

PROBLEMS OF FILM COPYRIGHT AND RELATED MATTERS AS THEY AFFECT
FILM ARCHIVES

A working paper submitted to the XXVII FIAF General Meeting, Wiesbaden
by N. MARCH HUNNINGS

At the meeting of the FIAF Executive Committee in London on 26 February 1971, it was decided to work on the preparation of a draft for a reform of the copyright laws as they affect film archives. The draft is to contain all the reforms which archives would like to see irrespective of political viability. The Committee thereupon discussed a number of matter which it was thought desirable to consider in the draft; and with that guidance I have prepared the present paper, which takes the form of a preliminary working paper setting out the problems and the possible lines of approach as I see them.

General Context

The law of copyright in Europe is linked in all countries with the Berne Convention. This applies also to non-European countries except, principally, for the USA and Central and South America (which are parties to the Pan-American Union and also to the Universal Copyright Convention) and China and the USSR (which are not parties to any international copyright arrangements). The Berne Union holds major diplomatic conferences about every 20 years, at which conventions to amend the basic Berne Convention are drafted and agreed. The last such conference took place in Stockholm in 1968; the next one may therefore be expected in about 1988, i.e. in 17 years time.

Film copyright has never received very much attention at the Berne Union conferences, with the result that provisions for film copyright are generally incomplete and unsatisfactory, especially from the archive point of view. A well-thought-out and prepared pressure from the film archives upon their national authorities in good time before the next conference may consequently be expected to have some success in shaping the international law of film copyright. I presume that one of the purposes of the present project will be to test the feasibility of taking such joint action.

The Berne Convention, however, provides only a basic minimum copyright law, a few fundamental rules which it is left to the national laws to clothe with the flesh and skin of detailed legal regulation and practice. The second line of approach will therefore be to seek to influence national legislators so that the national copyright laws may be developed satisfactorily. For such a purpose it is clearly helpful to have a

programme of reforms worked out internationally (in FIAF) with the added force of agreement between archivists in a wide variety of countries.

On a technical legal level, however, this comparative approach has its problems, the first of which being, of course, the fact that different countries or groups of countries adopt differing basic principles for relevant parts of their copyright laws, which it is not reasonable to expect can be changed at the mere wish of a group of film archivists. A fundamental difference, for example, appears between the French principle of multiple authorship of films and the English principle of the author being the person who made the arrangements for the film to be made, i.e. the producer. Similarly, droits moraux have not been adopted into English copyright law. And so on. This is, however, a perennial difficulty in comparative law which can usually be overcome so long as one is aware of it.

The programme which I would suggest should be kept in mind by this Federation is consequently the following:

1. A study in depth of the various legal needs of film archives and the legal problems that these raise on both international and national levels.
2. At an appropriate stage, the loosing of these studies upon the academic and trade worlds, so that discussion and argument (both self-seeking and disinterested) can take place and any tentative solutions can be tested.
3. Developing out of 2, a working upon the minds of opinion-forming and legislative groups both nationally and internationally, leading in some cases to national legislation.
4. Finally, the infiltration of national delegations to the next Berne conference with firm proposals for amendment of the Berne Convention.

It is the first stage with which we are concerned today; and I understand it as being my task to prepare appropriate working papers so that the various problems can be thoroughly studied and understood and satisfactory solutions drafted.

The Specific Problems

The problems appear to fall into three categories: (a) statutory deposit; (b) the law of film copyright; and (c) the administration of film copyright. We are, of course, only concerned with those aspects of these subjects which affect the work of film archives, but taking a film archive in its wider sense of an educational centre as well as a store-house and reference library.

(a) Statutory Deposit

In many countries copies of newly published books have to be deposited in the national library so as to enable that library to hold a complete collection of the national output of printed works. It has been suggested (and, indeed, put into effect in some countries) that a similar obligation of statutory deposit should apply to films. There are, however, some essential differences, not least being price (until cassettes come into general use).

Cost

So long as films are mainly produced for rental only and so are reproduced only in small numbers, the cost of a single print will remain high, both absolutely and also relatively to the total print bill. The arguments of the book trade that statutory deposit of books is a form of book tax will thus be even more powerful unless the cost of providing deposit prints is made to fall on the acquiring archive. The same argument will not apply with equal force in the case of cassettes, which are expected to be marketed as prices well below that of many books today. Indeed many of the books that I need for my work on Common Market law cost appreciably more than the price charged by a reputable London trader for a new 8mm print of Nosferatu.

