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From Colorization to Orphans: The Evolution of American Public Policy on Film Preservation

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FROM COLORIZATION TO ORPHANS

B R I A N R E A L

The Evolution of American
Public Policy on Film
Preservation

The National Film Preservation Act (NFPA) of 1988 was a pivotal decision focusing federal public policy on motion picture preservation. This legislation created both the National Film Preservation Board (NFPB) and the National Film Registry (NFR). However, the original 1988 legislation was not concerned primarily with preserving physical films in the archival sense; instead, the law was drafted in response to controversial, contemporary efforts to colorize classic black-and-white motion pictures.¹ The term *preservation*, as used in the law, was primarily concerned with the preservation of original motion picture content without significant visual alterations. The NFPB and NFR were designed mainly as enforcement mechanisms for the preservation of motion picture content; archival preservation was an afterthought.

The laws that followed the original 1988 act, however, moved toward preservation in the physical, archival sense, with each subsequent piece of legislation that was passed as a continuation of the NFPA of 1988 increasing the government's commitment to this goal. This was due to the efforts of the Library of Congress, film archivists, and their allies, who saw the very public formation of the original NFPA as a means of increasing the visibility of preservation issues to Congress and the general public. The creators of the NFPA of 1992 and the legislation and reports that followed altered the primary purpose of the NFPB and NFR to deal with the problem that "motion pictures of all types are deteriorating faster than archives can preserve them."² This article argues that the staff of the Library of Congress and other stakeholders in the film preservation community worked deliberately and thoughtfully to redirect federal legislation from the controversial, ineffective copyright compromise in 1988 to an effective public policy plan that provides strong federal support for the physical preservation of motion pictures. Additionally, this future legislation—particularly the NFPA of 1996—guided preservation priorities for noncorporate archives away from a focus on commercially released feature films and toward the preservation of orphan works.

COLORIZATION AND THE MORAL RIGHTS OF MOTION PICTURE ARTISTS

Congressional attention toward the so-called preservation of motion pictures began with the controversy surrounding colorization of classic, black-and-white motion pictures in the late 1980s. New computer technologies during this decade made it possible to add color to classic films, which made the works more appealing to audiences who preferred modern, colorized motion pictures.³ Media moguls such as Ted Turner were buying classic films and using the new media of cable television and video to commercially exploit these works, and in some cases, they were finding that colorized versions earned several times

as much through cable and video as the original, unaltered versions. Other modifications, such as panning and scanning to fit widescreen films on standard televisions, editing for commercials, censoring for broadcast standards, and time compressing films to fit into shorter programming blocks (lexiconing), were also standard practice and done to make films more commercially viable, but colorization was done to make films more appealing to certain audiences rather than to fit technological and commercial broadcast standards. Therefore, despite the popularity of these colorized works among portions of the public, the original filmmakers and stars of these films argued that the colorization process altered these works in an artistically unacceptable manner, presenting them in a way that defaced their original intentions. These creators of the original motion pictures—who were not the copyright holders—attempted to argue that they should have moral rights over works they created, with moral rights being limited control given to artists to prevent the legal owner of their work from altering it substantially without their permission. Such rights are meant to prevent copyright owners from taking actions that may damage the original artists' reputations by misrepresenting their contributions to their work. While moral rights for films and other arts have been a standard part of European law, as outlined in the Berne Convention, no such explicit protections existed within American copyright law. With this situation, the Hollywood creative community began to lobby Congress for moral rights protections against digital alterations to works they created. While the creative community used the well-publicized issue of colorization to fight for moral rights, the ultimate goal was to give creators greater control over and—when needed—protection from all alterations to their films, not just colorization.

The U.S. Congress had an opportunity to quickly address the issue of artists' moral rights when dealing with motion pictures through the Berne Convention Implementation Act of 1987, which brought much of U.S. copyright law in line with European standards. Congress's partial adoption of Berne was prompted by urging from several copyright-dependent industries, including motion picture studios, that believed Berne could provide greater protection against moving image piracy.⁴ Had Congress adopted the entirety of the Berne Convention at this time, which would have included the implementation of moral rights provisions, this would have given artists significantly greater protections against copyright holders who wished to alter the content of their works. In fact, John Huston's heirs later used French law, which did have explicit Berne Convention-compliant moral rights, to enjoin the broadcast of a colorized version of his film *The Asphalt Jungle* (1950) on French television. However, despite Sydney Pollock and Frank Pierson testifying on behalf of the Directors Guild of America (DGA) and the Writers Guild of America, respectively, in favor of adopting the explicit moral rights component

of the Berne Convention specifically to battle colorization, Congress chose to exclude this element from the legislation, despite it appearing in the original draft.⁵ Instead, Congress decided to deal with moral rights in separate legislation, preventing American publishing, music, and film production companies from using their legislative clout to block Congress from joining Berne. Although corporate copyright holders were in favor of most of the Berne Convention—indeed, they were a driving force in bringing this matter before Congress—they would have blocked any legislation including moral rights because they did not want the uncertainty that new rights might provide to contributors to works or for creators to be able to block commercial exploitation of works-for-hire. Temporarily avoiding moral rights allowed Congress to craft easily passable legislation to make the United States compliant with most of the Berne Convention and make it easier for American interests to protect their copyrights on the international stage, but it allowed colorization and moral rights more broadly to be an ongoing, highly debated issue.⁶

The Judiciary Committee of the Senate held a hearing on “Legal Issues That Arise When Color Is Added to Films Originally Produced, Sold, and Distributed in Black and White” on May 12, 1987. This hearing, which included testimony from filmmakers such as Woody Allen, Milos Forman, and Sydney Pollack, as well as a letter from James Stewart in support of moral rights, primarily focused on the protection of motion picture content. However, when testifying on behalf of Turner Entertainment—which wished to preserve its right to release colorized versions of films—company president Roger Mayer argued that colorization actually helped the physical preservation of motion pictures.⁷ Mayer noted that the colorization process was done on video and that the original film elements had to be cleaned and restored to an optimal state before the transfer to video could occur. Additionally, the entire reason for Turner Entertainment purchasing libraries of motion picture classics—including the collections of Metro-Goldwyn-Mayer (MGM) and RKO—was that the home video and cable markets had given these films new venues for commercial exploitation. Mayer asserted that Turner Entertainment and other companies that held the rights to classic films were doing more than ever before to preserve these works, as they were now seen as financial assets whose value extended far beyond their original theatrical releases. Therefore, Mayer argued, colorization and other alterations that made films more commercially viable in home entertainment markets aided the physical preservation of motion pictures.

