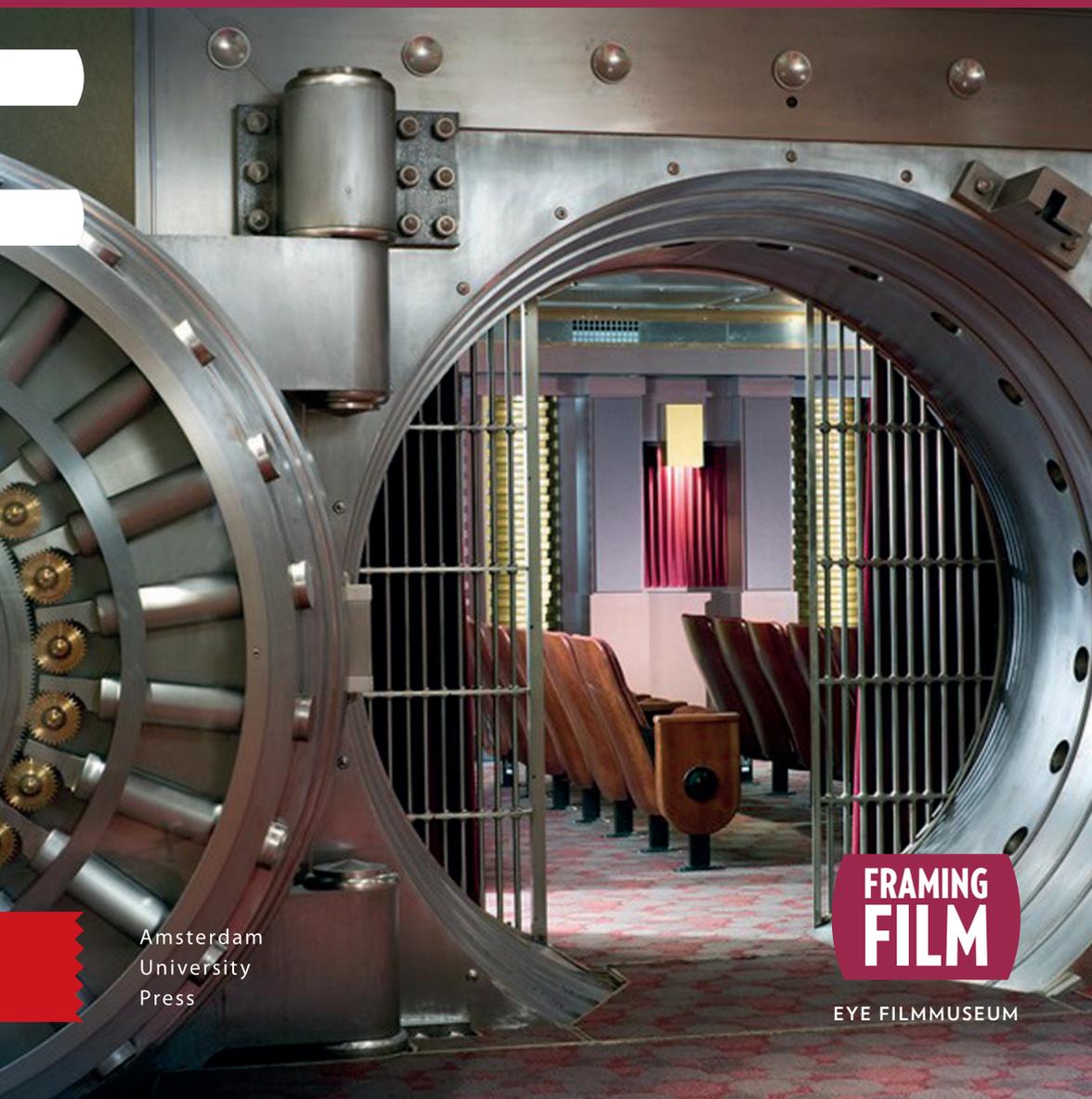


CLAUDY OP DEN KAMP

THE GREATEST FILMS NEVER SEEN

The Film Archive and the
Copyright Smokescreen



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THE GREATEST FILMS NEVER SEEN



FRAMING FILM is a book series dedicated to theoretical and analytical studies in restoration, collection, archival, and exhibition practices in line with the existing archive of EYE Filmmuseum. With this series, Amsterdam University Press and EYE aim to support the academic research community, as well as practitioners in archive and restoration.

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TABLE OF CONTENTS

ACKNOWLEDGEMENTS 9

| 5

PREFACE 11

THE ORPHAN IN A HANDBAG 17

An introduction to the film archive and intellectual property

The book's approach 20

The film archive: a brief history 22

– Archival beginnings 22

– Digitization 24

– Intellectual property 26

Structure of the book 28

1 TERRA INCOGNITA 35

The Nederlands Filmmuseum / EYE Film Institute Netherlands

What's in a name? 36

Dichotomy I: Creating historical resonance 38

Dichotomy II: The need for recategorization 43

2 A SWISS BANK 51

Recategorization I – The embargoed film

The archive as rights holder 52

Third-party rights holders: Fragile relations 53

– Close-up: ALS TWEE DRUPPELS WATER ('LIKE TWO DROPS OF WATER') 54

– The colourization debate 56

3 A HANDBAG 65

Recategorization II – The orphan film

Close-up: DE OVERVAL ('THE SILENT RAID') 66

The 'orphan works problem' and its causes 70

– Definition, demarcation, and scope 71

– Legal causes 74

– Administrative causes 79

Proposed solutions to the orphan works problem 81

– Legislative measures 81

– Administrative measures 84

4 A VEHICLE OF POWER 95

Recategorization III - The public domain film (or, what orphan films are not)

Close-up: BEYOND THE ROCKS 96

6 | What is the public domain? 100

– The digital skew 102

– The public domain and public access 103

– The public domain and access to high-quality originals 107

5 A BIRTHPLACE 115

The begotten film

Found footage, legal provenance, and the 'aesthetics of access' 116

– Institutional reuse 117

– Noninstitutional reuse 122

The question of the archive 125

– 'BITS & PIECES as synecdoche': a challenge to film history 126

6 THE POTENTIAL FOR HISTORY-MAKING 133

Of accidents and activation

Close-up: The Paper Print Collection 134

Themes and tensions 139

– Archival practice, and the 'activation of copyright' 139

– Public domain status 140

– The potential for (film) history-making 140

The archive and 'doing' history 141

The 'research program' 147

CONCLUSION 155

The Brighton line

- The film archive 156
- The copyright smokescreen 158
- The greatest films never seen 160

FILMOGRAPHY 165

BIBLIOGRAPHY 167

INDEX 183

In loving memory of Martha Blassnigg (1968-2015)

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EXIT.



