

DEALING WITH ORPHAN WORKS: A DUTCH FILM ARCHIVE'S PERSPECTIVE



Leontien Bout/EYE Filmmuseum/Amsterdam, July 2017

1. A bit of background

EYE is the national film archive of the Netherlands and currently holds a collection that consists of roughly 40,000 films as well as the so-called film-related collections: photos, posters, projection equipment, film music, as well as paper archives of filmmakers and businesses.

The collection spans the entire history of film and is expanded with old and new titles every year, from both the Netherlands and abroad. EYE is the only institute in the Netherlands that collects and provides access to film-related collections.¹

All that is mentioned hereafter only relates to the audiovisual collection of EYE, first and foremost as the photographs, posters and paper archives are not covered by the Orphan Works Directive. For the other works in the collection that are covered (such as books and film music), the orphan works issue is not really relevant as these items are not digitised by EYE and are only made available for study purposes in situ (which is not a copyright-restricted activity).

Images for the Future

EYE was involved in a large digitisation project in the Netherlands, called “Images for the Future” (2007-2014) which accounted for some impressive numbers:

The total available budget was 115 million euro, out of which EYE received 24 million euro.

This allowed EYE to digitise a total of 3,874 hours of film/7,500 titles.

The project also allowed for the clearing of part of the collection:

A total of 7,090 films were cleared (as in the rights status was established),

of which 483 were declared public domain and 2,479 were declared orphan works².

In short: as a result of this project EYE already had a pretty good insight into the legal status of a considerable chunk of its audiovisual collection.

History

The orphan works issue is not a recent phenomenon. As long as there have been film archives, there have been “orphan works”. They just weren’t called that; they were the films in the archive of which nobody had any idea who made them and/or when, or sometimes even what the title was. So, they were just used for whatever purpose and nobody cared, at least no rights holder ever came forward in EYE’s case. Of course, this practice was technically in breach of copyright, but as stated, this never led to any problems.

¹ For more information, check www.eyefilm.nl

² This was prior to any orphan works legislation. EYE also declared films orphan that under the current legislation would fall out of its “jurisdiction”.

At the same time, it was believed that orphan works formed a substantial amount of film archives' collections and this would ultimately hinder the archives' ability to open up their collections as there was no specific copyright exception in place to allow for the use of these works.

In order to get a clearer view of the scale, the Association des Cinémathèques Européennes (ACE)³ conducted a survey in 2009/2010 amongst her members asking them to give estimates of the number of suspected orphans in their collections.⁴

24 ACE archives responded to the survey. The key findings were:

- 21% of all film works held in the responding 24 film archives (ca. 225,000) may be considered orphans,
- 55% of the requests for the use of orphan works are for cultural purposes, while 44% of the requests are for commercial purposes,
- 60% (ca. 135,000) of the orphans held in the respondents' archives were produced before 1950,
- 31% of the orphan works are fiction films.

Notably, 40% of the orphans are made after 1950 and almost one third concerns fiction films, thereby suggesting it's not just old news reels or the likes that turn out to be orphan.

EYE did not consider the situation a problem, but the rights holders – who have traditionally been very well organised – did not see it quite that way.

High Level Expert Group/ Copyright Subgroup (2007-2009)

Linked to the [i2010: Digital libraries initiative](#), the High Level Expert Group was set up by the European Commission to solve existing copyright issues, which are considered to be the main barrier for accessing film and cultural heritage online. ACE was a member of the HLEG Copyright Subgroup to find solutions for orphan works, especially for film as a relatively “young” medium, and out-of-distribution works. The Copyright Subgroup developed key principles for rights clearance centers and databases. A working group of AV stakeholders co-chaired by ACE established due diligent search criteria for orphan works. A Memorandum of Understanding was signed on 4 June 2008 by representatives of right holders and cultural institutions, amongst them ACE.

This was one of the first attempts to gain a formal recognition of orphan works. During the course of the meetings of the working group of AV stakeholders, it became painfully clear that the (organisations of) rights holders would not admit to the existence of orphan works, claiming it's impossible a rights holder cannot be found. It seemed they were convinced the film archives were

³ The Association of European Cinémathèques (ACE) is an affiliation of [44 national and regional preservation film archives](#) from all over Europe.

⁴ The full text of the survey results can be found here: http://www.ace-film.eu/wp-content/uploads/2011/12/ACE_Orphan_Works_Survey_Results_final_1004014.pdf

just out to find a quick, simple and cheap way to use their works, thereby showing no understanding of the actual holdings of European film archives' collections⁵.

