

# Forgotten faces: why some of our cinema heritage is part of the public domain

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The arbiter of DVD sales in the United States is Wal-Mart. While DVD is only 2 per cent of Wal-Mart's business, the company's more than 3700 stores sell 40 per cent of new DVD releases.<sup>1</sup> In the back of a typical Wal-Mart store are two completely different worlds of cinema. There is new DVD product from the major studios at competitive prices along with overstock of recent and less familiar titles. Then over to the side is an array of older films from no-name DVD companies selling for as little as a dollar apiece or multi-film packages with as many as fifty titles for the price of one new release. Ranging from John Wayne B westerns of the 1930s to colour movies with Cary Grant and Danny Kaye, there is little apparent rhyme or reason for the choice of titles.

The dollar bin at Wal-Mart is the end product of a mini-industry where public domain motion pictures are identified, sold and resold. These are films with no copyright or an expired copyright, so the distributor does not have to license rights or pay royalties or residuals. The mainstream motion picture industry is built around protecting intellectual property, controlling distribution to ensure the maximum financial return, and constricting supply to retain pricing power.

Out-of-copyright films follow a different economic model. The public domain provides wide public access to a large number of titles. Because distributors of public domain titles do not have exclusive rights, cutthroat competition forces them to compete on price and value. And public domain works are often among the first titles offered in new distribution formats, most recently streaming video and downloads.

This article addresses a single question – why did some movies lose their copyrights? – and tries to

provide a partial explanation of why the final resting place for some movies is that dollar bin at Wal-Mart. Of necessity, this narrative sets aside many of the complexities of copyright, including music and story rights, the term of protection, foreign copyrights, and films with invalid renewals to focus on a single issue. The story has little to do with the artistic value of our cinematic heritage. The producers and owners treated these films not as artistic works that reflect the culture and values of the creators and audiences, but as properties to be exploited and then traded. Their seemingly callous approach is reflected in this history through specific case studies that also demonstrate the happenstance nature of many of these outcomes. The information is presented within the context of a discussion of some of the standard business practices of the time. And the focus is on the major movie studios during the classic Hollywood sound era: films from independent producers and small studios such as Republic and Monogram were subject to different economic drivers, and deserve an article of their own, as does the story of the archival survival of these orphaned and abandoned works. Hopefully this article will encourage others to pursue these topics.

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**Fig. 1.** Blackhawk Films advertises 8mm silent and sound releases licensed from Hal Roach Studios. From *8mm Collector* #11 (Spring 1965): 36.

### The birth of a business in public domain films

The public domain film industry began in a meaningful way in the 1970s with a handful of small companies that distributed copies of films with expired copyrights. Although Blackhawk Films had been selling public domain and licensed prints of mostly silent films since the 1950s, the business only boomed once a significant number of sound films had passed into the public domain. Thunderbird Films, Reel Images and others sold Super 8 and 16mm film prints to colleges, public libraries, non-theatrical distributors and private collectors. The first champion of films in the public domain was Tom Dunnahoo, a film bootlegger who was raided by federal marshals in

1971 and charged with selling a print of *Beach Blanket Bingo* (1965) to an undercover agent. Afterwards Dunnahoo went the public domain route, and in the mid-1970s his Thunderbird Films was offering 16mm prints of the Shirley Temple Technicolor feature *The Little Princess* (1939) for \$320, Frank Capra's *Meet John Doe* (1941) at \$250, and *It's a Wonderful Life* (1946) for \$200.<sup>2</sup>

Another big customer was television, with UHF stations looking for cheap programming and not scared off by the fact that most of these movies were in black and white. In 1978 *Variety* featured a front page banner headline – 'Big Demand for Public Domain Pix'. The article saw mostly benefits; for television stations "the reward, of course, could be considerable, as even black and white films more than 28 years of age are valuable if they have some audience appeal and cost only the price of a print, as they can be run endlessly, especially as late night filler. Of course, there is no exclusivity, as any other station in the market can get the same feature film."<sup>3</sup>

The public domain business took off at the retail level with the advent of video cassettes. In the early 1980s, VHS cassettes of licensed titles had list prices of \$79.95, so public domain titles at \$29.95 were classic films at cheap prices. Prices 'at discount stores and supermarkets can drop to as low as \$5.99', the *New York Times* reported in 1993. 'For some movies, that is. You won't find *The Sound of Music* at \$5.99, but the price applies to a raft of public domain titles and B movies that studios and distributors figure they might as well sell as have lying around film vaults.'<sup>4</sup>

These markets have declined today, because changes to the copyright law have ended the addition of new titles into the public domain, low prices for studio sell-through DVDs have forced public domain prices to pennies above cost, and the independent television stations that once showed black and white product later affiliated with start-up networks, so they no longer needed old movies. Nonetheless, over the years, millions of video cassettes, laserdiscs and DVDs have been sold of public domain orphan films.<sup>5</sup> And the basis for public domain in the United States dates back to the founding of the country.

### The Constitution

Copyright has a constitutional basis in the United States, as one of the enumerated powers granted to the Congress:

The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries<sup>6</sup>

The framers saw this as a balance between public benefit – the purpose of ‘promote the progress’ and the restriction of ‘limited times’ – and the protecting of authors by granting them a copyright, which is the exclusive right to sell copies. Public domain and copyright are what the Supreme Court once called ‘balancing claims upon the public interest’. The court wrote that the incentives for creativity ‘must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts’.<sup>7</sup>

Since copyright is granted under federal, not state law, the pivotal cases end up with the United States Supreme Court. In the Sony Betamax case, which determined that recording programs off-air was not copyright infringement but fair use, the Supreme Court addressed the purpose of copyright:

It is intended to motivate the creative activity of authors and inventors by the provision of special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.<sup>8</sup>

It is a basic assumption of the law that when works fall in the public domain, they will become much more widely available. This is most relevant for books and sheet music where copies have been sold to the public and can be readily reprinted when they lose their copyright protection. In the most extreme case the prospective publisher of a public domain book can always go to a library and transcribe the text.

This is a fundamental problem for motion pictures, as some public domain films are simply not available. Most of the time, the owners of motion pictures still have control of the best quality materials. As a result, the public domain copies are sometimes inferior, most often copied from old 16mm television prints. The market has evolved over time. In 1990, *Video Business* noted ‘public domain titles have long been regarded as the lowest form of prerecorded video life, and most of the uninitiated (including consumers and most video specialists) view the genre as so cheap it couldn’t possibly be worth even the paltry asking price. That may have been the case in years past ... [H]owever the invasion of low-priced

first-run and re-released studio titles ... have caused many public domain firms to beef up their quality even as they lower their prices to remain more competitive.’<sup>9</sup> In the current environment many public domain releases are equivalent to major studio licensed releases, while some are barely acceptable.

### Registration and renewal

Until 1989, the United States required owners to go through ‘formalities’ to protect their copyright. Films had to be released with a copyright notice, and the owner had to fill out a form, enclose a fee, and send two copies to the Copyright Office, so an examiner could confirm the notice, and provide the Library of Congress with the opportunity to add a copy of the film to its collections.

One of the delightful screwball comedies of the 1930s was Hal Roach’s production of *Topper* (1937) with Constance Bennett and Cary Grant. Just after release, an attorney at Roach’s distributor, MGM, filled out a registration application form to send to the Copyright Office, enclosed a fee, two copies of the film and a written description. A few weeks later, a copyright registration certificate was returned. For all films released through 1963, an application to renew the original copyright had to be filed in the 28th year after the original release. Many years after the original release, a studio paralegal would check the files to confirm the publication date on the original copyright certificate, and add 27 years, to identify the start of a 12 month window when the original copyright was eligible for renewal.

