single complaint.

Mass digitization of manuscript collections also impacts the Library's mission to support the Congress. For example, the Law Library has a collection of the briefs filed in Supreme Court cases. These briefs have great legal and historical significance: a database that included them in company with the case opinions and the underlying laws would provide incredible insight into Supreme Court practice and jurisprudence. Such a project could substantially further the Library's mission to provide analysis to Congress on constitutional and other legal issues. Because most of these many thousands of briefs have not been registered for copyright or published, they would be subject to a copyright term of as long as 120 years. Thus, to make the collection publicly available online, the Law Library could face the task of clearing all briefs filed after 1893 -- including trying to trace who among the labyrinth of lawyers, law firms, and clients held the rights. While fair use arguably might permit mass digitization of these briefs, an orphan works safe harbor could directly unlock this critical part of the nation's legal heritage.

Mass digitization issues for non-book collections extend beyond manuscripts. The National Digital Newspaper Program is limited to pre-1923 materials entirely because of copyright concerns. See Case Study 4 (Newspapers). The folklife collections in the Library's American Folklife Center are similarly fraught with orphan works issues. For example, the Center for Applied Linguistics collection, which preserves American dialects, reports: "Most of the recordings, however, are of the voices of people whose specific identities are unknown, but whose comments represent the richness of the American experience. There are Gullah speakers from coastal South Carolina, sharecroppers from Arkansas, Puerto Rican teenagers in New York City, Basque shepherders from Colorado, Chesapeake Bay watermen, Vietnamese immigrants from Northern Virginia, and many others." <http://memory.loc.gov/ammem/collections/linguistics/>. These recordings, classic orphan works, were posted online, with a request for more

information. Many similar collections are presently available only on Library premises. Case Study 2 (AFC).

The Library also has more than 1000 reels of unidentified silent films in its collection. These film reels are orphan by definition – not only are their rightsholders unknown, but their very titles and backgrounds are lost. In 2012 the Library conducted “Silent Film Archeology: A Film Identification Workshop,” inviting film experts to help identify about 100 reels of unidentified silent film from its collections. (See Case Study 5.) During the course of screenings of the 100 films, participants identified over half the films, and provided additional information that may permit identification of many more. Were the Library able to make this workshop virtual by relying upon an orphan works exemption to put low-resolution versions of orphaned films online, it could enlist film professionals and aficionados in the identification process, exponentially expanding knowledge about the films. Similarly, the Library has a substantial collection of more than 35,000 reels of home movies – again, classic orphan works, often lacking even basic identifying information. As the home movie case study notes, absent the legal ability to put these orphans online for identification and adoption, “whoever owns the film is unlikely to emerge from history’s shadows.” Case Study 8 (home movies).

For some collections that lack identifying information, and particularly historical collections, posting materials online (on an opt-out basis) and seeking information about them from the general public may be the only way to obtain key information. Failure to do so might, ironically, result in their permanent orphaning. For example, the Library has substantial photographic and sound recording collections from the civil rights era, in particular in its NAACP collection. Many of these works have little or no information about rights. See http://www.loc.gov/rr/print/res/086_naa.html (advising users of rights and restrictions in NAACP photo collections). By not making these materials freely available online immediately, while those who participated in the civil rights movement might be able to see them and identify events, context, and particular participants -- as well as rightsholders – the Library and the nation risk having the identity of those participants and rightsholders lost to history. Case Study 6 (NAACP).

Conclusion

The Copyright Office’s colleagues in the Library support the Copyright Office’s commitment to exploring orphan works issues and stand ready to assist the

Office and the Congress in moving forward to develop and implement appropriate solutions, including orphan works legislation.

