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VIA E-MAIL to

Office of Strategic Initiatives
U.S. Copyright Office
James Madison Memorial Building, Room LM-637
101 Independence Avenue, SE
Washington, DC 20540

Re: Section 108 Study Group Request for Comments - 71 Fed. Reg. 70434

Dear Sir or Madam:

I am writing on behalf of my client Carol Serling, widow of the famed writer Rod Serling known for such classic works as REQUIEM FOR A HEAVYWEIGHT and the TWILIGHT ZONE and NIGHT GALLERY television series. Our comments are directed to Topics A, B and C as set forth in the above referenced notice and we seek to bring to your attention the negative impact of digitization and digital copying on collections of largely unpublished textual and non-textual physical materials embodying copyrighted works which are being held by libraries, archives and museums.

Background and Comments Applicable to All Topics

In the 1960's, Mr. Serling loaned or gave several university library archives selections of his papers and other materials, including manuscripts and correspondence. Most of this material is unpublished or reflects earlier drafts of works which were published only in a further revised form[1]. The grants limited the use of this material in various ways to scholars and researchers. No copyright interest whatsoever was conveyed to the institutions receiving such materials[2].

At the time these loans or grants were made, photocopying was a known technology, but not widely in use as the process was relatively expensive and time-consuming and it produced low quality copies, generally on electrostatic paper. Moreover, it was not clear at the time that any photocopying by libraries, archives or similar institutions without the consent of the copyright owner was lawful. The courts did not address this issue until the early 1970s when the U.S. Court of Claims ruled that copies of entire journal articles made by certain government libraries, which were expressly authorized to make copies

under 42 U.S.C. Section 276(a)(4), constituted fair use. That decision was highly controversial, coming as it did with two dissenting opinions . The Supreme Court did little to resolve the legal uncertainties when it affirmed the Court of Claims decision by an equally divided court. Williams & Wilkins Co. v. U.S., 487 F.2d 1345 (Ct. of Claims, 1973), aff'd. by equally divided court, 420 U.S. 376 (1975). On January 1, 1978, the first statutory provisions regarding library photocopying took effect, namely Section 108 of the Copyright Act of 1976.

Thus, at the time Mr. Serling loaned or granted his archival material to various libraries, the availability of fast, inexpensive and widespread photocopying through libraries and archives would not have been anticipated. The availability of ever faster, cheaper and virtually unlimited ability to copy and disseminate works by digital means would have been completely unforseen.

Some commentators have suggested that adequate protection for collections of unpublished creative works can be obtained by incorporating contractual restrictions in the grants when these materials are loaned or conveyed to a library, archive or museum. Unfortunately, such limitations are not always sufficient to protect rights-holders from abuse of the library photocopying exemption or any proposed future digital reproduction and distribution of unpublished works.

For example, in the 1960s Mr. Serling granted to the University of Wisconsin some of his materials on loan to that University "for the purpose of making these same materials available to scholars and for the pursuit of an active program of research under the direction of the Wisconsin Center for Theatre Research," later named the Wisconsin Center for Film and Theater Research, which became an archive of the University of Wisconsin-Madison and the State Historical Society of Wisconsin ("Wisconsin"). For many years, Wisconsin allowed only actual researchers to access the Serling collection, requiring them to present supporting credentials before seeing the collection. In 1987, Wisconsin required any researchers to obtain Mrs. Serling's written permission prior to photocopying any scripts .

Today, however, Wisconsin takes the position that anyone requesting copies of scripts or any other material from the Serling collection is presumed, without documentation or verification, to be a researcher and part of an active program of research under Wisconsin's direction, unless the party requesting copies affirmatively volunteers information to the contrary which would indicate some commercial interest in the material, such as identifying himself as a producer[3]. Nonetheless, we are aware of at least one instance in which Wisconsin did not apply this policy and actually copied and distributed an entire script by Mr. Serling to a self-identified producer. This copy was provided in response to an email request from the producer who learned of the existence of this material from an online catalog. Moreover, we are aware of at least one instance in which a copy of an unpublished work from the Serling collection at Wisconsin found its way into unauthorized magazine publication.

