November 18, 1996

RE: NEWPORT '69 POP FESTIVAL
Control No: 80-412-9903(H)**(DATE)**

Dear Mr. Hoffman:

In your letter to James Vassar, Head of the Performing Arts Section, dated May 24, 1996, you requested an Appeals Board determination regarding the registration of two copyright claims in a video tape depicting various performances in the Newport Rock Festival of 1969. Mr. Vassar has now forwarded this letter to the Appeals Board which reviews final agency appeals. The Board has considered your appeal and determined that it should affirm the refusals to register for the reasons set out below.

Administrative Record

On February 4, 1995, on behalf of your client, Anthony Nicolosi, you submitted completed Forms PA and SR covering a videotape entitled NEWPORT '69 POP FESTIVAL. The PA application designated the nature of work as a "video copy of an original 16mm film." The SR application designated the nature of authorship, as "all sounds (including music) on video copy of original 16mm film." James Holloway, the copyright examiner handling this case, called you about this submission on April 13, 1996, and was told that the video tape was "found" footage, and that the original author was unknown. You asserted that any copyright in the footage had been abandoned and that the work was eligible for exploitation.

In a letter dated April 21, 1995, Mr. Holloway subsequently refused to register Mr. Nicolosi's claim since he found no basis to register. He noted that the validity of Mr. Nicolosi's claim would depend on his securing permission to use the material and claim copyright in a derivative work.

On August 22, 1995, you filed an appeal on behalf of your client arguing that copyright was secured as a result of abandonment and enclosed a photocopy of the discussion of abandonment in Nimmer's treatise on copyright. On December 26, 1995, following reconsideration of your client's claim, Mr. Vassar wrote you confirming the Office's refusal to register this work. In that letter he rejected your assertion that the abandonment doctrine could be used to transfer a copyright and further concluded that consideration of registration as a derivative work could not be made without documentation indicating that your client had obtained the permission of the original copyright owner.

Your May 24, 1996, letter directed to the Appeals Board provides more details as to how this film was left in a hotel room in Hollywood and found by your client. However, you do not provide additional support for the theory that abandonment can be interpreted as a transfer of copyright. Alternatively, you assert that the deposited video tape was a "substantially edited" version of the 16mm original and was, therefore, registrable as a derivative work.

The Appeals Board has considered all of the relevant principles of copyright law raised in your final agency appeal.

Copyright Material in the Preexisting 16mm Film

The preexisting film from which Mr. Nicolosi's videotape was made likely contains significant intellectual property. It contains images of well known performers and recorded music and sounds. Your client does not appear to have created the intellectual property constituting the original audiovisual material. Further, since your client does not know the identity of the person(s) who created the film, he is presumably unaware of whether the creator(s) of the film had secured the proper clearances from the performers to make the film in the first place. Therefore, the original 16mm film may, or may not be, a lawful, authorized copy. Your client, according to your assertion, has merely come into possession of a physical copy which he asserts was found in a hotel room.

The Office takes no position on whether your client's possession of the 16mm film is lawful. The copyright law is very clear, however, that transfer of a physical copy does not affect the copyright. The copyright law provides:

> Ownership of a copyright or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

17 U.S.C. § 202 (1994).

Rights under the copyright law are determined by the explicit language of the statute. Section 201 of the copyright law states that copyright "vests initially in the author." Subsection (d) of that provision provides that copyright may be transferred by "means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession." Section 204 adds that transfers of ownership must be in writing.

Abandonment of Copyright Claim

As noted in Mr. Vassar's letter of December 26, 1995, "[i]f Mr. Nicolosi is claiming copyright only in original authorship he added to the...[preexisting] 16mm film and bases his right to create and claim copyright in that derivative work solely on the abandonment of copyright, we must again refuse registration on the facts presented thus far." (Letter from Vassar to Hoffman 12/26/95, at 2).

In your letter of May 24, 1996, on behalf of your client, you still give no documentation provided by your client of the copyright owner's intent to abandon his or her copyright in the works embodied in the copy Mr. Nicolosi found.

We cannot agree with your interpretation of the doctrine of abandonment. You cite no cases where abandonment was applied to effect a transfer of copyright. As Mr. Vassar wrote, "Nimmer does not acknowledge the possibility of any subsequent ownership of an abandoned copyright, only subsequent use. He states that abandonment constitutes an effective defense in an infringement action." Id.

