

NOW WHAT?



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NOW WHAT ?

Report on the symposium

The Right's Thing

FIAF congress

Jerusalem 1996

**NEDERLANDS FILMMUSEUM
Amsterdam, september 1996**

PREFACE

During the FIAF congress of 1996, held in Jerusalem, a two-days symposium took place about the legal problems, with which filmarchives have to deal and which have become even more complex with the developments in media technology. THE RIGHT'S THING was well attended and somehow served as a platform for all kinds of notions, that were floating around in FIAF circles, to become more explicit and structured.

In order not to let the results of the symposium evaporate all interventions of the guest-speakers and the audience have been compiled in this booklet, along with a first chapter that summarizes the main issues and conclusions. Being responsible for the concept and the organisation of this symposium, I sincerely hope that this material evidence of that happening will serve the FIAF membership as a reference in the discussions about the (legal) conditions we need in order to fulfill our mission properly, as well as in the discussions about the future of our Federation.

I am truly grateful for all the help and goodwill I got during the organisation and in making this booklet.

In the preparation of the event the following people were involved in various stages and forms: Gabrielle Claes, Steve Ricci, Clyde Jeavons and Michael Henry. A number of colleagues contributed to the reader with printed material.

The guest speakers, Nathalie Piaskowski, Gabrielle Claes, Marc Wehrin, Tony Greenman and Vincent Létang prepared substantial interventions and Nathalie Piaskowski and Marc Wehrin also helped FIAF out by taking care of their travel expenses themselves.

During the symposium Michael Friend did a terrific job as general moderator and so did Bob Rosen, Steve Ricci and Jose Manuel Costa as moderators of the discussion groups. The latter three were assisted by the legal specialists Henri Choukroun, Tony Greenman and Marc Wehrin. Scott Mittelman was of great help in summarizing the discussions for the final session.

At the Jerusalem end the symposium was organised by Amy Kronish and crew of the Israel Filmarchive. As a result of their efficiency and care, everything went smoothly and the breaks were feasts for stomach and eye.

Lia van Leer's decision to offer the premises of the archive as location for the symposium has been proven to be an excellent one indeed!

The guest-speakers were again of great help by providing their interventions on floppy disc, with the exception of Marc Wehrin, who didn't write out his intervention, but corrected his text as it was written down from the tapes. The latter accounts for the slight difference in nature between his intervention and those of the other guests as they are printed in this booklet. Gabrielle Claes took the monstrous job upon her to correct my phonetic French.

I would like to thank all these people, and the ones I might have forgotten to mention, warmly for their involvement, their enthusiasm and for all the trouble they took to help build up the symposium and carry forward this discussion, that is of vital importance to FIAF.

Hoos Blotkamp
27-08-96

MESSAGE TO THE SPEAKERS FROM THE AUDIENCE

Dear colleagues and other contributors to the lively discussions in the symposium. I must apologize to you for not having given you the opportunity to check whether I have extracted your words from the tapes correctly. I think I did, but there's always a possibility that I didn't. However, since it was a rather time consuming job already and because I felt that getting the report to the membership of FIAF in september at the latest in order for it to have a function in the discussions, I decided not to lose time by sending the texts around.

I also apologise for the fact that sometimes I couldn't identify a voice, so you might have your contribution listed under the name "unidentified voice".

If you are not happy for one reason or another, I hope you will forgive me, considering that the whole is much more important than each part in itself. It is also to a high degree due to you, speakers from the audience, that we now have a lot on paper of our preoccupations, questions and worries - and sometimes even of a possible course to take.

The distribution of the report will be restricted to the membership of FIAF and the "outsiders", who were one way or another involved in the symposium.

Hoos Blotkamp
27-08-96

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I THE MISSION STATEMENT

When starting the preparations for the symposium the aims and the outline of the happening were formulated as follows:

General aims:

- To clarify the legal situation of filmarchives and to pin down the problems with existing (or absent) legislation (mostly copyright).
- To define - if possible - a FIAF point of view on the "rights" (legal backing) that filmarchives should have in order to fulfill their cultural mission properly.

General approach:

The symposium should be a lively happening in which all members can participate actively. For that reason much time will be devoted to discussion in plenum or in groups. During the discussions the members can communicate their specific problems or pose questions to legal experts that will be present. Since many problems are related to the legal rights and/or the general attitude of the producers world The FIAPF will be invited to participate actively in the symposium. In the best case the latter might also lead to a better mutual understanding.

The symposium will consist of the following elements:

- General introduction of the problems.
- Points of view on the situation by representants of different working areas (lawyers, producers, filmarchives).
- Plenum discussion (including exchange of information and questions for experts (FIAPF-representant(s) and lawyers that will be present).
- Group-discussions on three major topics:
 - A:** The impact that developments in media-technology have on the work of the archives;
 - B:** archives as producers;
 - C:** developments in (inter)national legislation, the Unesco-recommendations, GAT, the (draft-)convention of the European Council etc.
- Summaries and conclusions, preferably leading to a practical FIAF-document that all members can use in their own country.

General aims of the discussiongroups

The discussion-sessions in three groups of fairly small size give the opportunity to go further into detail about issues that have or have not come up on the first symposiumday. Since covering all issues in each workinggroup would be far too much, each discussion-group focusses on a central subject, that will be the hatstand for a number of related issues.

Each group subject will be dealt with in two sessions, so all participants can partake in the discussions on two of the three subjects. The subjects have a specific moderator and (if possible) legal expert attached to them. The participants will halfway the morning change from their first subject in one room to their second subject in another room.

The subjects are:

THE IMPACT OF THE DEVELOPMENTS IN MEDIA-TECHNOLOGY ON THE WORK OF THE ARCHIVES

Within the context of the symposium issues related to this subject could be: copyright in relation to new carriers, kinds of use of the archive-material that are not (yet) covered by legislation, moral rights in relation to interactive productions and the use of clips (educational or not), copyright in relation to textual databases concerning av-material, legal implications of making textual data and/or images available on global networks etc. etc.

ARCHIVES AS PRODUCERS

Within the context of the symposium issues related to this subject could be: legal implications of being producer and archive at the same time, legal implications of joint ventures with broadcasting companies or software producers, moral rights in relation to interactive productions and the use of clips (educational or not), obligations towards original producers etc. etc.

DEVELOPMENTS IN RELEVANT (INTER)NATIONAL LEGISLATION

This is basically a rather European subject, although the information will be interesting for everybody, since it deals with international legislation, that now is restricted to the E.C., but that might well become some sort of model for world-wide legislation. The GATT issue concerns Europe and USA.

II THE CHARACTERS IN THE PLAY

General moderator of the symposium: **Michael Friend**

Guest speakers:

- Nathalie Piaskowski** Assistant director of the International Federation of Film Producers Associations (I.F.F.P.A. or F.I.A.P.F.) and Attorney at Law, specializing in intellectual property.
- Gabrielle Claes** Director of the Cinémathèque Royale in Brussels. This archive preserves a lot of films but also has a long tradition in showing them on a daily basis in its screeningrooms.
- Tony Greenman** Attorney at law, is a member of the Bars of Israel and California. He received an Award in the Business and Management of Entertainment from UCLA Extension with a Specialization in Legal Affairs and concentrates his practice on copyright and the laws relating to motion pictures and television production.
- Marc Wehrlin** Head of Film Division, Federal Office of Culture, Bern. He created and presided SUISSIMAGE, the Swiss collecting society for audiovisual rights. As a member of the Federal Commission for Cinema for 16 years, he has been active in cultural politics for an independent cinema.
- Vincent Létang** Head of the Legal Deposit Department of Les Archives du Film, CNC. He conducted a worldwide survey on (presence, absence or other forms of) legal deposit of moving images.

Moderators and legal experts of the discussion groups:

- THE IMPACT OF THE DEVELOPMENTS IN MEDIA-TECHNOLOGY ETC.
moderator: **Steve Ricci**
legal expert: **Tony Greenman**
- ARCHIVES AS PRODUCERS
moderator: **Bob Rosen**
legal expert: **Henri Choukroun**
- DEVELOPMENTS IN RELEVANT (INTER)NATIONAL LEGISLATION ETC.
moderator: **Jose Manuel Costa**
legal expert: **Marc Wehrlin**

III A HARVEST OF THE DISCUSSIONS

Reading back the discussions and interventions of the symposium and the Open Forum of the congress, as well as some older documents, it became apparent that it is possible to collect quite a few clear notions that pop up again and again, that can be grouped under the most important headings that came out of the symposium:

- **Actions for the near future**
- **A Bill of Rights**
- **A Code of Ethics**

1. **Actions for the near future**

One of the main conclusions of the discussions has been that for several reasons we can't postpone to define, for ourselves and the world, who we are and what we want, in terms of legal conditions and otherwise. It became very clear that we also can't deal with the future nature and size of FIAF separately from legal issues, Bill of Rights and Code of Ethics - it is all interrelated.

Out of the symposium came a feeling of urgency. We need to hurry because otherwise the framework we'll have to work in will take shape without us. Although much is happening in Copyright on the intercontinental and international level, little of that affects us deeply. We must concentrate on direct negotiations with the producers and on the national legislation on the basis of a collective document in which we define what general conditions we need.

After the General Assembly in Jerusalem the issue of the future of FIAF was discussed during the Open Forum. Much of the comments touched the issues that had been discussed in the symposium and also underlined the need for actions of various kinds. For that reason the main points raised in that session are summarized here.

- Almost every speaker emphasized the necessity to raise our profile in the world. Some said that expanding the membership would also serve that purpose, others maintained that restriction to the hard-core of filmarchives would give us a better position to do so.
- Several speakers were drawing attention to the fact that the concept of a filmarchive has changed, which implies that we need to redefine what we consider a proper filmarchive. Related to this is the remark that also the concept of preservation has changed and that preservation now might be interpreted as the whole path from acquisition and storage to access and exhibition.
- Quite crucial was the observation of several people that credibility and negotiation-power (in relation to producers and legal deposit) require control of the federation over its members in order to guard the standards. This mostly was linked to the conclusion that expanding the membership would stand in the way of such control.
- Twice it was suggested that FIAF could expand the membership and at the same time have a code of ethics that could be subscribed by only part of the membership.
- One person observed that FIAF has no common ground on working tools and no means to control its members.
- Some expressed the fear that expanding the membership would lead to loss of the personal contacts the members have now and to much more bureaucracy.
- Someone observed that all present associate members have the profile of a potential FIAF member.

On the whole the membership present that day seemed to agree that one single kind of member is feasible and in the end it was agreed by handraising that the EC would proceed working out future models on that basis.

MAIN ACTIONS FOR THE NEAR FUTURE THAT CAME OUT OF THE DISCUSSIONS

- Formulate what we want collectively
- Appoint a task force to prepare a Bill of Rights and Code of Ethics
- Focus attention more on national legislation
- Provide ourselves collectively and individually with professional legal advice
- Continue dialogue with FIAPF now that the door is open
- Pay much attention to the fact that issues of Bill of Rights, Code of Ethics and future of FIAF are interrelated.
- Raise our profile in the world
- Start already to introduce elements of the future Bill of Rights in the contracts the archives make with donors and depositors.
- Fight for access to European financing funds for found-footage films
- Circulate "bona vacanti" and "usu capio" possibilities amongst members with clues how to go about these procedures.
- Find a new language, new terms, to deal with possibilities of new technologies in the contracts between archives and donors or depositors.
- Develop FIAF basic-models and terminologies for contracts of all kinds: donor, depositor, access (for tv, video- and other media market, coproduction etc.)
- Have all members put FIAF membership on their letterheads
- Keep an eye on developments in identification-numbers, wich in future will make access to rightsholders identities possible through one adress (GICOA, CISAC)

2. A Bill of Rights and a Code of Ethics

In the discussions much emphasis has been laid upon practical and financial problems. However, there is another fundamental right that we need to fulfill our cultural mission properly, which can be summarized in the one word "freedom". As long as we need permission of the producers or other rightsowners to keep, to preserve, to exchange between archives and to screen on our premises, these parties basicly determine what we can preserve for future generations, what we can study and what we can show in the context of our mission. It might, in theory, ultimately lead to a situation in which we only obtain permission to preserve and use the materials in which the rightsowners see no future commercial potention whatsoever. That is a kind of selection that has very little to do with our mission, disagrees with it even on a very fundamental level. So the need for freedom lies at the basis of most of the conditions we require and will write down in a Bill of Rights.

Now this freedom might be a very scary concept for the producers. Their contract of 1971 recognizes the value of the work of film archives, but shows a lot of fear for abuse in the sense of unrightful commercial exploitation. It doesn't seem to be the producers intention at all, and everything Mme Piaskowski said during the symposium confirms that really, to stand in the way of that fundamental freedom we need as cultural institutions, but just to rule out the possibility of unrightful commercial exploitation by demanding that the archives ask permission for virtually everything they want to do with a deposited film. We must realize that therefore it is necessary that we can absolutely guarantee that granting us that freedom will in no way harm the interests of the producers/rightsowners. We should be able to show them that our activities do not compete with their exploitation. We should also describe precisely where our freedom ends and never step over that line without permission of the rights-owners. We will have to be able to indicate what conditions we offer to guarantee that we don't abuse the freedom we want and what the possibilities are to control that we don't.

Nathalie Piaskowski as well as Gabrielle Claes, seemingly being the representants of opposed points of view, both pointed out that the FIAF membership contains a wide range of different institutions with different practices, because of which our Federation doesn't manifest itself as a trustworthy partner to the producers. Many more speakers therefore expressed the need of an internal discussion within FIAF to find solutions to this problem and formulate them in a Code of Ethics. That will be the moral or behavioural part of this document, or whatever shape the Code takes.

The other part of a Code of Ethics should be about archival standards partly behavioural, partly technical. Much of that can be found in a document that a number of American archives subscribed in 1977 and that is included in the appendix of this report.

POSSIBLE ELEMENTS OF A BILL OF RIGHTS THAT CAME OUT OF THE DISCUSSIONS

1. Legal Deposit for national production and encouragement of Voluntary Deposit for foreign films that circulated in the nation.
2. the right to copy for preservation purposes.
3. the right to show on archive premises without authorisation and free of charge, regardless voluntary or legal deposit, or prints borrowed from other archives.
4. the right to physical ownership of all original materials already resting in the archives of which the ownership is not stated by any document.
5. the right to physical ownership of preservation materials made in the past, now and in the future.
6. the right for the archive to become rightsholder of unique material in case of impossibility to locate another one.
7. the right of free exchange and circulation of films amongst archives.
8. the right of free exchange of (image) information between archives by means of traditional media (film, video) as well as new media (digitally).
9. the possibility to quote images for archival, educational and information purposes.
10. the right to claim a contribution to the preservation costs from commercial users and a part up to all preservation costs in case a rightsholder wants to commercially exploit, depending on what kind of exploitation.

Explanatory remarks:

Ad 1 - The deposit agreements should, amongst others, contain the following elements:

LEGAL DEPOSIT AGREEMENTS:

- deposit of original format, preprint materials and copies
- deposit of paper documentation: scenario, stills, publicity materials
- right to protect deposited material even from the depositor or rights-owner (technical control of the archive and limited use of the material)

VOLUNTARY DEPOSIT AGREEMENTS:

- deposit of more than one copy (if possible) of optimal quality (the ones first taken out of circulation for instance)
- deposit of paper documentation: subtitling, stills, publicity materials
- the right to copy first in case of withdrawal of deposited materials
- right to protect deposited material even from the depositor or rights-owner (technical control of the archive and limited use of the material)
- minimum duration of deposit, for example 20 years
- obligation for depositor to pay costs of storage in case of withdrawal of the material

- Ad 2 - In many countries Copyright Law forbids copying without authorisation for whatever purpose; the preservation purpose should become an exception to this rule.
- Ad 3 - It is the archives mission to preserve and to show in order to keep the public interest in the history of these media alive and this activity evidently has no profit purpose. The admission fees do not cover the costs of the screening, let alone those of the preservations and other archival work. It is to a high degree due to the public screenings of archives, that old films regained commercial potential.
- Ad 4 - Most older filmarchives hold a lot of material of which the acquisition, made in a far past, is not documented and for which no depositor can be located. Criminal law can be ambiguous about the question whether the archive is fully in the clear and can call itself the owner of the physical material of these films.
- Ad 5 - Since the laws don't provide a clear cut answer to the question whether preservationmaterials, made of moving images of which a rightsowner exists, are the physical property of the archive and cannot be claimed by the rightsowner, it should be established officially that the archive is the owner of this physical material, which should however be accessible for the rightsowners under certain conditions (see ad 8).
- Ad 6 - Many archives have a number of (mostly old) films of which no rightsowners can be found, whatever efforts they make to locate them. The archives should become owner of the physical material of these films as well as of the rights to exploit them. By trying to exploit them - which isn't easy, it never concerns the hits of the century - the archives can maybe generate some extra preservation budget. They would always have to have a budget in escrow to be able to pay a rightful claimant that would appear unexpectedly.
- Ad 7 - Especially film is a medium that from the beginning has been international by nature. Thus in all nations foreign film has contributed to the cinema-culture and the cultural climate in general at least as much, but often even more than the national filmproduction. Apart from this, it also has as a result that the materials of a title can have landed in any archive in or outside the production country. For both reasons it is of vital importance that there can be a free exchange of film between archives, for preservation purposes, collecting purposes or screening purposes.
- Ad 8 - For research purposes the archives need to be able to use all media, including the digital ones, to transmit (image)information to colleague archives all over the world. This information can only be used by the receiving archive on it's own premises, for individual research.
- Ad 9 - For educational activities and information purposes the archives sometimes need to be able to use excerpts of films outside the own premises without authorisation. Naturally these excerpts shouldn't exceed an agreed upon limit in duration. In many countries Copyright Law already makes an exception for quotation for certain purposes, that maybe could be extended to the moving images for archival purposes.
- Ad 10- Preservations are carried out with public money or donations. If a rightsowner wants access to preservationmaterial in order to be able to commercially exploit, it is no more than fair that he should contribute to the costs of the preservationwork. The re-exploitation can vary from a one time use for for instance television, to a full rerelease for theater and television and/or for sales video. The height of the refunding of preservationcosts should be related to the kind of exploitation.

POSSIBLE ELEMENTS OF A CODE OF ETHICS THAT CAME OUT OF THE DISCUSSIONS

moral:

- respect the rights of copyright owners, avoid harming their interests in any way
- respect the terms of collective agreements with producers and other rightsowners
- respect the limits of the archival freedom as they will be defined
- respect the moral rights of creators in own use and in case of use by other parties
- no piracy
- respect the terms of bilateral contracts with donors and depositors
- respect the legal obligations of institutions one deals with
- respect the non-profit principle; revenues should be used for archival purposes only.
- keep financial thresholds for public screenings as low as possible.

archival:

- obligation to preserve
- preservation precedes over all other activities
- all films should be preserved in principle
- clear priorities in case of insufficient financial means (see 1977 USA document)
- be up to date with developments in preservation
- preserve the movie-experience
- encourage and facilitate serious research; give researchers access to preserved nitrate
- protect the archive material (as opposed to viewing copies) by severe limitation of use by the archive itself and no use by other parties.
- best storageconditions
- no use whatsoever of unique/unpreserved material
- preservation from best surviving materials
- check for materials elsewhere before preservation
- keep original materials after copying

If we have to define the limits of our freedom we should also think of questions like:

- what period has to be elapsed after release before the archival freedom to screen without authorisation can be applied
- what are the "premises of the archive"
- what exactly are archival activities (preservation, cataloguing, screening on own premises, educational programs, information, research for instance) that we want freedom for and what are activities that some archives undertake, but that not are specifically archival (production for instance) for which we cannot claim that freedom, even if we do use the revenues for archival purposes
- which institutions do we consider the archives that the freedom will apply for, by name or by profile
- the conditions under which rightsowners can have access to preservationmaterials



APRIL 17TH MORNING
GUEST-SPEAKERS AND SHORT PLENARY DISCUSSIONS

IV LEGAL ISSUES FACING FILM ARCHIVES
Introduction of legal issues by Tony Greenman

When material is deposited with or promised to a film archive, the legal questions that the archivist may ask himself or herself can generally be summarized as follows: what am I getting? what can I do with it? what can't I do with it? what must I do with it? what happens if the film is lost or damaged? or if it transpires that the donor didn't really own the material? or if he wants it back?

These questions raise legal issues arising in relation to three main categories of rights:

- the rights of the archive and of the depositor in the material deposited;
- the rights of the archive and of the original authors, or their assignees, in relation to the work contained in the deposited material;
- the rights of other parties in connection with the film.

1. The rights of the archive and of the depositor in the material deposited

The rights in this category will generally be determined by the form of deposit.

- An outright purchase transfers to the archive full ownership and control over the material.
- The same should be true of a bequest or a gift, once completed. However, until such time, the donor may change his mind. Furthermore, he may make the gift or bequest conditional.
- In the case of a conditional gift or bequest, or when the material is merely on loan to the archive, the contract between the parties, or the will, controls the rights.

Contract laws vary from country to country, but in general a contract may be either written or oral, express or implied. In order to achieve the greatest possible degree of certainty, express written contracts are preferable.

The issues to be addressed in any contract are the nature of the deposit and the materials included, the terms of deposit, particularly rights of access and use of the materials of the depositor and of others, the rights of the depositor to terminate the loan, the duties of the archive in regard to maintenance and preservation of the material and its rights to compensation.

In the absence of a contract, general principles of law such as those of quasi-contract and unjust enrichment will apply. In certain jurisdictions, an archive which incurs expenses in order to preserve a film that would otherwise suffer irreparable harm will be entitled to reimbursement under these theories. However, this rule does not apply in all countries, and in all instances.

A mere promise will normally be unenforceable. However, if the archive has somehow relied thereon and changed its position based on such reliance, the promisor may be estopped from reneging on his promise.

2. The rights of the archive and of the original authors, or their assignees, in relation to the work contained in the deposited material

Rights in the cinematographic or other audiovisual work are controlled mainly by the law of copyright. Since the archive will rarely own the copyright, it is essential to understand the most fundamental principles of this law, first, so as to know which forms of exploitation require a license; second, in order to be aware of those acts which are permitted.

Copyright is akin to, but not exactly the same as, ownership of the work. Copyright exists in the work itself and not in the physical embodiment of that work, i.e. the reel of film. It protects the original expressions contained therein.

Although recognized across most of the globe, over the years two quite distinct systems of copyright law evolved.

- The Anglo-American system sought to encourage original expressions for the benefit of society as a whole. This entrepreneurial spirit led to the recognition of the rights of entities to own copyrights.
- On the other hand, copyright in the Continental European system was born out of a recognition that the author of a creative work has a fundamental right to control the exploitation thereof, and to enjoy its fruits. This right is known as the *droit d'auteur*.

International conventions, most importantly the Berne Convention and the Universal Copyright Convention, have led to a certain degree of harmonization in international copyright law and to mutual recognition among member states of copyrights born within other member states. Similarly, EEC Directives on the subject are designed to bring the differing laws of member states into line. Nonetheless, variances and differences still exist on fundamental matters such as initial ownership, duration of rights and permitted acts. Thus, although the main principles of copyright law today are substantially similar in most countries, it is still impossible to speak of copyright law, as such, in fully international terms.

The most fundamental principle of copyright law is that copyright protects original expressions as opposed to unprotected ideas. The Anglo-American system requires nothing more than that the work was not copied, while European countries usually require some sort of creativity to afford protection to a work. However, even this requirement is minimal. Thus almost every original audiovisual work, including news reports, will pass the threshold of copyright protection. The US requirement that the work be fixed in a tangible medium - a requirement that does not exist in most of Europe - will also be fulfilled in these works.

Copyright vests automatically with the creation of the work, without any need for registration or notice. The US, which refrained from signing the Berne Convention for many years because of its adherence to these dual requirements, abolished them in the 1976 Copyright Act, allowing it to finally join the Union.

Copyright initially subsists in the author of the work, but may be transferred. In Continental Europe and much of Eastern Europe, the principal director of a motion picture is recognized as its author, usually along with the story writer and screenwriter and the composer of the score, if specially composed for the film. However, it is common for copyright laws in these countries to create a presumption that the exclusive rights to exploitation of the film have been transferred to the producer, usually subject to a duty to pay royalties to the above authors. In contrast, in the US, under the "work made for hire" doctrine, initial copyright will normally subsist in the person or business entity that commissioned the film - most often, the studio or independent producer.

In the EEC, under a recently adopted Council Directive, copyright in a motion picture is to last for the life of the principal director, or the last to die of the several initial authors, and another 70 years. In the US, copyright in a film which was created as a work made for hire lasts 75 years from publication, or 100 years from creation, whichever is longest. In many Eastern European States, the rule is life of the author plus 50 years. Central and South American countries, as well as those of Asia and Africa have differing periods of protection, ranging from 10 years to the life of the author and a further 99 years.

At the end of the term of copyright, a work enters the public domain and may be freely exploited by anyone.

Copyright is transferable, either in whole or in part, on a worldwide basis or for a particular territory. The custom to grant rights to films by different territory and for different media, and for limited periods of time, makes it extremely difficult to check chains of title. This difficulty is compounded when an author has a right to terminate a copyright assignment. Such a right exists, for example, in the US, some 35 years after assignment. A further complication in tracing the chain of title arises when a previously expired copyright becomes subject to a restoration provision, such as under recently enacted legislation in the UK, implementing the EEC Council Directive on Harmonization of the Term of Protection.

Copyright confers on the owner certain exclusive rights to exploit the work by way of reproduction, adaptation, distribution, public performance and display. Any act of exploitation falling into one of these categories by anyone other than the copyright owner, requires a license, unless justified by an exception to the rule, such as the fair use doctrine which is discussed below.

A separate category of rights, known as moral rights, exist and operate independently of the fiscal rights. They protect the author's right to attribution and to the integrity of his work through the prevention of distortions and mutilation.