PREFACE

In *Buster Keaton Never Smiles*, Dutch author Arnon Grunberg devotes one of his essays to Martin Scorsese's documentary on Italian cinema. He argues that Scorsese's personal voyage through film demonstrates that the films you love, and that arguably help shape your emotional life, could be seen as an 'autobiography'. I have always felt that to be true. However, I did not realize just how few titles comprise the formative years of my autobiography until I came across a 2016 article in *The New Yorker*, in which Tad Friend claims that the 'average teenager [...] sees six films a year in the [film] theatre'. I understand that media consumption in general, and cinema-going in particular, has changed tremendously over the last few decades, but this number astonished me, because it is closer to the *total* amount of films I saw in the cinema as a teenager. | 11

My handful of cinema-going experiences (in addition to a youth spent glued to the television), however, were life-altering: not only did these moving-image experiences make me question the world, myself, and who I wanted to be, but also informed my later professional choices. This preface is the story of the films I was able to see, and perhaps more importantly, the ones I later discovered I could not. This discovery, and some of the reasons why I was unable to access these films, form part of the personal and professional experiences that serve as the background to this book.

'LET'S START AT THE VERY BEGINNING'

In the autumn of 1994, during one of my first film history classes at the University of Amsterdam, we were shown Peter Delpeut's LYRISCH NITRAAT ('LYRICAL NITRATE', 1990). I am quite sure it must have been a fuzzy VHS copy of the

film, but I was mesmerized. My previous experience of silent film had been limited to television screenings, and mainly consisted of – with all due respect – Laurel and Hardy. So, ‘studying’ a film that used non-slapstick, ‘lyrical’ silent film footage, woven into a story, was a revelation. Shortly afterwards, I went on a class excursion to Overveen, a beautiful Dutch seaside resort, where the Nederlands Filmmuseum’s nitrate film vaults are located. This visit took place at a time when I fully subscribed to the ‘myth of the archive as a repository of objective truth where documents lay dormant, waiting to be roused’ (Amad, 2010, p. 159); this was where the film had been assembled, and the magical location where the inflammable clips resided.

12 |

It was the spectacular final scene of *LYRISCH NITRAAT*, in particular, that hit home. In this scene from Edward Warren’s *WARFARE OF THE FLESH* (1917), in which Adam and Eve are expelled from the Garden of Eden, a flickering pattern of decaying nitrate slowly replaces the photographic image. As a viewer, your attention constantly shifts from the film’s content to its surface as the decaying nitrate obstructs the narrative flow. The photographic images are overtaken by the irreversible process of decay, until the strip of film itself becomes the principal focus. Aside from the ambiguous emotion of enjoying the strange beauty of deteriorating film, the nostalgic sense of a (literally) disappearing cinema touched me deeply. I am only able to compare it to knowing your way around a house that does not exist anymore; watching the film filled me with a somewhat hallucinatory feeling. At some point, films, if they are not preserved, can no longer be seen, and if they cannot be seen, it will become increasingly hard to remember them. The vital force of past cinema will be permanently lost. As I watched Adam and Eve banished from their paradise, I too was expelled from mine.

‘I’LL BE RIGHT HERE’

I ended up working in Overveen, as an archivist. Fortunately, my daily work in the film archive was not always as overwhelming as that first experience. Film preservation is, in the main, entertaining and fulfilling (albeit time-consuming) work, often culminating in a festive, champagne-filled film première. The realization that spending your days in this manner could be considered ‘work’ is still a little mind-boggling. My experience in Overveen involved working alongside highly motivated colleagues with a shared passion for everything film-related. Added to this was the regular excitement of receiving international guests, including academics and (found-footage) filmmakers, who were engaged in fascinating research projects. My ‘work’ also included frequent pilgrimages to Italy – to Le Giornate del Cinema Muto (‘Pordenone Silent Film

Festival') in Pordenone and Il Cinema Ritrovato ('Cinema Rediscovered') in Bologna – where it took on an international perspective.

Mainly, however, I felt privileged to be able to view and engage with material that most people outside of the film archive world would probably never see. Over time, working in an environment where, as Peter Delpout (1997, p. 7) put it so well, 'the marginal is the norm', questions began to creep up on me. What is it that is kept in the (public-sector) film archive? How does this enormous quantity of 'stuff' actually end up there? And how does what is kept and safeguarded in the archive relate to textbook film history? I have sensed the wonder and amazement that a few frames of film can elicit, and have happened across many mysterious faces along the way. Indeed, what I encountered in my archival practice had very little to do with the 'official' film history I had been taught. The biggest wonder was that I recognized almost none of these works.

| 13

'NOBODY PUTS BABY IN A CORNER'

The relationship between film historiography and film archives, and between the available filmic sources and their 'potential for history making' (Jones, 2012, p. 119) in particular, have fascinated me ever since. I pursued these reflections on the practical nature of archival work in the form of an MA in Film Archiving at the University of East Anglia. All elements of the degree, including the production of a creative product incorporating archival material, fostered my growing concern with the question of access to archival film.

An interest in archival access goes hand-in-hand with a desire to discover those factors that facilitate or impede it. There are, of course, issues of funding, language, and culture, as well of formats and technical obsolescence, but it was the legal factors that captured my interest the most. It was in the Brussels chapter of the Archimedia programme, in 1998, that I first came across the topic that would come to dominate my research interests, but it was in the practical archival environment that I really became aware of the intertwined relationship between copyright and access to archival collections.

