

## **PRESENTATION FIAF 2015 SYDNEY: DUTCH SOLUTIONS TO CLEAR LEGAL OBSTACLES**

**As the title of my presentation suggests, I would like to present you with some examples of practical solutions to legal hurdles encountered by film archives when trying to fulfill their public missions, in particular opening up their collections to the public.**

**It basically comes down to this:**

1. **Stretch existing copyright exceptions and limitations.** As an example: in Dutch copyright law there is an exception that allows archives to show their collection to members of the public via “dedicated terminals” on their premises for educational or research purposes without the need to ask permission from right holders. We “stretched” this exception to include the “pods” we have in our building where people can watch films from our collection in an interactive and entertaining way. We did not ask permission from right holders, nor did anybody complain (so far).
2. **Seek out relevant stakeholders and try to reach an agreement.** This can be applied of course to a whole variety of legal problems, but I just want to highlight a few examples here: two from “Images for the Future” and one concerning legal deposit.

### **IMAGES FOR THE FUTURE**

Some of you have probably heard of the big digitization project in The Netherlands EYE was involved from 2007-2012. Although unfortunately cut short by two years (originally the project was due to run till 2014) the project still accounted for some impressive numbers:

The total available budget was 115 million euro, out of which EYE received 24 million euro.

This allowed EYE for a total of 3874 hours of film/7500 titles to be digitized.

The project also allowed for the clearing of part of the collection:

A total of 7090 films were cleared (as in the rights status was established):

Of which: 483 were declared Public Domain & 2479 were declared orphan works and so on.

The clearing was a necessary part of the project as the aim of the project was not only safeguarding “images for the future” but also making these images available to the public. Furthermore it was initially expected from the project partners they would generate income with the thus digitized images that would flow back to the Dutch Government.

Two of the project partners, EYE and the TV Archive Sound & Vision, teamed up with the Dutch Association of Feature Film Producers and decided on the creation of a Video-on-Demand platform as one of the ways to both opening up the digitized collection and generate the required revenue. In order to make this possible, some new and creative solutions were necessary to solve the following two problems:

1. In The Netherlands we do not have a one-stop-shop for acquiring all the necessary permissions from all the possible rights holders nor do we know extended collective licensing. And as the situation for films made prior to 1985 is rather murky while more recent titles also involve neighbouring rights we had to come up with a workable solution. Furthermore there was no available budget to pay right holders up front for permission to use their films.  
**THIS RESULTED IN A SYSTEM OF VOLUNTARY EXTENDED COLLECTIVE LICENSING: AN AGREEMENT BETWEEN ARCHIVES, PRODUCERS AND COLLECTING SOCIETIES:**

The concept was EYE searched for right holders. License agreements were made with producers. All other possible right holders were covered by a collective deal with 5 CMO's. In order to help them with repartition to non-members, EYE provided them with contact information (if and when known to EYE).

The five Collective Management Organizations that were deemed representative were:  
BUMA/STEMRA for music composers and lyricists  
LIRA for (screenplay) writers  
NORMA for neighbouring rights (actors, musicians)  
VEVAM for directors  
SEKAM for producers

Collectively, they granted permission to exploit the works of their members through our VoD platform, while exonerating the platform for claims of members AND non-members. Exoneration for non-members is up to a max of the amount a member would have received. Members did have the option to opt-out in case they did not agree with the repartition offered.

Repartition had one huge advantage: the collecting societies were paid from the proceeds, so no money was needed to pay them off up-front:

From the net proceeds 10% off-top went to these collecting societies, who divided the income between them, according to a set percentage. Of the remaining 90% 35% was dedicated to the running costs of the platform en 65% for the licensor of the VoD rights.

Agreement also applied to orphan works and public domain works. Note: this is long before the Orphan Works Directive or subsequent legislation. Interesting Fact: The Orphan Works definition is somewhat broader than the one used by the Directive: it also includes works where the status can't be determined because it is unknown if the makers died and/or when they died.

2. The second problem concerned the digitization and how to generate the required income for the archive.

**Digitization:** Although The Netherlands know an exception in their copyright law which allows archives to digitize works in their collections, some restrictions apply: Most notably the work in question needs to be either falling apart, so a copy needs to be made in order to keep the work for the collection, or the work is no longer accessible because of an obsolete format (think: nitrate film). This implies that digitizing for the sake of digitizing is not permitted under this exception. So in order to make sure we are allowed to make (digital) copies, we need explicit permission from the rights holders.

