

[1] LEGAL AND ETHICAL ASPECTS OF ACCESS TO THE IMPERIAL WAR MUSEUM FILM AND VIDEO ARCHIVE – Roger Smither (April 2008)

Although our collections have many similarities, particularly in terms of the material which we both hold, the Imperial War Museum Film and Video Archive is not an exact parallel to ECPAD. [2] There was a similar impetus behind the idea that the films being generated during the First World War should be kept for posterity. In our case, we like to quote as a key text [3] an editorial response from the London *Times* to the film *The Battle of the Somme* in 1916 which said: “In years to come, when historians want to know the conditions under which the great offensive was launched, they will only have to send for these films and a complete idea of the situation will be revealed before their eyes – for we take it as a matter of course that a number of copies of them will be carefully preserved in the national archives.” However, the British Army had not endeared itself to the British Cinema trade during the war, both by its tardiness in allowing filming at all and in its subsequent arrangements for distribution, and [4] a 1919 cartoon from the trade journal *Kinematograph Weekly* sums up the suspicion quite neatly. In a vision of a future cinema show, the audience is gathering to watch “Episodes of the Great War Based on the Recollections of Survivors and Lifelike Imitations of the Real Thing”. A small boy asks his father: “Why didn’t they film the Great War, Daddy?” and his father replies: “They did, my son, but the films fell into the clutches of the War Office and died in captivity.” Rather than staying with the Army as in France, therefore, in Britain the films of the First World War were entrusted to a civilian body.

The British Cabinet had decided as early as 1917 that a National War Museum should be set up to collect and display material relating to the Great War, which was then still being fought. The interest taken by the Dominion governments led to the museum having its title changed to Imperial War Museum, and it was under this name that it was formally established by Act of Parliament in 1920. [5] Its founding curators were remarkably far-sighted in accepting from the start that the filmed record of the war should take its place in their collections. Relevant material was transferred to the Museum in the early 1920s, and the first custodian of this collection – the Government Cinematograph Adviser, Edward Foxen Cooper – developed procedures for the long-term care of such a collection, including appropriate storage and the preparation of film copies made specifically for preservation. The Museum even managed to obtain government funding to put Foxen Cooper’s proposals into practice at a time when post war spending was being cut back ruthlessly.

[6] At the outset of the Second World War the Museum’s terms of reference were enlarged to cover both world wars, and they were again extended in 1953 to include all military operations in which Britain or the Commonwealth have been involved since August 1914. The Imperial War Museum now describes itself as Britain’s national museum of contemporary conflict, but it is not an Army, or Armed Service museum, and it is not administratively linked to the Ministry of Defence. Our parent body is the Department of Culture, Media and Sport and our remit is to illustrate and record all aspects of the causes, course and consequences of modern conflict, and of the individual’s experience of war, whether allied or enemy, service or civilian

The collections of the Museum’s Film and Video Archive, which now total some 20,000 hours, reflect this institutional remit. The subject matter is all war-related, but this does not mean that the collection contains only combat film. From a century or more of ‘total war’,

the film record contains much that is of at least as much relevance to social, environmental, political and cultural – including film – history as to military history. [7] Material in the collection comprises mainly non-fiction film and includes record footage, [8] edited documentaries and newsreels, films for information and instruction (and indoctrination), and retrospective histories. Much of this material comes from British official sources, but the collection also includes material from commercial production companies and [9] amateur filmmakers in Britain and comparable material from many Commonwealth countries, as well as from wartime allies and former enemy countries.

Another significant difference between ourselves and ECPAD is that since we are separate from the services and from the Ministry of Defence, we have no continuing institutional link to the parts of the British Armed Services that have production units and which generate moving image records. A large proportion of our collection has been, and continues to be, transferred to the Museum from such sources, but it reaches us indirectly. The Imperial War Museum acts on behalf of The National Archives as an official place of deposit for relevant public record films. Legally, the requirement has been for official records to reach us no later than thirty years after they were created. In practice, under the growing pressure both of more liberal interpretations of the concept of ‘freedom of information’ and of technological change, [10] official material now reaches us much more quickly – sometimes in a matter of months.

The legal status of this material under British law is that it was filmed under the conditions of Crown Copyright. What this means is that people making films while on the payroll of government departments, or under contract to them, forfeit any claim to copyright. Rights are instead held in the name of the Queen and administered on her behalf by a body formally known rather grandly as Her Majesty’s Stationery Office, now rather less grandly as the Office of Public Sector Information. This office has the right to delegate or licence other bodies to administer Crown Copyright on its behalf, and the Imperial War Museum is one such body. It is sometimes said that the IWM owns the copyright in much of its material. This is not strictly correct – what we have is a licence to administer the copyright in much of our material and, most usefully, to retain any income that we can earn by doing so, provided that we spend such income on the preservation of the collection. Unlike many FIAF members, we are therefore in the fortunate position of being able to earn income ourselves from footage sales, rather than being largely agents acting on behalf of third party rights holders. Our annual income from this source typically runs into several hundred thousand pounds. We earned just over £300,000 in the last financial year, which was not a very good one, but there have been years when we have earned more than twice that amount. Current exchange rates mean these figures no longer sound quite as good as they used to when expressed in Euros, although they sound better as US dollars: £300,000 is currently worth a bit more than €375,000 and a bit less than \$600,000.

