

Statement of Gregory Lukow  
Chief, Packard Campus for Audio Visual Conservation  
Library of Congress  
Before the  
Subcommittee on Courts, Intellectual Property and the Internet  
Committee on the Judiciary  
U.S. House of Representatives  
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Chairman Goodlatte, Chairman Coble, and members of the Subcommittee: I appreciate the opportunity to participate in today's hearing on "Preservation and Reuse of Copyrighted Works." As Chief of the Library of Congress Packard Campus for Audio Visual Conservation, this statement will necessarily focus on problems and challenges facing the Library's audiovisual collections. However, the issues raised by this timely hearing — including orphan works, Sec. 108 and mass digitization — profoundly impact the Library's ongoing attempts to acquire, preserve and make available the American cultural record contained in the 158 million items in all its varied formats and collections.

The Library of Congress has the largest and most wide-ranging collection of the world's recorded knowledge ever assembled by any one institution, and also the closest thing to a mint record of the cultural and intellectual creativity of the American people. It was created and has been sustained for 214 years by the Congress of the United States. The Library has encouraged, protected, and preserved America's creativity through the work of the Copyright Office since 1871, served the Congress directly for nearly 200 years with the nation's largest law library, and acted as the Congress' primary research arm for 100 years through the Congressional Research Service.

**Overview: Library Preservation and Access**

Our mission is to support the Congress in fulfilling its constitutional duties and to further the progress of knowledge and creativity for the benefit of the American people. We accomplish this by acquiring, preserving, and providing access to a universal collection of knowledge and the record of America's creativity. Today's Library of Congress is an unparalleled world resource: more than 158 million items, including more than 36.8 million cataloged books and other print materials in 470 languages; more than 68.9 million manuscripts; the largest rare book collection in North America; and the world's largest collection of legal materials, films, maps, sheet music and sound recordings.

Though we have made great progress in preserving substantial parts of our collections thanks to the support of the U.S. Congress and the American public, we face numerous, formidable impediments in making this content available for research and scholarship. Copyright law restricts libraries' ability both to preserve collections, especially sound recordings and audiovisual works, and to provide access to preserved works. Recently, the promising advent of digital technologies has enabled us to preserve vastly more of this heritage for the long-term future, yet we are legally unable in many cases to make these priceless collections available to

researchers or the public now. We face a cruel irony: the tantalizing promise afforded by our increased preservation capabilities is often not realized since the public cannot access this content beyond the controlled environment of our Washington, DC reference centers.

At the Library of Congress, our main concerns involve non-commercial titles, where the problems are most acute. Copyrighted works possessing commercial value historically have a better record of being made publicly available, though there remain substantial portions of still-copyrighted film and recording industry collections not accessible to the general public. Many issues involving commercial works can be addressed, to some extent, through partnerships; the Congress encourages interested parties to find common ground and solve difficult issues whenever possible.

Non-commercial works, however, do not lend themselves to such arrangements and would be vastly aided by legislative remedies. Much of the vast film, television, radio and recorded sound materials in our collections have been out of print for decades and are in effect orphaned works in that the companies that own rights to these materials do not currently make them available to the public, from lack of commercial incentive to do so, absence of business models, or other reasons. Our statement focuses not only on orphan works, whose status results from ownership questions, but also on these “marketplace orphans.” Although these “marketplace orphans” have little or no commercial value to their rights holders, many are of great historic, cultural or aesthetic value to researchers, educators, and the general public. Examples from the audiovisual collections include:

- **Films:** silent era, educational, ephemeral, independent, home movies, avant-garde, and advertising films.
- **Other moving images:** video and digital productions, local television news, the American Archive of Public Broadcasting (described in more detail below).
- **Sound recordings:** radio broadcasts, monaural classical musical recordings, many other pre-1955 works, ethnic recordings, poetry and other spoken word and vast quantities of “non-commercial” recordings found in many other genres.

Another focus of this hearing, mass digitization, does not affect simply preservation of and access to books. As the Copyright Office has noted, 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 in all formats and, in particular, collections with multiple rights holders such as manuscript correspondence files and sound recordings featuring many layers of rights ownership.

Time is of the essence. Waiting until deterioration is evident, as the law currently requires, not only is counter to best preservation practice, it also significantly and permanently devalues the archived preservation file which will in time be the only/best surviving copy.