These rights, which are of European origin, are generally personal and inalienable. They continue to vest in the original author even after transfer of his fiscal rights.

It is safe to say that moral rights have now also penetrated the Anglo-American system. The UK has specifically adopted moral rights, vesting them, in the case of motion pictures, in the principal director. In The US, although the Berne Convention Implementation Act adopted no measures to protect moral rights, existing case law does offer some measure of protection of the rights of attribution and of integrity, although under different theories of law. However, the position of the artist vis-a-vis the producer is still stronger in Europe than it is in America.

It can be seen from the above that not owning the copyright or a license thereunder greatly restricts an archive's permitted activities with any deposited material. A screening of a film to any forum other than a family or its acquaintances is a public performance. This is true even if the screening is to a limited forum such as archive patrons only, and even if no admission fee is charged.

Notwithstanding any of the above, the doctrine of "fair use", as well as other provisions of copyright law, applying especially to libraries and archives, operate to effectively permit certain acts that would otherwise be considered infringement.

Most countries permit the fair use of copyrighted material for the purposes of criticism, comment, parody, news reporting and - most importantly for archives - education and research. The type and degree of use which is considered fair varies from country to country. In the United States, where principles of freedom of expression are embedded in the First Amendment, the courts have generally been liberal in applying the doctrine, especially where the use is not for commercial gain.

The fair use doctrine will operate in most cases to permit archives to give access to students and researchers to view films from the archive's collections, on an individual basis, for scholarly purposes. It will also permit the copying by them, or for them, of reasonable portions of other materials in the archive's collection, such as shooting scripts and stills.

Under the fair use doctrine, archives may make available materials for use in reporting current events. However, this privilege does not apply to the use of historical news materials in a context other than reporting of current events.

In many countries, copying is only permitted for self-study, while US law allows teachers, within the bounds of fair use, to make multiple copies of copyrighted materials for classroom use. This could apply to courses of instruction put on by archives. UK teachers, on the other hand, may not make multiple photocopies, but they may copy portions of a copyrighted work onto a chalkboard. However, instructors in film making may make a copy of a film for purposes of instruction.

Modern legislation in many countries allows libraries and archives to make single copies of materials for preservation purposes and to replace copies of those which have been lost or destroyed. To hold this privilege, the library or archive must usually be open or accessible to the general public. Under certain conditions, one library or archive may make a copy for another library or archive.

3. The rights of Third parties

Most countries recognize that celebrities, including actors and directors, have rights in their own image which exist independently of the copyright in the film. These rights, such as performers rights and rights of publicity, may affect promotional campaigns of archives. In general, there is nothing wrong in quoting the name of a director or actor in a particular film, however it is impermissible to use a name or image in other promotional material. A further third party rights issue relates to the dubious history of some films that have ended up in archives, and the rights of the original owner in the event that he or she was not the depositor.

In general, it will be rare indeed that an archive will, by accepting material into its collection, become an accessory to a crime.

Most films, even those which are held in breach of contract, will not actually be "stolen property". Furthermore, the archive will lack a criminal intent. If, however, the original owner demands the material, a struggle may develop over ownership of the film. In such an instance, the archive may will lose out, unless it actually purchased the film, in good faith. It should, however, be compensated for any expenses incurred in preserving the film.

V QUESTIONS & REMARKS FROM THE AUDIENCE

Roger Smither

I come from an institution bedevilled by a number of ancient acquisitions where the relevant paperwork only refers to "deposit", "transfer" and most problematic of all "permanent loan" and I wonder if there is any legal interpretation for these terms, or has that to be done on a case by case basis?

And a second question is, if I'm writing a book I'm allowed to quote a certain limited piece of text. Now if I am making a television program about a filmmaker does the same right to quote also extend to the use of filmfragments?

Tony Greenman

The terminology mentioned doesn't fit any proper legal categories. This is a big problem in many fields, not only in yours.

A "permanent loan" is an anomaly. If somebody has used the term loan this implies that he can get his material back at some time, but then what's the meaning of "permanent".

So you'd have to see what the intention was: was it to be more permanent than it was a loan? I guess that the longer the period that has elapsed since the acquisition, and the more rights you were given at the time - for instance to copy, to exhibit etc. - the more the "permanent" prevails.

The term "deposit" also implies something other than a full transfer, and when parties say "deposit" the question is: do they mean "loan"? When you can do things with the films, make them available for research etc, then it's actually not a deposit, but a loan and it will probably be treated under the same rules, that's to say if the parties didn't address the issue of when the deposit can be terminated and what access the depositor can have to the material, then the general rule of reasonable notice would apply.

Now "transfer" sounds more like a gift or a sale. The law recognises terms like "loan", "sale" or "gift" and the question is: is it revokable or irrevokable. But you have to interpret it case by case.

Concerning the quoting of text, the "fair use" rule, that differs from country to country, says that you can use small portions of peoples work (small meaning in legal terms "non-substantial" as opposed to "substantial") under certain circumstances. It depends on what your purpose is. In general - again with differences per country - the "fair use" rule applies for purposes like education, news reporting, current news, parody or criticism. If, with your program, you fall in such a category, I suppose the rule would also apply to quoting films, but only in countries that have the "fair use" exemption.

Clyde Jeavons

In the deposit-contract we [BFI/NFTA] sign with depositors we now have a clause that says: in the extreme case of the withdrawal of a deposit, we are allowed time and have the right to copy the material first.

As for the quoting, this worries me a bit. I doubt whether such quoting by archives, legitimate or not, would please the rights owners. It is a delicate issue. We are operating in a goodwill system and quoting without permission might in the end lead to cutting off your social supplies.

Tony Greenman

The "fair use" can only be made in the framework of the permitted use. Normally this would be criticism, in this case for instance: is it a good or a bad movie. Normally what filmarchives are doing wouldn't fall in the category of current news. Television goes far beyond the the scope of an educational exemption. So it would boil down to the question: is it criticism or not.

The pragmatic points that you touched upon might be far more important than the legal arguments that we can put up to tell whether it is permitted or not.

Eva Orbanz

Does the archive need the permission of the copyright owners to restore a film?

Tony Greenman

If your country has one of those library/archive exemption rules you don't need that permission. You then are allowed to make one copy for preservation purposes only, that has to stay in the archive and can't be used for public screening or distribution.

The U.S.A., Japan and other countries have that exemptions. In other countries, with less up-to-date laws, copying for preservation is only allowed for literary or dramatic works but explicitly not for cinematografic works and then of course you do need permission.

So it depends on the country you work in.

Unidentified voice

Ma question concerne la possibilité de citer un extrait d'une oeuvre cinématographique sans l'autorisation des titulaires des droits. Vous avez répondu que dans le cadre du "fair use" c'est possible. Mais dans les pays européens, notamment en France, c'est strictement impossible, la notion de "fair use" n'existe pas. Le droit de courtes citations n'existe pas en matières audiovisuelles et cinématographiques.

Tony Greenman

I accept what you're saying. Like I said copyright law differs from country to country. Basicly there are two issues. One is whether the "fair use" exemption exists in a country - if it doesn't you obviously can't make use of it - and the second is: does your "fair use" exceed what is "fair".



VI THE PRODUCERS POINT OF VIEW Intervention by Nathalie Piaskowski

"CONCEPTION DES PRODUCTEURS QUANT AU RÔLE DES CINÉMATÈQUES"

Avant toute chose, je tenais à remercier la FIAF ainsi que le personnel organisateur de ce symposium de m'avoir invitée, pour exprimer la conception des producteurs quant au rôle et au travail effectué par les cinémathèques, ou devrais-je dire plutôt de manière plus générique les organismes d'archives. La FIAPF, et je tiens à souligner cette homonymie qui déjà devrait nous rapprocher puisque seul un P nous sépare, représente des associations nationales de producteurs de films à l'échelle mondiale. Nous comptons en effet 35 associations issues de 27 pays (dont 12 pays membres de l'Union Européenne), dont nous représentons les intérêts juridiques et économiques devant les instances européennes et internationales.

Je suis particulièrement heureuse d'être parmi vous aujourd'hui car c'est pour moi l'occasion d'éclaircir ce qui m'est toujours apparu comme un malentendu. Les relations entre producteurs et organismes d'archives se sont toujours déroulées dans un climat passionnel. Les intérêts des uns comme des autres ont toujours été considérés comme radicalement différents dans le meilleur des cas et souvent comme inconciliables.

Avant d'exposer la conception des producteurs quant au rôle des cinémathèques, je souhaiterais régler ce malentendu qui aujourd'hui devrait être dépassé, permettant à nos relations de passer à un stade de maturité, et de laisser place après une période de conflit et de déchirements à la stabilité et l'apaisement.

L'opposition un peu caricaturale se présente comme suit : les organismes d'archives contre l'industrie, les archives comme incarnation de la culture et les producteurs comme de vils marchands capitalistes et mercantiles.

Quelles sont les causes de ces dissensions?

- 1° Le cinéma au cours de ses trois grandes périodes d'évolution a subi de grandes pertes causées par des vagues de destructions collectives de pellicule du fait de producteurs parfois peu responsables. Ces vagues de destructions, on les attribue à l'abandon des primitifs, puis au passage du muet au parlant, et enfin à l'interdiction du nitrate. Elles ont eu pour effet de susciter une certaine méfiance des cinémathèques à l'égard des producteurs. De telles destructions sont impensables aujourd'hui.
- 2° Ce blocage a perduré parce qu'il trouvait sa justification dans cette vieille opposition de deux conceptions du cinéma, deux conceptions qui pourtant devraient se rejoindre. Les organismes d'archives considèrent le cinéma comme un art ; les producteurs le tiendraient uniquement pour un produit marchand. Les cinémathèques en arrivent logiquement à la conclusion que cet art a été perverti par son industrialisation et par une approche mercantiliste dont les producteurs seraient les instigateurs. Il me semble devoir nuancer ce point de vue.

Il ne faut pas oublier que ce qui fait la particularité du cinéma c'est précisément son caractère hybride. Le cinéma ce sont des oeuvres d'art à part entière mais c'est précisément parce que ces oeuvres d'art sont aussi des produits susceptibles d'être commercialisés que la création peut se poursuivre, grâce à un apport continu de capitaux. Le cinéma ne peut échapper à une analyse économique et une approche industrielle de ses marchés de commercialisation sous peine de disparaître.

Ce n'est pas parce que ce sont les producteurs qui, vecteurs de cette approche industrielle, sont chargés de cette commercialisation, qu'ils sont dénués de sens artistique et ne considèrent le cinéma que comme un produit. Ils le considèrent aussi comme un produit. Mais la conscience du film comme œuvre d'art est très présente chez la majorité d'entre eux.

Les producteurs quoique "marchands", n'en sont pas moins amoureux du cinéma.

- 3° Les relations actuelles entre producteurs et cinémathèques reposent sur des conflits passés et dépassés, reposant notamment sur le souvenir de ces vagues de destructions, et surtout sur une grande incompréhension mutuelle. Ceci peut peut-être s'expliquer par la constitution relativement récente des cinémathèques. La première cinémathèque a été créée à Stockholm en 1933. Et celles-ci n'ont pris leur visage adulte que dans les années 60. Elles se sont cherchées longtemps notamment quant aux buts qu'elles devaient poursuivre. Longtemps en effet, les objectifs des cinémathèques n'ont consisté qu'en la propagation d'un patrimoine portant sur des documents à caractère plus sociologique et utilitaire que divertissant. La règle était davantage celle de la sélection des œuvres qu'une collecte systématique de la production cinématographique. Il n'y a finalement pas très longtemps qu'une politique plus uniforme et plus stable s'est dessinée et que les cinémathèques ont eu pour but premier la conservation du patrimoine ainsi que le précisent les statuts de la FIAF. Ces difficultés à trouver leur véritable identité et raison d'être, n'ont pas facilité les relations avec les producteurs qui de leur côté prenaient peu à peu conscience de l'importance de leur production et de la nécessité de la préserver.

- 4° Du côté des producteurs, il y a dans le passé et aujourd'hui encore, mais dans une moindre mesure, une certaine méfiance à l'égard des cinémathèques qui au début fonctionnaient dans un vide juridique total avec pour unique but d'agrandir, d'étoffer des collections naissantes d'œuvres cinématographiques. Les producteurs ont toujours vécu dans la préoccupation que leurs droits ne soient pas respectés et que leurs œuvres soient exploitées sans leur autorisation.

Ces inquiétudes ont pu sembler parfois excessives mais les droits que le producteur détient sur un film constituent son seul actif. Souvent ces préventions à l'égard des activités des cinémathèques ont pu s'apparenter à de la paranoïa. Mais comme l'a dit Woody Allen "ce n'est pas parce qu'on est paranoïaque que l'on n'a pas d'ennemis".

Le problème de la piraterie est un véritable fléau non pas seulement pour les producteurs mais pour tous les autres ayants droit, dans la mesure où il représente un manque à gagner important. Comme tel il rend l'amortissement des œuvres hypothétique et a pour conséquence à long terme de menacer l'existence même du cinéma.

- 5° La multiplication des organismes d'archives opérant sans contrôle ni cadre légal ont pu susciter par le passé une certaine méfiance souvent mal comprise et mal perçue par les archives. La FIAF a joué un rôle important en fédérant progressivement la majorité des organismes d'archives, apportant ainsi un gage de confiance et d'honnêteté à tous ces organismes.

Et aujourd'hui le cadre d'exercice de leur activité par les cinémathèques a changé. De nombreuses législations se sont mises en place donnant un cadre juridique aux cinémathèques, susceptible de rassurer les ayants droit. La FIAF elle-même a défini des critères précis d'adhésion, comme l'absence de but commercial, donnant par là même un véritable statut aux organismes d'archives. Par ailleurs au niveau européen la recommandation de l'UNESCO a posé en 1980 un certain nombre d'orientations quant à l'organisation des cinémathèques et leurs relations avec les ayants droit. Ce texte a sans aucun doute constitué un progrès.

Par ailleurs une Convention du Conseil de l'Europe portant sur la protection du patrimoine européen est maintenant en phase finale après avoir fait une large place aux concertations entre producteurs et organismes d'archives. Cette convention ira plus loin que la recommandation de l'Unesco, quant à la forme puisqu'il ne s'agit plus d'une recommandation mais d'une convention et quant au fond puisque ce texte essaie de donner un cadre encore plus précis aux relations entre cinémathèques et producteurs.

L'époque où il était reproché aux producteurs, de pas reconnaître, ou plus simplement de n'avoir pas conscience de la nécessité et de l'importance des travaux des cinémathèques et l'époque où le cinéma avant tout divertissement n'était pas considéré comme véritable œuvre d'art. Cette époque là est donc révolue. Les conflits qui ont longtemps perturbé ces relations doivent appartenir au passé et laisser la place à des relations plus constructives. Néanmoins avant d'aborder le contenu de ces nouvelles relations que nous pourrions aborder ensemble, je souhaiterais faire état des questions que les producteurs considèrent comme essentielles en matière de conservation et d'accessibilité du patrimoine.

1 LE FONCTIONNEMENT DES CINÉMATHÈQUES VU PAR LES PRODUCTEURS

Il existe 4 préoccupations :

- a. Equilibre des intérêts en présence et respect de la propriété intellectuelle.
- b. Clarification des fonctions des organismes d'archives.
- c. Les utilisations des copies en dehors des locaux des cinémathèques.
- d. Problème de l'accessibilité de certaines oeuvres au public.

a. Equilibre des intérêts en présence et respect de la propriété intellectuelle

Toute appréhension du rôle des organismes d'archives et de la contribution des ayants droit doit reposer sur un système équilibré tenant compte à la fois de la nécessité de préserver et sauvegarder le patrimoine cinématographique et des intérêts et droits existants des ayants droit. Les droits de ceux-ci sont notamment protégés à l'échelle mondiale par des textes internationaux tels que la Convention Universelle du droit d'auteur, la Convention de Berne et la Convention de Rome. Ces droits protégés ne peuvent être réduits voire abolis dès lors qu'une œuvre franchit le seuil d'une cinémathèque.

Aucun ayant droit ne le nie : les cinémathèques doivent bénéficier d'un cadre juridique suffisant pour effectuer leurs travaux de conservation et de restauration indispensable à la survie des oeuvres et plus largement du patrimoine. Mais ce cadre juridique ne saurait et [ne nécessite pas] d'être défini par l'affaiblissement de la propriété intellectuelle.

Il ne serait pas acceptable, et je pense qu'il n'y a pas d'ambiguïté sur ce point, d'agir comme si l'œuvre, dès lors que la conservation du patrimoine est en jeu, tombait dans le domaine public, une fois son exploitation commerciale terminée. D'abord parce qu'une

œuvre ne devrait jamais tomber dans le domaine public, étant une création de l'esprit et en tant que telle étant attaché à la personne à l'initiative de sa création, ensuite parce qu'aujourd'hui, moins que jamais, on ne peut augurer de la durée d'exploitation d'une œuvre [en raison de la multiplicité des moyens d'exploitation résultant des techniques numériques et multimédia].

Une œuvre peut connaître une nouvelle vie des années après ce qu'on avait pu considérer comme la fin de son exploitation commerciale. C'est le cas notamment d'œuvres qui au moment de leur sortie en salles étaient peu adaptées aux goûts du public de leur époque et ont su aujourd'hui rencontrer leur public.

Cet élément a d'ailleurs pu être observé par les cinémathèques elles-mêmes lorsqu'elles se sont posées, dans leur jeune âge, la question de la sélection des œuvres pour en arriver à la conclusion que la notion de "classique du cinéma" était une notion extrêmement variable d'une époque à l'autre et qu'il fallait donc accueillir toutes les œuvres dans une cinémathèque. C'est pour la même raison qu'on ne peut déterminer avec précision la durée d'exploitation d'une œuvre et donc son terme.

Dans le même esprit, il ne peut davantage y avoir des licences légales instaurées au profit des cinémathèques. Il n'est pas nécessaire de rogner sur la propriété intellectuelle des ayants droit pour permettre aux cinémathèques d'effectuer leur travail dans le plein respect des équilibres existants et en toute équité.

b. Clarification des fonctions des organismes d'archives

Les organismes d'archives remplissent deux fonctions totalement différentes dans leurs objectifs et dans leur nature : le recueil du dépôt légal et celui du dépôt volontaire constituant la collection de la cinémathèque et destinée à être diffusée auprès du public. Les producteurs ont toujours insisté sur l'indispensable distinction de ces deux fonctions dans tout texte réglementaire qu'il soit national, européen ou international.

LE DÉPÔT LÉGAL

Le dépôt légal est un dépôt de référence, un dépôt de sécurité, destiné à assurer qu'une œuvre de l'esprit ne disparaîtra pas et sera conservée pour les générations à venir. Le dépôt légal doit alors être considéré comme un coffre fort. Par conséquent une copie déposée dans ce cadre n'est pas destinée a priori à être utilisée sauf en ultime recours au cas où des exemplaires normaux de l'œuvre ne pourraient plus être retrouvées. En tout état de cause, elle ne peut servir qu'à faire une copie si l'organisme d'archives n'en dispose pas d'autre pour ses projections dans ses locaux.

Conçu comme tel, le dépôt légal est tout à fait acceptable aux yeux des producteurs qui considèrent comme un devoir de conserver un exemplaire de référence afin d'éviter que notre patrimoine ne disparaisse.

Conçu comme tel, le dépôt légal ne peut pas être multiple et ne se justifie qu'une fois dans le pays d'origine de l'œuvre, c'est à dire qu'il ne peut porter que sur la production nationale. L'on sait que l'une des revendications traditionnelles des archives est de multiplier le nombre de copies déposées afin de diminuer les risques de disparition totale des œuvres. Néanmoins il semble qu'une telle exigence confonde les deux fonctions d'une cinémathèque. Le dépôt multiple ne peut se faire qu'à travers le dépôt volontaire auquel les producteurs procèdent volontiers dès lors qu'une relation de confiance s'est installée avec l'organisme d'archives, ce qui tend à se généraliser aujourd'hui ainsi que je le soulignais tout à l'heure.

De plus, je pense qu'il faut faire preuve de réalisme en matière de dépôt légal. Nous en sommes tous conscient, archives et producteurs, le coût des moyens techniques nécessaires à la conservation à long terme des copies de films est très élevé. On ne peut raisonnablement demander à un pays d'étendre le dépôt légal aux oeuvres étrangères distribuées alors que pour bon nombre d'entre eux, la conservation d'une copie de sûreté pour chaque oeuvre nationale représente déjà une charge financière très difficile à assumer, même pour ceux possédant un service d'archives déjà bien doté financièrement. Si chaque pays instaure le dépôt légal pour sa production nationale, la totalité du patrimoine peut être sauvée.

La production de certains pays, comme les pays d'Afrique ne disposant pas d'une législation en la matière, peut néanmoins être conservée par le biais de dépôt volontaire. A défaut l'effort doit être porté sur l'introduction de dispositions sur le dépôt légal de la production nationale plutôt que sur l'extension du champ d'application du dépôt légal.

LE DÉPÔT VOLONTAIRE

Le dépôt volontaire couvre quant à lui tout ce qui ne peut entrer dans le champ d'application du dépôt légal et c'est par ce moyen que les cinémathèques peuvent se constituer leurs collections. Dans la mesure où tout se déroule sur une base volontariste, généralement par contrat entre l'organisme d'archives et l'ayant droit propriétaire de la copie, souvent le producteur ou le distributeur, il peut être prévu si l'ayant droit en est d'accord, que les versions doublées et sous-titrées seront déposées et dans plusieurs formats si les parties en sont convenues ainsi. Ce dépôt a généralement lieu après l'exploitation commerciale normale de l'oeuvre.

Le rôle des organismes d'archives recueillant le dépôt volontaire doit à nos yeux être d'une nature complètement différente, même si les fonctions de dépôt légal et de dépôt volontaire peuvent être exercées par un seul et même organisme. Il est de permettre la recherche, l'étude de l'histoire du cinéma ainsi que l'accès du public à cette histoire du cinéma en présentant des films dans un cadre "non commercial", c'est à dire ne conduisant pas à une exploitation commerciale déguisée de l'oeuvre.

De nombreuses sociétés de distribution ou de production ont conclu des accords permanents avec certaines cinémathèques, aux termes desquels elles déposent systématiquement une copie de chaque film qu'elles produisent ou distribuent. Ces contrats fixent d'un commun accord les conditions d'utilisation de la (ou des) copie(s) déposée(s).

Le dépôt est effectué à titre fiduciaire c'est à dire que l'ayant droit ne perd pas la propriété de la copie. Il est informé de l'utilisation qui en est faite et sa reproduction en particulier est soumise à son autorisation ainsi que toute utilisation en dehors des locaux de l'organisme d'archives dépositaire.

Il ne serait pas acceptable que ce dépôt fiduciaire, qui se situe par définition hors du champ du dépôt légal, soit lui aussi une obligation légale. Ce serait contraire à tous les principes de propriété intellectuelle et en particulier à la Convention de Berne qui n'autorise d'exception en matière de droits exclusifs qu'en ce qui concerne le droit de reproduction "pourvu qu'une telle reproduction ne porte pas atteinte à l'exploitation normale de l'oeuvre, ni ne cause un préjudice injustifié aux intérêts légitimes de l'auteur". Les exceptions au droit de reproduction sont, on le voit, très limitées par la convention de Berne, ce qui concrètement ne permet aux organismes d'archives de tirer une nouvelle copie qu'en cas d'urgence (conservation). L'absence d'autres exceptions aux droits de propriété intellectuelle interdit donc l'introduction dans les législations nationales de licences légales en matière de représentation publique.

De nombreuses cinémathèques fonctionnent ainsi depuis longtemps de façon tout à fait satisfaisante : elles ont acquis la confiance des professionnels qui n'ont aucune réticence à travailler avec elles. La seule chose que souhaitent savoir les professionnels c'est quelle utilisation ils sera fait de leurs oeuvres. Cette information est d'autant plus importante qu'il faut éviter qu'une cinémathèque ait prévu d'organiser une projection publique alors que le producteur ou le distributeur a lui-même projeté de reprendre l'exploitation commerciale de l'œuvre. Dans ce cas l'ayant droit aura priorité sur l'organisme d'archives qui devra attendre un peu avant de procéder à sa projection.

Les dépôts volontaires interviennent généralement en très grand nombre dans la mesure où les ayants droit, si l'on excepte quelques sociétés, ne sont pas outillé de manière à assurer le stockage et la conservation de leurs oeuvres. Dans ce cas les cinémathèques rendent à ceux-ci un authentique service. C'est la raison pour laquelle, lorsqu'un ayant droit reprend, aux fins de nouvelle exploitation commerciale, une copie à la cinémathèque dépositaire, qui l'a restaurée, il est concevable que celle-ci perçoive une rémunération en fonction des moyens qu'elle aura déployée pour sauver la copie. Cette rémunération devrait être fixée par contrat.

c. Les utilisations des copies en dehors des locaux des cinémathèques

On ne parlera ici que des copies ayant fait l'objet d'un dépôt volontaire, puisque les copies de dépôt légal n'ont qu'un objectif : assurer la pérennité de l'œuvre et au plus faire l'objet de consultations individuelles à des fins de recherche. Les copies déposées volontairement ont pour but, on l'a dit, de diffuser la culture cinématographiques auprès des générations présentes et futures. La cinémathèque peut donc organiser dans l'enceinte de ses locaux des projections, sans demander systématiquement l'autorisation des ayants droit.

En revanche le problème est beaucoup plus délicat, lorsque la cinémathèque participe à des manifestations ou organise des projections publiques, en dehors de ses locaux, que ce soit sur son territoire national ou à l'étranger, ou encore procède à des échanges avec d'autres cinémathèques par des prêts de films, temporaires ou illimités, lorsque ces cinémathèques ont une collection de films plus pauvre.