In short, changing personnel, supervision, ownership and policies of libraries, archives and museums with regard to reproduction, distribution and interlibrary loans can easily erode or nullify statutory and contractual protections for rights-holders. The problems for rights-holders are particularly acute for unpublished materials being held by libraries, archives and museums. Prior to January 1, 1978, the right of first publication was protected by common-law copyright. In the 1976 Act, Congress eliminated the distinction between statutory and common-law protection and made the right of first publication an express statutory right. The importance of the right of an author to determine whether to publish a work at all and if so, when and how to do so, was recognized in a different context in Harper & Row, Publishers, Inc., v. Nation Enterprises, 471 U.S. 539 (1985). That case involved excerpts taken from a pre-publication manuscript of a presidential memoir, where the financial value of "first serialization" rights played an important role.

However, it is even more important to protect the right of first publication where the author intentionally withholds his work from publication or decides to limit its availability (e.g., to scholars). Simply because unpublished works are donated to a public institution does not mean that the donor intended or agreed to their unlimited copying and distribution, particularly where the unpublished work reflects an interim draft and not the one approved by the author for publication. For example, unpublished manuscripts of literary works might well be of educational value for purposes of fair use doctrine, yet the Senate on the Copyright Act of 1976 recognized that "under ordinary circumstances, the copyright owner's 'right of first publication' would outweigh any needs of reproduction for classroom purposes." Copyright Law Revision, Senate Report No. 94-473, 94th Cong., 1st Sess., 64 (1975).

Unless rights of first publication are fully protected from encroachment by libraries, archives and museums, authors will be reluctant to loan or grant manuscripts and other archival materials or will do so only subject to severe restrictions prohibiting all access, copying and/or dissemination until the expiration of the copyright. In the long run, this will have the effect of making such materials less available to researchers and scholars than they already are.

For future grants, authors can at least place such restrictions on their collections of unpublished works. However, this remedy is not available to authors who have already loaned or granted archival material to libraries, archives and museums, based on their understanding of the legal and practical limitations of the time on copying and distribution by such institutions. The reasonable expectations of the authors at the time of the grant that their unpublished works will not be published or widely distributed must be preserved.

In short, an unpublished work in the collection of a library or archive (including works later published in another form or in a revised version) should not be copied or distributed at all by libraries, archives or museums in any digital format. To the extent that any statutory exemptions are enacted, they should apply only prospectively to loans or grants to libraries, archives made after such exemptions have taken effect. Neither

analog nor digital copying exemptions for unpublished works should be extended to museums as such copying would far exceed the reasonable expectations of any rights-holder granting physical materials embodying unpublished works to museum.

Topic A

Unfortunately, it would be virtually impossible to avoid or limit significant harm to rights-holders if libraries or archives were allowed to make digital copies of works available to their users or on interlibrary loan.

Where the rights-holder (e.g., the author or his heirs) choose to publish a previously unpublished work in response to the development of new markets made possible through technological changes, an exemption for libraries, archives and museums would preempt and compete directly with the rights-holders for those first publication rights. Where the rights-holder choose not to publish or limit access to his works, that decision should be respected for all authors, but especially those who made grants or loans of archival material prior to the enactment of digital exemptions.

New digital technologies have created new markets for Mr. Serling's previously unpublished works. Mrs. Serling has already been presented with the opportunity to release some of these works in electronic form. However, this will require an initial expenditure to convert the material from analog to digital format. It is unrealistic to expect publishers or other investors to finance such a transfer knowing that a library, archive or museum might be able to offer digital copies of the same material for little or no cost to the user. As a result, Mrs. Serling may well be unable to pursue this or any other opportunity to release her husband's unpublished works, including those she considers appropriate for publication.