## **Library Priorities for Statutory Change**

**1) Modernize Sec. 108 so that the Library of Congress can fulfill its mission to preserve audiovisual and other materials.** Several parts of Sec. 108 do not apply to audiovisual materials. As a result, these items do not enjoy certain valuable preservation and access exceptions granted to other works. This section of the copyright law should not favor one format over another and its provisions should apply equally to all works. Sec. 108 needs to be updated for the digital age and with language applicable to all formats. In addition, subsection 108(c), which was designed to help libraries and archives preserve their materials, in reality only allows these institutions to preserve materials already damaged or in a state of deterioration. In order to preserve fragile, at-risk audiovisual materials, the Library must be able to legally make copies of materials *before* they are damaged or deteriorating.

**2) Expressly address the orphan works issue in copyright law.** The dilemma of orphan works plagues audiovisual collections daily. Put simply: our inability thus far to solve this issue is a key factor leading to the unavailability of countless parts of our moving image and sound recording heritage. We need a common-sense compromise legislative solution to this vexing problem; doing so will benefit archives, copyright owners, the general public, and rights-holders both known and unknown. At the end of this statement I have appended three of the case studies the Library submitted to the Copyright Office as it again considers solutions to the orphan works problem.<sup>1</sup>

**3) Federalize pre-1972 sound recordings.** Thanks to quirks in the development of U.S. copyright law, these works have never been brought under federal copyright protection. This anomaly creates many vexing preservation, access and rights issues, as the works are covered by common law or a myriad of disparate state laws. Pre-1972 sound recordings must be brought under the federal copyright regime, a recommendation we note was recently voiced in the U.S. Copyright Office's 2011 report on this topic.

## **The Role of the Packard Campus for Audio Visual Conservation**

The Packard Campus was created through a unique partnership among the Packard Humanities Institute, the U.S. Congress, the Library of Congress, and the Architect of the Capitol. The Library of Congress Packard Campus for Audio Visual Conservation [<http://www.loc.gov/avconservation/>] is a state-of-the-art facility funded as a gift to the nation by the Packard Humanities Institute. Located in Culpeper, VA, this is where the nation's library acquires, preserves and provides access to the world's largest and most comprehensive collection of motion pictures, television programs, radio broadcasts and sound recordings.

Our holdings presently number more than 5 million items (1.5 million moving image and 3.5 million recorded sound). But this is by no means a static collection; each year we acquire around 50,000-100,000 new items. Our robust preservation "factory" preserves nearly 40,000 items annually from existing collections, focusing on those most at-risk or which represent unique or best surviving copies.

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<sup>1</sup> Library of Congress "Orphan Works" comments may be accessed at:  
[http://www.copyright.gov/orphan/comments/loi\\_10222012/Library-of-Congress.pdf](http://www.copyright.gov/orphan/comments/loi_10222012/Library-of-Congress.pdf)

These collections of invaluable intellectual property are protected through stringent security measures and safeguards. We provide staff support for the Library of Congress National Film Preservation Board ([www.loc.gov/film](http://www.loc.gov/film)) and the National Recording Preservation Board ([www.loc.gov/nrpb](http://www.loc.gov/nrpb)), which develop and maintain the national moving image and recorded sound preservation plans, in addition to the national registries for film and recorded sound.

### —*Moving Image Preservation and Access*

The Library’s vast film collection begins with the oldest surviving motion picture registered for copyright: *Edison Kinetoscopic Record of a Sneeze*, dating back to January 1894. From 1894 until 1912, over 3,300 films were registered for copyright in the form of reels of photographic contact paper, or “paper prints” as they came to be known. These deposits of film transferred to photographic paper were necessary because copyright law did not yet allow for the registration of celluloid motion picture film, for the simple reason that celluloid motion pictures did not yet exist when the law was written. Because of this historical quirk in copyright law, “paper prints” have ensured the survival of these important early works of American cinema. Later, when the Copyright Act of 1912 recognized celluloid motion pictures as a copyrightable format, film companies began submitting nitrate film prints for copyright registration. However, the Library had no suitable storage for flammable nitrate film stock, and so returned the deposits to claimants; it wasn’t until 1942 that the Library acquired vaults specifically for nitrate storage.