My internship for the MA was spent in the sales department of the Netherlands Filmmuseum, where I coproduced a DVD entitled, *Highlights from the Collections*. Due to the nature of its content, rights clearance and a close collaboration with the museum's legal department played a major role in its production. My thesis centred on a Dutch film, whose release on DVD, it was predicted, would be significantly delayed, as the film's rights holders could not be traced. Today, the film would be regarded as an 'orphan work'.

'SHE RESCUES HIM RIGHT BACK'

My practical awareness of the burgeoning 'orphan works problem' resulted in a PhD research proposal for the Transtechnology Research Group at Plymouth University. Focusing on theoretical research, away from archival practice, provided me with the distance I needed to investigate the intricate relationship between the film archive and copyright. Initially, I thought of copyright as an exclusively restrictive concept. During the course of my research, however, I began to regard it in a subtler fashion as a filter that helps shape access to archival film in ways that both impede *and* facilitate. The resulting PhD thesis forms the basis of this book, which is partially informed by my theoretical and practical professional experiences.

14 | On a personal level, the book is also the story of my changing relationship with the moving image. It is over 20 years since I first saw LYRISCH NITRAAT; meanwhile, I have turned into a person who now sees *more* films in the film theatre than the aforementioned 'average teenager'. And, of course, the options for viewing films have rapidly expanded. That one particular film, however, still fascinates: over time it has come to mean so many different things to me. Although my PhD research was firmly embedded in an academic context, I also relied on my experience of working inside a national public film archive – LYRISCH NITRAAT's wonderfully and provocatively compiled source material has helped me trace my memories of and access to that institute. In the meantime, the 'myth of the archive as a repository of objective truth' has evolved, for me, into a firm belief in the archive as a mediator of the past.

This book is a personal interpretation of what it means to think, to create, and to participate in a specific culture, and reminds me of my formative cinema-going years. In writing it, I have gained a deeper understanding of a certain 'permission culture', and the meaning of the ever-expanding collection of films I both can and cannot see (and that some recalcitrance goes a long way...).

Mel/Bourne/mouth, September 2017

BIBLIOGRAPHY

- Amad, Paula (2010) *Counter-Archive. Film, the Everyday, and Albert Kahn's Archives de la Planète*. New York: Columbia University Press.
- Delpeut, Peter (1997) *Cinéma Perdu. De eerste dertig jaar van de film 1895-1925*. Amsterdam: Uitgeverij Bas Lubberhuizen.
- Friend, Tad (2016) 'The Mogul of the Middle', *The New Yorker* [Online] Available at: <http://www.newyorker.com/magazine/2016/01/11/the-mogul-of-the-middle>.
- Grunberg, Arnon (2013) *Buster Keaton lacht nooit*. Amsterdam: Nijgh & Van Ditmar.
- Jones, Janna (2012) *The Past is a Moving Picture. Preserving the Twentieth Century on Film*. Gainesville: University Press of Florida.



The Orphan in a Handbag

An introduction to the film archive
and intellectual property

Op den Kamp, Claudy, *The Greatest Films Never Seen. The Film Archive
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| 17

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ABSTRACT

This introductory chapter explains the film archive as a research subject and describes the book's aims, its approach, and where it fits into the wider landscape of current film scholarship, concluding with an overview of its contents.

KEYWORDS

film archive, digitization, intellectual property, orphan work

This introductory chapter explains the film archive as a research subject, and describes the book's aims, its approach, and where it fits into the wider landscape of current film scholarship, concluding with an overview of its contents.

18 | To capture the underlying idea of the book, however, we must first turn to London in 1895. Oscar Wilde's *The Importance of Being Earnest*, first staged in that year, revolves around the fortunes of a baby boy who is found in a handbag at Victoria station.¹ We learn about this incident in the opening scene, which takes place 30 years later, when the self-same orphan, Jack, asks Lady Bracknell for the hand of her only daughter, Gwendolen. We find out that an elderly gentleman, Mr. Cardew, who was mistakenly given the bag instead of his own, took the baby in, and, inspired by his own first-class train ticket to a fashionable coastal resort, bestowed on Jack the surname Worthing.

The site of the mistaken handbag incident was the station cloakroom for the Brighton line. Bewildered by Jack's revelations, Lady Bracknell declares that 'the line is immaterial'. She refuses to consider Jack's request and advises him to produce at least one parent 'before the season is quite over'. In order to marry Gwendolen, Jack is in need of both a benefactor (to provide him with social status) and acceptance into 'good society'.

Now widely seen as one of the great comedies of the English language (Cave, 2000, p. 419), *The Importance of Being Earnest* was first performed in London on St. Valentine's Day, 1895. This was one day after the Lumière brothers patented their Cinématographe,² a combination motion picture camera and projector, and just several months before their first public screening of projected motion pictures in Paris. Wilde could hardly have envisaged that his tale of lost parents would provide an analogy for the fate of 'orphaned films' more than 100 years later.

The term 'orphan' is applied to a copyright-protected film for which the copyright holders cannot be identified or located, rendering it unclear whose permission to seek before using the film. We will look at orphan films in more detail later, but for now it suffices to say that an orphan film's needs parallel those of Jack: a benefactor to provide it with status and fund its preservation, and acceptance into wider 'society' – that is, a place in the film-historical narrative. A film archive functions as a 'placeholder' (or 'handbag') while these needs are fulfilled. In the case of the orphan film, just as with Jack, they are interrelated: Jack must acquire social status before he can be accepted into

‘society’; an orphan film needs visible status – exposure – in order to fulfil its ‘potential for history making’ (Jones, 2012, p. 119).

It is worth revisiting the importance of the ‘Brighton line’ for a moment. Victoria station is a central London terminus. This means not only that the baby could have arrived on any of the numerous lines ending at the station, but that he could also depart in any direction. And it is precisely the baby’s equivocal social status that is at stake in Wilde’s play. The Brighton line serviced the then-wealthy locales on Britain’s southeast coast, so Jack departed from Victoria, with Mr. Cardew, in a prosperous direction – where it turns out he belonged all along. Spoiler alert: he is revealed to be Lady Bracknell’s sister’s son, and, by virtue of association with Lady Bracknell, he acquires the all-important social status and a place in ‘good society’.³ As a consequence, he is allowed to marry Gwendolen.

