4. Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001); and Kembrew McLeod, *Freedom of Expression: Overzealous Copyright Bozos and Other Enemies of Creativity,* 1st ed. (New York: Doubleday, 2005).
5. http://www.centerforsocialmedia.org/rock/backgrounddocs/printable_rightsreport.pdf.
6. Patricia Aufderheide and Peter Jaszi. "Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers" (Washington, D.C.: Center for Social Media, School of Communication, American University). This can be obtained by contacting the Center for Social Media or by accessing centerforsocialmedia.org/fairuse.
7. Michael J. Madison, "A Pattern-Oriented Approach to Fair Use," *William and Mary Law Review* 45 (2004), 1525.
8. http://www.centerforsocialmedia.org/rock/backgrounddocs/bestpractices.pdf.
9. For further information, copies of the Statement and current information on the status of legal clinics, refer to centerforsocialmedia.org/fairuse.htm.

Access to Orphan Works: Copyright Law, Preservation, and Politics

by Eric J. Schwartz and Matt Williams

In the past two years Congress has turned its attention to amending U.S. copyright law to permit the broad public use of so-called "orphan" works—works for which a copyright owner cannot be determined. Although amendments to the law were not adopted in the 109th Congress (which concluded in December 2006), the momentum for change in the coming years is building. The history of what spurred Congress to action is instructive to understanding the substance of the proposals now under consideration.

Congressional consideration of orphan works—including the preservation of physical copies (films)—dates back at least fifteen years. In the years preceding the passage of the 1998 *Sony Bono Copyright Term Extension Act*[1]—to the current term of the life of the author plus a seventy year term or ninety-five years for works made for hire—granting term extension to so-called "orphan works" (variously defined) was raised, albeit as a minor consideration.[2] Both supporters and opponents of term extension understood that the then proposed amendments would likely extend term to a broad sweep of commercially valuable and commercially insignificant works. Far more attention was paid and opposition raised to the somewhat related issue of whether to restore copyright to preexisting public domain works when (or if) terms were extended. Ultimately, the 1998 term extension provisions were adopted "retroactively," thus including preexisting works, but the changes excluded any works already in the public domain. The issue remained of what to do about all those works with little or no commercial value, and,

in particular, those for whom an original copyright author or current owner could not be found—including all those works after 1998 that were term extended.

At the same time that term extension was being debated, a more tangible problem surfaced relating to motion pictures: how to ensure the preservation of orphan work films regardless of their legal status (that is, whether copyright protected or public domain). It was understood then as now that many films of little or no commercial value might be of great aesthetic, cultural, educational, and/or historic value. It was also clear, after a seminal 1993 Library of Congress film preservation study, that these orphan works were the most vulnerable to loss. During preservation study hearings in Los Angeles, Roger Mayer (who now chairs the National Film Preservation Foundation) highlighted the need to increase efforts to preserve films that have "no father and no mother to take care of them."[3] The Report of the Librarian of Congress concluded that films, "often labeled 'orphans,' that lack either clear copyright holders or commercial potential to pay for their continued preservation" require the most urgent attention from the government and preservationists.[4] So a concerted effort was undertaken in the 1990s by the National Film Preservation Board of the Library of Congress and a sister organization—the National Film Preservation Foundation—to preserve endangered orphan films and, where possible, to make them more accessible to the public. The clear congressional purpose in the organic act of the National Film Preservation Foundation in 1996 (and again in the 2005 reauthorization) was to focus preservation efforts to save orphan films (defined as films "not protected by private interests").[5] These were steps in a process, still continuing today, to support the many public archives and museums ("orphanages") that collect, catalog, preserve, and restore these films.

The film preservation efforts directed to orphan films in the mid-1990s played an important role in focusing attention on the preservation of orphan works in general, as well as a part in the development of the pending potential legislative response. However, the 2006 legislation is in much larger measure a reaction to the 1998 term extension provisions (which treated all works, not just films). The new orphan works amendments would, if adopted, broadly extend access to and the use of orphan works whether newly created or long-since abandoned. The recent consideration for broad access to orphan works is a way of letting some of the steam out of the still-simmering opposition to term extension. More important, it is a way to recognize that, while copyright law may serve to encourage the creation and dissemination of works (especially commercially valuable ones), many copyright protected works already in existence have no determinable owner and, as a result, are restricted from many uses by the public.