Acquiring Archive

Under existing statutory deposit rules, there may be more than one library entitled to receive copies of books (in Britain there are six). There need, therefore, be no problem regarding choice of film archive in countries such as Italy where there are several. There may be practical problems, however, but these are unlikely to be linked to cost.

Material to be deposited

Considerable difficulty will be experienced in finding an adequate definition of the material which is to be subject to statutory deposit. Moving images are used in a wide variety of ways in an equally wide variety of situations: commercial film distribution (theatrical, film clubs, educational establishments, television); non-commercial film distribution (commercial publicity, government propaganda); television broadcasts; sale of prints; sale of cassettes. Unless all these different types of movie are to be deposited, it will be necessary to decide, firstly, as a matter of policy and secondly as a matter of legal definition precisely which categories are to be covered, and when the obligation is to mature (completion of the film, publication, first performance).

Having decided on the general definition, the problem then arises as

to whether there will be a corresponding duty upon the national archive to take for deposit all items falling within the definition. That is the case as regards books, and already there are serious storage problems at the British Museum, some 30 miles of shelving being required to store all the books at present lacking shelf space. The problem is in one way more serious for celluloid films in that much stricter and so more expensive storage conditions are required. For films made on tape and other bases this is less serious; but to envisage storing celluloid films on video-tape would be equivalent to storing books on microfilm and then destroying the originals (conduct which is not unknown). In any case, the obligation to store everything would be likely to change the character of most film archives.

The final choice to be made under this heading is whether the obligation to deposit and store should apply to national productions only or to all films shown or distributed in the country. In the case of books, the former applies.

Variant Versions

It has been suggested that deposit of variant versions of a film would be of value. This suggestion has, indeed, the effect of suggesting a completely new line of approach to the whole question of statutory deposit, and one which may not be altogether to the taste of the archives. For there is in France an institution known as the National Film Register upon which all commercially produced films must be entered, together with all contractual arrangements concerning the film, on the analogy of a land register. The system is now being studied with a view to extending it throughout the Common Market, and it is not unlikely that any form of statutory deposit in a country having such a register would be linked to the register, just as the registration requirements of American copyright law led to the deposit of paper prints of films.

(b) The Law of Film Copyright

The term "copyright" begs the question in relation to films, and the French term "droits d'auteur" is better, since there are essentially two rights in question: one is the right to make copies, and the other is the right to exhibit prints.

Copying

In the film trade, the making of prints of a film is strictly governed by the terms of the relevant contract. Film archives are in the same position with regard to many of their films; but other films are held in the archive collections as a result of outright purchase or gift and often

without the copyright owner being known. There is therefore no-one to whom the archivist can turn for permission to make a print. Rules are required, therefore, to cover the situation where the copyright owner is unknown, and also (perhaps) to give archivists certain rights against the will of the copyright owner even if he is known.

A right to make copies is likely to be linked to the reason for doing so and restricted to certain motives. These latter are:

- (i) Preservation and other archival purposes (e.g. cataloguing),
- (ii) Exchange with other archives (in or outside the country),
- (iii) Private research,
- (iv) Exhibition within the Archive,
- (v) Exhibition outside the Archive,
- (vi) Incorporation in other films.

In the last four of these cases, a right to make copies will depend upon a right to exhibit and may be discussed under the latter heading. The first two, however, do not involve exhibition at any stage and so involve copying in its purest form.

While a right to make preservation prints can be strictly controlled in law and so would not raise any particular difficulties, the same does not apply with exchange prints, particularly exchange across national frontiers. For in the latter case, the use of the exchange print escapes the control of the national courts of the archive which makes it and there may be a danger of piracy or at any rate less than scrupulous use of the print. This may become of less importance when cassettes arrive, since reproduction for sale will involve a less negatively restrictive approach to film use. This is already visible in the growing trade in commercially marketed 8mm prints of films both ancient and modern.

Exhibiting

The showing of prints on an editola or screen within the Archive to private research students would seem to fall into a category generally recognised with regard to other copyrighted materials. Its extension to screening at other institutions for the same purpose (a form of inter-archive loan scheme) would be subject to the worries of misuse expressed in the previous paragraph, but would still not exceed currently accepted practice for other material.

Showing on the screen within the Archive not to individual research workers but to small audiences could be more objectionable since there would be little or no distinction between that and general educational use outside the Archive, except the location of the theatre and the small scale. Showing to Archive staff must, of course, be permissible.