*Topper* had a publication date of 14 July 1937, so the renewal had to be filed between 15 July 1964 and 14 July 1965. Once again the owner had to fill out a form, enclose a fee, and mail it to the Copyright Office. For *Topper*, Hal Roach Studios’ Vice President Herb Gelbspan filed the renewal in plenty of time – 27 July 1964. Most producers were conscientious. After all, for the lack of a simple form filed with a government office, an owner could lose exclusive control of a valuable asset. To ensure that the renewals were filed on time, the studio legal departments prepared what were known as ‘tickle lists’. At one point, each company prepared a summary listing of all of the copyrights that would require renewal in the future. After review by a senior attorney, these were given to junior staff to serve as a reminder list with dates to take action. This procedure worked for the renewals of *Topper* and *Topper Takes a Trip* (1938). However, when *Topper Returns* (1941), the third title



**Fig. 2.** Roland Young in the orphaned Hal Roach production, *Topper Returns* (1941).

in the series, came up for renewal four years after the first film, Hal Roach Studios neglected to send in the renewal form. *Topper Returns* fell into the public domain.

Owners could file for their copyright registration anytime before the renewal was due. There are a surprising number of cases where the copyright was eligible for renewal soon after the original application was filed and the owner *still* neglected to renew. The owners of the 1960 *Little Shop of Horrors* successfully registered the film in 1986, but forgot to file the renewal two years later. The owner of *Rock, Rock, Rock!* (1956), which featured a very young Tuesday Weld, filed the registration application in November 1983. The film was eligible for renewal in December of the next year, but no renewal application was submitted.<sup>10</sup>

Many foreign motion pictures either never qualified for American copyright protection, or their copyrights were allowed to expire. In 1994, as part of the General Agreement on Tariffs and Trade (GATT), the US passed legislation that restored all expired foreign copyrights to their full term of protection. This relief was not offered to works by American authors.<sup>11</sup>

### The first renewals

The major studios had legal staffs in New York whose responsibilities included keeping track of copyrights. Ironically, at the same time that the vault staffs of the studios were destroying the last copies of their old silent films, the studio attorneys in New York were filing copyright renewals, ensuring that no one else

could possibly exploit these titles. The majors renewed, or at least intended to renew, every film that they produced and still owned.

Although motion pictures had been registered for copyright as early as 1894, not a single renewal was filed for films from the first twenty years of cinema. The first copyright renewal for a motion picture was filed on 18 August 1941 by author Gilson Willets for the 1913 Selig Polyscope film *Man in the Street*. In February of the following year Paramount filed renewals for three features based on Jack London stories, including *Martin Eden* (1914), and the next month Twentieth Century-Fox renewed nine film copyrights, including *A Fool There Was* (1914), the film that established actress Theda Bara.

Universal had many copyrights to renew from that early period, but for some reason, let them expire. In April 1948, Universal destroyed what remained of its silent film library. In 1952, the studio began renewing a few copyrights for its 1924 films and began filing renewals consistently only beginning with films released in the summer of 1925. The copyrights on Universal's early films, from *The Dream* (1911) with Mary Pickford, Erich von Stroheim's *Blind Husbands* (1919), Clarence Brown's *Smouldering Fires* (1924) to Rupert Julian's *The Phantom of the Opera* (1925) with Lon Chaney, were allowed to lapse, while other 1925 titles such as Clarence Brown's *The Goose Woman* were protected, along with most of the remainder of Universal's library from that point forward.<sup>12</sup>

### Copyright notice

Before 1989, every film had to have a copyright notice when released to qualify for protection. The copyright notice has *three* necessary elements – a © mark or the word copyright, the year of first publication, and the name of the owner of the copyright. The purpose of the copyright notice was to inform a potential user of the name of the owner and to determine when a work would fall in the public domain. The copyright notice is often located on a film's main title, but could be placed anywhere on the film. For many films, the year was printed in Roman numerals, as in the days that films had extended releases, it was desirable to present the year in a format where the age of a film was not immediately evident.

Prior to 1978, the failure of a film to have a proper copyright notice upon release was catastrophic, as the work would instantly lose all copyright protection.<sup>13</sup> The major producer-distributors

had legal departments who reviewed and approved film credits and the final prints. They checked to see that the billing followed contractual requirements, and that the copyright notices were correct. Very few major studio films failed this test, though there were stories of distributors on occasion having to send out replacement footage to theatres. Independent films did not always receive such careful attention.

*Night of the Living Dead* (1968) was a pioneering film, both as an independent production that found a huge commercial success and for its explicit violence and implicit social commentary. The picture was produced in Pittsburgh by director George Romero with his friends and co-workers who had formed a small company, Image Ten, named for the ten original investors. The film's working title was *Night of the Flesh Eaters*, and during the search for a commercial distributor a few prints were made with the title *Night of Anubis*. The Walter Reade Organization's Continental Distributing accepted the film for distribution, trimming about ten minutes and providing a more commercial title. One sympathetic account noted 'one of the biggest problems *Night's* creators faced in later years resulted from the fact that a copyright line was inadvertently left off of the film's title when it was changed from *Night of Anubis* to *Night of the Living Dead*'.<sup>14</sup>

Dismissed by some critics and championed by others, notably Roger Ebert, interest in the film grew through midnight showings. Then some theatre owners discovered they could simply purchase a print from Thunderbird Films and show the film without paying a rental. Even today, *Night of the Living Dead* is available from many different distributors in innumerable VHS and DVD editions and downloads at various prices and in variable quality. That lack of copyright notice immediately placed the film in the public domain and cost the producers millions of dollars.<sup>15</sup>

Sometimes the copyright notice was left off prints when films were reissued. After Howard Hughes temporarily retired from film production, he licensed his sound films to Astor Pictures in 1936 for theatrical reissue. Astor did great business with *Scarface* (1932), thanks to the violence and the continued appeal of stars Paul Muni and George Raft. The film played the 42nd Street grindhouses monthly, achieving over 3,000 bookings nationwide in its first six years in reissue through Astor's 28 exchanges. Hughes' *Hell's Angels* (1930) did so well, the *New York Times* reported, that in 1940 the film was 'mod-



**Fig. 3.** Poster for the 1950 Lippert reissue of *Babes in Toyland* (1934), under the new title *March of the Wooden Soldiers*.

ernized and streamlined by cutting some 5,000 of its original 15,000 feet. Then they added much aerial warfare, which had been shot but never used.<sup>16</sup> The film was promoted with taglines 'The Battle of London' and 'See Planes Defend London' without noting that the setting of the film was not the current Battle of Britain, but the previous war. Astor's 'improvements' included remaking the main titles to emphasize the role of Jean Harlow and inadvertently removing the copyright notice. This had no effect until the 1970s, when an enterprising independent distributor tried to offer the 1940 version as a public domain work. Hughes' lawyers argued that the lack of notice did not invalidate the copyright because their contract with Astor required the distributor to retain the notice.<sup>17</sup>

The least typical Laurel and Hardy feature was *Babes in Toyland* (1934). The heirs to composer Victor Herbert would only license film rights to the 1903 operetta for a fixed term, so producer Hal Roach made his film under a ten year license to the story property. In 1945, after Roach's rights had expired, the heirs made a new ten year agreement for \$66,000 with producers Boris Morros and William Le Baron, whose Federal Films was planning to use Technicolor and feature George Pal's Puppatoons characters for the toyshop sequences.<sup>18</sup> Separately, they purchased the negative to the Laurel and Hardy version from Hal Roach Studios for a token \$3,000. But when they were unable to get their film into production, Federal Films forfeited on a \$100,000 bank loan in 1950 and the story rights (and 1934

negative) were seized by Pacific Finance Loans.<sup>19</sup> The 1934 film was licensed for a 1950 reissue to recover some of the lost investment. Distributor Lip-pert Pictures, Inc. made some cuts to satisfy the MPAA, and left off the copyright notice when they renamed the movie from *Babes in Toyland* to the more commercial *March of the Wooden Soldiers*, which increased the marquee value by shifting the emphasis away from babies and toys to war. Although the copyright for the original *Babes* was renewed, some adventurous public domain distributors distribute the film under the reissue title, claiming that their copy, at least, is in the public domain because of the lack of notice.