L'effort est louable et l'on comprend très bien l'objet de l'opération, qui est de permettre à des pays en voie de développement ou à de "petites archives" d'accéder à la culture cinématographique mondiale.

Néanmoins si ces prêts, si ces manifestations sont possibles, ils ne peuvent l'être sans l'autorisation des ayants droit, car il s'agit là d'utilisations qui dépassent le simple cadre du dépôt volontaire.

Il n'est pas dans l'idée des producteurs de faire obstacle à ces utilisations dont encore une fois le but est estimable mais seulement d'être informés de l'utilisation de leurs oeuvres. Ils souhaitent par ailleurs conserver un certain contrôle, dont l'objet n'est pas d'être pesant ou contraignant, sur des copies dont ils sont propriétaires à la fois du support physique et des droits d'exploitation.

Il est donc important que l'ayant droit puisse donner son autorisation écrite avant la réalisation de telles utilisations, ce qu'il fera dans la plupart des cas si la cinémathèque dépositaire lui apporte toutes les garanties de sécurité sur ces utilisations de son œuvre.

d. Problème de l'accessibilité de certaines oeuvres au public

Il est des problèmes juridiques plus ponctuels auxquels il peut paraître difficile d'apporter une réponse et qui ont généré une frustration intense chez les cinémathèques et un certain désarroi chez les professionnels.

L'un de ces problèmes est le conflit qui oppose la nécessaire conservation du patrimoine au droit moral de l'ayant droit. Ces cas sont marginaux, assez exceptionnels mais nous aimerions démontrer qu'il s'agit en fait de faux problème.

La situation est celle d'un auteur, mécontent de son œuvre, qui décide de la détruire ou qui sans la détruire interdit son exploitation future. Le cas s'est partiellement produit avec Stanley Kubrick qui a détruit le négatif et toutes les copies de son film FEAR AND DESIRE ou du moins le croyait-il puisqu'une copie a été retrouvée et récupérée par une cinémathèque. La question qui peut se poser d'un point de vue juridique est de savoir si la cinémathèque avait le droit de récupérer ce film, que l'ayant droit, en exerçant son droit moral, voulait faire disparaître définitivement ou dont il voulait interdire la communication au public.

En réalité la question ne se pose que pour les oeuvres antérieures aux législations et réglementations imposant le dépôt légal puisque dans ce dernier cas la copie devient la propriété de l'Etat et l'ayant droit ne devrait pas pouvoir le récupérer pour la détruire. Dans la situation d'oeuvres n'ayant pas fait l'objet d'un dépôt légal, le droit moral de l'auteur ne peut empêcher la cinémathèque de détenir une copie pas plus que la conservation de celle-ci, si elle a été déposée par le producteur ou le distributeur. Mais au regard du droit applicable il devrait pouvoir empêcher celle-ci, au nom de son droit moral, de procéder à des projections dans ses locaux. La consultation individuelle à des fins scientifiques ou de recherche devrait pouvoir être autorisée dans les limites très strictes qui sont les siennes.

Un autre problème beaucoup moins marginal est celui des ayants droit inconnus. La situation est celle d'une cinémathèque recherchant les ayants droit pour procéder à certaines utilisations de l'œuvre. Sur un plan purement juridique l'utilisation de ces oeuvres sans l'autorisation des ayants droit est illégale.

Néanmoins il est regrettable qu'une partie du patrimoine demeure inaccessible au public à cause de cet empêchement. L'œuvre reste bloquée. Il existe plusieurs solutions dont aucune n'est complètement satisfaisante.

- La première solution consiste, dès lors qu'une cinémathèque a recherché les ayants droit en vain, à recourir aux organismes de gestion habilités à représenter les ayants droit qui auront la possibilité d'accorder les autorisations nécessaires et de percevoir les rémunérations, le cas échéant. Cette solution ne semble pas une nécessité dans la mesure où les ayants droit étant par définition inconnus, cette gestion n'aurait d'autre but que d'accroître les moyens financiers des services administratifs de ces organismes.
- La deuxième solution de loin la plus satisfaisante aux yeux des producteurs consiste à faire reconnaître par un tribunal l'impossibilité de retrouver les ayants droit. Le tribunal décide alors de consigner la somme auprès d'organismes financiers pendant un certain nombre d'années au cas où un ayant droit se manifesterait. Cette solution n'est pas exempte de reproche dans la mesure où elle n'est pas transposable aux pays qui ne disposent pas d'organismes de dépôt ou dont les magistrats n'ont pas le pouvoir d'ordonner une telle consignation.

2. PERSPECTIVES D'UNE FUTURE COOPÉRATION

La FIAPF a établi en 1974 un contrat de dépôt auquel ont souscrit certaines cinémathèques mais qui peut aujourd'hui avoir besoin d'un dépoussiérage, d'une mise à jour. Je présenterai dans un premier temps les grandes lignes de ce contrat pour envisager ensuite ce qui pourrait faire l'objet d'améliorations ou ce qui surtout fait défaut et qui devrait être prévu dans un tel contrat de dépôt.

a. Grandes lignes de l'actuel contrat FIAPF

1. Il s'agit d'un dépôt fiduciaire par l'ayant droit qui conserve donc la propriété de la copie qu'il a déposée. Celle-ci doit lui être remise dans un certain délai après la demande qu'il aura formulée auprès de la cinémathèque.
2. Aux termes de ce contrat, la cinémathèque peut utiliser la copie qui lui a été confiée dans l'enceinte de ses locaux et notamment organiser des projections dans les salles habituellement utilisée par elle, sans demander l'autorisation du producteur.
3. En revanche, pour toute autre utilisation de la copie en dehors de ses locaux, qu'il s'agisse de projections ou de prêts à d'autres cinémathèques ou d'autre organismes pour des manifestations culturelles, la cinémathèque doit obtenir l'autorisation écrite du producteur.
4. Aux termes du contrat, le producteur a accès au matériel déposé pour effectuer de nouvelles copies si l'état du matériel le permet.
5. Le contrat de dépôt réserve par ailleurs les droits des autres ayants droit, le producteur étant invité à cet égard à préciser ses droits.
6. Le contrat propose par ailleurs une solution au problème des ayants droit inconnus. La cinémathèque doit dans un premier temps s'adresser à l'association nationale de producteurs afin de recueillir dans la mesure du possible des informations sur les ayants droit. Dans le cas où l'association ne disposerait pas d'informations, la cinémathèque est alors habilitée à utiliser l'œuvre dans les conditions fixées par le contrat de dépôt. Néanmoins le contrat type ne règle pas la question de la rémunération de l'ayant droit inconnu en cas d'exploitation commerciale de l'œuvre.

Ce contrat présente l'avantage de prendre en compte et de régler même parfois imparfaitement les deux missions de l'archive : la conservation et la mise à disposition du public, dans des conditions bien définies, de sa collection.

Néanmoins ce contrat n'est pas immuable. Il est bien entendu susceptible d'être amélioré et notamment de couvrir des problèmes qui n'y ont pas été abordés. Le seul moyen de voir ces contrats appliqués par tous (ayants droit et archives), c'est de mener une négociation commune des dispositions d'un modèle d'accord cadre, afin qu'un tel accord soit reconnu et accepté et qu'il ouvre une nouvelle ère de relations entre cinémathèques et ayants droit.

b. Tentatives de propositions

Il ne s'agit pas ici d'aborder le fond de propositions mais plutôt de proposer des directions quant aux questions qui pourraient être précisées au sein d'un tel accord cadre. Au cours des réunions de concertation qui ont été organisées par le Conseil de l'Europe, les professionnels des archives et de l'industrie du cinéma ont été invités à exprimer leurs positions sur une annexe dont l'objet est de fixer un certain nombre de principes devant régir les relations des archives avec les ayants droit. Cet exercice s'est révélé très utile dans la mesure où il a permis de s'apercevoir que les positions des deux parties étaient tout à fait conciliables mais nécessitaient de plus amples discussions.

Par ailleurs, le résultat de ces discussions très fructueuses a donné naissance à un projet d'annexe, dont de nombreuses dispositions renvoient à juste raison à la rédaction d'un contrat, la totalité des conditions et modalités d'un dépôt ne pouvant être réglées dans l'annexe d'un texte réglementaire européen. Il appartient en effet aux parties et à elles seules de fixer d'un commun accord les modalités de leur rapport.

C'est la raison pour laquelle un accord cadre pourrait régler ces questions laissées en suspens par l'annexe, comme notamment :

- le statut du matériel nouvellement tiré par la cinémathèque
- les conditions du terme du dépôt

Dans un ordre d'idée quelque peu différent, les archives et les producteurs pourraient examiner ensemble quels moyens sont à leur disposition pour encourager un dépôt volontaire encore plus large des ayants droit. Il s'agirait en fait de renforcer la confiance des ayants droit dans les cinémathèques. Le Conseil de l'Europe avait suggéré que la FIAPF mette sur pied un système d'accréditation des cinémathèques. Ce système est un système très lourd que pour l'instant la FIAPF n'est pas prête à mettre en œuvre. Néanmoins les organismes d'archives pourraient notamment par l'intermédiaire de la FIAF mettre en place une sorte de code de déontologie de nature à susciter la confiance des ayants droit à l'égard de toutes les cinémathèques qui y auraient adhéré.

Je demeure persuadée que nos relations qui se sont déjà considérablement améliorées, chacun arrivant désormais à reconnaître l'interdépendance de nos contributions respectives, les ayants droit alimentant un patrimoine que les archives protègent et font connaître aux générations futures, je reste persuadée que ces relations sont susceptibles d'atteindre la maturité et la sérénité issues de la confiance et de la compréhension mutuelle ainsi que de rapports constructifs.

VII QUESTIONS & REMARKS FROM THE AUDIENCE

Jose Pinto Ribeiro

Est-ce que la FIAPF serait disposée à insérer une clause dans les contrats, du type contrat-cadre pour le Dépôt Volontaire, selon laquelle au moment où le contrat arrive à son terme et où l'ayant droit reprend les copies qu'il a confiées à l'archive, l'archive serait autorisée à faire des copies et à les conserver. Et cela même s'il reprend entièrement ses droits relatifs au matériel qu'il avait volontairement déposé - c'est à dire de prévoir une sorte de supplément au Dépôt Volontaire, qui dans le cas où le matériel est récupéré, fonctionnerait à la manière d'un dépôt légal sur les copies, dans un régime proche du Dépôt Légal?

Par ailleurs est-ce que la FIAPF serait disposée à conclure un accord au niveau général en ce qui concerne le délai de validité des droits des ayants droit?

Nathalie Piaskowski

Votre première question me paraît délicate dans la mesure où je ne suis pas mandatée par mes membres pour m'exprimer de manière précise sur le fond. Il est probable que l'insertion d'une telle disposition soit possible mais dans certaines conditions seulement, notamment si le retrait par le producteur ou l'ayant droit de sa ou ses copies n'était pas dûment motivé, par exemple par une mésentente entre le producteur et la cinémathèque fondée sur des raisons objectives.

En ce qui concerne la deuxième question, je ne suis pas sûre de l'avoir bien comprise. Qu'entendez-vous par délai de validité des droits ? Est-ce que vous voulez dire par là que vous voudriez limiter les droits de propriété intellectuelle des ayants droit? Je ne crois pas avoir bien compris votre seconde question?

Jose Pinto Ribeiro

Ma question était de savoir si vous seriez disposée à fixer un délai minimum obligatoire pour ces dépôts volontaires. De manière à ce que l'investissement consenti par les archives soit en quelque sorte amorti, pas dans un sens économique mais dans un sens artistique par l'utilisation nécessaire et obligatoire de ces oeuvres pour, par exemple, vingt ans pendant lesquelles elles ne pourraient pas être retirées.

Nathalie Piaskowski

Sous les mêmes réserves concernant mon absence de mandat, je pense qu'il pourrait peut-être exister un tel délai. Tout dépend de la durée de ce délai.

Henri Choukroun

Il y a un point qui m'a choqué. Vous avez dit que les cinémathèques doivent pouvoir restaurer et sauvegarder mais que cela ne doit pas être au détriment de la propriété intellectuelle. Et vous avez même précisé qu'une oeuvre ne devrait pas tomber dans le domaine public parce qu'elle est attachée au droit de la personne. Je suis d'accord avec vous que les cinémathèques ne doivent pas sauvegarder au détriment des propriétaires intellectuels. Mais est-ce que cela signifie que le droit du propriétaire, du producteur sur le support physique c'est le droit de propriété intellectuelle?

Nathalie Piaskowski

Non, pas du tout ! Je pense qu'il faut vraiment distinguer les deux choses. Il y a d'une part la propriété des ayants droit sur le support physique, si le dépôt a été fait volontairement et aux termes d'un contrat et si le contrat a bien stipulé que le déposant était propriétaire

de la copie dans ces termes. Et par ailleurs, il y a la propriété intellectuelle, qui est donc la propriété des droits d'exploitation de l'œuvre, qui est quelque chose de complètement différent.

Il se peut très bien que la cinémathèque soit propriétaire dans certains cas, du support physique. Mais elle n'est pas pour autant propriétaire des droits d'exploitation.

Henri Choukroun

Mais une œuvre ne tombe jamais dans le domaine public pour la part du droit qui est attachée à la personne puisque cette part du droit c'est le droit moral. Et on sait que celui là est "ad vitam aeternam". Par contre la propriété du producteur sur le support, elle ne tombe pas dans le domaine public au moment où l'œuvre tombe dans le domaine public. Quand vous dites qu'une œuvre ne peut pas tomber dans le domaine public, moi je pense qu'il y a un petit lapsus. Ce que vous voulez dire, c'est que le support ne tombe pas dans le domaine public et que le droit d'auteur du même coup ne devrait pas tomber non plus.

Mais le propriétaire de l'objet matériel - quand c'est le producteur d'origine, par exemple, ou quand c'est un producteur qui a acheté l'œuvre comme c'est le plus souvent le cas parce qu'un siècle après la production il est bien rare que la propriété du matériel soit encore dans les mains du producteur d'origine - le propriétaire de ces objets matériels, de la pellicule, il y a un moment où il va faire échec au droit d'auteur. C'est lui à la limite l'ennemi du droit d'auteur, puisqu'il va continuer à être propriétaire d'un support, alors que l'œuvre est tombée dans le domaine public. Autrement dit, il va avoir un droit privatif, un droit d'accès tandis qu'il n'y a plus de droit d'auteur, de copyright.

Nathalie Piaskowski

Oui, mais de la même manière, les cinémathèques peuvent le cas échéant, avoir un droit de propriété sur certaines copies, lorsque celles-ci auront fait l'objet de dons. Je ne vois donc pas en quoi cela peut vous poser un problème. Non, quand je disais qu'une œuvre ne devrait jamais tomber dans le domaine public, je ne pensais ni au support physique, ni au droit moral mais aux droits d'exploitation.



VIII THE RIGHTS OF ARCHIVES: TO PRESERVE AND PRESENT

Intervention by Gabrielle Claes

INTRODUCTION

When she first started pondering the structure to adapt in developing this symposium, Hoos Blotkamp imagined that, to defend the archives' point of view, it would be very convenient to have three orators: the first to represent those archives where the priority is given to - or which are exclusively devoted to - preservation; the second for those archives whose preponderant activity is programming and where preservation makes up a minor issue; the third for those institutions trying to push both activities to the forefront. That I should now be the only subsisting element of this trio, is primarily a question of schedule, but also of a lack of candidates who identify themselves with one or other of these categories. It would be too hasty to draw from this experience the conclusion that all archive members of the FIAF seem to devote as much energy and resources to preservation as they do to presentation.

Whether we talk preservation or presentation, the essential partner of the archives in this discussion is inevitably the producer, the right owner, and I am very glad that this partner has accepted to be present here in the person of Mrs Piaskowski. I would like to stress as well that I am about to defend an entirely personal viewpoint, which only concerns myself - not the entire FIAF - and is based on personal convictions as well as a particular local situation with its particular customs.

Nevertheless, taking the specific case of Belgium as a lead, I shall try to isolate some general, relevant principles that, I hope, will give rise to a broad discussion.

THE CASE OF BELGIUM

Belgium is a tiny country, with only a very limited cinematographic production. Like in most European countries, this production subsists for the most part through government aid, and has done so for some 30 years now. Despite all this, there exists at present not one measure making the legal deposit of this production obligatory.

Moreover, in spite of the limited expanse of territory, the distribution of foreign films flourishes. This activity is organized by what we call independent distributors, a term designating Belgian societies establishing distribution agreements with foreign producers. Parallel to this, many of the major foreign production companies - essentially American - are represented in our country: Warner, Columbia, UIP and Walt Disney actually possess distribution offices in Brussels. Naturally, no form of legal deposit exists for these foreign productions distributed in Belgium.

Our activities are thus based on a - fortunately - widely practised form of voluntary deposits. Looking at national and foreign productions alike, we can state that an average of 90% of all films produced and distributed in our country today find their way to our vaults. In the course of 1995, for example, 2.785 copies were deposited, which amounts to some 1.660 individual titles.

Once again: these deposits are subject to no obligation of any kind. The underlying atmosphere behind these activities is one of trust, a trust founded on the seriousness of our conservation work and the extreme rigour - if not severity - we apply to the use of those films in our care, be it for our own public showings or for external purposes.

Of course, this rigour does not always make for great popularity among cultural and film organizations in Belgium, nor with colleagues abroad. Yet it is the very factor that guarantees us the deposits that are of such value and which in future would be permanently compromised by any breach of this (unwritten) code.

The major production and distribution bodies located in our country are familiar with our conservation facilities. They can be sure that their films are conserved according to the internationally agreed scientific norms. They have been given the opportunity to witness at first hand the work carried out in our stores. Beyond a certain guarantee that what remains their property is being preserved, this storage activity also offers an immediate benefit. Given the increasing number of prints produced in response to the demands of a distribution network which must, in one same week, cover the whole of the nation (however tiny it may be!), it is not unheard of for the first deposits to reach us less than a year after the initial release.

As a consequence, from time to time distributors may withdraw an item in our care for re-release or isolated showings. We are well aware that these (temporary) withdrawals constitute one further demand on an already undermanned and overworked body of staff - and that in some cases they may even put at risk the conservation work already performed. Nevertheless, in thus aiding the distributors - which is in fact a relatively infrequent occurrence (total number of prints deposited in 1995: 2.785; number of withdrawals for distributors: 205) - we are without doubt contributing to the industry's overriding confidence in our institution. Let us now return once more to the two essential activities mentioned at the very beginning of this address: preservation and presentation.

PRESERVATION

I am convinced that we all agree on the necessity for a rapid safeguard of the best possible material. In due course, the notion of restoration should be irrevocably banished not only from our vocabulary, but from the field of our activities as a whole. To avoid restoration tomorrow, we must preserve today. Legal deposits form, at least where the national production is concerned, the best possible solution to this problem. Producers may pretend to be all the more convinced of the necessity of conservation according to scientific standards, they may be all the more numerous in appealing to archives in order to retrieve material they themselves have lost over time, the curious fact remains that many among them are revealed as very sloppy caretakers of the product which is, after all, their own investment. Referring more specifically to low-budget productions, the producer (often doubling as director) loses all interest in his previous films, exclusively devoting all of his or her attention to new projects presenting themselves. Legal measures in favour of the conservation of our cinematographic legacy are thus called for, and in this respect we give all credit to the Counsel of Europe for taking the initiative.

But even then, the legal deposit should still apply to the primary - i.e. printing - material. José-Manuel Costa, Michelle Aubert and I have gone to great lengths in our negotiations with the European Counsel to obtain a deposit of "the original or of material allowing to reestablish the quality of the original". There is no use in cheating ourselves: if we authorize, within the framework of a system of legal deposits, the deposition of used exploitation copies, these copies are by no means guaranteed to be safeguarded, even less where video or non-film elements are concerned.

Let us not forget that this legal deposit, even when actually enforced, will only offer a partial solution to these problems. It will apply only to the national production, and only from the date of commencement on. 100 years of national production, together with all foreign productions, will not fall under this rule. Concerning this enormous body of films - some having been stocked in our vaults for a number of decennia now, some having been restored entirely at our expense - a few guarantees are called for.

Not only the material originally deposited, but also the material resulting from our restoration efforts can still be retrieved without prior notice or indemnity. In legal terms, this property remains under the ownership of the producer, save any agreement to the contrary (and such agreements are only rarely recognised by national legislation).

Thus, I would like to claim a right for the archives to compensate this preservation work. The producers should not misunderstand this: we do not ask for a right to exploit or to make any commercial use of these films we want to preserve on a long-term basis, nor do we want the preservation of a given work to prevent its proprietor of using it for whatever purposes.

To the contrary, the better a film is preserved, the easier it will be to use the material. Therefore, it is a legitimate claim for the archives to expect some form of participation in the costs of preservation and restoration, which permit or contribute to the accessibility of the film.

PRESENTATION

Presentation is, first of all, an intellectual and cultural duty. The work has to be shown in such a way that film history - international film history - remains a living concept. Which museum of the arts, which library worthy of its name would limit itself to bringing its audience nothing more than locally produced work? It is also an obligation to the public, a political duty. Let us not forget that film archives are more or less generously supported by the civil state - some of them indeed form an integral part of a given government structure - and that, as such, it is inconceivable that their efforts, which we all know to be very capital-intensive, should serve exclusively private interests. The authorities on which we rely for, at the least, our subsistence, want us to present them with the results of our efforts. This is a totally legitimate claim, which we cannot afford to ignore.

Then again, the terms of presentation remain to be agreed upon. For the moment, I shall strictly limit myself to what I would designate as "archive presentations", held in a theatre directly linked to this idea of responsibility and where certain principles prevail. It must be clear that the practices I am about to describe and the great freedom they imply do not apply to any other form of presentation whatsoever, so-called "cultural" screenings included.

In Brussels, for example, our programming activity is both exhaustive, discrete and entirely non-lucrative. Exhaustive, because we show five different films on every day of the year - discrete, because this does not incur any advertising costs. Promotional work is limited to the programme we publish and which visitors must pay for; regular press coverage takes place only in articles written on the newspapers' own initiative. I also insist on the non-lucrative character of this activity: our entrance prices are kept deliberately affordable. At the time of writing, a ticket for one showing costs just under 2\$ if it is bought in advance. A ticket for the day of purchase costs less than 3\$. By way of comparison, seat prices in Belgian cinemas nowadays average around 8\$.

On the one hand, this democratic pricing is an expression of our refusal to consider programming as a profit-making operation (as a government-funded institution we are not subject to the same overheads as commercial exploitation); on the other, it is also a move designed to encourage visitors to follow retrospectives without excessive financial constraint.

Our programming activity is also considered as complementary to what the conventional Belgian exploitation circuit offers. In other words, if certain classics are at a given moment reintroduced into this exploitation circuit - a situation that has become all the more common recently -, we naturally renounce to showing those same items within the period of their exploitation, unless we receive the express authorization of the distributor.

Thanks to a rigorous observance of these rules, we now enjoy great freedom in the use we make of films deposited in our vaults, entirely free of charge. This means that we pay the right owners no royalties at all, nor for the films deposited, nor for the films we lend, and only require their authorization for the most recent productions (i.e. less than 10 years old). This liberty constitutes a silent agreement observed by all representatives of the film profession in Belgium, be they local producers or distributors.

Such freedom, however, had to be earned, notably through a strict compliance with aforementioned standards, which clearly dissociates us from all notions of commercial activity. Archive screening theatres or film museums should not base their functioning on the standards of commercial cinema, not even on the so-called 'art houses'.

Yet that is not all; film archives should, first and foremostly, do the utmost to live up to their primary duty: the preservation of our cinematographic heritage. Only when this work is accomplished seriously can they - as a kind of reward - claim their liberty in the field of programming.

I, for one, would very much like to see this freedom in programming become a standard within the FIAF framework. However, I must admit to being afraid that, given the actual state of affairs, this is becoming more and more problematic for a number of reasons: the increasingly divergent policies followed by different archives with respect to right owners, the very different levels of priority given to preservation or programming and the incongruity between the extent of the collection and the available financial means. How can we ever reconcile certain countries where archives enjoy the liberty of using their collection as they see fit, exempt of charge, with the situation in others where right owners claim and obtain a fee for the lending of films, even those preserved and maybe restored by the very same archive? How to bridge the considerable gap between the collection on the one hand and programming activities on the other?

An inquiry held by Catherine Gautier within the scope of the Commission for Programming and Access clearly demonstrated that the relation between the extent of a given collection and programming activities varies greatly from one archive to another. Whilst some fill their programme for some 90% with films they hold, others draw some 80% from outside sources. I would like to add that there seems to exist not the slightest statistical relationship between the extent of a collection and programming activity. Some very large collections are only rarely shown, while some archives with only modest collections practise frenetic programming.

I think the time has come to abandon the dated and rigid heritage of Langlois or Lindgren, who considered programming an enemy of preservation. To the contrary, it is only the just and necessary accomplishment of this activity. Rather than being necessarily detrimental to goals of preservation, presentation can become a means to this end, an accelerator of the measures needed to safeguard, restore, enhance and enrich the collection.

A regulated legal deposit offers a solution to the question of preservation of the national patrimony, if and when it is correctly applied. Nevertheless, a system of voluntary deposits remains indispensable, and the related formalities need to be discussed beforehand with the proprietors of the films, the producers and the right owners. For the foreign productions circulating in each of our countries, this system will, in the best of cases, remain in effect where it exists. As far as I know, only France can at present profit from a form of legal deposit pertaining to foreign productions. An encouragement of voluntary deposits would, evidently, serve the goal of making our presentation activity more complete, being no longer limited to national productions. On a local basis, it could also contribute somewhat to goals of preservation.

More and more often, we succeed in obtaining from the depositors a number of copies of the same title (if possible, of course), permitting a given work to be both conserved and programmed when this is called for. In a country as small as ours, it is nevertheless not rare to have only a single copy of a film in distribution, or to have only one copy survive the hardships of exploitation.