Respectfully submitted,

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Case studies:

1. Prints & Photographs Division
2. American Folklife Center
3. Recorded Sound Division: Emerson Phonograph Company
4. Newspaper Digitization: National Digital Newspaper Program
5. Motion Picture Division: Silent Films
6. Educational Outreach: NAACP Collection
7. Manuscript Division: Drama Copyright Deposits
8. Motion Picture Division: Home Movies

Library of Congress Orphan Works Case Study 1 Prints and Photographs Division

The Prints and Photographs Division receives multiple queries each day about the rights status of images that members of the public would like to use for publication, exhibition, broadcast, and other purposes.

A case in point is this image, which came to the Library of Congress in 1945 as part of the archive of the Office of War Information, a World War II government agency that sometimes acquired photographs from commercial organizations.



The Statue of Liberty from Ellis Island, U.S. immigration station in New York Harbor, a small boy shows his parents the Statue of Liberty, ca. 1930, <http://hdl.loc.gov/loc.pnp/cph.3a50956>

We have had three inquiries about this photo in the past two months.

The Office of War Information left no record of the source of the photograph, which is believed to have been taken ca. 1930. Assuming it was a commercial photo and was issued after 1923, it could conceivably be under copyright restriction. But it could also be from a source that did not hold or renew copyright. Insufficient information to determine the rights status has repeatedly limited the use of a picture that helps people understand what immigration and liberty mean.

Each time we get asked about this popular image, we spend at least a quarter hour of staff time explaining the situation, and the researchers gain very little.

We have added information to our description to indicate the undetermined nature of the rights status and the lack of information about the source, but we have hundreds of thousands of images like this that lack sufficient information to know the rights status and for which we have indicated that researchers must do

their own evaluation of risk. Prints & Photographs Division staff estimate that at least 50% of the questions we receive are requesting rights information, and a large percentage of those questions pertain to images that are, like this one, essentially orphan works.

For lack of guidance and some degree of assurance regarding the use of orphan works, researchers are denied the opportunity to make use of the hundreds of thousands of historically significant images that lack identification and most likely are no longer under copyright. Moreover, Library of Congress staff members spend hours analyzing what is known about such images (too little) and supplying information to the public (basically conveying the fact that no information is available)--hours that could be spent in helping researchers locate and learn about images in the collections.

Library of Congress Orphan Works Case Study 2 American Folklife Center ethnographic recordings

Field recordings often pose issues for locating rights holders, since the Folklife Center holds no proprietary rights over the recordings in its collections. Ethnographic collections typically consist of documentation of many individuals, often from multiple communities or even states (or countries). Older collections, made before the days when the use of permission forms became the accepted standard for ethnographic work, generally have no such forms and sometimes not even performers' names (e.g., performers identified only as "three schoolchildren" or "group of prisoners"). So we have no way of knowing who those performers were and who may have any rights over the performances (even presuming that the songs they sang are public domain). But without a name to go on, we've generally made those recordings available for use without further searches.

More often, however, we have a performer's name and the town or city where the recording was made. While it is likely that such recordings were made in the community where the performer lived, occasionally we have documentation indicating that the person was visiting from elsewhere at the time he/she was recorded. So while that may sometimes be the case in instances where we don't have documentation, it has seemed most sensible, when seeking rights holders, to use such strategies as sending certified, return-receipt-requested letters to the performer in care of the postmaster of that town or city. Occasionally such letters have found their way to a person, but more often they've come back unopened, with a postal mark on the envelope indicating that the envelope was undeliverable for one or another reason. We've retained those envelopes in correspondence files as documentation of the effort made to locate a performer. We've had patrons seeking to publish such recordings conduct similar searches, asking them to send us the unopened envelopes (or at least a photocopy with the postal marking).

We also encourage researchers to use online databases such as genealogical indexes, and to contact whatever libraries are in or close to the community of the performer. Given current interest in local history and genealogy, many public libraries have staff who can direct researchers to relevant local resources.

Over time, then, we've built up files regarding any performer whose recordings have been sought, and can advise potential users as to the success or failure of past attempts. There are, however, in collections of field recordings, many more

performances that have never been sought -- recordings for which, consequently, we have no specific information regarding rights holders. And ultimately it is not our role to evaluate the veracity of those who do come forward to claim rights over specific recordings.

