

8. LEGAL CONTEXT BY ERIC J. SCHWARTZ

As caretakers of the nation's film heritage, archives, libraries, and museums need to understand the legal framework in which they work. The context is defined by federal copyright law and donor agreements. Copyright and donor agreements define how institutions preserve their motion picture materials and share them with the public.¹ This chapter briefly outlines some of the major issues, including federal provisions supporting film preservation. For detail and guidance on how copyright and donor agreements affect local policy, preservationists should consult their institutional counsel.

8.1 COPYRIGHT

Copyright is the federal protection given to creators or subsequent owners of original films, music, dramatic compositions, art, and other works of intellectual property—whether published or unpublished. It grants authors five exclusive rights to their works:

1. Reproduction (the right to make a copy of the work)
2. Distribution (the right to disseminate physical copies to others)
3. Public performance (the right to publicly screen, broadcast, or show film through various venues including on the Internet)
4. The right to prepare derivative works (for film, this generally means remakes or adaptations)
5. The right of public display (public display embraces the use of frame enlargements and the presentation of video in a museum exhibit)

DIVISIBILITY OF COPYRIGHT. Authors may divide and assign their rights by geographic region, media, and time period and may grant rights exclusively or nonexclusively. For example, an independent filmmaker may give one distributor the exclusive right to book screenings of a film in the United States (region) for one year (time period) but assign others the ability to make and sell videos or DVDs. There are innumerable ways that rights can be split, licensed, or transferred. Depositories generally try to secure the transfer of copyright and all the rights therein when they acquire film materials (see 8.4).

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1. Some states have additional laws prohibiting the unauthorized commercial exploitation of a person's name, likeness, or voice, especially in the case of celebrities. Generally speaking, these laws are limited to advertisements or other commercial applications and thus do not apply to most archival uses of film material.

Copyright is generally reassigned through a written document endorsed by the owner or the owner's representative. Certain oral agreements are permitted for nonexclusive uses, but it is always better to "get it in writing" to prevent misunderstandings.

UNDERLYING RIGHTS. Further complicating the picture is the matter of underlying rights. Films may contain other already copyrighted works, such as preexisting music, recordings, works of art, or dramatic compositions. The rights to underlying works are often treated separately from the film, especially when the film is in the public domain. Thus, in those cases the reproduction, distribution, public performance, adaptation, and display of the film may also require securing clearance from the rights holders of the underlying works.

TERM OF COPYRIGHT. Copyright law has changed over the years, making it difficult to determine the length of copyright protection for some older films. Before 1978, films could generally receive protection for 75 years from the date of their first release. In 1998, the term was extended for 20 years for films still under copyright protection. This extension did not affect films whose copyright had already expired. Thus any film published before 1923 is in the public domain in the United States, although it may still be protected in other countries.

In fact, prior to 1989, when the laws changed, many films did not receive a full 75 years of copyright protection (the initial term of 28 years plus the renewal term of 47 years). To obtain the full duration, copyright owners had to publish their films with the proper copyright notice (©) and file timely copyright renewal forms with the U.S. Copyright Office. Some films slipped through the cracks and entered the public domain in the United States.² However, many foreign films were exempted from these old rules in 1996 and may now have a different term of copyright protection in the United States.

The rules regarding copyright term are different for films created after 1977. Films created after December 31, 1977, now enjoy a copyright term of the life of the author(s) plus 70 years. "Works made for hire," films created by contractors or staff employed by an entity to which they assign their rights, receive a term of 95 years from publication or 120 years from creation if the work remains unpublished.

CHECKING THE COPYRIGHT STATUS OF PUBLISHED WORKS. You can check the copyright status of a published work without hiring an attorney. The U.S. Copyright Office Web site (www.copyright.gov) provides this information for post-1977 works. Earlier titles, however, must be searched in person in the catalogs open to the public in the Copyright Office in the Library of Congress. There are professional search firms that specialize in this research.

2. For films published with notice but not renewed, the terms ended after 28 years. Films first published without notice, however, entered the public domain at the moment of publication.

Absent a will or other written agreement, copyright generally transfers to the heirs or estate of the filmmaker.

8.2 COPYRIGHT OF UNPUBLISHED WORKS

January 1, 1978, marks an important change in the U.S. copyright treatment of films. Prior to that date, federal copyright law pertained only to published films. The law defined published films as those offered widely to the general public in copies for sale, rent, or lease. Under the old law, screening or broadcast did not by itself constitute publication. Thus the published or unpublished status of a film was unclear (and sometimes still is). State laws offered some level of legal protection for unpublished films, often extending coverage “in perpetuity.” Unpublished films protected by state laws did not have to comply with federal requirements regarding display of copyright notice, registration, and renewal. Legal changes in 1978 and in 1989 swept aside the old rules and, for the most part, the distinction between unpublished and published films.

All films, whether published or unpublished, are now protected for a finite term under federal copyright law. For pre-1978 films, the protection still differs for published and unpublished works. Figuring out the duration of protection for unpublished pre-1978 works can be complex, particularly if the unpublished work was later published. Many repositories have footage and amateur films that fall into these categories. This is one reason why it is so important that repositories clarify rights issues in the deed of sale, gift, or deposit agreement prior to film acquisition (see 8.4).