Mayer’s statements suggesting that he was personally and professionally concerned with physical film preservation were unquestionably earnest, because he had dedicated much of his career to this. When Mayer was hired as the assistant general manager of MGM Studios in 1961, a large part of his duties revolved around overseeing

the physical maintenance of the Culver City studios.⁸ Mayer discovered that many of the studio's negatives were being stored in improper conditions, and he fought to secure studio support to better preserve these works despite the lack of a video and cable aftermarket, which would have offered MGM a profit motive. Therefore, when Ted Turner purchased the MGM library in 1986, many of these films were extant because of Mayer's significant effort to preserve these works, resulting in Mayer being brought into Turner Entertainment as company president. Mayer's personal dedication to physical film preservation both before and after the emergence a profit motive for saving such works did not conflict with Mayer's advocacy of colorization but instead showed that questions of physical and content preservation were two separate debates.

In response to the ongoing dispute about the colorization issue, Representatives Robert Kastenmeier and Carlos Moorhead—who had jurisdiction over copyright issues in Congress as chairman and ranking minority member, respectively, of the House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice—requested that the Copyright Office of the Library of Congress prepare a report on motion picture colorization, with a completion date set for early 1989.⁹ The Copyright Office of the Library assigned two recently hired attorneys, William Patry and Eric Schwartz, to complete this report.¹⁰ Schwartz was able to travel across the country and speak with producers, directors, writers, cinematographers, and actors, learning how digital alterations to motion pictures changed their artistic visions or contributions. It was directors, writers, and cinematographers in particular who argued that “material alterations” for posttheatrical markets, without their input or approval, misrepresented their contributions when these transformed films were shown to the public with their names attached. Schwartz also spoke to studio representatives—including Roger Mayer—about their intentions, with these individuals reiterating that the colorization debate was separate from questions of physical preservation. Schwartz was able to visit all three of the labs in the United States and Canada that were colorizing films and see firsthand that the films that were being transferred to video for the process had been cleaned and preserved for an optimal transfer to tape, confirming that colorization did not harm films but rather that the readying process of making new print materials could aid film preservation in the long run. These observations were submitted to Congress in March 1989 as *Report of the Register of Copyrights on Technological Alteration of Motion Pictures and Other Audiovisual Works*. However, Congress took legislative action on moral rights in motion pictures well before the completion of the report, and thus the Copyright Office had little impact in shaping the first legislation to pass on the moral rights issue in the United States.

Instead of waiting for the House and Senate Judiciary Committees to fully investigate moral rights and pass legislation that would weigh the interests of both artists who created films and the corporations that owned the copyright to these works, the DGA and other creative guilds lobbied Congress to act sooner, with the colorization controversy providing a starting point for the government to take action on moral rights in general.¹¹ Rather than going through the House Judiciary Committee, which had jurisdiction over matters involving copyright, the DGA approached Representatives Robert Mrazek and Sidney Yates, both congressmen on the House Appropriations Committee and the latter the chairman of the Subcommittee on the Interior. The Hollywood guilds felt that they would have more success by working with these congressmen, because they were both pro-union and supported creative artists' rights. What emerged following this lobbying effort was the NFPA of 1988, which was introduced by Mrazek and Yates in May 1988 as a nongermane amendment to an appropriations bill for the Department of the Interior. This amendment would have been highly favorable to artists' demands, creating labeling requirements for all materially altered motion pictures that would include language noting that "the principal director or principal screenwriter of the film desires to be disassociated from the materially altered version of the film."¹² The legislation also promoted the creation of a National Film Commission within the Department of Interior, which would elevate the recognition of film as an art form by designating culturally important films to be part of a NFR. The placement of the NFR within the Department of Interior was a result of Yates's association with the department.

The DGA and other creative organizations worked with members of Congress outside of the Judiciary Committee partially to avoid interference by other stakeholders, and they were initially successful in this strategy.¹³ However, the film studios—as represented by Motion Picture Association of America president Jack Valenti—learned of the amendment when the Subcommittee on the Interior reported it to the Appropriations Committee on June 8, 1988. Valenti was able to encourage other members of Congress to support him in fighting the amendment, and Representatives Mrazek and Yates recognized that they would need to compromise to get enough votes to pass it. In a closed-door meeting with different members of Congress, including Mrazek and Yates, Valenti was able to redraft a compromise amendment to prevent colorization legislation from expanding to such a degree that it would impede the motion picture industry's right to alter films as they pleased.¹⁴ This closed-door drafting of legislation bypassed the House Judiciary Committee, which held the initial hearings on these matters, thereby avoiding consideration of many of the key arguments presented in that committee's hearings on colorization in the process. One of the main stakeholders in

the earlier congressional testimony was the Copyright Office of the Library of Congress, whose ongoing research into colorization was being ignored in this new legislation. Although the Copyright Office had little influence on the final language of the amendment, Eric Schwartz was able to convince librarian of Congress James Billington to protest the placement of the NFR and NFPB within the Department of Interior, with Schwartz arguing that the Library of Congress's holding of the largest motion picture collection in the world made it a more appropriate home for the registry and board and that they could later be repurposed to support physical film preservation.¹⁵ With the approval of Mrzaek and Yates, Schwartz and Billington were successful in this effort to shift the location of the NFR.