The Memorandum of Understanding⁶ that was ultimately signed by the AV stakeholders contained due diligent search criteria that later served as inspiration for the diligent search contained in the Orphan Works Directive⁷.

2. Fast forward a few years....

EYE was relieved when the Orphan Works Directive materialised, as for the first time the existence of orphan works was “officially” affirmed. Most FHI's were less than impressed, especially with the, in their eyes, bothersome required diligent search, but EYE was actually quite happy.

EYE's point of view is not shared by many, but hopefully the “pragmatic” approach to the orphan works issue set forth in this paper— aided by the fact there is no CMO breathing in EYE's neck—can get you places...

As it currently stands, EYE is one of the main contributors of (audiovisual) orphan works to the Orphan Works Database as maintained by EUIPO in Alicante with 966 films declared orphan⁸.

A diligent (documented) search has been performed on all of those, but of course with some common sense.

3. The diligent search

The most useful information (to EYE) is to be found in the National Archive, newspaper archives, the Chamber of Commerce, various genealogical sources and, of course, EYE's own collection database.

Strangely enough, sources such as newspaper archives and genealogical archives are not mentioned in the list of mandatory sources to be consulted, as the sources in the list seem to be aimed at finding “makers” and NOT “rights holders”.

To EYE, this is a gross omission as EYE tried to explain to the Dutch Ministry of Culture in the consultation rounds in preparation for the implementation of the OWD.

As EYE tried to stress on numerous occasions, the whole point of the search is to find rights holders as opposed to makers. In fact, a film is often orphaned not because one doesn't know who made it in the first place (although this happens a lot, as well), but because there are no known heirs to the original rights holders, or the production company went bankrupt without a transfer of rights.

⁵ To my knowledge there are no minutes published of these meetings, but as a representative of the AV sector, I was present at every meeting of the working group, so I am speaking from personal experience.

⁶ The full text of the MoU can be found here: <http://www.ifap.ru/ofdocs/rest/rest0001.pdf>

⁷ Directive 2012/28/EU Preamble under 14: “In so doing, Member States could refer to the diligent search guidelines agreed in the context of the High Level Working Group on Digital Libraries established as part of the i2010 digital library initiative.”

⁸ At the time of writing, 800 titles have been uploaded to EUIPO and 166 titles are pending.

It also makes sense to only consult those sources that are really relevant.

For instance: for silent film, there is no sense in consulting a CMO for music rights.

In the case of amateur film, there is no sense in consulting databases of organisations of professional film makers.

In the case of an old newsreel: there is no sense in consulting ISAN code (this International Standard Audiovisual Number was introduced in 2000 and does not track rights holders)

If you have found what you are looking for in a source, there is no need to consult more sources any more than it makes sense to consult any source if you have no leads whatsoever. The latter may occur when you have an audiovisual work without any credits or title on the film, no information on the film can and the provenance of the work doesn't provide any leads either (for instance, the film was donated to the archive by a collector).

4. The diligent search and FORWARD

This same principle (highly professional people exercising a certain professional discretion to only consult those sources that are *relevant*) was used for the diligent search in the framework of the FORWARD project⁹.

In order to come up with a list of sources that were relevant for each country participating in the project, a query was held amongst the project partners asking them to provide sources as well as their relevance.

This resulted in a first shortlist for each country, containing sources with their url's (if available). The project reviewers agreed to further narrow down this list and add sources that are not mandatory according to the Orphan Works Directive, but nevertheless necessary for a successful search, such as the aforementioned genealogical sources.

The reviewers asked for a further study to research the relevance of each source, according to the project partners as well as their accessibility (for instance, whether they were available online, or whether they had an API).

This led to some interesting insights:

- of the CMO's, only 18% is available online and none of their websites provide an API (application programming interface)
- 14 % of online databases provide an API
- 56% of the sources include an online database

⁹ More information about the project can be found here: <http://project-forward.eu/results/>

Relevance (100%= 232 sources)¹⁰

- 38%: high relevance
- 37%: medium relevance
- 25%: low relevance

Mandatory

- 65% of the sources is mandatory

Breakdown of mandatory sources (65%) per relevance

- 32%: high relevance
- 20%: medium relevance
- 13%: low relevance

It resulted in the following sources for the Netherlands:

- BUMA/STEMRA (M)¹¹
- Delpher
- EYE-database (M)
- Familieadvertenties/Central Bureau for Genealogy
- Filmproducenten Nederland (M)
- ISAN Nederland (M)
- Dutch Directors Guild (M)
- Lira (M)
- Media Archief (M)
- Nederlandse Beroepsvereniging van Film- en Televisiemakers (M)
- VEVAM (M)
- Wie was Wie

In FORWARD's diligent search process as in EYE's own practice, sources are only consulted if they are relevant *even if they are mandatory according to law*. The system allows the user the discretion to select the source the user deems relevant and document this search, but the system does not require the user to select and consult all sources.