For all films created after 1977, federal copyright protection begins on the date the film or its working copy is completed (the “date of fixation”). As mentioned in 8.1, the term is the life of the author(s) plus 70 years or 120 years for unpublished works made for hire. Thus, for newer works the dividing line between published and unpublished films no longer makes much practical difference.

8.3 PHYSICAL MATERIALS AND COPYRIGHT

Before moving on to donor agreements, it is important to clarify a key issue of copyright law. Copyright law distinguishes between the ownership of the copyright and the ownership of the “material object” in which the work is embodied. Thus an institution possessing a physical copy of a film may not have the right to exploit it. Those rights—the rights of reproduction, distribution, public performance, and public display and the right to make derivative works—are retained by the copyright holder unless transferred explicitly to the repository.

This bifurcation can create situations in which the rights holder owns the rights to films for which the holder has no physical material. For example, the Library

of Congress has the only known 35mm nitrate print of *Clash of the Wolves* (1925), the Warner Bros. silent feature starring the original Rin-Tin-Tin. Although the canine action hero was one of the most popular cinema personalities of the 1920s, few copies of his films are known to survive. The unique print was discovered in South Africa and transferred to the Library for preservation copying. Warner Bros. has no original source material for *Clash of the Wolves*, but it still owns the copyright and controls the film's exhibition, distribution, and remakes. Thus, whenever the Library publicly screens its new preservation copy, it must obtain prior approval from the rights holder. To include the work in its forthcoming DVD set of rare silent films preserved by American film archives, the National Film Preservation Foundation (NFPF) asked permission, and Warner Bros. generously granted the request.

An important exception that permits public depositories to make preservation copies of protected films without the rights holder's permission is discussed in 8.5.

8.4 DONOR AGREEMENTS

Institutions generally include copyright among the many issues addressed during film acquisition. The document defining the relationship between the donor of film materials and the depository is called a donor or gift agreement. Donor agreements are governed by state property, contract, and gift laws. Unless specified in written contract with the depository, copyright generally does not transfer with the physical material.

Donor agreements, as pointed out in the Library of Congress's "Depositing Films with Archives: A Guide to the Legal Issues," can take many forms.³ The contract puts into writing the expectations of both parties. Generally the agreement covers four major areas: (1) the description of the films, including the ownership of the rights for those materials, (2) the nature of the transaction (whether it is a gift, deposit, loan, purchase, or combination of these), (3) the responsibilities of the depository for the physical materials, and (4) the use of the films (including any restrictions on this use by the depository, its patrons, or the donor).

The agreement may outline the depository's specific duties to copy, maintain, and make available the materials as well as responsibilities for insurance, inspection, and cataloging. The document sometimes includes the timetable for transferring films to the depository and provisions by the donor to help defray the costs of upkeep.

The donor or deposit agreement may also add restrictions on the use of physical materials that go beyond copyright. For example, Technicolor Worldwide Film

3. This paper is included in *Redefining Film Preservation: A National Plan* (Washington, D.C.: Library of Congress, 1994), 49–79, and available at lcweb.loc.gov/film/donate.html. The paper provides an issues checklist and sample agreement language.

Group deposited the original camera negative for *Toll of the Sea* (1922), the earliest surviving feature made in the two-color Technicolor process, with the UCLA Film and Television Archive, which meticulously restored the film. Although the film is no longer protected by copyright, the use of UCLA's restoration is still governed by the deposit agreement made many years ago. To enable the NFPF to include the restored *Toll of the Sea* on the DVD set *Treasures from American Film Archives: 50 Preserved Films*, Technicolor generously provided a letter of permission.

Some active independent filmmakers deposit their films with public and non-profit institutions under the condition that they retain ownership of the physical materials and be allowed continued access to the originals. The depository makes prints available to researchers and provides secure, climate-controlled storage. Generally in these arrangements, preservation copies made by the depository belong to that institution, although the copyright may remain with the filmmaker.

As discussed in 8.2, unpublished films are also protected by copyright. When acquiring the physical copies of amateur films from a donor, it is important that depositories clarify the rights and use of the materials as part of the gift agreement.

8.5 ARCHIVAL RIGHTS AND RESPONSIBILITIES

Federal law recognizes the important role of nonprofit and public institutions in saving America's film heritage. It gives depositories, which are "open to the public" and "available not only to researchers affiliated with the library or archives," the ability to copy films for "preservation and security."⁴ The institution may make up to three copies of unpublished films. It may also make up to three copies of published works that are damaged, deteriorating, lost, or stolen if copies are unavailable from the copyright owner.

Film archives interpret this provision, as well as "fair use," described in 8.7, to embrace the creation of a preservation master, answer print, and access copy. Furthermore, a depository may ship its own copy to a sister institution, if consideration is given to the film's well-being and storage and if no additional copies are made by the recipient.

Unless forbidden by its gift agreement, the depository may make films available for on-site study by researchers without the approval of the copyright holder or the transfer of rights. However, as noted in 8.6, it may not exhibit these works without permission.