Owing to significant lobbying from the motion picture studios, the final legislation did not create any significant alterations to the existing copyright law.¹⁶ Instead, when the NFPA of 1988 was passed on September 27, 1988, it required the Library of Congress to designate twenty-five commercially released motion pictures each year as significant works of art worth protecting. These films would be added to the NFR, which would be chosen by the NFPB. The NFPB was to be assembled by the librarian of Congress, who would have the power to choose these individuals from among professionals in the motion picture production industry, film archivists, and film scholars. The legislation would legally require that anyone who significantly altered a film on the registry, including the original copyright holder, would have to label it as having been materially altered before any form of exhibition or distribution. This included a disclaimer at the front of the visual work as well as labels on videotapes and other physical carriers for motion pictures. Therefore *preservation* in this instance meant the preservation of motion picture content in its original form rather than preservation in relation to proper archival storage that prevents physical deterioration. This act did not go nearly as far as European copyright laws in protecting artists' moral rights, only preventing copyright owners from misrepresenting artists' contributions to their own works in a very limited number of cases. The only minor gesture to physical preservation in the legislation was a mandate that the Library of Congress attempt to obtain by gift a preservation copy of every film on the registry, although there would be no penalties for failure to obtain a preservation copy or extra powers given to the library to encourage film studios to donate such materials. The legislation also provided funds to support the NFPB's operating expenses but no extra funding to support motion picture preservation programs at the Library of Congress. As a result of lobbying on the part of Jack Valenti and the film studios, the legislation would also expire in three years, making it unlikely that labeling enforcement for the films chosen for the NFR and the resulting interference

with the film industry's distribution practices would continue after this brief term.¹⁷

In his 1992 book *Nitrate Can't Wait*, Anthony Slide was critical of the legislation and the labeling plan, stating that "the legislation . . . is a compromise which serves no valid purpose; simply it increases the legislative bureaucracy and adds an additional quarter-of-a-million-dollars to the taxpayers' burden."¹⁸ Contemporary criticism from both sides of the debate reflects this assessment, especially among advocates of actual physical preservation. On June 22, 1988—the day after the private meeting between Valenti, Mrazek, Yates, and other members of Congress to revise the NFPA of 1988—Representative Robert Kastenmeier of the House Judiciary Committee proposed and opened hearings for the Film Integrity Act of 1988.¹⁹ This built on the judiciary's previous work on this matter, including commissioning a colorization report from the Register of Copyrights, and was put forth as an ultimately unsuccessful alternative to the NFPA of 1988. Testifying once again, Roger Mayer noted that Turner had spent \$1.4 billion to purchase what was then the largest film library in the world and that it had already spent more than \$30 million to physically preserve these assets.²⁰ Mayer continued to argue that moral rights legislation, which limited commercial exploitation of these assets through colorization and other processes that made these products more commercially successful, would be depriving his company of the means to preserve these works and the company's investment.

Register of copyrights for the Library of Congress Ralph Oman also testified to explain the library's reservations.²¹ Oman suggested that it would be better to leave interpretation of contemporary copyright law's influence over colorization to the courts and that having the library oversee the enforcement of this matter was beyond the appropriate scope of the institution's powers. Oman also attempted to shift the dialogue from content preservation to film preservation by sharply suggesting that if they chose not to pass the NFPA, "the money you save on the [NFPB] could be spent on film preservation at the Library of Congress."²² Oman further emphasized this fundamental flaw in a bill nominally about film preservation by noting the absence of film preservation representatives from the Library of Congress, the American Film Institute, the National Archives, the Academy of Motion Picture Arts and Sciences, and other stakeholder institutions from hearings on this legislation. However, Oman did suggest that the film commission that would later become the NFPB in the draft of the NFPA of 1988 could be useful in another context, if it were to be used as a publicity mechanism for physical preservation of motion picture materials.

The NFR and NFPB were created through controversial legislation as a compromise that pleased few of the interested parties. However, despite these problematic

origins, the NFR and NFPB have grown into important publicity mechanisms for the preservation of motion pictures. The sections that follow detail how the Library of Congress, corporate owners of theatrical motion pictures, and other stakeholders in the film preservation community guided future federal legislation to better support motion picture preservation in the United States.

THE NFPA OF 1992 AND CONGRESSIONAL SUPPORT FOR ACTUAL MOTION PICTURE PRESERVATION

After the passage of the law in fall 1988, Eric Schwartz and another Library of Congress employee, Pat Loughney, were tasked with overseeing the formation of the NFPB and the NFR on behalf of the Library of Congress. In accordance with the law, the library appointed individuals from various stakeholder organizations to compose the NFPB, these individuals solicited public suggestions on what films to choose for the NFR in 1989 and 1990, and the board voted on which films to include.²³ The library appointed screenwriter, playwright, and former Academy of Motion Picture Arts and Sciences president Fay Kanin as president of the NFPB. Kanin used her political abilities to moderate the competing interests of studio and creative representatives on the board. With Kanin's and Schwartz's oversight, the NFPB was able to institute guidelines—following Congress's vague and sometimes contradictory suggestions as detailed in the legislation—for what constituted significant enough “material alterations” to require a film on the registry to be labeled as materially altered. The law, and therefore the guidelines, also permitted alterations that made it possible to air films on television, such as lexiconing and panning and scanning, without labeling.

Despite the NFPB's success in executing Congress's intent in terms of film labeling, the members of the board and the staff of the Library of Congress were displeased at having to do so. Although Jack Valenti was largely responsible for the compromise legislation that led to the creation of the NFR and NFPB, as a member of the latter, he stated during the first board meeting that he was against any government entity being allowed to regulate film distribution.²⁴ Though the other board members were not quite as hostile toward the labeling requirements during this and subsequent meetings, there was prolonged debate over Congress's intent with the labeling process owing to ambiguities in the legislation. Representatives from the creative and archival communities felt that labeling should be as encompassing as possible, including panning and scanning and any other alterations for broadcast or video, while representatives from the motion picture production industry urged that films on the registry that had been

edited for television did not require labeling. Despite prolonged debate over how labeling should be handled, the board was able to reach agreement on some issues. First, near the beginning of a September 1989 NFPB meeting, Valenti received clear approval from the board when he put forth a motion to lobby Congress for funding to preserve the first twenty-five films selected for the NFR and other actual film preservation programs at the Library of Congress.²⁵ In fact, the board was encouraged by positive press coverage about the first selections of the NFR and the press's inclusion of information about physical preservation issues in the wake of the list of films being announced in July of that year. These press notices and their pro-preservation content were the result of the considerable and deliberate efforts of the NFPB and were perhaps the board's greatest achievement at this point. Second, when various board members expressed at different points that the NFPA and its labeling requirements were inherently flawed as a result of Congress passing the legislation too quickly, there was no disagreement by other members present at the meetings.

