The Greatest Films Never Seen

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ABSTRACT

This chapter looks in detail at the rationale behind the book’s focus on the EYE Film Institute Netherlands and introduces a recategorization of the archival film collection based on copyright ownership. The resulting categories (the embargoed film, the orphan film, and the public domain film) will function as the basis for an analysis of digital archival access practices in the following chapters.

KEYWORDS
Nederlands Filmmuseum, EYE Film Institute, historical resonance, recategorization
This chapter looks in more detail at the rationale behind the book’s focus on the EYE Film Institute Netherlands (known simply as EYE) and explores how the two dichotomies mentioned in the Introduction play out in practice in this particular national film archive.

The first dichotomy is between canonical ‘textbook’ film histories and the material holdings in a film archive. Chance, as well as choice, has played a role in the formation of EYE’s collection. This chapter looks at how the institute’s adoption of a distinctive aesthetic attitude towards preservation led to the opening up of its archive and endowed its noncanonical archival holdings with historical resonance. In the process, it created a potentially rich primary source for film-historical research, and encouraged the growth of interest (and expertise) in the artistic practice of found-footage filmmaking.

The chapter also places a second dichotomy, between the intellectual and material ownership of works, under scrutiny. It introduces a recategorization of the archival film collection based on copyright ownership. The resulting categories (the embargoed film, the orphan film, and the public domain film) will function as the basis for an analysis of digital archival access practices in the following chapters.

WHAT’S IN A NAME?

EYE – the film sector’s institute of Dutch cinema and national museum of film – is the result of a merger in 2010 of four institutions, including the former Nederlands Filmmuseum. This account uses both names, the Nederlands Filmmuseum and EYE, to highlight the precise timing of the events under discussion: Nederlands Filmmuseum is used when discussing events taking place before 2010; EYE is used after that date, and whenever the institute is mentioned more generally.

EYE is one of two national audiovisual archives in the Netherlands. The other, the largest in the country, is the archive of the national broadcasting corporations – the Netherlands Institute for Sound and Vision. The Netherlands also has several regional archives, some of whose collections are exclusively composed of audiovisual material.

EYE is not the only institution that displays the tensions inherent in the
two dichotomies mentioned above; they can also be seen in the practices of the Netherlands Institute for Sound and Vision, and in many other not-for-profit cultural institutions. However, its digital access practices present a slightly more apposite context for this analysis. The institute is not only focused on collecting, preserving, and restoring its collections; as it is partly subsidized by public money (Fossati, 2009) and is a not-for-profit institution – like all the national archives belonging to the International Federation of Film Archives (FIAF) – EYE is also mandated to provide access to its holdings. However, it holds the rights to only a very small proportion of its collection (the estimate is less than 5%, a similar number to the British Film Institute), and this means that some of the steps it needs to take towards providing access are restrained by copyright. A further important characteristic is the fact that it often collaborates in cross-jurisdictional restoration projects, due to the international character of film preservation, which relies on the exchange of film elements and international (online) distribution.

Also, over the last four decades or so, EYE has taken an active stance when it comes to the creation of historical resonance for its own collection by reflecting on its historiographic position and challenging that of other archives. It has accomplished this through, for example, engaging in found-footage filmmaking practices – that is, ‘writing history with the films themselves’ (Fossati, 2012, p. 179); it has not only collected filmmakers’ work for its permanent collection, but has also invited artists into the institute to work with the archival films, a theme we will return to in Chapter 5.

As one of this book’s concerns is the concept of the archive as a storehouse of films that are potential sources of film history, its periodization roughly comprises the last 40 years of film archiving. This not only corresponds with the practices described above, but also with the birth of an understanding of films and archives as primary historical sources and a realization of the changing nature of filmic evidence and the importance of films previously perceived as marginal. This timeframe hinges on the landmark 1978 FIAF Congress, held in Brighton in the UK, which is commonly regarded as a turning point in film historiography. Indeed, the Brighton Congress and the changes in archival practice could be seen as interrelated. The Congress itself will be explored in more detail in Chapter 6 as part of a larger historical contextualization of the ‘return’ to archival film as a primary source.
DICHOTOMY I: CREATING HISTORICAL RESONANCE

