

# Pushing Back:

FIAT &  
COPYRIGHT



DR MELANIE STOCKTON-BROWN







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This zine was written and created by Dr Melanie Stockton-Brown, Bournemouth University in 2022.

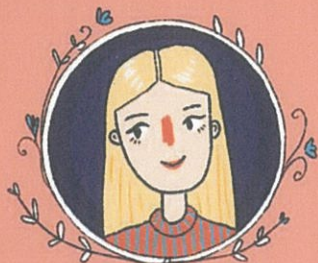
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## Welcome to this zine!

Copyright law had been placed into legal statute for the first time in 1710 in the UK, in the Statute of Anne; the same Queen Anne of *The Favourite* (2018) fame. Not long after this, copyright legislations were enacted in other countries around the world.

FIAF (International Federation of Film Archives) brings together film archives from across the world, who preserve and care for film collections. FIAF as an institution and as a community has embraced -through necessity- a conflict between digitisation and public access, and with copyright law. Copyright law limits digitisation, archival access, and archival reuse.

As film archiving and copyright law intersected, so began what continues to be a complex, sometimes strained relationship between film archiving and copyright law.

This zine shares snapshots of research undertaken into how copyright law has impacted on FIAF's archival policies and members; and also how FIAF has impacted on copyright law. The research undertaken will be expanded on in more depth in a book chapter in the upcoming FIAF book about its history.

The illustrations in this zine created by Hana situate this complex relationship between FIAF and copyright law in a wild, somewhat mystical forest. This came about from my sense that FIAF and its members have been tirelessly cutting a path through the overgrown and murky copyright laws around the world. Strange encounters are had in this forest!

Copyright and legal surprises await around many corners, but FIAF has nonetheless found a way to cut through, and even shape, some of the forest around us to enable film archives to carry out their important roles.







## FIAF & Copyright

Copyright issues and film archiving practices have been intertwined from the early film archival beginnings in the late 1930s. Using film from an archive, either to screen as it is or to incorporate into new copyright works, requires archivists to engage with copyright law.

Many film archives do not own the copyright to the films they preserve, or rather the copyright holder is unknown or cannot be located. This is further complicated by the fact that the majority of films within film archives are still protected by copyright.<sup>1</sup> Op den Kamp comments that the key issues copyright poses for film archives are:

copyright term extension, elimination of mandatory formalities, and multiple individuals determining copyright expiration are some of the legal causes underlying the orphan works problem that impacts archival practice directly.<sup>2</sup>

Fossati notes that approximately the first forty years of film archival practice was “quite inaccessible and, at times, even secretive, partly due to complex legal issues.”<sup>3</sup> One of these issues is that films within the archive were usually owned by commercial production companies, who could (and sometimes did) exert their copyright over these films.<sup>4</sup>

This early tension with copyright law has arguably shaped the relationship that archives as institutions and individual film

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<sup>1</sup> Claudy Op den Kamp, *The Greatest Films Never Seen: The Film Archive and the Copyright Smokescreen* (AUP, 2018) 52

<sup>2</sup> Claudy Op den Kamp, *The Greatest Films Never Seen: The Film Archive and the Copyright Smokescreen* (AUP, 2018) 78

<sup>3</sup> Giovanna Fossati, *From Grain to Pixel: The Archival Life of Film in Transition* (AUP, 2009) 17

<sup>4</sup> Giovanna Fossati, *From Grain to Pixel: The Archival Life of Film in Transition* (AUP, 2009) 17



archivists have with it, which in some cases involves copyright fear or anxiety.

For instance, when Henri Langlois headed the Cinémathèque Française, he acted in the “mentality of a private collector” and refused to make a catalogue of the collection public; this “secretive approach was supposed to protect the Cinémathèque against other film archives and rights holders.”<sup>5</sup>

Preservation of the films was always the focus for FIAF, as well as facilitating international archival collaboration. Its founding constitutional agreement sets out that it will:

...consist of national, semi-official and recognized private film archives. These organisations shall have for their prime object the conservation of films, the compilation of national and private film records and, if necessary, the projection of films for a non-commercial purpose, either historic, pedagogic or artistic.<sup>6</sup>

The inclusion of “non-commercial purpose” demonstrates that film archives were already making distinctions between commercial and non-commercial uses of works, and therefore was from the beginning having its policies shaped by copyright law and commercial exploitation of films.

