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Association des Cinémathèques Européennes - Represented by EYE Film Institute Netherlands, Leontien Bout (legal Counsel) and Géraldine Vooren (legal Counsel)

COPYRIGHT ISSUES ENCOUNTERED DURING DAILY PRACTICE OF FILM CLEARING

Introduction

Good afternoon, ladies and gentlemen. We would like to thank you for giving the Association des Cinémathèques Européennes the opportunity to provide its input on the subject matter. We are Leontien Bout and Géraldine Vooren, both legal counsels at EYE Film Institute Netherlands. We have been asked to represent the Association des Cinémathèques Européennes because we have extensive experience with film clearing. As a result of the project 'Images for the Future' our Institute has received a substantial subsidy to digitize our collection and to make it available to heritage professionals, to the creative industry, to educational institutes and the general public. Part of the project is to find out the rights situation of our collection and to seek permission from the rightsholders. For the past three years a team of legal counsels and historians have been searching for rightsholders. This large scale rights research provides EYE Film Institute Netherlands with a unique experience, for instance regarding orphan works. Most archives do not have the budget for rights clearing on this scale and these archives will only clear rights if they want to use the work.

With this presentation we want to tell you about the most important copyright related issues we have encountered so far that complicate and slow down our practice of film clearing. Our clearing practice is based on Dutch law, unless stated otherwise. However, ACE would like to emphasize that the difficulties that EYE has encountered are more or less typical for right clearing procedures in other European Film archives as well. In this context we would also like to draw your attention to the fact that the EYE legal counsels have performed an extensive study to national copyright laws applicable to film clearing in a number of European Member States in the framework of the European Film Gateway project. This study has resulted in the Report of legal frameworks in the EFG Consortium Member States, which provides for Guidelines on Copyright Clearance and IPR Management.

We have divided these issues in five main subjects following our clearing process . We start with legal copyright exceptions for archives and the lack thereof. We then expand on assessment of legal status and the search for rightsholders. We then go on with orphan works and finally tell you about our experience with collective rights management organizations.

Copyright Issue 1: Legal copyright exceptions

If the archive wants to use a certain film, the first step is to look if there is a copyright exception applicable. We have found that in case we want to show our collection to the public on dedicated terminals on our premises for the purpose of research or private study, it is allowed by a copyright exception. However If we want to show our collection or clips thereof online on the website archive's museum on a non-commercial basis, there's no exception applicable allowing such use. Therefore, we have to start the very time-consuming process of film clearing. Also, we have noticed that some other archives do not have the copyright exception under national copyright law allowing them to show the collection on dedicated terminals on the archive's premises (as this exception was not mandatory implemented under the Copyright Harmonization Directive of 22 May 2001). Therefore, for those archives even more film clearing has to be performed.

Furthermore, the legal copyright exception that allows archives to make a preservation copy is not implemented in all EU member states. Therefore, archives in those EU member states cannot start digitizing before asking permission from the rightsholders.

Copyright Issue 2: Establishing copyright protection

The next step in the clearing process is to establish if a film is still protected by copyright law or if it belongs to the public domain. That means that under current Dutch copyright law one has to find out if the principal director, scenario writer, the dialogue writer and the film music composer have deceased more than seventy years ago. This may be a time-consuming process, however it is clear from a legal point of view.

For films made before 1995, the legal situation is more complicated. When the law was implemented in Dutch copyright law stating that the duration of copyright protection was linked to the life of the principal director, scenario writer, dialogue writer and film music composer, it also stated that this law could not reduce the copyright protection based on copyright law that was applicable until then. That means that regarding the calculation of the copyright protection duration of films made before 1995 we have also to take into account the life plus a fifty year protection period of other rightsholders such as cameramen or art directors. Based on that transition law, after the search to find out if the principal director, scenario writer, the dialogue writer and the film music composer have died more than seventy years ago, we have to find if there are any other rightsholders that have died less than fifty years ago. In that case the film would still be protected. Apart from being a very time-consuming process, the problem is that under copyright law there is no definition of who can be considered a rightsholder. Under copyright law anyone who has made a creative contribution to a film can be deemed a rightsholder. As there is no list of such creative contributors, the archive itself has to make a list of categories of creative contributors and thus of potential rightsholders.

Copyright Issue 3: Search for rightsholders

The next step after establishing that a film is still protected under copyright law is to search for the rightsholders. First of all, we would like to emphasize that the search for rightsholders has shown to be an extremely time-consuming process. Also, there is no sufficient legislation regarding films made before 1985 (in 1985, the legal assumption that the film producer is the rightsholder was implemented in Dutch law) as to whom can be deemed a rightsholders. Therefore, the archive can never be completely sure that it contacts the right persons for permission to use the film.

