

Orphan Works talk for 4/12/2012

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I'm a moving image archivist and filmmaker who's been working with orphaned works for about 30 years, and I think I'm the only maker on the panel. I've used them in my own films, which I'll talk about in a moment, and furnished archival material to tens of thousands of users for a fee and millions more for free. Our collection at Internet Archive has racked up about 25 million downloads and views since we started counting, and I think YouTube and other mirrors would more than double that number. Our work's pretty conspicuous, but we've never once received an authentic copyright claim regarding anything we've distributed physically or online. We've received a few claims, but they've come from gold-diggers claiming copyrights that never existed or from studio bots confusing our filenames with their properties.

We work with both public domain and orphaned materials. When I started building a collection in 1982, I chose to collect what I called ephemeral film -- advertising, educational, industrial, sponsored films and home movies. Ephemeral films are the

predominant forms of moving image expression in this country, and there are a lot of them. Without counting home movies, whose quantity approaches infinity, some half-million ephemeral films were probably made before film died out, and I'm not even going to try to count how many were made afterward. Just about every company, school, university, association and group made films, just as they put up webpages today. These works weren't meant to last. Ephemeral films were made for specific purposes at specific times, and when their time was up, no one bothered to put the materials in archives or renew copyrights. Of some 500,000 films, almost all are either public domain or orphaned.

These days I focus on home movies and amateur films. These are quite a different animal. In the sense that copyright law speaks of publication, you can count the number of home movies that were formally published on a few hands. There are a very few exceptions, like the Tacoma-Narrows Bridge collapse, shot by owners of The Camera Shop in Tacoma, published by Paramount and later by the photographers themselves. Practically all home movies are therefore unpublished works, often by authors whose death date is unknown, and as such would be under copyright protection unless they were created before 1892, if I read Peter Hirtle's chart correctly. But home movies as we know them date back only to 1923. This looks like an issue. Now, any of you who watch the so-called History Channel or

keep abreast of historical programs on television know that producers use a lot of home movies in their documentaries. Why? They're personal expression rather than corporate expression; they can humanize historical events; and there's often no better way to recall a place and time than looking at vernacular records made by ordinary people. No one talks about it, but many, perhaps most, of the home movies you see in documentaries are orphaned works.

At the moment we have about 8,000 home movies. Home movies, as you can see from the "Corn" film I'm showing, span the spectrum from ridiculous to sublime. They're interesting on many levels, but one striking attribute is that in most cases we don't know who shot them. Perfect orphan works, right? So if we choose to scan, distribute or give them away, we're theoretically tickling the dragon's tail. But as I said, the dragon hasn't stirred in thirty years. What might this tell us as we think about a remedy for the orphan problem?

Well, when we think about reusing orphan works, we can think about several different classes of use.

One kind of use is highly visible. Think of the filmmaker making a documentary for HBO, the advertising art director, the historian with a trade book contract or the

reprint publisher. Each of these seeks to avoid the risks incumbent in using works whose status is uncertain or unknown. But crucially each of them inhabits a world where licensing is an everyday practice. And typically copyright claimants expect compensation when use of their works occurs at this level. This kind of use doesn't happen very often when compared to other sorts of use, but when it does it carries high value.

Another kind of use is less visible -- it occurs within contingent groups. This might include use within institutional walls, within archives and libraries, in class readers, within the art world or as part of experimental film, perhaps even in online resources cloistered behind paywalls. It might also include use of works in live, one-time presentations that are conspicuous but ephemeral. In these situations, reusers gain security through obscurity.

And then there is ordinary, everyday use, whether on a personal website, via YouTube or Facebook, or via photocopying and personal exchange. These are the billions of unbillable events that are now combining into an accelerando of personal expression. These are citations, quotations, samples and extracts that we edit into our personal timelines as references not only to what we've done but to what we've heard, seen, read or played. This is also remixing -- the kind of popular authorship

we celebrate as an index of an emerging participatory culture. Everyday use comes in many flavors, but I especially like two: it's often sociopolitical commentary, and it's one means by which emerging generations and newer Americans come to their own terms with the cultural heritage they've inherited.