### Faulty notice

*Charade* (1963) was the first thriller by director Stanley Donen and was filmed on location in the French Alps and Paris with stars Cary Grant and Audrey Hepburn. Post production took place in England, and the British laboratory was responsible for the copyright notice which reads 'MCMLXIII BY UNIVERSAL PICTURES COMPANY, INC AND STANLEY DONEN FILMS, INC. ALL RIGHTS RESERVED'. It is obvious today, but no one noticed at the time that this notice is missing the word 'copyright' or the © symbol. Although the copyright in the original story by Peter Stone was renewed, the film is widely distributed as public domain.<sup>20</sup>

Robert Mulligan's unremarkable *Inside Daisy Clover* (1965) features Natalie Wood as a 1930s teenager who becomes a star overnight. Although released in 1965, Warner Bros. successfully filed their copyright renewal in 1973 – eight years after release, not 28 years. Roman numerals are complicated, and the main title for *Inside Daisy Clover* gives the year as MCMXLV, not MCMLXV – the X (10) is before the L (50) – so the year in the copyright notice is 1945, not 1965. This didn't invalidate the copyright, as the copyright law allows producers to reduce their copyright protection by putting in an earlier year... as long as the year in the notice is not more than a year after release.<sup>21</sup>

George Stevens' *The Greatest Story Ever Told* (1965) is a very reverent telling of the story of Jesus Christ from the book by Fulton Oursler. The film was panned by most critics, including *Time*, which noted that the style of filmmaking seemed to belong to the past as 'the story of Jesus unfolds, midrash, myths, Gospel and all, in a series of stately tableaux, each as literal and conventional as religious calendar

art'.<sup>22</sup> The director did not envision the film as a medieval pageant, but regardless, the copyright notice on the film uses the year 1165. The notice on the film should have listed the year as MCMLXV, but for some reason lacks one M, as MCLXV. For reasons lost to time – and the Copyright Office policy of destroying correspondence files after 20 years – the copyright was granted, and that copyright was duly renewed. It is possible that the negative publicity that would have resulted from damaging the commercial value of a \$20 million dollar production might have been enough for the Copyright Office to be flexible in granting the original registration for the film.<sup>23</sup>

### The value of a good story

During the pre-World War II period, styles of filmmaking and fashions changed so rapidly that the ongoing value of most films was not in the right to show them, but in the remake rights. The *New York Times* presented the conventional wisdom in 1935: 'Women's hats and automobiles change so much from season to season that a film three years old is practically a costume or period film'.<sup>24</sup> The remake value is demonstrated by a popular title such as George M. Cohan's stage adaptation of Earl Derr Biggers' novel, *Seven Keys to Baldpate*, first filmed in 1917 and remade in 1925, 1929, 1935 and 1947. The popular play *Brewster's Millions* was filmed five times in 31 years. And less well-known titles were reworked no less frequently: Richard Washburn Child's story *A Whiff of Heliotrope* was filmed four times, under three titles, most memorably in 1928 by director Victor Schertzinger as *Forgotten Faces*.<sup>25</sup>

Producer David O. Selznick was no stranger to remakes, and in 1956, as he worked on a new film version of Ernest Hemingway's *A Farewell to Arms*, he wrote, 'There is a very good reason why a large percentage of that minority of films which are going to be successful will be remakes. The reason is that for forty years or more, the producers of the world have been combing the literature of literally thousands of years for good material. On the face of it, good new stories are not going to be written every year that are as good as the pick of the stories that have been written during many centuries.'<sup>26</sup>

The studios were always reviewing old releases for new angles. 'We began to run dry [of stories] in 1928', said Paramount's executive assistant for stories, D.A. Doran, in 1947, 'but the invention of sound, to our great joy, allowed us to do them all over again. If we could buy 20 great stories today,

we'd take them all and buy some for the future. There are not enough good ones to go around.<sup>127</sup>

Producer Samuel Z. Arkoff understood the value of new films and old films. As part of the sale of American International Pictures, he retained rights to some of the company's earliest productions. What is the value of old films? Arkoff told independent distributor Kit Parker in 1993, 'Forget the home video rights. Forget the Pay TV rights. The remake rights are where the big money is'.<sup>28</sup>

Studios would occasionally get into a bidding war over a hot stage or literary property, as these were considered safer investments because they had already proven themselves with the public. *Variety* noted in 1940, 'Best method of getting a story of proven b.o. [box office] quality, they feel, is in a book or play that has certified itself by the patronage of the public. There has been, as a result, a strong trend developing toward the purchase of Broadway legit hits and best-seller novels.' The same justification also held true for remakes. 'In addition to the desire for properties of audience value, proved by past acceptance, several behind-the-scenes angles protrude into the reasoning back of the purchase of w.k. [well known] books and plays. The additional cost of such an established product is often made up in saving all along the line, from the time the assignment for scripting is handed to a lot scribbler, to the sale of the resultant picture to the exhibitor.'<sup>29</sup>

In general the studios were not eager to sell their old pictures to another company for remake. The very best film properties might have some value in reissue. With 50 pictures to release each year a good story might be of use, and no one wanted to sell a property that could become a hit for the competition. Often sales were one-sided propositions with a seller in a weak position – that is why the strongest studio, MGM, allowed very few of their pictures to be remade by other companies. Often the agreements were structured as trades, so that each party got a valuable property. Additionally, a trade might have provided some tax advantages.

The value of a good story property rose along with the overall increase in production costs. The *Wall Street Journal* quoted one studio executive in 1947, 'when pictures could be made for \$250,000, a top play could be bought for \$25,000. Today, we make a \$3.5 million movie and we pay \$350,000 for the play.'<sup>30</sup>

Throughout the classic Hollywood period, the Motion Picture Producers Association operated a

title clearing house for story properties. Studios had full rights to copyrighted works they purchased, and could register exclusive use of a public domain work for four years, before having to release their claims. Each studio could register permanent protection of 250 titles, even those lacking a story. The purpose was to establish priority over use of public domain novels and plays and to limit competing productions or stealing titles. It also, at times, required a studio to purchase another company's 'rights' to a public domain story.<sup>31</sup>

This was to prevent situations such as occurred in 1921 when Paramount and Vitagraph simultaneously released film adaptations of James M. Barrie's *The Little Minister*. The protocol finally broke down in the late 1950s under attack from independent and foreign producers such as Samuel Bronston willing to buck the system. Twentieth Century-Fox had been developing the film version of *The Greatest Story Ever Told* when Bronston announced production of his *The King of Kings*.<sup>32</sup> Believing there was only a market for one film of this type, Fox cancelled the production, despite an investment that had already reached \$3 million.