Therefore Eric Schwartz and other members of the board recognized that the NFPB and NFR could be put to much better use if the focus were shifted away from labeling and copyright debates to fully embrace the promotion of physical film preservation.²⁶ By 1991, the 1988 legislation was set to expire. There was no interest in renewing the law, but the librarian of Congress and his staff—including Eric Schwartz—spoke to relevant stakeholders and floated the idea of a newly reconstituted board and mission, one focused on physical preservation. Schwartz received some resistance from board members over this idea of a reconstituted, refocused board, as representatives of the Hollywood creative guilds were frustrated that the concept of moral rights was dropped from future legislation and studio representatives were wary of continuing potential government intrusion into the film industry, including the possibility that the new legislation would revert into another round of the moral rights debate. However, he was ultimately able to overcome these criticisms by noting that the creative guilds could still pursue other legislation to deal with moral rights and assuring the studio representatives that his plan would not alter copyright or intrude on their business model. As a result, when Congress began discussions about the future of the NFPB and the NFR during House Judiciary Committee hearings for the Copyright Amendments Act of 1991, representatives of the Library of Congress and the film industry agreed to allow the labeling requirements to expire and shifted the focus of the law to supporting film preservation programs at the Library of Congress and other film archives. Though the Library of Congress had little influence over the drafting of the NFPA of 1988—with the notable exception of shifting the NFR from the Department of the Interior to the

library—Eric Schwartz, in his capacity as an employee of the Copyright Office, was the primary author of the language in the NFPA of 1992.

The discussions on this proposed plan included further congressional testimony from Ralph Oman and Roger Mayer as well as testimony from James Billington, Eric Schwartz, curator for film programs of the Library of Congress Pat Loughney, and Fay Kanin. The testimony of these individuals echoed many of Oman's and Mayer's original critiques of the NFPA of 1988, while the representatives of the Library of Congress and Kanin presented suggestions for future legislation that would guide the NFR and NFPB away from their roles as moral rights enforcement mechanisms and toward allowing these entities to act as effective means to promote archival preservation of motion pictures. Billington emphasized the irrelevance of labeling to motion picture preservation by stating, "I would note that labeling films that are materially altered does not protect or preserve the original film materials. Only film preservation activities do this."²⁷ Therefore the Library of Congress was clearly displeased with the concept of "preservation" as protecting original content as part of a copyright dispute instead of saving physical filmic materials. Congress was receptive to this and dropped labeling and enforcement duties from the NFPB and NFR, causing these entities to focus on the actual preservation of motion pictures.²⁸

Acting on the NFPB's suggestions, Billington also took action to move the NFR away from a singular focus on feature-length, theatrically released motion pictures, noting in his testimony that he had already urged the writers of the legislation to remove these requirements from the new bill. Billington's argument for this was that "this will allow us to select significant films which may be less commercial in nature though we believe equally deserving of preservation and public note."²⁹ Although Billington was not turning fully away from features but, instead, attempting to expand the scope of the film canon, Turner Entertainment president Roger Mayer argued that preserving the feature films that had already been selected for the NFR was an ineffective use of tax dollars, because the copyright holders had a significant interest in maintaining these materials. Instead, Mayer suggested that "government efforts might be better focused on films of historical or cultural interest which are in the public domain or are, for other reasons, not being preserved rather than on the twenty-five Film Board 'best film' designations which are, undoubtedly, already being preserved."³⁰ Congressman Carlos Moorehead echoed some of these sentiments when questioning Billington, noting the financial motivations for studios to preserve films for which they owned copyright.³¹ While Billington countered this by questioning the adequacy of some studios' preservation and restoration methods, it is clear that Congress and the library were already

contemplating a shift toward greater protection of works without commercial potential. Though this is the first time that the concept of *orphan works* appeared in testimony for the NFPAs, Eric Schwartz noted that the term and its attachment to the concept of works that lacked commercial potential and, therefore, were at significant risk of not being preserved were coined during NFPB deliberations by Fay Kanin early in the existence of the NFPB, with the already mentioned repetition of these concepts probably coming from her original formulation.³²

With the focus of the NFPA of 1992 now on actual preservation, the NFPB and the library also urged Congress to take further action to expand both the Library of Congress's and, through providing funding, the federal government's role in supporting motion picture preservation beyond the library's activities. Schwartz recognized that a comprehensive overview of the state of film preservation in the United States was not available, so he and the other supporters of the legislation requested funding to collaborate with various stakeholders in the entire motion picture preservation community to develop a comprehensive, national plan to support film preservation and encourage greater collaboration and less redundancy between various film archives in the United States.³³ Schwartz also knew from experience that congressional studies often did not result in congressional action, so he suggested the study be complemented by an action plan to improve American film preservation. Congress approved these proposals and provided funding for them, allowing the NFPB to oversee the study and action plan. As detailed later, this study showed that concerns about the state of preservation for materials without commercial potential expanded beyond the library and Mayer to most noncorporate archives and numerous academic institutions.