¹⁰ These results were presented by EYE during the FORWARD project review in Brussels on March 15th 2017.

¹¹ M = mandatory

Orphan Status Assessment

forward.pp.cineca.it/forward-core/app/index.html#/diligentSearch/orphanAssessment/locate?taskId=80039&entryId=536

Apps Phstorm debug Zend Debug Infosites Projecten OS/Server Pakketten Talen/Frameworks HTML & JS DB+NoSQL Onderzoek Software


FORWARD 2.2 EYE Film Institute Netherlands

Rightsholder Locate

Initial RightsHolder J.C. Mol

Target RightsHolders Agents

Search agents... + New

Name	Contract Management Office	Located
Multifilm (Haarlem) (id=COR11628)		YES 

Target list complete? Yes

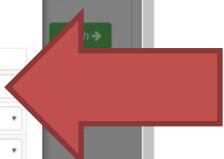
Type By contract

Notes

External data sources

Name	Type	Information retrieval
Wikipedia	ORS	Found
Film Institute internal database	FIA	Found
VEVAM	CMO	
Leden	PAN	
Media-archief	FIA	
Delpher	NAL	Found
Wie Was Wie	NAL	
Familieadvertenties	CBG	
BUIMA / STEMIRA	CMO	
Filmproducenten Nederland	PAN	
Isan Nederland	SAI	
LIRA	CMO	
Nederlandse Beroepsvereniging van Film- en Televisiemakers	PAN	

Cancel Save transfer detail



5. Diligent search: lessons learned

EYE's practical solution for films with no available data (no title, no known makers, no credits on film) and no leads whatsoever is to assume they are still copyright protected, so that they can be declared orphan. As mentioned earlier, in such cases EYE does not consult any sources with the exception perhaps of its own database.

In case you feel uncomfortable refusing to search legally mandatory sources, even though they are clearly not relevant, EYE suggests contacting the source in question to obtain a written statement (or even to enter into an agreement) in which they state they cannot provide any relevant data so this source doesn't have to be consulted anymore.

Some more lessons learned:

- personal contact is unavoidable: at some point a prospective rights holder needs to be contacted (by phone or email) to verify he/she is the person you are looking for;
- some sources require specialised knowledge to be able to consult them;
- some sources cost money to be able to consult them (such as the Chamber of Commerce);
- it may be essential to watch the film itself to search for credits or other clues, but as long as the title has not been declared orphan it can't be put online so it can only be watched on site (that is, if it is digitally available in the first place)

6. Diligent search: the results

So far, EYE has declared 966 films as orphan¹². These certified orphans are sent directly to EUIPO who then send the upload to the Dutch RCE (*Rijksdienst voor Cultureel Erfgoed*), the Dutch national authority, for authorisation. Note: the RCE does not actually check the validity of the data.

EYE uses an Excel spreadsheet for the bulk uploads, which has been provided by EUIPO.