In such cases, the unique copy deposited in our vaults is of course not eligible for presentation, given the absence of a positive or negative to ensure proper preservation on a long-term basis. This rule is now widely respected by the depositors, who avoid requesting material which they know to be unique in the country.

CONCLUSION

Rounding up, I would like to briefly express my proper beliefs in this matter, which boil down to two words. First of all, "dialogue". Here I would like to refer to the negotiations that followed the initiative taken by the Council of Europe, and which resulted in the reader compiled by Hoos Blotkamp. I do not think I am mistaken when I state that these results are not, in their present written form, entirely satisfactory for either the producers or the film archives, this for evidently antagonistic reasons.

All the same, I am convinced that - and the presence of Mrs Piakowski enforces this conviction - that our getting together led to a seminal dialogue which we promised to pursue further. I think we must explain to the producers as clearly as possible not only what our function is and in what measure it is indispensable for the safeguard of our common cinematographic heritage, but also how this can serve their immediate interests in certain cases. The producers should then reevaluate the way in which they still too often perceive us, that is to say as a kind of swashbuckling Erroll Flynn in *THE SEA HAWK*, an image that no longer fits the present-day archivist.

The second keyword - and now I turn to my fellow FIAF members - is "self-criticism". Only through rigidity and seriousness in our conservation and preservation work will we convince others to be worthy of their trust. We have opted for an open FIAF, a body of institutions of diverse nature that can be divided in several categories. For some, the preservation of the cinematographic heritage is not a priority. We are all aware of this fact, but considered it nevertheless a worthwhile effort to establish concrete links with them through our Federation.

For all sorts of reasons - a limited collection, the need for financial resources, political obligations - some have focused their attention primarily on presentation, which was sometimes detrimental to preservation. This should be clearly admitted and endorsed. We, too, have a long dialogue ahead of us, with rules to be clarified so that our discussion with the producers can lead to a constructive conclusion.

IX QUESTIONS & REMARKS FROM THE AUDIENCE

Jose Pinto Ribeiro

Je voudrais vous demander combien de membres vous avez à la cinémathèque et combien de spectateurs pendant l'année 1995.

Gabrielle Claes

L'entrée est libre, ouverte à tout le monde. Et nous avons eu l'année dernière 100.000 spectateurs. Nous avons une salle de 125 places, où nous montrons 3 films différents par jour, et une salle de 30 places, où nous montrons deux films muets tous les jours. Il y a un million d'habitants à Bruxelles.

Jose Pinto Ribeiro

Vous avez dit que le matériel produit par les archives continue d'appartenir aux ayants droit. Vous avez dit cela à partir de la loi belge, à partir des contrats que vous avez conclus avec les déposants ou à partir d'une jurisprudence établie par les tribunaux en Belgique?

Gabrielle Claes

Essentiellement à partir de la loi belge, mais je doute qu'elle soit à cet égard exceptionnelle.

Jose Pinto Ribeiro

Une précision encore: même lorsque vous avez reçu la copie de quelqu'un d'autre ou que vous l'avez achetée?

Gabrielle Claes

Nous n'achetons pas de copies!

Jose Pinto Ribeiro

Est-ce que vous croyez que la confiance que vous avez réussi à mériter de la part des producteurs vous la devez à une auto-censure en ce qui concerne l'activité culturelle de la cinémathèque?

Gabrielle Claes

Si vous voulez appeler auto-censure les règles que j'ai précisées tout à l'heure vous pouvez le faire. Je ne le vois pas du tout comme ça. Je pense que nous n'avons pas à faire le même travail que ce qui est déjà fait par d'autres et notamment par les salles "art et essai". Il s'agit d'une certaine limitation dans notre travail, mais que je ne ressens pas personnellement comme une contrainte.

Michelle Aubert

Je voudrais soulever un problème dont nous avons parlé déjà. Ici nous parlons des producteurs, des accords avec des producteurs, avec lesquels en général nous avons de bonnes relations.

Mais la difficulté à laquelle nous devons faire face c'est que la plupart des déposants ne sont pas des producteurs mais des distributeurs. Alors, je me demande, je me pose la question, comment allons nous pouvoir conclure des accords avec des producteurs alors que les déposants et les responsables du dépôt ce sont en fait les distributeurs?

Gabrielle Claes

Je crois que tu touches à un problème essentiel et plus particulièrement encore dans des petits pays comme la Belgique ou le Portugal, où l'essentiel de notre collection est évidemment étranger.

C'est vrai que les dépôts nous viennent des distributeurs. J'ai indiqué - et c'est le cas, je suppose un peu partout - , qu'il y a deux catégories de distributeurs: Il y a les distributeurs qui sont des représentants de "majors" américaines, dont on peut dire qu'au travers eux on a un accord direct avec la production; ce n'est évidemment pas du tout le cas avec les mandataires belges, les distributeurs belges, qui n'ont que pour un temps limité les droits d'exploitation pour le pays et qui même s'ils nous déposent les films en effet n'ont pas le droit de nous accorder des droits à cet égard, puisqu'ils les perdent à un certain moment. C'est pour ça que je pense que seule la négociation d'une sorte d'accord cadre, comme l'a évoqué madame Piaskowski, peut répondre à ce problème.

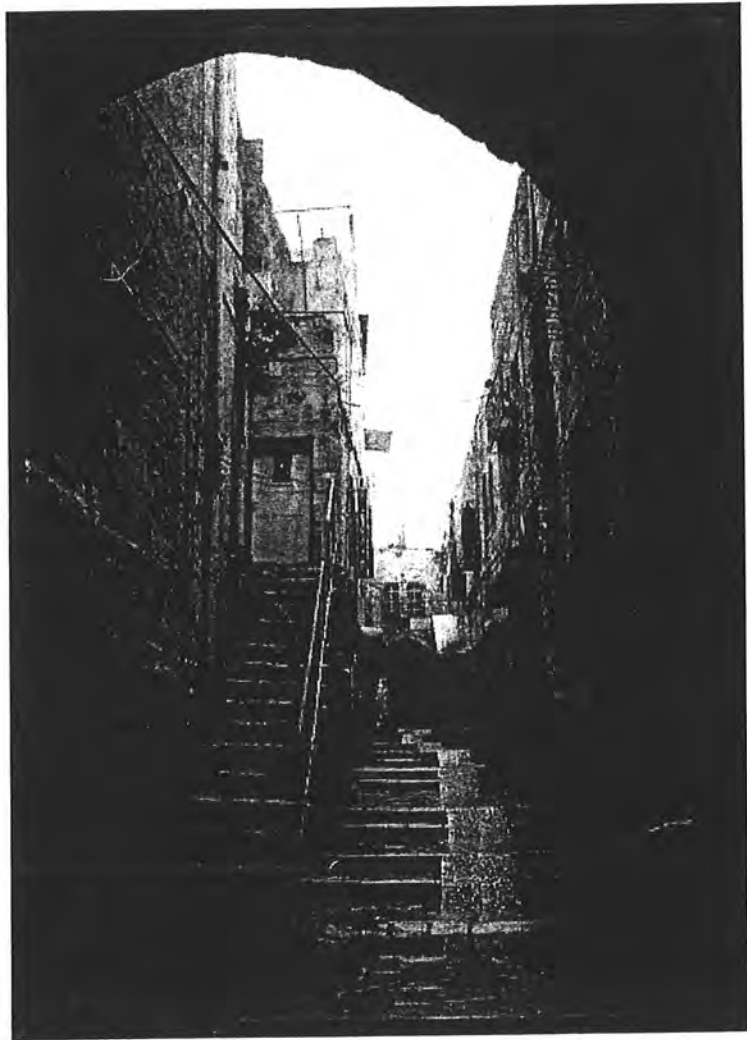
João Bénard da Costa

Je voudrais souligner un point de l'intervention de Gabrielle, que je crois important et j'aimerais avoir là-dessus le point de vue de madame Piaskowski. Gabrielle a dit, et ça c'est un point très discuté dans la FIAF, qu'elle a conscience d'avoir une sorte de privilège, dans la mesure où elle montre les copies, qui sont en dépôt permanent, dans la salle de la cinémathèque, et exclusivement pour le public de la cinémathèque, sans demander la permission des ayants droit et donc sans payer de royalties. Ça se passe aussi au Portugal d'ailleurs, ça se passe aussi dans d'autres cinémathèques, mais dans beaucoup d'autres cinémathèques la pratique est différente.

Je me suis toujours demandé, si certaines cinémathèques n'ont pas été plus papistes que le pape. Ce "modus vivendi" entre la distribution et les cinémathèques, basé sur la confiance mutuelle, et évidemment impossible à réduire à un accord écrit, ne devrait il pas devenir une pratique générale des cinémathèques et les producteurs auraient-ils véritablement des objections de forme si cette pratique se généralisait pour les cinémathèques qui mériteraient cette confiance.

Nathalie Piaskowski

Je crois avoir plus ou moins répondu à cette question dans mon intervention, dans la mesure où la pratique que vous évoquez et qui a été décrite par Gabrielle Claes, figure partiellement dans le contrat type que la FIAPF avait élaboré en 1974, qui prévoit que la cinémathèque pourra "mettre à la disposition" de groupes limités dans ses locaux (ou dans la salle habituellement utilisée par elle) les films, sans autorisation du producteur. Ces projections étant gratuites, elles ne donnent pas lieu au versement de royalties au producteur.



X A STUDY OF MANDATORY DEPOSIT SYSTEMS Intervention by Vincent Létang

Why this survey

As far as the cinematographic institutions are concerned, the legal deposit system is a genuine tool. As each nation seeks, sooner or later, to gather together and safeguard its collective memory, and given the chemical fragility of film, it is becoming increasingly evident that it makes better cultural and economic sense to ensure that cinematographic works receive optimum archiving as and when they are produced, rather than waiting for a few decades before launching highly expensive chemical rescue plans in order to save what little can still be recovered. In this sense, mandatory legal deposit can be seen as an instrument of prevention.

Since 1994, the CNC Film Archive has been operating a mandatory and comprehensive system of legal deposit covering national film production, as well as the majority of foreign films shown in

French cinemas. Though the French legislation of 1992/1993 poses some problems in implementation, it is, in itself, an extremely efficient instrument for the preservation of the cinematographic heritage. Therefore, it seemed to us worthwhile to survey a number of foreign Film Archives having similar systems of legal deposit, to ask them about the nature and operation of their system, the results obtained and their views on its efficiency as a legal instrument for the preservation of the heritage. Moreover, in view of the sometimes rapid changes taking place at national level, this study also serves to update the information provided by the 1992 questionnaire drawn up by Mrs Michelle Aubert and by Mr Clyde Jeavons (NFTVA) for the symposium on legal deposit at the 1994 Bologna Congress.

This study is designed for information of Archives that still have no national mandatory deposit law and wish to get one. The CNC Film Archive keeps all the answers we have received available for interested Archives, together with full information on legal deposit in France.

I. THE MAIN MODELS OF MANDATORY DEPOSIT SCHEMES

Questionnaires were sent to the Archives of some fifty countries. The replies we have received cover 26 countries. While collating the responses to our questionnaire and various other documentary sources, we were able to assess the situation in some 47 countries. Of these, it would seem that 20 countries do not yet have any system for the mandatory deposit of films : Australia, Austria, Bangladesh, Belgium, Brazil, Great Britain, Greece, Hungary, India, Indonesia, Ireland, Japan, Netherlands, New Zealand, Poland, Portugal, Sweden, Switzerland, Taiwan and Turkey.

Survey sample (number of countries 47)

| | |
|---|----|
| No mandatory deposit system at all: | 20 |
| Mandatory deposit (total): | 27 |
| of which : | |
| Mandatory deposit free of charge: | 12 |
| Mandatory deposit financed by the State: | 5 |
| Mandatory deposit of Government-sponsored films only: | 4 |
| Statutory deposit (Popular Republics): | 2 |
| Other and undefined: | 4 |

Thus, in one form or another, 27 countries currently have a mandatory system that permits gathering of nationally produced films.

1. Mandatory deposit at the expense of producers (classic legal deposit)

Out of these 27 countries, 12 have a exhaustive mandatory system for the legal deposit of national production, which is disconnected from copyright systems or to State subsidised production and the cost of the material deposited is borne by the party effecting the deposit. These countries are: Denmark, Finland, France, Italy and, to a lesser extent, Bolivia, Colombia, Macedonia, Mexico, Norway, Russia, Venezuela and the Yugoslav Republic of Serbia.

This type of mandatory deposit seems to give the best results in terms of deposit rates, quality of the collection, i.e. efficiency for film preservation.

For every film, France requires a new positive print or an intermediate matrix; Denmark requires two positive prints (including one new); Finland requires a positive print and an intermediary matrix; Italy requires positive prints (and/or new positive prints and/or intermediate matrices where the production of films has been assisted). In Finland and France, where the mandatory deposit comes after the release of the film, there are some difficulties in applying the legislation, particularly with regard to small producers. However, it is estimated that 70 to 80% of national films have been deposited since legal deposit was introduced. France received 300 feature length films and 200 shorts in 1995 ; Finland received 4 features and 30 shorts in 1994 ; in Denmark, 632 deposits were made in 1994. Since 1965, virtually all Italian films have been deposited.

2. Mandatory deposit financed by the State

This system is comparable to that just described, the prominent difference being that the cost of the material deposited is borne by the State through the depository organisation. Five countries have a State-financed system of mandatory deposit: Bulgaria, Czech Republic, Iran, Slovenia and, to some extent, Canada. The deposit is mandatory to the extent that producers are obliged to provide their material on request (in general, this type of deposit can be applied for). It is exhaustive in the sense that, potentially, it covers all national films.

3. Mandatory deposit of Government-sponsored films only

Four countries have a system of mandatory deposit of Government-sponsored films. This could be comparable to a exhaustive legal system in that practically all nationally produced films are subsidised in one way or another and so must be deposited. The countries concerned are: Argentina, Spain, and,

o a lesser extent, Germany and Israel. Under this system, producers who have received public funds for the production of the film deposit the material at their own expense. Thus, the deposit is indirectly financed by the State. A contractual system for the deposit of Government-sponsored films exists in some other countries (Netherlands) but it is partial and unsystematic.

In Spain, entrega obligatoria has been compulsory since 1965 in return for financial aid from the State. Though a great amount of spanish film have been deposited thanks to this system, the Filmoteca Española highlights some disadvantages which limit its efficiency : the system is rather complex (with several types of deposit depending on the type of aid received) and producers can avoid the deposit obligation, e.g. when the financial aid is paid before production takes place and so before deposit, or when the cost of the material is higher than the financial aid they might receive for depositing.

For all of these reasons, the Filmoteca Española - as well as the Israel Film Archive - hope that their Governments will create a "real" system of mandatory deposit law, disconnected from the system of aid to production.

On the level of principles, it is natural that something should be given in return for State aid to the cinema industry, especially production, and that obligations should be created for the beneficiaries, in this case the deposit of one or more examples of the film receiving assistance. However, such an obligation is contingent and should come in addition to the general obligation of a pre-existing system of exhaustive mandatory legal deposit (theoretically, in the Spanish frame, any film which would not receive State aid would not have to be deposited at all).

Films which have received State aid should be deposited under more stringent conditions or the producers could be required to deposit extra material. As the two types of deposit do not have the same basic objectives, they could be differentiated on the basis of the material concerned and the use made of it. The general legal deposit should be intended for conservation purposes only ; the mandatory deposit of Government-sponsored productions might in addition allow for the deposit of material for cultural use (consultation, non-commercial showing, promotion of national production).

It seems to us that the principle of legal deposit should be that every national film should be preserved and has the right to be preserved. The legal deposit of a film should exist from the very fact that it has been made and made public. Mandatory legal deposit is a guarantee given by the law to the nation ; it guarantees that, irrespective of any economic vested interest, type, success or size of each film, the link will continue to exist between this film and the nation, between the creators on one side and the public and researchers on the other.

4. Statutory deposit and others

Two of the countries surveyed, namely China and North Korea, still have a system of mandatory statutory deposit applying to major State-owned companies. Once a certain period has elapsed, the entire material of each film is automatically transferred to the national film Archive.

Four cases remain: Egypt, where deposit for censorship becomes a final deposit for conservation; the USA where the Library of Congress deposit requirement is mandatory in the procedure for copyright registration, which is itself indispensable for the copyright protection ; finally, there are two countries which have a legal deposit system, the modalities of which remain unknown to us: Rumania, which did not reply to our questionnaire and South Korea, where mandatory legal deposit was instituted by a law promulgated 1995 but the regulations are not yet in place.

5. European Convention on the Protection of the Audiovisual Heritage (Council of Europe)

The aim of the Convention is twofold :

- to encourage and codify voluntary deposit
- to provide for the installation of mandatory legal deposit for the national production of moving images and to give a general shape of what should be a mandatory deposit legislation

Principles (Art 3)

- Objectives : conservation-restoration and scientific consultation
 - Extent : exhaustive for national cinematographic production (sampling possible but only for television pictures) with possibility of extension to imported films.
- Designation by the State of an Archive deposit organisation for legal deposit and the grant of financial resources by the State to this organisation (Arts. 4 and 5).

Modalities for legal deposit (Art 6)

- Nature of the material : "original or material permitting the original quality to be recovered"
- Time limit for deposit : 12 month maximum with effect from "the completion of the definitive version"
- Possibility of the depository Archive carrying out restoration or duplication work from the material deposited "within the limits of Article 9 of the Berne Convention".

To ensure ratification by as many states as possible, the modalities provided for in the Convention have deliberately been kept more flexible for professionals than the most developed legislations already in existence. However, the Convention remains firm on fundamental principles : namely the question of exhaustiveness (everything must be preserved) and the question of financing. Then, it will constitute a starting point, a minimum form from which national legislations will have the possibility to evaluate towards even more protective forms. This basic model may be very useful for members of the Council of Europe which have no legal deposit till now, for example in Eastern Europe. It may even be used as a model for other international cultural treaties, on other continents.

II. ASPECTS STUDIED THROUGH OUR SURVEY - DIVERSITY OF SCHEMES

1. Origin of mandatory deposit systems

The first laws for the mandatory deposit of films appeared after the Second World War: Venezuela (1945), Italy, Yugoslavia and Mexico (1949). Mandatory deposit then followed in Denmark and Spain (1964), in Italy in its current form (1965), in France and Iran (1978), in Finland (1984), in France in its current form (1992), in the Czech Republic (1993) and - the last country to have adopted the system - South Korea (end of 1995).

2. Extent of the obligation to deposit

In most cases, mandatory deposit extends to national feature length films and to short films. Only 8 of the 27 countries have a mandatory deposit system which extends to imported foreign films (Bulgaria, China, France). In countries where the deposit of imported films is not mandatory, the Archives often conclude voluntary deposit agreements with the distributors. In countries like Finland and Spain, this sometimes results a large deposit of foreign films.

3. Aim of mandatory deposit and use of material deposited

Conservation is cited by almost all the Archives as the main use of the material deposited. It is almost always accompanied by individual scientific consultation (with greater or lesser restrictions for the safety of the materials). Some countries provide for the use of deposited material for larger viewing within of the Archive depository, subject to certain conditions (Spain) or even for cultural showing (Russia, Argentina). The collection of films by mandatory deposit can also allow Film Archive to do national cataloguing and filmographies.

4. Modalities of actual deposit

Time limits nature of the material that is to be deposited, legal penalties in case of non-deposit, are some factors which can ensure the exhaustiveness of the collection, and the quality of the material deposited to be preserved, i.e. the efficiency of the system. States intending to use legal deposit for the purpose of conservation often requires the deposit of a new positive print.

Certain countries require two positive prints, usually at least a new one for conservation and a good, maybe used one for consultation (Czech Republic, Denmark and Russia). Some countries require a new positive print or an intermediate materials (France, Spain, Yugoslavia). Others require a new positive print and an intermediate materials (Bulgaria, Finland, Slovenia).

Finally, only the statutory legal deposit system of the communist countries (China, North Korea) requires the transfer of the original negatives and the prints from the production studios to the Archives. On this point, the European Convention says : the producer shall deposit "the original or material permitting the original quality to be recovered" (Article 6).

The time limits for deposit vary from before first exploitation to some years after first showing. Any considerable delay after the release of the film, results in problems for the depositary organisation to recover material which has not been deposited spontaneously (e.g. disappearance of the producer, scattering, destruction or deterioration of the material to be deposited).

In some cases, certain states provide for the deposit to precede the release of the film: definitive deposit of the copy presented to the censorship commission in order to obtain a permit (Italy, Egypt) or deposit prior to the payment of financial aids (Spain). In this regard, it shall be recommended to impose as standard practice - at least in the case of the deposit of positive prints - deposit prior to the commercial release of the film, e.g. coinciding with the examination of the film by the board of film censors or the classification board.

On this point, the European Convention says : the deposit of the material shall take place "within a maximum of twelve months of completion of the definitive version."

Every legal text must include legal penalties for non-fulfillment of the obligation. In Canada, the Czech Republic and France, failure to deposit is an offence punishable by a fine (equivalent of USD 2000 in the Czech Republic and up to USD 100 000 in France). These sanctions remain important even though, in practice, the Archives prefer to persuade producers to deposit rather than to have recourse to the legal procedures stipulated by law.

5. Financing of material deposited

Out of the 27 States found by our study to have a mandatory deposit system, 4 finance the deposit material. In the Czech Republic, every producer is obliged to offer two new prints of his film to the Národní Filmový Archiv of Praha. The Archive is then free to buy the material or not, which it does systematically (obligation to offer for sale). In Slovenia, the materials deposited are reimbursed by the State.

Payment for the material deposited may relieve the administrative work against recalcitrant producers and can ensure that the collection of the mandatory deposit is really exhaustive. However, the annual financial charge represented by public financing of the materials deposited is less important than the principle that the legal deposit should be free of charge, which is essential to defend.

It is clear that a real mandatory legal deposit system would involve the deposit of materials free of charge. Though each private producer bears the cost of making this material this cost remains well below the amount which the Nation, through the State authorities, invests in conservation or even restoration of the material in the long term. And, in any event, the national interest in preserving the cinematographic heritage must outweigh the short term private interests of the producers. The Law, on the one hand, requires each producer to deposit one or more films for the needs of the depositary organisation.

The Law, on the other hand, obliges the State (i.e. the depository organisation) to conserve permanently and in good condition each film deposited. It is here that the public share of the financial burden of legal deposit is manifest and may constitute an adequate recompense for the deposit, were such a recompense required. If the State had to bear the cost of prints as well, it would be paying twice.

Beside standing firm on these principle, we must educate producers who, having limited funds, do not see that legal deposit is in their immediate interest. We insist that, in the long term, it is also in the interest of producers, directors and authors, for a copy of every film to be conserved permanently in the CNC Archives, free of charge, and in conditions of security and air conditioning which are superior to those found in most laboratories, private stocks or producers' offices (with growing numbers of cable cinema channels, we are beginning to receive requests from producers wishing to have access to prints or interpositives of their films placed in legal deposit some ten to fifteen years ago to make new masters).

The deposit of an intermediate material such as an interpositive further may settle the question of cost since such an element may have been used in the industrial process and will remain accessible for exceptional work even after deposit.

6. Physical ownership of material deposited

Though some laws expressly refer to the transfer of physical ownership of materials deposited to the State (particularly where the State assumes the financial burden) most legislation passed does not seek to answer the following question: Is there a transfer of ownership or is it simply that the material to be conserved reaches its final destination in the depository organisation? It seems that the legislators have not felt the need to spell out the legal implications. Anyway, either possibility seem to be acceptable to both Archives and producers, provided that the 2 following principles are upheld in law and/or practice:

- The legal deposit of the material is definitive (the material cannot be recovered by the depositor, even temporarily if it is a positive print)
- If the material deposited is a matrix, the rightholders will always have access to the matrix, under the technical control of the depository Archive, for works indispensable to the use or restoration of the film (reprinting an internegative, producing a master video or TV).

If there is no explicit transfer of ownership of the support material, and if the latter principle is not respected, the producer can recover the material deposited temporarily and even use it for projection. Under such circumstances, it is difficult to run an effective conservation policy.

III. LEVELS OF OBLIGATION AND LEVELS OF PROTECTION

The legal deposit obligation is in fact the addition of various obligations. The first is of course a material one (obligation to deliver a copy), but there are also some immaterial obligations that allow the repository Archive to fulfill its preservation role :

Reproduction rights (duplication of deposited material, access to matrices).

Some laws provide for the assignment by the depositor - compulsorily in some cases - of a right to reproduce from the material deposited and even from matrices which may be not deposited, in order to produce a new print, whether for conservation (if the deposited material is not good enough) or for consultation (in order to avoid using the deposited material).

Presentation rights.

Permanent authorisation to use deposited material for consultation by individual researchers lies at the very heart of the mandatory deposit system. There would be no point in conserving films if they could not be seen by researchers. Some legislations goes as far as including authorisation for the use of material for limited cultural viewing within the Archive.

What a "real", complete, mandatory deposit should be

The following classification shows 3 levels that we shall consider respectively as a minimum (1), a regular (2), and a complete (3) mandatory deposit form (from the least to the most demanding for producers, from the least to the most secure for film preservation and scientific research on cinema).