The film archive is also a sort of terminus: films can arrive from any direction, and, after a certain kind of ‘place holding’ in the archive, depart in others. But whether it concerns integration into high society for a man of uncertain social status at the turn of the last century, or inclusion in a wider historical narrative for an archival film with uncertain copyright ownership, the ‘line’, of course, is *everything*.

Knowing that a film will easily find historical recognition helps speed up the search for a benefactor. When, for instance, a ‘lost’ Hitchcock is found (as happened in New Zealand in 2011),⁴ it is not difficult to prove its historic worth and secure funding for its restoration, moving it up the ‘queue’. However, as the Preface pointed out, the films encountered in archival practice often bear little relation to the ‘official’ film history. What about a previously neglected, eccentric advertising film with no known copyright holder, for instance? How do you find a benefactor to fund its preservation or activate its ‘potential for history making’?

The problem of the uncertain legal status of the orphan film (and its wider implications) was the catalyst for the research project that forms the basis of this book – as was the notion of the archive as a go-between or a temporary ‘placeholder’, where a film ‘waits’ until a benefactor is found and its place in film history (re)constructed.

In the last decade, the film archive’s attempts to juggle the task of designing policies that allow access to its digital collections with its new responsibility of digital guardianship has brought its role as a mediator of content to the fore. The mission of a film archive, particularly a public archive, is often focused on the preservation of and the provision of access to its holdings. However, in response to the pressures of digitization and funding, these institutions feel compelled to make far-reaching decisions about whether a film will be digitized or not based on whether there is clear copyright ownership

(Hudson and Kenyon, 2007). The tension between property rights over a film as a material object and intellectual property (IP) rights over the reuse of the material (in a public-sector archive, these are usually exercised by two different parties) render the intersection of the material film archive and intellectual property a timely research subject.

This account cannot answer all of the questions raised above, but, by focusing on the human agency behind certain decisions, it attempts to unravel the ‘orphan works problem’ in the context of a public-sector film archive. In so doing, it reveals that this is not an exclusively legal dilemma. To date, there have been no substantial accounts of the topic, despite the challenges intellectual property presents to the provision of access to archival collections, and the repercussions this may have on our understanding of film history. This book aims to address this gap.

THE BOOK'S APPROACH

Tackling the subject of the orphan film requires an interdisciplinary vantage point. Looking at film archival collections through the lens of copyright ownership has enabled the scrutiny of discrete parts of archival collections, and has afforded the opportunity to take a meta-perspective and examine the kinds of issues that occur in categories of films as opposed to individual titles. Not only does this approach provide an insight into copyright ownership in relation to the question of access to archival collections, a previously under-explored issue, but it also allows for a close look at the consequences for another field of research, the writing of film history, which is intimately related to the intellectual property system.

In this book, we will mainly look at one of the intellectual property regimes: copyright. Copyright is a territorial notion and a national approach is taken in regards to jurisdiction. This book does not aim to provide a comprehensive overview of the international or European legal circumstances of film archives; it explores the legal status of the film material involved in digital access practices mainly in the context of Dutch law. However, restoration and access practices often involve cross-jurisdictional collaborations, so, where a transnational approach is appropriate, it visits other jurisdictions – mainly other European Union Member States and the US – in order to compare and contrast.

If legal rules are to be interpreted and understood, they need to be studied ‘in context’ (Twining, 2008, pp. 680-2). This study therefore adopts a contextual approach: it describes a legal phenomenon in its real-life institutional, social, and economic context, investigating how it has been influenced by that context. Its intention is not to present a bare exposition of the legal rules, but to

illuminate the fact that the rules of the IP system are not and cannot be applied mechanically; rather, they are 'activated' in and by their specific context.

For a time-limited study such as this, there are distinct advantages to taking an approach that is limited to one institution. Most of the contextual conditions – institution, country, technological possibilities, and legal framework – are identical in each of the examples and remain constant throughout the investigation.

The limitation of this approach, however, is that findings in one context are not necessarily easy to map onto another – one size does not fit all. There are important divergences, for instance, between national interpretations of certain copyright regulations. Yet, although certain aspects in this book might be considered unique to the Dutch context, it provides a starting point for research in other contexts. What initially appears to be a local and exclusively legal phenomenon can also be seen in a larger context as an epistemological problem, due to its potential impact on film history. As such, this research hopes to resonate not only beyond the Netherlands, but also beyond the specific demarcation of the film archive.

| 21

Another important aspect of this book is the choice of a national public-sector film archive as the locus of the research. This is principally because this type of archive, which usually does not hold the rights to the majority of its holdings, is a prime example of where the tension between, and sometimes conflation of, rights in property and rights in intellectual property is most apparent. Again, however, other institutions, including for-profit archives, will be used for comparison where appropriate.

The various primary and secondary data sources, such as literature and archival records, are complemented with semi-structured interviews. Due to their flexibility, these interviews provide the most effective method for obtaining primary source material that is unavailable elsewhere. Interviews were conducted with staff members of a variety of institutions involved in the case studies. A set of questions was prepared but in most cases was not rigidly followed, and the length of interviews allowed for follow-up of interesting and unexpected lines of enquiry. Once completed, the interviews were transcribed to provide usable data and the transcriptions were used in a variety of ways. At some occasions, quotations have made their way directly into the text of this book. In other occasions, they have led less visibly to a particular streamlining of the consulted literature and further shaping of the research questions underpinning the book.

Overall, the book's orientation brings a fresh perspective to the subject, opening it up to a wider readership. However, before examining these topics in greater depth, we need to turn to a more detailed explanation of the film archive and its origins.

THE FILM ARCHIVE: A BRIEF HISTORY

Archival beginnings

If we take the orphan film as our starting point, including the problem of not knowing whom to ask for permission to use it, we must begin by examining in more detail how archival collections are formed. This varies along a spectrum, from legal, structured, and intentional methods through to unstructured, unintentional ways, and even blind chance. The aim of this section is not to provide a comprehensive overview of all the different ways in which collections are formed, but rather to hint at the often-haphazard fashion in which they arrive at an archive's door. The theme of archival origins will be explored in greater detail during the course of the book; it is enough to say here that obscure origins frequently lead to unpredictable destinies, as the necessary (legal) information has been lost along the way.

