The Greatest Films Never Seen
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A Swiss Bank

Recategorization I – The embargoed film

CHAPTER 2

ABSTRACT

This chapter, using the recategorization suggested in Chapter 1, commences with a systematic analysis of digital access to films that fall within a public sector archive’s legal cross section, introduced in Chapter 1. Examples show that, while copyright fulfils a protective function for rights holders, it can limit a film’s potential for ‘history making’ by inhibiting its public accessibility.

KEYWORDS

embargoed collections, rights holders, ALS TWEE DRUPPELS WATER, colourization debate
This chapter, using the recategorization suggested in the previous chapter, commences a systematic analysis of digital access to those films that fall into the quadrants of a public-sector archive’s legal cross section (see the chart in Chapter 1). It marks the beginning of an exploration throughout the next few chapters of the impact of copyright on the visibility of important works that are arguably crucial to our understanding of the past and the history of film.

In one of these instances, the film archive itself could be described as a sort of ‘Swiss bank’. The film archivist and cofounder of the Cinémathèque française, Henri Langlois (cited in Houston, 1994, p. 49), described the archive in similar terms when he spoke of its ‘obligation to maintain confidentiality about its holdings in the interests of its depositors’. The chapter looks at Fons Rademakers’ 1963 film, ALS TWEE DRUPPELS WATER (‘LIKE TWO DROPS OF WATER’), an embargoed work in the Nederlands Filmmuseum’s collection, which exemplifies the copyright dichotomy between material and intellectual property that such a characterization presupposes. It also draws a comparison with an international example of this dichotomy: the colourization debate of the late 1980s in the US.

Both examples expose the archive as a vulnerable place, unable to guarantee a fixed and stable environment for cinematic memories. They also show that while copyright fulfils a protective function for rights holders, it can limit a film’s potential for ‘history making’ by inhibiting its public accessibility.

**THE ARCHIVE AS RIGHTS HOLDER**

The first and most obvious result of a legal cross section of an audiovisual archive is that it falls into two parts: films in copyright (quadrants 1 and 2) and films out of copyright (quadrants 3 and 4). In the European Union and the US, copyright currently lasts for a term of 70 years beyond the author’s death, and, although there are many exceptions, this very generally means that most films are still in copyright. In most public-sector but also in privately held archives, such works will comprise the majority of the holdings. This chapter and the next study the films in copyright, while Chapter 4 examines those out of copyright.

A further division can be made based on whether the copyright is held by
the archive or by a third party. A commercial archive, such as a studio archive, will own the rights to the large majority of its holdings. When a secure copyright ownership is in place that will protect against potential infringement when the film is distributed, it is relatively straightforward to initiate a film restoration project that requires a substantial initial investment as the investor can expect to benefit financially when the film is made public. The restoration of David Lean’s *The Bridge on the River Kwai* (1957) in 2010 and Martin Scorsese’s *Taxi Driver* (1976) in 2011 by their copyright owner, Sony Pictures Entertainment, are recent examples.

The public-sector archive (the physical context for this analysis) presents a very different scenario: it holds the rights to very few of its holdings. When large parties donate or deposit films, the rights are not usually transferred (Rother, 2014). Distributors tend to deposit multiple copies of (feature) films in the archive systematically after their theatrical run is over, but only on rare occasions are the rights to this material transferred with the donation or deposit.

Nowadays, the contract between donor and archive generally lays down specific limitations. In the case of EYE, the archive has reached contractual agreements with certain filmmakers and collections, whereby, for instance, potential profits will be shared; however, only very few production companies have transferred all of the exclusive rights to their films to the archive.

In the context of a public-sector archive, the part of the collection that is owned by the archive is almost negligible; the vast majority of the collection will be owned by someone else.

