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Library of Congress
Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000

Re: Comments on Orphan Works

Sirs:

The term “orphan works” has different meanings to archives, which may be experiencing difficulty in contacting copyright owners who have seemingly disappeared, and to content library owners such as ourselves. For us, “orphan works” relates to the term commonly used by film processing laboratories, storage facilities, and print depots – collectively, “Storage Facilities” -- for physical materials that they have in storage but for which storage charges are no longer being paid.

The Storage Facilities, with rare exceptions, only claim a warehouse lien on the materials, and not on the copyrights on the works embodied in the materials. From time to time, they dispose of materials either by private sale or through public auctions. However, for the most part, they are reluctant to sell the materials to buyers who cannot exhibit chains of title to them, or other indicia of copyright ownership. We postulate that there is a significant supply of physical materials for such seemingly abandoned works, sitting in dead storage in dozens, if not hundreds, of such facilities, and of course, in many hundreds of archives.

We own or distribute one of the largest remaining primarily good copyright entertainment libraries, with more than 500 feature films, more than 2,500 radio programs, and more than 1,000 television programs. We have a great deal of materials on deposit with UCLA, and in public storage facilities; an unknown amount of materials have been donated to various archives, frequently to garner income tax charitable deductions for the donors; our own experience is that the archives rarely troubled themselves with requiring chains of title back to the copyright owners, for such donations.

We have extensive inventories for our materials, but even so, over the eight decades in which we have been in business, we have lost track of physical materials for many of our titles. This is a relatively minor problem where we have ownership or control of the primary print elements, such as picture and track negatives; however, it is a far more serious problem where (a) the primary elements have deteriorated, as is often the case with nitrate film elements, or (b) the primary elements have been misplaced by others in the chain of title, as is often the case with early live television programs preserved on kinescope, or (c) distributors or sub-distributors have neglected to return physical elements after their licenses expire, as is often the case with theatrical prints.

Further complicating matters is the demise of many of the commercial film laboratories, which traditionally held film negative and print elements at little or no charge, so long as the owner was using their facility to manufacture release prints, and later, video copies. The laboratories go out of business, change hands, move physical locations; while notices of pending materials transfers are supposed to be sent to the owners, they too may have moved, or gone out of business, or transferred ownership to others.

We constantly look for the physical materials for our works. In the past, they frequently made their way into the collector market, although in many cases the “collectors” were independent video companies who were unconcerned with copyright ownership. A real service was provided by a magazine called *Big Reel*, which was the primary source of advertising for the sale of theatrical prints and other physical materials; unfortunately, it went out of business, and the only alternative is eBay. We have a number of searches on eBay, which are supposed to alert us when materials for one of our works surface for sale; however, they are dependent on the way in which the seller has listed the materials, and are at best an imperfect tool.

We frequently have to issue “cease and desist” notifications for persons who exploit our good copyright works without our permission, because they have somehow obtained possession of a physical copy of them. Invariably, when we point out that the chain of title to us has been recorded with the Copyright Office, they profess ignorance and apologize. In the case of complaints against large Internet sellers, such as eBay and Amazon.com, and Internet sites such as YouTube which furnish a means to make video copies available to the public, the offending listings are quickly taken down. However, from time to time, the infringer simply changes the title of the work and relists it again. While there are commercial services which will routinely monitor the Internet for any listings of specific works, and routinely issue cease and desist or takedown notifications, the cost is far beyond our means; we have to rely on searches by title from time to time, which is an imperfect procedure at best.

We are in opposition to any legislation which would somehow strip the exclusivity afforded to works which we own or distribute, under the Copyright Act, unless it placed a significant burden on the person or entity which proposes using physical materials for such works to locate the rights holders, and to keep computer records of revenues received by them from any exploitation of the materials.

We do this all the time when we are considering distribution of a title that we have materials for – it isn't complicated. However, it requires more than simply doing a physical Copyright Office records search for pre-1978 recordings, or an online search for post-1978 recordings. For instance, we routinely look for video offerings on Amazon.com and eBay for the titles, so that we can contact the video company to determine if they can put us in touch with the rights holder.

We hope to eventually commission a proprietary search engine which would enable us to search the web sites of all of the archives listed on the Copyright Office's web site, by title or metadata, for deposited materials for our titles. It shouldn't be that daunting a problem for the Copyright Office or one of the university-affiliated archives which have so graciously submitted comments for this subject, to do this. For content owners or distributors such as ourselves, having a way to search for physical materials for our good copyright titles in hundreds of archives, would be an enormous help; for the archives, having a way to search for duplicative materials in other archives which may be in touch with copyright owners or legitimate licensees, would be a similar help. We believe that this should be done prior to the enactment of any legislation which will somehow strip exclusivity from copyright owners for physical materials which have been classified, for one reason or another, as "orphan materials."

Very truly yours,

Alexander W. Kogan, Jr.
President

Filed by uploading to Copyright Office