During this three-decade gap, many thousands of titles disappeared through deterioration, fire, and neglect from perceived commercial irrelevance. The general consensus is that approximately 50% of American films produced before 1951 (the year that non-flammable “safety” film was introduced) no longer survive. This astonishing rate of loss serves as a cautionary tale and vivid demonstration of the need for archival custodianship of these collections.

Film is a fragile medium and motion pictures of all types are deteriorating faster than archives can preserve them. The Library slows this inevitable decay through environmentally controlled storage and copying endangered works onto more durable formats. We devote much of our current effort in attempts to locate and preserve surviving copies of these titles.

Regarding silent-era feature films, the Library published in December 2013 a detailed study of the survival rate of approximately 11,000 U.S. feature films produced between 1912 and 1929<sup>2</sup>. Among the study’s findings:

- Approximately 70 percent no longer survive, even in incomplete versions. These staggering losses include: Lon Chaney’s *London after Midnight* (1927); *The Patriot* (1928); *Cleopatra* (1917); *The Great Gatsby* (1926), and all four of Clara Bow’s feature films produced in 1928, including *Ladies of the Mob*. Only five of Will Rogers’ 16 silent

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<sup>2</sup> *The Survival of American Silent Feature Films: 1912-1929*, by David Pierce. Available for download at <http://www.clir.org/pubs/reports/pub158>

features have survived and 85 percent of features made by Tom Mix—Hollywood’s first cowboy star—are lost.

- Fourteen percent of the feature films produced domestically from 1912-1929 survive in their original-release 35mm format.
- Eleven percent of the films are complete only as foreign versions or on lower-quality formats, such as 28mm or 16mm.
- Five percent are incomplete, either missing a portion of the film or existing only as an abridged version.
- Of the more than 3,300 films that survived in any form, 26 percent were originally found only in other countries.
- Of the American silent films located in foreign countries, 24 percent already have been repatriated to an American archive.

We have created an online database<sup>3</sup> listing these nearly 11,000 titles and holdings for those that survive. This provides a crowd-sourcing resource where the public can identify extant materials for titles previously considered lost. Through this process, we hope to locate and preserve many of these works that have been lost owing to deterioration and disinterest since they were assumed to have no commercial value.

While qualified researchers can access nearly the entirety of the Library’s moving image collection in our Capitol Hill reference center, we are increasingly focused on making more content available online. Currently, the Library makes fewer than 600 public domain titles available for viewing on its web site, although we have ambitious plans for adding many hundreds more in the next few years.

At the same time, the number of non-public domain titles we can mount online is restricted by the length of copyright protection and, in some cases, the impossibility of obtaining permissions. As a result, access to critically important 20<sup>th</sup> century collections is currently restricted to those who can afford a research visit to Washington, DC. The current environment of corporate reorganization and consolidation creates a maze of further uncertainty in the rights environment.

These issues are not unique to film; they also impact our broadcast video and other television collections, including the *American Archive of Public Broadcasting*. In August 2013, the Library of Congress entered into a collaborative agreement with WGBH in Boston for the management and oversight of this archive, an initiative designed to preserve for posterity historical public broadcasting programs – both radio and television – that currently are at risk of deterioration. A study commissioned by the Corporation for Public Broadcasting (CPB) concluded that the American people had invested over \$10 billion in programs that were no longer available to them. In the first phase of this initiative, the Library, with funds supplied by CPB, will preserve approximately 40,000 hours of programming selected by more than 100 public broadcasting stations in some 35 states from materials that have sat for decades on shelves in their storerooms. The Library plans to make this material accessible to researchers visiting its reference centers. In addition, once rights are secured, the Library and WGBH plan to make as much of this material as possible available to the general public via the American Archive website. Some of these

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<sup>3</sup> <http://lcweb2.loc.gov/diglib/ahas/html/silentfilms/silentfilms-home.html>

programs that are not owned by public media entities are now considered to be orphan works, including *Mingus* (discussed below), which was aired on National Educational Television in 1971.

### —*Recorded Sound Preservation and Access*

Experts estimate that more than half of the titles recorded on cylinder records – the dominant format used by the U.S. recording industry during its first twenty-three years – have not survived. The archive of one of radio’s leading networks is lost. A fire at the storage facility of a principal record company ruined an unknown number of master recordings of both owned and leased materials. The wire recording made by crew members of the *Enola Gay* from inside the plane as the atom bomb was dropped on Hiroshima has disappeared. Key recordings made by George Gershwin no longer survive. Recordings by Frank Sinatra, Judy Garland, and other top recording artists have been lost. Personal collections belonging to recording artists were destroyed in Hurricanes Katrina and Sandy.