Exhibition outside the Archive, even if restricted to educational purposes, raises of course a great number of problems. Any form of right to distribute prints for that purpose would be tantamount to a form of compulsory licensing, such as exists in English law for music and records. The English Copyright Act (s.41) does indeed provide that the exhibition of a film in class in the course of the activities of the school, shall not be regarded as a public performance (and so is not an infringement of the performing right) so long as only teachers and pupils form the audience. But that does not confer any rights of copying apart from the usual contractual arrangements. Much of the difficulty in this field springs from the generally restrictive attitude of the film industry to film use; as the latter is broken down, educational distribution can be left to commercial or semi-commercial agencies and archives will be able to concentrate on archival and research activities.

This, however, does raise the point that for all except current products archives will be the repository and often the source of the best available master material. They will consequently have a function to fill in the commercial distribution of old films, which raises questions of the correct conduct of archives and the services which they may properly provide. This will be touched upon in the final section of this paper.

Implicit in much that has been stated in this section is the question of definition of "public exhibition", for under most copyright laws protection is given only to public and not to private performance. The concept is much wider in copyright law than in e.g. licensing law, censorship regulation and other branches of law. In English law for instance, only exhibition privately and domestically to members of the household and genuine friends or within an organisation as part of its work would be private; all other forms of exhibition will be public. The criterion determining the factual situation is whether the audience constitutes a potential audience for a commercial exhibition (or perhaps in other words, whether they are consumers as opposed to users of the film).

The film industry distinguishes non-commercial and commercial distribution, or more accurately theatrical and non-theatrical. But certainly non-theatrical and mostly non-commercial exhibition involves remuneration, even at a profit; only one section of non-commercial exhibition is gratuitous - that which is done for publicity purposes. These distinctions might become relevant if some form of compulsory licensing were made available either to film archives or to others.

Copyright Status

Apart from changes in the copyright law to enable archives to carry out

their functions properly, there are a number of legal points which in present conditions make it difficult for archives to know their legal position. These are all related to the establishment of the exact copyright status of a given film. The points at issue are:

- (i) Duration of copyright,
- (ii) Definition of the author,
- (iii) Status of subsidiary authors,
- (iv) Assignment of copyright.

These points are all of more general import than merely archival; but archives may well have a preference for one solution over another for reasons of e.g. clarity and definiteness. Thus it is simpler to determine one's position if the copyright runs a fixed term rather than a term based on the author's life. If so, the establishment of the date from which the term runs should be fixed so as to be easily determinable. The present use of "publication" is unsatisfactory as regards films as being vague. Indeed, the emphasis upon marketing as opposed to exhibition of films surely shows yet again that copyright laws are still overloaded with a literary bias (the French law's listing of co-authors of a film shows this literary preoccupation even more clearly); and even on wider grounds there is much to be said for running the copyright term from the date of first public exhibition or some similar event.

Similarly, the existence of multiple authors and subsidiary authors of a film increases uncertainty. It would presumably be in the interest of archives to have authors' rights tied into an indissoluble bundle so that in effect a film had a single author who could be comparatively easily traced, even though his rights could necessarily be fragmented both geographically and media-wide. Such an approach would, however, affect the operation of droit moral, and somewhat tricky legal juggling would be necessary to find an entirely satisfying solution.

Finally, even if the rules for determining whether a film is in copyright and who the author was are clarified, it is still necessary to know who is the current holder of the respective copyrights. This is particularly an archive problem since old films form the bulk of the collections. It will be discussed in the final section of this paper, since it is primarily an administrative question.

Right of Citation

Archive material is often sought for the making of educational and commercial compilation films, for use in documentary programmes, for insertion into entertainment films (e.g. Godard's use of Dreyer's Jeanne

d'Arc in Vivre sa Vie), for illustration of lectures, supply and publication of stills. Most other forms of copyrighted material are subjected to a "right of citation" which enables them to be used in the form of short extracts in education or in scholarly works, criticism, news items etc. where their use is incidental and strictly subordinate to the main material. Anthologies and similar collections on the other hand have commercial value directly proportional to the value of the extracts used and consequently copyright protection will usually be preserved.

Films do not yet generally enjoy such a right of citation. In considering whether they should, there are two points for study; firstly, whether the copyright owner should be entitled to prevent such use (cf. the attempts by certain American publishers to censor the use made of quotations from works published by them); secondly, whether archives should have any privileged position, beyond the reproduction fee for supplying the material needed. This whole question involves a complex reconciliation of interests which would require very careful legal analysis.