Identifier	Related to	Title of work	Title VIAF ID	Description	Alternative Title/VIAF ID	Language(s)	UnPl
1		Aan boord van de Sabina (NL, Theo Frenkel sr, 1920, Amst		Aan boord van de Sabina (NL, Theo Frenkel sr, 1920, Amsterdam Fil			
2		Aandael van de mariniersbrigade in de politionele act		Aandael van de mariniersbrigade in de politionele actie op oost-Ja nl			
3		Aankomst burgemeester de Ranitz (NL, Onbekend, 1		Aankomst burgemeester de Ranitz (NL, Onbekend, 1948,) nl			
4		Aankomst commissie van drie (, Onbekend, 1947,)		Aankomst commissie van drie (, Onbekend, 1947,)			
5		Aannemingswerken (NL, Max de Haas, 1949, Max de		Aannemingswerken (NL, Max de Haas, 1949, Max de Haas) nl			
6		Aardappels rooien (NL, Onbekend, 1948,)		Aardappels rooien (NL, Onbekend, 1948,)			
7		Afbraak Chateau Bleu (NL, Henk Alsem, 1942, Hispano Film		Afbraak Chateau Bleu (NL, Henk Alsem, 1942, Hispano Filmfabriek nl			true
8		Afrikaansche Missieffilm, Een (NL, C.W. van Graven, Afrikaansche Missieffilm, Een (NL, C.W. van Graven, 1927, F nl		Afscheid van twee pioniers (NL, J.Th.A. van der Wal, Afscheid van twee pioniers (NL, J.Th.A. van der Wal, 1949, 1 nl			
9		Agio tip (NL, Onbekend, 1970,)		Agio tip (NL, Onbekend, 1970,)			
10		AGWO (NL, Andor von Barsy, 1931, A. von Barsy (perso		AGWO (NL, Andor von Barsy, 1931, A. von Barsy (persoon)) nl			
11		Airwick - Luchtverfrisser ~ Actifral 10 vitamine prepari		Airwick - Luchtverfrisser ~ Actifral 10 vitamine preparaat : na nl			
12		Alle 7 Dagen (NL, Theo Güsten, 1940,)		Alle 7 Dagen (NL, Theo Güsten, 1940,)			
13		Als een Firma een goede Reputatie heeft (NL, Alex Benno, Als een Firma een goede Reputatie heeft (NL, Alex Benno, 1932, A nl		Als wij levenden, sterven (NL, Max de Haas, 1935, Vi			
14		Als wij levenden, sterven (NL, Max de Haas, 1935, Vi		Als wij levenden, sterven (NL, Max de Haas, 1935, Visie Film nl			
15		Als een Firma een goede Reputatie heeft (NL, Alex Benno, Als een Firma een goede Reputatie heeft (NL, Alex Benno, 1932, A nl		Als een Firma een goede Reputatie heeft (NL, Alex Benno, 1932, A nl			
16		Ambacht en Industrie (NL, Max de Haas, 1949, Max d		Ambacht en Industrie (NL, Max de Haas, 1949, Max de Haas nl			true
17		Amsterdam (NL, Max de Haas [?], 1932, Visie Film (A Amsterdam (NL, Max de Haas [?], 1932, Visie Film (Amsterdi nl		Amsterdam bij nacht (NL, Alex Benno, 1936, Actueel			
18		Amsterdam bij nacht (NL, Alex Benno, 1936, Actueel		Amsterdam bij nacht (NL, Alex Benno, 1936, Actueel Film (Hi nl			
19		Amsterdam in Woord en Beeld (NL, Theo Frenkel sr, 1924, The		Amsterdam in Woord en Beeld (NL, Theo Frenkel sr, 1924, The Dutch nl			
20		Amsterdam in Woord en Beeld (NL, Alex Benno, 1924, Amsterdam in Woord en Beeld (NL, Alex Benno, 1924, Actue nl		Amsterdam, een beeld van handel en industrie (NL, T Amsterdam, een beeld van handel en industrie (NL, Theo Gü nl			
21		Amsterdam, een beeld van handel en industrie (NL, T Amsterdam, een beeld van handel en industrie (NL, Theo Gü nl		Amsterdam, verwoesting haven (NL, Piet Out, 1945,)			true
22		Amsterdam, verwoesting haven (NL, Piet Out, 1945,)		Amsterdam-Batavia door de lucht (NL, Theo Güsten, Amsterdam-Batavia door de lucht (NL, Theo Güsten, 1930, f nl			
23		Amsterdam-Batavia door de lucht (NL, Theo Güsten, Amsterdam-Batavia door de lucht (NL, Theo Güsten, 1930, f nl		Amsterdam-diversen (NL, Willy Mullens, 1900 - 1925, Amsterdam-diversen (NL, Willy Mullens, 1900 - 1925, Filmfal nl			
24		Amsterdam-diversen (NL, Willy Mullens, 1900 - 1925, Amsterdam-diversen (NL, Willy Mullens, 1900 - 1925, Filmfal nl		Amsterdamse marktwezen. Het (NL, Herman Wassen Amsterdamse marktwezen. Het (NL, Herman Wassenaar, 19 nl			true
25		Asta Nielsen in Haarlem (NL, Alex Benno, 1920, A. B		Asta Nielsen in Haarlem (NL, Alex Benno, 1920, A. Benno (p nl			

NB As from this year, this particular excel sheet is no longer used as the upload process is semi-automated. The user selects the titles it wishes to upload and the FORWARD system automatically puts them into an Excel sheet which is sent to EUIPO (who send it to RCE for approval, who then send it back to EUIPO) after the user has given the command to do so.