Of the 46 million sound recordings that currently do exist in the nation’s libraries, archives, and museums, millions, perhaps as many as 20 million, are in urgent need of preservation or they, like those recordings destroyed by Katrina, may be lost as well, according to a recent study. Digital technologies can significantly aid in preventing this. Yet digital reformatting of large audio collections is costly. Funders often stipulate that public access be provided for the digitized materials they pay to preserve. Broad access to historical recordings generates support for audio preservation.

Congress recognized the connection between preservation and access when it passed the National Recording Preservation Act of 2000 to implement a “comprehensive national sound recording preservation program” with one of its objectives to “increase accessibility of sound recordings for educational purposes.” The Act called on the Librarian of Congress to create a National Recording Preservation Board, in part to create a study to report on preservation and access challenges. The report titled one of its chapters, *Preservation, Access, and Copyright: A Tangled Web*. In today’s world, the study concluded, “preservation and access have become joined, locked together in the realm of sound recordings.”

Legal impediments to broadened access have created daunting challenges for the national preservation effort. Few historical recordings can be made available online legally because of idiosyncrasies in the U.S. copyright law. Federal copyright protection does not apply to recordings produced before February 15, 1972, leaving them subject to a complex network of disparate state laws. For orphan works, copyright owners cannot be identified or located.

In order to implement the national sound recording preservation program mandated by Congress in 2000, the Library of Congress in December 2012 published 32 recommendations for action in a National Recording Preservation Plan.<sup>4</sup> The recommendations were crafted by six task forces comprising specialists representing archivists, librarians, academia, the record and music industries, and private collectors.

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<sup>4</sup> The complete Plan can be accessed at: <http://www.loc.gov/rr/record/nrpb/PLAN%20pdf.pdf>

The Plan concluded that broader access to sound recordings can only be achieved if federal copyright protection is applied to sound recordings produced prior to February 15, 1972. This key proposal, discussed in more detail below, will create a more streamlined legal framework for sound recordings, enabling libraries and archives to copy and disseminate/provide access to orphan works; it would also enable a revision of Sec. 108 to clarify libraries and archives' rights to copy, preserve and reproduce materials in all formats for purposes of public access to further private study, scholarship, and research.

### **Statutory Changes: Library Proposals and Justification**

#### **—Sec. 108: Revise to facilitate preservation and expand public access to sound recordings, films and broadcasts.**

Sec. 108 was enacted to grant certain exceptions and identify specific circumstances under which libraries and archives can legally make copies, including preservation and replacement copies. In addition to fair use under Sec. 107, Sec. 108 also grants crucial exceptions allowing libraries and archives to reproduce materials for purposes of public access to further private study, scholarship, and research. Although these exceptions have been amended over the ensuing years, they are still exceedingly narrow, leading the *Section 108 Study Group* appointed by the Library of Congress and the Copyright Office to conclude in 2008 that the law reflects the pre-digital era and “embodies some now-outmoded assumptions about technology, behavior, professional practices, and business models.”<sup>5</sup>

Furthermore, like films and non-news broadcasts, all post-1972 sound recordings that embody musical works are excluded from exemptions in subsections 108(a) and (d)–(g), while pre-1972 recordings are wholly ineligible for *any* Sec. 108 exemptions.

The following legislative amendments to Sec. 108 are recommended:

- *Make all U.S. sound recordings, including those fixed prior to February 15, 1972, subject to Sec. 108 of the Copyright Act of 1976.*

Because U.S. sound recordings made before 1972 are not subject to federal copyright law, they are currently not eligible for Sec.108 exceptions. Legislative action to bring pre-1972 sound recordings under copyright law would resolve this problem. As an alternative approach, should pre-1972 sound recordings not be placed under federal copyright protection in the near future, Congress should pass an amendment stipulating that Secs. 107 and 108 apply equally to all sound recordings—regardless of whether they are governed by state or federal law.