## Remakes

The common element in some of the best public domain films from the studio era is that they were sold to another studio for a remake, and the company that made the new version forgot to renew the copyright on the original. For decades, the original versions were extremely hard to see, and for the most part, the buyers had absolutely no interest in the original. After all, they had a nice new version, often in colour, so they could safely ignore the copyright on the original. As Leonard Maltin noted, 'major studios are loath to permit an older film to be shown when a new version is waiting in the wings. Comparisons are frequently unkind to the current endeavor, and box-office returns could be diminished by a revival of the oldie.'<sup>33</sup>

As part of the late 1930s horror cycle, RKO producer Pandro S. Berman wanted to remake *The Hunchback of Notre Dame* as a big budget 'A' picture. Universal had produced a version in 1923 with Lon Chaney, and considered remakes throughout the 1930s. When producer Carl Laemmle, Jr. left Universal to produce for MGM, he had MGM purchase the property for him, and planned at one point to star Peter Lorre in the picture. Although Victor Hugo's copyright to the novel fell into the public



**Fig. 4.** Irene Dunne and Charles Boyer aboard ship in Leo McCarey's *Love Affair* (1939).

domain worldwide in 1935, the MPPA protocol required RKO to purchase MGM's interest. Meanwhile RKO had been developing a remake of the studio's first big success, the 1929 *Rio Rita*, to star Irene Dunne with John Boles repeating his role from the original film. It cost RKO \$125,000 to purchase MGM's priority to *Hunchback* along with the negative to the original 1923 film version. Even in the context of a \$2 million production cost for *Hunchback*, this was a big outlay. MGM would only release *Hunchback* as part of a trade that included RKO's *Rio Rita*, valued at the original \$85,000 purchase price for film rights to the Broadway show.<sup>34</sup>

More to RKO's liking was their 1940 purchase of remake rights to Sidney Howard's *They Knew What They Wanted* from MGM for a mere \$50,000, which included the 1928 Paramount silent with Pola Negri and Jean Hersholt, and the 1930 MGM version with Vilma Banky and a pre-stardom Edward G. Robinson.<sup>35</sup>

As an indication of the complexity of these arrangements, the trades were not always for cash or other story properties. In 1942 RKO had few stars on its roster, so it struck several unusual deals to

borrow leading players from other studios. In return for the loan of Joan Leslie and John Garfield for one picture each, RKO gave Warner Bros. a cash consideration and rights to the Philip Barry play *The Animal Kingdom* (which had starred Ann Harding and Leslie Howard on screen in 1932), and the 1934 film adaptation of Somerset Maugham's *Of Human Bondage*, which featured an important early performance by Bette Davis.<sup>36</sup>

The same year RKO producer Damon Runyon needed a male lead to appear opposite Lucille Ball in *The Big Street* (1942). Runyon approached Twentieth Century-Fox to borrow the services of Henry Fonda while at the same time producer William LeBaron was interested in making a new version of *Bird of Paradise* with Gene Tierney; RKO's 1932 original had featured Dolores Del Rio and Joel McCrea. The two companies made the trade, and Runyon's production budget was charged \$75,000 as the market value of the story property.<sup>37</sup>

In 1945 RKO sold off several properties to MGM, including the Astaire-Rogers musical *Roberta* (1935). MGM was so wealthy that it could stockpile stories; it had no immediate remake plans, and the interest in *Roberta* was simply to use the songs in then-current production of *Till the Clouds Roll By* (1946), Arthur Freed's all-star screen biography of Jerome Kern.<sup>38</sup>

That same year David O. Selznick purchased from RKO rights to the stories and talking film versions of *A Bill of Divorcement* (1932 and 1939) and *Little Women* (1933). He even signed freelance director Mervyn LeRoy in 1946 and started production on a Technicolor remake of *Little Women* starring Jennifer Jones and Shirley Temple. But ultimately he shut the production down and in 1948 sold the package to MGM. The novel was in the public domain, but Selznick had priority on the property in the MPPA register, and the sale included 'a screen adaptation by Andrew Solt, and all of Selznick's costumes, set designs and production preparations'.<sup>39</sup>

*Love Affair* was produced for RKO in 1939 by director Leo McCarey with Irene Dunne and Charles Boyer. McCarey spent years searching for another story with the same emotional resonance; finally, he decided to remake his earlier success. Twentieth Century-Fox bought the original film and story from RKO for \$165,000 in 1956.<sup>40</sup> McCarey's new version, *An Affair to Remember* (1957) with Cary Grant and Deborah Kerr, managed to capture the effectiveness of the original.



In all of these examples, the purchase of the original film was incidental to the acquisition of the remake rights to the story. The less attentive purchasers – RKO, Fox, Warners – allowed the copyrights in the original *The Animal Kingdom*, *Of Human Bondage*, *Bird of Paradise*, *Love Affair*, *The Hunchback of Notre Dame* and the previous film versions of *They Knew What They Wanted* to fall into the public domain.

The French film, *Pépé Le Moko* (1937) directed by Julien Duvivier with Jean Gabin was, according to Pauline Kael, 'a classic romantic melodrama of the 30s, and one of the most compelling of all the fatalistic French screen romances'.<sup>41</sup> It was a natural for an English language remake, and six months after its release in France MGM licensed world rights (outside France), including remake rights, for nine years for \$35,000.<sup>42</sup> The next year MGM resold those rights to Walter Wanger Productions, which produced *Algiers* for release by United Artists. Pauline Kael called the result 'an entertaining piece of kitsch, featuring a torrid romance between Charles Boyer and Hedy Lamarr, making her American film debut'. She continued, 'It's so close a remake that many of the original sequences are followed shot by shot'.<sup>43</sup> Wanger's rights were taken over by United Artists, and when the license expired the original *Pépé Le Moko* reverted to the French producer and *Algiers* vanished from sight. Only when the copyright expired did a few copies of *Algiers* emerge through the public domain market.

Just because a film is remade and falls into the public domain doesn't mean that it is available. The 1928 drama *Burlesque* starred Hal Skelly and Barbara Stanwyck, ran 372 performances on Broadway, and was a natural for talkies. Paramount teamed Nancy Carroll with Skelly in the 1929 film version, *The Dance of Life*, a stark musical with a Follies sequence in Technicolor. Director Mitchell Leisen remade the film for Paramount in 1937 as *Swing High, Swing Low* with Carole Lombard and Fred MacMurray. Columbia Pictures bought the properties in 1944 for a reported \$65,000, for an Al Jolson film which was never made. Following the show's successful 1946 Broadway revival with Bert Lahr, Columbia offered the property for sale and Twentieth Century-Fox bought the rights, resulting in the 1948 version called *When My Baby Smiles at Me* with Betty Grable and Dan Dailey. Even though *The Dance of Life* exists – there are prints at the Library of Congress and the UCLA Film and Television Archive – the film has not

been seen outside archive showings. The available copies of *Swing High, Swing Low* are from director's Mitchell Leisen's personal 16mm print.

Not every remake resulted in the loss of copyright for the original. MGM was careful nearly from the outset to renew the copyrights in films they purchased for remake. In particular, they were very conscientious about the rights to many old RKO films, including *Rio Rita* (1929), *Hit the Deck* (1930), *Cimarron* (the Best Picture Oscar winner for 1931), *Girl Crazy* (1932), *The Age of Innocence* (1934, with Irene Dunne as Edith Wharton's heroine), and the Astaire-Rogers *Roberta* (1935). Other titles protected by MGM included a group of films produced by Universal: James Whale's *Waterloo Bridge* (1931), the first two versions of *Show Boat* (1929 and 1936), and the Deanna Durbin vehicle *It's a Date* (1940). For similar reasons they also renewed the David O. Selznick production of *The Prisoner of Zenda* (1937) and the 1932 Paramount version of *Dr. Jekyll and Mr. Hyde*.<sup>44</sup> Disney was also fastidious, renewing the original Paramount *Peter Pan* (1924) and RKO's *Swiss Family Robinson* (1940).

