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RE: HUSBANDS
Control No. 10-600-754-2(C)

Dear Mr. Komen:

I am writing on behalf of the Copyright Office Board of Appeals concerning your appeal of the Office's refusal to register a renewal claim in the screenplay for the film *Husbands*. You submitted the renewal claim to the Office on February 26, 1998, on behalf of the heirs of John Cassavetes, author of the screenplay. Before proceeding further, however, I would like to take this opportunity to apologize for the long delay in getting back to you with the Office's decision. Concerning that decision, because of long-standing registration policy, the Board of Appeals has determined that no renewal registration may be made for the screenplay. The administrative record in this case and the Board's reasoning underlying its decision follow.

ADMINISTRATIVE RECORD

I. Initial submission

On February 26, 1998, you submitted two renewal claims for registration: one for the motion picture *Husbands* in the name of Faces Music, Inc., and one for the *Husbands* screenplay in the names of Gena Rowlands [widow of the screenplay author John Cassavetes], Nicholas Cassavetes, Alexander Cassavetes and Zoe Cassavetes [children of the deceased screenplay author Cassavetes.] Renewal registration RE 786-355 was made for the motion picture; renewal registration for the screenplay was refused. The Office's refusal to register was communicated to you by letter dated March 25, 1999, in which supervisory examiner Evelyn Leedy explained that the lack of a separate original registration for the screenplay meant, under Office registration practices, that no separate renewal registration for the screenplay could be placed on record. Ms. Leedy's letter also noted that any statutory copyright protection for a screenplay such as the one for *Husbands* must rely on the statutory protection for the motion picture.

II. Your appeal

On August 6, 1999, you submitted a second appeal to the Office's Board of Appeals.[1] Your second appeal submission included biographical material for the deceased screenplay author Cassavetes. You set out in your appeal the history of ownership of the rights in the screenplay, noting that Cassavetes wrote the *Husbands* screenplay in 1968 as an individual and not as an employee for hire and subsequently transferred [mid-1968] the rights to Faces Music, Inc. There then followed a re-assignment to Cassavetes [later in 1968] and a subsequent re-assignment from Cassavetes to Faces Music, Inc. [1969].[2] John Cassavetes died February 3, 1989. Because you maintain that the screenplay in question was authored by Cassavetes as an independent, not-for-hire author, you submitted a renewal registration application for it under the provisions of 17 U.S.C. 304[a][1][C], naming Cassavetes' widow and children as renewal claimants.

Your appeal argues that copyright protection for the screenplay was secured by original registration for the motion picture in 1970 and that, given the purported original-term copyright for the screenplay, your submission of the renewal claim in the name of the Cassavetes heirs is appropriate. You cite Stewart v. Abend, 495 U.S. 207 (1990) and Fred Fisher Co., Inc. v. Witmark & Sons, 318 U.S. 643 (1943) on renewal rights generally and for the fact that where the author does not survive into the renewal term, the renewal vests in the statutorily designated classes. You recognize the holding in Batjac Productions, Inc. v. Goodtimes Home Video Corp., 160 F.3d 1223 (9th Cir. 1998) [concerning the motion picture *McLintock!*] that publication of a motion picture publishes the constituent elements of the motion picture and further note that the Batjac court did not find that the renewal copyright for the *McLintock!* screenplay would have been automatically merged with any renewal secured for the motion picture as a whole. You go on to cite the lower court decision in the *McLintock!* case which stated in dictum that the renewal term for the screenplay in *McLintock!* "would lie with the author's heirs... because... the author of the screenplay died... prior to the expiration of the initial copyright term." Maljack Productions, Inc. v. UAV Corp., 964 F. Supp. 1416, 1425 (C.D. Cal. 1997).

You analogize the Batjac facts to those surrounding the authorship of the *Husbands* screenplay. Your argument is that the *Husbands* screenplay has been properly copyrighted

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[1] Because the Examining Division would merely have confirmed its refusal to register according to the Office's examining practices, the Register in her discretion allowed you to proceed directly to the second appeal of the refusal to register the screenplay for *Husbands*.