People do, however, move (and eventually die – with rights to the estate devolving to someone unknown to us), so an address that was accurate at one point may not remain so. That becomes an issue when the performance for which usage rights are being sought has been protected by the rights' holder in the past. We encountered such a situation with the recordings of a Texas man in the John and Ruby Lomax 1939 expedition collection. After making a good-faith but unsuccessful attempt to re-contact the son, whose address we had in our files, we included the recordings in the web presentation. Quite some time later, the son (who had moved several states away) contacted us and others, angry that the recordings had been used without his permission but not requiring that they be taken down.

There are also instances in which we know that letters requesting permission have been received (the postal form was returned, complete with signature of receipt), but the rights' holder has chosen not to respond one way or another. This was true for one artist in our collection whose blues recordings were not acknowledged by fundamentalist descendants, so they wanted nothing to do with the further release of those recordings despite the royalties that would have come their way.

Web presentations have created additional complexities. At one point, we investigated placing online a major collection of morris-dancing video documentation. The ethnographer had verbal consent from the dancers for this documentation, but not always from the accompanying musicians, and definitely not from the people in the audience observing the public dances, some of whom were potentially recognizable in the footage. The decision at the time was that this was too risky for the Library, even though the collector had already placed the very same material online at his home university.

As we place more descriptive information online regarding our collections, more families are contacting us about the kin whose names they find through search engines such as Google. We are able in such circumstances to give a copy of the relative's recordings to the family member who agrees to be their representative, both in terms of rights' issues and in terms of disseminating materials to other members of the family. These interactions have also provided opportunities to

add information to the collections here, when those family members send us biographical information and anecdotes about the performers/speakers and often scanned photos -- thereby helping to turn a voice on a recording into an actual person with history and image. While these interactions currently cover only a tiny portion of previously orphaned works in the collections here, the opportunities are increasing.

This has also been the case with the James Madison Carpenter collection being prepared for online presentation. Carpenter, an American, documented some Anglo-American traditions but even more English folk songs and drama between 1927 and 1955, and eventually sold his collection to the Library of Congress. This material is of great historical interest both here and in England. A team in the UK has done major work cataloging the collection and has placed the catalog online, resulting in many inquiries from family and descendants, thus enabling us identify more rights holders. But there are many names, and still many unidentified participants whose voices and photos are part of the collection. So rights clearance activity has been protracted.

Not all ethnographic recordings with minimal documentation are, however, filled with truly orphan works. Native American recordings, for example, are strongly protected by their communities; rights holders, in these cases, may be descendants, but can also be historic preservation offices, whole clans, societies of practitioners of specific rituals, etc. There are protocols and codes of ethics for many professional societies as well as documents being developed by the World Intellectual Property Organization that speak to the rights of tribal communities over their collective intellectual property heritage. We routinely direct researchers seeking to acquire and use tribal recordings to the community entities most likely to be able to assist them.

Library of Congress Orphan Works Case Study 3 Emerson Phonograph Company

In his Survey of U.S. Recordings, a study commissioned by the Library's National Recording Preservation Board, author Tim Brooks quantifies the commercial accessibility of recordings published before 1965. Among his most significant (and disturbing) findings: of all recordings published in the U.S. between 1890 and 1965, only 14 percent are currently made available commercially by rights holders. The Recorded Sound Section of the Library of Congress manages a collection of nearly 3.5 million sound recordings, well over a million of which are commercial releases, produced, and sold by record companies as far back as the 1890s. The vast majority of these exist on obsolete formats and, as Brooks reveals, are not commercially available. In addition, any recordings produced prior to February 15, 1972 are not covered by Federal copyright law, but rather are governed under a complex array of state and common law copyrights, severely limiting the access that institutions and private collectors can legally provide to their historical recordings. In spite of their age and lack of commercial viability, most of this rich legacy of our Nation's creativity remains inaccessible to the American public.