22 |

Many of the collections dating from the early days of film archives were accumulated in quite random ways. Initially, collectors were motivated by the 'waves of collective destruction' (Borde, 1983, p. 18) that followed each technological innovation – for example, the replacement of silent film by sound in the 1930s and the abandonment of inflammable nitrate film stock in favour of acetate in the 1950s, when it was often assumed that what came before could be either recycled for its silver content or simply discarded. It was these waves of destruction that led to the formation of the first film archives in the 1930s, and the establishment of their collective organisation, FIAF, the International Federation of Film Archives (Dupin, 2013).

In her publication, *Keepers of the Frame*, in which she traces the institutional history of the British Film Institute, Penelope Houston describes the many varied forms of film archives:

Film archives, by their historical nature, come in all shapes, scales and sizes, have varying policies and remits, and are mostly underfunded. Many, for example, have relatively large, eclectic, international collections of which the national production represents only a proportion of the whole; some others concentrate more, in varying degrees, on caring for the films of their own country. A few have systems of legal deposit which guarantee (for recent years, at least) a higher rate of deposit of national productions. But most do not. (Houston, 1994, p. 165)

Film archives not only differ in origin and size, however, but also in organisational structure and funding: they can be funded publicly, privately, or through a combination of both (Fossati, 2009). Some of these organisational structures

have direct consequences for the composition of the collections: for instance, the holdings of most public archives can be characterized by their national or regional focus, whereas the holdings of most privately held archives appear to reflect their copyright ownership.

Houston describes the early decades of film archiving as the collection of ‘material of uncertain provenance, as well as films picked up from private collectors or from outside the system of heavily policed industry control’ (1994, p. 3). It was often considered best to remain secretive about holdings to avoid attracting the attention of rights holders.

Archival collections are also built up by ‘chance elements, such as grants, discoveries or acquisitions’ (de Kuyper, 2013, p. 127). Some parts of archival holdings are accumulated more or less randomly; these holdings often start out as ‘stuff’ that has turned up at the archive’s door, which can make for a quite heterogeneous collection. Generally, a film archive’s collection does not exclusively consist of films; it often includes non-film material. The archive might collect, for example, projectors, posters, film stills, filmmakers’ paper archives, or even film props and cinema décor. The part of the collection that does consist of films will not exclusively carry complete titles, but multiple versions of the same title, scene outtakes, unedited camera negatives, incomplete films, and even film fragments, some of which are unidentified. The holdings often comprise innumerable types of different formats, only some of which have become industry-wide standards; others will no longer be playable. It is hardly surprising that, in many of these cases, it is not clear who made what or who owns what anymore.

| 23

Over the course of the latter half of the 20th century, the archiving field was subject to a certain amount of professionalization, and this has been reflected in a shift in the foundational body of literature. Where it initially focused on portraits of individual institutions and the myriad eccentric figures who spearheaded them (Roud, 1983; Houston, 1994), this body of work has recently been supplemented by specialized texts, which address the field more comprehensively, attempting to define such concepts as ‘patrimony’ and (cultural) ‘heritage’ (Fossati, 2009; Frick, 2011).

This professionalization has also been recognized on a national scale, and some countries – for example, Denmark, Finland, France, and Poland – have adopted a mandatory legal deposit system (Gorini, 2004). In most cases, this means that a national archive is designated to hold copies of all audiovisual works that have received government funding, in an attempt to establish a national cultural patrimony. Although other countries such as the Netherlands do not adhere to such a deposit system, an archive’s decisions on selection, acquisition, and exchange will also shape its collection in fundamental ways. Equally, its strategies for preservation and access will help shape the

wider film-historical narrative – for instance, as the senior curator of EYE, Mark-Paul Meyer, points out (2011), the reevaluation of colour in early cinema was influenced by new restoration techniques.

What these examples reveal is the dichotomy between the canonical textbook film histories and the actual material holdings of a film archive. The archive is not a place where pristine copies of complete films lie dormant, simply waiting to be ‘roused’ to life (Amad, 2010, p. 159); more often than not, it is a place where the marginal is the norm and a significant portion of the material is in a fragmentary state (Delpout, 1990).

Furthermore, in the analogue era, two categories of the archive’s work were ‘at odds with each other [...]: preservation and access’ (de Kuyper, 2013, p. 122). These two archival missions sometimes appeared to conflict so utterly that some archives took the radical decision to focus exclusively on one to the detriment of the other. The early curators of the National Film Archive (UK) and the Cinémathèque française, Ernest Lindgren and Henri Langlois, respectively, were classic embodiments of this tension. Lindgren personified the idea of preservation for the sake of posterity in its most polemical form, allowing no provision for access; Langlois, a collector at heart, was dedicated to screening films, regardless of the need for preservation (Houston, 1994, pp. 44–49).

24 |

A key change in the last decade, however, has been the shift to a digital culture, partially driven by funding imperatives. The funding for preservation is often linked to an obligation to provide archival access, which in turn appears to be synonymous with digital and online access (Cherchi Usai, 2009). Whereas archival access in previous decades meant screening programmes, museum exhibitions, and on-site study, there is now an ‘expectation not merely from the public but also from their political representatives that the collections of publicly funded institutions will be accessible to view and to study online’ (Padfield, 2010, p. 208).⁵ As a consequence, preservation and access are now seen as two sides of the same coin (Nissen, 2002).

Digitization

It is clear that new technologies and distribution techniques are creating novel ways to access and use collections. Digitization in particular has and will continue to have far-reaching implications for the way in which film works can be preserved, exploited, and protected.

Over the last decade, discussions about digitization in relation to the collections of cultural heritage institutions have gathered steam. For many archives, however, the dream of a full digital facsimile of their holdings is a world away, despite the fact that the digital age appears to offer ‘seem-

ingly guarantee[d] instant accessibility' (Horak, 2007, p. 29). Indeed, Kristin Thompson argues that the so-called celestial multiplex, in which every film is available at any time for free at the click of a mouse, will not appear any time soon. Although her article was published in 2007, Thompson's rationale still holds true.