THE BIRTH OF A NATIONAL FILM PRESERVATION PLAN AND BETTER COOPERATION BETWEEN ARCHIVES

With the mandate to create a report on the current state of film preservation in the United States, the library and the NFPB formed discussion groups and held hearings first in Los Angeles and then in Washington, D.C., that included representatives from archives around the country, in addition to representatives from the motion picture industry, scholarly organizations, and retrospective film exhibitors.³⁴ Teams of individuals with expertise in certain areas worked together to define the primary issues facing film preservation, with these discussions resulting in the creation of two documents: *Film Preservation 1993: A Study of the Current State of American Film Preservation* and the subsequent *Redefining Film Preservation: A National Plan*, which built on the former

report to define future courses of action in support of motion picture preservation in the United States. These reports were overseen by two outside consultants, Scott Simmon and Annette Melville.³⁵ Both individuals were former Library of Congress employees, but they were not employed by the library at the time of the study. Therefore the two had not only enough of an understanding of the library and archival communities to be able to conduct the report but also enough distance to ensure that the final results of the studies would not seem biased toward the library's desires, instead reflecting the input of the broader archival and film community.

The first panel of the Los Angeles hearings included testimony from Karen Ishisuka of the Japanese American National Museum, Stephen Gong of the Pacific Film Archive, and Robert Rosen of the UCLA Film & Television Archive, who spoke, respectively, of the difficulty in preserving—and, by extension, obtaining funding to preserve—home movies of Japanese Americans, experimental films, and newsreels.³⁶ These individuals noted that these works had limited commercial potential and therefore were at significant risk of deterioration and eventual loss as part of our cultural heritage. These early remarks were consistent not only with later testimony from other representatives of archives that dealt with noncommercial works but also with remarks made by representatives from major film studios. These studio representatives echoed the concepts presented by Roger Mayer in testimony for the NFPAs of 1988 and 1992, with the consensus being that the studios not only had significant motivation to preserve feature films with commercial potential but were in fact spending significant amounts of money to do just that. These studio representatives—including Mayer himself—noted in later hearing panels that they understood the harm that would come with the loss of noncommercial films, with Paramount Pictures vice president Philip E. Murphy stating that such “titles are called orphans because they have no protectors, no organization with the wherewithal to . . . assure that future generations will have the opportunity to view what the early part of the century looked like on film.”³⁷ As a result, the authors of the reports suggested that “newsreels, documentaries, avant-garde works, anthropological and regional films, advertising shorts, and even some home movies (especially of ethnic groups invisible in the mainstream media) [which were] now seen as important records of America’s social memory”³⁸ be given special preservation priority in the new national film preservation plan.

These works, defined in the reports as orphan films, therefore fell under the preservation domain of public-sector and nonprofit archives owing to the inability of private-sector archives to commercially exploit them, so for-profit organizations had no motivation to preserve them.³⁹ The reports also noted that silent films were

at risk owing to their limited appeal for cable and video markets. While the dividing line between private archives preserving commercially exploitable feature films and public and nonprofit archives preserving orphan works is not always clear cut—indeed, the Library of Congress still preserves copies of many sound feature films with commercial potential—this split has been the dominant paradigm following the creation of the reports.

While the authors of these reports created a distinction between the responsibilities of private film archives and those of public and nonprofit archives, they also recognized that there were significant areas of overlap in all archives.⁴⁰ Therefore the reports recommended that archives work together to avoid redundancies on projects, ensuring that no two archives restore the same film independently of each other. By avoiding these overlaps, archives would be able to restore more films in total, thereby allowing more of the nation's cinematic heritage to be saved. Additionally, the authors of the reports recommended that archives work together to create standards, such as norms for cold storage vaults for physical preservation, digitization, and metadata.⁴¹ This would allow for cost savings by lowering overall investment in such innovations as well as greater interoperability between archives by making their storage and digital systems work with each other.

The creators of these reports also recognized that federal funding for film preservation was declining owing to contemporary changes in governmental budgetary priorities.⁴² Rather than simply hoping for this funding to return, the discussion group—with support from the Library of Congress—developed a plan to increase funding for public-sector film preservation. The goal was to create a foundation that would raise funds for film preservation in the United States through donations from private individuals and the private sector. The federal government would provide matching funds to motivate potential donors to give to this cause, thereby stretching the value of limited federal funding. This idea became reality with the reauthorization of the NFPB in 1996.

THE CREATION OF THE NATIONAL FILM PRESERVATION FOUNDATION

In 1996 the U.S. Congress once again reauthorized the NFPB and the NFR.⁴³ The structures of the NFPB and NFR were left intact, showing that Congress was pleased with the progress that had been made and the direction of the organization since the 1992 reauthorization. The law followed the recommendations outlined in *Redefining Film Preservation: A National Plan* and gave the librarian of Congress a mandate to create a

National Film Preservation Foundation (NFPF).⁴⁴ This organization was designed to be a congressionally authorized, Title 36 nonprofit organization that, despite its federal mandate to raise funds for motion picture preservation efforts throughout the country and a requirement to report annually on its work to the librarian of Congress, would act as an autonomous entity independent of direct government control.⁴⁵ Although Eric Schwartz had left the Copyright Office of the Library of Congress in 1994 for private law practice, he still did pro bono work, drafting the 1996 legislation, working with the archival community for its enactment, and doing the legal work to create the NFPF as a 501(c)(3) after the law passed. Schwartz's decision to make the NFPF an autonomous legal entity was in part to ensure that it would continue even if Congress failed to provide it with further funding in future legislative sessions. The librarian of Congress appointed Schwartz as the founding director and Roger Mayer as the chairman of the Board of Directors of the NFPF. The Board of the NFPF had its first meeting in 1997, and when it had raised sufficient private monies during the first year, the board hired Annette Melville as its first paid—and full time—director. The foundation's own reports can be used to gauge its success, which has been significant since its formation. More importantly, though, this article discusses how this mandate allowed the Library of Congress to take the lead in defining the norms for film preservation for the public and nonprofit sectors.