- *Revise subsections 108(b) and (c), which govern the reproduction of unpublished and published works, to allow for the use of current technology and best practices in the preservation of film, video, and sound recordings.*

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<sup>5</sup> Background on the Study Group and the full report can be accessed at: <http://www.section108.gov/>

Subsections 108 (b) and (c) present several obstacles to the preservation of sound recordings and other audiovisual works that must be ameliorated.

First, the three-copy limitation on reproduction must be amended to accommodate best practices in the digital era. Nonprofit institutions should be permitted to make a reasonable number of copies of both published and unpublished sound recordings and other audiovisual works for replacement and preservation purposes, which requires the ability to produce and archive digital files in excess of the three-copy limit.

Second, the narrow focus of subsection 108(c), which limits duplication solely to *replacement* copies of a published work that is damaged, deteriorating, or in an obsolete format, must be expanded. Both replacement and preservation copies should be allowed for at-risk recordings, and copying must be allowed *before* damage or deterioration has compromised the medium.

Third, the prohibition of offsite lending of digital replacement copies should be amended. Libraries and archives should be allowed to lend digital replacement copies for scholarly and research purposes under specific circumstances, such as when the original copy is in a physical digital medium that can lawfully be lent offsite and the replacement is in an equivalent format.

- *Revise subsections 108(d) and (e) to allow for the secure electronic delivery of digital copies for private study, scholarship, and research.*

Electronic access under subsections 108(d) and (e) should be permitted if adequate measures are taken to ensure that access is provided only to the designated single user and to prevent unauthorized reproduction or distribution of the work. Recent technological innovations have created various options for streaming audio files, and a growing number of companies provide password-protected secure streaming services. Record companies, film studios and television producers use secure sites to stream recordings (or even offer downloads) to members of the press for publicity and review.

Libraries and archives should likewise be allowed to use these services, or to establish their own secure networks, to stream out-of-print recordings to researchers. Even if the streaming is limited to an interlibrary loan type service (library A streams requested recording to library B, where the researcher listens on-site), this would be a major step toward providing access to out-of-print recordings.

- *Make sound recordings fixed prior to February 15, 1972, subject to subsection 108(h). For sound recordings produced prior to 1961, make subsection 108(h) applicable in the last 45 years of their copyright term (rather than the last 20 years, as is currently the case with other works) provided that the works are not commercially available or cannot be obtained at a reasonable price. For recordings made in 1961 or after, make subsection 108(h) applicable in the last 20 years of their copyright term.*

This recommendation, by a Library of Congress task force convened to advise on the development of the National Plan with regard to copyright and audio preservation, is the result of several factors. Subsection 108(h) was intended to mitigate the impact of lengthening copyright terms by 20 years as required by the Copyright Term Extension Act of 1998, which provided libraries and archives and their users “the benefit of access to published works that are not commercially exploited or otherwise reasonably available during the extended term.” Subsection 108(h) recognizes that very few works are still commercially exploitable near the end of their copyright life, although many may be of great historical, cultural, and research importance.

Applying subsection 108(h) to sound recordings fixed prior to 1972 would allow qualified libraries and archives to reproduce, distribute, or display in digital form a work toward the end of its term of copyright protection for purposes of preservation, scholarship, or research, provided certain benchmarks are met. Specifically, a library or archive could make a recording available if it is not otherwise subject to normal commercial exploitation by its owner and no copy can be obtained at a reasonable price. If either of these conditions applies, or if the copyright owner claims that either condition applies, the library or archives should not be able to take advantage of the exception provided in subsection 108(h).

The task force recommended further that Congress make subsection 108(h) applicable to all sound recordings in their last 45 years of copyright term rather than in their last 20 years, as is currently the case with other works, provided that the works are not commercially available or cannot be obtained at a reasonable price. The task force agreed that applying subsection 108(h) to the last 45 years of copyright protection of sound recordings offers the best hope of providing the certainty and clarity that libraries and archives require to preserve recordings in their collections and make them accessible for scholarship or research.