¹² At the time of writing, 800 titles have been uploaded to EUIPO and 166 titles are pending.

Interestingly enough this Excel sheet does not require to give the planned uses of the orphan works, even though the OWD and the Dutch copyright legislation mention that this information is needed¹³. As this information is not requested, it is not given.

7. Orphan Works: uses

As far as use goes, there is no limit on the kind of uses EYE makes: orphan works are used for EYE's own museological uses¹⁴ as well as made available to third parties for various purposes, although their "commercial" value is usually very limited.

Whenever EYE makes material available to third parties, it levies a fee—an activity EYE can fully justify as the proceeds allows for the digitisation and otherwise preservation of more (orphan) works. The fee mentioned is expressly meant as a reimbursement for the storage, digitisation and other costs as incurred by EYE. The fee is due for all types of material, both copyright protected with a known rights holder (who has to give permission to use the material in question and can ask for royalties independently from the fee EYE levies), and public domain and orphan works. This fee hardly ever covers all costs and it certainly never generates a profit. Strictly speaking, this practice does "generate income", something that both the OWD and the Dutch Copyright Act allow, as long as the revenues are used for the digitising and making available of (yet more) orphan works: *"The organisations may generate revenues in the course of such uses, for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public."*¹⁵

EYE doesn't keep a separate account for any revenues generated from orphan works, but any revenues will most likely be generated through the museum's sales department, and in that respect are separate from other income, such as ticket sales. All sales revenues are put towards preservation.

Art. 6 sub 1 of the OWD sums up the permitted uses which include making the orphan work available to the public, within the meaning of Article 3 of Directive 2001/29/EC:

"Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them."

Interestingly, when this article was transposed into Dutch national law, the permitted use was narrowed down to only contain *"...the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them."*¹⁶ Could this have been an oversight, or has this been a deliberate choice of the Dutch legislator? In any case, there is room to argue for a broader interpretation of "making available".

In art. 6 sub 2 the OWD gives additional requirements and permissions regarding the use of orphan works including the requirement that orphan works only may be used *"in order to achieve aims*

¹³ art. 3 lid 5 sub b OWD / art. 16 p lid 5 sub b Aw.

¹⁴ Such as EYE's a dedicated channel on YouTube where mainly orphan and public domain material can be viewed, streaming only as well as watermarked: <https://www.youtube.com/user/eyefilmNL?hl=nl&gl=NL>

¹⁵ Art. 6 sub 2 OWD.

¹⁶ Art. 16 r Aw.

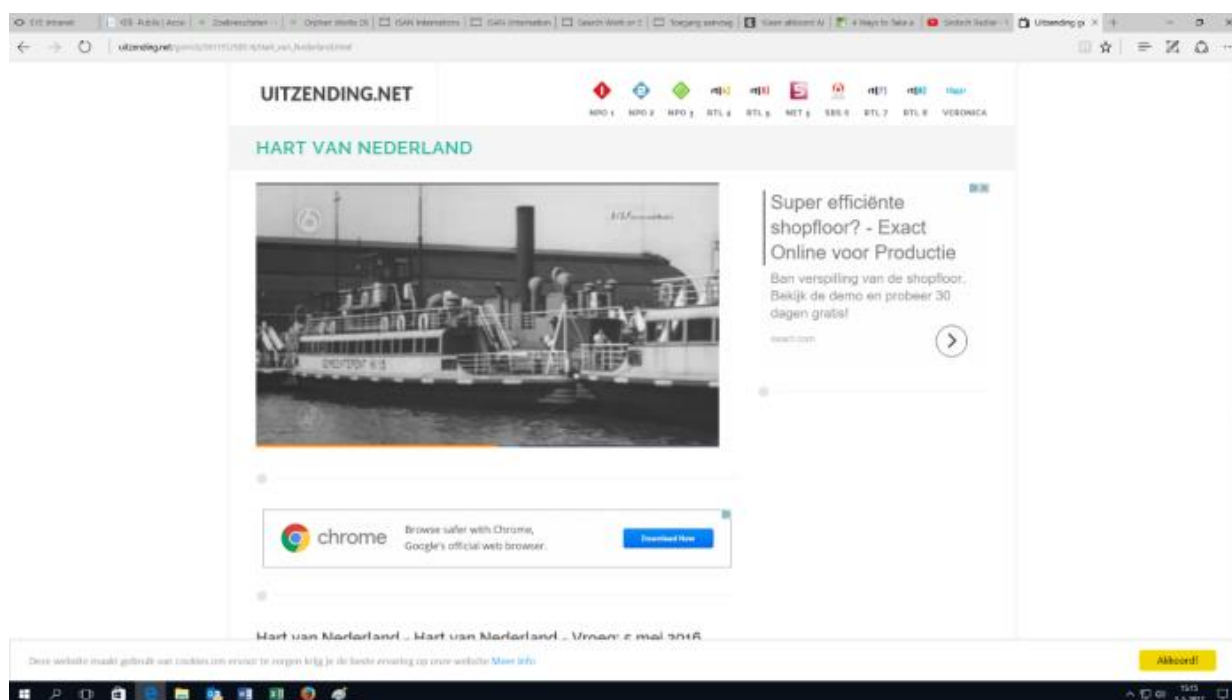
related to their¹⁷ public-interest missions”¹⁸, (but that should not be too much of a problem, as providing third parties with material from EYE’s collection is part of the museum’s mission as described in its foundation statutes) as well as the permission to generate revenues in the course of the permitted uses mentioned above.