If Ken Burns documentaries, *Mad Men*-themed commercials and books from Random House are the 1% of orphan reuse, we might call this last category the 99%.

When we talk about a new regime to ease reuse of orphan works, I'm afraid we're all too often talking about minimizing risks for the 1%. And the wide spectrum of creativity we see, for instance, on YouTube -- which is the work of millions upon millions -- isn't likely to be assisted by new laws. It's likely to be pinched, or even crippled, especially when content controllers or distributors find ways to turn their claims into fences, gates and locks. And even more when they overreach, as they often do.

When we see a disjunction between an existing legal regime and current practice, we're of course tempted to try and change the law. Uncertainty also creates a perceived need for bright-line tests. But I wonder whether some of the changes

under current discussion will put the collective "us" in a better position than we are now.'

Registries. The lower the barrier to entering works in registries, the more bad information will come in. Look at YouTube's ContentID registry, where false claims abound and the DMCA appeals process has been hobbled so there is no real redress for those wrongly targeted as infringers. And what about orphaned works that no one registers? They seem ripe for generating false claims. Mere presence in a registry, even if this constitutes nothing more than a claim, might be used to intimidate, just as unsubstantiated copyright claims are used now. Plus, I can't imagine a registry expansive enough to include the kind of works I'm showing examples of today. And what kind of collecting society would be an appropriate administrator of a collective licensing scheme for them?

Diligent searches. Wikipedia pointed me to the page showing decisions about orphan works reuse made by the Copyright Board of Canada. (<http://www.cb-cda.gc.ca/unlocatable-introuvables/licences-e.html>). Here's a case where an apparatus exists to vet petitions for reuse. It grants most of them, but there seems to be a level of absurdity I wouldn't want us to emulate. Many of the petitions, for

example, concern people remodeling their home who want to make a copy of their house plans but can't find their original architect.

I've been using home movies for six years in my *Lost Landscapes* programs, which feature archival film relating to the histories of San Francisco and Detroit. Most of the time I cannot ask permission, and because this is a pro bono project I couldn't ever afford to. And I just received a Creative Capital grant for my new feature project, *NO MORE ROAD TRIPS?*, which examines the history and future of travel and mobility in America. The film will be made almost completely out of home movies, most of which have no clear line or origin or chain of title. I had to indemnify my funder against anything that will arise out of my use of this material, but thirty years of experience makes me feel that this will be OK.

I worry that an expansion of copyright formalities undertaken in the spirit of fair play will actually throttle free expression, even as it removes certain anxieties faced by high-level creators and their errors and omissions insurance carriers. I also worry that complex procedures governing reuse of orphan works will increase popular confusion around what copyright law actually says, as well as increase disrespect and disregard for the law. After years of interacting with members of the public about copyright, I've come to the conclusion that most people tend to feel

quite passionately that copyright law is what they want it to be. If you disagree, I'd refer you to any online public forum concerned with rights and clearances -- Petri dishes for the production of inaccurate and self-serving ideas. Or may I suggest you try to correct the thinking of a Kinko's store manager when she says that everything bearing a date after 1900 is in copyright and can't be copied.

Finally, speaking as an archivist, I'm acutely aware of the fiscal and physical constraints that archives are now facing. The twentieth- and twenty-first century archival records are massive, and we can't keep everything. Uncertainty about copyright status is one thing; complex reuse procedures with high transaction costs, especially in an age when archival access means reuse much more than research, is another. I fear that tightening reuse procedures will function as a disincentive for many archives to collect what they cannot digitize and disseminate.

Let's make sure we're not proposing laws that benefit high-level content creators and aggregators while throwing the activities of the 99% into question. Let's rather think about what works right in today's imperfect system, and what we might lose with overly complex solutions. And finally, when we apply remedies, let's do it homeopathically, in ways that allow us to back off if the solution turns out to be worse than the problem.