**THIRD-PARTY RIGHTS HOLDERS: FRAGILE RELATIONS**

In his account of European film archiving in the 1950s, the cofounder of the Cinémathèque de Toulouse, Raymond Borde (1983, p. 121, author’s translation), describes the ‘arrival of a redoubtable character in the sleepy and peaceful landscape where the film archives reside: the rights holder’. For several decades, rights holders were regarded with suspicion; Borde refers to them as ‘alligators’ hiding in the swamps where archives ‘peacefully conduct their historic mission of cultural preservation’ (1983, p. 121). The time that Borde depicts is one in which the default attitude of film archives was secrecy (de Kuyper, 2013). The relationship between archives and commercial producers could be characterized as contentious. The producers, who were often the copyright holders, could legally confiscate materials that had been acquired by less-than-legal means. Many archives therefore resorted to concealment, and most of these institutions did not have a full or accessible catalogue.
However, the 1980s saw a new generation of archivists take the helm at the major archives, who brought to their work a higher degree of transparency and a sense of collaboration that also extended to their relationships with third-party rights holders (de Kuyper, 2013).

The second part of quadrant 1 – those film holdings with a known third-party copyright holder – arguably comprises a very large part of most archives' collections. In general, a public-sector archive can collect, preserve, and provide on-site access to films that have third-party rights holders, but cannot distribute them commercially or engage in other projects without the specific permission of the rights holder. When a film has a known copyright holder, however, it is clear whom to ask for permission to reuse the film material. That is not to say that permission will necessarily be forthcoming, but at least negotiations can be set in motion.

EYE, for instance, collaborates in international projects to restore film elements that are in their keeping but to which they do not hold the rights. In such cases, an external party, such as another archive or producer, will initiate the restoration project and ideally clear the copyright with the rights holders. In exchange for lending some of their film elements, EYE receives an attribution in the credits or a restoration copy for its own collection. A recent example of this is Alfred Hitchcock’s *Downhill* (1927), restored in collaboration with the BFI in 2012. Another common scenario involves EYE supporting another archive’s restoration project, where the material it holds is out of copyright – for example, Alfred Machin’s *Maudite soit la guerre* (*War is Hell*, 1914), restored in collaboration with Belgium’s Cinémathèque royale in 2014.

It is fairly normal for a contract to be drawn up between the donating party and the archive specifying the conditions attached to a particular donation or deposit, including limitations on the access to and distribution of the film. The role of the archive, however, is called into question when the rights holder stipulates that access to the material is indefinitely suspended, keeping the film out of the public realm. When films are publicly inaccessible, their ability to engage with the dynamics of history and to fulfil their potential for ‘history making’ are greatly limited.

Close-up: *Als twee druppels water* (*Like Two Drops of Water*)

Fons Rademakers’ celebrated film, *Als twee druppels water* (1963), remained under embargo in the Nederlands Filmmuseum, due to the copyright holder’s restrictions, for nearly four decades, despite the archive’s remit of preservation, restoration, and dissemination.
The story behind this state of affairs begins with Rademakers’ search for additional financing to supplement the funding given to him by the national Productiefonds voor Nederlandse Film (Production Fund for Dutch Films) to make the film. He approached several rich industrialists and ultimately found a partner in beer tycoon Freddy Heineken, who was looking to break into film production and therefore offered to fund the whole film himself (Barten, 2002). By financing and producing *Als twee druppels water*, Heineken became the film’s rights holder.

The film was an international success, not least due to the work of cameraman Raoul Coutard, who had recently contributed to such hits as Jean-Luc Godard’s *À bout de souffle* (1960) and François Truffaut’s *Jules et Jim* (1962) (Welgraven, 2001). The film played at the 1963 International Film Festival in Cannes, alongside such films as Visconti’s *Il gattopardo* and Fellini’s *Otto e mezzo*, where it was nominated for a Golden Palm (Barten, 2002). Soon afterwards, however, Heineken withdrew it from circulation, allegedly in retaliation against an ex-girlfriend who had played a minor role in the film. In search of more control over his creative efforts, Rademakers tried to buy the film’s rights from Heineken, but his request was rejected. As a result, what was considered, according to Dutch newspaper *Het Parool*, a ‘courageous film noir of European stature’ (Barten, 2002) vanished into the vaults of the Nederlands Filmmuseum. The reason why Heineken withdrew the film is relatively unimportant, and the story itself is clouded in obscurity; however, the fact that he was able to do so – much to the chagrin of the director – is significant.