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<sup>5</sup> Christophe Dupin “Je t'aime...moi non plus' Ernest Lindgren and Henri Langlois, pioneers of the film archive movement” in Geoffrey Nowell-Smith and Christophe Dupin *The British Film Institute, the government and film culture, 1933-2000* (Manchester University Press, 2012), 54-55

<sup>6</sup> FIAF, “Agreement for the International Federation of Film Archives”, 17 June 1938. Available at: <https://www.fiafnet.org/images/tinyUpload/History/FIAF-History/Digitized-documents/Constitutional-papers/Original%20FIAF%20Agreement.pdf>  
Accessed 17<sup>th</sup> May 2019







FIAF members are also bound by FIAF's Code of Ethics<sup>7</sup> which prohibits engaging in activity that interferes with the intellectual property rights of a film or its commercial exploitation. FIAF's Code of Ethics states:

3.1. Archives recognise that the materials in their care represent commercial as well as artistic property, and fully respect the owners of copyright and other commercial interests. Archives will not themselves engage in activities which violate or diminish those rights, and will try to prevent others from doing so.

3.2. Unless and until commercial rights in items from their collection shall have expired or been either legally annulled or formally vested in their institution, archives will not exploit those items for profit.

The above clearly illuminates the importance copyright law has within film archiving, and the care which FIAF go to ensure that rightholders are protected.

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<sup>7</sup> FIAF, "FIAF Code of Ethics" FIAF, "FIAF Code of Ethics" Available at: < <https://www.fiafnet.org/pages/Community/Code-Of-Ethics.html> > Accessed on 17<sup>th</sup> May 2019\*



## **Managing differing copyright laws across international members**

Copyright laws differ around the world (and differed even more so during the 20<sup>th</sup> century). Pierce commented at the 2008 FIAF Congress that it “is only a slight exaggeration” to say there are two models or groups of copyright law globally: the American and the French “as embodied in the Berne Convention”.<sup>8</sup> This presents a significant challenge to FIAF, as legal jurisdiction becomes very important in relation to the film collections.

To add to this complexity, conceptions of ownership, authorship & creation also differ vastly across the world and across different communities. This difference is further exacerbated by copyright laws that conflict with these views. For instance, Kelly has persuasively asserted that the Western perspective on archival practice views the safety of the objects as “the maintenance of the integrity of the physical object”. This contrasts with the alternative indigenous Maori viewpoint, which

would include the cultural and spiritual safety of both the physical object and the guardians of that object who may be descendants of those in the archival image or descended from those who made an object or used it.<sup>9</sup>

There are many other communities or individuals who share these concerns about the wider cultural or contextual meaning of cultural heritage artefacts. The aspects of the “cultural and

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<sup>8</sup> David Pierce “Coping with the End of the Public Domain – The Impact on Moving Image Archives” presentation at the FIAF Congress in Paris 2008.

<sup>9</sup> Emma Jean Kelly, *The Adventures of Jonathan Dennis: Bicultural film archiving practice in Aotearoa New Zealand* (John Libbey Publishing Ltd, 2015) 15



spiritual safety” are regarded differently within Western and European copyright laws.

That said, moral or author’s rights are a fundamental part of copyright law within many European countries, most notably France. In this sense, there are considerations of the artefacts that are archived being ‘part’ or an extension of its author, but not normally viewed as an ancestral link.

Prelinger has further noted that:

Questions of Aboriginal, indigenous or community cultural and intellectual property rights, and the moral rights of creators, all pose issues that go far beyond the bounds of copyright.<sup>10</sup>

Therefore, FIAF members and FIAF as an institution operate in a difficult cultural and legal space, and copyright law intersects these concerns. It is noticeable throughout FIAF’s history that it has always sought to respect ethical, social, and cultural aspects or conditions of the films in the collections – often going beyond what was required legally.

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<sup>10</sup> Rick Prelinger “The Future of Memory: Disrupting the Archives to Save It” FIAF Symposium Presentation, 2015. Accessed at <  
<https://www.fiafnet.org/images/tinyUpload/E-Resources/Reports-Glossaries-And-Papers/Sydney-Symposium/Sydney-Symposium-slideshows/Rick%20Prelinger-slideshow.pdf>>







## The Copyright Commission

Due to the complexity and importance of copyright law to FIAF members, FIAF set up a Copyright and Legal Commission to research copyright and provide guidance to the members. The Commission was active for most of the 1970s. Copyright reform for the benefit of film and audiovisual archives was a key aspect of this Commission's work.

At the FIAF Executive Committee in 1971, "it was decided to work on the preparation of a draft for a reform of the copyright laws as they affect film archives. The draft is to contain all the reforms which archives would like to see irrespective of political viability".<sup>11</sup>

This demonstrates that FIAF were looking to reform copyright laws. Not simply to endure them or follow copyright, but to change the law, to *push back*. Furthermore, the comment "irrespective of political viability" shows full comprehension of the political aspect to copyright law around the world, and also that FIAF have to balance the intersecting multiple perspectives of their film archive members from around the world.

