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March 12, 2014

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

Re: Comments on Orphan Works

Sirs:

Reference is made to my letter to you of March 12, 2014, responding for comments on orphan works.

We believe that the goal of establishing a mechanism for allowing true “orphan works” to become available to the public, other than languishing in obscurity forever, is laudable, and we support it.

HOWEVER, we are repeatedly faced with infringements for our unpublished works which we have not yet registered, based on errant prints which were allowed by predecessors in our chain of title to escape from their control. The almost universal response to a “cease and desist” demand is something like “I didn’t realize that [the work] was not in the public domain” or “I thought that [the work] was in the public domain.” This may be somewhat understandable when the work is a pre-1978 work, which cannot be researched online at copyright.gov, but there is absolutely no excuse when documents regarding it have been recorded post-1978, and are readily discoverable online.

This is of particular concern to owners of audiovisual works that fall generally into the category of unregistered unpublished works, such as is the case of most kinescoped live television broadcasts. In the case of NBC’s donation of its huge kinescope library to the LOC, the donated materials may be the only ones which are available, so it is crucial that access to them be conditioned on something other than an applicant’s simple written statement that he/she/it has made a diligent effort to locate the copyright owner or claimant.

A similar problem arises in the case of motion picture photoplays, which frequently have multiple working titles prior to their eventual releases, or as is typical of many foreign-photoplays which are frequently co-productions involving two or more countries, different titles in different languages. A search under the published title might reveal no registration or documentation, whereas a search under the alternative titles might reveal one or both. When we are researching a “lost” title, we habitually move past the title to searching online for the talent – director, writer, cast – as well. It is relatively easy to cross-reference their credited appearances or participation, to identify the “lost” title.

Before the initial tests are expanded, we would urge the development of a search report algorithm that would support a request for a digital copy of a supposedly “orphan” audiovisual work, to confirm that the applicant has really made a diligent effort to at least search the publicly-available records of the Copyright Office. We urge that permission to publish an audiovisual work by means of a Copyright Office-supplied digital copy, be conditioned either a Copyright Search Report from an expert such as Elias Savada, or on a search report from the Copyright Office, confirming that at a minimum, there are no post-1978 recorded documents regarding the orphan title in question. The report would have to be submitted with the application for a digital copy.

Finally, I would also like to suggest that the pre-1978 card files be scanned into a searchable database. This is not a substitute for a truly skilled professional copyright search, but it would go a long way toward enabling potential orphan works claimants to do the initial determinations of whether or not the work is a true orphan, themselves. An alternative would be to scan the Superlist into a searchable unofficial database.

Very truly yours,

Alexander W. Kogan, Jr.
President

Filed by uploading to Copyright Office