The film was rarely seen after its withdrawal from public viewing. It was screened a few times on special occasions – at a retrospective of Rademakers’ work, for example – but only with Heineken’s express permission. The film was also screened occasionally at Heineken’s private viewings. However, there were no further public cinema or television screenings. In the 1980s, Heineken obstructed the film’s television broadcast, ostensibly so that he would not miss out on potential home-video revenues (van Driel, 2003). Rademakers, in turn, learnt from his experience with *Als twee druppels water* and produced all his subsequent films himself (Beerekamp, 2002). In the future, as the rights holder, he would be in charge of the fate of his films.

In the meantime, the Nederlands Filmmuseum shouldered the financial responsibility for the continued preservation of the film’s source material without any possibility of providing access to the film itself. When Heineken died in early 2002, archivists at the museum reopened negotiations with his heirs, who agreed to the restoration and redistribution of the film (van Bracht, 2012). The restored film re-premièred in September 2003, at the Nederlands Film Festival in Utrecht, after nearly 40 years’ absence from the public realm.
and erasure from the (Dutch) audience’s collective memory, and only a few years before Rademakers died.

The film itself has been heralded for its complex portrayal of the Second World War, particularly when compared with other films of the era. Like the 1958 book it adapted (The Darkroom of Damocles by Willem Frederik Hermans), it questions reality, the nature of betrayal and resistance, and whether morally correct choices are possible in extreme circumstances (Schoots, 2004). Als twee druppels water is now considered one of the most important postwar Dutch feature films.

The colourization debate

Although some of the circumstances of the ‘colourization debate’ differ significantly from the previous example of an embargoed film (the debate mainly played out in a commercial setting and the rights of the films were sold to the owner of that commercial setting), it reflects the same struggle between the rights holders, who call the shots, and the directors, who lack any power over their work. However, in this case, the heirs of one of the directors involved were able, by means of a European court ruling based on his moral rights, to halt the use of colour – although he did not live to see the results.

Although experiments with colourization had been taking place for some years, the controversy really picked up speed when media mogul Ted Turner bought the MGM and RKO film libraries in 1986 and 1987, respectively. The purchase included the copyright to the films, and Turner quickly announced that he wanted to colourize them. Films originally shot (and instilled in the audience’s collective memory) in black and white were colourized with the help of digital technology. A video copy of the film was colourized, while the original black-and-white film elements were left ‘untouched’:

The team’s first task was to take the best available copy of the film and transfer it to one-inch videotape. For the purpose, Turner had a freshly minted print struck from the original negative. This pristine celluloid copy was then dubbed onto videotape, and a digital computer was used to further enhance the picture by removing any discernible blemishes. (Edgerton, 2000, p. 28)

Colour titles were in high demand for television screenings: it was believed they would stop people from channel-hopping (allegedly more prevalent with black-and-white films), and could be programmed in prime time (Slide, 1992). Moreover, Turner could distribute the materials on his own television chan-
nels. The Turner Entertainment Company represented a gigantic ‘corporate coalition that controlled both the copyrights and the ancillary markets’ (Edgerton, 2000, p. 25), so potential returns were high.