EYE has been instrumental in the rewriting of film history based on the material it has made available over the last few decades. Giovanna Fossati notes:

[D]eputy directors Eric de Kuyper first, and Peter Delpeut later, encouraged restoration and presentation practices that were mainly moved by the aesthetic value of films rather than by their historical relevance. [...] From this perspective, the focus shifted from the celebrated centerpieces of official film history to its margins. (Fossati, 2009, p. 172)

As part of the ‘return’ to archival film evidence in the late 1980s and early 1990s, the Nederlands Filmmuseum focused on (the aesthetics of) the films in its own collection rather than the accepted canonical titles. As the films themselves were brought to light, viewed, and examined, the whole concept of the film archive changed: it was no longer regarded as terra incognita, uncharted territory, but as a potentially vital primary source for written film history. By revealing the fragmented nature of its collection of surviving films, the institute helped establish the historical resonance of its holdings, thus challenging the traditional canon.

During the first 40 years of its existence, the Nederlands Filmmuseum concentrated predominantly on collecting. The senior curator of EYE, Mark-Paul Meyer, reflects on the collection’s beginnings:

Just as many other film museums, the Filmmuseum in Amsterdam was started up shortly after World War II by enthusiastic cinephiles who were interested in collecting films to ensure that they would not be lost. While the Filmmuseum’s archive expanded over the following decennia through contributions from collectors, the largest part of the collection was donated by distributors, filmmakers and producers. Due to this, the archive was a reflection of the film climate in the Netherlands, and by definition, it was characterized by both chance and lacunae. (Meyer, 2012, p. 146)

The museum, however, was far from being a focused and well-organized institution: its collecting practices were shaped by its limited budget, and the items themselves were ‘piled up in the basement in a cluttered chaos’ (Delpeut, 1998, p. 2). But when Hoos Blotkamp (previously head of visual arts and architecture at the Ministry of Welfare, Public Health, and Culture) became its director in 1987, the Nederlands Filmmuseum was ‘awoken by a kiss’ (Hendriks, 1996, p. 109). In 1988, Blotkamp appointed filmmaker and
scholar Eric de Kuyper as its first deputy director, and it was de Kuyper who was responsible for the huge increase in the number of screenings. Just a few years later, the museum secured a substantial grant to tackle the backlog in its nitrate preservation (Hendriks, 1996). In order to deal with what she termed a ‘conglomerate of broom closets’ (Hendriks, 1996, p. 109), Blotkamp took a pragmatic attitude towards archiving, which could be described as ‘start at the bottom right and end at the top left’ (Delpeut, 1998, p. 2). This meant that, in a very post-Brighton spirit, everything was taken out of the archive and viewed from a fresh perspective.

This in itself was a revolutionary move: it was not standard practice to view a film before deciding on its preservation. In similar institutions in other countries, such as the Cinémathèque française, such decisions were often made by external committees after consulting a list of films, a practice guaranteed to maintain the dominance of the established canon (Delpeut, 2012). De Kuyper (1994, p. 102) criticized this approach, which he claimed meant that archives adopted a ‘common approach to the history of film’ as opposed to letting their discrete programmes ‘reflect the collections’ or ‘reflect on film history’.

Blotkamp and de Kuyper took a very different approach at the Nederlands Filmmuseum: they relied on the expertise of staff members, who were asked to view the films and then make a decision on what to preserve based on their own tastes and personal insights. This encouraged unique, sometimes inspired choices (Delpeut, 1998). The film prints themselves became the point of departure (Hertogs and de Klerk, 1994). Meyer emphasizes how the composition of the collection itself was fundamental to the Filmmuseum’s innovative preservation and presentation methods:

To a large extent, the archive was only accessible in a limited way at the end of the 1980s. While the films were properly registered, much about the films was still a mystery; identification, technical quality, and the determination of the cinematographic importance left much to be desired. In fact, there was only one way to change the situation: to take everything out of the vault, film by film can, and see what each contained. It turned out that there was much to discover and, in the process of going through everything, it became clear that what was in the film history books didn’t match with what the Filmmuseum had in its vaults. There were titles from well-known directors, of course, but by far the majority of what was discovered was completely unknown material – often masterful or exceptionally beautiful work that deserved a place in film history – or film history as the Filmmuseum would propagate it. (Meyer, 2012, p. 146)
This practice of viewing the material before reaching a decision on its preservation, letting chance play a role, led to an eclectic film collection. EYE’s collection bears little resemblance to those of other archives, as most of the material uncovered in those early days turned out to be unknown, ‘wonderful rubbish’ (Meyer, in Olesen, 2013), and ‘scarcely traceable to the canon of cinema history’ (Delpeut, 2012, p. 220). Mainly as a result of decay and lost material, a significant number of films turned out to be incomplete. These fragmentary films became an analogy for the incomplete nature of the film archive and of film history itself (Lameris, 2017). De Kuyper (1991, p. 10) addresses the general denial of the archive’s incompleteness in an article in which he speaks of ‘falsifying’ and ‘distorting film history’ by not taking archival lacunae into consideration. Blotkamp, in turn, believed that it was essential to bring the curious and neglected parts of film history to the attention of the public as ‘[o]thers had set foot on the beaten paths of history sufficiently already’ (Delpeut, 1998, p. 4).

The fundamental building blocks of a new Dutch preservation policy therefore rested on three factors. The first was the specific composition of the Filmmuseum’s archive, which comprised a high number of noncanonical titles. The museum’s own collection took centre stage because it was regarded as a direct reflection of film culture in the Netherlands. The second factor was the emergence of a particular historiographic position, which claimed that film history necessarily presents an incomplete image; there is no one film history, but several. And the third was the existence of what was thought of as a specifically ‘Dutch’ attitude towards preservation – that is, since one of the archive’s tasks was to present and reflect on film history, it was essential to address its discrepancies and lacunae.

The composition of EYE’s collection, its public mission, and its specific attitude form a coherent theme that runs throughout the book – one that is arguably still reflected in EYE’s practices today. For example, in response to the opening at EYE of the Orphan Film Symposium in March 2014, Peter Delpeut remarked that ‘technical knowledge, fortitude of content and above all creative forms of presentation still characterize the work of the current staff’.5 This includes inviting artists to reuse its holdings creatively, as well as finding novel ways of presenting its collection. This attitude – with its emphasis on human agency – will be a significant factor when we turn to analyzing access to specific film categories in the next chapters.

The new preservation policy at the Nederlands Filmmuseum was part of a wider post-Brighton shift from the ‘old’ to the ‘new’ film history that took place in both the academic and archival worlds. The aim was to place previously unknown films in the spotlight (Lameris, 2017). This unique development, however, did not in itself create a collection that was ready to be programmed
– the many unknown films and film fragments were in need of contextualization. EYE’s current head of collection, Frank Roumen, who began his career at the Nederlands Filmmuseum in 1988, comments:

We had this insight that we should move to what we had in the archive, what we owned, and search for ways and forms of presenting [...] short, silent, and unknown films. [...] We started to experiment with [the addition of] theatrical [aspects], live music, orchestra[s], and compilations. (Roumen, cited in Escareño, 2009, p. 190)

De Kuyper and Delpeut, who both played an instrumental role in the international film archival practice of the late 1980s and early 1990s, provided a context for the collection of the Nederlands Filmmuseum. Both addressed the discrepancy between archival films relegated to obscurity and canonical film history on several occasions. Delpeut, for instance, advocated that the archive be seen as an ‘aesthetic repository’, which would in turn provide the source material for the Filmmuseum’s programming:

The films should firstly be the subject of pleasure and should only be secondarily the subject of identification (and all related rational activities). That state of affairs can provoke the film archive to approach film history [...] more from an aesthetic standpoint than from a historical one. Films exist then as the bearer of an affective relationship, not merely as a historical fact. This also means that when screening the films from the archive they should firstly be presented as fun and entertaining facts, not as historical facts. Perhaps this would also provoke a different kind of choices, other selections in conservation schemes. (Delpeut, 1990, pp. 83-84)