1. Basic criteria

- Mandatory deposit by Law (not voluntary and independent of any agreement with depositors)
- Main objective : preservation of deposited material
- Second main objectif : scientific, individual consultation

2. Other central criteria

- Exhaustive deposit: for any cinematographic - at least national - productions, on a non selective basis
- Disconnected from subsidies (deposit of all films, whether they are government-sponsored or not)
- Disconnected from copyright protection
- Free deposit for the Archive (material financed by depositors, without payment from State)
- Permanent deposit (no withdrawal and limited access)
- Right to use deposited material and/or have access to non-deposited masters, to print new prints for viewing or preservation

3. Optional criteria

- Deposit for foreign, imported productions
- Right to use deposited material or duplicate material for some cultural showings within the Archive

IV. CONCLUSION : LEGAL DEPOSIT AND NATIONAL CONTEXTS

The key factors for the emergence of a mandatory legal deposit system The establishment of a mandatory legal deposit system means introducing a legal constraint to cause an industry to manage the long term survival of material which it views as a source of short and medium term profit, a task for which it sees no purely industrial necessity. Thus, the emergence of a mandatory deposit system for films results from a number of factors:

- the more or less interventionist tradition of the State in the economy and culture
- the volume of national production (the greater the production, the greater the cost of deposited material and preservation)
- the pressure the industry can exert on the State
- the pressure which can be exerted by the national film Archives and intellectuals
- the previous existence of legal mandatory deposit schemes for other cultural objects (books, papers, audio records)

The States in which there is no mandatory deposit system are generally those with a strong liberal tradition, and where the lobby of the cinema industry has been able to prevent the Government from introducing mandatory deposit (Great Britain, Germany, Benelux countries, Japan...).

Nowadays, the British Film Institute and the British Library have been fighting for years for a mandatory deposit law of films. Among Northern countries and Mediterranean where there is a strong tradition of State intervention in the economy and culture, most of countries do have a legal deposit (see our map). Among the former communist countries of Eastern Europe, where there used to be a statutory system of automatic deposit, some have started a transition to a mandatory deposit system adapted to a liberal economy (Bulgaria, Czech Republic, Russia), while others are still awaiting a new mandatory legal deposit law (Hungary, Poland).

In Asia, China has the statutory deposit system of a communist State. However, in some major producing countries like India and Indonesia, there is no mandatory deposit system at all.

In Latin America, Brazil seems to be the only large country with no mandatory deposit law.

Preserving the cinematographic heritage even without mandatory deposit

In countries where there is no - not yet - a mandatory deposit law, the cinematographic heritage can still be preserved by temporary or alternative solutions. Let us consider two examples:

In Turkey, there is a widespread voluntary deposit of Turkish film negatives with sinema-TV Enstitüsü. The Turkish Archive has now become a channel which cannot be circumvented with regard to the showing of films on television. Thus, the deposit of negatives with the Archive is indispensable if films are to produce a return. This ensures their preservation.

In Switzerland, every year, the Swiss State grants the Cinémathèque Suisse a budget which enables it to print and preserve new prints of Swiss films which are awarded the "quality prize". This permits the preservation of a fraction of national production which is considered most valuable from a contemporary point of view. However, though that may be better than nothing, one of the main scientific advantages of legal deposit should be precisely to preserve the whole cinematographic heritage without exercising choices.

Towards legal deposit

In Belgium, Great Britain, Portugal, Australia and Ireland, as in many other countries, the Film Archives keep trying to push for the introduction of mandatory deposit laws. They hope that their internal pressure will be helped by the pressure exerted by the international community through the FIAF, the UNESCO or the Council of Europe.

Beyond this study, the Archives du Film of the CNC wish to inform and help other National Film Archives.

XI THE INTERNATIONAL STATE OF AFFAIRS

Intervention by Marc Wehrlin

The organisers of the symposium asked me to inform you about the developments in international legislation that are of relevance for the work of filmarchives, and to explain what the draft Convention of the European Council is about.

Maybe not all the points that I am going to explain to you will be of direct relevance to filmarchives, but nevertheless it will be useful for you to have an overview of more or less everything that is going on and thus get an idea of the context in which the relevant legislation exists or is being developed.

To begin with I will show you what is in discussion related to the revised Berne Convention, we will come to the intellectual part of the World Trade Organisation, the former GATT, we will have a few looks at the European Union, and then in a second chapter, we will examine the European Legal Deposit Convention.

After all that I have added a chapter that I call: What actions are missing on the international and national level? Because I have, like you maybe, the impression that many things are going on on the international level, but too little in relation to your interests. Many things are now under revision in Author's Right for other reasons than yours. And I think that there are a few links or parts missing and maybe this symposium will be the reason or will be a starting point for a common action.

THE REVISED BERNE CONVENTION.

The Berne Convention is a very old Convention, more than a hundred years old in fact. It has been founded in my little native town, that for this reason became so well known in the Copyright world. The Convention has been revised several times, but it is now very difficult to revise it again and that's why people are not talking about a formal revision but about a "Possible Protocol Additionel". The points now under discussion are basically the same points that are being discussed in the other international instruments.

- Should computerprogrammes be included in the Berne Convention? It is more or less achieved now that they are considered as "works", even if they are not "works" in the classical sense of Author's Right. But in many nations and in the jurisprudence most would say: yes, software has the protection of Copyright. When the Protocol Additionel is finished and there will have been a diplomatic conference at the end of this year, software programs will be a formal part of the Berne Convention.
- Second point is databases. This might concern you because of the catalogues that you put in databases. Until now it's clear that if a database is a collection of protected works, that in itself has a sort of originality or creativity behind it, on a very low level, according to today's knowledge of Copyright it is already protected, because of that.
There are also databases with economic value without such characteristics that comply with the notion of "work" in the Copyright field. The discussion now is about the question whether every database - because maybe every compilation of information can be of economic value - or just a certain kind should be protected under Copyright.

You see a possible development here that is not without danger for Copyright. Within the world of intellectual property Author's Right had a sort of privileged position and if slowly other elements, that are not artistic works, are introduced in it, this might endanger that special position of Copyright in the long term.

- The next point will hardly be of interest to you. Until now the Berne Convention allows that, under certain circumstances, broadcasting can be reduced to a legal licence. The normal rights within Author's Right are absolute rights, meaning that you can say "no" or "yes" and that when saying "yes" you are free in fixing the conditions. In case of a legal license the "yes" is already built in in the law and even the price - not being negotiable any more in relation to the possibility to say "no" - in many countries is fixed by a court or by an administrative authority. The idea is to do away with this possibility.
- The distribution right has no place in the Berne Convention today although lawyers will say it exists. The question is, should it be named explicitly in the Berne Convention.
- Rental rights are not part of the minimal standard of the Berne Convention today either. They might be added in that Possible Protocol Additional.
- The term of protection for photographic works is under discussion and then the whole chapter - and you will find that again in the World Trade Organisation discussion - of the legal protection.
- Several issues related to multimedia are under discussion too, but I will come back to those later when I'm speaking about the European Union.

One of the weaknesses of the Berne Convention today is that it's at its minimal standards, that it didn't provide for a court system, nor for any law enforcement measures. All this has been totally left to the discretion of the member states of the Berne Union. A state could ratify the Berne Convention and nevertheless not embed it in its law and put it in practice. There's no legal instrument. The World Intellectual Property Organisation didn't have any legal instrument either to force a state to fulfill its obligations.

This is now of less importance because the same problem has been discussed in the TRIPS agreement [former GATT] and has been successfully solved there. Most of the nations that signed the Berne Convention are also members of the World Trade Organisation and by means of this body the minimum standard can now be enforced.

So this was the discussion about the Possible Protocol Additional to the Berne Convention and you will see it won't change the world of the filmarchives a lot or at all.

Intellectual property is not only a Copyright issue. The Intellectual property like trademarks and patents were a big subject in the Uruguay Round of the GATT because one of the most interested parties in this Round, the United States, makes a lot of money out of this kind of intellectual property. They have a great interest in the free trade or at least in the protection of it. That's why this became a special part of the Uruguay Round, called the TRIPS, the Trade Related Intellectual Property Rights agreement. This now has become part of the World Trade Organisations Treaty.

As a matter of fact you find the same principles in it as in the Berne Convention.

Concerning the minimal standard the aim was more or less to make the Berne Convention part of the World Trade Organisations Treaty and to enforce the dispositions of the Berne Convention by the instruments that the World Trade Organisation would offer. You find in it the principle of national treatment, the clause of the most favourite nation, minimal standards, that are roughly the ones of the Berne Convention.

On the level of the Berne Convention and the World Trade Organisation you find the same competition you can have in Europe between the European Council and the European Union, that sometimes try to play tricks on each other in order to be first in the race.

There's only one article of the minimal standard of the Berne Convention that has not become part of the TRIPS agreement, which is the moral rights. Having told you that the USA had a big interest in the TRIPS you can understand why. Computer programs and databases are also part of the TRIPS, so even this discussion is now of less importance for the Berne Convention because these problems are solved already within the framework of the World Trade Organisation.

The Trips agreement includes Rental Rights, but only for audiovisual works and computer programs. So the agreement allows for prohibiting the rental of software and audiovisual works.

You have a chapter about the Neighbouring Rights, which, within the context of the World Trade Organisation, are the rights of producers of phonograms, and then you have the big chapter on legal protection, which creates the situation that now, like I mentioned before, the minimal standard can be enforced on the international level by means of the rather complicated mechanisms of the World Trade Organisation. So that's the state of affairs on the intercontinental level.

EUROPEAN DEVELOPMENTS

You heard this morning about the Green Book on Author's Rights. There are a few existing directives that have already harmonized part of the Author's Rights in Europe - but only a part. The Green Book has been written to deal with the developments in technology and questions like multi-media, software, and the information-highways. All these issues lead to the principle question: is the traditional Author's Right still able to bring the answers to these new questions. The Green Book deals, roughly speaking, with this problem.

The present state is that probably, and this is also my personal opinion, you can handle the future more or less with the existing Author's Rights. Multi-media works can be mastered by the classical definition of what a "work" is and by the classical notion of what an "author" is. You don't have to invent new categories of "works" or "authors".

The aim of all action of the European Union in this field is still the free flow of information, goods, services and so on. That's the aim of the harmonisation and when you look at the directives you see that they all fit into the concept of the big European market. They deal with the same issues that figure on the intercontinental level, which I mentioned already, so I won't say a lot about them anymore.

One of the questions also raised by the European Union and the Green Book is: does the new technology, the upload, download, the sending of a "work" from one computer to another, demand that you invent new rights? So that's another problem to be dealt with.

Then the European Union studies a subject, that might be interesting for you, which is the identification of the "works". The question in this matter is: does the big number of "works" and the free flow of them through the new technical means require some sort of "digital fingerprint" on them to make identification possible?

One of the last, rather important questions under study is the use of existing works in (multi)media, which happens a lot. The multimediaproducers don't like that, because it often means that they have to acquire the rights from a number of different parties in different places. So one of the big subjects is the so called "one stop shopping", a kind of central license. The main fight now is about the question: should the problem be dealt with by means of the classical Author's Right, should there be a collecting society of the producers or will it be - to stay in my region - people like Bertelsmann, who will just have a huge catalogue and act as the "one shop".

So these are the questions raised by the Green Book. People have reacted to it and in may there will be a conference in Florence, that will have to result in some kind of resumé and in the first conclusions that the European Union will draw from the different reactions to the Green Book. To say it in short, I don't think that on the international level much is happening in the Copyright field for you to bother about. Your problems are not being solved, but I don't think that many problems are added either.

THE DRAFT CONVENTION OF THE EUROPEAN COUNCIL

I will now try to give you some information about the draft Convention on Legal Deposit of the European Council, a project of which you might have heard before. First I'll make a couple of preliminary remarks. I can be called one of the fathers of this Convention. You know how it is with fathers, they may in some way participate in the creation act but their influence on what is created, on what is coming out, is very limited. Even though I have participated in the creation of the Convention as one of the experts of the European Council I had very little influence on the result. One of the problems of this work was that I myself, André Luckas and Michael Henry, the two other lawyers involved, were in the situation of three architects that had to build a house for a person that didn't know what kind of house he wanted. So sometimes the experts had to take political decisions or provide the outlines of possible political decisions.

I think all this shows one of the weaknesses of the European Council, which is that you don't have a real body. You might know that actually the Conseil du Cinema, due to budgetary problems, has no meetings although there's still a chairman. Thus in different meetings we came to know what individual countries wanted, what the archives wanted, what the producers wanted, but we didn't have a reliable partner, who could tell us: that's what Europe wants.

I fear that consequently one of the weaknesses of this draft Convention is too that there's no sufficient political power behind this action, a body that could really say: that's possible in Europe, that's what we want and that's the way we will go. Now the draft has been sent out for consultation and we are wondering what the result will be. One of the possible results may be that, by chance, we have found what can be a common denomination in Europe. But it may also happen that the old war between the nothing of the Germans and the 300% of the French - just to give two examples - starts all over again.

So this is a project with a very uncertain future, that will be presented to and discussed by the ministers of Culture in Budapest at the end of October. I have no idea what the outcome of that will be.

Let me try to explain in a few words what the draft Convention is about and what the main questions are.

As you probably know it should introduce the Legal Deposit, but there the debates began: should just national productions be deposited or all films distributed in a country? The draft suggests that it's impossible to convince the parties to extend Legal Deposit, even on the European level, to all films distributed in a country, so it has been restricted to the nationally produced audiovisual heritage.

Second Question is: should this Convention define or suggest what should be regarded as national audiovisual heritage?

The experts voted for "no". It was difficult to include the term "national audiovisual heritage" for two reasons. As we know all, and we heard it again this morning, it is risky to indicate what should be considered as a "classical" film or an "important" film for we can't know with certainty today what we should keep for the next generations. If we now make some kind of quality judgement the next generations might not be happy with our choices. And I think it's also one of the principles of FIAF that there shouldn't be such a kind of quality criterium. The second reason was that we were afraid of discrimination within the nations. Many nations have minorities and have problems with that. The danger we saw was that a nation in the phrasing "national heritage" might find an excuse to exclude part of their population, like a linguistic or cultural minority, from what they'd choose to keep. I won't give any examples in order not to offend anyone, but you certainly know that this is not a fictional problem. This is also one of the questions that will be answered by the consultation that is now under way.

Another question was: should the Legal Deposit be limited to what is most dear to us, the cinematographic works. Was it Gabrielle this morning, who said: we have lost the first 100 years - if we make a Convention we make it for the next 100 years. Well, we felt that, if you really wanted to do something for the future, it was impossible to exclude audiovisual works that are not considered cinematographic works. So the Convention proposes Legal Deposit for all moving images, independent of their format and technical standards, and it doesn't even speak of "works", just of "moving images".

When you do speak of moving images, this generates automatically two other problems. The first is the great number of moving image productions in a country, even in a tiny country like mine. We all know that if we had collected everything since the ancient Greeks, this world would be one big museum, but we wouldn't be able to live in it. So the Convention proposes which in French is called "échantillonnage", sampling. That's some scientific system like in the history of Noah, who took two of each kind. So the idea is to avoid discrimination and keep samples of all categories and not forget for instance news or publicity.

The sampling system however, will not do for cinematographic works. For this category, and that was a "quality" decision, the Convention proposes to apply the Legal Deposit to all films that will be shown in the movie-theaters.

The convention indicates what are archives, touches upon the issue of their independence, their not having any commercial activity and with that we step into the next problem.

If we are talking about "moving images", then what to do with what's been broadcasted. Here we have a political question, that cannot be answered by the experts. We did have an opinion, but you'll find a different proposal in the draft Convention. We said: o.k. the broadcasters are here and it's true that they have archives, but let them make their own "legal deposit", but the draft Convention offers a choice.

If they have an archive that responds to the criteria of the Convention concerning the collecting principles - not only keep what has future commercial potential -, accessibility and independence, if they offer exactly the same structure, you can say: o.k., as a compromise, they can run the archives themselves and be under the same authority as the others. Or, if they do not respond to that criteria, the moving images produced by the broadcasters will be under Legal Deposit as if they had been produced by independent producers.

THE COPYRIGHT THING

you heard this morning, I think from Mrs Piaskowski, that article 9, alinea 2 of the Berne Convention gives member states the possibility to make exeptions for the reproduction, the copying of "works" and we, the experts thought that it's time for the member states to make this exeption in their national laws for the reproduction of moving images for preservation and restoration purposes. That would solve one of your problems. Now that's what you'll find in the draft Convention concerning the Legal Deposit.

The people working for this Convention knew that the way Legal Deposit is defined in this document only covers part of the issue and that Voluntary Deposit might be even more important.

But in case of voluntary deposit, what can you do as a state, as government? You could pay for the material, you could try to make a better framework and better conditions. We thought that the Copyright could be an instrument in this and that's why I first started to negotiate with the FIAPF and then you filmarchives joined in and I tried to achieve a kind of Appendix to the Convention, that would lead to better conditions to solve the Copyright issue.

Whereas the Berne Convention gives the member states the possibility to make exeptions for reproduction, it doesn't do the same, nor does the World Trade Organisations Treaty, for public screening. If it comes to that, you archivists have to find an agreement with the producers, the rightsholders.

This Appendix has not become what I had hoped for, but consider it a first step. I hope that the reactions to the draft, that the European Council gets, will show clearly that it is really just a first step and not what we wanted.

There are still a lot of problems to be solved and if you, like me, should find that it's a starting point but still far from a satisfactory result, don't hesitate to let the European Council know.

WHAT ACTIONS ARE MISSING

Now I come to my conclusion.

What actions are missing on the international and national level? You have asked several questions.

What legal condition is needed for preservation? I'd say: adaption of the national legislation that is based on article 9 of the Berne Convention. The question of moral rights is rather theoretical. Just don't touch it, I think you can live with the situation as it is.

What legal conditions are needed to make the heritage accessible for future generations? One thing I'd suggest is a voluntary collecting administration. I think Mrs Piaskowski said this morning that she wasn't in favor of such thing, but let me explain what I mean. You know, I have founded the collecting society in Switzerland, that is uniting the authors, the producers and the distributors. And my idea is the following.

Collecting administration nowadays is necessary because of the different levies that are collected, the cable-rights and so on. Wherever you have a modern information industry you already have collecting administration for the audiovisual field. So why not include in the membership agreements with the authors, producers and distributors that, under certain circumstances yet to be defined, for a future in which a work will not in any way be used commercially, you have a "one-stop-shop".

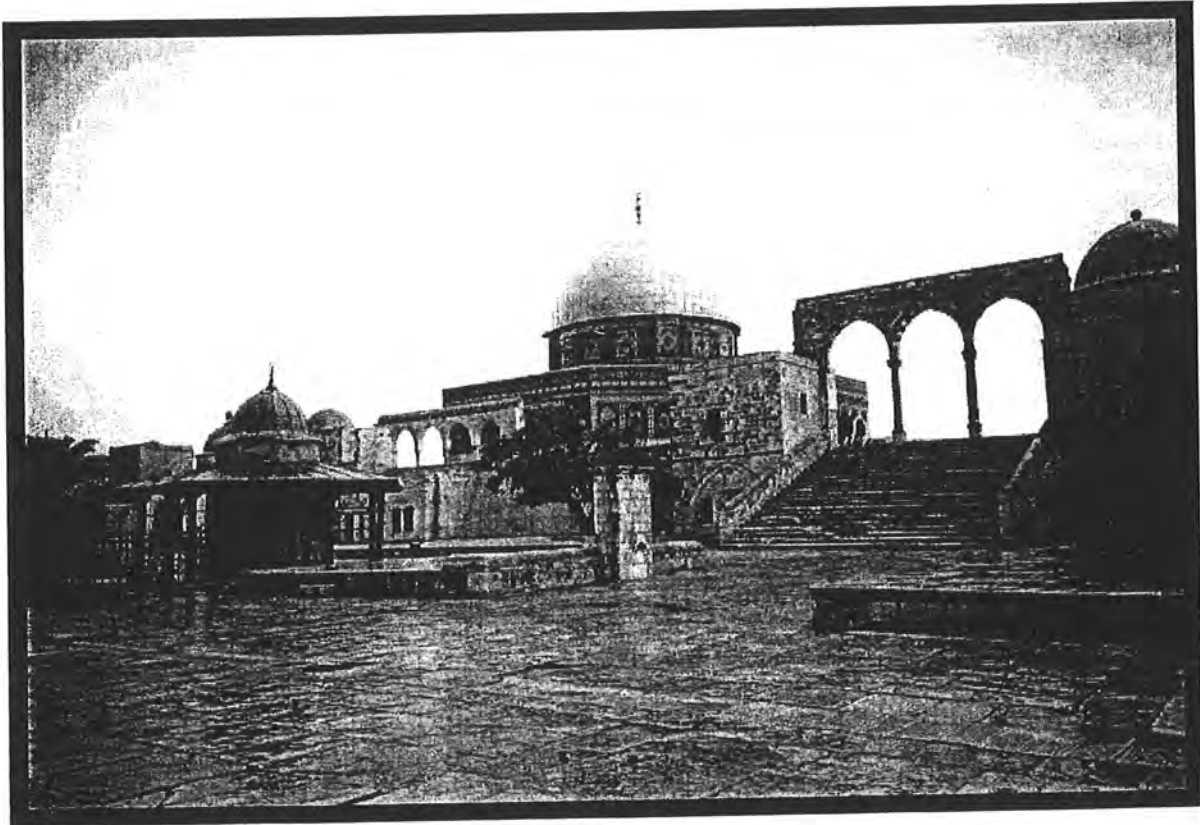
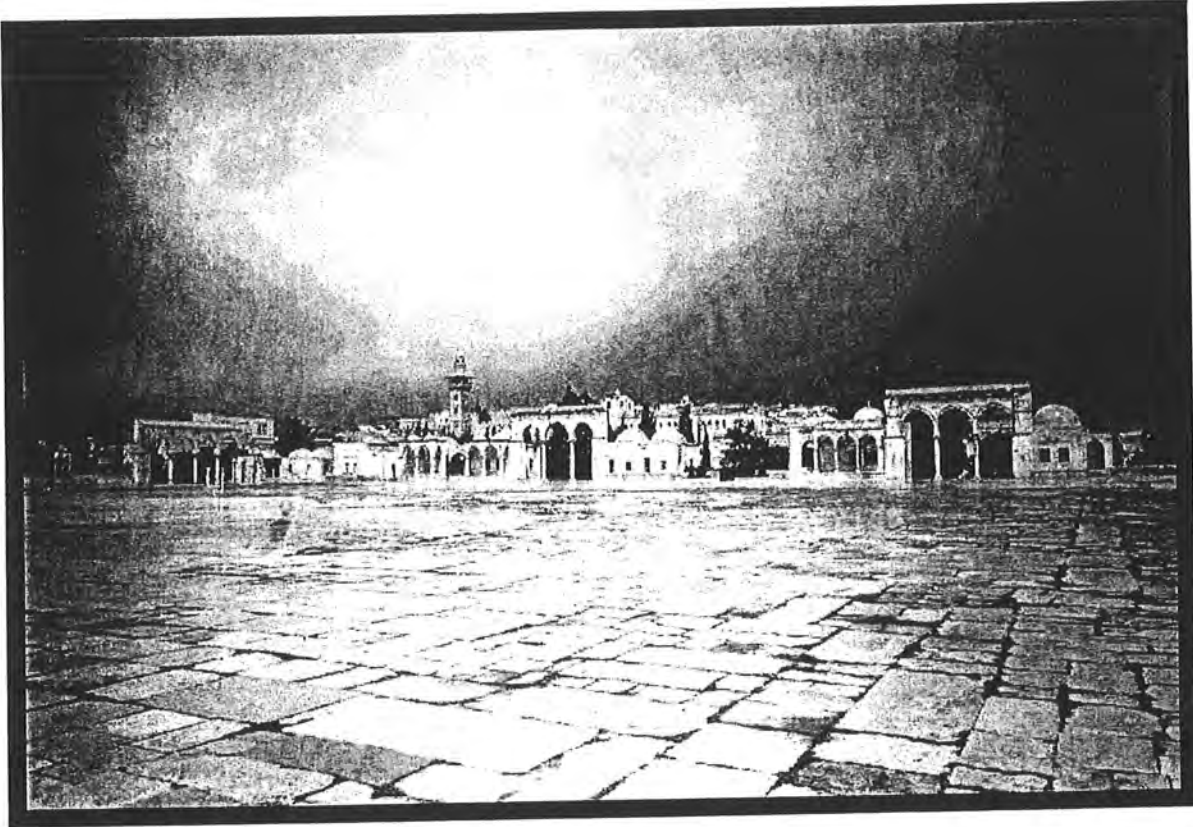
You then could go to the Authors Rights Society in your country, which, through the international network of such Societies or because the producer is member of that particular Society, would be able to act as rights-holder. This would be much easier for you than to make all these phonecalls and send all these faxes around the world to find out who owns the rights.

This could also mean that this Society, in most of the cases, would be able to collect the fee for the non-commercial public screenings - not only on the premises of the archives, but also for instance for retrospectives elsewhere - to the rightsholder.

And when no rights-holder exists? Well, all these Collecting Societies have some sort of Cultural Fund. You could come to an agreement, and the producers should join that agreement, that in that case the equivalent of the fee is flowing into the Fund, earmarked for the restoration of films.

By a collective agreement you can find a solution, that won't function tomorrow, but will the day after tomorrow. You'll have to build up the repertoire, the rules, you'll have to go a long way but I think you have to go it.

Finally, having been a Copyright lawyer for fifteen years, and now as a "fonctionnaire fédéral", I think some problems should be solved in order to enable you to fulfill your mission as described by Gabrielle. I think she has given a very good picture of the framework in which you are working, of how you are working and I think that you have a right to a solution to these problems. It's not up to me to tell you what to do, but I really think you have to move now, because without your lobby they won't be solved. You are not the USA asking for an Uruguay Round!



APRIL 17TH AFTERNOON

XII PLENARY DISCUSSION WITH PANEL OF GUEST-SPEAKERS

Michelle Aubert

J'ai été particulièrement intéressée par la dernière partie de la présentation de monsieur Marc Wehrin, qui repose le problème à nous conservateurs, archivistes, et nous dit en effet que c'est à nous d'entreprendre les négociations nécessaires pour que le patrimoine que nous conservons puisse être accessible au plus grand nombre. J'aimerais ajouter à cela que le patrimoine européen, tel que je l'ai calculé et qui est conservé dans les archives, est en effet un patrimoine immense.