[2] We note that although these transfers of rights in the screenplay were contemporaneously recorded with the Copyright Office, no separate original-term registration for the unpublished screenplay [which under Office regulations administering the provisions of the 1909 Act would have been in class D and would have covered the "acting versions of dramatic works such as plays, radio or television dramas... motion picture shooting scripts..."] was made before publication of the motion picture occurred in 1970.

as part of the 1970 copyright registration for the motion picture and that the motion picture registration, in the name of Faces Music, Inc., the assignee of John Cassavetes, protected the independently authored screenplay as well. The distinction you make between the *McLintock!* screenplay and the *Husbands* screenplay is that the heirs of the *McLintock!* screenplay did not file a timely renewal for the screenplay whereas the Cassavetes heirs did.

You bolster your argument for renewal registration of the Cassavetes-authored screenplay by reference to Goodis v. United Artists Television, Inc., 425 F.2d 397 (2d Cir. 1970). There the Second Circuit accorded protection to contributions to a composite work [a story published serially in a magazine] even though the contributions did not carry separate copyright notices and had not been separately registered. The Goodis court extended the protection of the overall composite work to its individual contributions, giving as its reasoning the fact that the individual contribution author had not intended to dedicate his work to the public even in the absence of a separate copyright notice for the contribution and an absence of the act of separate registration. As you also note in your appeal, the Office's practice has been to register a renewal in contributions to composite works which contributions were not separately registered for their original term of copyright.[3]

You have also stated that the Office's refusal to register for renewal the claim of the Cassavetes heirs in the *Husbands* screenplay will make people unwilling to deal with the widow and children unless the owner of the renewal rights in the motion picture were willing to acknowledge the expiration of its rights in the screenplay for the renewal term, something which you term a "highly unlikely scenario." You maintain that the Office's refusal to put the renewal claim on record will deny the widow and children the right to claim royalties for the continued use of the screenplay by the owner of the rights in the derivative motion picture. You urge the Office to reconsider its long-standing policy with respect to registering renewal claims in component parts of a motion picture in order to assure consistency of our practices with case law.

DECISION

The Copyright Office Board of Appeals affirms the Examining Division's refusal to register a renewal claim in the names of the heirs of John Cassavetes for the screenplay in the motion picture *Husbands*.

I. Motion picture registration practices under the copyright law of 1909

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[3] This is, indeed, the case as long as the periodical or other composite work was registered in its original term. *See* Compendium II, Compendium of Copyright Office Practices, sec. 1310.02 (1984), the Office's manual of registration practices under the 1976 Act.

A. Characteristics of motion picture authorship

The Copyright Office considered a motion picture to be a unified work of authorship for purposes of registration under the 1909 law. The Office's Compendium I (1973) describes a motion picture as "ordinarily... embod[ying] a large number of contributions, including those of the author of the story, author of the screenplay, director, editor, cameraman, individual producer, etc. These persons are not regarded as the 'author' of the film in the copyright sense."[4] Compendium I, sec. 2.14.3 (III)(a)(2)(*1*). Compendium I further states that most motion pictures were works made for hire, with the production company's being the employer in most cases. Id. at 2.14.3 (III)(a)(2)(2). The Office's understanding of motion picture authorship was based on then-prevailing industry practices; its recognition of the ownership of motion pictures as works made for hire and motion picture authorship as consisting of contributions or parts, each of which is meant to be joined to other contributions or parts, in order to produce an integrated entity underlies this understanding.

In its administration of the 1909 Copyright Act, the Copyright Office did not consider the authorship of a motion picture to be a composite work, i.e., a work consisting of distinct and separable contributions which do not merge into a unitary whole. Although the 1909 Act contained no definition of "composite work," case law and scholarly commentary came to accept the definition of a composite work as lacking the common design of a unified entity.[5] This understanding of motion picture authorship has continued under the Office's administration of the 1976 Copyright Act. The Copyright Office generally regards a motion picture as a work of authorship which evidences a common design and is meant to exist as an integrated whole. Compendium II, sec. 1317.04[a], in its renewal provisions provides an explicit statement concerning the nature of a motion picture: "Generally a composite work is an original publication relating to a variety of subjects to which a number of different authors have contributed distinguishable and separable selections. Thus, a work by a single author consisting of a collection of his writings is not a composite work. Similarly, a work which is the product of joint authorship and common design, or which consists of elements which have been

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[4] Although motion picture industry practice, including the recognition of rights in parties contributing to the overall authorship embodied in a motion picture, may have changed over the decades since the Office's Compendium I was in effect, the Office continues to apply its practices for motion picture authorship governed by the 1909 statute consistently as they have been applied in the past in order to assure fair and equitable registration treatment.