Together, de Kuyper and Delpeut took the focus on the aesthetic rather than the historic aspect of moving images to the extreme by reanimating hidden, forgotten, and fragmented film history. They placed unknown material centre stage by preserving, presenting, and disseminating unidentified fragments. For example, the Bits & Pieces collection at the Nederlands Filmmuseum, established in the late 1980s and early 1990s, is a ‘series of (generally) short unidentified fragments of film, preserved primarily on account of the aesthetic value of the images’ (Hertogs and de Klerk, 1994, p. 9). At the heart of this policy of preserving and presenting the unidentified and neglected fragments lay the desire to challenge the prevailing historiographic orthodoxy:

The reason why they are neglected is that they do not have, and can’t be given, a label. They are not registered and cannot be part of traditional
film history. We don’t have criteria to select them. [...] The result is that a film, which cannot be labelled with the help of the notions mentioned, cannot acquire a historical identity. That means, literally, it does not exist for film history. (de Kuyper, 1994, pp. 104–105)

These unidentified fragments will be explored in more detail as orphan works in Chapter 3 and as raw ingredients for new films in Chapter 5.

The need for contextualization in this new preservation policy went hand in hand with the demand for academic reflection. The institute organized numerous academic symposia to answer these needs. The International Amsterdam Workshop, in particular, was arguably an heir to the Brighton Congress – this series of workshops allowed an international peer group of film scholars, film archivists, and relevant experts to watch and discuss materials and topics that had previously been under-researched in both the film historiographical and film archival fields (Hertogs and de Klerk, 1994; 1996).

More recently, EYE launched an imprint with Amsterdam University Press, entitled ‘Framing Film’, a series of scholarly works ‘dedicated to theoretical and analytical studies in restoration, collection, archival, and exhibition practices in line with the existing archive of EYE’. Aside from this book, Fossati’s 2009 publication, From Grain to Pixel, which charts the changing preservation and restoration practices of a film archive in transition from the analogue to the digital era, and Bregt Lameris’ 2017 publication, Film Museum Practice and Film Historiography, on the interaction between film preservation practices and film-historical discourses, are works that are published within the imprint, and which both also centre on EYE. These works contribute to the argument that, in the context of the archival institution, historiography does not mean a mere succession of epistemic shifts; rather, the archive contains multiple film-historical attitudes. The processes of collecting, restoring, and presenting all reflect ‘some ideology, however unconscious, associated with a certain historical taste’ (de Kuyper, in Hertogs and de Klerk, 1996, p. 79). In film restoration, for instance, ideas about which elements should be reproduced are subject to continuous change:

Film restorers are, in fact, creative film historians who render interpretations of film history visible; they create new versions of the archival films, which reveal the dominant film historical perspective at the time of restoration. (Lameris, 2017, p. 122)

EYE understands that the archivist’s active intervention shapes a collection’s potential for history making; the judgments they apply to the past reflect the present they inhabit. And the institute itself is ‘a reservoir of information
about the different ways film historians have perceived museum films in the past’ (Lameris, 2017, p. 200). The archive is as much the result of a particular historical narrative as it as an instrument for constructing a new one. The self-reflexive stance of EYE vis-à-vis its role in shaping the historical resonance of its own collection, therefore, makes it an ideal site for the exploration of the dichotomy between canonical ‘textbook’ film histories and the actual material holdings in the film archive.

**DICHOTOMY II: THE NEED FOR RECATEGORIZATION**

Although copyright is a territorial notion, copyright law has long been the object of international regulation. The Berne Convention (1886) represents the first attempt to harmonize international copyright legislation. The UK was part of the small group of countries to first approve the treaty, while the Netherlands joined later in 1912 (the US did not join until 1989). However, despite this convention, and numerous more recent initiatives, countries continue to exhibit important differences, and copyright essentially remains national law. The purpose of this book, however, is not to provide a comparative overview of the legal circumstances of the various national film archives; rather, it focuses exclusively on the Dutch legal context.