In addition, risk assessment plays an important part and in that respect it should be noted that there is actually one more reason an audiovisual work can be considered orphan. Apart from rights holders that are unknown and/or can’t be found, there are also those cases where the rights holder simply doesn’t exist—either because the original rights holder died without any heirs, or the rights holder was a company that went bankrupt and the rights were not sold on and the liquidator closed the case file. In those cases the risks related to use are of course *non-existing*, so an archive should not hesitate to use the work in question in the broadest sense possible.

8. Use of Orphan Works by third parties: examples

As said, EYE does make orphan works available to third parties and levies a fee for the use made. Here are some examples of the various “commercial” uses EYE has allowed:

Herwonnen vaart (NL, Herman van der Horst, Allan Penning, 1946, NWF - Nederlandse Werkgemeenschap voor Filmproductie (Nederland))

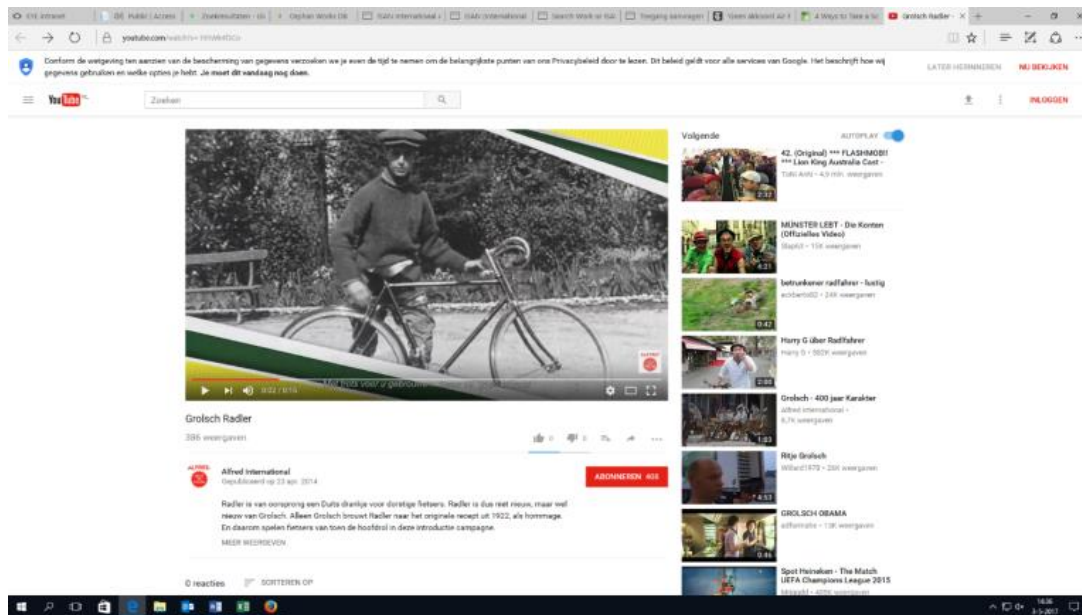


This title was sold to the commercial broadcaster SBS to use in a news item.