When permitted by its donor agreements, a depository holding copyrights may license those rights to others for any type of commercial or noncommercial use,

4. The reproduction in a digital format is permissible for the preservation and security of unpublished films and to replace damaged, lost, or deteriorating copies of published films. The digital copies cannot be "made available to the public in that [digital] format outside the premises of the library or archives."

including screenings, broadcasts, or reproduction of still images in publications. Licensing agreements generally spell out the territory, duration, and intended use of the film material (see 9.4). Each depository should work closely with its institutional counsel to develop any licensing agreements.

8.6 OBTAINING PERMISSIONS

As summarized in 8.1, public performance is one of the creator's five basic rights under copyright law. For motion pictures, the rights holder controls where and how the holder's film is publicly screened and transmitted. For any performance "to the public," depositories must obtain permission from the copyright owner. In copyright law, public performance is generally defined as "any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." It also embraces television and cable broadcast, since the protection encompasses places where "the public is capable of receiving" the performance. Whether an admission fee is charged is irrelevant.

Posting films on the Internet is considered a public performance and also requires permission. So, digitizing and uploading a film to an institutional Web site, absent the rights holder's permission, is a copyright infringement.⁵

8.7 FAIR USE

Sometimes individuals will claim that their use of film stills or clips in a public lecture or publication is "fair use" and does not require permission from a copyright holder. What does this mean?

The guidelines for determining fair use are set out in the law as four broad considerations and not defined through explicit examples. These factors are (1) the amount of the copyrighted film to be used, (2) whether the use has a commercial or noncommercial purpose and whether the user is "transforming" the work into something new and useful, (3) whether the copyright owner's income (or the work's market potential) will be affected by the use, and (4) whether the work is published or unpublished.

The courts ultimately decide whether a particular use is fair or not, based on past cases or precedents. Unpublished works are generally granted more protection.

5. For a discussion of the legal issues surrounding digital copies of copyrighted works, see June M. Besek, *Copyright Issues Relevant to the Creation of a Digital Archive: A Preliminary Assessment* (Washington, D.C.: Council on Library and Information Resources: Library of Congress, 2003). Also available at www.clir.org/pubs/abstract/pub112abst.html.

8.8 PROTECTING YOUR INSTITUTION

Given the complexity of these issues and increasing public interest in using film, it is important that your institution's legal rights and responsibilities for its films are understood by all employees. The unauthorized use of films by staff or researchers can lead to institutional liability. Similarly, breach of a donor agreement could, in a worst-case scenario, lead to the forfeiture of the material.

Copyright liability applies whether or not an individual or organization knows that an action constitutes infringement. Simply making an illegal copy or publicly screening a film once without permission can leave your institution vulnerable to civil fines. The best approach is to work with your organization's counsel to develop policies for licensing agreements, public screenings, Internet use, and other film usages, and to educate staff on how to implement them.

If your institution owns full rights to a film or can negotiate necessary permissions with all appropriate rights holders, it may well serve your institution's interest to explore many avenues for providing access. By legally sharing what you have preserved, you will help build appreciation for your institution's work as well as an audience for film preservation.

CASE STUDY: UNIVERSITY OF TEXAS AT AUSTIN

Norman Bel Geddes' *Hamlet* (1931, 2,000 ft., 16mm, black and white, silent), preserved by the Harry Ransom Humanities Research Center, University of Texas at Austin.



Intellectual property rights are often complex, particularly for works involving celebrities and artists. Nevertheless, through agreements with rights holders, archives can find ways to satisfy both their public service and their preservation missions, as the following story illustrates.

Norman Bel Geddes' 1931 production of *Hamlet* is among the most celebrated of the visionary stage and industrial designer's works. His innovative designs for sets, lighting, and sound emphasized the psychological state of the characters, an approach that was controversial at the time. As he developed these production elements, he documented them on film.

The resulting hour-long documentary, along with the scripts, drawings, and prompt-books from the stage production, were among the personal papers acquired by the Harry Ransom Humanities Research Center in 1958 shortly after Bel Geddes' death. Through the sale the center acquired the physical collection and the ability to make it available for scholars. The Bel Geddes estate, however, retained the intellectual property rights to the material. Although it does not appear that Bel Geddes registered his *Hamlet* documentary for copyright, the film still has protection as an unpublished work.

U.S. copyright law gives archives the right to copy films for preservation but does not give them the right to screen the new copies in public programs without the permission of the rights holders. Thus when Bel Geddes' *Hamlet* was discovered to have vinegar syndrome in 1999, the center faced a problem common to many cultural repositories. It had the responsibility to preserve the physical artifact but did not have the right to publicly exhibit the result.

Preservation, of course, is in the interest of the rights holder as well as the public. Receiving a grant to preserve *Hamlet*, the center used the opportunity to renegotiate access arrangements with the Bel Geddes estate and received permission to screen the film in conjunction with its 2003 exhibition *Make It New: The Rise of Modernism*. Parties wishing to publish material from the Norman Bel Geddes Papers must continue to obtain the estate's permission, as did the NFPF for the above photograph.