However, it seems that the decision to colourize these films was fuelled by an arguably more significant factor. A large amount of the black-and-white titles were about to enter the public domain, but, as colourized, derivative works, they would be granted another 75 years of copyright protection:

One of the major advantages of the colorization process and its competitors was that by adding color to black-and-white films, it was possible to copyright them as new titles, thus adding additional years of copyright life to a copyright protected black-and-white feature and starting a whole new copyright life for a film already in the public domain. Of course, the colorization process [did] not affect the copyright status of the black-and-white original. (Slide, 1992, p. 124)

In July 1988, the Library of Congress confirmed the difference between the colour-converted Casablanca and the 1942 Michael Curtiz original by awarding a new copyright to the Turner Entertainment Company. This decision determined that the addition of a minimum of three colours to a black-and-white film was all that was needed to legally copyright the new version as a separate work (Edgerton, 2000).

Colourization, as a method of extending the duration of copyright protection, reveals the copyright holder as the most powerful party in terms of the title’s public accessibility, irrespective of who owns the film ‘creatively’ or materially. Colour conversion and a new copyright made the practice seem a profitable enterprise:

It’s only feasible to convert to color if you own the world rights, since the cost would be prohibitive for small markets. [...] [Turner] might have hesitated to pay 1.2 billion USD for a film library if the pictures had soon lapsed into the public domain. By converting them to color, though, he could get a fresh copyright, which would be valuable for years to come in the broadcast and cassette markets. [...] [T]he companies were trying to conjure private property out of the public domain. (Klawans, 1990, p. 175)

The justifications for colourization often took a teleological turn. It was argued that, if the original filmmakers had been able to, they would have shot the films in colour. This argument was based on the underlying (untrue) idea that a black-and-white title was essentially a primitive version of a colour film. Initially, many filmmakers were interested in the process; Frank Capra, for
instance, was an early adopter. When it became clear, however, that the directors’ permission was not needed before embarking on the colourizing process, since, in most cases, they were not the rights holders or the film had already lapsed into the public domain, most of them turned vehemently against the practice.³

The arguments against colourization included ethical aspects. The practice was seen to condone a so-called ‘falsification’ of history:

Films made in the black and white era capture and record the heritage and culture of a time now passed. To present altered versions of these films, it is said, is akin to presenting an altered version of American history. Instead of educating the young as to the worth of these original films and their era, colorized films instead present a faddish and distorted view of history. (Kohs, 1988, p. 36)

Anthony Slide (1992, p. 127) explains that copyright holders were thought to have an ‘ethical responsibility’ to protect and preserve the artistic integrity of black-and-white films. Colourization was seen as ‘cultural vandalism and a distortion of history’ and an ‘unwarranted intrusion into the artistry of the cinematographer’ (Slide, 1992, p. 129). In their arguments against the practice, filmmakers focused on the rights of the mass audience, whose sensibilities would be ‘corrupted’ if they were deprived of the original black-and-white versions (Edgerton, 2000, p. 27).

Turner relished the controversy and welcomed all sorts of accusations, provocatively telling reporters at a press conference in the summer of 1988 that he ‘colorized CASABLANCA just to piss everybody off. [...] I wanted to do it and it’s mine’ (Slide, 1992, p. 126). The audience, however, did not seem to care that much: they watched the broadcasts and they bought the videotapes, but, by the early 1990s, the novelty had worn off and they lost interest; colourized videos rapidly became money losers (Edgerton, 2000).