From the beginnings of commercial recording up until the late 1920's, the Edison, Victor, and Columbia companies dominated the domestic marketplace. But there were smaller and significant record labels that attracted top talent, and the Emerson Phonograph Company was one of those. The company, founded by former Columbia Records executive Victor Hugo Emerson began operations in 1915. The label made good quality recordings of popular dance and vocal music, including many jazz and blues records released in a "race" series. There are numerous important artists found in the Emerson catalog: Eubie Blake and Noble Sissle recorded for the label, and Fletcher Henderson's band cut a few records. One Fletcher Henderson disc includes Louis Armstrong. The great vaudevillian comic Nat Wills was also on the label as was Eddie Cantor. They even had an operatic series with some members of the Metropolitan Opera Company. Ethnic sides included the Toots Paka Hawaiian Company and Rigo's Hungarian Gypsy Orchestra. Artists from the "pioneer" days of acoustical recording appear as well, such as Billy Murray and Vernon Dalhart. But unlike the Victor and Columbia labels (both now under the control of Sony Music, Inc.), the complex and muddled corporate lineage of Emerson indicates that a large portion of the recordings produced by the company could be made available under the Orphan Works exemption if it applied to pre-72 sound recordings.

In 1924 Emerson was acquired by the Scranton Button Company and subsequently reorganized as the Emerson Recording Laboratories. This lasted until 1926, when it was again reorganized by former Emerson executives as an independent company, the Consolidated Record Corporation, which would come to own several other record labels until it went under in the early 1930s. Assuming that the entire Emerson back catalog went to Consolidated in this sale, Emerson Records, along with those other labels would likely fall into orphaned status because Consolidated seems to be the end of the corporate lineage. However, while detailed research into court documents and corporate records by discographers has resulted in strong support of this conclusion, it has proven difficult to confirm absolutely.

Much of the information for this study was taken directly from:

Allan Sutton *_Recording the 'Twenties: The Evolution of the American Recording Industry, 1920-29_* (Denver, CO: Mainspring Press, c2008, p.315)

Allan Sutton, *_American Record Labels and Companies: An Encyclopedia (1891-1943)_* (Denver, Colo.: Mainspring Press, c2000)

LIBRARY OF CONGRESS ORPHAN WORKS CASE STUDY 4 NEWSPAPER MASS DIGITIZATION

Newspapers are a valuable resource for a wide variety of research uses. They include local perspectives on community, regional, national and international historic events. Hidden within the text can be found vital records information and personal histories. Articles on economic, social, literary, domestic, agricultural, scientific, and political issues provide commentary on prevailing attitudes, biases, and concerns of the day. However, newspapers are also abundant in content and quantity and bring substantial management challenges to any archive or library providing access to these materials. Storage and handling of print newspapers can be prohibitively expensive given the number of pages produced by a single publisher in a daily publication. Historically, to address these challenges, print newspapers are commonly microfilmed for preservation, exchanging large, quickly embrittled and discolored pages and/or cumbersome bound volumes for dense microfilm storage, preserved for up to 500 years and available to anyone with a light source and magnifier.

Preserved in microfilm, newspapers can be browsed 1000 images at a time on reels but still represent substantial resource costs per item. However, the standardization and content organization of the filming process also produces an archival item ideal for mass digitization and providing online access, potentially transforming research and discovery through functional enhancements and searchability.

Online access to newspapers has already proven intrinsically valuable to both the general public and scholarly research through a variety of commercial digitization projects as well as the National Digital Newspaper Program¹¹. In FY2012, more than 4.3 million users accessed the 5.2 million pages available through this program, hosted by the Library of Congress website. Research use of the content has ranged from new insights into family history and biographical research to etymology and cultural mores to studying public discourse during the Reconstruction era and epidemiological studies of the dissemination of