As an alternative, the task force proposed that libraries and archives should be able to provide access to copyrighted sound recordings during their last 20 years of copyright, as is the case with subsection 108(h) as currently written. This would not be as useful an exemption to scholars and researchers as one based on the last 45 years of copyright term. Its clarity and consistency with existing law, however, makes it an acceptable alternative to libraries and archives, especially when coupled with a copyright term based on fixation and not publication (thus clarifying many of the uncertainties as to what constitutes the last 20 years of term). Libraries and archives could reproduce, distribute, display, or perform in analog or digital form a copy of a sound recording during its last 20 years of copyright term so long as the original recording is not subject to normal commercial exploitation or a copy of the recording cannot be obtained at a reasonable price.

The copyright status of U.S. recordings will not be affected if this recommendation is enacted into law; all recordings still will be protected. Underlying rights in musical compositions or texts and rights in album artwork, photographs, etc., will remain protected under the *status quo* copyright law. This longer “window” will allow a limited exception to copyright for the purposes of private study, scholarship, or research for

sound recordings that are not commercially available and for which rights holders have not indicated a desire to make them available at a later date.

The potential impact on rights holders will be minimal. A report on the availability of historical recordings commissioned by the National Recording Preservation Board<sup>6</sup> found that for the period 1955 to 1959, only 34 percent of recordings of historical interest were available on compact disc from the owners; for earlier years, the percentage was much lower.

The Library's task force on copyright and audio preservation acknowledged that lengthening the period of the subsection 108(h) exemption beyond the term granted under the Copyright Term Extension Act could be perceived as having an unintended negative impact on the rights holders of underlying musical works. Therefore, the task force recognized that if Congress allows libraries to make sound recordings accessible during the 20th to 45th years of the remaining copyright term (as opposed to only during the last 20 years), libraries may be required to pay mechanical reproduction fees to the owners of rights in the underlying work when such rights exist (i.e., the underlying work is not in the public domain).

These recommendations are made because many older recordings and other audiovisual works of great historical, cultural, and research importance are not available in the marketplace. The recommendations are intended only to allow libraries and archives to fulfill valuable cultural and historical functions by making these noncommercial works accessible, and only because they are not otherwise being made available by the rights holders. Those audiovisual works that still have commercial viability will be excluded from this provision, as subsection 108(h) applies only to works that are out-of-print.

*• Amend subsection 108(i) so that out-of-print sound recordings and audiovisual works fall under the provisions of subsections (d) and (e), regardless of content.*

Subsection 108(i) summarily excludes musical works and audiovisual works other than those dealing with news from the provisions of subsections 108(d) and (e), which govern access copies for users; this exclusion severely limits opportunities for private study, scholarship, and research. Providing limited access to out-of-print recordings and other audiovisual works under section 108 provisions would cause no market harm. Subsection 108(i) should be amended so that sound recordings and other audiovisual works are eligible for subsections (d) and (e), regardless of content, provided they are out-of-print. This would make the treatment of audiovisual works and musical sound recordings consistent with that of other forms of intellectual property.

**—Orphan works: Enable audiovisual materials, including recordings, whose copyright owners cannot be identified or located to be more readily preserved and accessed legally.**

Orphan works are a serious issue throughout the Library. Potential users of orphan works, who have been unable to obtain permission to use the works legally, often refrain from making

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<sup>6</sup> The study can be accessed at: <http://www.loc.gov/rr/record/nrpb/pub133.pdf>

productive and socially beneficial use of them, fearing the possibility of liability for copyright infringement; this is a situation that the U.S. Copyright Office has characterized as “not in the public interest.” Such potential users include libraries and archives committed to preserving orphan works and making them accessible to the public for educational purposes.

Legislation designed to create a legal framework to facilitate the authorized use of orphan works would greatly benefit the archival community. A legal study commissioned by the National Recording Preservation Board concluded, “If such legislation is ultimately enacted, a limitation of liability for copyright infringement for orphan works could provide greater security for libraries that wish to copy and disseminate such works.” Orphan works legislation will facilitate preserving and making accessible older recordings as well as those produced in the recent past.

However, sound recordings that were fixed before February 15, 1972, will not be covered under orphan works legislation unless Congress also extends federal copyright protection to these works. The confusing and highly restrictive state and common law statutes that govern pre-72 recordings have no orphan works provisions. There are hundreds of thousands of out-of-print recordings dating back to the late 19th century that will in all likelihood never be re-issued because they have little or no commercial value to the rights holders. These “marketplace orphans” include long forgotten but historically significant popular, classical, operatic, and spoken word recordings that are under the control of companies that have no profit incentive to digitize and make them available. Institutions and private citizens who have collected these important cultural artifacts cannot digitize and share them under current copyright law. The end result is that a vast and vital part of America’s audio legacy has fallen out of our collective memory and now stands a significant risk of permanent loss. Should Congress enact orphan works legislation, even in the absence of federal protection for pre-1972 sound recordings, it is crucial that the legislation apply to works protected under state statutes and common law.