¹⁷ Referring to the organisations referred to in Article 1(1)

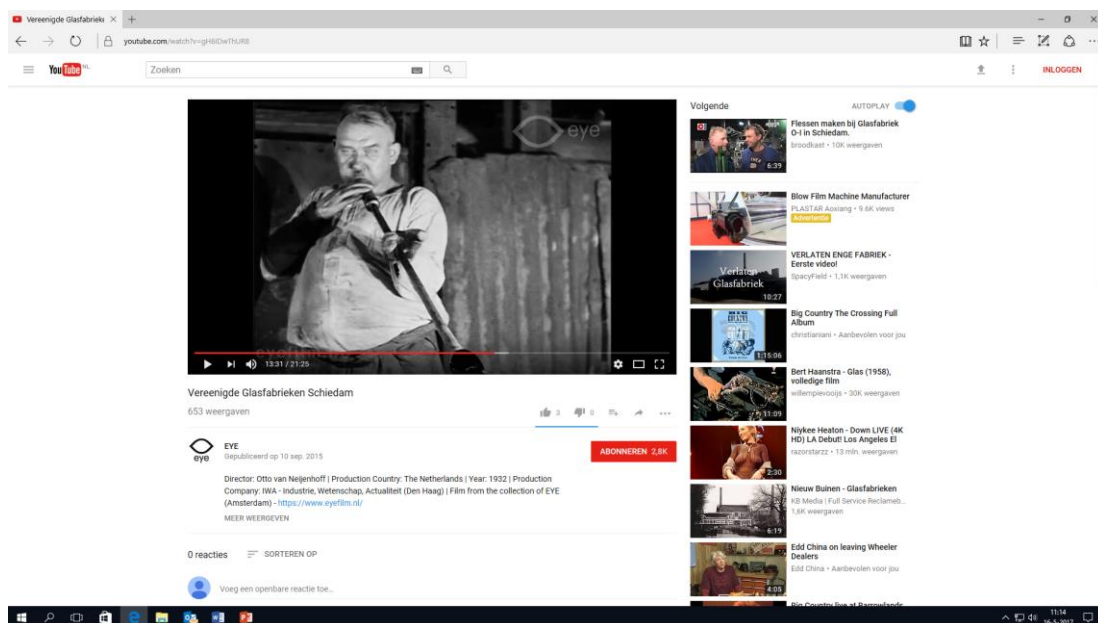
¹⁸ Art. 6 sub 2 OWD. The text of the article clearly suggests “*in particular* the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection”, thereby leaving the option of *other* public interest missions.

Ontwikkeling van het rijwiel, De (FR, Onbekend, 1915 [?],)



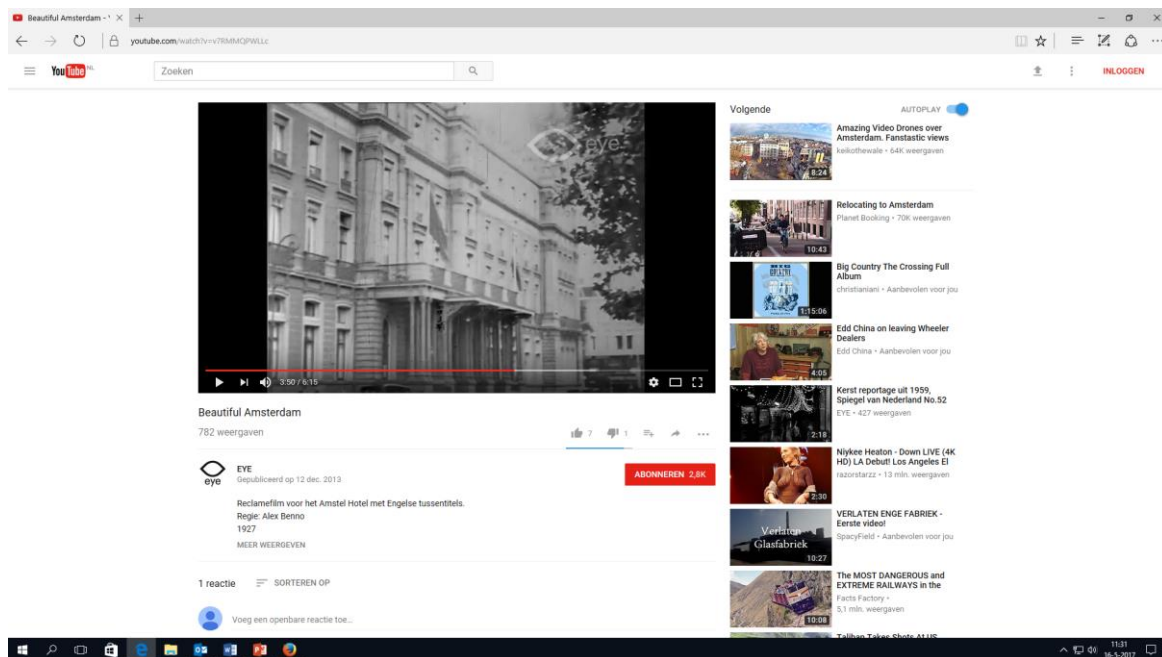
This item was sold to Dutch brewery Grolsch to use in a commercial for their “Radler” beer.