Cassettes

Some concern has been expressed with regard to the effect on film copyright of the introduction of cassettes. While they will certainly have an influence on the development of the existing law, especially through their encouragement of the sale of films, they do not bring any new legal problems which are not already posed by e.g. the marketing of 8mm prints. The parallel introduction of cassette recorders will have a more serious effect, similar to that of tape recorders and photocopiers, but the effect will be felt by television companies rather than film producers. Nevertheless it will have to be borne in mind.

(c) Administrative Problems

There are two particular problems in the administration of the law of film copyright as it affects archives - the establishment of the copyright status of a film and the use made of and by the Archive in making available its stored copyrighted material.

(i) Copyright Status

I have already mentioned the difficulty faced by archives in tracing the copyright status of an old film and have suggested those aspects of copyright law which are directly affected by this.

There is another aspect of this problem which also affects archives, and that is the recording of copyright data. We all know how useful (within limits) the US catalogue of copyright entries can be. If each archive were to compile gradually a copyright history of each of its

national films as an extension of its normal cataloguing work, it would be both a contribution to film historical scholarship in its own right and also of value to the archive and others when engaging in acts covered by the copyright laws. In those countries which have a National Film Register the Register itself will contain the copyright history of the films entered on it, and the archive would only need to do the work for the period preceding the establishment of the register.

(ii) Archive Services

Film archives occupy uneasily an intermediate place between commercial film libraries and national museums. This derives from their origins as collections built up by a dedicated man (or men) who gradually acquires a staff, an organisation and the support of the public authorities. That is, of course, the way most national libraries and museum collections began in the past; but only in a few cases have the archives, thus formed, now hardened into bureaucratic institutions on a par with other national collections of artistic or scholarly material.

Film archives have, nonetheless, been aware of their public importance and have been chary of compromising their status by entering into the supply of commercial services. However, much of the work of an archive has commercial value and, until there is a substructure of commercial agencies to take the responsibility off its back, it is unnecessarily restrictive for an archive to consider its duties end with the successful preservation of films in its vaults and the compilation of a good catalogue (hard though such tasks are). I have mentioned commercial film libraries (which often preserve unique material by preserving its continued commercial value, just as the great commercial zoos are preserving species in a way that the zoological societies of the past cannot do). Where an archive possesses unique prints which are sought for commercial purposes the archive should, the copyright situation permitting, not feel inhibited from charging a proper fee for the service, and consequently should also feel under an obligation to supply the service. Nor should it feel that it would thereby be compromising its status as a scientific institution existing for the service of scholars. The Max Planck Institute for International and Foreign Civil Law in Hamburg, which is one of the great legal research institutions in the world, gains a large part of its revenue from selling legal opinions on foreign law to litigants for use as expert advice in law suits.

Such a change in attitude could involve some far-reaching alterations

in the whole ethos of film archives and would obviously need careful thought. One aspect, however, which would perhaps be easier to absorb and which is linked to much of what I have said today, is the relation between the archive and the copyright owner.

The draft FIAPF-FIAF regulations (November 1969 version) set out a number of would-be onerous rules as to ownership of prints and in particular would provide that all archive prints should be the property of the film's producer and should be delivered up to the producer on demand. Where such a print is a preservation print made by the archive, the producer would pay to the archive "the normal and relevant laboratory costs for the prints so transmitted". (cl.4). That to me seems a piece of impudence to which there is only one answer. But it does raise the point that archives have not only performed a public service by preserving prints from oblivion; they have also performed a service for the producers themselves who, now that old films are becoming marketable again after they had long been abandoned by their makers as worthless worked-out junk, are using the rescued prints for a new round of profit-making. There is certainly no reason why an archive should not enjoy a share in those profits, either by claiming a royalty - as does a theatre when a play which it has risked launching turns out a hit and is transferred to a larger theatre for a long and profitable run - or a large fee.

What I have given you today is a summary listing of those aspects of copyright law relating to films and affecting film archives which seemed to me and to the Executive Committee to need further examination. I have indicated some of the issues involved and hinted at the lines to be followed. I have not treated any of the issues more profoundly than the thickness of an onion skin, and much work will probably be needed in this pioneering enterprise before we are ready to proceed with confidence.

But it has been necessary to set it out like this so that we can see the pattern. I hope that it has clarified the position; more probably you are even more confused now than before I started speaking. But it can be summed up in three sentences: The law of film copyright generally is a mess. The copyright law as it affects the work of film archives is oppressive, clumsy and thoroughly inadequate. And only by very careful and full examination of what is wanted and of the way in which that can be elegantly interposed into the general rules of copyright law can an adequate solution be found.