The Library also has more than 1,000 reels of unidentified silent films in its collection. These film reels are orphaned in several respects—not only are their rights holders unknown, but their very titles are lost. In June 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 **Appendix: Case Study 1**). During the course of on-site screening of more than 100 films, participants identified over half the films and provided additional information that may facilitate identification of many more. Were the Library able to make this workshop “virtual” by invoking an orphan works exemption to put low-resolution versions of orphaned films online, it could enlist cultural historians, film professionals and aficionados from around the world to crowd-source the identification, exponentially expanding knowledge about the films. Another workshop is planned for this coming July.

The unsettled legal status of orphan works is having a deleterious effect on the accessibility of great swaths of this country’s unparalleled cinematic heritage. Here are three examples drawn from nearly daily occurrences:

- Our collection includes *Mingus*, a 1968 documentary directed by Thomas Reichman about legendary jazz bassist and composer Charles Mingus. Vincent Canby of the *New York Times* called *Mingus* “a very personal, very moving portrait,” while the *Village*

*Voice* hailed it as “the first jazz film about jazz.” However, *Mingus* is under copyright protection until 2063. Thomas Reichman died in 1975 and all attempts to track down his relatives or heirs have been unsuccessful. *Mingus* is thus a classic orphan work because no one is alive to claim rights to the film, thus diminishing its accessibility.

- Recently, a patron sought to purchase a copy of a 1951 *March of Time* newsreel called *Narcotics and Teenagers*. The Library requires that copyright be cleared prior to duplication, so the patron paid for a search that determined the film was owned by HBO via its ownership of Time, Inc. (original producer of the *March of Time* series). However, HBO stated, “according to our records it is copyright unknown,” so rather than risk it, the patron declined to proceed with the order. The newsreel remains in legal limbo.
- The Packard Campus collects and preserves many thousands of feet of home movies dating back more than 100 years – beautiful and evocative chronicles of a vanished America. However, our ability to make all but a select few available online is hampered, because these classic orphan works, often lack 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.” (See **Appendix: Case Study 2.**)

**Abandoned Films.** Unfortunately, the universe of orphan works continues to expand. For example, the shift to digital motion picture production has been accompanied by a wave of film processing laboratory closures. In many cases, these laboratories also provided storage services to their clients and so when the lab closed, so did their vaults. Usually every effort is made to contact clients to retrieve their property, but in many cases those clients could not be located, resulting in warehouses full of abandoned film. As often as not, those films are eventually offered to the Library and other archives, and rather than see these motion pictures consigned to oblivion, we acquire them.

Rarely do the films arrive with an inventory and/or a record of the last known owner, and as a consequence we store literally thousands of film reels existing in a legal netherworld. We either have no information at all about the rights holders or very few leads to trace that the originating lab didn’t already try. Conversely, when filmmakers cannot locate their material because their storage facility no longer exists, we cannot take the risk of charging for duplicate copies of these films or putting them online for fear that the owner will emerge to claim infringement.

Orphan works legislation is especially relevant to the national effort to preserve our audiovisual history and make it publicly accessible. Many films and sound recordings were issued by small companies that have gone out of business or cannot be located. Ownership is inadequately documented for many types of audiovisual material, including radio broadcast recordings (for which intellectual property rights have not been made explicit in the broadcast itself) and many unpublished works.

—**Bring sound recordings fixed before February 15, 1972, under federal copyright law.**

Sound recordings have a unique legal status in the United States. Unlike other works, such as books, pamphlets, poems, music, photographs, drawings, paintings, and motion pictures, they were not covered by copyright law until February 15, 1972. As a result, recordings produced

earlier have been subject to a complex network of disparate state civil, criminal, and common laws, a situation that complicates the efforts of libraries, archives, and educational institutions to preserve these recordings. State laws that prohibit unauthorized duplication of sound recordings make no provisions for duplication for preservation purposes by libraries or archives. As a recent report has noted, “[m]any librarians and archivists are reluctant to copy and disseminate older sound recordings in the face of this patchwork of state laws that lack well-delineated exceptions.” Unless Congress revises the law, this situation will continue until February 15, 2067, when pre-1972 sound recordings are scheduled to enter the public domain.