The basic principle of Dutch copyright law (which is true of other jurisdictions as well) is that it grants the author of a work the exclusive right to reproduce and communicate its contents to the public. The rights of reproduction and communication include a range of actions, such as translation and adaptation, as well as publishing, distributing, exhibiting, and broadcasting. The period of copyright protection starts from the moment the work is created, but it does not last forever: its ‘term’ expires. When a copyright has expired, the work is said to be in the public domain and can be freely used without restrictions. Throughout the European Union and in the US, the length of a copyright term is currently fixed at the author's lifetime plus 70 years. After the author's death, the rights transfer to his or her heirs. However, a copyright owner may permanently 'assign' their right to another person (transferring ownership), or temporarily permit - ‘licence’ - another to execute copyright-restricted activities within certain limits (while retaining ownership). Licensing is the most common form of copyright exploitation. Some of the various rights known as 'moral rights' (for instance, the right to be acknowledged as the director of a film or the right to object to modification) may be retained by the author even though ownership has been assigned (Bently and Sherman, 2014).

Copyright has only come to be seen as a significant issue for institutions in the cultural sector in the last two decades, and, as a result, they began to
employ specialist staff to deal with copyright problems (Padfield, 2010). For example, when EYE became the principal partner in a seven-year national digitization project, ‘Images for the Future’, in 2007, the institute put a legal team in place, which, at its largest, consisted of four full-time employees. Ever since, EYE has been at the forefront of legal research in the film archival context and has been a partner in several international initiatives, including the European Film Gateway (EFG) project, leading a ‘work package’ dedicated to copyright issues, as well as the Framework for an EU-wide Audiovisual Orphan Works Registry (FORWARD).

The legal issues confronting EYE differ from those of a commercial institution. Whereas other archives can own the copyright to the large majority of their holdings, EYE, as a national public-sector institution, hardly owns any of the intellectual property of its holdings; much of its physical archive is held on deposit. The dichotomy between the intellectual ownership and material ownership of archival material, and the tension that arises with the demand for access, is most evident in a public institution, with its specific remit (and practices) of film preservation and dissemination. This issue will be looked at in more detail in later chapters.

The need to recategorize archival holdings according to their copyright-ownership status arose with the realization that the legal issues that prevent the distribution of a film ‘rarely have anything to do with the type of film in question’ (A Matter of Rights, 2010). In order to analyze the difference in how access to the materials is provided, the films need to be ‘freed’ from other categories, such as country, director, or genre; it is more important to know whether a film is an orphan work, for example, than whether it is a documentary (although these factors tend to be intertwined, as will emerge later). The recategorization has resulted in an archival cross section with four quadrants (reproduced below), each representing a particular copyright ownership situation plotted against its potential availability. Although the cross section has been modelled on EYE, it could also be used to represent the most common situations confronting other public-sector national archives, such as the British Film Institute (BFI) or even the Centre National du Cinéma et de l’Image Animée (CNC), the mandatory national film depository of France.

The first distinction is whether a film is still in copyright (1, 2) or whether it is in the public domain (3, 4). Within these two sections are further subdivisions. Quadrant 1 represents the films under copyright, which are more or less ‘available’. Availability in the context of this cross section should be understood as the potential or latent accessibility of the material. Material might be available for researchers for an on-site consultation, for instance, but that does not mean that the material is publicly accessible for further dissemination. In the context of discovering a film’s potential for ‘history making’, avail-
ability should be understood here as public accessibility. Quadrant 1 can be split into two parts: films to which the archive owns the rights and those with a known external third-party rights holder. The former is a very small portion of the collection and can consist of films by an individual filmmaker who has (partially) donated their holdings along with their rights to the archive. The latter includes, in the case of EYE, studio material deposited by distributors.

The second quadrant represents those films that are in copyright but are not readily available. This quadrant also consists of two sections: one with material with a known third-party rights holder, which might be under embargo (a scenario we will look at in more detail in Chapter 2), and the other with material with an unknown or un-locatable rights holder, so-called orphan works (the subject of Chapter 3). Some of the films in the orphan works sec-
tion, however, after the necessary research, might turn out to be in the public domain.

Quadrants 3 and 4 can be considered together as they both address films in the public domain. As the cross section was made on the basis of copyright ownership and plotted against the material’s potential availability, it could be assumed that the public domain works pose no problem as they appear legally ‘available’. It turns out, however, that, although they can seemingly be reused unrestrictedly without the permission of a copyright owner, archives are not necessarily able to provide access to these materials. The exclusive ownership of the source materials plays a crucial role in this category of films, and it is where we see the largest divergences in terms of access between different types of institutions (the subject of Chapter 4).