As part of this, it had to be understood what the various copyright laws around the world *were*, and the Copyright Commission had an ambitious plan to tackle this. When the Copyright Commission presented their report at the Bucharest Congress and requested that each film archive should create a report summarising the copyright laws in their countries, "[t]he reaction of the [FIAF] members was somewhat opaque and I believe many of them will need active support by

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<sup>11</sup> Neville March Hunnings, "Problems of Film Copyright and Related Matters As They Affect Film Archives – A working paper submitted to the XXVII General Meeting, Wiesbaden", 1971, pg. 1



correspondence to fulfil the recommendation of the Commission.”<sup>12</sup>

The Iranian Film Archive was one of the few film archives to submit a report as requested to the Copyright Commission.<sup>13</sup> For many of the film archives, there was not the legal expertise or time needed to complete the summary.

FIAF would go on to agree an institutional policy on fair use within copyright law in the 2000s, but it was involved in international and internal discussions about fair use decades beforehand. Even in the 1970s, FIAF was taking part in discussions about “fair use” for the benefit of film archives; and Hunnings encouraged FIAF members to take part in national copyright reform discussions that were taking place in the UK, Denmark, and the USA in 1974.<sup>14</sup>

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Another key concern for the Copyright Commission was issues of reputational harm, and the impact of film donors withdrawing materials if the film archives do not respect copyright law. To illustrate, the Chairman of the Copyright and Legal Commission in 1972 noted that “if an archive does not observe [copyright] responsibility most strictly, it will alienate its depositors, and so endanger its own existence as an archive.”<sup>15</sup> This fear of reputational harm to a film archive remains prominent today.

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<sup>12</sup> “Minutes of the Legal and Copyright Commission, FIAF, Helsinki, Finland”, 18<sup>th</sup> February 1974.

<sup>13</sup> Letter from Farrokh Ghaffary (Director of the Iranian Film Archive) to Mr John Kuiper on 24<sup>th</sup> January 1974.

<sup>14</sup> “Minutes of the Legal and Copyright Commission, FIAF, Helsinki, Finland”, 18<sup>th</sup> February 1974, pg. 2.

<sup>15</sup> Memorandum for Milan, October 1972. Annex 2 “A personal statement by the Chairman of the FIAF Copyright and Legal Commission”, pg. 2



## **Lobbying for international copyright reform**

FIAF has engaged with policy-makers, legislators, and academics to influence international copyright reform for decades. For example, FIAF has worked with the EU for many years in relation to film heritage and legal barriers to film archival work. Indeed, representatives from the European Commission have presented at FIAF Congresses.<sup>19</sup>

This focus on influencing copyright reform for the benefit of the film archives was borne out in FIAF wishing to lobby ahead of the next Berne Convention meeting (in relation to the Berne Convention for the Protection of Literary and Artistic Works, which is an international convention that governs copyright law).

Hunnings wrote in his report about this that “A well-thought-out and prepared pressure from the film archives upon their national authorities in good time before the next conference may consequently be expected to have some success in shaping the international law of film copyright. I presume that one of the purposes of the present project will be to test the feasibility of taking such joint action.”<sup>20</sup>

This evidences the plan to intentionally influence and lobby their respective national governments, to influence the reforms made at the next Berne Convention on international copyright law. This is decisive, organised action across the world to influence the law to better allow film archives to fulfil their important daily functions, for the benefit of everyone.

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<sup>19</sup> Jean-Eric de Cockborne (Head of the Audiovisual and Media Policies Unit at the European Commission), “The EU and film archives” presentation at the FIAF Congress in Paris 2008.

<sup>20</sup> Neville March Hunnings, “Problems of Film Copyright and Related Matters As They Affect Film Archives – A working paper submitted to the XXVII General Meeting, Wiesbaden”, 1971, pg. 1







FIAF has continued to influence and engage with international copyright law and international practices in relation to cultural heritage and copyright law.

The *FIAF Declaration on Fair Use and Access* was approved during the 2007 FIAF Congress in Tokyo.<sup>21</sup> It was unanimously adopted by the FIAF General Assembly in Paris in 2008). As Michael Loebenstein noted:

“The undoubtedly biggest statement FIAF has made in recent years about archives’ management of intellectual property is the FIAF Fair Access Declaration adopted by the FIAF General Assembly at the Paris Congress in 2008. It’s worthwhile at the beginning of this session to re-read key statements from the declaration again, even if some of us for legislative reasons cannot without conflict fully adhere to these principles.”<sup>22</sup>

This tells us two things: firstly, the importance of copyright law and fair access/use to FIAF members; and secondly, that FIAF must walk a very difficult path, in trying to navigate a diverse spectrum of copyright legislations globally. FIAF will continue to balance the interests of its members within the constraints of their respective national copyright laws; and continue to advocate for fair access to, and use of, films.