In the introduction to the NFPF's 2011 annual report, chair of the Board of Directors Roger Mayer noted that

when Congress created the NFPF 15 years ago, it put film preservation on the national agenda. At that time, only a handful of film archives had the capacity to save motion pictures documenting America's history and culture. Now, thanks to federal funding secured by the Library of Congress and the contributions of the entertainment industry, organizations across all 50 states have joined the effort. Through the NFPF grant programs, 239 archives, libraries, and museums have rescued more than 1,870 films that might otherwise have been lost. These newsreels, documentaries, cartoons, silent-era works, avant-garde films, home movies, industrials, and independent productions are used in teaching and reach audiences everywhere through exhibition, television, video, and the Internet.⁴⁶

This statement shows that the NFPF has been successful in light of several of the goals that were put forth in *Redefining Film Preservation: A National Plan*.⁴⁷ Additionally,

Roger Mayer's involvement in the NFPF as the chair of the Board of Directors since its founding is an interesting development in the evolution of federal policy on film preservation. As I detailed earlier, when Mayer repeatedly testified before Congress as a representative of Turner Entertainment, he explained that corporate entities were doing more than ever to protect films as financially exploitable assets. He also urged governmental and other noncorporate film archives to focus on materials without commercial potential. With Mayer taking a pro bono leadership role in the NFPF while he was still with Turner Entertainment and continuing this role following his 2006 retirement from the company, it is clear that the beliefs he expressed about the value of film preservation and what preservation priorities should be were not merely convenient defenses against government intrusion into the motion picture industry but instead a clear expression of his personal convictions. Additionally, though the federal government provided \$250,000 annually in matching funds to support the NFPF's efforts, the 1996 legislation withheld those monies for the first three years, until private funds could be raised.⁴⁸ Also, the law stipulated that none of the federal funding could be used for administrative purposes, ensuring that all taxpayer dollars were used for actual film preservation. Because no federal funding was given to the organization until 2000, Mayer reached out to his contacts within the entertainment industry shortly after the foundation's creation to raise the private funds necessary to make the organization functional.

The foundation met its goal of increasing the amount of overall funding for film preservation beyond limited federal funds, as dozens of individual and corporate supporters have donated since 1997.⁴⁹ Although many of the institutions that have received preservation funds from the NFPF are larger, well-known archives—such as the Library of Congress and George Eastman House—the presence of smaller, lesser-known recipients, including numerous state historical societies, shows that the foundation successfully publicized its grants and reached out to organizations with films well outside the mainstream. This confirms a continuing dedication to works without significant commercial potential, with the government-supported NFPF bolstering non-profit organizations that help preserve a national film heritage expanding well beyond commercial feature films. Therefore the initial work of the NFPB, the NFPA of 1992, the resulting reports and actions, and congressional testimony from Roger Mayer and other film industry representatives changed the concept of American film heritage and made more works considered worthy of preservation. The academic community subsequently built on this expanded heritage and, through the Orphan Film Symposium, worked with archivists to absorb these works into film scholarship.

GREATER RECOGNITION OF ORPHAN WORKS

Following the success of the NFR, the NFPB, and, especially, the NFPF, subsequent congressional actions dealing with motion picture preservation no longer encountered the same controversy that accompanied the NFPA of 1988. In fact, the NFPA of 1992 and 1996 have been successful enough that the librarian of Congress worked with Congress to create the National Recording Preservation Act of 2000.⁵⁰ This legislation mirrored the NFPA of 1992, including a mandate to create a proposal and national plan on preserving audio recordings as well as public policy mechanisms to promote the preservation of recorded sound in the United States. These mechanisms included the National Recording Registry, National Recording Preservation Board, and National Recording Preservation Foundation. This new legislation depended heavily enough on the NFPA of 1992 that much of the legislation was copied verbatim, with references to motion pictures changed to address sound recordings.

Additionally, the increased interest in orphan films, as well as increased funding for their preservation, led to greater scholarly collaboration between archives and film scholars. The discussion group that formed the content of *Film Preservation 1993: A Study of the Current State of American Film Preservation* and *Redefining Film Preservation: A National Plan* acknowledged that film scholars had begun to recognize the importance of films outside the mainstream— orphan films before they were commonly defined as such.⁵¹ This academic interest in these films continued to grow, especially in light of archives placing greater emphasis on these works.⁵² This resulted in the establishment of the first annual Orphan Film Symposium in 1999, which was supported in part by the NFPF and brought together film archivists, film scholars, and filmmakers. The founder of this now biennial symposium, Dan Streible, noted that the convergence of these individuals over this common interest had resulted in cooperation between them and, in some cases, a blurring of the lines between the professions.⁵³

It is also worth noting that the NFR evolved with public policy on film preservation. Just as the Library of Congress and federal preservation funding shifted from a focus on Hollywood features to orphan films, the NFPB began to select orphan films for the NFR. Despite these films being eligible for the NFR after the change in selection criteria in the NFPA of 1992, orphan films began appearing on the NFR primarily in the wake of the establishment of the NFPF and its promotion of such works and, by 2007, accounted for about half of the films selected annually.⁵⁴ With this shift, it can be said that popularity or commercial success is no longer a factor in deciding which films are added to the registry each year, but instead films are selected based on their artistic merit and ability to represent part of America's cinematic heritage.⁵⁵

As the NFPAs evolved from an obligation placed on the Library of Congress to legislation that has saved previously neglected films, created new scholarly communities, and—through the National Recording Preservation Act of 2000—provided a model for other preservation programs, it is unsurprising that the programs instituted in the NFPA of 1996 were renewed without significant debate or controversy in future legislation. Indeed, in 2005, Congress reauthorized the NFPB and, by extension, the NFR, in Title 3 of the Family Entertainment and Copyright Act, and it again reauthorized these institutions for another seven years with the Library of Congress Sound Recordings and Film Preservation Programs Reauthorization Act of 2008.⁵⁶

CONCLUSION

The NFPA of 1988 was a seriously flawed, hastily crafted piece of legislation that, ironically, had little to do with the actual preservation of motion pictures. The law also put the Library of Congress into the awkward position of policing alterations to certain motion pictures, despite the Copyright Office not having been consulted about whether the government had the authority to do so under current copyright law. Despite this, however, the Library of Congress realized the potential of the NFPB and the NFR to act as mechanisms to promote the value of actual motion picture preservation. The Library of Congress, the NFPB, and representatives from the motion picture industry guided future legislation to shift Congress's attention from a controversial dispute over moral rights to a strong, effective series of legislative actions that have improved film preservation in the United States.