D'après moi ça concerne plus de 400.000 oeuvres, et je parle ici de titres, et la plupart, je pense la moitié de ces oeuvres ne sont pas accessibles à cause du fait qu'on ne retrouve pas les ayants droit.

Ma conclusion est donc que, si on arrivait à mener des négociations collectives sur ce problème à l'échelle européenne, nous pourrions librement faire circuler ces oeuvres, qui pour l'instant sont totalement inaccessibles, à tout le monde et à la distribution commerciale en particulier. Je veux dire que c'est un fonds économique autant qu'un fonds culturel. Nous conservons ces documents pour la culture, mais ils pourraient aussi être exploités, et peut-être nous permettre d'avoir des revenus pour la préservation.

Jose Manuel Costa

J'ai une question pour monsieur Wehrin mais aussi pour tous les avocats qui sont dans la salle. La question principale, que je trouve la plus importante à discuter, est la suivante. Nous avons maintenant un patrimoine de cent ans de cinéma, qui pour une grande partie, au moins pour les cinquante premières années, est déposé dans les différentes archives.

Ce qui nous manque ce sont des instruments législatifs pour protéger ces oeuvres et le travail fait par les archives et on se pose aujourd'hui la question, au moment du centenaire du cinéma, de voir ce qu'on peut finalement résoudre au niveau national ou international, pour nous préparer un futur différent.

Apparemment et jusqu'à présent, il y a une réponse qui consiste à faire deux choses: établir un Dépôt Légal et améliorer les règles, qui, à ce niveau là, évidemment ne sont pas des lois, et améliorer le système du Dépôt Volontaire.

Mais ça me pose une question préalable. Le Dépôt Légal concerne le futur. Le Dépôt Volontaire concerne les rapports bilatéraux entre les ayants droit, les propriétaires, les producteurs, les distributeurs d'un côté et les archives de l'autre.

Mais il y a quand même quelque chose qui reste apparemment en dehors de tout ça et qu'il faut résoudre d'urgence au niveau de la législation internationale, à savoir tout ce qui concerne le travail effectué sous forme de conservation et restauration par les archives dans le monde. C'est à dire, des collections immenses détenues par les archives, des matériaux déposés de manière obscure dans le passé, mais qui ont été l'origine de beaucoup d'autres générations de matériel: tous les matériaux de préservation du nitrate, tous les internégatifs, tous les interpositifs, toutes les copies d'archive qui ont été faites. Ce travail reste très fragile du point de vue juridique. En effet il n'y a aucun instrument qui nous protège en ce qui concerne ce travail.

Ma question est donc: est-ce que vous connaissez en dehors du champs spécifique des archives du film, du cinéma et de l'audiovisuel, dans le domaine de la culture en général, un précédent qui pourrait servir de point de départ à l'établissement d'instruments de

législation internationale, une convention par exemple, qui ne concernerait pas seulement le Dépôt Légal, donc la production future, qui ne contiendrait pas seulement des suggestions pour le Dépôt Volontaire, mais qui protégerait l'ensemble du patrimoine déjà détenu par les archives nationales.

Est-ce qu'on peut encore faire quelque chose pour établir une telle protection, ou est-ce qu'on doit considérer cela comme une bataille perdue?

Marc Werhlin

Au niveau du Conseil de l'Europe nous avons beaucoup réfléchi: est-ce qu'il y a une possibilité de régler le passé par la Convention, surtout en ce qui concerne la propriété physique du matériel. Je pense que c'est là où il y a probablement le plus à régler. Mais nous avons vu très vite que juridiquement, au niveau international, c'était très difficile, parce que dans beaucoup de pays la notion de propriété privée est couverte par des droits constitutionnels, qui ne permettent que peu de prérogatives et sous des conditions très très précises. Et nous avons vu que la complexité et la diversité des systèmes juridiques dans le Droit des Biens Matériels ne permettaient aucune intervention au niveau d'une Convention.

Vous avez peut-être vu les difficultés qu'on a maintenant dans un autre domaine avec cette Convention, je ne me souviens pas comment elle s'appelle, sur le marché des Biens Culturels, qui a été conclue à Rome, qui traite des Biens Culturels qui ont été transférés d'un pays à l'autre, où il faudrait réguler le marché, éviter que tous les trésors de l'Egypte se retrouvent à Paris et vice versa - ce n'est pas tellement vice versa.

Vous auriez des problèmes constitutionnels énormes. Et nous avons pensé que nous n'avions pas de solution.

Mais je ne suis pas aussi pessimiste que vous. Peut-être parce que je ne connais pas la pratique. En ce qui concerne la qualité des copies, la qualité du matériel, vous avez un grand problème, parce qu'avec le temps tout ce matériel est en danger, mais juridiquement c'est plutôt le contraire. Je pense plutôt "il tempo, il medico", ça veut dire: plus le temps s'écoule, moins il y a la possibilité d'une intervention juridique, d'avoir un plaignant ou quelqu'un qui va vous causer des ennuis.

Nous avons introduit une seule disposition, mais tellement cachée que je pense que personne ne la comprend, dans l'article 8 de la Convention, qui parle de "mesures d'urgence". I will explain that in the coffee-break if you want.

Unidentified voice

My question is for Nathalie Piaskowski. I liked your lecture very much, but it held a lot of demands for archives, how you want archives to fit into your world.

But of course we would like very much to get some ideas and support from you. You represent producers and I would very much like to hear if you have plans or projects that show that you think of supporting the archives, financially or otherwise? You demand a lot and we might demand something from you.

Nathalie Piaskowski

Je n'ai pas eu le sentiment de demander beaucoup aux organismes d'archives dans mon intervention de ce matin. J'ai surtout essayé d'une part de lancer un message de dialogue et d'ouverture à l'adresse des cinémathèques et d'autre part d'indiquer quels étaient les points qui pour les producteurs constituent des "no starter" en matière de dépôt d'oeuvres et de leur utilisation par les cinémathèques. Mais je pense qu'en dépit de ces éléments nous pouvons parvenir à un accord.

Certains problèmes demeureront peut-être provisoirement irrésolus mais nous trouverons - je suis optimiste sur ce point - des compromis pour beaucoup d'autres d'entre eux.

Quant à la deuxième partie de votre question, c'est à dire si les producteurs ont développé des projets de nature à fournir des aides financières aux cinémathèques, à ça je dois répondre que non, il n'existe pas de tels projets aujourd'hui et qu'il est peu probable que de tels projets se développent à l'avenir à l'échelle de notre fédération ou à celle des associations nationales dans la mesure où le budget dont elles disposent est assez faible et ne leur permet pas de songer à de tels projets.

Nils Aas

I would like to thank madame Piaskowski for her intervention this morning and particularly for having underlined the new spirit of co-operation and understanding between the organisations. I think, however, that one of the points you made, concerning the use of material deposited, could be put in other terms and I am doing so in the spirit of a certain understanding of the problem.

I think that rather than poach on the intellectual property rights of authors the prime concern of curators or even cinémathèque programmers is not to violate these rights but to be able to identify the correct rightholders of a title.

And in continuation of the former question I'd like to challenge the FIAPF to take on the responsibility as a project to try to facilitate this task of identification. Of course some countries have Legal Deposit laws, under which we can actually charge those who deposit films with us as of that moment with informing us in case of any future change in rights-ownership.

Nathalie Piaskowski

L'identification des ayants droit est une préoccupation pour nous comme pour vous. Marc Wehrin vous a exposé tout à l'heure à propos des travaux de l'OMPI sur le Protocole Additionnel à la Convention de Berne, les propositions de dispositions concernant l'identification des oeuvres. On retrouve cette même préoccupation dans le Livre Vert sur la société de l'Information.

En ce qui concerne les producteurs, l'AGICOA a mené des travaux en association avec la CISAC, qui est la Fédération internationale des auteurs, dont le but est d'élaborer un numéro international d'identification des oeuvres. Il s'agit d'un numéro d'identification qui ne contient pas d'information sur les ayants droit eux-mêmes mais uniquement sur des éléments permettant d'identifier l'oeuvre purement et simplement. Ce numéro renvoie ensuite aux sociétés de gestion qui par le biais de leur banque de données peuvent identifier les ayants droit. Voilà donc très brièvement le contenu des travaux très avancés de ces deux organismes. Les producteurs sont assez favorables à un numéro d'identification conçu de cette manière, susceptible d'aider les cinémathèques mais aussi les producteurs, qui y voient un moyen de contrôler l'utilisation de leurs oeuvres ainsi que la possibilité de freiner la piraterie.

C'est pourquoi nous favorisons ce mouvement et ces travaux. Il y a néanmoins un point sur lequel nous demeurons extrêmement fermes : nous ne voulons pas que ce numéro, qui, incorporé dans l'oeuvre ou plutôt dans le support physique, devrait par nature être immuable, contienne des informations sur les ayants droit ou sur les conditions de cession de droits. Pourquoi? Pour une raison très simple.

Parce que si un numéro contenant de telles informations est tout à fait envisageable et possible en ce qui concerne les oeuvres imprimées, il ne l'est pas en matière d'oeuvres cinématographiques et audiovisuelles, domaine où la titularité des droits change très souvent. Pour des raisons matérielles évidentes il serait impossible d'être à jour de ces informations sur les ayants droit si on les introduisait dans ce numéro d'identification.

Tony Greenman

This problem seems to me one that should be solved. Contrary to popular belief the law is meant to facilitate things and not to hinder them.

I believe that the law shouldn't tolerate the situation in which there are properties or materials, that you say are part of the cultural heritage, that cannot be exploited. And I believe certainly in the anglo-american system in Israel and I might in another countries as well.

If you hold materials and, after good faith efforts, you cannot locate the rightsholder, I don't see any reason why, if the archive has substantial amounts of titles that would justify that, you wouldn't apply to a court to appoint a reciever for the copyrights. And the court rules would then be able to license that reciever, who of course would have to keep the money, or part of it, in escrow or something like that. Only a few titles wouldn't justify the effort and costs of this of course, but if you are talking about huge collections for which you can't locate the copyrightholders (that maybe were, for instance, corporations that don't exist anymore or individuals who dispersed all over the world and don't even know that they hold the title) then this is a solution that as far as I can see would be adopted by any court.

Marc Wehrin

With one exeption! You will have problems with the international Conventions on Copyright, of which I'm not so sure that they allow such a system. But that's a discussion between lawyers. And if you have two lawyers at the table, you have three opinions.

David Francis

I'd like to follow up on something Marc Wehrin said. He advised us to lobby effectively, and this is a unique situation where we're all together, and it seems very important that if we are to lobby we have to discuss what is the best way in which we can lobby.

It seems to me that at the moment it's a good time to lobby, because we have the European directive, and I understand it's only a directive that comes into force on the first of july, but that doesn't mean that the individual countries already agreed to an extension of Copyright to 70 years. As far as I understand it, they have agreed in principle, but it has to be discussed in each country. And I know the situation in America is that the discussions are still going on and the reason why they are is to achieve parity with Europe. So this moment that everyone else wants something seems to be the best time to argue for what wé want.

But we've got to agree on what we want and how we are going to present our case. Because in the American situation, when for instance the Copyright office appeals for comment on a change in Copyright legislation, obviously the entertainment industry arrives with a band of lawyers, very well briefed. And I, representing an archival point of view, go there myself and the impact that I have is basicly nowhere near as great as the lawyers have. So it seems to me that we have to discuss how we might make such a presentation.

Is there any way that we could get that sort of representation, when these issues are discussed in our respective countries, so that we would at least have some chance of presenting the archival point of view more strongly?

With all the legal opinions here, that hopefully are archivally sympathetic at least for a couple of days, can you advise us about how we might do this?

Marc Wehrlin

I won't have a recipe for everyone, but let's do some brainstorming. At least in my work for the Council of Europe and also the Appendix of the Convention, I had a difficulty to know what the FIAF really wanted and if we were going in the right direction.

So, as a first thing, I really think, maybe I was wrong but I also heard some remarks on this from some of you, that you still have to do your homework and decide: that's our common position and formulate it. And then, for the lobby - I don't have any experience in the USA, I know that it works with lawyers and it's not so different in other countries. In my country we had a similar situation with an Author's Rights proposition from the government, and that was just ... - oh, I was speaking of the "black friday" when they presented that in Parliament for the first time. And there we did the lobbying always together: a lawyer and a representant of the cultural field, for instance a director, a writer or an actor.

So maybe you also need a partnership like that. And I think that you in your countries also have departments or ministries of Culture? They should be your natural allies. As soon as you know what you want, you will find a way. You still may lose, but you'll have to try it. Don't lose in advance!

Tony Greenman

I do support what Marc Wehrlin said. In Israel we have a committee that's drafting a new Copyright Law, after some 85 years - our Copyright Law is from 1911. I think movies didn't even speak in those days. And one of the provisions in this draft Law is that the Copyright of a motion picture would rest automatically with the producer. Of course the directors in Israel are aware of the situation of the directors in Europe, who have initial Copyright. So they were outraged by this and we went to the committee, like Marc said, with a director and myself for the legal opinion. I think that's the way to do it.

I know that in most countries before laws are enacted there are Bills and Parliamentary Committees, and you have to be on the ball somehow and follow, through the media, when a law is being made or revised, and appear before such committees to state your position. But like Marc said, you need to know what your position is.

Clyde Jeavons

This revokes to an earlier point. Just to reassure those who are scared off by lawyers-speak, this particular point: you can successfully do what Tony Greenman suggested, which is, in particular cases, make a case for assuming the rights where they have gone into obscurity.

We've tried it in the UK with some titles, it's called "bona vacanti" in the United Kingdom, and oddly enough you do it with the Treasury. It is a little arduous, it takes a while, you have to do quite extensive researches into the Copyright background of a film to be able to sort of "prove" the non-existence of another rightsholder, but it is possible, it is successful and once you've got it you got it.

Tony is quite right, you should put some "insurance-money" aside in case somebody comes out of the woodwork to claim that film, but in our case that hasn't happened yet. So now we are beginning to go down that trail sometimes.

Vittorio Boarini

Je pense que David Francis a raison d'insister que les archives exercent une pression sur les gouvernements et surtout sur la Communauté européenne et le Conseil de l'Europe à propos de la conservation et de la préservation des films.

Il y a une question fondamentale, qui est que le Cinéma n'est pas considéré comme un Bien Culturel comme les autres. Toutes les dispositions pour sauvegarder les films sont basées sur ce principe, à savoir que les films sont surtout des marchandises. Je donne un exemple. Le propriétaire d'un palais, disons d'un palais du 17e siècle, ne peut pas le détruire. Il est propriétaire, mais le palais doit être sauvegardé. Il y a une loi, qui protège ce palais. Ça n'existe pas pour le film. Le propriétaire d'un film peut le détruire.

Le Dépôt Légal, comme Gabrielle Claes a dit ce matin, pour être efficace doit garantir le dépôt d'une matrice, d'un matériel qui permet de tirer des copies de qualité. Mais nous sommes bien loin d'une telle législation, bien bien loin. Et les films continuent à être détruits. Je pense que ça c'est un problème fondamental à poser devant la communauté internationale.

Deuxième question - très importante. Les cinémathèques ne sont pas toutes des institutions d'état. La cinémathèque que je dirige est une institution publique, mais pas une cinémathèque d'état.

Alors, je veux vous faire une confession, que généralement personne ne fait: je conserve beaucoup de copies que je détiens illégalement, beaucoup beaucoup! Je suis très fier de conserver des copies illégalement, parce que à cause de cela ces copies sont sauvées de la destruction.

Mais je pense que nous avons passé une - disons - période de guerre, au cours de laquelle nous avons fait tout qui était possible pour sauver des films.

Alors je pense que maintenant, le moment est venu d'exercer des pressions pour obtenir une législation qui va protéger ces copies qui ont été sauvées. Dans une telle situation imaginaire il sera finalement possible pour les archives de confesser leurs travaux "illégaux" mais en même temps de dire: nous avons sauvé ces pellicules et maintenant nous pouvons aussi révéler que nous les avons sauvées. Je pense que ça aussi est une question à mettre sur la table de la communauté internationale.

Nathalie Piaskowski

J'aimerais répondre sur ce point. D'abord en ce qui concerne la possibilité, comme vous dites, pour un producteur ou un auteur de détruire son film, il me semble que cette question suppose une absence de législation sur le dépôt légal. Dans la mesure où une législation impose l'obligation de ce dépôt légal aux producteurs et autres ayants droit, le problème ne se pose pas. Le dépôt légal fait de la copie de la copie déposée la propriété de la cinémathèque, ou le cas échéant de l'Etat. Dans ce cas le producteur ou l'auteur ne peut pas décider de détruire une copie dont il n'a plus la propriété du support physique.

Cela me conduit au second point de votre question. Vous dites que vous détenez illégalement des copies que vous avez sauvé de la destruction. Moi je ne considère pas que cette détention est illégale si elle est le résultat d'un dépôt, même si le déposant n'a pas de droits sur l'œuvre.

Il est souvent au moins propriétaire du support physique et c'est cette propriété et seulement celle-là qu'il vous a transmise par le dépôt. Par conséquent le fait qu'à votre tour vous deveniez propriétaire du support physique par le jeu du dépôt, vous autorise à conserver et sauver ces copies de la destruction. En revanche comme ce déposant n'est titulaire d'aucun droit d'exploitation sur l'œuvre, il ne peut vous transmettre plus de droits qu'il n'en a. Ainsi ce qui serait illégal, ce serait de procéder à des projections y compris dans vos locaux, sans l'autorisation des ayants droit. Mais je ne pense pas que le fait de détenir des copies que vous avez sauvées de la destruction soit illégal en tant que tel. Il faut examiner au cas par cas les conditions de dépôt et savoir en particulier si le déposant était bien propriétaire du support physique.

Gianni Comencini

Je voudrais poser une question à madame Piaskowski, qui représente ici la FIAPF, c'est à dire l'association des producteurs du monde entier. Vous connaissez la situation italienne. En Italie il y a le Dépôt Légal, comme a dit notre ami Vittorio Boarini. Mais ce Dépôt Légal est exclusivement pour la Cineteca Nazionale à Rome, qui est une cinémathèque d'état. En ce moment en Italie on travaille beaucoup pour sauver le cinéma Italien. Nous à Milan faisons beaucoup de restaurations, par exemple du cinéma muet Italien, et nous participons maintenant avec Rome à la sauvegarde, la restauration de l'oeuvre de ce grand metteur-en-scène Roberto Rossellini dans le cadre d'un projet qui s'appelle Progetto Rossellini.

Mais la question que je voudrais poser à madame Piaskowski est-celle-ci: pour le cinéma étranger en Italie c'est un drame. Après l'exploitation le cinéma étranger est détruit. J'ai entendu ce matin ce qui se passe en Belgique et qui est très important: n'est-il pas possible pour la FIAPF d'encourager, je dis bien encourager, les producteurs étrangers, à travers leurs distributeurs Italiens, de déposer volontairement les copies des films étrangers qui passent en Italie au lieu de les détruire?

Nathalie Piaskowski

Oui je comprends que cela constitue un problème pour vous. Mais il s'agit d'une question globale qu'on ne peut traiter à la seule échelle de l'Italie. C'est pourquoi ce matin et cet après midi, j'ai insisté sur le fait que ce problème était généralement lié à l'absence de confiance des producteurs dans les cinémathèques et des cinémathèques dans les producteurs. C'est la situation du dépôt volontaire qui fait l'objet des conflits les plus intenses. Ceux-ci ne peuvent se résoudre que par l'établissement d'un cadre juridique, contractuel entre deux structures à définir, représentatives de chacune des parties, producteurs et cinémathèques, de manière à ce qu'on arrive à une normalisation de nos relations, susceptible de réinstaurer la confiance des uns et des autres et qui permettrait effectivement d'encourager un dépôt volontaire dans des pays comme l'Italie.

Marc Wehrlin

Mais est-ce que on peut encore donner une réponse beaucoup plus brutale? Parce que moi je pense - je parle au titre de mon expérience professionnelle, je ne sais pas ce qui se passe dans la tête des producteurs mais j'ai une certaine force d'invention - l'Italie a un assez grand problème de piratage.

Et c'est peut-être lié à ça, que vous avez plus de difficultés que dans d'autres pays. Je n'engage personne.

Unidentified voice

I would like to ask two short questions and because I am taking the French legislation as study-case I will ask my question in French. Une concerne le Dépôt Légal en France au

niveau du CNC. Je pense que peu de personnes vont contester que c'est peut-être une des législations les plus évoluées qui existent.

Ma question concerne le fait que le Dépôt Légal en France stipule qu'il faut déposer des courts-métrages, des films publicitaires et des films de long métrage qui ont obtenu un visa d'exploitation en salle.

Pour ce qui concerne le domaine audiovisuel et sans que l'on prenne en compte le support sur lequel l'oeuvre a été tournée, le Dépôt Légal se fait au niveau de la Bibliothèque Nationale, dans le format que le producteur choisit et donc bien évidemment dans le format le moins cher qui est la cassette VHS, et au niveau du Département Audiovisuel de CNC, pour ce qui concerne les industries de programmes, aussi dans un format video, sans tenir compte du format de tournage du film.

De plus en plus les films de long métrage se font avec l'argent de la télévision et il s'agit surtout de documentaires et de téléfilms. Comment faire, est-ce qu'il n'y a pas une lacune au niveau de la législation? Ne devrait-on pas insister sur un dépôt au format du tournage d'origine. Je considère cela comme un point important pour les pays, qui n'ont pas encore une législation concernant le Dépôt Légal.

Ma deuxième question concerne deux problèmes législatifs qui existent en France mais aussi au niveau de la Communauté européenne, au niveau d'Eurimages.

Les producteurs qui font des films de long métrage ou des films qui contiennent plus de 50% d'images d'archive n'ont pas le droit de bénéficier des fonds d'Eurimages d'un côté et de l'autre côté, au niveau du CNC, un film, destiné à une exploitation en salle, qui contient des images d'archive est considéré comme un film de compilation et donc on ne l'accepte pas au Fonds Automatique de soutien.

Je crois que la FIAF, si elle le souhaite, devrait exercer une pression sur les institutions européennes en soulignant que c'est un des moyens de survie des archives qu'aussi les films, qui sont des compilations d'images d'archive, puissent accéder à ces fonds, ce qui va, peut-être, inciter les producteurs à faire davantage de films à partir d'images d'archive.

Vincent Létang

A votre deuxième question je peux difficilement vous répondre personnellement, car elle ne concerne pas un domaine pour lequel je suis mandaté à vous répondre.

La première question, si j'ai bien compris, ne concerne pas les films de cinéma mais les oeuvres audiovisuelles essentiellement.

Il y a trois organismes, qui reçoivent des images animées en France, le CNC pour tout ce qui est sur support photochimique et qui passe en salles de cinéma, la Bibliothèque Nationale pour tout ce qui est édition vidéo et multi-media et vidéo-disque, et l'Institut National de l'Audiovisuel pour tout ce qui est programme radio- et télédiffusé.

Donc les programmes ou les films de télévision sont déposés auprès de l'Institut National de l'Audiovisuel et, si c'est là votre question, ils sont effectivement déposés sur un format Beta-SP, même si le format de tournage était 16 ou 35 mm. Mais ça c'est la législation et la réglementation, qui a imposé ce standard et en tout cas au niveau du CNC on ne peut pas faire grand chose pour ça. Je suppose que j'ai répondu à votre question.

Unidentified voice

Oui, mais la question concerne les pays, qui n'ont pas encore de législation. Est-ce qu'il ne faut pas faire une petite mise en garde, insister sur les formats de tournage et pas les formats d'exploitation.

Aujourd'hui beaucoup de films qui se tournent en 35 mm ou en 16mm, sur support film, sont montés en vidéo, des films audiovisuels, des oeuvres de long-métrage. Est-ce qu'il ne faut pas attacher le Dépôt Légal au format de tournage?

Vincent Létang

Dans la législation française on a attaché le Dépôt Légal à la destination de l'organisme qui reçoit le dépôt. C'était le plus simple pour effectuer une délimitation de compétence entre les trois organismes dont j'ai parlé.

Mais c'est vrai que, d'un point de vue purement de conservation, il est évidemment préférable de conserver en 35 mm tout ce qui est en vidéo, même en Beta-SP. Simple-ment ça posera un problème pour les oeuvres de télévision parce que on a recours de plus en plus souvent au montage virtuel et en effet on n'a pas d'éléments complets et fidèles à l'oeuvre sur support film, même si les prises disjointes étaient effectuées sur ce support.

Unidentified voice

Je peux répondre pour la deuxième partie de la question, pas en ce qui concerne Eurimage, mais en ce qui concerne le CNC.

Les films de montage d'archives sont bien subventionnés par le CNC. Il y a deux films qui ont été subventionnés l'année dernière, qui sont le film d'Agnes Varda qui était à base d'archives et également le film de Jacques Perrin, LES ENFANTS DE LUMIÈRE.

Gérald Grunberg

Je voudrais apporter une double précision sur la question qui a été posée précédemment. La première précision c'est que la distinction entre les organismes attributaires du Dépôt Légal en France se fait effectivement sur une notion de support, non pas sur une notion d'édition. C'est à dire que, par exemple, la Bibliothèque Nationale de France est attributaire de tous les documents audiovisuels mis à la disposition d'un public autre que le cercle familial, même s'il n'y a aucune édition (comme c'est le cas de la plupart des films d'entreprises et d'un certain nombre de films d'institutions) et c'est extrêmement important pour le patrimoine.