**Income:** Apart from any revenues because the archive can be considered rights holder (including public domain and orphan works): Another means by which EYE created an opportunity to generate income is by giving right holders the opportunity to buy and use (derivatives from) film elements made and paid for by EYE in return for a part of the proceeds generated with these elements.

All this was laid down in a digitization agreement EYE concluded with right holders.

### Highlights of the Agreement:

-no obligation to digitize: still depending on available funds and/or priorities;

-rights holder gives permission to make copies: analogue and/or digital;

-copies made by EYE remain property of EYE;

-no transfer of copyright, but rights holder gives permission for museological use of the film;

-rights holder can buy copies from EYE in all sorts of (digital) formats;

-if the copies are exploited by rights holder (or third parties) EYE receives a contribution towards the digitization costs based on the length of the film and on what material the digitization was based: up to 2000 euro per hour if analogue material was used, 500 euro per hour for a digital master and 200 euro per hour for a digibeta.

Repartition is 50% of the net proceeds received by rights holder up to the maximum amount mentioned above.

After the digitization costs have been repaid, rights holder pays EYE a contribution towards preservation costs (if any): 15% of any net proceeds received by rights holder up to the total preservation costs

This all sounds a bit like the principles laid down as a result of the Licenses for Europe Stakeholder Dialogue as presented by Nicola Mazzanti yesterday, but bear in mind this agreement was already in place some 7 or 8 years ago when EYE needed an urgent solution for the problems mentioned.

There are also some notable differences:

The agreement applies to all sorts of films: in and out of commerce and even amateur, and can be concluded with all types of right holders including heirs.

The agreement does not deal with (commercial) exploitation by EYE other than the already mentioned museological use, that's why EYE concludes additional agreements with right holders that deal with permission for VoD, clips licensing etc.

The advantage of exploitation by EYE is we can directly withhold amounts due for digitization or preservation.

### 3. The third and last problem concerns the lack of legal deposit in The Netherlands

In The Netherlands we do not have a legal deposit for AV works. So how do we as archive assure that we at least receive all new Dutch (co-)productions for our collection and the right to use them? We have made a deal with the Dutch Film Fund (which is completely independent from EYE):

#### VOLUNTARY LEGAL DEPOSIT

-when applying for a subsidy with the Film Fund, filmmakers have to sign a contract which obligates them to donate their film to EYE

-although this is a legally binding commitment, their obligation is to the Fund and not to EYE, so we had to come up with a further incentive to entice the filmmakers to actually give their material to us

-only after the filmmakers have given us their material, and it is checked by us and meets our standards, we provide the filmmakers with a “declaration”, stating we received the material and specifying this material. With this declaration the filmmakers then go back to the Film Fund which gives them their last installment of the subsidy.

All this ensures EYE gets alle the latest Dutch AV productions (most of them receive some sort of subsidy from the Film Fund), in the best possible format (we constantly update our technical requirements ). And furthermore, the filmmakers enter into a donation agreement with EYE in which they grant EYE museological use of their films.

Flaws: at the moment the biggest issues are the huge amount of time and effort (and funds) it takes to check, register and store this material. We are currently talking about 120 films a year at roughly 1 ½ Terrabyte per film. Another problem we sometimes encounter is filmmakers that are unwilling to sign the donation agreement with EYE.

## CONCLUSION

Despite an ever growing awareness of the importance of film archives and the role they can play in providing audiences worldwide with vast amounts of (unique) films, on a legislative level things are moving rather slow. It is not very likely further limitations to copyright will be introduced any time soon, allowing film archives to show their collections online (or even on their own premises) without the need to first clear the rights. In Europe a small step forward has been only last year with the introduction of legislation regarding orphan works. Technically a new limitation to copyright, film archives in Europe now are entitled to duplicate and use orphan works. Although a step in the right direction, many film archives are disappointed as to them the new rules are to restricting since they require a prior diligent search for rights holders before a work can even be declared orphan.

On January 15 the European Parliament published a Draft Report on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

(2014/2256(INI))

Although the report stresses that:

*"in this digital environment (...) libraries and other cultural heritage institutions are increasingly struggling to fulfil their public interest missions of public education and preservation of works",*

the recommendations made are more geared towards harmonizing already existing limitations and exceptions than introducing new ones.

All this urges film archives to stretch these existing limitations and exceptions to the limit in order to facilitate fulfilling their public missions and where this is not enough be creative and seek out relevant stake holders which can lead to solutions profitable to all parties concerned.