The NFPB was essential in advising the librarian of Congress on the creation of the reports that redefined film preservation in the United States, thereby justifying the board's existence through an expansion in its purpose beyond that mandated by the 1988 legislation. As for the NFR, in each year since its founding, news of the new titles added to the list has been featured in the *Washington Post* and the *New York Times*, on CNN, and through other major media outlets.⁵⁷ These stories highlight the need for motion picture preservation and, to varying degrees, detail the lesser-known orphan works added to the list. Therefore the registry has successfully been transformed into a promotional mechanism that brings greater public attention each year to the need for film preservation. These positive actions, as well as the creation of the highly successful NFPF, demonstrate that the Library of Congress was highly successful in guiding public policy away from questionable legislative actions and toward the advancement of programs that continue to save important elements of our cultural heritage.

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NOTES

1. There were numerous articles in legal journals discussing the NFPA of 1988 following its passage, with these articles focusing primarily on colorization issues and not physical preservation. Although I cite some specific arguments for and against colorization, this article is not intended to provide a comprehensive overview of the colorization debate but only enough information to provide a framework for understanding the origins of future legislation on physical preservation. For more thorough overviews of the colorization debate and legislation, see Eric J. Schwartz, "The National Film Preservation Act of 1988: A Copyright Case Study in the Legislative Process," *Journal of the Copyright Society of the USA* 36 (1989): 138–59, and Janine V. McNally, "Congressional Limits on Technological Alterations to Film: The Public Interest and the Artists' Moral Right," *High Technology Law Journal* 5, no. 1 (1989): 129–56.
2. Annette Melville and Scott Simmon, "Film Preservation 1993: A Study of the Current State of American Film Preservation: Report of the Librarian of Congress," National Film Preservation Board of the Library of Congress, June 1993, <http://www.loc.gov/film/study.html>.
3. Paul Grainge, "Reclaiming Heritage: Colourization, Culture Wars, and the Politics of Nostalgia," *Cultural Studies* 13, no. 4 (1999): 622–23.
4. Peter Decherney, *Hollywood's Copyright Wars: From Edison to the Internet* (New York: Columbia University Press, 2012), 144–50.
5. House Committee on the Judiciary, *Berne Convention Implementation Act of 1987: Hearings on H.R. 1623*, 100th Cong., 1st and 2nd sess., 1987, 407–11.
6. I have chosen to discuss moral rights in relation to motion pictures only to such a degree that it illustrates the meaning of the NFPA of 1988. However, for a thorough discussion of the history of moral rights legislation and court cases for American motion pictures, see "Auteurism on Trial: Moral Rights and Films on Television," chapter 3 in Decherney, *Hollywood's Copyright Wars*, 108–54.
7. House Committee on the Judiciary, *Legal Issues That Arise When Color Is Added to Films Originally Produced, Sold, and Distributed in Black and White*, 100th Cong., 1st sess., May 12, 1987, 150–51.
8. Karie Bible, "An Interview with Roger L. Mayer (Chairman, National Film Preservation Foundation)," *Film Radar*, May 30, 2003, http://www.filmradar.com/articles/item/an_interview_with_roger_l_mayer_chairman_national_film_preservation_foundat/.

9. Schwartz, "National Film Preservation Act of 1988," 139.
10. David Pierce, "Copyright, Preservation, and Archives: An Interview with Eric Schwartz," *The Moving Image* 9, no. 2 (2010): 112–14; Eric J. Schwartz, personal interview with the author, Washington, D.C., August 29, 2012.
11. Schwartz, "National Film Preservation Act of 1988," 139–44; Schwartz, personal interview with the author, Washington, D.C., August 29, 2012.
12. Schwartz, "National Film Preservation Act of 1988," 142–43.
13. *Ibid.*, 143–44.
14. National Film Preservation Board, *Meeting of the National Film Preservation Board* (Washington, D.C.: Library of Congress, 1989), audiocassettes of meeting in Washington, D.C., on September 26, 1989.
15. Schwartz, "National Film Preservation Act of 1988," 153–55; Schwartz, personal interview with the author, Washington, D.C., August 29, 2012.
16. Warren H. Husband, "Resurrecting Hollywood's Golden Age: Balancing the Rights of Film Owners, Artistic Authors, and Consumers," *Columbia Journal of Law and the Arts* 17 (1993): 344–46; Anthony Slide, *Nitrate Won't Wait: A History of Film Preservation in the United States* (Jefferson, N.C.: McFarland, 1992), 129–30.
17. Schwartz, personal interview with the author, Washington, D.C., August 29, 2012.
18. Slide, *Nitrate Won't Wait*, 130.
19. Schwartz, "National Film Preservation Act of 1988," 145–48.
20. House Committee on the Judiciary, *Film Integrity Act of 1987: Hearings on H.R. 2400*, 100th Cong., 2nd sess., June 21, 1987, 136.
21. *Ibid.*, 11.
22. *Ibid.*, 14.
23. Schwartz, personal interview with the author, Washington, D.C., August 29, 2012.
24. National Film Preservation Board, *Meeting of the National Film Preservation Board*.
25. *Ibid.*
26. Pierce, "An Interview with Eric Schwartz," 116–17; Schwartz, personal interview with the author, Washington, D.C., August 29, 2012.
27. House Committee on the Judiciary, *Copyright Amendments Act of 1991: Hearings on H.R. 2372*, 102nd Cong., 1st sess., 1991, 320.
28. This was not the end of the film labeling debate, and in fact, Congress dropped the labeling function of the NFR, despite testimony from Elliot Silverstein of the DGA and Brian Walton of the Writers Guild of America encouraging the expansion of these duties. House Committee on the Judiciary, *Copyright Amendments Act of 1991*, 379–96. Shortly after labeling requirements were dropped from the NFPA of 1992, Congressman Mrazek held hearings for new legislation entitling the Film Disclosure Act (1992), which would have expanded film labeling while not involving the Library of Congress. This legislation failed, as did a similar bill several years later called the Film Disclosure Act (1995). Moral rights were successfully passed for certain works—such as paintings, sculptures, still photographs, drawings, and prints—in limited cases with the Visual Artists Rights Act of 1990, but this once again excluded motion pictures.