Moreover, in considering whether there has been sufficient abandonment to permit subsequent use, Nimmer points out that "abandonment occurs only if there is an intent by the copyright proprietor to surrender rights in his work." He adds that there is "...strong authority holding that an overt act evidencing such an intent is necessary to establish abandonment." 3 Melville B. Nimmer and David Nimmer, Nimmer on Copyright § 1306 (1993). As Judge Learned Hand said in distinguishing abandonment and forfeiture of copyright:

> We do not doubt that the "author or proprietor of any work made the subject of copyright" by the Copyright Law may "abandon" his literary property in the "work" before he has published it, or his copyright in it after he has done so; but he must "abandon" it by some overt act which manifests his purpose to surrender his rights in the "work," and to allow the public to copy it.

National Comics Publications Inc. v. Fawcett-Publications, 191 F.2d 594, 598 (2nd Cir. 1951). The cases cited in Nimmer are ones where the court considered whether the author had undertaken some act showing an intent to abandon. Mere inaction of the author or copyright owner does not constitute abandonment of the work. See, e.g., Lottie Joplin Thomas Trust v. Crown Publishers Inc., 456 F. Supp 531 (S.D.N.Y. 1977), aff'd, 592 F.2d 651 (2nd Cir. 1978). Nor will destruction of the only copy of a work necessarily constitute abandonment. See, e.g., Pacific & South Co. v. Duncan 744 F.2d 1490, 1500, aff'g 572 F. Supp. 1186 (N.D. Ga. 1983) cert. denied, 471 U.S. 1004 (1985). A court has found abandonment where there has been

an unreasonable and unexplained delay in asserting authorship and "a long acquiescence in widespread publication" of the work. J. K. Sandler and R. Robins, Inc. v. J. P. Katz, 20 Copyright Off. Bull 621, 625 (S.D.N.Y. 1925). You have provided no documentation pointing to such a lack of assertion of authorship and ownership in the instant work. As Examiner Holloway wrote you in April of 1995, copyright in this unpublished work could still exist.[1]

Another commentator emphasizes the need for an overt act on the part of the copyright owner before abandonment can be concluded.

> Because the subject matter of copyright lacks a physical dimension, no copyright owner can possibly scout out every single infringement that may occur in every corner of the country. Courts recognized the unfairness and inefficiency of a rule that would require universal vigilance as the price for preserving a copyright, and consequently require proof that the copyright owner overtly demonstrated an intent to abandon before they will find that the copyright owner has abandoned his rights.

Paul Goldstein, Copyright § 9.3, at 157 (1989). While abandonment may limit enforcement of the copyright by the rightful owner, it does not of itself transfer rights under copyright to the finders of lost physical copies. Nimmer does not cite any case so holding.

In the instant case, the author, possible current owner, and the circumstances surrounding the creation of the 16mm film are unknown. As Mr. Vassar clarified in his letter of December 26, 1995, the only person entitled to claim copyright in the audiovisual work embodied in the 16mm film is the author or his lawful assignee, and you have provided no documentation indicating who the author/owner is and that he has overtly abandoned his copyright in the original audiovisual work.

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[1] Registration is permissive, not mandatory. 17 U.S.C. § 408 (1994).

Derivative Work Claim

We also cannot agree with your argument in the alternative that your client created a new derivative work through editing the original 16mm film. The right to prepare a derivative work is one of the exclusive rights a copyright owner enjoys. 17 U.S.C. § 106 (1994). Thus, in order to prepare a legal derivative work from a copyrighted work, one must first get the right to do so from the copyright owner. Relying on a mere presumption of abandonment as a basis for using possibly copyrighted works to create derivative works instead of obtaining permission from the author or owner of the copyright appears to be untenable. In the instant case, no such abandonment has been documented.

Your client has indicated that he does not even know who the author is; he cannot, therefore, claim to have received any authorization from the copyright owner to make a derivative work. Again, section 106 vests the right to make derivative works in the copyright owner. While Mr. Nicolosi may well have added copyrightable authorship to the preexisting work, we cannot register a claim in such derivative work authorship in the absence of documentation showing authorization from the copyright owner who remains unknown. Section 103 of the copyright code provides that "protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully." 17 U.S.C. § 103 (1994).

For the reasons stated in this letter, the Appeals Board affirms the Examining Division's refusal to register the submitted claims and is closing the file in this case. This decision constitutes the final agency action on this matter.

Sincerely,

Nanette Petruzzelli
Chief, Examining Division
For the Appeals Board
U.S. Copyright Office

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November 19, 1996