¹¹ The National Digital Newspaper Program (NDNP) is a joint program of the Library of Congress and the National Endowment for the Humanities (NEH) to enhance access to American newspapers and build a geographically-diverse digital collection of historic papers, published 1836-1922. In February 2013, more than 5.8 million pages are available on the site. These newspapers are selected and digitized by institutions in each state funded for this activity by the NEH. For more information, please see <http://www.loc.gov/ndnp/>.

information during the Influenza Pandemic of 1918 and much more. However, all such projects (and subsequent scholarship) are frequently limited to those materials that haven fallen into the public domain or where current rights holders can be easily identified. Newspapers that do not meet criteria for public domain and whose rights holders are unknown cannot be made available in this way without assuming certain risks (risks that, for voluminous newspapers, are extended by the amount of data related to a single copyright holder).

The situation for these “orphan” newspapers is further complicated by the instances of copyright claimed by creators. Newspapers are generally copyrighted by publishers as “collective works,” either through registration of individual issues or, if microfilmed, as groups of issues per current registration guidelines. In addition, individual components published in a newspaper such as photographs, illustrations, comics, syndicated articles, literary or musical works, etc. may also be registered by individual creators, who have licensed their use to the publishing newspaper. The complexity of assessing rights ownership in these publications has led to restricted re-use of these materials for digitization and online access. For known rights holders, an appropriate permissions agreement can be concluded to allow content holders to digitally reformat and make the material available online; however, for publications with unknown or unlocatable rights holders, the material, currently, cannot be reused for digitization and online access, limiting its availability to enhance new research and scholarship.

These limitations mean, de facto, that research enhanced by the transformative presentation of large numbers of newspapers with full-text search capability comes to a halt at 1922. Without full-text access, many topics cannot be fully explored – subjects such as the Great Depression, American perspectives on the rise of Hitler and World War II, post-World War I and immigrant communities in America, the assassination of President John F. Kennedy, community views on the Civil Rights Act of 1968, to name a few. Some historic events with roots in the pre-1922 era, such as Prohibition, women’s suffrage, the League of Nations and the Harlem Renaissance, can be researched initially using these improved research techniques but such access is limited after 1922. In addition to the benefits of individual use of full-text search, the digitized full-text corpus can also be used in new forms of research involving data mining and automated text analysis to explore previously unanswerable (or prohibitively resource intensive) research questions.

Library of Congress Orphan Works Case Study 5 Identification of 'Lost' Silent Films

A recent report commissioned by the Library of Congress noted that 75 percent of all American feature films made during the silent era no longer exist. Perhaps an even greater percentage of short subjects and newsreels have vanished.

However, many films sit in archives throughout the world that, due to the ravages of time, have lost their identity. Title frames and other identifying information have been removed – sometimes purposefully but more often through deterioration or neglect.

These films are not literally lost – we can physically locate them – but they are mostly lost in the sense that we do not know fully what they are.

In an effort to address the issue of unidentified films, silent-film experts gathered in June at the Library's Packard Campus for Audio Visual Conservation for two days of intense viewing of unidentified film at "Silent Film Archaeology: A Film Identification Workshop."

The Library of Congress holds more than a thousand reels of such film, and while staff members regularly are able to identify titles, the added benefit of 60 additional experts viewing the films greatly speeds the process along.

More than 50 percent of the nearly 100 reels shown during the workshop now have been identified, and many of the other reels have had vital information provided that eventually will lead to identification.

The workshop was a collaborative effort, with the Museum of Modern Art (New York), George Eastman House (Rochester), Lobster Films (Paris), EYE Film Institute (Amsterdam) and the UCLA Film & Television Archive (Los Angeles) providing unidentified films to be screened along with those from the Library's own collection. A wide range of film experts and archive professionals representing film festivals, studios, libraries and film archives attended.

LIBRARY OF CONGRESS ORPHAN WORKS CASE STUDY 6 THE NAACP COLLECTION

Since 1965, the Library of Congress has been the home of the NAACP collection, a treasure trove of papers, photographs, and sound and audiovisual recordings about the civil rights movement. Under the terms of the gift agreement with the NAACP, the public was allowed access to the collection thirty years after the date of the record or the date of the Library's receipt of undated records. Yet, because the NAACP did not have copyright to all the materials in the collection, copyright uncertainties effectively orphan large swathes of the collection. Providing open online access to the NAACP records would have a significant impact on K-12 teachers and students nationwide.