[5] For a detailed treatment of the development of the concept of composite works, *see* former Register of Copyrights Barbara Ringer's Study No. 31 Renewal of Copyright, Copyright Law Revision Studies, issued pursuant to S. Res. 240, 86th Cong., 2d Sess. 131-134 (1961). The Study includes reference to a number of judicial opinions decided during the 1940s and 1950s concerning musical works in which courts described composite works as those works of multiple authorship which nevertheless lack a common design or unity.

indistinguishably merged into a single entity, cannot be regarded as composite, e.g., musical compositions, dramas, dramatico-musical works, and motion pictures."

I point out the 1976 Act's treatment of the soundtrack of a motion picture, with a soundtrack's possibly embodied works of authorship such as musical compositions and screenplays, and the Act's legislative history's acknowledgment that the soundtrack of a motion picture is explicitly included in the definition of a motion picture H.R. Rep. No. 94-1476, at 56 (1976). Nimmer directly states it: soundtracks are "fully protected by the motion picture copyright." Nimmer at 2.09[E][1]. Current examining practices of the Motion Picture unit [*Motion Picture Authorship* (MPAU) 9/15/93], administering the provisions of the current copyright law, provide a definition of "author" of a motion picture: "The authors of a motion picture generally include the producer, director, camera operator, editor, screenplay writer, and other individuals who make a copyrightable contribution to the production. Except for the script and musical score, all the elements comprising a motion picture are considered part of a single, integrated work and must be registered as a whole." This examining practice under the current Act does allow for the registration of a screenplay separate and apart from the registration of the motion picture as a whole. However, even the current [1993] examining practice [MPAU at 2] indicates that examiners should question an application for a feature film or a network television production which is limited to the authorship of the "script" and that examiners should call or write to verify the extent of the claim--this because of the Office's *continuing* understanding that a motion picture is generally to be regarded as an integrated, single work and that it is unusual for separate claims in component parts of the motion picture to be submitted.

B. The 1975 regulation re motion picture soundtracks

As previously explained, during the years of the 1909 copyright law the Office considered a motion picture to be an integrated entity but Compendium I stated that the Office "takes no position as to whether copyright in a motion picture covers the integrated sound track portions of the work." Compendium I at 2.14.1 (III).

In 1975, however, prior to the 1978 effective date of the current Act, the Office issued a regulation [37 C.F.R. 202.15(e) (1975) (removed January 1, 1978)] which recognized that "copyright in a motion picture extends to an integrated soundtrack and its copyrightable component parts" and which permitted separate registration for a copyrightable component of a motion picture sound track where the component part was not previously published or registered *but only if* the motion picture bore a separate copyright notice covering the particular component part. The 1975 regulation, explicitly stated to pertain to applications for registration made after May 12, 1975, also specifically allowed that "applications to register a claim to copyright in a component part of a motion picture soundtrack for the renewal term shall be accepted *only if separate registration has first been made for the original term.*" [emphasis added]. Thus, although the 1975

regulation is no longer in effect and although the Office's registration practices under the 1976 Act allow the separate registration of a component part of a motion picture soundtrack [including a screenplay] in the Office's recognition of the protection of the copyrightable aspects of a soundtrack in a motion picture [17 U.S.C. 101, definition of motion picture], a work first published in 1970 is governed by registration practices as they existed under the 1909 law. Further, even the 1975 regulation, somewhat liberalizing registration with respect to separate works embodied in motion picture soundtracks, disallows the separate renewal registration for the Cassavetes screenplay which had not been registered for an original term of copyright.

II. The Goodis theory and its non-applicability to the Cassavetes screenplay

Goodis involved a short story published in serial segments in a magazine. The magazine carried an overall notice in the name of the owner of the copyright in the collective, or composite, work as a whole but did not carry an individual notice for the short story. The owner of the rights in the magazine, the collective work, held only the right of first publication from the story's author. The Second Circuit held that a copyright notice in the name of the magazine's owner– only a licensee with respect to the short story– was sufficient to secure a valid copyright on behalf of the author-owner of the rights in the short story. Goodis v. United Artists Television, Inc., 425 F. 2d 397, 399 (2d Cir. 1970). Applying principles of equity as well as the liberalized provisions of the 1976 Act not yet in effect at the time of the decision but, in the opinion of the court, already well-known among copyright industries, scholars and the courts, the Second Circuit held that the notice for the magazine as a whole was "more than adequate to apprise any innocent party that he might be infringing another's copyright" and that "although placing a special notice in the author's own name on each installment appearing in the magazine would be a more careful practice...," the court found that "failure to do so [i.e., use of individual notices] should [not] cause an author to suffer forfeiture." Id. at 403.