In 1935, Columbia Pictures purchased the film assets of the dormant Pathé Exchange. Pathé had ceased production in 1931, selling its studio and a few films in production to RKO, while keeping its other assets, including the Pathé Laboratories. Columbia's interest in Pathé was in the remake potential of its old films, not the negatives and prints, and they figured \$44,000 was about right for 15 good story properties. The sales agreement noted 'it is agreed that when you have produced and released fifteen feature pictures exclusive of Westerns and Shorts, based on story material listed, then our liability with respect to any additional feature motion pictures over and above such fifteen, exclusive of Western features, shall not obtain'.<sup>45</sup> Pathé's *Holiday* (1930), *The Awful Truth* (1925 and 1930) and *The Wreck of the Hesperus* (1927) were among the titles remade by the new owner, and Columbia filed copyright renewals for most of the Pathé originals.

In the late 1950s producer Richard Zanuck was determined to film William Faulkner's *Requiem for a Nun*. While developing the script, screenwriter James Poe found it necessary to incorporate parts of Faulkner's *Sanctuary* into the screen story. Getting those rights proved problematic. Paramount had produced a film version in 1933 as *The Story of Temple Drake*, but with Paramount's sale of their films to television, ownership had passed to MCA.



**Fig. 5.** Lobby Card for Paramount's 1933 version of William Faulkner's *Sanctuary*, retitled *The Story of Temple Drake*.

Ultimately, Zanuck had to pay \$75,000 to acquire the original version, roughly the average price per title that MCA paid for the 700 usable films in the Paramount library. Twentieth Century-Fox renewed the copyright, so *The Story of Temple Drake* (1933), one of the films that led to the introduction of the Production Code, has been little-seen since.

The ultimate effect of such legal complexities can be seen by reviewing three Anna Neagle pictures. In 1940, following a series of historical dramas, the leading lady and her producer-director husband Herbert Wilcox began a series of minor musicals for RKO, each based on a popular Broadway show. First to appear was *Irene*, a remake of a 1926 Colleen Moore film. RKO had bought the property outright from Warner Bros. in 1937 as a possible vehicle for Fred Astaire and Ginger Rogers. *Irene* was RKO's second most profitable picture of 1940, and RKO looked for other properties for Neagle.

*No, No, Nanette* (1940) and *Sunny* (1941) were produced under a curious deal with Warner Bros. which had produced earlier versions of each title in 1930. With *No, No, Nanette*, Warners sold a seven-year license on the property to RKO for \$165,000 and agreed to destroy the negatives and prints of the 1930 version (except for one library print). At the end of seven years, RKO agreed to return all story rights to Warners, and to destroy all negatives and prints of the new version (again, except for one library print). A similar agreement was executed for *Sunny*.<sup>46</sup>

*No, No, Nanette* was RKO's Christmas release for 1940, and *Sunny* followed six months later, but the

films managed to barely break even. Because of their contribution of rights to the story and score, Warners ended up making far more profit from these two productions than RKO. In addition, once the rights reverted, Warners was able to remake *No, No, Nanette* in 1950 as *Tea for Two* with Doris Day.

### Case study: A Farewell to Arms

Ernest Hemingway's novel *A Farewell to Arms* was published in 1929 to great acclaim. The *New York Times* found it 'a beautiful and moving book', and concluded that 'the story of the love between the English nurse and the American ambulance officer, as hapless as that of Romeo and Juliet, is a high achievement in what might be termed the new romanticism'.<sup>47</sup> The following year, a short-lived theatrical adaptation by Laurence Stallings featured Glenn Anders and Elissa Landi. In 1930, Paramount purchased the film rights for the book and play for \$80,000. From the wording of a unique clause in the contract, it appears Hemingway was concerned that the rage for musicals then sweeping Hollywood might influence the film version of his story:

no composition by a composer and lyricist creating a score and/or lyrics and/or the introduction of dances and/or the adaptation of the dramatic work into a dramatico-musical or any other form of musical compositions, shall be permitted<sup>48</sup>

The resulting 1932 film was directed by Frank Borzage, and starred Gary Cooper as the young American ambulance driver and Helen Hayes as the nurse. William K. Everson wrote of the film many years later, 'Although a handsome and glossy production, with big sets, plenty of extras and superb camerawork, it carefully remains non-epic in scope ... It is "emotionally big" in the way that few movies are any more, yet Borzage could get away with scenes and clichés that other directors couldn't'.<sup>49</sup> A huge hit, the film was put forward by Paramount as one of its two nominees for the Academy Award as Best Picture and won the award for best cinematography. In an industry in which most films had very short lives, *A Farewell to Arms* was remembered as an outstanding achievement for director Borzage and its stars.

When word emerged that Paramount was planning to reissue the picture in the summer of 1938, *Los Angeles Times* columnist Edwin Schallert speculated, 'one wonders, of course, just what arrange-



**Fig. 6.** Adolphe Menjou and Gary Cooper in a publicity still for Paramount's *A Farewell to Arms*, as reissued by Warner Bros. in 1949.

ments will be made on the censorship angles ...The story is pretty daring for the code restrictions that exist today in the Hays office'.<sup>50</sup> The answer emerged that summer, when the film was reduced from 90 minutes to about 78. *Los Angeles Times* critic Philip K. Scheuer described the impact: 'If Ernest Hemingway's *A Farewell to Arms* were suddenly to be issued in a new edition, with fifty or a hundred pages of its most intimate lines expurgated, the effect would be similar to that which meets the saddened eye at the Paramount [Theatre] this week ... They have cut out a half-dozen at least of its most powerful scenes. And don't let anyone tell you different.'<sup>51</sup>

Paramount gave the reissue a full release with all new prints, claiming *A Farewell to Arms* 'was selected instead of a half-dozen other prospects because of a demand voiced by fans'. William LeBaron, Paramount's head of production, made the case to the press that with the success of this rerelease 'good motion pictures will henceforth be recognized as having a permanent value, instead of a purely transitory one, as believed previously. After all', he continued, 'there is no difference between good film dramas, and good literature. And you

wouldn't think of throwing away a good book because you had read it once.'<sup>52</sup>

The next appearance of a Hemingway novel on the screen was also from Paramount, and the huge success of Gary Cooper and Ingrid Bergman in Sam Wood's *For Whom the Bell Tolls* (1943) spurred interest in remaking *A Farewell to Arms*. Warner Bros. tried to buy the property from Paramount as a vehicle for Humphrey Bogart and Bergman, to reunite the stars of *Casablanca*. Paramount tried to pair Bergman and Ray Milland for the picture, but was unable to borrow Bergman's services from David O. Selznick.

Separately, at Warners Bros., producer Jesse L. Lasky was developing a film version of the 1927 Rodgers and Hart musical *A Connecticut Yankee*, itself an adaptation of the 1889 story by Mark Twain. Following his successful *Sergeant York* (1941) for Warners, Lasky was planning *A Connecticut Yankee* to follow a Mark Twain screen biography. Warners even backed a 1943 Broadway revival of the musical. Although *A Connecticut Yankee* was considered for James Cagney, Cary Grant and Fred Allen, it never entered production, and Lasky left the studio after the



**Fig. 7.** Jennifer Jones and Rock Hudson in David O. Selznick's 1957 version of *A Farewell to Arms*.

succès d'estime of *The Adventures of Mark Twain* (1944) with Fredric March and the George Gershwin biography *Rhapsody in Blue* (1945).