A more significant issue in the colourization controversy, however, is embedded in the question of the artist’s moral rights. David Kohs (1988, p. 28) shows how ‘[t]he fundamental difference between the American and European systems of copyright was brought to the forefront by the colorization controversy’: one system favours ownership, the other the creative person behind the work. The crux of the controversy has often been expressed as essentially ‘one of ownership versus creative rights’ (p. 7).⁴ The legal situation in Europe, with its focus on moral rights, stipulates that the maker (who is not necessarily the rights holder) may limit the ways in which and by whom the work is presented, and can object to any distortion or modification that might constitute a misrepresentation of their artistic vision.
John Huston’s heirs, for instance, fought to obstruct the broadcast of a
Turner had the film colourized, and, because the US does not recognize the
moral rights of the director, Huston’s heirs could not prevent its domestic
broadcast. Indeed, as the director, Huston had no legal claim over the film in
the US at all; initially, the rights were MGM’s. When the film was scheduled
to be broadcast in France, a country that does legally recognize moral rights,
Huston’s heirs took the case to the French courts. The final ruling came too
late to prevent the film’s broadcast in 1988, but, in 1994, ‘a French trial court
permanently banned the television broadcast of a colourized version of John
Huston’s *The Asphalt Jungle* on the basis that it would cause “unmendable
and intolerable damage” to the integrity of the work and would therefore com-
promise Huston’s moral rights’ (Grainge, 1999, p. 636). Moreover, the court
ruled that all directors are considered coauthors, and so these rights could be
passed on to the heirs (Vaidyanathan, 2017) – a ruling that was particularly
important in this case as Huston had died by this time.

A ‘DISTORTION’ OF FILM HISTORY
Film archives have preserved and restored colour films in black and white for
several decades now as part of an established preservation and restoration
practice, driven by budgetary and long-term chemical stability concerns (Read
and Meyer, 2000). Although film scholars have addressed these preservation
processes as historical practices, they have (surprisingly) never considered
them in a film-historical context as a possible distortion of film history.

Similarly, as motion pictures have been a television staple for decades,
distortions and alterations, such as panning and scanning, lexiconning, and
other editing functions, have been routinely used to present theatrical films
in a televisual format (Kohs, 1988). Again, however, although these practices
are creatively controversial in their own right and are often opposed by the
filmmakers themselves, they have not been framed in a scholarly context as
potentially misrepresenting film history.

So why did the inverse of the standard archival practice, the colourization
of black-and-white films, create such a controversy? Was it the obvious inter-
ference of the rights holders? Was it perhaps the realization that the archive
could no longer be seen as a safe haven for an ‘official’ film history? Colouriza-
tion created new versions that could be protected by copyright and there was
a real concern that it was these colour versions that would live on rather than
the black-and-white versions so familiar to audiences. The idea that certain
titles could only be accessed in a form or version that differs dramatically from
the way the film is generally remembered shook the very idea of what a film
archive is. Rather than a place of preservation that lends a certain stability to a
film’s memory, it came to be seen as a mere warehouse for copyright holders’ property, a ‘Swiss bank’.

THE NATIONAL FILM REGISTRY
One of the outcomes of the colourization controversy in the US was the establishment of a national film commission tasked with creating a National Film Registry – that is, a canon of distinguished films: ‘The National Film Preservation Act, part of a Department of the Interior appropriations bill, created a 13-member panel that could name up to 25 movies a year to be included in a national registry of classic films’ (New York Times, 1988). These would be ‘culturally, historically, or aesthetically significant films’ (Slide, 1992, p. 131) that would showcase the range and diversity of American film heritage and increase awareness of the need for its preservation. Although the Act’s primary purpose was to stop colourization and other reformatting processes, the conflation of ideas of preservation and ownership are interesting to note, and it is questionable whether its name actually reflects its supposed remit:

The name of the bill [The National Film Preservation Act] is, of course, a misnomer. It has nothing whatsoever to do with film preservation. All the bill does is have the Librarian of Congress, in collaboration with his appointed panel, select 25 films a year which can still be altered in any way by their copyright owners. (Slide, 1992, p. 131)

The Act could not (and cannot) protect the ‘safety’ of the film titles; it was only able to force copyright holders to indicate on the film itself if it had been reformatted or otherwise changed since its original release. As Kohs (1988, p. 19) remarks, the ‘longest anyone would be able to thwart the colorization process would be a period equal to the duration of the copyright in the film itself. After this period […] the film falls into the public domain and anyone [with access to a material copy] is free to make a colorized version’.