Before turning to an analysis of the artistic practice of reusing archival film (Chapter 5), the following chapters will address each quadrant systematically, illustrating them with examples from EYE’s collection. The selection of these examples has been based on the moment of their public access – between 2002 and 2005. This was a period in which the particular constellation of technological, social, economic, and institutional factors impacting the film archive and copyright remained relatively uniform. As mentioned earlier, the advantages of limiting the analysis to one institution is that most of the contextual conditions, such as institution, country, technological possibilities, and legal framework, are identical for each example and remain consistent throughout the period under scrutiny.

Although the specific way the Dutch national archive is governed, and the enormous funding opportunities for film preservation made available in the Netherlands over the last few decades, might not be representative of other regional or national film archives, the underlying legal issues in some of the examples in the following chapters represent problems that face many other archives. Films may, for example, be deposited under embargo, contradicting the archive’s mandate to both preserve and to provide access to its film holdings. They might have untraceable rights owners, forcing the archive to undertake a risk analysis before deciding whether to go ahead with a particular reuse. Alternatively, films might be in the public domain and provide an opportunity for exploitation.

In terms of numbers, the second section in quadrant 1 (works in copyright with a known third-party rights holder) is by far the largest part of EYE’s collection, and this arguably holds true for other national collections. Based on a database estimate, all of the other sections together – that is, the part of the collection for which the archive owns the rights, works in the public domain, plus orphan works – make up approximately less than 10% of the entire collection.¹¹
Some of these works can be relatively easily exploited by the institution; some will be ‘policed’ for business or strategic reasons; and others can only be disseminated digitally or online after a risk assessment. There are large divergences between not-for-profit and for-profit institutions in these parts of the collection. The following chapters will look at this 10% and the consequences of the unavailability of material in greater detail, with the aim of extrapolating the more generic issues that are germane to a wider context. But, before doing so, the next chapter focuses on quadrant 1, and the first section of the second quadrant: the embargoed film.

NOTES

1 The four institutions are the Nederlands Filmmuseum, Holland Film, the Filmbank, and The Netherlands Institute for Film Education. Available at: https://www.eyefilm.nl/en/about-eye (accessed on 12 April 2016).

2 This information was provided by Leontien Bout, legal counsel for EYE, in an email to the author on 28 September 2017. The number for the BFI was provided by the BFI’s legal counsel, Richard Brousson – see Estelle Derclaye (2009).

3 The funding, 13,000,000 guilders (approximately 6 million euros), was made available in two stages. It was known colloquially as ‘the gold ship’ (Hendriks, 1996, p. 109).

4 Although Jan de Vaal, director of the Nederlands Filmmuseum prior to Hoos Blotkamp, was a former International Federation of Film Archives (FIAF) treasurer and attended the Brighton Congress (for the list of participants, see Holman, 1982, Vol. 1, p. 365), the Filmmuseum did not contribute any film prints to the Congress (see the list in Gaudreault, 1982, Vol. 2, p. 18).


6 The first reel, Bits & pieces 1-11, dates from 1990. This information was provided by Annike Kross (an EYE film restorer) in an email to the author on 24 November 2014. This means, however, that the clips were assembled over a long period of time before that date.

7 To date, there have been five workshops: ‘Nonfiction from the Teens’ in 1994; ‘Disorderly order’: Colours in Silent Film’ in 1995; ‘The Eye of the Beholder: Exotic and Colonial Imaging’ in 1998; ‘Re-Assembling the Program: The Program as an Exhibition Format’ in 2004; ‘Advertising Films: The Images that Changed your Life’ in 2009. This information was provided by Nico de Klerk, the organizer of all the workshops, in an email to the author on 22 December 2015.

Fantasia of Color in Early Cinema, a ‘coffee-table book’ focusing on early colour film images from the archives of EYE Film Institute Netherlands, was also published in the ‘Framing Film’ series in 2015.

Available at: http://beeldenvoordetoekomst.nl/en.html. ‘Images for the future’ was the largest digitization effort in Europe to that date.

This information was provided by Leontien Bout, legal counsel for EYE, in an email to the author on 28 September 2017.

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