By 1946 Paramount had their eye on *A Connecticut Yankee* as a musical vehicle for Bob Hope or Bing Crosby. Although the novel had fallen into the public domain the previous year, Warners had priority on the title, and the book and songs of the Broadway adaptation were still protected. So an agreement was made for Paramount to trade Warners both *A Farewell to Arms* and a novel by Henry Bellamann (the author of *King's Row*, which Warners had filmed successfully in 1942). Warners wanted Bellamann's *Victoria Grandolet* as a vehicle for Bette Davis, but had lost out to Paramount in April 1943 in a bidding war so fierce that they sued the literary agency that handled the sale for breach of contract.<sup>53</sup>

At Warners, producer Jerry Wald developed an updated version of *A Farewell to Arms*, which the high-energy producer saw as an ideal comeback vehicle for Greta Garbo (aged 43) to star in opposite Humphrey Bogart (aged 48). While waiting for the new production to get off the ground, Warners reissued *A Farewell to Arms* in 1949, with additional cuts. The unmemorable remake finally emerged in 1951 as *A Force of Arms*, now set in World War II, with Hemingway uncredited and Michael Curtiz directing William Holden and Nancy Olson.

For *A Connecticut Yankee* Paramount had acquired 'the silent, sound and talking motion picture rights throughout the world, in and to and in connection with' the musical play.<sup>54</sup> Paramount moved forward with *A Connecticut Yankee* and then discovered they couldn't afford to use the Rodgers and Hart score. In the contract, Warner Bros. reserved the right to publish all the music from any picture which used songs from the score. Had Paramount's producer, Robert Fellows, gone through with his plan to use 'Thou Swell' and 'My Heart Stood Still' from the Broadway show, 'Warners could have published all the rest of the tunes from the picture, an extremely profitable undertaking with a Crosby film', the *New York Times* noted with glee. 'Also, John Burke and James Van Heusen, who were engaged to write additional songs for the Paramount production, have their own publishing company and were unwilling to turn their rights over to Warners.'<sup>55</sup> So the Paramount musical used an all-new score.

'For many years as a young producer, I had dreamed of making *A Farewell to Arms*', David O. Selznick once recalled.<sup>56</sup> He had tried several times to acquire the rights, but the owners would not sell. Selznick formed his own company, Selznick International Pictures, in 1935, with financing from John Hay Whitney, and it soon absorbed Whitney's Pioneer Pictures. When Selznick International Pictures was dissolved in 1941, the Whitney interests received the rights to Pioneer's films along with several Selznick productions, including *A Star Is Born* (1937). Two years later, Whitney sold the pictures to reissue distributor Film Classics, Inc., who put the films into continuous rerelease. As Film Classics' theatrical business slowed, they sold *A Star Is Born* in 1950 to producer Edward L. Alperson. Alperson developed a screenplay, but in 1953 found it more lucrative to transfer the property to Warner Bros. for their musical version with Judy Garland.

In preparing for the new version, Warner Bros. discovered to their amazement that while they had remake rights, Selznick had retained rights to some foreign territories for the film, and could take advantage of Warners' promotion to rerelease the original picture in key overseas markets, including Germany. So, under duress, Warners traded its rights to *A Farewell to Arms* to Selznick in return for \$25,000 and Selznick's remaining rights in *A Star is Born*. The new version of *A Star is Born* was a critical, if not commercial, success, while Selznick's production of *A Farewell to Arms* in 1957 was the last of his career. The

original *A Star is Born* had gone through four owners before resting at Warners, while the 1932 *A Farewell to Arms* had gone through three before reaching Twentieth Century-Fox, and both new owners allowed the original copyrights to expire.

### Case studies: RKO, 1930

RKO Radio Pictures is the only major studio of the golden era to have completely ceased production, and numerous early RKO sound films from late 1930 and early 1931 are in the public domain. The highest profile films of this group are *Check and Double Check* (featuring the Duke Ellington Orchestra, and starring radio's Amos 'n' Andy, Freeman Gosden and Charles Correll, playing in blackface), and *Dixiana*, a less successful follow-up to *Rio Rita*, with the same director and many of the same cast. 'The year 1930 was surely the most uninteresting one in RKO's history', RKO scholar Richard Jewell noted, 'and the films released during the period generally reflect the moribund state of affairs. When the Los Angeles County Museum of Art accorded RKO a 128-film retrospective in 1977, not one picture from 1930 was screened.'<sup>57</sup>

But even so, why would the owner have allowed the copyrights on so many RKO titles from the early thirties to expire?

RKO spent most of the 1950s slowly going out of business. In 1955 owner Howard Hughes sold the studio to the General Tire and Rubber Company, which wanted to show the RKO films on its television stations. By early 1958 RKO General had ceased production, sold off its sound stages, disposed of most of its television rights, turned over distribution to Universal, and laid off virtually all the studio's employees.<sup>58</sup>

RKO had an employee in the New York office, Vera Lane, whose job was to renew the copyrights. She filed renewals for 13 features in December 1957, protecting films originally released in April, May and June of 1930. Soon afterwards, given her notice along with everyone else, she closed up her desk and went home. Years later RKO Archivist John Hall reconstructed what had happened: 'Miss Lane was the administrative assistant to William Clark, Treasurer of RKO Pictures, Inc. However, she was let go in the H.Q. closure following the [General Tire] buyout and closure of RKO. I believe this must have happened circa 1957–58. She had been responsible for copyright renewals when she was let go, and no one in New York knew this or took over her responsibilities.



A number of RKO features from the year 1930 fell into public domain before Vernon Harbin, in Los Angeles, realized what was happening and got permission from his boss, Harry Gittleson, to handle the renewals out here.' Randy Gitsch was the Archives Manager at RKO in 1987–88, and recalled that Harbin 'had started working at RKO's Gower Street studio in 1931, and had worked for the company for 57 years. It's easy to imagine Vernon getting on the phone in 1959, calling the New York office at 1270 Sixth Avenue, and saying 'No one's taking care of our copyright renewals'. 'What renewals?' comes the response'.<sup>59</sup>

When Harbin took over he sent in paperwork for three features on the last possible day in March 1959 they qualified for renewal. For 15 months, no copyright renewals had been filed by RKO, so eight months of RKO's production, covering a total of 18 consecutive titles from 1930 and 1931, fell into the public domain.<sup>60</sup>

**Fig. 7.** Fred Astaire dances around the room in Stanley Donen's *Royal Wedding* (1951), a film whose copyright lapsed due to procedural irregularities.