THE ‘REAL’ QUESTION
The real question underpinning the colourization controversy seems to be: what exactly is ‘official’ film history and where does it reside? Some of the fears mentioned above might even be justified. Given the enormous financial investment required for colourization, ‘it is likely to be the colored version, which will, perhaps exclusively, be marketed. The public cannot [easily] go into the archive and see the original black and white print. As a result, original black and white works might indeed be effectively replaced by colorized copies’ (Kohs, 1988, p. 30). Not all of the filmic evidence that is kept in the archives can be publicly viewed or used; the colourization debate made it obvi-
ous that, just because a film is extant does not necessarily mean it is publicly accessible. Helene Roberts (1994) argues that images that were first seen are the ones that persist in the memory, so colourization’s threat was that now some of the material would be made publicly accessible, but in a completely different form than the original.

The colourization debate brought into focus the powerful position of the rights holder, as well as the dichotomy between intellectual and material ownership – especially when the holders of these rights are one and the same – and the repercussions for what could be called the audience’s ‘cultural’ ownership. Although amending intellectual property holdings has always been the prerogative of studios and producers, the archive was now exposed as a vulnerable place for archived films:

[T]he innovative technologies that brought about the ability to replicate and exhibit films inexpensively also created the capacity for people outside of the archival setting to alter the content and meanings of canonical films. [...] Colorization technology also revealed a significant and troubling fact about the cinematic artefact: powerful people and new technologies could dramatically alter films sitting safely in the archive.

The film archive [...] hardly guarantees a fixed and stable cinematic memoryscape. (Jones, 2012, pp. 18-19)

Thus, the archive found itself on shaky ground, and, as a result, so too did the writing of film history, since ‘filmic meaning was not necessarily tied to or correlated with the cinematic artefact protected in the archival vault’ (p. 78). What colourization emphasized is that the film archive ‘could not maintain, protect, or help to construct a singular cinematic meaning for any film’ (p. 78). It threatened the established position of the film archive and undermined its status (and that of its films) as a primary historical source.

This chapter has explored two examples of how the dichotomy between material and intellectual property plays out: one in which both rights are held by the same party and one in which they are not. These examples also take place in two vastly divergent contexts. The situation of an embargoed film in a public-sector archive, with its mandate to preserve and provide access to its holdings, is very different from the circumstances of a film in the hands of a powerful rights holder, who inventively prolongs copyright on his intellectual property, and, in the process (perhaps unwittingly), rewrites film history.

The next chapter turns to the subject of ‘orphan films’ – that is, films that are still within the copyright period but lack an identifiable or locatable rights holder, and which raise particular difficulties in the context of the debate on archival access.
NOTES

1 There are other exceptions for which no permission is needed, but these lie outside the scope of this book.

2 This information was provided by Ronny Temme (former head of sales at Netherlands Filmmuseum/EYE) by email on 1 February 2014, and by Leontien Bout (EYE’s legal counsel) in a phone conversation on 13 March 2014.

3 Directors spearheading the crusade against colourization included Frank Capra, Woody Allen, and John Huston, amongst others. Orson Welles, on the other hand, was able to rely on a clause in his contract that prevented anyone tampering with his work to forestall the colourization of CITIZEN KANE (Slide, 1992).

4 A current version of the same debate can be seen in what has been dubbed ‘dimensionalization’, converting films to 3D (Hoyt, 2011).


6 This is a process by which theatrical motion pictures, composed for viewing on large screens, are altered to fit the narrower television screen (USCO, 1989).

7 This technology involves the electronic time compression or expansion of a motion picture in order to fit the picture into a broadcasting time slot (USCO, 1989).

BIBLIOGRAPHY

Houston, Penelope (1994) Keepers of the Frame: The Film Archives. London: British Film Institute.


Rother, Rainer (2014) Filmhistorisches Arbeiten am Museum [Lecture Forschungs-Kolloquium FIWI, University of Zurich]. 15 October.


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