Most libraries, archives and museums ordinarily do not need to receive a return on their investment to justify the expenditure to copy analog works into digital form. In fact, many libraries are delegating this task to for-profit businesses like Google in exchange for nothing more than a digital copy of the works copied. Thus, the digitization of library or archival material is not being undertaken simply to make works more readily available to researchers, scholars and the public. It is being undertaken as a profit-making enterprise, at the expense of the rights-holders. Such "outsourcing" of digitization and dissemination materially impairs the marketability of the unpublished works of well-known (and hence marketable) creators by the rights-owners by making it impossible for them to cover the costs of digitization, let alone to make a return on that investment. Without adequate protection, the owners of rights in unpublished works like Mrs. Serling will not be able to exploit their rights of first publication (i.e., to determine whether, when and in what form a work is to be published) and cedes that right to others seeking to profit from it, whether under new or old business models for content distribution.

The need for preservation is a red herring in the debate over digitization. Years of library deaccessioning in favor of microfilm and other supposedly newer more advanced media has demonstrated that paper is, in fact, the most stable medium of preservation. Digital

records can be easily compromised by mechanical or electrical fields and may be subject to disintegration just like other media. More importantly, digital records routinely become unusable as technological changes make the software and equipment for reading them obsolete. This has already proved problematic for many businesses which kept detailed computerized databases, only to discover that they could not be accessed or used after installation of new computer systems. In any case, if an exemption is to be made based on the need for preservation, it should be truly limited to this purpose. In other words, no copies should be made from such a digital version of an unpublished work, nor should it be distributed to users or on interlibrary loan unless the original analog material is wholly destroyed (e.g., by fire). Otherwise, it should be held solely as a preservation copy until the copyright in the work expires.

With respect to unpublished works, even isolated instances of minor unauthorized copying can amount to a major inroad into copyright, including the right of first publication. Thus, permitting even single or isolated digital copying of such a work will not adequately address the problems of rights-holders. However, if libraries, archives and/or museums were to be granted an exemption for digital copying and distribution of unpublished works, it should be very circumscribed with respect to both copies provided directly to users or on interlibrary loan. The special protection afforded unpublished material more than justifies according them greater protection than published works.

First and foremost, no exemptions should be applied retroactively to unpublished works loaned or granted to libraries, archives or museums prior to the enactment of such exemptions. Retrospective exemptions run contrary to the reasonable expectations of the rights-holders at the time the loan or grant was made. While rights-holders can mitigate the risk, at least to some extent by imposing conditions on future loans or grants, the owners of rights in works already granted would be deprived of the opportunity to address these risks.

Moreover, if any digital copying or distribution of unpublished works by libraries, archives or museums is permitted, either directly or through interlibrary loan, it should not be easy to take advantage of such an exemption, without giving serious thought to the ramifications of their actions on rights of first publication and undertaking adequate efforts to protect those rights.

Thus, if an exemption is granted, it should be limited to no more than a single copy and no copying of these materials by either the end users or the institutions should be permitted. Access to digital copies of unpublished works should be limited to streaming only, with only with no download or printing capabilities. In addition, access to digital copies should be allowed only for a limited period, roughly comparable to reasonable library check-out periods (e.g., 5-21 days). This is already being done for musical and audiovisual works made available online on a rental or subscription model.

All secure means of copy protection, including DRM and watermarking, should be required in exempt digital copies of unpublished works to prevent further copying, distribution or other infringing downstream use. In addition, digital encoding should be

required to identify the original source of the material (i.e., library, archive or museum) and any individual or institution accessing or obtaining a digital copy.