There are innumerable discussions about the potential costs of digitization and the loss of information when scanning films (as well as the virtue of continuing to screen film as film), the long-term digital preservation and storage battles, and whether digitization spells the end of film. However, the inevitable digital change has already occurred in the archival practices of distribution and access. And archives find themselves in a bind:

Although large-scale digitization projects of film collections have been extensively discussed in the last ten years by many archives and some of them are ongoing, archivists are still struggling with the questions regarding the kind of access that should be granted to their users once the content would be available in digital form. In other words, the question is whether film archives will move on from the chaperone model and let go of their collections, acknowledging the new role of the users. (Fos-sati, 2009, p. 97)

| 25

But 'letting go' of collections, allowing users to explore these new digital archives on their own without a 'chaperone', does not mean that the traditional role of the archivist as a human gatekeeper – a role closely associated with the analogue archive – has disappeared. These new archives may be performative, but the archivists are still the 'editors of knowledge' (Noordegraaf, 2010). Indeed, the element of human agency can be discerned clearly in the process of digitization: the works that are most frequently made public are the ones that are easiest to digitize – that is, works that (aside from restoration issues) have a secure legal provenance (Hudson and Kenyon, 2007), and someone has to make that decision.

Consider, for instance, the now defunct Dutch initiative, 'Ximon'. Developed in light of the national digitization project, 'Images for the Future', one of the reasons behind the creation of this video-on-demand platform was to avoid the problem of the material's legal status dominating the character of the portal. However, in practice, the decision of what to present online was mainly determined by 'what was clearable' (Rechsteiner, 2010), a process that is highly dependable on human negotiation skills.

Thus, the 'challenge of digital reproduction' has meant that 'intellectual property has come to be a household term' (David and Halbert, 2014, p. xlix). Issues of digitization and copyright are intertwined in the film archive because

widely held assumptions about the nature of film itself owe their provenance not only to what evidence is kept in the archives but, more importantly, on how much of that evidence is publicly accessible, which is a theme throughout this book.

Although this book's primary site of investigation is the film archive, it is focused more specifically on the archive's digital access practices, as the impact of copyright is most palpable in the area in which the archive intersects with the outside world. It is only through access to films that we can construct frameworks of meaning and start to fathom the implications of digitization and intellectual property for the understanding of film history. (In the context of this book, film history will mean the kind of film history that focuses on extant film material, as not all kinds of film history are written based on archival material nor are they all written within the context of the film archive, a theme we will return to later in the book.)

26 |

Intellectual property

Aside from the primary dichotomy between the canonical film histories we find in textbooks and the actual material holdings of a film archive, a second can be discerned: the copyright dichotomy between intellectual and material property. Film archives own or hold on deposit many physical works of film; the copyright owner, on the other hand, might be someone quite different: 'The ownership of the copyright is independent of the ownership of the physical medium in which the work is expressed, and so it is perfectly possible for one person to own copyright in an object physically owned by another' (Hunter, 2012, p. 41).

The distinction between intellectual and material property is particularly interesting in the context of public-sector institutions. These institutions own or hold on deposit numerous material holdings but hold the copyright to almost none; meanwhile, they often have a remit to preserve and provide access to their holdings. The balance between ownership and the exchange of ideas is key to the debates over intellectual property (David and Halbert, 2014). This tension is a theme that will be explored throughout the course of the book.

Film is a fragile material that needs special preservation treatment, and film archives often have to duplicate original elements in order to ensure the long-term survival of their contents. Duplicating works and communicating them to the public are considered to be copyright-restricted activities and the consent of the rights holder is needed.

As early as 1991, the UNITED NATIONS EDUCATIONAL SCIENTIFIC AND

CULTURAL ORGANIZATION (UNESCO) produced a report, *Legal Questions Facing Audiovisual Archives*, in response to the desire of the UNESCO Consultation of Experts on the Development of Audiovisual Archives in 1984 to 'initiate a study of copyright in relation to moving images to determine the changes necessary to permit moving image archives to function, and a parallel study of archival legislation to determine how archives can be exempted from copyright restrictions' (p. 3). The report concluded that there were indeed international conventions and recommendations that related to audiovisual *material*, but they did not in any way relate to audiovisual *archives*. There was little recognition of the special position of archives as keepers of the audiovisual heritage and no recommendations had been integrated into national copyright legislation.

More recently, institutions in the GLAM sector (galleries, libraries, archives, and museums) in many countries have been able to rely on a preservation exception in certain circumstances, which means they are allowed to reproduce work without the rights owner's permission if the aim is to protect the work from decay or to keep it accessible if the technology through which it is accessed has become obsolete. In the Netherlands, for instance, this preservation exception has been in place for some time, although in the UK, format shifting was considered a breach of copyright until recent changes in the law accommodated this exception.⁶

Initially, although the literature that addressed copyright in the context of film archives, or cultural heritage more generally, emanated from the legal as well as the archival field, it never strayed beyond its own disciplinary boundaries. More recently, however, we have started to see a sort of cross-fertilization as each field begins to address the implications of one area for the other. One of the earliest cross-fertilization studies was undertaken in the light of copyright clearance for archival footage in the realm of documentary film. The authors clearly showed that the avoidance of clearance problems 'may dictate filmmakers' choices of subject-matter, influencing them, for example, to avoid projects involving current events or modern history – which tend to be minefields [...] because strict compliance through licensing is often required' (Aufderheide and Jaszi, 2004, p. 29).

The literature, particularly the legal literature, dealing with one of the main topics in the field of copyright in the context of the film archive – orphan works – initially stalled at the notion that collections remained dormant as a consequence of rights issues, as it was concerned with mapping the orphan works problem, including its causes and potential solutions (USCO, 2006; van Gompel, 2007a; 2007b; Elferink and Ringnalda, 2008; van Gompel and Hugenholtz, 2010; JISC, 2011; Pallante, 2012a; 2012b; Borghi and Karapapa, 2013; Favale et al., 2013).

As a result of (predominantly) EU-funded research projects and initiatives,

archival practice has mostly contributed to this debate in the form of project deliverables. In the context of the EU project, European Film Gateway, for instance, it has led to such texts as the *Report on Legal Frameworks in European Film Gateway (efg) Consortium Member States* (2009) and the *Final Guidelines on Copyright Clearance and IPR Management* (2010). Mainly focused on laying out the current legislation in several EU member states, these studies did not deal with any of the implications of potential restrictions to archival access.