### Universal, 1938

Universal was never Hollywood's strongest studio, so the failure of the company to renew the copyright on eleven consecutive 1938 productions was not especially tragic. These films were products of a period of studio austerity following the relatively spendthrift Laemmle era. As described by historian Clive Hirschhorn, 'apart from the Deanna Durbin successes, the years between 1937 and the outbreak of war were pretty lean. The plots of Universal pictures were corny and unimaginative ... while the talent both in front of, and behind the cameras was generally second rate.'<sup>61</sup>

The films Universal released from May through early August of 1938 are an undistinguished lot. There are two program pictures directed by James Whale at the end of his film career – *Sinners in Paradise*, a crashed-airplane-on-a-desert-island picture with Madge Evans and John Boles, and *Wives Under Suspicion*, a remake of Whale's 1933 *The Kiss Before the Mirror*. Hirschhorn agreed that 'better-than-mediocre pictures during this period were hard to find but there were the occasional offerings ... Danielle Darrieux made her American screen debut in [Henry Koster's] *The Rage of Paris* and got the thumbs up from press and public alike'.<sup>62</sup> The other public domain title of interest, John M. Stahl's *Letter of Introduction*, surrounded rising star Andrea Leeds with a strong supporting cast of Adolphe Menjou, Edgar Bergen (with Charlie McCarthy) and George Murphy.<sup>63</sup>

### Hal Roach Studios, 1941

The failure of the Hal Roach Studios to file a renewal for *Topper Returns* took place in the midst of corporate turmoil. Roach had sold the studio to his son, Hal Roach, Jr., in 1955, with payments to be spread out over 30 years. But in 1958, in need of greater working capital, Hal Roach, Jr. merged the company into a corporate conglomerate, a decision which dragged the studio into bankruptcy in less than a year. Under court protection, Hal Roach Studios ceased television production, sold off its physical plant, and lived off licensing income, while regularly renewing the copyrights in the old films that were its only livelihood. Company Vice President Herb Gelbspan filed three copyright renewals on 1 November 1967, and after court approval of a reorganization plan the company emerged from bankruptcy.<sup>64</sup>

Having been one of the largest creditors, Hal Roach Sr. had a large equity stake and was president

of the new company, which was apparently so busy trying to raise funds for operations that neither he nor Gelbspan filed any copyright renewals for the next 16 months, causing all of the company's 1941 films – including, as already noted, *Topper Returns* – to fall into the public domain.<sup>65</sup> Hal Roach scholar Richard W. Bann knew Roach and Gelbspan and understood their daunting challenge of trying to put the company on a sound footing. 'Hal Roach was always looking forward, never back', Bann recalled, 'so during this post-bankruptcy period when he was in charge, he may well have directed Gelbspan's time and energy elsewhere'. It is also possible that Gelbspan 'believed his equity stake in the company was going to be bought out and therefore was less concerned about renewing copyrights in those 1941 films, which in addition were regarded as marginal subjects anyway'. Gelbspan had been with Roach since 1935, and stayed with the company's successors through 1985. When asked, his 'standard answer in response to many problems Hal Roach Studios faced during the 1970s and through 1985 was simply, "Bankruptcy really hurt this company"'.<sup>66</sup>

### MGM, 1951

MGM was never known for its mystery films, but there has been a mystery as to why the studio's copyrights on eight features from the 1950/51 season fell into the public domain. Most of the films are of moderate interest: *Go For Broke!* has Van Johnson leading Japanese-American troops on the European front in WWII; Howard Keel, Van Johnson and Barry Sullivan were *Three Guys Named Mike*, each trying to land Jane Wyman. Technicolor films include *Mr. Imperium*, a musical with Lana Turner and Ezio Pinza, *The Painted Hills*, the studio's final Lassie picture, and *Vengeance Valley* with Burt Lancaster and Robert Walker in a Cain and Abel story. The best of the bunch are Stanley Donen's *Royal Wedding* with Fred Astaire, Jane Powell, and some innovative dance numbers, and Vincente Minnelli's *Father's Little Dividend*, a sequel to the previous year's *Father of the Bride*, featuring the same stellar cast of Spencer Tracy, Joan Bennett and Elizabeth Taylor.

There are no obvious thematic, story or filmic connections among these films, which are not consecutive releases. These are mostly 'A' pictures, they were all in-house productions, they weren't sold to another studio, they had valid copyright notices, they were all released from January to June 1951, and

MGM did file copyright renewal applications for them.

The main title for *Vengeance Valley* has a proper copyright notice: 'Copyright 1950 in USA by Loew's Incorporated'. The copyright registration application for *Vengeance Valley* is filled out properly, though there is a red asterisk by the publication date. The reference for the asterisk is not on the front of the application – it was typed on the back by the Copyright Office. It notes that although the film was released in 1951, the year in the notice on the main title was 1950. This affects when the renewal is due, moving the period earlier by a year. So the renewals should have been filed 28 years from 1950, not 1951. This was marked on the application filed by the Copyright Office. It turns out that the footnote in red was left off the certificate returned to MGM. As a result, MGM's tickle file was incorrect and the studio filed their renewal 12 months too late. The studio attorneys tried to plead their case with the Copyright Office, but finally lost out and no renewals were granted.<sup>67</sup>

### Orion Pictures, 1963

As an indication of the chaos which sometimes accompanied the filing of copyright renewals, look at the case of some films originally distributed by American International Pictures (AIP). The company was active from 1955 until television and film distributor Filmways, Inc. acquired the company in 1979. Filmways, in turn, was acquired in 1982 by Orion Pictures. Orion Pictures administered the substantial library of films they had acquired, and in 1991 as the company was on the brink of bankruptcy, it filed for the renewal of four titles, including *Black Sabbath* (1963) an Italian import with Boris Karloff that AIP had co-produced, and three cheapies, *Diary of a Bachelor*, *Navajo Run* and *Under Age* (all 1964 with 1963 notices).

Orion sent the renewals on 25 October 1990, but as that was a year early, they were rejected by the Copyright Office. Orion dutifully resubmitted the renewals on 10 December 1991, the day before the company filed for bankruptcy protection. Not surprisingly, perhaps, Orion had no funds in their Copyright Office credit account, and the renewals were placed on hold until additional monies were received the following month.

Meanwhile, back at Orion, unable to reach an agreement with creditors, the company announced in February 1992 that it would lay off most of its

400-member staff.<sup>68</sup> For its part, the Copyright Office lost the renewal applications in somebody's desk, and there was no one at Orion to inquire about the status of these titles. It was assumed by both Orion's new parent MGM, and the public domain community, that the films were no longer protected by copyright, so *Black Sabbath* was released on home video by such public domain distributors as Sinister Cinema.

The Copyright Office discovered the renewals behind a desk in 1998 and contacted MGM, noting 'the applications were apparently misplaced here after receipt; the unused fees are still open and available. If you will re-submit new renewal applications, we should be able to register them with an effective date of 10 December 1991.'<sup>69</sup> MGM promptly sent in new renewal applications (dated 1999), and with this action, four films that had been in the public domain for eight years were drawn back into copyright, and the film disappeared from the public domain market.

### Conclusion

The motion pictures discussed in this article found their way to the public domain bin at Wal-Mart for a variety of reasons. These titles have no greater or less historic significance than many other films from the same period whose copyrights were renewed. In that sense, they represent a near-random sample of Hollywood and independent production of their period.

The benefit to the public has been significant, as many of the titles had become orphan films, or were owned by corporations which largely ignored their older motion picture assets. There has not been an authorized release of *A Farewell to Arms* since the 1949 reissue, and 'owner' Twentieth Century-Fox has no material on the film. Preservation of that title has been left to the Library of Congress and the UCLA Film and Television Archive, while access has been provided by public domain video distributors and retailers such as Wal-Mart.

At the time that their copyrights expired in the 1960s, 70s and 80s, most of these films had limited commercial value, and the public domain appeared to be the only path to their preservation and wide public access. Subsequently, the markets for older material on VHS and then DVD gave sufficient incentive for the studios to preserve much of their film libraries and make selective titles available. None of the owners intended to dedicate their movies to the public domain. They were tripped up by provisions of the copyright law which at the time required that

rights-holders follow detailed steps in order within rigorous time periods to retain their ownership. The procedures were unrelated to the value of the film properties involved. The owners' financial loss was limited, as each major studio owns thousands of other works still protected by copyright.

The real impact has been public access to many otherwise completely unavailable titles at very competitive prices. When producers release their editions of titles already in the public domain they ignore the competition in their pricing or distribution, relying on their marketing and distribution prowess for success in the marketplace. The public domain status of *The Little Princess* with Shirley Temple or the musical *Till the Clouds Roll By* has not kept Twentieth Century-Fox or Warner Bros., respectively, from preserving these Technicolor features, or from making them available on DVD.

