

David Pierce

March 25, 2005

Jule L. Sigall
Associate Register for Policy and International Affairs
Copyright Office
The Library of Congress
Washington, DC 20540

Dear Mr. Sigall:

I am very pleased that the Copyright Office is examining the important issues surrounding 'orphan works.' I have encountered orphan films from several perspectives: as an independent researcher of the Copyright Office records, providing information to owners, distributors, and potential users of films and television programs; locating owners and purchasing rights to films long out of distribution and making them widely available to new audiences; working as a consultant for several major archives in the United States on access issues; and until recently heading the British Film Institute's National Film and Television Archive.

The greatest single improvement to the identification and availability of 'orphan' material would be for Congress to fund the Copyright Office to place all of its records on the Internet. Currently the indexes of registrations, renewals and assignments from 1978 to the present can be searched on-line, but the documents themselves and all pre-1978 indexes and documents can only be viewed by a personal visit to the Copyright Office. It is essential to have all records from the 18th Century to the present – including all indexes and images of all registrations, renewals and assignments – available on the Internet.

1. Nature of the Problems Faced by Subsequent Creators and Users

There are several situations where the lack of a traceable owner causes difficulty.

- Producers of documentaries need to document the ownership of any pre-existing material they reuse to qualify for errors and omissions (E&O) insurance. This insurance is required by the broadcaster, and requires proof of clearance for copyrighted material, and documentation of status for public domain materials. When a producer wants to use an excerpt that is protected by copyright, but their best efforts are unable to identify an owner, they will incur a risk premium or the lack of clearance will affect their ability to get insurance. Usually, the material is simply not used.

- It unclear for many works whether they have been previously published or remain unpublished. This is especially significant for television materials and works that were created for showing to specialized audiences. The lack of a clear definition of publication for moving image material is unhelpful. A training or educational film that received limited distribution or a television program from 1955 may or may not have been published, and 50 years later it is extremely difficult to reconstruct the distribution history of a work. If such a work were published and never registered, then it would be in the public domain. If it were not published, then the work would be still protected by copyright. In some cases, the Copyright Office has granted registration as unpublished to works over 28 years old that would be in the public domain had they been published. Because the supporting documentation provided by the claimant during the application process is not made readily available (and Copyright Office in-process records are not retained for the full term of copyright) the actual situation with these works is unclear.
- While the Copyright Office registration and assignment records are invaluable for tracing owners, there are also hundreds of registrations and renewals with false claimants and numerous falsified assignments. The difficulty of determining ownership (and refuting registration or assignment documents previously accepted by the Copyright Office) results in those works not being used.
- Numerous works have untraceable owners. As the current copyright law allows published works from as far back as 1923 and unpublished works that are even older to be protected by copyright, some owners will always be untraceable. I have driven to addresses listed on renewal applications, requested wills and death certificates from states or counties, and ordered copies of corporate Articles of Dissolution from state offices. Sometimes these are useful, but often they too are a dead end. It is not practical to simply ‘take your chances’ because often the only copies of these orphaned works are held by archives that require permission for access. Even if you already possess a copy, the statutory penalties are onerous. The risk far outweighs the potential benefit.

This will prove to be a much greater problem in the future for works created more recently, where copyright protection is automatic, and even the initial owner of copyright cannot be determined with certainty.

2. Nature of “Orphan Works”: Identification and Designation

While orphan films are titles without traceable owners, the definition should also include works with unclear ownership, including situations where a party claims rights in a work that if not for their claim would be in the public domain. In some cases, where specific rights – such as broadcast television – were sold in perpetuity, it is not possible to identify the owner of other rights in a work. Therefore, I believe that the designation as ‘orphan work’ must be specific to the situation.

I do not consider it to be a problem if an owner is identified, but requests a higher fee than the prospective user is unwilling to pay. The decision whether to make material available and the conditions of that availability are the right of the owner.

I see little value in a system where copyright owners could indicate continuing claims of ownership in works. Unless claims are documented, it is open to fraud.

Overall I believe that any solution should require minimum paperwork and minimal cost. Rather than put the onus on owners to register their claims, I would prefer a 'case-by-case' approach where potential users are required to follow a process to find an owner, then file a notice of intent to use a work with the Copyright Office. If an owner appears, then the reliance party should be allowed to continue to use the work for an extended period of time and forever if they used only a small portion of the work. This enforcement could follow the procedures used for the GATT implementation, with a notice of intent to enforce, allowing users to sell off existing copies of entire works and, if necessary, go to a judge for a negotiated royalty.

3. Nature of "Orphan Works": Age

I believe that the orphan status of a work is based on the specific situation, and should not be based on the age of the work.

4. Nature of "Orphan Works": Publication Status

While I recognize that there are significant issues in expanding the definition, I believe it is essential that the definition of 'orphan works' include works that are unpublished, especially with works for hire. Much moving image material, such as outtakes and live television recorded by kinescope, remain unpublished and often have no traceable owners.

5. Effect of a Work Being Designated "Orphaned"

I believe that the identification of a work as orphaned is based on the situation, and it should be possible for owners to lose track of works for a period of time, then return and regain them with no permanent loss of rights (excepting continued use by reliance users as discussed in #2 above).

Because this issue involves stakeholders with different needs and interests, in the case of audiovisual material, I encourage the Copyright Office to utilize the National Preservation Boards to sponsor working groups to review the issues for film, television and sound recordings and establish best practices for due diligence.

I look forward to participating in the debate on this important subject.

Yours truly,

David Pierce