The orphans issues are also the result of changes in copyright law during the past thirty years that have made it "substantially easier for an author to obtain and maintain copyright in his or her creative works" without the formalities of copyright notice, registration, and the like.[6] In addition, the laws have been successful. According to legal scholar Paul Goldstein, "There are more independent book publishers, record labels and motion picture companies than at any time in the

past."[7] But just as more films and other creative works are being spawned by artists and commercial investors, many copyrighted works either die quick deaths or are otherwise forgotten or neglected. This occurs for a variety of reasons, including the following: the vast cornucopia of that which is created but unable to be identified with its creators by users (i.e., without copyright notices on the works); original creators who have died without heirs, or the knowledge of heirs that works existed; works created by legal entities now out of business or partnerships that dissolved without a clear division of assets; chains of title that have grown cold (i.e., owners moved without a forwarding address, etc.); or works out of distribution for so long it is impossible to identify or locate the current rights holders.

The new orphans legislation is intended to reduce, or possibly even remove, the risks associated with use of certain "orphan" works, including films, under certain conditions. Clearly, the impetus and political climate that produced this move is the push-back from what some consider an increasing "expansion" of copyright protection, most visibly embodied in term extension. Opponents of term extension maintain it exacerbated preexisting problems associated with forgotten and neglected works.[8] Others have argued that increased terms actually promote the maintenance and preservation of creative works.[9] Nevertheless, the disagreements have placed a public spotlight on the issue of making orphans more accessible—which many copyright and user constituencies agree on—and thus have spurred congressional action.

On May 22, 2006, a bill was introduced in the House of Representatives: H.R. 5439, "The Orphan Works Act of 2006." Support for the bill grew from a broad public inquiry and report by the Copyright Office that revealed a large consensus among a diverse group of copyright owners and users for broad unauthorized uses of orphan works. For example, in nearly identical public commentary, the UCLA Film and Television Archive and the Motion Picture Association of America proposed ways to permit the otherwise unauthorized uses of orphan films including (but not limited to) not-for-profit performances of preserved and restored films. The broad consensus among the many public commentators is that legislation should provide clear steps for users of orphan materials to follow to severely limit or avoid liability.

The legislation was largely based on the Register of Copyrights' "Report on Orphan Works," which was released in January 2006 after the Office's public inquiry concluded. The report defined "orphan works" as "a term used to describe the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner"[10] and concluded that "there is good evidence that the orphan works problem is real and warrants attention."[11] It also concluded that the best way to address the "problem" is by limiting the remedies available to a copyright owner if a user of a copyrighted work makes a "reasonably diligent search" aimed at locating the copyright owner, prior to using the work, but is unsuccessful in her efforts. In such a scenario, under the Register's recommendation,

the user could use the work (so long as the user attributed the work to its creator, if known) subject only to liability to the copyright owner, if the owner should learn of the use and make herself known, for "reasonable compensation for the use."[12] In addition, if the user is a "noncommercial" user, and the user stops using the work upon the copyright owner making herself known, monetary relief would be unavailable to the copyright owner. Moreover, if the user "transformed the orphan work into a derivative work like a motion picture[,]" the copyright owner would not be able to enjoin the user from continuing to exploit the derivative work.[13] Otherwise, injunctive relief would be available, and the user would have to cease use.

