The Greatest Films Never Seen

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Published by Amsterdam University Press

Op den Kamp, Claudy.
The Greatest Films Never Seen: The Film Archive and the Copyright Smokescreen.
Amsterdam University Press, 2018.
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Conclusion

The Brighton line

Op den Kamp, Claudy, *The Greatest Films Never Seen. The Film Archive and the Copyright Smokescreen*. Amsterdam University Press, 2018

DOI: 10.5117/9789462981393_CONCL

ABSTRACT

The preceding chapters have explored the film archive and the resulting categories of a legal cross section (the embargoed film, the orphan film, and the public domain film), as well as found-footage filmmaking as an artistic practice in which all those categories can be seen to converge. Here, the themes that have emerged in these chapters are drawn together and some thoughts about the overall topic of copyright and digital archival access practices are given – to what extent copyright can be seen as a smokescreen, and to what extent the greatest films are never seen.

KEYWORDS

Brighton line, film archive, copyright smokescreen, greatest films never seen
In this book, we have looked at the various parts of the film archive affected by copyright, focusing in particular on the challenge it represents to digital access. By reshuffling the archive’s contents and examining them through the lens of copyright, we discovered a very different story from the one usually told. This new story reveals how copyright ownership, and the tendency to prioritize those films that are legally available, has coloured our understanding of the history of film. Archival film historiography – the way film history is written using archival films, as well as the history of written archival film history itself – is naturally skewed towards those films that are accessible. This book, however, has found a new point of entry into the study of film history; as such, it offers a novel, counterfactual narrative.

**THE FILM ARCHIVE**

The copyright lens has revealed some important insights into the current state of the film archive, including its historic shift from uncharted territory to a potentially rich primary source for film historians. Even more importantly, it has exposed the way both commercial and not-for-profit archives actively shape access to their holdings and, in doing so, help create a certain version of film history.

This book has taken a specific public-sector film archive (EYE) as a case study in order to explore these insights in greater depth; it first recategorized the archive’s holdings, on the basis of copyright ownership, and then subjected the results to a systematic analysis. Its enquiries have necessarily been more empirical than theoretical, but they have demonstrated the conceptual challenges involved in archival access. It illustrated one such challenge by relating the history of a particular film that had been placed under embargo: public archives have a remit both to preserve and to provide access to the film material they hold, but in this particular case, the rights holder had explicitly forbidden the exploitation of the title. After his death, however, the museum’s staff successfully negotiated with the rights holder’s heirs, and subsequently restored and re-released the film. In this way, it was at last revealed to the world after nearly 40 years of invisibility. Another, differing example was that of an orphan work – that is, a film that was still within the period of copyright
but without an identifiable or locatable copyright holder. In this case, after undertaking a risk analysis, EYE took the decision to publish the film on DVD, despite the fact that its rights situation was unclear due to the obscurity of its production company’s past. Another archive might well have come to a different decision, and the film would have remained unseen and unacknowledged – representing another lacuna in the history of film. Yet another example was a title that had lapsed into the public domain. This US-produced film was believed lost until it was discovered in the Dutch archive nearly eight decades after its original production date. As the original production and distribution studio had no interest in re-releasing the film, arguably due to its public-domain status, the institute’s staff managed to secure the necessary external funding to digitally restore it. These examples from just one archive show how films can remain hidden from public knowledge due to the vagaries of their copyright status; their existence is only revealed to the world if these problems are overcome. Their fate can turn on legal restrictions, chance discoveries, and human decisions.

The book’s examination of the artistic intervention made by found-footage filmmaking in the context of this public-sector institution (EYE) has also helped us to investigate further the role of the archive in the creation of a certain film history. The reuse of archival film of course has aesthetic repercussions, but it also foregrounds the fact that the practice of ‘doing’ history with the films themselves involves (as we saw with the previous examples) the intersection of rights issues, human agency, and the films’ potential for history-making. As such, found-footage filmmaking challenges canonical film history and the way that history has been written. The archive itself plays a role in this process: it either acts as an impediment (‘gatekeeping’) or as a catalyst (providing access to the films in its holdings), revealing the existence of a ‘permission culture’ inside such institutions. Thus, the film archive and its staff are crucial nodal points in the larger network of actors involved in the debate over archival access.

