

Festival Films



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COPYRIGHT DISCUSSION

The following attempts to give an overview of the general principals and problems of copyrights and of the Public Domain. It is wise to familiarize oneself with these concepts in case one is ever contacted by, for example, whoever owns the copyrighted episodes of "Bonanza." The correct response to such a hypothetical inquiry is: "We only use the 31 episodes that were not properly renewed and so are in the public domain."

"Public Domain" means those creations which are no longer owned or protected by their creators or designated companies and which are fully usable by the public since they have fallen into Public ownership. This discussion will be limited to filmed materials that are recorded on film, on disc or tape, in electronic memory or any other means of recording and archiving progressive images in the form of moving / action presentation.

Public Domain films have been openly sold worldwide for over 35 years by hundreds of wholesale and retail merchants on 16mm, VHS, laser and DVD. They have been broadcast by television stations to millions of consumers. They are available in streaming video on the internet. All of this has been done in full view of the movie studios who allowed the rights to lapse on their own movies. Courts have often ruled in favor of public domain when studios did not adhere to the copyright requirements.

A film's protected status and protectable life begins with the initial commercial showing, the copyright registration date or the in-notice date, whichever comes first. No item is protected until it has fulfilled the current legal requirements for such protection. Until such protection is initiated the materials may be in the "Public Domain" and are certainly usable without penalty. Failure to protect initially may be an oversight, but continued failure can be construed as abandonment of the rights of protection for that item.

Thousands of Hollywood motion pictures are in the Public Domain because they were 1) released without Copyright Notices; 2) were never registered with the Library of Congress, had improper or late registrations; or 3) were not renewed after 28 years under the old requirements for films made before 1964. Let's look at these three main reasons why a film becomes PD.

1) COPYRIGHT NOTICE.

Publication of materials without notice caused the materials to immediately fall into the Public Domain. The law required that a copyright notice consisting of the Year, the word copyright or the symbol for copyright (©) in its place, and the name of the claiming copyright owner. The notice had to be clearly displayed and readable somewhere in the opening or closing credits of a film or television production. Publication of a defective notice was the same as publication without notice and the work would fall into the Public Domain. Examples of films released without © notices are Night of the Living Dead, McLintock!, Carnival of Souls, some 1950s TV shows and many Roger Corman films.

2) REGISTRATION

Registration of a motion picture with the Library of Congress is always required. Because of neglect or the feeling they would have no future value, some films were never registered -- from 1930s B-films produced by Principal Pictures, to an occasional A-feature like LIFE WITH FATHER, to numerous 1950s TV series such as "Westinghouse Studio One." Initially, prompt registration was called for in the law but the courts have interpreted that period might extend for the full 28 year period. Failure to register during that period caused the materials to fall into the Public Domain. Films made before 1964 that were never registered, can NOT be registered and protected at this late date.

Most films are promptly registered TODAY. However, since the period allowed for registration is inadequately defined, a film bearing notice can be registered at any time during the registration life span (currently 95 years from the date produced). So no penalties under law exist until the work is placed under copyright protection by registration. The term **Non-Registered (N.R.)** applies to these unregistered but still protectable materials that includes made-for-TV movies, foreign films and others made after 1964 that have not yet been registered. Under the current copyright law they still can be registered by someone connected with the original production, but until that time they can be sold and used as public domain.

3) COPYRIGHT RENEWAL

Initially under copyright law the first Registration with the Library of Congress was for a term of 28 years, and that term could be renewed for another 28 years for a total protected term of 56 years. Failure to renew 28 years after a movie or TV show was made is the main reason that American films made before 1964 are currently in the public domain.

In 1966 Congress prepared a new copyright law that extended protection to 75 years from the date a film was released. This same extension applied to films which had not entered the Public Domain prior to 1966. Thus any film in copyright after 1909 and renewed automatically had its copyright period extended to 75 years. In 1992 legislation extended to films made prior to 1978 and after 1963 the automatic extension of their initial copyright. Such films were automatically protected without copyright renewal. This law did not set aside the requirement under law for prompt registration for film made PRIOR to 1978 and as such failure to register those films within the copyright registration period of 28 years automatically transferred the materials to the Public Domain.

In 1998 an additional 20 years was granted to the copyright period making all films for 1923 on available for a 95 year period of protection. All films made BEFORE 1923 are permanently in the public domain. Through all of these extensions, American films which had already fallen into the public domain for the reasons sited above continued to be public domain.