While that legislation was largely based on the Register's report, there were some significant differences between the bill and what the Copyright Office proposed. For example, the legislation: (1) specifically required users of orphan works to "document" their reasonably diligent searches; (2) clarified that a reasonably diligent search may include paying for services aimed at locating the copyright owner; (3) required users to negotiate in good faith with resurfacing copyright owners regarding payment of reasonable compensation (which the legislation defines as "the amount on which a reasonable willing buyer and a reasonable willing seller in the positions of the owner and the infringer would have agreed with respect to the infringing use of the work immediately before the infringement began") or risk paying full damages; (4) initiated a public inquiry by the Register of Copyrights into potentially creating a kind of copyright small claims court in order to ease the burdens on litigants in cases involving "limited amounts of monetary relief"; and (5) delayed the effectiveness of the legislation by two years (thus making the new provisions effective on June 1, 2008). These changes were made, in the main, to address the concerns of organizations representing photographers and graphic illustrators. Those copyright creators fear that the legislation would negatively impact their members because of the particular difficulties associated with identifying and locating the owners of photographs and illustrations due to inadequate and/or nonexistent databases for locating such works, and the lack of attribution (on their works) that is currently the market norm.[14]

The photographers and illustrators preferred the introduced bill to the Register's proposal. However, they are unsatisfied with the 109th Congress' introduced bill, fearing that too many of their works will be incorrectly deemed to be orphans and thus used with little or no compensation. Their opposition is the reason why the legislation was not adopted last year; changes will likely need to be made to accommodate some, if not all, of their concerns.

Although the legislation was not adopted, it is likely to be reintroduced. Other changes could be made in the interim: for example, the identification of and access to orphan (and other) works could be improved if pre-1978 data was added to the Copyright Office's on-line database. The Office has requested funding for this project from Congress, but it is uncertain whether the monies will be appropriated. Even if no changes in the law are adopted, and the data-

base is not placed online in the near future, at least three exceptions in the existing copyright law intended to shield certain users of orphan works bear mention.

First, of course, is "fair use" (section 107 of title 17 of the United States Code). The statute provides a nonexhaustive list of four factors for courts to consider. The factors include the nature of the use, the nature of the work used, the amount of the work used, and the impact on the potential market for the copyrighted work. It is this provision that generally exempts parodies, news reports, and movie reviews from liability. In addition, the legislative history to the provision explicitly states that copying an entire film for the purpose of preservation (i.e., transferring nitrate to acetate) is a fair use.[15] Although the fair use doctrine is oft criticized for producing unpredictable outcomes,[16] and proposals exist to improve it,[17] the doctrine nevertheless provides a broad sphere of accepted unauthorized uses that benefit the public.

Second, section 412 of title 17 already limits the remedies available to copyright owners who fail to register their works with the Copyright Office prior to infringing activity by barring owners from seeking statutory damages or attorney's fees. This limitation serves to encourage registration (to fill the copyright database and the collections of the Library of Congress). But it is also of great value to a user screening a home movie at a film festival celebrating a hometown history or for incorporation into a documentary film, for example. Since home movies are rarely registered, such uses result in limited liability. Even if the use is determined to be infringing—that is, not otherwise a fair use and, even if these limited remedies are available only after the copyright owner registers the work—actual damages and any profits earned from the use (under section 504 of title 17) are prerequisites to filing suit under section 411 of the copyright statute. Thus, commentaries warning of the wrath of the copyright statute often overstate its dangers.

Third, section 108 of title 17 limits the rights of copyright owners by exempting public libraries and archives from liability for certain copying and distribution activities. Specifically, section 108(h) allows a public library or archive to reproduce, display, distribute, or perform a copyrighted work during the last twenty years of copyright protection for purposes of preservation, scholarship, or research so long as the work is not being otherwise commercially exploited or made available at a reasonable price. The application of this provision to audiovisual works was confirmed during passage of The Family Entertainment and Copyright Act of 2005, which included the "Preservation of Orphan Works Act."[18]

So, despite popular misconceptions, the copyright law does allow many unauthorized uses of copyrighted works—including orphans—for broad public access.[19] Still the orphans legislation would vastly improve access to a large array of works.

Last, more can and should be done by Congress to ensure the preservation of copyrighted works, including all audiovisual material, sound recordings, and the like. Preservation and access of orphan works should be treated hand and glove with each other. Unfortunately, the debates on the legal treatment of orphans has overshadowed the basic notion that if orphan materials are not preserved with a combination of public and private monies, then there will be no uses or rights left

to debate. As much time (and more money) needs to be spent caring for the orphanages (the libraries, archives, universities, historical societies, and museums that comprise the majority caretakers of orphan works, especially films) as on the orphans. These institutions preserve (and in some cases, restore) the materials, as well as store, catalog, and, ultimately, make accessible for on-site or, as permissible, off-site use in both analog and digital formats. The online distributors may be the digital folk heroes of Internet users, but these institutions are the workhorses that make any uses possible—and not just of film and other audiovisual materials, of course, but also of text, as well as photographic and audio materials.