La deuxième précision concerne le fait, qu'il n'a pas été imposé aux producteurs de déposer dans le format d'origine. Je crois que malheureusement - enfin, je mets le mot "malheureusement" entre guillemets, parce que cela soulève toutes sortes de questions d'ordre culturel - c'est là l'héritage de la longue pratique du Dépôt Légal du livre. Il n'a jamais été demandé aux imprimeurs de remettre à la Bibliothèque Nationale leurs tirages de tête, mais bien des exemplaires, des ouvrages sous la forme la plus communément diffusée auprès du public (on revient à cette notion de diffusion) et cet principe a été repris, sans autre réflexion vraisemblablement, pour les oeuvres audiovisuelles. Il est sûr que, si la législation devait être révisée ou en tout cas pour les pays où elle doit encore être établie, la question mérite sérieusement d'être posée.

Michael Friend

I'd like to bring the discussion back a little bit to our original topic of archival rights and the necessities for retaining and preserving films. The difference between what we do and what the production companies do is that we preserve films. Their job is to make money. There's no company in the world that I ever heard of, that has in it's charter the statement: we are here to preserve films.

And since society has more or less realised that the preservation of our audiovisual heritage, films and other works, is very important we have a very specific mandate, which differs from the companies from whom we draw films, it differs from the authors, who's rights we try to protect, it differs from the public that we serve.

What we need to do as an organisation is to move back and refocus on the specificity of what it is that we do and who we are. And that is: we are people who preserve films and the rest of the audiovisual heritage.

So to that end I'd like to ask the discussion to move back a bit towards the direction of what it is that we might be able to do individually and, more important, collectively at this time to put across the needs that we have in order to achieve that specific goal

Michelle Aubert

My question, I hope, will be very practical. I heard Mrs Piaskowski telling us about this new list of works with descriptions etcetera, this register, ce registre dont vous parlez, qui va être mis en oeuvre.

Je ne comprends pas pourquoi le nom du producteur ne sera pas mis à la disposition du public. Parce qu'en effet, si dans les archives on cherche à connaître l'appartenance d'une oeuvre, comment va-t-on pouvoir résoudre cette question.

Nathalie Piaskowski

Je dois d'abord préciser que je ne décrivais pas, tout à l'heure, le fonctionnement d'un registre de droits. L'OMPI a introduit l'idée puis mis en place un registre international des oeuvres. Mais dans la mesure où seuls douze pays ont adhéré au traité de création de ce registre, il n'est pas véritablement opérationnel.

Je parlais des travaux de l'AGICOA et de la CISAC, quant à la mise en place d'un numéro d'identification. Pourquoi les producteurs ne veulent pas inclure des informations sur la gestion des droits et sur les ayants droit eux-mêmes ? C'est parce qu'ils considèrent que la propriété des droits change de mains beaucoup trop vite pour qu'une telle information puisse figurer dans les supports d'une oeuvre sans risquer d'être rapidement obsolète. Voilà la raison essentielle.

Que vont faire les archives pour retrouver un ayant droit à partir d'un éventuel numéro d'identification? Ce numéro contenant un nombre limité d'informations, pourra comporter une référence à un organisme qui détient des informations sur ces ayants droit, voire sur les conditions d'utilisation et de cession de l'oeuvre. Ça peut être une société de gestion collective; ça peut être aussi comme en France, le Centre du Cinéma qui gère un registre cinématographique enregistrant les cessions de droits. Cette simple référence permettra de se reporter aux banques de données existantes.

Michelle Aubert

Je vous remercie pour cette précision, et je dois dire aussi que justement la recherche des ayants droit, qu'il s'agisse de films anciens ou de films récents, est un problème considérable pour nous tous. Nous voulons en général suivre la situation juridique de chaque film. Mais c'est quasiment une impossibilité.

Donc entre nous, nous nous aidons et nous avons déjà réfléchi à créer un registre à l'échelle européenne, qui nous permettrait au moins de nous en sortir pour tout ce qui concerne les producteurs européens.

Est-ce que vous pensez qu'il y a déjà des idées de ce genre évoqués dans le cadre de MEDIA II, par exemple?

Nathalie Piaskowski

Non je n'ai pas connaissance d'un tel projet dans le cadre du Programme Media II. Je ne sais pas si quelqu'un dans le panel en a connaissance. En ce qui me concerne je ne pense qu'il en existe dans ce cadre.

Jose Pinto Ribeiro

Je voudrais revenir à ce qu'a dit Marc Wehrin. En parlant en présence des archives, des cinémathèques, je voudrais dire que la jurisprudence est vraiment une science d'argumentation, et qu'en effet lorsque vous avez deux avocats vous avez trois opinions. Mais si vous avez cent avocats, vous avez aussi trois opinions! C'est à dire, que les opinions ne se multiplient pas à l'infini. Même si vous avez trois opinions divergeantes, finalement vous aurez une opinion qui prévaudra sur la majorité des autres.

A mon avis, ce qui manque aux cinémathèques, c'est un appui juridique. Elles manquent de "legal advice" et en général lorsqu'elles ont un, il est mauvais. Il est rare qu'elles ont un bon "legal advice".

Et elles n'ont pas exploité les possibilités de leurs droits nationaux. Quand on parle de "bona vacantia", il s'agit en fait d'une espèce de l' "usu'capio" [prescription acquisitive], que apparemment personne n'en a utilisé.

C'est très curieux à mon avis, et exemplaire, que ce soit Nathalie Piaskowski qui dise à un représentant d'une cinémathèque: "mais ce n'est pas illégal. Les copies que vous détenez sont à vous. Vous en êtes propriétaire."

Mais je ne partage pas son opinion, à propos du caractère illégal de la projection de ces copies. Si vous faites de l'exploitation économique je suis d'accord avec elle. Mais si vous faites des exhibitions purement culturelles et donc vous ne causez pas de dommage aux ayants droit connus, qui détiennent les droits économiques d'exploitation, même là vous ne seriez pas dans une situation d'illégalité.

Une deuxième chose à faire, à mon avis, pour les archives, pour les cinémathèques, c'est un véritable travail de "lobbying" au niveau de la législation nationale. C'est très compliqué, Marc Wehrin l'a dit, au niveau d'une Convention d'établir des règles qui soient communes au droit anglo-saxon et au droit continental. Même au niveau du droit germanique et du droit romain ou de tradition romaine, c'est très compliqué d'établir une clause universelle pour tous ces pays là. Mais il est possible au niveau des droits nationaux, et conformément avec le droit national de ces pays, d'introduire des changements, qui touchent au droit de propriété.

Il y a plusieurs pays en Europe, selon les droits desquels, si un Bien Culturel est abandonné pendant un certain nombre d'années, il devient un bien public et l'état a le droit de s'en occuper. Ceci existe dans certains pays d' Europe même pour le dépôt d'argent auprès des banques. Ce n'est pas le cas en Suisse, évidemment, mais bien dans certains pays. Si quelqu'un a déposé de l'argent auprès d'une banque et ne s'en occupe pas pendant plus de vingt ans cet argent revient à l'état - et là, il s'agit d'argent!

Il se pourrait donc que dans le cadre de certains droits nationaux, on puisse faire de même pour certaines copies, qui ont été pour ainsi dire abandonnées, et qui pourraient ainsi être utilisées par certaines archives, surtout par des archives publiques, à des fins culturelles.

Je crois que ce n'est qu'en fin de parcours, qu'on peut aborder la question du "lobbying" au niveau Communautaire, au niveau des Conventions internationales. Ce n'est qu'à ce moment là, que nous pourrions peut-être trouver des solutions communes, après avoir bien établi dans quels cadres nationaux nous nous trouvons.

Nathalie Piaskowski

J'aimerais juste répondre à la question qui a été de nouveau soulevée par Monsieur Ribeiro, qui reprenais mes propos. J'ai dit qu'une cinémathèque pouvait tout à fait être propriétaire du support physique d'une copie qu'un déposant sans titres lui aurait apportée sous forme de don, mais sur laquelle il n'aurait aucun droit de propriété intellectuelle. Dans ces conditions, la cinémathèque devient propriétaire de la copie, en tant que support physique et uniquement support physique et peut détenir légalement cette copie aux fins uniques de conservation. Cela signifie que pour toute autre utilisation, que ce soit à l'intérieur des locaux de la cinémathèque ou à l'extérieur de ses locaux, pour toutes autres manifestations ou émissions, la cinémathèque devra rechercher l'ayant droit pour obtenir son autorisation par le biais d'un contrat.

Vittorio Boarini

Je voulais préciser une chose. Prenons par exemple l'Italie: une copie qui arrive au terme de son exploitation doit être détruite. Mais puisque détruire la pellicule coûte très cher, le producteur dit au distributeur: c'est toi qui dois la détruire et tu dois me jurer que tu l'as détruite. Alors, le distributeur fait une déclaration dans laquelle il dit: j'ai détruit toutes les copies de ce film là. C'est une déclaration qui sert à rassurer le producteur. Bon! Les copies ont été détruites.

Mais.... Si le distributeur fait cette déclaration, mais qu'il ne les détruit pas effectivement, ces copies ne sont pas détruites, mais légalement ce sont des copies détruites, puisqu'il y a eu une déclaration officielle selon laquelle ces copies ont été détruites. Et ensuite le distributeur, après plusieurs années, quand ses caves sont pleines de copies, il les confie à la cinémathèque, disons par exemple, la cinémathèque de Bologne.

Donc, ces copies n'existent pas, puisqu'il y a une déclaration qui établit qu'elles ont été détruites. Je détiens alors des copies qui ont été détruites mais.... qui sont là!

La question, que je voudrais poser, c'est que le principe du Dépôt Légal est un principe qui rend la législation sur le cinéma très différente de la législation sur la peinture, la musique, l'architecture etc.

La différence est la suivante: pour protéger ce type de Bien Culturel on ne dit pas que c'est interdit de le détruire. Non, nous disons où on devrait le déposer. Et la situation actuelle du Dépôt Légal, tel qu'il fonctionne en pratique dans plusieurs pays et pas seulement en Italie, est une situation dans laquelle il n'est pas garanti que le film soit bien conservé. Voilà ce que je voulais dire.

Mon ami Marc Wehrin a dit, erronément, qu'en Italie on agit comme cela, pour sauver les films. Je dois dire, brutalité pour brutalité, que la question de la piraterie n'est pas une argumentation brutale. C'est une argumentation vulgaire, c'est simplement vulgaire!

Marc Wehrin

Mais elle existe.

Et pour répondre à la première partie, je pense qu'il faut faire une distinction: qui a commis une erreur juridique et cette erreur juridique du distributeur, aura-t-elle ensuite des conséquences pour la cinémathèque? Bien sûr, si le distributeur déclare vis-à-vis de son producteur qu'il a détruit la copie et qu'il ne l'a pas fait, alors il a rompu son contrat.

Mais, allez quand même voir dans votre droit italien: si après un certain temps, les biens non détruits ont été donnés à la cinémathèque, même si vous savez pertinemment qu'en principe le distributeur aurait dû les détruire, est-ce que ça aura des conséquences. Ce n'est pas sûr du tout.

C'est une question de Droit privé de chaque pays. Il y a des pays, où, après un certain temps, vous devenez propriétaire. Et puis il y a deux variantes: celui qui a reçu la copie, doit-il être de bonne foi? Ou bien, même s'il est de mauvaise foi, ne deviendra-t-il pas propriétaire malgré tout? C'est vraiment une question à examiner pays par pays. La réponse de Nathalie Piaskowski peut quand même être correcte, même s'il y a eu ces histoires avec les distributeurs.

Tony Greenman

I like to comment on the films being destroyed, but are still there. It's like the guy who goes to the zoo and sees a giraffe and then says that they are extinct. A clear distinction has to be made between the Copyright and the physical property. As long as you are not receiving what you know are stolen goods - stolen: somebody has broken into someones warehouse and stolen them - , as long as you have that physical property and it's not stolen, and you are just holding it on your premises, in your archive, I don't see that you're breaching any law. It becomes a different matter when you start to exploit it. When you do that you go back to the copyright issue.

It doesn't matter whether you got the material from the distributor who had the rights or hadn't or from the producer. You have received that reel of film and the question is not: are you committing a crime. You are not committing a crime unless it's stolen property and you know that.

The question is, what happens if the producer turns up and says: I want this reel back, it's my property. And then, like Marc Wehrin said it's a question of the domestic laws, but normally he would be able to get it back and if you preserved it and if you had spent money on that and you'd have done that in good faith, then I think you would also have a right to get that money back. You are not a partie in the contract between the producer and the distributor and you don't need to be.

So you must distinguish between Copyright and the physical property.

Michael Friend closes april 17th session

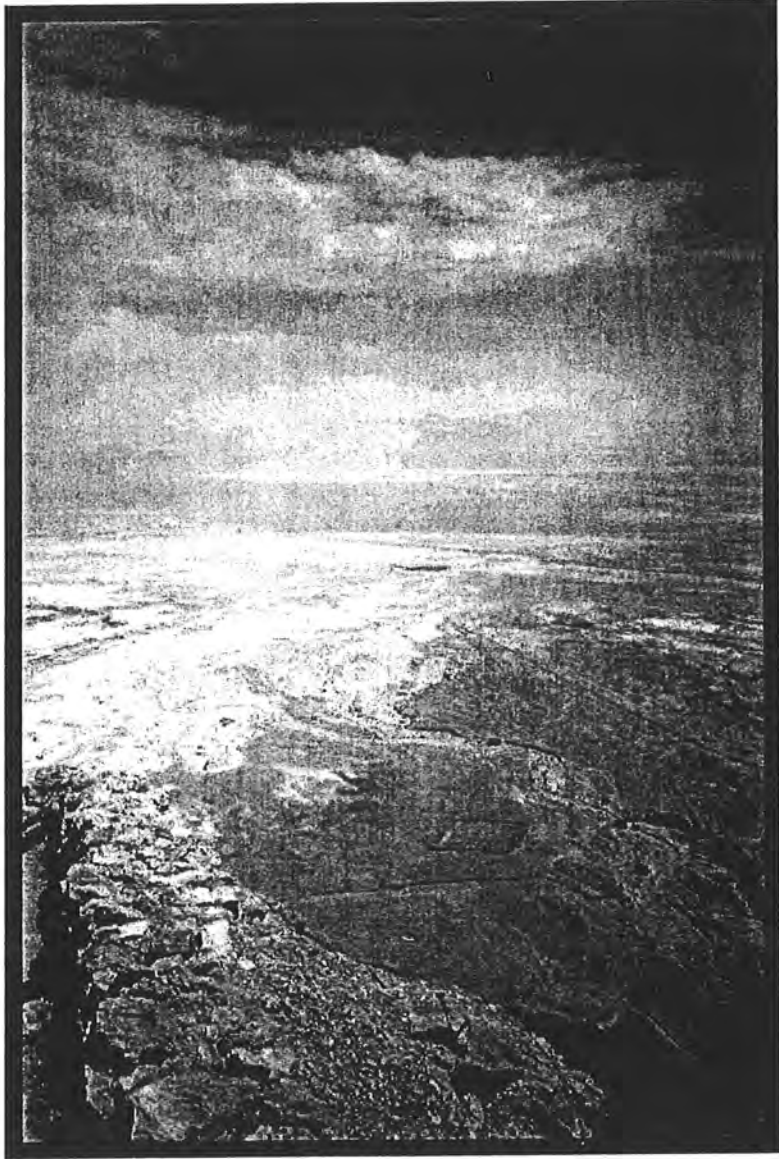
We have come to the conclusion of today's discussion, but I would hope that for tomorrow's sessions we think about a sort of platform.

What is it that the archives need in terms of any kind of conceivable legal relief under Copyright Laws. What are we going to need to be able to do what we most want to do.

I think we have to proceed from a positive direction, a pro-active direction, not from reactions to Copyright Law or any problems with producers and distributors. We need to define what it is that is necessary and sufficient to preserve the film heritage of the world. And I hope we come to tomorrow's sessions with that in mind and deal really with the causes rather than the symptoms, which we all experience in our archives.

So with that comment I would like to relieve the thieves and philosophers of our congregation to go out and have a good time in Jerusalem. And I'd like to thank our panellists very much for their presentations.

APRIL 18TH MORNING: DISCUSSION GROUPS



APRIL 18TH AFTERNOON:

XIII REPORTS AND FINAL PANEL DISCUSSION

Michael Friend opens session

We have come to the last session of THE RIGHT'S THING and I'd like to open the session by thanking Hoos Blotkamp for her work in organising this symposium and sending around a monument of documents, which we are all compelled to read and which brought us all more or less together. And also I'd like to thank Mr Greenman, Mr Wehrin and Mr Choukroun for their participation in our discussion groups today. Their input was very valuable and very helpful.

We'll have our group leaders summarizing the result of the discussions that we had today and they have results in a number of areas. We hope to be able to move forward in the typical FIAF fashion by forming another group after this one, but it's very important that today we get some consensus on directions we are going to move in. So the first thing I'd like to do is have a discussion on the main points, which came out of the groups today and those will show us where to go next.

Steven Ricci reports on the theme of his discussion group: The impact of new technologies on the archival activity

I'd also like to thank Tony Greenman for his help in the group that I moderated. The charge for my group was to talk about the impact of the new technologies and the production of new media on our archival rights situation. That's to say, how does our situation change once we get involved in both being producers of new media and also given that we are getting more and more requests from producers of new media. So in general terms the relationship between new technologies and archival activity.

There was a series of areas that we talked about. I'll try to boil this down to three or four basic conclusions if you will or to represent the consensus of the discussions well.

What we are talking about here are activities such as:

- the Internet, that's to say both things that we do on the Internet, FIAF has its own web site now and a growing number of archives do as well, but also the kind of requests that we get for use of our materials on the Internet,
- the whole notion of the deployment of Weberian networks which can transmit information of various types in ways that are brand new,
- production of CD-ROMs, again both our production and the requests made to us to use our materials,
- digital video-disc in the future for sure,
- and then finally what we are going to do with protecting the disseminating in our own best interests, but also protecting the development of our own databases of information about our collections.

The first general consideration, fairly obvious, is that we are now in a position, given the facility with which one can get involved in new media production, of asking questions about both:

- what we can do vis-a-vis the rights that are invested with the copyright owners on the one hand,
- but since we're also involved in the production ourselves what then are our rights.

So simultaneously asking questions about production in both directions.

The second general point was, and this is a fairly strong recommendation, that we need to explore ways for claiming the right to be able to exchange information in an unhindered way between archives about our collections, including the use of visual clips, without any fear of Copyright infringement. The specific case that is cited here is the need to identify a fragment of a film for example.

It is true that you can send a videotape, you can also exchange textual information, but it is also very very fast and efficient to be able to send, receive, download and then study a particular clip. We'd like to be able to do this without fear of being sued at the same time. I think we can extend it even a little bit further than that, beyond the notion of simple identification, to preservation and all the complexity of activities involved. So an unhindered exchange of information is a crucial right that we need to establish.

The third observation was that we need to explore whether it is possible to extend that kind of exchange of information to the actual study, analysis and appreciation of complete items in our collections. And this is problematic, because the previous protections about viewing things on site and under supervision etcetera are not spoken to specifically by the current set of Copyright Laws, at least in the USA. So this is something that we need to explore.

Fourth and finally, there is this sense that the Copyright Laws that currently exist sort of cover what we are doing in the so called digital domain. At the same time traditional languages that we use in our contracts with our donors and depositors, apart from the copyright issues, might also apply. The famous phrase that something can be viewed "on the premises of the archive" might also still apply. But if there's anything that is true about the digital domain it is that physical spaces, geographical spaces expand and explode by the fact that you can transmit things to remote sites, which can never be fully under archival supervision. That is to say, they can't be physically on archival premises. But we want to be involved and be able to develop such activities.

So there was a desire in many ways to find new language, which would replace or modernise the "on archive premises" phrase. This is one specific example, but the general proposal is to find new sets of terms, new phrases for our contracts with our donors and depositors, which will reassure them that we're not improperly using the material, and more important, which will guarantee to us the right to use the material albeit in the new media circumstances.

Those were the four basic thoughts that came out.

**Jose Manuel Costa reports on the theme of his discussion group:
International & national legislation and Legal Depot**

My group started with some discussion about the relative importance we give to international or national legislation. Following previous discussions here yesterday we felt that it should be stressed that there is much to do on the national level. Even if we should go on with initiatives like the Convention of the Council of Europe, we shouldn't expect to solve our problems on that basis mainly. There is much work to do on the level of national legislation.

So the first idea is that we should go on working in the international field but that we'd have to increase our attention to the national level.

Following this, the main feeling is that the next step for us should be to get to know exactly what want. This means that the main task for us in the near future is to become very concrete and precise on what we want in legal terms and what we want as a platform for

the dialogue with the producers, the FIAPF, now that this door is open. The conclusion is: we don't have a document yet, a list of requirements in a very precise and concrete way, that we can present as our common position. So the next step should be an internal one within FIAF to do this work.

The way to do it should be, as we see it, to make a list of requirements that could be transformed into a "Bill of Rights". And, as I will explain later, this is strongly connected to the idea of another internal document that we should produce, which is a "Code of Ethics". If we want to go out and fight for our rights we should also know exactly what we can offer and what FIAF itself can offer concerning guaranties of behaviour. There is much to do on that level too.

We then, just as examples and startingpoints, discussed some specific parts of what could be that requirements, that conditions we need for our archival work. We concentrated on two or three main topics.

The first one is the concept of Legal Deposit. Here the basic issue is the need to specify in a much clearer way than before that we, as far as real preservation is concerned, have to receive preprint material and not just positive prints. The positive print is not the right material for long term preservation.

We also discussed what happens with the material once it is in the archive, the use of it by external parties like the depositor himself or exhibitors that are allowed by the depositor to use it. We have concluded that further use of the material should technically be completely controlled by the archive as the very minimum standard. For instance, the archive should, in case of printing activity, choose the laboratory. And maybe in future the number of uses of the material should also be limited.

Another item on the table was the authorization of the rights-owners for the screenings in the archives. The basic concern here is, and everybody agreed on this point, we shouldn't accept the FIAPF concept that the Legal Deposit material should be kept in the vaults and only be used for maybe individual research and not for the public screenings in the archives, as they at present accept automatically for the Voluntary Deposit material. The difference between the two systems doesn't make sense. There was an agreement that we should stress the point that both Legal Deposit material and Voluntary Deposit material come to the archives for the same purpose, which is to preserve and to show, the showing being a part of the preservation concept. This we should fight for.

The next step to take is to realise a situation in which we can make the material circulate, to make the exchange of prints inside FIAF possible. But it is evident to us that this is very much linked to what I said before about the "Code of Ethics". We feel that the ground is not clear enough for us to win this battle. Further discussion is needed inside FIAF, related to the question: what are we really demanding from our own members concerning the showing of films and how are we controlling the standards of projection and all that showing involves. So this is a specific point where the battle for the free exchange within FIAF must be closely linked to a new procedure inside FIAF concerning the ethics of showing.

The group also expressed a concern about the tendency, which seems to grow, towards an decrease of the scope of the public domain. We also discussed a specific case happening now in Europe, which we felt could become exemplary for what can happen on a larger scale in the near future. Some archives are now receiving letters from Turner asking lists of what we have of certain American production companies. Some of the letters hint that the next step will be that they will want the prints back or destroyed.

We decided that it is best to react friendly and explain our position. This can be done individually, but we feel that the president of FIAF should also react and open a dialogue with them.

Finally we had an interesting discussion on what should be done in the near future concerning the use of legal expertise from lawyers, in our own countries, but also by FIAF. There were two complimentary positions expressed. Many problems are policy problems for FIAF and we should accept them as such.

We have to prepare our background more and more, especially in the legal field, in order to know where we are going and how we have to deal with situations. So the idea that FIAF should have a regular legal consultancy was on the table.

**Bob Rosen reports on the theme of his discussion group:
The archive as producer**

My group was dealing with the question of the archive as producer of material. The point of departure was the assumption that the hard fast distinction between producers on the one hand, who dealt with commodities on the marketplace, and archives on the other hand, that dealt solely with preservation and dissemination of culture was no longer valid. The notion that they were entirely separate was invalidated by the experience we have on a daily basis. On the one side the fact that producers themselves become more involved in the production of culture as commodity and then come to us for materials, means that we are involved with them as suppliers. On the other side the fact that the archives, in their desire to disseminate culture, start to produce finite products of one kind or another as a mode of dissemination means that we are involved as producers as well. And some of the questions that we pose about producers we might want to pose about ourselves.

The assumption was that this process of coming together is already in evidence, that it is inevitable, that it will grow in the future and that trying to deal with it on a legal basis evokes more questions than we have answers.

So the areas that we spoke about were areas for further inquiry, the establishment of an agenda for future discussion rather than conclusions at this point.

A key distinction we made is that the archive is involved as producer in either a passive or an active way. The passive way is the providing of the materials, under certain agreements and terms, to producers. The active way is when the archive itself creates cultural products.

It became clear that both of these areas are more complicated than it seems at first glance. It becomes evident in particular when you try to disentangle the obligations that come from an array of different kinds of rights like the issues associated with moral rights, copyrights, contractual rights, the statutes under which an institution is established and must operate etc. They are all intertwined in extraordinarily complex ways, particularly when the product crosses national boundaries.

An archive in a country, for example, that has like the USA no legal notion of moral rights, may become involved in the creation of a product, that when it crosses the national boundaries may very well get caught in a legal struggle over issues of moral rights. And archives have to be aware of such things in their role as producers.

There is also complexity in either the passive or the active role in the area of protecting the archives interests. One area of particular interest is the misuse of material once it leaves the archive and becomes imbedded in a work outside of your control.

There was considerable discussion about legal ways to protect yourself under these circumstances, where not only your material rights must be protected but the integrity of the work as well.

We discussed a number of other related issues like the necessity, within the context of the FIAF itself for example, for various institutions to be concerned with the legal rights that other institutions have obligations to.

And finally we discussed the question of a "Code of Ethics" as a counterpart of a "Bill of Rights", which is considered a real necessity and a real affirmation of the statutes and the code of ethics that already exists.