The ability to make money from a collection is not an unambiguously good thing. The Museum remains a public sector, public service institution and is committed to providing maximum access to its collections, and this impulse can sometimes be difficult to combine with the raising of revenue. Under recent British Governments, the same bi-polarity is enshrined in official policy: on the one hand, many Government initiatives (and indeed many grants) are predicated on the expectation that the results will be freely accessible, but at the same time other parts of the same Government are telling institutions like ours to maximise their self-generated income. You do not get thanked for pointing out that the two instructions

can be mutually contradictory, but it still remains true that they can, and we are obliged to try to work out ways of living with both simultaneously.

Returning to the question of rights, I should emphasise that we do not have the ability to license all the film in our collection. We hold third-party copyright material, which we must handle with the same concern for rights holders as anyone else. We also have ‘orphan’ material, for which we must work out our position, and we have other anomalous collections, such as our holdings of Nazi-era German film, which are covered by a specific piece of British legislation called the *Enemy Property Act* (1949). Nonetheless, we are in effective control of the administration of the rights of a large part of our collection, and it is perhaps this relatively privileged position that has enabled or encouraged us to develop aspects of our licensing agreement that go beyond the question of legal rights alone. I should like to spend the balance of this presentation looking at a few examples.

Unlike ECPAD, we do not have to concern ourselves with film that is still classified as secret. In theory, no material should reach us until it has been officially declassified. It can still happen that a hurried transfer from an establishment that is about to be closed down for some reason may include a film that we find is still classed as secret, but it is not a problem with which we have to deal on a regular basis. The concerns which we engage are more those to do with the ethics of footage licensing, or the responsibilities that an archive may have to the material in its care, to the people who made it, and to the people depicted on it.

In a couple of cases, the Museum is simply informing its users of conditions imposed by those from whom we obtained a particular collection. For example, we hold significant collections of material from the United Nations and from NATO, and are bound by the terms of the relevant agreements with both these organisations to include certain specific wording **[11]** in our standard Terms and Conditions:

NATO and United Nations Copyright Material

This material is released by the Museum subject to ... the following conditions (stipulated by NATO and the United Nations):

- (a) no material is to be used in parodies, theatrical productions or any programmes and products that defame the United Nations or NATO;
- (b) material is released for use only in objective and balanced documentaries, even though at times the end products may be critical of the United Nations or NATO. In those cases when a member state is criticised, the United Nations or NATO wish it to be made known that they do not associate themselves with the contents of the documentary.

Once we were imposing conditions like this on users of these specific collections, we found ourselves asking why we should not impose similar protection for other parts of the archive. One concern which we share with other archivists is that the films accessed from our vaults should reflect, in the words of FIAF’s *Code of Ethics*, “the truest possible representation of the work of its creators”. We plan to address this concern with a clause in our standard terms and conditions which will say the following **[12]** (this text comes from a proposed revision to our licence, rather than from the current text):

The User will ensure that the Material is not used or edited (including adapted, altered, cropped or manipulated) in any way which will or in the Museum’s opinion (in its sole discretion) is likely to be detrimental to or disparaging of, or likely to tarnish the reputation of the Museum or the Material or its subject matter or bring them into disrepute.

What are the issues that we have in mind when we draft such a clause? A classic example of use that might be considered to go against this clause is colourised film – and here I must confess [13] to the existence of a series called *World War I in Colour* based very largely on colourised film sourced from the Imperial War Museum collection, which of course provided it in black and white. It was in fact the experience of this series that led us to start on the process of introducing such a clause into our Terms and Conditions. A further type of misuse that concerns us is currently a more frequent problem in the Museum’s still Photograph archive than on the film side, although we may expect it there as well – I refer to the possibility of a designer or digital expert will take it on themselves to make an archive image more exciting or more graphically interesting than the original actually is. [14] Another example that we did not manage to prevent is a book cover using an image that actually derives from two of our photographs combined into one; one of them was even reversed for improved graphic effect... A project that we were able to stop [15] was a proposal to insert an image of a modern Winston Churchill impersonator in a state of undress into an archive photograph of the Cabinet War Rooms in Whitehall.