The archive as a whole is therefore an amalgamation of various facets. This book has dedicated a discrete chapter to an exploration of each of these facets in turn under the heading that best describes this aspect of the archive’s role: as terra incognita; as a ‘Swiss bank’; as a ‘handbag’; as a vehicle of power; and as a birthplace or place of renewal. The new conception of the film archive that has subsequently emerged illustrates that it cannot be envisaged as some sort of future ‘celestial multiplex’, in which all of its films will be digitally available to all people at all times; rather, it is a go-between, a terminus, or a mediator between the legal restrictions of copyright and the potential of archival films for history-making.

One of the fundamental characteristics of academic research, however,
is the need to adopt a critical attitude towards the source material itself – as well as towards its study and use. It goes without saying that this obviously applies to film history. Indeed, ever since the historiographic turn of the late 1970s, the source material of film historians (and the way they use it) has been a topic of intense debate – in particular, the question of the object of study and what should be regarded as evidence. As a result, scholars who engage with filmic sources and other filmic phenomena (which are also subject to broader discussions beyond academia) are called upon to reflect on these sources critically. In order to do so productively, however, it is essential to first contextualize the sources historically, as well as to understand the factors that influence their accessibility, including their legal provenance. However, film studies scholars, and film historians in particular, who use archival films for their research, tend to regard the film archive as simply a place of storage for their primary sources. But this ‘storage place’ is itself changing in response to digitization and funding pressures. If the field of film studies is to respond appropriately to this rapidly shifting landscape, it is paramount that the field becomes familiar with the inner workings of the film archive, and especially with the practices of archival access.

**THE COPYRIGHT SMOKESCREEN**

The examination of the Paper Print Collection in the previous chapter has further contributed to our understanding of the historical interaction between film and copyright by revealing the extent to which registration formalities – and their circumvention – helped stabilize the recognition of film as a new medium. In fact, this theme of the complex interaction between the film archive, copyright, and human agency has threaded its way throughout the book as we looked in detail at stories of copyright (and its circumvention) in relation to archival practices and administrative procedures. These stories have shown us how, in order to analyze the potential of archival material to act as historical primary sources, it is essential to take into account the conjunction between the legal context, the material’s copyright status, and the human agency behind the ‘activation of copyright’ involved in these practices.

An examination of the film archive as a safe(guarding) place for potential historical sources reveals that both film history and intellectual property are concepts that are historically and culturally contingent. The book lays no claim to originality in these proposals; however, what is novel is that it has used the idea that intellectual property is a historically and culturally specific concept as the crucial underpinning of its (legal) study into archival access, providing an analytical tool, which can be replicated no matter the context.
under analysis. It therefore offers a gateway into productive research in other contexts, with the potential to provide fresh insights into such subjects as the relationship between the film industry's dynamics and the shaping of film form. By rethinking the link between the film archive and the potential of its holdings for history-making in relation to the (current and potential) challenges of digitization, the research in this book also resonates beyond the confinement of its specific field to inform broader debates affected by archiving and economics. As such, it is not only relevant to discussions on archival access, but also contributes to the film historiographic debate by opening up questions of particular significance to academics – for example, the consequences for the writing of film history when films are (un)available for legal reasons.

Thus, the idea that archival access is controlled both by those who own the rights and by those who own the physical assets can be extended to other archival contexts. For example, the orphan works problem, often seen as the result of a specific legal discourse, in fact reaches beyond the exclusively legal realm; it is part of the debate over access, irrespective of its archival context – be it a commercial, not-for-profit, national, or regional archive. As we have seen in the practice of EYE, orphan works need not always be problematic. In this respect, it is important to unravel the challenges provoked by the contemporary economics of archival access, while simultaneously recognizing the interplay between the legal aspects of the problem and human agency. Copyright can therefore be used as a sort of ‘sieve’ through which we can filter the various narratives found in the archive.

In practice, however, ‘copyright issues’ are too often used instead as a shield to hide behind. Copyright therefore becomes a smokescreen that obscures an infinitely larger issue: the impossibility of providing access to everything that still survives and has been preserved in the archive. In order to understand how we use archival sources to determine what film history is or where (official) film history resides, we have to begin with film history’s and film historiography’s interconnectedness with the intellectual property system. In this sense, copyright also obscures the very nature of film history itself – that is, the fact that it is a necessarily partial and provisional story, told from the perspective of the present. Any discussions over the potential for future historiography needs to place the public accessibility of source material at the forefront. The orphan works issue, for example, and legal issues more generally, cannot be detached from archival policy decisions, especially if these concern access and distribution. Policies, in turn, must aim to reflect fully the implications of inaccessibility for film history, particularly in the case of unclear ownership. Ideally, they should also include a dialogue with stakeholders, and provide the possibility for historical reinterpretations, even though, at times, these might
not be in the interest of some of the stakeholders, whether they be the rights holders or the archive itself.