Although your appeal urges renewal registration for the screenplay, the Office finds the Goodis decision inapplicable to the Cassavetes screenplay. As previously explained [**I. A.,** *supra*], it is the position of the Office that a motion picture has not been regarded as a composite work for registration purposes as was the magazine in Goodis; this position prevents the Office from placing the renewal for the screenplay on the public record. The failure of the screenplay author Cassavetes [or of a party that could have been deemed his agent] to have reserved via registration the copyright in the unpublished version of the screenplay [which could have been done contemporaneously with the recordation of the multiple transfer assignments (*n. 2, supra*)], thus rendering the screenplay's copyright for purposes of the public registration record separate and apart from the copyright in the motion picture, means that the Office, viewing the motion picture as an integrated entity, cannot now insert into the public record a claim to renewal rights owned by a party different from the owner of record of the rights in the integrated entity, i.e., in the motion picture as a whole.

The Board confirms the Examining Division's position that, for registration purposes, a motion picture cannot be considered a composite work and, thus, the Office's analysis of the Cassavetes screenplay proceeds from the viewpoint that the screenplay, not having been segregated as an identifiable work for registration purposes as the subject of a separate original-term registration prior to its incorporation into the published motion picture [*n.3, supra*] and such separate ownership fact for the screenplay not having been placed on the public record, the screenplay must be treated as an integrated, component part of the overall motion picture.[6]

III. The medium of fixation

We also address your contention that because the Office has registered renewal claims in contributions to collective, or composite, works where the only original- term registration was that for the collective, or composite, work as a whole, the Office should now, in a similar vein, register the Cassavetes screenplay. You support this position by reference to the fact that the nature of the medium in which authorship is fixed should not affect the rights in that authorship and you cite Shoptalk, Ltd. v. Concorde-New Horizons Corp., 168 F. 3d 586 (2d Cir. 1999) in support of the principle. We wholeheartedly add our recognition of that principle and further cite both section 101 of the current Act which defines "fixation" of a work as well as the House Report to the 1976 Act which clarifies that, differing from case law under the 1909 statute that held statutory protection to be dependent upon the medium in which authorship was fixed, no such limitation exists under the 1976 Act and "it makes no difference what the form, manner or medium of fixation may be" regarding the copyright in a work. H.R. Rep. No. 94-1476, at 52 (1976).[7]

The Cassavetes screenplay is, of course, a work governed by the 1909 Act and the case law which developed under it. We need not, however, consider that case law because our refusal to register the screenplay rests not on the differing medium of the work

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[6] Although Nimmer states that the Goodis decision left unanswered the question of whether the holding of the umbrella-like protection of a notice in the name of a collective, or composite, work owner protecting an individual contribution extends to other types of works in "which the name appearing in the notice was that of a mere licensee" [Nimmer, at 10.01[C][2], n. 48], we need not consider the unanswered question. Again, because of the works involved– the Goodis magazine considered as consisting of distinct and separate contributions and the *Husbands* motion picture considered an integrated whole– the consistent registration practices explained above which developed under the 1909 Act recognized a significant difference in the nature of authorship and ownership between the essential composition of a magazine and that of a motion picture.

[7] The 1976 Act explicitly rejects the prior case law developed under the 1909 statute which followed the doctrine of White-Smith Publishing Co. v. Apollo Co., 209 U.S. 1 (1908), which had held that unless the medium of fixation is one from which authorship may be visually perceived, that medium does not constitute a copy of the authorship and, thus, the authorship in such a medium could not be deposited and registered, rendering it non-protectible.

involved in the Goodis case [a story appearing in a print magazine] versus the screenplay work first published as part of the soundtrack of a motion picture. Our refusal, rather, is based on the Office's classification of a motion picture as an integrated work of authorship requiring the positive step of reserving any separate original-term copyright for an aspect of, or contribution to, the soundtrack in which separate ownership was the case.