GATT RENEWAL OF FOREIGN FILMS

Over the years many foreign films had been improperly registered or renewed with the Library of Congress. Effective in 1996 materials which were protected in countries falling under the Bern convention were permitted to be protected under U.S. Copyright. This GATT treaty automatically placed all such protected materials under copyright within the limitation of the U.S. Copyright laws. The rightful owners had two years to register their protection and upon registration there was a one year grace period for owners of record to exploit their ownership before ceasing such exploitation. Owners of record as of January 1, 1996 were considered

compliance owners and were granted a perpetual exclusion for all materials not protected within the two year registration period. Any film protected under GATT by the foreign owner of that material or his designated representative on his behalf was granted Copyright status in the United States.

Films which were re-claimed include most Mexican films, Swedish films of Ingmar Bergman, Italian films by Fellini and Rossellini, Japanese films by Kurosawa and German films like METROPOLIS extending back into the 1920s. Library of Congress filings were also made on most British films of the 1930s and 1940s, even though they were public domain in Britain at the time, and the validity of these claims has not yet been challenged in court. The British films of Alfred Hitchcock are still sold as public domain by many vendors.

Some Italian, Spanish and other foreign, westerns and horror films from the 1960s-80s were not reclaimed under GATT, and presumably can no longer be claimed at this late date.

In summary, all materials which failed to meet registration requirements in any of the various phases of Copyright protection, through the numerous law changes over the years, would be usable by the Public today within its rights of Public Domain.

MUSIC IN PUBLIC DOMAIN FILMS

Most movies contain MUSIC -- songs, a title song composed for the film, a background score or incidental music. Music is often copyrighted independently from the film in which it appears. However, film producers purchase music rights when they make a film. The music becomes part of that new work just like the story, the actors' performances, the sets, costumes and so on. The film is then copyrighted, registered and protected. When it falls into the public domain through intent or accident, all components of that film -- including the music -- become public domain within the original film that was released. An example is the MGM musical TILL THE CLOUDS ROLL BY that contains numerous famous songs by Jerome Kern.

The music industry is well aware of this situation and has not initiated any law cases which could overturn the wide practice of using public domain films without paying additional royalties to the holders of music rights. By ignoring the situation for so long, they may have abandoned any hope of reclaiming rights should some test case eventually go to court.

However, if sections of a public domain film are excerpted for use in a new work like a documentary, then the producer needs to negotiate for any music rights in the clip. NOTE: TV variety shows often did not purchase music rights in perpetuity, so it may be necessary to pay music rights for use of an otherwise public domain TV show like "The Colgate Comedy Hour."

LITERARY RIGHTS

Courts have asserted that underlying materials for a film (such as the story) may be exercised in the protection of that film if the underlying material is still protected under copyright. The exception to this would be if the creating company had bought in perpetuity all film rights for the underlying materials. In order to insure that such rights do not prevail the actual

production and underlying material contracts would have to be scrutinized.

Many movies are based on books, magazine articles, comic books or other literary sources which have been copyrighted independently from the films. Examples from 70 years ago include RAIN (1932, Somerset Maugham), A FAREWELL TO ARMS (1932, Hemingway), HIS GIRL FRIDAY (1939, Ben Hecht), FIGHTING CARAVANS (1931, Zane Gray), all of which are widely sold as public domain. Producers purchase these rights when they make a film and when the film lapses into public domain the literary rights are usually not contested. In a few cases the owner of the literary rights will come forward after many years and try to claim the films, but such claims must come from the author's estate and will not come from the original studio. Law suits have taken place, i.e. over the Dick Tracy character, and ruled in favor of the public domain vendor. We can not guarantee there will be no literary claims out of left field in the future, although the extreme time over which they have not been contested makes this unlikely, and no penalty could be imposed other than a request to cease and desist or pay a royalty. An example of reclaiming a film through its literary rights is IT'S A WONDERFUL LIFE -- many vendors were told to stop selling it as public domain, but no one was sued.

SALE OF P.D. FILMS TO OTHER COUNTRIES

I assume that an American film that is public domain in the USA is also public domain worldwide. However, I do not know if any certain country has unique copyright laws that might apply. For instance, Germany does not seem to recognize the concept of public domain. Foreign customers need to determine their own situation by consulting a local attorney.

NOTE: This is a personal assessment of the copyright/public domain situation as it has existed for many years. It is not a legal opinion. Questions about the use of film clips or music or actors' likenesses in public domain films are best answered by a copyright attorney.

-- Ron Hall
FESTIVAL FILMS

COPYRIGHT RESEARCH:

- 1) Films which were registered or renewed after 1976, or reclaimed under GATT, may be researched at the Library of Congress website: <http://www.copyright.gov/>
- 2) The renewal status of films registered from 1923 through 1959 is noted in 3 volumes of copyright research which we refer to frequently.
- 3) If further research is required, we urge customers to obtain their own copyright search reports from the excellent researcher Elias Savada (ESavada@mac.com)
Background information on Elias may be found at --
<http://www.rottentomatoes.com/author-398/about.php>