What happens in practice with orphan works, and what happens outside of the film archival context (particularly in relation to mass digitization), will be paramount when it comes to addressing the legal aspects of these films. So far, the topic of orphan works legislation has been mainly the concern of European institutions in the GLAM sector, predominantly relating to these works’ use in educational and noncommercial contexts. It will be important to watch how developments in other contexts in relation to orphan works legislation, such as a commercial context, but also another geographical context (the US, for instance), will pan out in the future.

It is now 40 years since the first substantial collaboration between archivists and historians took place at the FIAF Brighton Congress, an event that raised awareness of the issues involved in the availability and the unavailability of source material. However, control in a ‘post-scarcity’ world presents a different dilemma, especially where the relationship between the archivist and the historian is potentially diluted as researchers make fewer physical visits to international archives, conducting their research online, limited by what is digitized. However, scholars will continue to rely on archives and archivists to provide them with their research material—the presence of the human gatekeeper despite the digital form of the archive—and the negotiation between them has to be based on transparency, not occluded by a copyright smoke-screen.

**THE GREATEST FILMS NEVER SEEN**

Reshuffling the film archive has exposed the fact that parts of archival collections are not publicly accessible. The discovery of one ‘orphaned’ collection always seems to unveil yet another, unavailable one, and it appears that the fragmentary state of the archive cannot be resolved.

The stories in this book have only skimmed the surface of this dilemma. Undoubtedly, there are countless other, untold stories that we could unearth to illustrate the dichotomy between the intellectual and material ownership of archival source material, and the effect this has on the writing of film history. But the most important point to take away from all of this relates to the agency of the archivists – a neglected component in the debates on archival access. Indeed, it appears to matter a great deal whether the archivist tries to exercise agency in a national archive or a regional one, or even outside the institutional context altogether. Furthermore, of course, it also matters whether they are trying to do so in a nonprofit context or in a more commercial one.
In this respect, EYE is, in some senses, unique: the institution is situated at the intersection of the two dichotomies that underpin the discussion in this book – the difference between canonical textbook film histories and the actual material holdings of a film archive, and the difference between intellectual and material property. Moreover, the composition of its collection, its public mission, and its (specifically Dutch) pragmatism go hand in hand. Its public mission to provide access to its holdings, combined with its large quantity of marginal and noncanonical film material and the way it has made its own collection the central focus of its access and presentation activities, means that EYE has been able (or has chosen) to respond to historiographical shifts and artistic interventions. The composition of the collection and its focus on the specific aesthetic qualities of its archival film material has led the institute to develop new archival policies. As such, it has been instrumental in the development and revision of written film history, based on what it has made available throughout the last few decades.

However, EYE’s pragmatic ‘can-do’ attitude and the agency exercised by its staff might be particular to the Dutch (legal) situation, and cannot be considered separately from the organizational, social, and political climate it inhabits. A significant element contributing to the institute’s attitude is the fact that its risk analyses have been made in the knowledge that (to date) no rights holders have ever come forward after it has made a work public without permission. Again, this attitude is no doubt reinforced by the fact that EYE holds the kind of collection that allows for such risks and the institute itself is situated in a country that is averse to litigation, meaning that it is not dominated by the culture of fear that prevails elsewhere, and where a wrong is not as ‘potentially punitive’ (Aufderheide and Jaszi, 2011, p. 148) as, for instance, in the United States. It is therefore no surprise that the legal scholar P. Bernt Hugenholtz (cited in Aufderheide and Jaszi, 2011), who professes that you should not fear copyright, is Dutch.

Although this book has looked at certain aspects that could be considered unique to the Netherlands, some of its findings can be extended to other contexts. Copyright is an important filter to add to the list of historical and contemporary factors that influence what material is potentially available and publicly accessible. A clear copyright ownership situation fosters film restoration projects: sometimes this means that the ownership of the material is undisputed and a large sum of money can then be invested in its preservation and access; sometimes it means that the film survives as unique material that is in the public domain. Whatever the context, copyright should, indeed, not be feared. If a heritage institution is properly informed about the nature of copyright, including the differences in international legal interpretations, it will not have to be excessively cautious (although ‘ethical’ obligations will
remain); it will, rather, be able to ensure a confident access policy that will expand the range of possibilities of what can be done with the material.