IV. Recent case law as it affects renewal registration of the Cassavetes screenplay

A. Stewart v. Abend

The right of a renewal owner in an underlying work to prevent the continued use during the renewal term of a derivative work based upon the underlying work was at issue in Stewart v. Abend, 495 U.S. 207 (1990). The Supreme Court held that the renewal right of an owner who had succeeded to the renewal in an underlying work at the death [prior to the beginning of the renewal term] of the author of the underlying work allowed the renewal owner to demand compliance with his terms for continued exploitation of the derivative work during the renewal term. In Stewart a short story was the subject of statutory copyright protection in a situation involving the timely original-term registration of the magazine in which the story had been first published. *See n. 3, supra,* for the Office's practice of registering for renewal a contribution to a collective, or composite, work where the only original-term registration is that for the overall collective work.

The underlying story in Stewart was timely renewed by the statutory successor and the renewal registration had for its basis the original-term registration of the magazine in which it was published. Although you cite Stewart generally for it affirmance of previous case law holding that where an author does not survive into the renewal term, the classes indicated in section 24 of the 1909 law– reenacted as section 304 of the 1976 law– succeed to the renewal right, the facts of Stewart are not the facts of the Cassavetes screenplay. Again, the lack of copyright registration for the original term for the screenplay considered by the Office to be authorship intimately intertwined in the integrated whole of the motion picture– which was registered for its original term of copyright– prevents a separate renewal registration for the screenplay which under Office registration practices cannot be said to be analogous to the Stewart v. Abend story which was incorporated not into an integrated, larger whole but into a composite, or collective, work in which the contributions sustained their independent identities.

B. Maljack v. UAV Corp.

Your appeal also cites Batjac Productions, Inc. v. Goodtimes Home Video Corp. and Marybeth Peters, Register of Copyrights, 160 F.3d 1223 (9th Cir. 1998) and states that the Ninth Circuit remarked in that opinion that, in order to have preserved a copyright separate and distinct from a published motion picture, the owner of the rights in the screenplay for the motion picture would have had to file a timely renewal which renewal,

according to your interpretation, would not have automatically merged with any renewal which may have been secured for the motion picture as a whole. Your appeal notes, however, that this principle was irrelevant in Batjac because the screenplay in question had not been timely renewed. You then, however, cite the lower court opinion in the Batjac litigation Maljack Productions, Inc. v. UAV Corp., 964 F. Supp. 1416 (C.D. Cal. 1997) which you maintain explicitly addressed the question of the rights in an underlying screenplay. You point out Maljack's statement that "under Stewart the right to seek a renewal term would lie with the author's heirs, not with plaintiff's [i.e., the owners of the rights in the published motion picture.]" Maljack at 1425. You also point out footnote 6 in the Maljack opinion supporting the statement that the screenplay in question was one authored independently and in which the rights had been transferred by the screenplay author to Batjac.

We regard the Maljack statement concerning the screenplay rights as lying with the heirs of the author and the statement's supporting footnote concerning the copyright transfer from author to production company to be dictum: (1) the statement is not necessary to the outcome of the case; (2) the court's analysis concerning the issues of the publication status of the screenplay and of the required degree of originality with respect to revisions in a public domain soundtrack can be sustained in Maljack without adverting to the statement on which you rely; (3) the question of the rights of the heirs of the not-for-hire screenplay was not at issue in the Maljack litigation.

We read this Maljack statement as saying in dictum that, assuming there had been a possibility of seeking a renewal for the screenplay, that possibility would have lain with the heirs of the deceased screenplay author rather than with Batjac. The statement, however, does not provide any guidance on the specific issue of whether the screenplay– unregistered for an original copyright term– embodied in the published motion picture may be separately renewed; the statement merely places the right of renewal with, i.e., assigns standing to, the screenplay author's heirs in the event a renewal filing were possible.

For the reasons stated in this letter, the Copyright Office Board of Appeals affirms the refusal to register the renewal claim in the Cassavetes screenplay. This decision constitutes final agency action on this matter.

Sincerely,

Nanette Petruzzelli

Nanette Petruzzelli
Chief, Examining Division
for the Appeals Board
United States Copyright Office