There was an array of other questions that were posed, but I prefer to leave those to the study-group to work through.

The one thing we came away with however, was a irreputable feeling that these questions were now on the table. There is no way to negate them, reality has put them on the table. And the only course now is to figure out ways that we can go about figuring out responses.

Michael Friend opens final panel discussion

In the last three, five, seven years or so, maybe ten years if you want to go back that far, we have seen some pretty dramatic changes in the world of movie making, movie exhibition and movie distribution.

Those changes have been moving faster in some ways than the FIAF archives have been developping. We have the vertical reintegration of massive international corporations that own very large amounts of film, much of which we have a deep interst in, we have seen massive appropriations of public domain and public spear material by these kinds of corporations and we've seen a certain kind of loss of information.....

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.....preserve, exchange and show important examples of our cinematographic heritage. And this brings us around to why we have this panel. In order to create a concept of an archival "Bill of Rights" which allows us, gives us sufficient and necessary support to do waht we need to do, internationally as well nationally, to continue our work in this new world of media.

We would like to ask the Executive Committee of FIAF to appoint a task force that creates a "Bill of Rights" that we can all subscribe to, a "Bill of Rights", which will focus on those essential characteristics of the organisations that we are, that will allow us to come together, that will provide a kind of a core and unity and a program by which we can adress the new conditions that we find ourselves in.

To that end we'd like to invite the Executive Committee to take up this issue and to appoint a task force which will do that, with the idea that in next years congress we will be able to vote on and adopt a "Bill of Rights", which we will have as an ideal for the archives in terms of their legal situations.

That's basicly all we have to say here.

Bob Rosen

I just want to reinforce one thing and that is: whatever part of the discussion went on, with all of our legal advisers and others as well, there always was a feeling that this was an important subject and we didn't want to put it off...and put it off.... and put it off.... , that the creation of a task force was with an eye towards coming up with a course of direction and doing so, with a high level of interaction with the membership and the assumption that the membership would very actively participate during the course of the year in this process. So that by the time of the next congress it isn't a report on progress, but is is a document that has already been discussed, around which has been a lot of interaction, and that can be voted upon and then implemented.

I think any discussion now about the importance of it would be very useful, a reaffirmation of the usefulness of this would be important, because everybody's participation is essential to make this thing work and not become just another area for discussion to be put off into the far distant future!

Gabrielle Claes

Comment voyez vous l'élaboration de cette "Bill of Rights", that you were talking of a few minutes ago? The dialogue and the negotiation with the producers association?

Bob Rosen

Well, I think you've just suggested a second topic, to be directed towards the EC, for discussion. I think that the consensus in at least one of the workinggroups was, that this should not wait until after we have documents in the future but should begin on the short term, that there was a certain sense of immediacy, of urgency in carrying out those dialogues. How that should be carried through strikes me as a responsibility of the Executive Committy to determine, representing the organisation as a whole. The question of how it will be carried out will have to be determined by others than us. I think the feeling we have is: soon!

Jose Manuel Costa

The "Bill of Rights" work should be carried out by a task force that, and this is just a proposal that the EC could take into consideration, should be created during this congress or very soon after.

The job of this task force, however, should be wider than just the "Bill of Rights". Because as we said, there is the problem of what for the moment we are calling the "Code of Ethics", which may be even a different document, not even necessarily a document. It might be a text to begin with or just a discussion inside FIAF, related to the statutes of FIAF, to the behaviour, the practical life of FIAF and the members of FIAF.

And it should of course be very closely related to the group that somehow is going on discussing the future of FIAF. Because actually, when we're talking about the "Code of Ethics", what we are talking about is again the scope of this Federation, the rules, the behaviour of the members and the control regarding our activities and so on. How are we going to face this kind of problems. And this is very closely linked to the urgent matter of defining the scope of the Federation and the process of enlarging the Federation, the growing of the Federation.

So all these issues are connected and the only way to create an organisational basis to deal with these connections is to ask the EC to take widening the job of the task force in that sense into consideration.

But it is our opinion that we should leave this congress with a precise task for the very near future.

Michael Friend

I might also say that we may alert the producers to our new positions through our ordinary interactions with them, for example in terms of our deposit agreements and things like this. We may end up writing the principles of our "Bill of Rights" into those deposit agreements as we continue our normal work. I don't know if this is necessarily going to require a press conference to tell the producers what we're doing or rather a gradual shift and an enhancement of our activity towards the natural state that we think things should be in.

Jose Manuel Costa

Still about the dialogue with the FIAPF, I think that's a very important issue. Because the door is open for next meetings, and now meetings organised by initiative of FIAPF and FIAF themselves. We don't need the Council of Europe or anyone else, the invitation is there. So we shouldn't wait for a year to call FIAPF for an appointment to sit at the table together and discuss things.

Before we have our "Bill of Rights" or something like that next year, we have to organise some kind of dialogue. This is obvious to us.

Now again the way to do this, who is going to make that call to FIAPF and what are we really going to discuss with the producers, is something that the EC in the end should decide upon. We still have the General Assembly ahead to talk about these things, but again, I think that very very soon, I'd say almost immediately after this congress, some word should be sent to FIAPF in order to tell them what we have done and when and how we'd like to go on with this dialogue.

João Bénard da Costa

Moi aussi je crois, comme José Manuel le disait tout à l'heure, que tout est lié, tout ça pose à propos de l'avenir de la FIAF, des questions tout à fait nouvelles et d'une très grande importance.

Il y a une autre question qui me semble avoir été au centre de toute cette discussion et surtout dans le rapport que Jose Manuel vient de faire à propos de la réunion de son groupe. Et c'est là aussi qu'il peut à nouveau y avoir une distinction assez nette entre les archives qui programment et celles qui ne programment pas.

La question du dépôt se ne pose pas exactement de la même façon pour ces deux types d'archives qui coexistent dans la FIAF. Les archives qui ont une activité de programmation ont tendance à se conduire plus souplement envers les producteurs parce qu'elles ont besoin d'être en bons termes avec eux pour mener à bien leurs activités de programmation. Les autres ont besoin d'être en bons termes pour des raisons différentes.

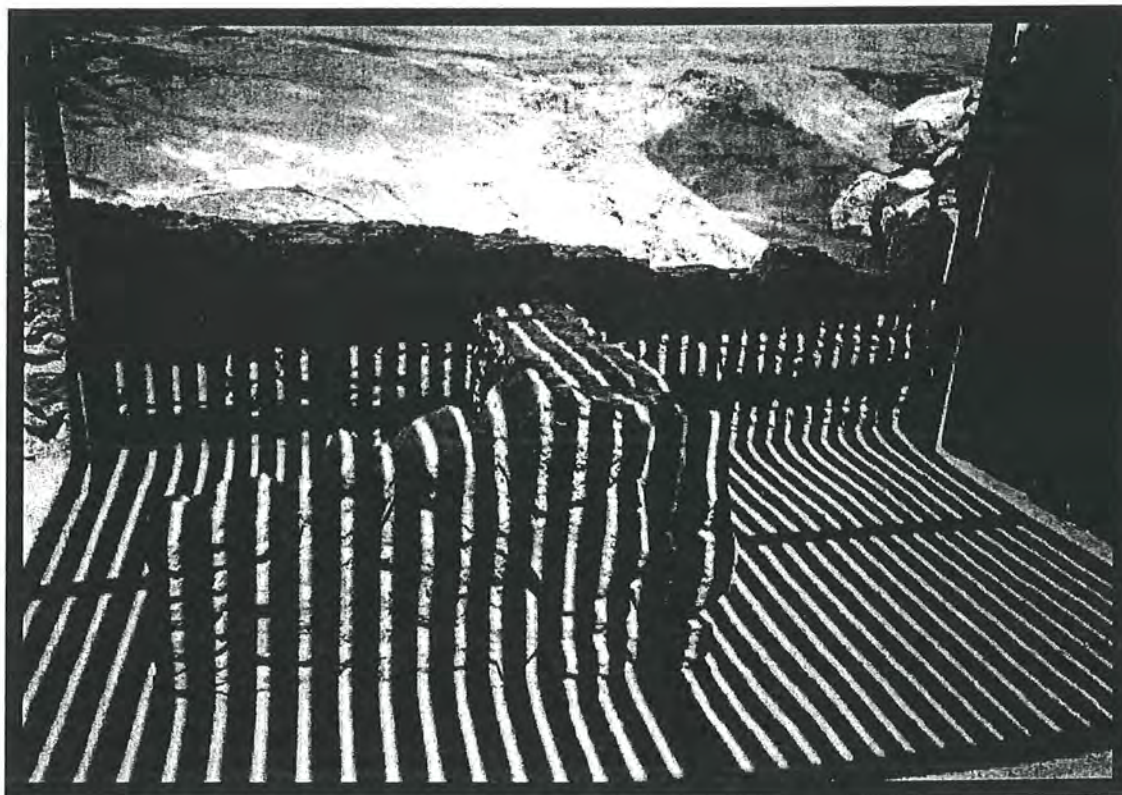
Il y a donc là deux perspectives différentes. Et tandis qu'à la FIAF coexistent ces deux types d'archives, je crois aussi que cela devrait constituer une source de réflexion entre nous et une préoccupation pour l'avenir. C'est à dire, qu'il y a là à nouveau un risque de souligner entre nous des divisions artificielles, qui ne seront pas bénéfiques à la Fédération, et qui pourront à la longue mettre en cause notre unité.

Michelle Aubert

Depuis quelques années nous avons beaucoup discuté d'un sujet qui me tient à coeur, à savoir le futur, l'avenir de la FIAF. En effet, moi, vraiment, je vous suis très reconnaissante, et reconnaissante aussi à Hoos d'avoir conçu ce symposium, parce qu'il me semble que vous avez orienté toutes nos discussions en fonction de l'avenir de la FIAF. Vous avez éclairé tout notre rôle futur, le rôle qu'on pourrait avoir vraiment, et quelles vont être nos futures missions.

Ce dont nous avons parlé avant le déjeuner dans un des groupes, c'est en effet de pouvoir accéder à des images dans un cadre démocratique, alors même que de plus en plus il va y avoir autour de nous des concentrations d'images, qui ne nous permettront pas de les visionner dans un cadre culturel, mais simplement dans des cadres individuels, familiaux, et c'est ceci qui va vraiment changer, je crois, la culture cinématographique. Je pense donc que ce symposium et vos interventions, nous ont placé dans un mode de pensée complètement différent. Je vous en remercie chaleureusement!

END OF SYMPOSIUM



PRINCIPLES OF FILMPRESERVATION IN ARCHIVES

These rules have been agreed to as working PRINCIPLES OF FILM PRESERVATION IN ARCHIVES by the following American archives:

The American Film Institute, Anthology Film Archives, International Museum of Photography at George Eastman House, Library of Congress, Museum of Modern Art, National Archives and Records Administration, and UCLA Film and Television Archives.

1. Archives acquiring films have an obligation to insure their preservation by:
 - a) Storage under the best climatic and secure conditions.
 - b) The manufacture of preprint materials (negatives, fine grain masters, etc.) of the highest possible quality and the most long-lasting materials, in order that new projection copies can be generated when required, which will be as near as possible to the quality of the originals.
2. The needs of filmpreservation must have precedence over other important archival tasks and external demands.
3. All films should be preserved. As most archives have limited resources or copying films, the following elements should determine the priority of films to be copied:
 - a) The degree to which the film is endangered. All nitrate films, and videorecordings are to be considered as endangered for reasons of instability. In the case of nitrate, priority must go to those films which show signs of beginning deterioration. Films which are being projected in master copies, as in the case of some independent filmmakers, are to be considered as endangered even when they are on acetate stock.
 - b) The degree of rarity of materials held, i.e., unique copies.
 - c) The anticipation of needs of present and future generations of viewers.
 - d) The judgement of the archivist as to the importance of the film.
 - e) The obligation to preserve the national production, or the specialized purpose of the individual archive.
4. No copy should be used for projection purposes until preprint or master materials of that film exist in an archive, or unless it is determined that better materials for preservation exist in another archive.
5. Efforts should be made to determine the best surviving materials before copying the materials held by the archive.
6. To avoid duplication of effort, attempts should be made to determine if any other archive has already made preprint materials and whether these are the best to be achieved. However, in some cases where the film is considered to be of special importance, it may be desirable to have additional preprint materials in more than one archive.
7. No preprint materials made for preservation should be used for projection. An archive should make an informed decision as to the number of times the preservation materials may be used for making release prints, after which additional preprint materials must be made for this purpose. Preservation materials should not be used for cording off sections to print excerpts; whole reels should be printed, even though only a part may be used.

8. Commercial users of an archive's films should be expected to pay not only all laboratory and handling costs, but in addition should contribute towards the preservation work of the archive which has made the commercial use possible.
9. Once copied, film originals should be stored by the archive as long as possible: that is, in the case of nitrate films, until they have deteriorated to the point at which it is dangerous to store them, in the hope that future technology will find a way to preserve the original images or to make better copies. However, once nitrate is protected by the best possible acetate preprint materials and is still in a condition to be used, access should be encouraged, because of the unique quality of the nitrate and the fact that its life is limited.
10. Archivists have an obligation to be informed of the latest developments in the field of film preservation and to encourage research in the field.

Adopted October 1977
by the Film Archives Advisory Committee

FIAPF CONTRACT 1971

INTERNATIONAL FEDERATION OF FILM PRODUCERS ASSOCIATIONS

In consideration of the services rendered by film libraries or archives (cinematheques) in preserving films after their commercial exhibition and in making possible to show them for educational purposes, and

In consideration also of the artistic and commercial ownership rights which must be in no way prejudiced by the exercise of these activities,

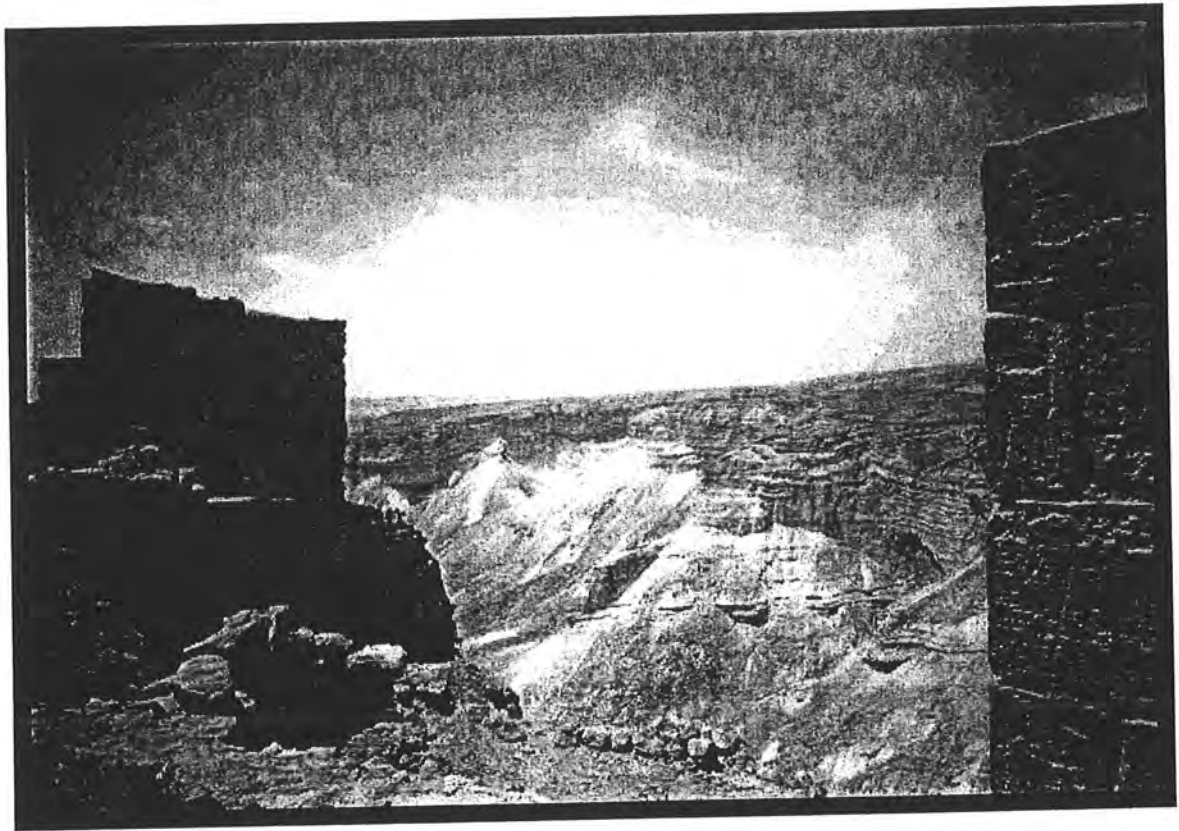
The International Federation of Film Producers Associations (I.F.F.P.A.) has confirmed at its General Assembly, held in Paris, Unesco Building, on the 19th of march, 1971,
The following:

GENERAL REGULATIONS CONCERNING TRUST DEPOSIT OF MOTION PICTURE PRINTS WITH FILM ARCHIVES

1. In these regulations:
 - "Film" and "films" shall mean any cinematographic film and any form of motion picture;
 - "Print" and "prints" shall mean any positive or negative print or copy of a film, including any material able to produce effects similar to those of cinematography;
 - "Producer" shall mean the maker of the film or his successors;
 - "An archive" shall mean a film archive which carries on activity for the collection and preservation of films with the sole purpose to further film research and studies of film and film history.
2. Artistic and commercial rights to films shall in no way be harmed or prejudiced by the activity of the archive.
3. The trust deposit of a film in an archive shall not imply any reproduction rights or any performance rights other than those expressly stated in these regulations.
4. Any print held by the archive, regardless of the source from which it has been obtained, shall be the property of the producer and shall be transmitted to him within one month after request in writing from the producer.
When a print is made at the costs of the archive, it shall nevertheless be the property of the producer, but when such a print is transmitted to the producer upon his request as provided above, for any other reason than the archive's violations of the rights of the producer, the producer shall pay to the archive, within one month after receipt of the print, the normal and relevant laboratory costs for the prints so transmitted.
5. The use to be made of the film by the archive shall be limited to preserving it on the archive's premises, and to providing for the private study thereof, on the said premises, by limited groups of bona fide students and film professionals engaged in serious research.

6. No other performance shall take place without the written approval of the producer. An approval to show a film does not imply the right to broadcast the film, unless the producer has explicitly granted such right to the archive.
7. The archive shall not reproduce any print without having first obtained the producer's approval in writing.
If it is deemed necessary, for reasons of preservation of the film to make a new print thereof, the archive shall notify the producer thereof in writing and ask for his approval to reproduce the film, stating the manner in which such reproduction should be made. If such an approval has not been refused by the producer in writing within two months thereafter, then the archive shall be entitled to make a new print and to take it into trust deposit on the same conditions as concerning the original print.
The archive shall not carry a print off its premises (and especially over national borders), nor shall it make any assignment, transfer, trust deposit or loan of a print to any third party (including any other archive and any state or governmental authority) for any purpose whatsoever without having first obtained the producers approval in writing.
8. The archive shall not carry a print off its premises (and especially over national borders), nor shall it make any assignment, transfer, trust deposit or loan of a print to any third party (including any other archive and any state or governmental authority) for any purpose whatsoever without having first obtained the producers approval in writing.
9. Approvals granted by a producer do not imply any authorization to show the film or otherwise make any use thereof, as far as the rights of the authors or other third parties are concerned, except within the period during which such rights are possessed by the producer. When a deposit is made, the producer is expected to indicate the rights possessed by him.
10. The producers right to a print shall not cease when his copyright to the film has expired. The print shall always, unless otherwise agreed upon by the producer, be held at the disposal of the producer as herein provided.
11. The fact that the current owner of a film may not be known does not imply that the archive may use such film in any other fashion than in accordance with approvals normally granted by known owners of films.
If the producer is dead (or liquidated in the case of an organization or corporate body) and the archive cannot trace the current owner, the archive shall turn to the Producers Association of the country in which the producer had his headquarters at the time of the making of the film and ask such Association if it has any information as to the current owners of the film.
If such Association cannot render the necessary information then the archive may use the film in such respects as are mentioned in article 6,7 and 8 hereof without the approval of the producer, provided however, that such use of the film should in no respect deviate from such use as is normally granted by known owners of films.
The National Association as referred to above, shall always be kept informed by the archive of all measures taken by the archive in accordance with this article.

12. The archive shall be under strict liability to see to it that films and prints shall not be used in any other way or manner than explicitly permitted in accordance with these regulations and also in accordance with such further provisions as may be stipulated by the producer from time to time. Such responsibility shall be carried by the archive also when a print is not in the immediate possession of the archive.
The archive may, at any time, at his own expense, deliver the print to the producer, whereafter the trust deposit is terminated.
13. The archive will at all times use its best endeavors to preserve the prints, and the archive will grant the producers access to such material immediately upon demand for examination thereof, and also for printing further copies as far as the material is useable for such purposes. Subject to the archive doing its best to preserve the prints as aforesaid, it shall, however, be under no obligation to the producer for any loss or damage to the prints however caused, other than the obligation to pay the amount corresponding to the laboratory costs of replacing the prints in printing them from other existing negative or positive prints.
14. The film archive shall preserve the cinematographic publicity material which has been deposited with the film, or at a later date, in the spirit evoked herebefore concerning the preservation of film prints. This cinematographic publicity material may be shown only within the premises of the film archive. Any presentation and any loan outside of the premises, as well as any reproduction of the cinematographic publicity material, may not be carried out without having previously obtained the explicit agreement of the producer.



ASSEMBLEE MONDIALE DES REALISATEURS DE CINEMA
MADERE 19-23 Octobre 1983

Travail de la Deuxième Commission:
"DROITS DES REALISATEURS"
Rapport final

Dans tous nos pays, quelles que soient leurs législations ou leur traditions juridiques, le réalisateur est, dans la réalité des faits, l'auteur principal de l'oeuvre audiovisuelle.

Afin de respecter sa liberté d'expression, il est impératif que cette oeuvre, comme toute propriété artistique et littéraire, n'échappe à son contrôle ni pendant, ni après sa création. C'est là qu'on entend dans le monde entier par des notions essentielles telles que "final cut", "droit moral des cinéastes" et "Unverletzbarkeit des Werkes".

Au nom de cette liberté fondamentale, dont dépendent à la fois l'originalité de la création artistique et la survie de toutes les cultures, les réalisateurs constitués en Assemblée Mondiale, affirment que doivent être reconnus, comme à tous les autres créateurs, les droits et les garanties nécessaires à l'exercice de leur métier et leur art, face aux forces politiques, économiques et sociales qui sans cesse font prévaloir leur domination.

Ces garanties ne peuvent être obtenues qu'avec le soutien des pouvoirs publics et du législateur. Devant la standardisation des produits audiovisuels, la prolifération des médias, l'apparition de nouvelles technologies et la piraterie qui en résulte, il est urgent de définir concrètement l'économie de nos droits. Le sort de notre profession et la survie du métier que nous aimons en dépendent.

1. Le réalisateur d'une oeuvre audiovisuelle est auteur du seul fait de la création de celle-ci.
2. Le réalisateur a droit au respect absolu et imprescriptible de son nom et de son oeuvre.
3. L'oeuvre audiovisuelle existe dès lors que le réalisateur a mis au point la version définitive (final cut).
Toute modification et altération de l'oeuvre ou tout changement de mode d'exploitation nécessite le consentement du réalisateur.
4. L'oeuvre audiovisuelle doit bénéficier du dépôt légal.
5. Le réalisateur doit bénéficier d'un contrat de production prévoyant les modes d'exploitation cédés, la durée de la cession et les territoires sur lesquels l'exploitation s'exerce.
6. L'accès de l'oeuvre audiovisuelle au public est un droit acquis au réalisateur (droit à l'écran).

7. Le réalisateur a droit à une rémunération proportionnelle aux recettes provenant de toute vente ou exploitation de l'oeuvre.
Cette rémunération est calculée sur le prix payé par le public chaque fois que les conditions de contrôle le permettent. Dans le cas contraire, elle est proportionnelle aux encaissements réalisés par le producteur ou, pour son compte, par le diffuseur. Cette rémunération est directement recouvrée auprès des exploitants ou organismes diffuseurs, et répartie entre les auteurs par les organismes professionnels mandatés ou cessionnaires de leurs droits.
8. Le réalisateur bénéficie, en cas de cession ou de rétrocession à des tiers de tout ou partie de ses droits par le producteur, de la préservation de l'intégralité des droits et rémunérations qui lui avaient été consentis.
9. Le réalisateur a droit à la remise de tous les contrats, comptes et justificatifs relatifs à l'exploitation de son oeuvre.
10. Le réalisateur dispose, en cas de cessation d'activité du producteur, d'un droit de préemption pour le rachat de son oeuvre qui devra faire l'objet d'un lot séparé.
11. Pour la sauvegarde des droits moraux et économiques du réalisateur, confronté à la naissance de nouveaux moyens de diffusion (TV par câbles, enregistreurs, satellites), l'autorisation du réalisateur est nécessaire pour la diffusion de son oeuvre sous ces formes.
12. Le contrat dont bénéficie le réalisateur doit prévoir la destination des éléments ayant servi à la constitution de son oeuvre: rushes, copies, matrices, etc.
En aucun cas, la matrice d'une oeuvre ne peut être détruite. Une copie de l'oeuvre, ou mieux une matrice, devra être confiée à une cinémathèque.

La complexité de la protection de nos droits, confrontés aux nouvelles technologies de diffusion, nécessite la tenue d'une prochaine et urgente rencontre mondiale des réalisateurs. Cette rencontre aura pour mission de définir les solutions précises à ce problème crucial.

Ce rapport a été voté à l'unanimité par
162 réalisateurs appartenant à 46 pays.