At the very least, it would be enormously beneficial for orphan works legislation to acknowledge that the efforts and costs associated with preservation merit consideration under any reasonable compensation analysis. The Orphan Works Act of 2006 did provide that courts should "account for any harm that [injunctive] relief would cause the infringer due to its reliance on having performed a reasonably diligent search." However, the bill did not take such harm into account when considering monetary relief, i.e., reasonable compensation for the use. While the Register's report suggested that often reasonable compensation would be zero, it would be better to have explicit recognition in the legislation that the activities associated with preservation should not lead to liability for reasonable compensation until the costs of preservation are recouped.

In sum, the legislation to grant greater access to orphan works may remain stalled until the concerns of some creators (especially certain photographers) can be addressed. But the work of the orphanages to collect, preserve, and maintain these materials continues unabated.

Notes

1. *Sony Bono Copyright Term Extension Act*, Pub. L. No. 105–298, 112 Stat. 2827 (1998).
2. Copyright Office Hearing on "Duration of Copyright Term Extension," Docket No. RM 93-8, September 1993 (exchange between Eric Schwartz and Bernard Sorkin regarding the treatment of films in public archives).
3. Librarian of Congress, *Film Preservation 1993: A Study of the Current State of American Film Preservation*, vol. 1 (1993), 79. See also the Web sites of the National Film Preservation Board at http://www.loc.gov/film/ and the National Film Preservation Foundation at http://www.filmpreservation.org/.
4. Ibid., 5.
5. Pub. L. No. 104-285, 110 Stat. 3377 (1996); Pub. L. No. 109-9, 119 Stat. 224 (2005).
6. Copyright Office/Library of Congress. Orphan Works Notice of Inquiry, 70 Fed. Reg. 3,739, January 26, 2005.
7. Paul Goldstein, "Copyright's Commons," *Columbia Journal of Law & the Arts* 29, no. 1 (2005).
8. Cecil Kuhne III, "Forcing the Copyright Genie Back into the Bottle: Public Policy Implications of Copyright Extension Legislation," *Southwestern University Law Review* 33, no. 327 (2004); Deirdre Mulligan and Jason Schultz, "Accessing the Law: Neglecting the National Memory: How Copyright Term Extensions Compromise the Development of Digital Archives," *The Journal of Appellate Practice and Process* 4, no. 51 (2002).

9. Senator Orrin G. Hatch and Thomas R. Lee, "To Promote the Progress of Science: The Copyright Clause and Congress's Power to Extend Copyrights," *Harvard Journal of Law & Technology* 16, no. 1 (2002).
10. Register of Copyrights Marybeth Peters, Report on Orphan Works (Washington, D.C.: United States Copyright Office, 2006), 15.
11. Ibid., 2.
12. Ibid., 11.
13. Ibid., 12.
14. Hearing on Orphan Works: Proposals for a Legislative Solution: Hearing Before the Subcomm. On Intellectual Property of the Comm. On the Judiciary of the United States Senate, 109th Cong. (2006) (statements of Victor Perlman and Brad Holland).
15. Copyright Law Revisions, H.R. Rep. No. 94-1476, 73 (1976).
16. David Nimmer, "The Public Domain: 'Fairest of Them All' and Other Fairytales of Fair Use," *Law and Contemporary Problems* 66, no. 263 (2003).
17. David Nimmer, A Modest Proposal to Streamline Fair Use Determinations," *Cardozo Arts & Entertainment Law Journal* 24, no. 11 (2006).
18. *Family Entertainment and Copyright Act of 2005,* Pub. L. No. 109-9, 119 Stat. 218 (2005).
19. Goldstein, "Copyright's Commons."