Also, there is no legislation regarding the search for rightsholders. That means that the archive has no certainty regarding the extent of the search and which sources need to be searched. For the search for rightsholders we make use of the Diligent Search Guidelines for Orphan Works drafted in June 2008 by the High Level Expert Group in the framework of the European Digital Libraries Initiative. However, the Guidelines have no legal status and the requirements for a sufficient search stated in the Guidelines are extremely strict. We will expand on these Guidelines later on in this presentation.

Furthermore, to complicate the search for rightsholders even more is the legal issue of the transfer of future rights. That means that under some jurisdictions it is not certain if a transfer of copyright in the past also included future rights, for instance the right to make the work available online. To give you an example, if a film production company made a film in 1920 as an assignment for a commercial company and the production company has transferred its copyright to the commercial company, we cannot be certain if that copyright transfer includes the online rights as well. Therefore, we cannot be certain who can be considered the rightsholder.

Finally, we have encountered a practical problem. If we find the rightsholders to a film that was produced before 1985, the number of rightsholders can range from one person up to ten persons per film. We found that it is practically impossible to contract all rightsholders if you want to clear thousands of films. To give you an impression of the time that's involved in film clearing: from the moment we ask permission of a rightsholder to use his film online to the moment the contract has been signed an average time of six months has expired.

Copyright Issue 4: Orphan Works

The next issue we would like to address is the lack of legislation regarding orphan works. We are currently clearing a collection of 7.000 films. We have found that at least a thousand titles can be qualified as an orphan work. Even though this collection of 7.000 films may not be completely representative for our entire collection, we estimate that the percentage of orphan works in our entire collection of 37.500 titles varies between 10 and 20 percent. We have every reason to believe that these percentages of orphan works are similar in other European film archives. We refer to the

survey on orphan works performed by the ACE presented in March of this year. According to this survey, approximately 20 % of the holdings in the ACE archives are considered to be orphan works. Furthermore, the survey states that 45% of the presumed orphan works which equals approximately 100.000 could be made available via the European Film Gateway and Europeana if a pragmatic or legal solution for rights clearings would exist. Although the numbers of orphan works stated in the survey are based mostly on estimates, these numbers are confirmed by our experience with the clearing of orphan works on a massive scale.

The first problem with the orphan works is that, as stated before, there is no legislation as to what extent we have to search before we can legally consider a film an orphan work. We apply the Diligent Search Guidelines for Orphan Works but these are not binding from a legal point of view. The second problem is that, at the moment we have established that films can be considered as orphan works, the archive still has legally no right to use the film. The archive that uses orphan works is in breach of existing copyright laws, as it uses copyright protected material for which it has no permission from the rightsholder.

Copyright Issue 5: Collective rights management organizations

Finally, we would like to tell you briefly about our experience with collective rights management organizations in relation to film clearing. We have found that in case of mass digitization and mass film clearing it is necessary to seek help from collective rights management organizations. We have encountered a number of problems regarding negotiations with these societies.

First, different categories of filmmakers, for instance directors, writers, producers and actors, are all represented by different collecting societies. By lack of an umbrella collective rights management organization representing all filmmakers, the archive is forced to negotiate with various collecting societies at the same time in order to clear a collection of films. This process is extremely time-consuming and draws heavily on our resources in terms personnel and budget.

The second problem is that the collecting societies do not represent all categories of filmmakers, for instance cameramen are not represented by a collecting society. Also, collective rights management organizations represent only a small percentage of all rightsholders.

Finally, a legal mandate to collective rights management organizations would make it much easier to involve them.

Recommendations for copyright solutions

The ACE is proposing the following solutions:

- First, harmonization of EU copyright legislation to facilitate digitization and the use of orphan works for educational and research purposes (by including mandatory exceptions in the EU Copyright Directive);

- Second, mandatory exceptions for cultural institutions to allow digitization for preservation purposes and (pass word protected) online access on the premises, even without the consent of the rights holder;
- Third, facilitation of the Diligent Search Criteria for Orphan Works, they are too complex. There seems to be an imbalance between the effort of a diligent search and the expected outcome when digitizing and making accessible such a work;
- The fourth and final recommendation is a legal indemnification in case the copyright holder of an orphan work reappears and the search criteria have been respected.

Final

That brings us to the end of our presentation. We hope that we have been able to give you some insight in the copyright issues our archive has encountered in the course of our process of film clearing on a massive scale.