Vereenigde Glasfabrieken Schiedam (NL, Otto van Neijenhoff, 1932, IWA - Industrie, Wetenschap, Actualiteit (Den Haag))



This title was sold to the national broadcaster NOS to use in a news item on the closure of this glass factory.

Beautiful Amsterdam (NL, Alex Benno, 1927, Actueel Film (Haarlem/Amsterdam))



This clip was sold to the Amstel Hotel in Amsterdam to use in a corporate film.

Interestingly, **Vereenigde Glasfabrieken Schiedam** and **Beautiful Amsterdam** are also available to view for free on EYE's YouTube channel—albeit watermarked—which shows that non-commercial and commercial use of orphan works coincides very well.

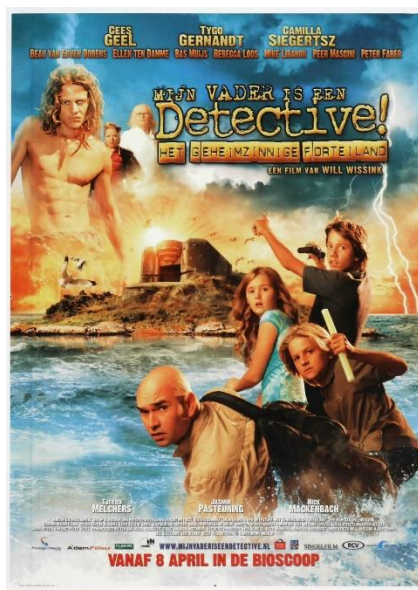
9. Future orphans

It is a misconception to think that there are only so many orphan works in the world and once they have been identified, that's that. Every day new orphans are created. This does not only pertain to the vast amount of video footage that is created daily and published online without any credits¹⁹, but also big cinema productions that are orphaned because the production company that holds all the rights goes bankrupt without the rights being sold on.

Examples of this scenario are the two recent Dutch children's films called "Mijn vader is een detective—Het geheimzinnige forteiland" (2008) en "Mijn vader is een detective—The Battle" (2012). Both titles were orphaned because the production company went bankrupt and the rights were not sold on²⁰.

¹⁹ Although to qualify as orphan they have to be contained "in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions".

²⁰ Information EYE stumbled upon by accident when trying to contact the production company to finalise a donation agreement. The liquidator was contacted, who informed EYE the rights were not sold on and the file was already closed.



10. Conclusions

Of course there are many reasons why an audiovisual work can become (and remain) orphaned, but especially as long as people die without heirs and companies go bankrupt without the rights being sold on, “orphaning” is a lasting phenomenon.

At the same time, it is not very likely that copyright legislation will dramatically change in the near future. In particular, it’s safe to assume that furthergoing exceptions are not be expected any time soon, so (EU) film archives will have to work with what’s currently available, in terms of which exceptions are available to them.

In EYE’s opinion, the existing exception on the permitted uses of orphan works is workable as long as one takes a *pragmatic approach*. That means that a diligent research should only focus on consulting those sources that are relevant. And yes, in some cases that means not consulting *any* sources.

Finally, there are also positive side effects to the diligent search that are often overlooked. It is the public domain films that are unearthed in the process (for which no further rights clearance is necessary), as well as the identification of rights holders with whom agreements can be negotiated.

With special thanks to Dr. Claudy Op den Kamp for not only taking over my presentation during the Symposium *New Approaches to the Orphan Works Problem Technology, Regulation, Practices* at Bournemouth University on 23rd June 2017, but also for helping to edit this paper.

Mw.mr. Leontien Bout/EYE Filmmuseum/Amsterdam, July 2017