The book has focused on a somewhat historical analysis, taking a retrospective consideration of film and the potential reverberations for film historiography. However, as a reflective academic practice, it could also provide a starting point for a consideration of comparable phenomena in a more general contemporary media landscape, particularly an analysis of media consumption practices, and could therefore be beneficial for others who investigate similar questions in different spheres of the media.

The study has not been centred on a specific methodology; rather, it has used a specific perspective – the filter of copyright ownership – to examine the practice of film archival access. The analysis can therefore be extended in several directions. Obvious examples would be related to practices that are already embedded in a legal discourse, such as file-sharing or peer-to-peer networks. As opposed to concentrating on the binary opposition of ‘legal’ versus ‘illegal’, or the detrimental effects these networks arguably have on the music or film industry (Patry, 2009; Johns, 2010), it might be more meaningful to recast such networks as mediators between the owners and users of copyrighted material. This would enable their analysis in a wider historically, geographically, socially, technologically, and legally contingent context.

Other areas of practice with immediate political as well as cultural dimensions (which potentially impede access to and exploitation of the work) could equally benefit from being freed from the confines of an exclusively legal debate. One such example is academic publishing in the digital realm, in which problems relating to the protection, accessibility, and exploitation of material are currently amplified by issues of digital technology and human agency.

Perhaps this book’s most significant contribution is the way it re-situates the discussion of archival access by proposing that it is the role of legality, combined with the activity of human agents, that governs archival material’s potential for history-making. Placing the historical narrative in the frame of intellectual property – and copyright specifically – adds an essential but previously unrealized dimension to the debate.

By way of conclusion, then, let us return one last time to baby Jack, whom we met at the very outset of our narrative exploration. Jack’s journey took him from a child with an equivocal social status to a grown man who has been fully accepted into high society. Our orphan film took an equivalent journey, starting out as a problematic title located in an institutional setting and finishing as a phenomenon that is, under certain circumstances, subject to legal recognition on an EU level. Both Jack and the orphan film have arrived at the terminus and now face a potentially prosperous future.
The significance of the Brighton line in Wilde’s play is that the provenance of baby Jack signaled that he had belonged in high society all along; he was just displaced from his proper role in life for a while. The orphan film, however, might have gained a certain legality but its acceptance into the larger historical narrative still appears to be quite uncertain, based on, amongst other things, its provenance. As stated in the Introduction, the line is everything. Current exceptions for use only apply to its educational and noncommercial uses in the GLAM sector. Its journey has not yet ended and there still seems to be some way to go.

Jack ends up with his intended, Gwendolen, just as Theodora Fitzgerald ends up with Rudolph Valentino in the final scene. Our orphan film has similarly ended up with the Orphan Works Directive. But only time will tell how their stories will develop in the future. We hope for the best for them, but their lives after the final credits will doubtless not be entirely happy-ever-after. For a final thought, we might need to look to one of the other characters in The Importance of Being Earnest, Algernon Moncrieff, who turns out to be Jack’s brother. Algernon claims: ‘I really don’t see anything romantic in proposing. It is very romantic to be in love. But there is nothing romantic about a definite proposal. Why, one may be accepted. One usually is, I believe. Then the excitement is all over. The very essence of romance is uncertainty.’

It may be that a little uncertainty is the very opening we need. The world outside the archive is changing drastically fast, and, as we have seen throughout the themes explored in this book, certain practices outside of the institutional context of the archive, in which filmmakers have ready access to the necessary material, have put and are putting the very concept of the archive under pressure. So, whether the classic gatekeepers will be able to ‘let go’ of their collections, acknowledging the new role of users, while their ‘institutional need to control risk may impinge on our rights as users’ (Aufderheide and Jaszi, 2011, p. 8) remains to be seen. Pat Aufderheide and Peter Jaszi (2011, p. 5) fabulously state that the ‘key to challenging the culture of fear and doubt is knowledge. Knowledge unlocks the door to action, which lets you join the culture of creativity’, which can lead to a true balance between ownership and exchange of ideas. It is that knowledge that can enable us to leave room for uncertainty – the uncertainty of untold and unexpected stories yet to unfold.
BIBLIOGRAPHY


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