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<sup>21</sup> FIAF, *FIAF Declaration on Fair Use and Access*. Available at: <<https://www.fiafnet.org/pages/Community/Fair-Access.html>>

<sup>22</sup> Michael Loebenstein, National Film and Sound Archive of Australia. *Do the right thing!* (FIAF Symposium, 2015), pg.2. Available at < <https://www.fiafnet.org/images/tinyUpload/E-Resources/Reports-Glossaries-And-Papers/Sydney-Symposium/Sydney-Symposium-presentations/Loebenstein-Do%20the%20right%20thing-presentation.pdf>>



## The end of the Copyright Commission

The complexity of copyright laws around the world, and the excellent work the Copyright Commission had done in detailing this complexity, ultimately lead to its ending later in the decade.

Kuiper and others felt that copyright law “was so complicated that a specialised commission headed by a lawyer was needed if any real results were to be achieved”, which was not possible within FIAF.<sup>16</sup> As a result, Mr Stenkler “argued that there was a case for having no Commission at all now”, and that the work the Copyright Commission had undertaken on the UNESCO document was now also complete.<sup>17</sup>

However, it should be stressed that the Copyright Commission was closed not because copyright law matters were thought to be unimportant within FIAF, *but rather the opposite*: “These problems were now so important for FIAF that the Copyright Commission, as it first was formed, had not much sense anymore.”<sup>18</sup> It is a task that needed more input and expertise.

Another aspect that likely contributed to the end of the Copyright Commission was the loss of Ernest Lindgren who had run it. Tragically, Lindgren had passed away in 1973. He had been highly influential in FIAF and at the BFI in the UK for decades, and had passionately pushed the copyright agenda within FIAF and the Copyright Commission.

Thank you, and rest in peace, to Lindgren and FIAF’s Copyright Commission.

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<sup>16</sup> Excerpt from the Executive Committee Meeting Minutes, 16-18<sup>th</sup> April 1980, New York, pg. 1

<sup>17</sup> Excerpt from the Executive Committee Meeting Minutes, 16-18<sup>th</sup> April 1980, New York, pp 1-2

<sup>18</sup> “C.J. Mexico, Copyright Commission”









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## Lobbying with other international organisations

FIAF has also actively and enthusiastically lobbied and advanced the cause of film archives to international organisations and bodies, including other NGOs, such as UNESCO and IASA (International Association of Sound and Audiovisual Archives).<sup>23</sup>

One of these discussions was in 1989,<sup>24</sup> and considered Kofler's 1989 report to UNESCO,<sup>25</sup> which is an incredibly detailed and high-level comparative approach to the copyright issues for film archives in various legal jurisdictions; and considers the problems the Berne Convention poses for the activities of film and audiovisual archives.

The report's proposals distinguish between commercial and non-commercial uses of the work;<sup>26</sup> as well as the conditions in which the film depositor should have "controlled access" to the deposited material in the archive.<sup>27</sup> FIAF was a keen member of all of these discussions, and their influence can be seen in the approach adopted by UNESCO.

Furthermore, there was a desire historically within FIAF to have "better personal contacts" with the FIAPF (International Federation of Film Producers Association). Kuiper was keen for better connection on the basis that "legal documents and agreements are useful only when the two parties involved

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<sup>23</sup> Discussed for example in "Letter to Jacques from John Kuiper on 19<sup>th</sup> September 1977".

<sup>24</sup> "Working Session with NGO Representatives on Legal Problems Relating to Audiovisual Archives", Paris, 5th December 1989.

<sup>25</sup> Birgit Kofler "Legal problems relating to AV Archives. Report prepared for UNESCO", April 1989.

<sup>26</sup> Birgit Kofler "Draft Proposals for Model Legislation on Audiovisual Archives: G. Access by the depositor and conditions of withdrawals" 1989, pg. 14

<sup>27</sup> Birgit Kofler "Draft Proposals for Model Legislation on Audiovisual Archives: G. Access by the depositor and conditions of withdrawals" 1989, pp. 9-10



already have a working understanding and a sense of mutual trust in each other.”<sup>28</sup>

This statement stresses that FIAF’s aim has always been to not simply have legal agreements in place that on the surface appear to demonstrate legal co-operation and communication with stakeholders. Rather, FIAF’s mission to benefit all of its film archives and restrict the impact of copyright law on their activities can only be borne out their genuine and reciprocal communication, trust, and understanding with other stakeholder groups.

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<sup>28</sup> Letter from John Kuiper to Jacques, 13<sup>th</sup> December 1973.









*FLAF*