Anyone requesting digital copies of unpublished materials should be required to appear in person and provide copies of a driver's license, passport or other official picture identification along with full home and work contact details, either to the library that will be supplying the material directly or to the library which will be requesting the material on interlibrary loan. It should not be possible to obtain digital access to or copies of unpublished material simply by going online or by sending an email request. Libraries and archives should further be required to make and retain detailed records regarding all users and interlibrary loans, which should be made freely available to rights-holders on request to enable them to track down and remedy any infringements of rights in unpublished works. Moreover, libraries and archives should be required by law to determine first on the basis of actual investigation that the unpublished work is being requested by a scholar or a researcher and not for further copying, distribution, adaptation or other exploitation, since it is apparent that contractual limitations are subject to changing interpretation over time and thus not adequate to protect the interests of rights-holders in unpublished works.

Statutory limitations on reuse of digital copies provided by libraries, archives or museums may be worth adopting, but they will be useless in the absence of legally-mandated methods of tracking the end user and adequate remedies for their infringement. For example, such infringements of unpublished works should be deemed willful and eligible for the maximum statutory damages, regardless of whether or not the work was registered prior to the infringement. Users (whether making a request directly or through interlibrary loan) could also be required to post a bond for the benefit of rights-holders to create a fund to ensure that they would have at least some remedy in the event a judgment-proof user engaged in infringing activity.

Any such protections should apply throughout the term of copyright in the unpublished work. Unlike published works which may go out of print, unpublished works should not become subject to less stringent requirements after the first 20 years of the copyright term or during its last 20 years. Ultimately, the right to withhold or limit publication of a work of authorship must survive for the entire term of copyright. To do otherwise would create a back door to a shortened term of protection for rights of first publication which is neither necessary nor appropriate where an author has decided to withhold or limit publication of his work.

Topic B

The same considerations apply to non-text-based works, including drawings, sound recordings and films. Again, such unpublished works should not be copied or distributed in digital form at all. None of the limitations on direct copying and interlibrary loans should be eliminated for unpublished works. If anything, such protections should be strengthened and expanded to include all types of unpublished works, as noted above with respect to unpublished textual works.

Topic C

This request for comment presents the issue of access to electronic copies largely in terms of materials initially acquired by libraries, archives and museums in electronic or digital formats. However, since it appears that these exemptions would apply not to all "lawfully obtained copies of electronic material for which [the institutions] have no license," they would also apply to any digital copies which might be authorized under the exemptions for digital copying now being contemplated. Thus, any legislation or rules must be clear that any exemptions which might apply to unpublished works originally obtained in digital form should not apply to any digital copies made from unpublished works acquired in analog form. Not even temporary or incidental digital copies should be permitted for unlicensed works created by these institutions from analog copies of unpublished text or non-text-based works in their collections. Thus, the same considerations apply to questions access to electronic copies as noted above and the same limitations should apply as well.

In addition, libraries and archives should not under any circumstances be permitted to display or perform unpublished works until the term of copyright protection has expired. Such activities will either compete directly with the rights-holders opportunities to exploit their first publication rights or ignore the author's decision not to disseminate the work.

FOOTNOTES:

1. Future references to "unpublished works" in these comments includes both unpublished works and those that are later released in another format such as a film or television program or are published only after further revision.

2. Although certain copyright interests in some of Mr. Serling's unpublished works (e.g., earlier drafts of scripts produced based on a later revision) may belong to third parties such as the companies that produced the audiovisual derivative work, he generally retained at least some rights, including the right to publication of the written text. Of course, Mr. Serling owned all rights in many of his unpublished works such as his correspondence. These rights now rest with and are administered by his widow.

3. Other institutions housing Mr. Serling's archives have afforded more extensive protection than this with regard to the copying of materials their collections.

Copies of these comments in WordPerfect 8 and Rich Text Format are also available on request. Please do not hesitate to let me know if you have any questions or if we can be of further assistance to the Study Group with

respect to the impact of a digital library exemption on owners of rights in unpublished works. Thank you.

Sincerely,

Louise Nemschoff

LN:cd

cc: Carol Serling