Legal restrictions have such a profound influence on what the film-historical field takes as its objects of study, it is surprising that only a handful of media scholars have addressed copyright issues more generally in the larger cultural and creative industries' context. Thompson (2007), in her aforementioned article on the 'celestial multiplex', identifies copyright issues as one of the main factors why she believes such a phenomenon will not materialize any time soon. Lucas Hilderbrand, in *Inherent Vice* (2009), analyses the specific case study of analogue VHS tape and its ties to bootlegging and preservation practices, while raising issues of intellectual property rights. Peter Decherney, in *Hollywood's Copyright Wars* (2012), as well as in some of his other writings, illustrates how the Hollywood studios and intellectual property laws have shaped each other reciprocally. However, it is only very recently that the potential effect of the unavailability of heritage materials – caused by diverse copyright issues – on preserving, accessing, and understanding digital cultural heritage has made its way into the literature from a legal point of view (McCausland, 2009; Derclaye, 2010; Wallace, 2016; Deazley, 2017).

28 |

A firmer bridge needs to be erected between these still relatively discrete bodies of literature by addressing the broader question of how and why only a part of extant archival material is publicly accessible, and the repercussions of this for our wider cultural understanding. The following chapters take up this task.

STRUCTURE OF THE BOOK

The primary purpose of this study is to examine the relationship between the film archive, copyright, and film material's potential for 'history making' based on how much of the material is publicly accessible. The next chapter (Chapter 1) introduces a specific public-sector national film archive, and explains why it plays such a central role in the book.

The following three chapters draw a picture of a 'recategorized' film archive based on the copyright ownership of the material. This helps to unravel the practices that govern access to the archived films according to discrete legal categories. Each chapter looks at a result of this recategorization, dis-

cussed in Chapter 1, including the *embargoed film* (Chapter 2), the *orphan film* (Chapter 3), and the *public-domain film* (Chapter 4).

Bringing together the preceding three chapters, Chapter 5 focuses on the practice of found-footage filmmaking as a specific artistic intervention in the reuse of film in the institutional context of the archive. Chapter 6 then takes a step back to examine copyright practices and the production of film history in the archival context, focusing on a particular historical example.

Finally, the last chapter draws some conclusions about the relationship between the film archive and copyright based on the discussion in the preceding chapters, as well as addressing the specific combination of the legal context and human agency in an institutional setting – a discussion that is threaded throughout the book.

NOTES

- 1 My thanks go to Michael Punt for pointing me in the direction of this material.
- 2 The full patent text in French is available at: <http://cinematographes.free.fr/lumiere-245032.html> (accessed on 17 March 2018).
- 3 Lady Bracknell, in turn, has rewritten her own story, as she had no fortune of any kind when she married and has done a significant amount of social climbing since then (Cave, 2000).
- 4 See, for instance, <https://www.theguardian.com/film/2011/aug/03/alfred-hitchcock-film-new-zealand> (accessed on 7 September 2017).
- 5 This mainly pertains to national archives in Europe; it is, for instance, not a categorical imperative for American nonprofit archives.
- 6 See Chapter 8 of 'Copyright 101', Copyright and Digital Cultural Heritage: Exceptions for Libraries, Archives and Museums, at the online resource, the Copyright Cortex. Available at: <https://copyrightcortex.org/> (accessed on 25 September 2017).

BIBLIOGRAPHY

- Amad, Paula (2010) *Counter-Archive. Film, the Everyday, and Albert Kahn's Archives de la Planète*. New York: Columbia University Press.
- Aufderheide, Patricia and Peter Jaszi (2004) *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*. Washington, DC: Center for Social Media, American University.

- Borde, Raymond (1983) *Les Cinémathèques*. Lausanne: Editions L'Age d'Homme.
- Borghini, Maurizio, and Stavroula Karapapa (2013) *Copyright and Mass Digitization. A Cross-Jurisdictional Perspective*. Oxford: Oxford University Press.
- Cave, Richard Allen (ed.) (2000) *The Importance of Being Earnest, and Other Plays*. London: Penguin Classics.
- Cherchi Usai, Paolo (2009) 'Are All (Analog) Films "Orphans"? A Pre-digital Appraisal', *The Moving Image*, 9(1), pp. 1–18.
- David, Matthew, and Debora Halbert (eds.) (2014) *The SAGE Handbook of Intellectual Property*. London: SAGE Publications Ltd.
- Deazley, Ronan (2017) 'Copyright 101', *Copyright Cortex* [online] available at: <https://copyrightcortex.org/copyright-101> (accessed on 25 September 2017).
- Decherney, Peter (2012) *Hollywood Copyright Wars*. New York: Columbia University Press.
- de Kuyper, Eric de (2013) 'Werken bij een Filmarchief/Filmmuseum, of: Schizofrenie als opdracht', in: Cinémathèque royale de Belgique (ed.) *75000 Films*. Crisnée: Editions Yellow Now, pp. 121–137.
- Delpout, Peter (1990) 'BITS & PIECES - De grenzen van het filmarchief', *Versus*, 2, pp. 75–84.
- Derclaye, Estelle (ed.) (2010) *Copyright and Cultural Heritage. Preservation and Access to Works in a Digital World*. Cheltenham: Edward Elgar Publishing.
- Dupin, Christophe (2013) 'First Tango in Paris: The Birth of FIAF, 1936-1938', *The Journal of Film Preservation*, 88, pp. 43–57.
- Elferink, Mirjam and Allard Ringnalda (2008) *Digitale Ontsluiting van Historische Archieven en Verweesde Werken: Een Inventarisatie*. Utrecht: CIER [Online]. Available at: <http://www.wodc.nl/onderzoeksdatabase/ontsluiting-historische-archieven-en-auteursrecht-hoe-beter.aspx?cp=44&cs=6796> (accessed on 21 April 2016).
- EFG (2009) *Report on legal frameworks in European Film Gateway (EFG) consortium member states*. Amsterdam: European Film Gateway [Online]. Available at: http://www.edfgproject.eu/downloads/D.5.1_legal_frameworks_in_EFG_consortium_a.pdf (accessed on 21 April 2016).
- EFG (2010) *Final Guidelines on Copyright Clearance and IPR Management*. Amsterdam: European Film Gateway [Online]. Available at: pro.europeana.eu/documents/.../EFG_D5.3_Copyright_Clearance.pdf (accessed on 4 November 2010).
- Favale, Marcella, Fabian Homberg, Martin Kretschmer, Dinusha Mendis, and Davide Secchi (2013) *Copyright, and the Regulation of Orphan Works: A comparative review of seven jurisdictions and a rights clearance simulation*. CREATE working paper. Available at: <http://www.create.ac.uk/publications/copyright-and-the-regulation-of-orphan-works/> (accessed on 11 October 2017).
- Fossati, Giovanna (2009) *From Grain to Pixel: The Archival Life of Film in Transition*. Amsterdam: Amsterdam University Press.