The African American struggle for civil rights in the 20th century is core to history and social studies teaching across the U.S. It's required by the content standards of nearly all fifty states and the District of Columbia, and is included in social studies, civics, and U.S. history curricula. These standards cover events that span more than 100 years, and require students to look closely at the roots, tactics, intellectual influences, and leaders of civil rights struggles.

One member of the Library's teacher community reports that, "The history of the African American civil rights movement history is an important part of the content standards covered by teachers as well as a piece of history that until recently only occupied a minimal part of text books."

For example, one Oklahoma U.S. history standard requires that students "cite specific textual and visual evidence to compare and contrast early civil rights leadership including the viewpoints of Booker T. Washington, W.E.B. DuBois, and Marcus Garvey in response to rising racial tensions, and the use of poll taxes and literacy tests to disenfranchise blacks and poor whites."

A North Carolina Social Studies standard: "Evaluate the extent to which the women's rights and African American civil rights movement influenced each other, as well as, the strategies and protests of other civil rights groups."

Michigan U.S. history: "Analyze the causes and consequences of the civil unrest that occurred in American cities by comparing the civil unrest in Detroit with at least one other American city (e.g., Los Angeles, Cleveland, Chicago, Atlanta, Newark)."

With the arrival of the Common Core State Standards, which have been adopted by 45 states and the District, primary sources are of greater importance to U.S. teachers than perhaps ever before. The primary sources in the NAACP records would provide teachers and students with unprecedented access to the thinking, the planning, the activities, and the personalities that shaped these freedom movements, and would provide teaching opportunities that would not be possible using any other materials.

The Library's Teacher in Residence, Earnestine Sweeting, reports that "Providing students with access to the NAACP papers would open up a world of learning to students. Reading the correspondence of field secretaries and NAACP officials would allow us to make connections between the motivations and strategies used by grassroots activists of the 20th century and activists of today. Studying the papers from the lead-up to *Brown v. Board of Education* would let students frame their own debates over the topic, and examine the points of view of the participants. Analyzing the writings of major civil rights figures would let us explore their personalities, and discuss what character traits we can and can't identify in leaders such as these. The records documenting the anti-lynching campaigns of the early 20th century would bring home the brutal reality of the lynching era, and would let us discuss the emotional cost that this struggle must have incurred on activists."

The NAACP records contain primary sources that have no equal in textbooks or in other cultural institutions. Until they are made freely available to teachers and students across the nation, their potential for transforming K-12 teaching and other research on the civil rights movement will remain untapped.

LIBRARY OF CONGRESS ORPHANS WORKS CASE STUDY 7 COPYRIGHT DRAMA DEPOSITS COLLECTION

A good case study illustrating the difficulties of using orphan works is the Copyright Drama Deposits Collection. This is a considerably large collection, dating from 1901 to 1977, and currently reproduced on more than 5,500 positive microfilm reels. The LC catalog record is available at <http://lccn.loc.gov/mm85061908>. The issues associated with this collection are also present in several other collections which were transferred from the Copyright Office to the Manuscript Division prior to 1985, including the Fred Allen Radio Scripts; W.C. Fields Comedies; Paul Rhymer Radio Scripts; Mae West Play scripts; Tennessee Williams Plays; and Robert Sherwood Play Scripts.

Since 2001, the Manuscript Reading Room has received more than 460 requests for approximately 1,600 items from the Copyright Dramas Collection, with staff responding to 41 requests for 100 containers in FY12, and 40 requests for 113 containers in FY11. In addition to readers conducting family research (i.e. a work copyrighted by a relative), the collection has attracted interest by scholars investigating the history of radio during the 1920s-1950s, and by non-profit theaters seeking public domain scripts to produce. The collection is arranged by year and registration number, and access to individual items requires readers to obtain this information, which is available via the Copyright Office card catalogs.