29. House Committee on the Judiciary, *Copyright Amendments Act of 1991*, 320.
30. Ibid., 577.
31. Ibid., 334–38.
32. Schwartz, personal interview with the author, Washington, D.C., August 29, 2012.
33. House Committee on the Judiciary, *Copyright Amendments Act of 1991*, 338–45; Schwartz, personal interview with the author, Washington, D.C., August 29, 2012.
34. Melville and Simmon, “Film Preservation 1993”; Annette Melville and Scott Simmon, “Redefining Film Preservation: A National Plan: Recommendations of the Librarian of Congress in Consultation with the National Film Preservation Board,” National Film Preservation Board of the Library of Congress, August 1994, <http://www.loc.gov/film/plan.html>.
35. Pierce, “An Interview with Eric Schwartz,” 118.
36. “Film Preservation Study: Los Angeles Public Hearing, February 1993,” National Film Preservation Board of the Library of Congress, June 1993, <http://www.loc.gov/film/hrng93la.html>.
37. Ibid.
38. Melville and Simmon, “Film Preservation 1993.”
39. Ibid.; Melville and Simmon, “Redefining Film Preservation.”
40. Melville and Simmon, “Film Preservation 1993”; Melville and Simmon, “Redefining Film Preservation.”
41. I have limited my discussion of the technical guidelines and collaborations that were developed as a result of Melville and Simmon, “Redefining Film Preservation,” because a detailed description of these benefits would do little to shed light on public policy decisions. However, for an excellent overview of the development and implementation of these guidelines, see Helen Sam, “Cataloging and Preservation of Moving Images: A Survey of Organizations and Initiatives,” *PNLA Quarterly* 73, no. 4 (2009): 62–68.
42. Melville and Simmon, “Redefining Film Preservation.”
43. Reauthorization of the National Film Preservation Board, Public Law 104-285, *U.S. Statutes at Large* 110 (1996).
44. It is worth noting that there was significantly less testimony about the NFPA of 1996 than there was for the NFPA of 1988 and 1992. Instead, the film archives submitted “Redefining Film Preservation” as part of the congressional record for hearings titled *Copyright Term, Film Labeling, and Film Preservation Legislation*, 104th Cong., 1st sess., 1995, with AMIA president Edward Richmond providing a brief introduction to the plan to create a National Film Preservation Foundation.
45. For a clear overview of the purpose Title 36 corporations and their relationships to the U.S. government, see Kevin R. Kosar, *Congressionally Chartered Nonprofit Organizations (“Title 36 Corporations”): What They Are and How Congress Treats Them* (Washington, D.C.: Congressional Research Service, Library of Congress, 2006).
46. National Film Preservation Foundation, *Report to the U.S. Congress for the Year Ending December 31, 2011* (San Francisco, Calif.: National Film Preservation Foundation, 2012).

47. Melville and Simmon, "Redefining Film Preservation."
48. Schwartz, personal interview with the author, Washington, D.C., August 29, 2012.
49. National Film Preservation Foundation, *Report to the U.S. Congress for the Year Ending December 31, 2011*, 2–3.
50. National Recording Preservation Act of 2000, Public Law 106-474, *U.S. Statutes at Large* 114 (2000).
51. Melville and Simmon, "Film Preservation 1993"; Melville and Simmon, "Redefining Film Preservation."
52. Dan Streible, "The Role of Orphan Films in the 21st Century Archive," *Cinema Journal* 46, no. 3 (2007): 124–28.
53. Ibid., 125–26.
54. Caroline Frick, *Saving Cinema: The Politics of Preservation* (New York: Oxford University Press, 2011): 179; Streible, "Role of Orphan Films," 126.
55. Daniel Eagan, *America's Film Legacy: The Authoritative Guide to the Landmark Movies in the National Film Registry* (New York: Continuum, 2010), ix–xi.
56. Family Entertainment and Copyright Act of 2005, Public Law 109-9, *U.S. Statutes at Large* 119 (2005). Title 1 of this legislation allowed for limited use of motion picture content sanitizing devices, which has little to do with the reauthorization of the NFR, NFPB, and NFPF. As far as I can tell, these legislative actions were included in the same law only because they both dealt with film. For more information on the somewhat controversial content of Title 1 of this legislation, see Matt Williams, "Making Encouraged Expression Imperceptible: The Family Movie Act of 2005 Is Inconsistent with the Purpose of American Copyright," *Virginia Sports and Entertainment Law Journal* 5, no. 2 (2006): 233–58; Decherney, *Hollywood's Copyright Wars*, 150–54; Library of Congress Sound Recording and Film Preservation Programs Reauthorization Act of 2008, Public Law 110-336, *U.S. Statutes at Large* 122 (2008).
57. For recent news stories on the annual additions to the NFR, see Ann Hornaday, "2011 National Film Registry List Is Announced: *Gump*, *Bambi* Deemed Worthy," *Washington Post*, December 27, 2011, http://www.washingtonpost.com/lifestyle/style/2011-national-film-registry-list-is-announced-gump-bambi-deemed-worthy/2011/12/27/gIQA56wbLP_story.html; David Itzkoff, "Silence of the Lambs, *Bambi*, and *Forrest Gump* Added to National Film Registry," *New York Times*, December 27, 2011, <http://artsbeat.blogs.nytimes.com/2011/12/27/silence-of-the-lambs-bambi-and-forrest-gump-added-to-national-film-registry/>; "Forrest Gump, *Bambi* Added to National Film Registry," CNN, December 28, 2011, <http://marquee.blogs.cnn.com/2011/12/28/forrest-gump-bambi-added-to-national-film-registry/>.