"If You Can't Protect What You Own, You Don't Own Anything": Piracy, Privacy, and Public Relations in 21st Century Hollywood

by Jon Lewis

In a March 6, 2001, MPAA state of the industry address entitled: "Traveling that Sweet Road That Leads to Success," then MPAA President Jack Valenti affirmed what we all maybe knew anyway, that the movie industry is in great shape.[1] But such success, Valenti warned at the end of this 2001 speech, was threatened by the 270,000 movies illegitimately downloaded every day.

Valenti and his successor, Dan Glickman, continue to express concern over Internet and other forms of copyright piracy, but frankly the data hardly back them up. Internet piracy is up, but so are revenues. Profits in 2001 reached an all-time high of $7.7 billion. The year 2002 was even better than 2001. And in 2003 profits reached the $9.5 billion mark.

The key to the MPAA's problem with piracy is also the key to their current success. Movies are not just movies anymore. Industry profitability these days depends on the free movement of products through a series of ancillary and parallel entertainment markets. Films on average cost the studios $100 million to produce, advertise, and distribute. Domestic theatrical revenues account, on average, for only 16 percent of the total revenue of the average studio film. The remaining

Contributors

Patricia Aufderheide is a professor in the School of Communication at American University in Washington, D.C., and the director of the Center for Social Media there. She is the author of, among others, *Documentary: A Very Short Introduction* (Oxford, 2007), *The Daily Planet: A Critic on the Capitalist Culture Beat* (University of Minnesota Press, 2000), and *Communications Policy in the Public Interest: The Telecommunications Act of 1996* (Guilford Press, 1999). She has been a Fulbright and a John Simon Guggenheim fellow, as well as a board member of the Independent Television Service, which produces innovative television programming for underserved audiences under the umbrella of the Corporation for Public Broadcasting, and has served as a juror at the Sundance Film Festival among others. She received the career achievement award for scholarship from the International Documentary Association in 2006.

Peter Decherney is assistant professor of cinema studies and English at the University of Pennsylvania. He is the author of *Hollywood and the Culture Elite* (Columbia University Press, 2005) and articles on film, media, and copyright history. He is currently working on a book on the history and future of film copyright.

Peter Jaszi teaches at the Washington College of Law of American University in Washington, D.C., where he also directs the Glushko-Samuelson Intellectual Property Law Clinic. He specializes in domestic and international copyright law. Professor Jaszi is an experienced copyright litigator and a frequent speaker to professional audiences in the United States and abroad. He also coauthors a standard copyright textbook. Alone and with Martha Woodmansee, he has written several articles on copyright history and theory; together they edited *The Construction of Authorship*, published by Duke University Press. In 1994, Professor Jaszi was a member of the Librarian of Congress Advisory Commission on Copyright Registration and Deposit. Since 1995 he has been active in the Digital Future Coalition, which he helped to organize. He is a Trustee of the Copyright Society of the U.S.A. and a member of the editorial board of its journal.

Jon Lewis is a professor in the English Department at Oregon State University. He is the editor of *Cinema Journal* and the author of several books, including *Hollywood v. Hard Core: How the Struggle over Censorship Saved the Modern Film Industry.*

Eric J. Schwartz is a copyright attorney at Mitchell Silberberg & Knupp LLP in Washington, D.C. He is also the founding director and a board member of the National Film Preservation Foundation, and has served as a counsel to the National Film Preservation Board in the Library of Congress since its inception in 1989.

Fred von Lohmann is a senior staff attorney with the Electronic Frontier Foundation, specializing in intellectual property issues. In that role, he has represented programmers, technology innovators, and individuals in litigation against every major record label, movie studio, and television network in the United States. He recently served as counsel to StreamCast Networks through the Supreme Court proceedings in the *MGM v. Grokster* case. In addition to litigation, he is involved in EFF's efforts to educate policymakers regarding the proper balance between intellectual property protection and the public interest in fair use, free expression, and innovation.

Matt Williams is a 2006 graduate of the American University Washington College of Law and an associate at Mitchell Silberberg & Knupp in Washington, D.C.