The basic issue associated with use of the Copyright Dramas Collection involves reproduction. The division's restriction notice indicates that in order to comply with current copyright law, the Manuscript Division will not allow mechanical reproduction of materials received from the Copyright Office for items dated after 1923, without the written permission of the copyright claimant, or evidence of copyright non-renewal entered between 1923-1964. The division rarely has contact information for claimants, and we regularly refer researchers to the Copyright Office for proof of non-renewal, such as a photocopy from an entry in an official Copyright Office record book. This requirement presents a particular burden for off-site researchers who are unable to visit the Copyright Office, and must rely on a search by Copyright staff, who impose expensive fees for such services. These fees are often in excess of the cost of reproducing a copyright drama. In addition, for those works copyrighted from 1923-1977, the claimant information in the Copyright office is often out of date, leaving researchers little recourse for securing reference copies. The continued steady interest in this collection demonstrates its research value, and the Manuscript Division has

made a substantial investment in preserving this large collection by microfilming portions of it, but it is not fully accessible to scholars and the public because of copying restrictions. It is especially problematical to gain permission to copy because there are tens of thousands of individual items and claimants, making it impossible to track down all potential rights holders.

LIBRARY OF CONGRESS ORPHAN WORKS CASE STUDY 8 HOME MOVIES

The Library's Motion Picture, Broadcasting and Recorded Sound Division is responsible for the cataloging, storage, and preservation of more than 1.2 million moving image items on film, video, and—increasingly—as digital files. Included in the collection is a varied array of home movies, which over the past decade have become the object of increased academic and archival interest. For example, Home Movie Day was begun by a group of archivists in 2003 to highlight the importance of these films as cultural documents. What started as a handful of local events has since grown into a yearly global celebration of amateur film in dozens of locations. In 2005, the Center for Home Movies, a non-profit organization devoted to “transform[ing] the way people think about home movies by providing the means to discover, celebrate, and preserve them as cultural heritage,” was founded, and two years later entered into a partnership with the Library to jointly collect and preserve these films.

Although the Library's Packard Campus for Audio Visual Conservation devotes considerable effort to the preservation and digitization of home and other amateur movies, relatively few are available for online access due to questions surrounding their copyright status. Of the millions of home movies that have been shot since the dawn of small gauge filmmaking 90 years ago, only an infinitesimally small number were formally registered for copyright (e.g., *The Tacoma Narrows Bridge Collapse* and the Zapruder film). Some of the Library's home movie collections are well documented, be they shot by well known people such as Edna St. Vincent Millay, Danny Kaye, and Florenz Ziegfeld, or enthusiastic amateurs like Robbins Barstow, whose *Disneyland Dream* was named to the National Film Registry in 2008.

This leaves many thousands of home movies held by the Library and other archives whose provenance is completely unknown, and that uncertainty has a paralyzing effect on their use, be it in commercial productions or in less visible uses such as within academic settings, personal web sites or Facebook pages. For example, in 2009 the Library purchased a collection of over 35,000 reels of film that contained nearly 400 compilations of multiple home movies. One—for which our catalogers have supplied the title *Home Movie 386*—was shot in the early 1940s on Kodachrome color film and was described by the seller as containing a “patriotic parade in Kenosha, Wisconsin; cheer teams, marching bands, military veterans, several American flags being carried by various groups,

flowery floats, elegant vehicles of that time, VIP officials--bustling streets; families with lots of children and vehicles on streets--small town atmosphere--good shot of film developing signs; 'Cairo Camera Shop' and '8 Large Prints 35 Cents & 8 Contact Prints 27 Cents, Two Day Service.'"

This particular collection is full of films like this one, beautiful and evocative chronicles of a vanished America, despite the fact that whoever "owns" the film is highly unlikely to emerge from history's shadows.