- Frick, Caroline (2011) *Saving Cinema. The Politics of Preservation*. New York: Oxford University Press.
- Gorini, Sabina (2004) 'The Protection of Cinematographic Heritage in Europe'. *IRIS Plus, a supplement to IRIS, Legal Observations of the European Audiovisual Observatory*, 08, pp. 1–8.
- Hilderbrand, Lucas (2009) *Inherent Vice: Bootleg Histories of Videotape and Copyright*. Durham: Duke University Press.
- Horak, Jan-Christopher (2007) 'The Gap Between 1 and 0: Digital Video and the Omissions of Film History', *Spectator*, 27(1), pp. 29–41.
- Houston, Penelope (1994) *Keepers of the Frame: The Film Archives*. London: British Film Institute.
- Hudson, Emily, and Andrew Kenyon (2007) 'Digital Access: The Impact of Copyright in Digitisation Practices in Australian Museums, Galleries, Libraries and Archives', *UNSW Law Journal*, 30(1), pp. 12–52.
- Hunter, Dan (2012) *The Oxford Introductions to U.S. Law: Intellectual Property*. New York: Oxford University Press.
- JISC (2009) *In From the Cold: An Assessment of the Scope of 'Orphan Works' and Its Impact on the Delivery of Services to the Public*. Strategic Content Alliance, Collections Trust [Online]. Available at: <http://www.jisc.ac.uk/publications/reports/2009/infromthecold.aspx> (accessed on 21 April 2016).
- Jones, Janna (2012) *The Past is a Moving Picture. Preserving the Twentieth Century on Film*. Gainesville: University Press of Florida.
- McCausland, Sally (2009) 'Getting Public Broadcaster Archives Online', *Media and Arts Law Review*, 14(2), pp. 142–165.
- Meyer, Mark-Paul (2011) 'Authenticiteit en fotografische materialiteit', in Annemieke de Jong (ed.) *Zorgen voor onzichtbare assets. Over het behoud van digitale AV-collecties*. Hilversum: Beeld en Geluid, pp. 95–108.
- Nissen, Dan (ed.) (2002) *Preserve Then Show*. Copenhagen: Danish Film Institute.
- Noordegraaf, Julia (2010) 'Performing the Archive: Archivists as Editors of Knowledge', *Reimagining the Archive: Remapping and Remixing Traditional Models in the Digital Age*, UCLA, Los Angeles, 12–14 November.
- Padfield, Tim (2010) 'Preserving and Accessing our Cultural Heritage – Issues for Cultural Sector Institutions: Archives, Libraries, Museums and Galleries', in Estelle Derclaye (ed.) *Copyright and Cultural Heritage. Preservation and Access to Works in a Digital World*. Cheltenham: Edward Elgar Publishing, pp. 195–209.
- Pallante, Maria (2012a) 'Orphan Works & Mass Digitization: Obstacles & Opportunities' [Keynote Address] *Berkeley Digital Copyright Project*, Berkeley Center for Law and Technology, 12 April 2012.
- Pallante, Maria (2012b) 'Orphan Works and Mass Digitization', *Federal Register*, 77(204), Washington, DC: Library of Congress, Copyright Office, pp. 64555–64561.

- Rechsteiner, Emjay (Curator Contemporary Dutch Film, Eye Film Institute Netherlands) (2010) Interviewed by Claudy Op den Kamp. Philadelphia, US, 6 November.
- Roud, Richard (1983) *A Passion for Films: Henri Langlois and the Cinémathèque Française*. New York: The Viking Press.
- Thompson, Kristin (2007) 'The Celestial Multiplex', *Observations on Film Art* [Online]. Available at: <http://www.davidbordwell.net/blog/2007/03/27/the-celestial-multiplex/> (accessed on 21 April 2016).
- Twining, William (2008) 'Law in Context Movement', in Peter Cane and Joanne Conaghan (eds.) *The New Oxford Companion to Law*. Oxford: Oxford University Press.
- UNITED NATIONS EDUCATIONAL SCIENTIFIC AND CULTURAL ORGANIZATION (UNESCO) (1991) *Legal Questions Facing Audiovisual Archives*. Paris: UNESCO [Online]. Available at: unesdoc.unesco.org/images/0008/000886/088674e.pdf (accessed on 21 April 2016).
- 32 | United States Copyright Office (USCO) (2006) *Report on Orphan Works*. Washington: Library of Congress.
- van Gompel, Stef van (2007a) 'Audiovisual Archives and the Inability to Clear Rights in Orphan Works', *IRIS Plus, a supplement to IRIS, Legal Observations of the European Audiovisual Observatory*, 04, pp. 1–8.
- van Gompel, Stef van (2007b) 'Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?', *IIC*, 6/2007, pp. 669–702.
- van Gompel, Stef, and Bernt Hugenholtz (2010) 'The Orphan Works Problem: The Copyright Conundrum of Digitizing Large-Scale Audiovisual Archives, and How to Solve It', *Popular Communication. The International Journal of Media and Culture*, 8(1), pp. 61–71.
- Wallace, Andrea (2016) 'Cultural Institutions and Surrogate Intellectual Property Rights: Resisting an Artwork's Transfer into the Public Domain', *ISHTIP conference*, University of Glasgow, 6–8 July.

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