Many pre-1972 sound recordings will deteriorate long before 2067. Sound recordings historically have been fixed on media that are much more fragile than many other types of copyrighted works. The uncertain status of pre-1972 recordings under state common law copyright severely limits the ability of institutions to allocate resources for recorded sound preservation activities. As noted above, Sec.108, granting libraries and archives limited rights to copy federally protected post-1972 sound recordings for preservation and access purposes, and fair use under Sec. 107, do not currently apply to pre-1972 recordings because they are not covered under federal law. The lack of clarity concerning copyright status and the inapplicability of Sec. 108 and fair use hampers efforts to raise funds to save this material.

Federal coverage for pre-1972 recordings would clarify ownership issues and specify terms of protection that do not vary from state to state. Coverage would provide certainty for qualified libraries and archives to undertake needed preservation copying and cataloging activities, and it would permit transparent rules for permissible access to these materials by library and archival patrons. For the first time, rights holders of pre-1972 recordings covered by federal law would become eligible for licensing payments under the Digital Performance Right in Sound Recordings Act of 1995—payments that are required only for transmissions of recordings protected by federal law. Clarity in the law could benefit rights holders of recordings for other licensing and exploitation purposes as well.

Libraries and archives will be able to preserve pre-1972 recordings through copying to digital formats and make them accessible to patrons much earlier than is currently possible. With careful definitions and processes to determine when a recording is eligible for an extended term of copyright, this approach would not impede preservation and access by libraries and archives.

### **Summary: Preservation and Access are Vital to the Mission of the Library**

Preservation in the digital era is vital for the Library of Congress in order to maintain a mint record of American creativity and universal knowledge for generations to come. Preservation itself is a valuable cultural and historical function, but is that much more meaningful when access to preserved materials is possible, while respecting rights of copyright holders. While new digital technology offers great promise to save the images and sounds of our past, institutions responsible for preserving audiovisual history for future generations have encountered significant economic and legal challenges in transitioning to digital preservation.

## Appendix: Orphan Works Case Studies

### Library of Congress Orphan Works Case Study 1: 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, 2013 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 2: Home Movies

The Library’s Motion Picture, Broadcasting and Recorded Sound Division is responsible for the cataloging, storage, and preservation of more than 1.5 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, either 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.

## **Library of Congress Orphan Works Case Study 3: Emerson Phonograph Company<sup>1</sup>**

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 notes, are not commercially available. In addition, any recordings produced prior to February 15, 1972 are not covered by federal copyright law, but are governed under a complex array of state and common law copyrights. Accordingly, most of this rich legacy of creativity remains inaccessible to the public.

From the beginnings of commercial recording until the late 1920's, the Edison, Victor, and Columbia companies dominated the domestic marketplace. But there were small and significant record labels that attracted top talent. The Emerson Phonograph Company was one of those. Founded in 1915 by former Columbia executive Victor Hugo Emerson, the label made good quality recordings of popular dance and vocal music, including many jazz and blues records released in a "race" series. Important artists are found in the Emerson catalog: Eubie Blake and Noble Sissle; Fletcher Henderson's band cut a few records, one of which includes Louis Armstrong. The great vaudevillian comic Nat Wills was also on the label, as was Eddie Cantor. They 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. But unlike the Victor and Columbia labels (both now under the control of Sony Music, Inc.), the complex corporate lineage of Emerson indicates that a large portion of the recordings produced by the company could be made available under an orphan works exemption if it applied to pre-72 recordings.

In 1924 Emerson was acquired by the Scranton Button Company (and known as Emerson Recording Laboratories). In 1926 it was again reorganized by former Emerson executives as an independent company, the Consolidated Record Corporation, and would own several other record labels until it went under in the early 1930s. Assuming that the entire Emerson back catalog went to Consolidated, Emerson Records, along with those other labels, would likely fall into orphan status because Consolidated seems to be the end of the corporate lineage. However, detailed research into court documents and corporate records by discographers has not been able to confirm this absolutely.

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<sup>1</sup> 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)