I am sure by now that many of you will be feeling quite uncomfortable about what I am describing. Although you may recognise the good intentions behind the quest for some kind of archival purity, you will also be wondering whether we have not moved close to, or indeed crossed the border into, an area where we are acting as censors and inhibiting freedom of expression. Is there not a risk that we will prevent some form of entirely legitimate and possibly quite wonderful artistic activity in the name of historical authenticity? Are we, as an archive that enjoys showing the world *Germany Calling*, perhaps being more than a little hypocritical? Please believe me that we are ourselves very sensitive to these dangers, and we do recognise that it may not be possible or appropriate to stop some forms of image manipulation taking place. In such circumstances we make our stand on the point that the extent of the manipulation must be explained, and should you bother to acquire *World War I in Colour* you will find there that both the voice of Kenneth Branagh and an on-screen title tell you, if you are paying attention, that the colour has been added by the production company to black-and-white material provided by the Imperial War Museum.

A further clause [16] included both in our current Terms and Conditions and in the new draft reflects our concerns that use of our footage might be liable ‘to trivialise, sensationalise or demean the subject portrayed’. What exactly are we talking about here? I can perhaps exemplify the sort of thing we mean by taking a reasonably typical request: a researcher who comes to us asking for ‘a really big bang – a building or a ship blowing up’. Well, we have exactly such a scene: [17] you will perhaps recognise it, since it is widely, if not always accurately, used in documentaries about war at sea. [17A] It shows the sinking of the British battleship HMS *Barham* by a German U-boat on 25 November 1941. It certainly meets the requirement for a really big bang, but bearing in mind that 841 men lost their lives when the *Barham* went down, just how comfortable should we be in allowing its use in, say, an advertisement or a music video? In fact, our Terms and Conditions address that directly by saying simply that

The inclusion of Material in electronic, computer-based games, advertising and pop promos is specifically excluded and no licence will be granted for such use.

This may be perceived as another form of censorship – and it certainly costs us potential income – but in this case it is something we are reasonably comfortable with.

There is another possibility of ‘demeaning’ use that is also of concern to us, and perhaps to all archivists who look after actuality footage, and this is that the figures who are captured on the films we hold are real and identifiable people, and they – or their families – may deserve some sort of consideration as to whether or not their images should be used in certain ways. I am not here concerned with the attempts made in some jurisdictions in America to register a person’s image and protect it legally: I am talking about the possibility of archivists trying to be sensitive to the feelings of the people whose images are in their care. There have been FIAF Congresses which have heard accounts of the special care needed to respect cultural sensitivities in the handling of anthropological or ethnographic film, but my point is to extend such respect into everyday concerns. For example, we have [18] a series of films named *Calling Blighty*, made during the Second World War, to allow soldiers in distant parts of the world to send messages home. To modern eyes, some of these people will undoubtedly look and sound funny – but is it appropriate to allow them to be used in a context which sets out to invite laughter, especially bearing in mind the circumstances in which they were filmed?

As a potentially more serious example: Britain has a very militant animal rights movement, which has been known to target, sometimes with intent to kill, people associated with experiments on animals. We have material relating to such experiments: would releasing such film possibly expose the scientists involved to any kind of risk? A third example of this kind of ‘duty of care’ concerns some footage we have of an ‘Exhaustion Centre’ – a facility set up by the British army [19] during the fighting in Italy in the Second World War for the treatment of soldiers with what was then known as battle fatigue and is now known as post-traumatic stress disorder. We were approached by a production company making a perfectly serious series about this syndrome who naturally wanted to use this footage, but we felt that their request – although the material was under no legal restriction – still needed to be treated with caution. The faces of individual soldiers were clearly recognisable in these shots, their names were recorded in supporting documentation, and they might still be alive. Even if they were not alive themselves, their wives and children would almost certainly be, and the soldiers might never have talked about this aspect of their wartime lives. Should we allow their private distress to be made public in a television programme? However valuable the programme itself, we felt there was a risk at the very least of an invasion of privacy, if not of something approaching a violation of medical ethics. We asked the company to obscure the faces of soldiers seen in close-up; they were not happy about this, but they did agree – only for us to find that very similar footage from another treatment centre, obtained from a medical archive, was used in the same programme with no such restriction!

When we examined our concerns about this episode after the programmes had been broadcast, we found that we were not so inclined to be protective of First World War images as we were of those from the Second World War. This would seem to suggest that there comes a point where the possibility of offence or distress is washed away by the passage of time, and the personal becomes historical. But exactly when is such a point reached? We have not arrived at a consensus on this question.

It has not been my intention in making this presentation to suggest that the Imperial War Museum has made the right decisions, or arrived at the right answers, in any of the areas I have talked about. I wanted only, in the context of a symposium about the legal context in which we operate, to open up for discussion some thoughts about the ethical context as well. I shall be very interested to hear what others think. Thank you.