Changes in the copyright law over the last 30 years promoted by the 'intellectual property' industries have streamlined copyright protection so that it is now both automatic and very long. As a result, it is highly unlikely that there will be a release of titles to the public domain in the future, as occurred with the films discussed in this article. Fortunately, the current wide availability of classic titles on DVD provides the public with some of the best and most significant films from this period, as opposed to the happenstance selection of public domain titles that occurred in the past.

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All errors of fact or interpretation in this account remain my responsibility.

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1. James Covert and Angela Pruitt, 'Wal-Mart's DVD Sales At Risk On Apple's Movie Plans', *Dow Jones Newswires*, 14 September 2006. <http://news.morningstar.com/news/DJ/M09/D14/200609141143DOWJONESDJONLINE000854.html> Accessed 3 October 2006.
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3. Larry Michie, 'Big Demand for Public Domain Pix', *Variety* (18 October 1978): 1, 270.
4. Peter M. Nichols, 'Home Video: Stretching the Tape (and Sometimes Quality) to Squeeze the Price of Old Movies Down to \$5.99', *New York Times* (22 April 1993): C22.
5. 'Orphan films' are those works that are abandoned by their owners.
6. United States Constitution, Article I, Section 8.
7. Both quotes from US Supreme Court, Twentieth Century Music Corp. v. Aiken, 422 US 151 (1975). <http://laws.findlaw.com/us/422/151.html> Accessed 26 September 2006.
8. Sony Corp. v. Universal City Studios, Inc., 464 US 417, 429 (1984). <http://laws.findlaw.com/us/464/417.html> Accessed 26 September 2006.
9. Mark Trost, 'PD Cue & Review', *Video Business Show Daily* (8 August 1990): 132.
10. *The Little Shop of Horrors*. Registered in the name of Santa Clara Productions, Inc., under PA-301-210, following publication 5 January 1960 (date of registration: 18 October 1985). No renewal found. *Rock, Rock, Rock!* Registered in the name of Vanguard Productions, Inc., under PA-212-638, following publication 24 December 1957 (date of registration: 2 November 1983). No renewal found.



11. See the US Copyright Office website at <http://www.copyright.gov/gatt.html> Accessed 9 October 2006.
12. For a review of the destruction of silent films by their owners, see David Pierce, 'The Legion of the Condemned: Why American Silent Films Perished', *Film History* 9, 1 (1997). Reprinted with additional information in *This Film Is Dangerous*, Roger Smither, Catherine Surowiec (eds), (FIAF, 2003).
13. Under the 1976 Copyright Act (effective 1 January 1978), an unpublished work is entitled to copyright protection as long as it is unpublished, it is published with notice, or, if it is published without notice, it is registered within five years and subsequently published with notice. See Section 405, 'Notice of copyright: Omission of Notice on Certain Copies and Phonorecords'. <http://www.copyright.gov/title17/92chap4.html#405> Accessed 3 October 2006.
14. Paul R. Gagne, *The Zombies That Ate Pittsburgh: The Films of George A. Romero* (New York: Dodd, Mead & Company, 1987), 39.
15. The producers of *Night of the Living Dead* filed a registration application for the motion picture in 1979, listing a publication date of 1 January 1978, even though the film was first shown publicly in 1968. The Copyright Office initially accepted this application, assigning the film registration PA-48-101. On 19 April 1989, the registration was cancelled by the copyright office, noting 'incorrect publication date. Published before 1978; no copyright notice'.
16. A.H. Weiler, 'Life in the Old Ones Yet', *New York Times* (24 August 1941): 142.
17. Hughes' lawyers sued Classic Film Museum, Inc. and Alan J. Taylor for unlawful distribution of *Hell's Angels*, *Scarface* and *The Outlaw* (1943). When it emerged that *The Outlaw* had fallen into the public domain for lack of renewal, the case was quickly settled, with Classic Film Museum agreeing to stop any distribution of the two copyrighted titles, and Hughes withdrawing its claim on *The Outlaw*. Agreement, Summa Corporation v. Classic Film Museum, Inc., Civil Action No. 75-81 N.D. Howard Hughes Files collection, Archives Division, Texas State Library.
18. Edwin Schallert, 'New 'Babes in Toyland' Will Be Novel Project', *Los Angeles Times* (12 December 1945): 11.
19. Copyright Office Assignment Records, Affidavit and Certificate of Sale, B.C. Reynolds, Pacific Finance Loans, vol. 748, p. 182, May 1950.
20. The original story basis for *Charade* was 'The Unsuspecting Wife' by Peter Stone and Marc Behm, which appeared in the July 1961 issue of *Redbook Magazine*. The copyright in the story was renewed by Stone in 1989.
21. See: Section 406 of the Copyright law: *Notice of copyright: Error in name or date on certain copies and phonorecords*. 'Error in Date. – When the year date in the notice on copies or phonorecords distributed before the effective date of the Berne Convention Implementation Act of 1988 by authority of the copyright owner is earlier than the year in which publication first occurred, any period computed from the year of first publication under section 302 is to be computed from the year in the notice. Where the year date is more than one year later than the year in which publication first occurred, the work is considered to have been published without any notice and is governed by the provisions of section 405.' <http://www.copyright.gov/title17/92chap4.html#406> Accessed 3 October 2006.
22. 'Calendar Christ', *Time* (26 February 1965) <http://www.time.com/time/magazine/article/0,9171,833531,00.html> Accessed 14 October 2006.
23. Thanks to Eli Savada for directing my attention to this film.
24. 'A Long Life For Dead Films', *The New York Times*, 14 April 1935, p. X3.
25. Once the literary source fell into the public domain, a new version of *Seven Keys to Baldpate* was produced in 1983 for Cannon Films: *House of the Long Shadows*, with Vincent Price, Christopher Lee and Peter Cushing. *Brewster's Millions* by Winchell Smith and Byron Ongley, based on the novel by George Barr McCutcheon, was filmed in 1914, 1921, 1926 (as *Miss Brewster's Millions*), 1935 and 1945 and again in 1985 with Richard Pryor and John Candy after expiration of copyright in the play. *A Whiff of Heliotrope* was filmed in 1920 as *Heliotrope*, in 1928 and 1936 as *Forgotten Faces*, and in 1942 as *A Gentleman After Dark*.
26. Letter, David O. Selznick to Spyros Skouras, 25 June 1956, in Rudy Behlmer (ed.), *Memo From David O. Selznick* (New York: Viking Press, 1972), 417.
27. Joseph W. Taylor, 'Biggest Film Firm', *Wall Street Journal* (21 July 1947): 1.
28. Kit Parker to author. Arkoff sold his films to the American Movie Classics cable channel in 1993, withholding remake rights. Many of the pictures were remade for the Showtime cable network for a 1994 series called *Rebel Highway*.
29. Herb Golden, 'Films' \$1,739,000 for Scripts in '39', *Variety* (3 January 1940): 7.
30. Taylor, 'Biggest Film Firm'.
31. Gladwin Hill, 'Any Titles to Spare?', *New York Times* (16 March 1947): X5. Clearance of titles among studios continues today, coordinated by the Motion Picture Association of America (MPAA), the successor to the Motion Picture Producers Association.

32. Eugene Archer, 'Producer Decries Movie Practices', *New York Times* (15 September 1961): 30.
33. Leonard Maltin, 'Hollywood's 'Lost' Films – And Why They Can't Be "Found"', *New York Times* (16 June 1974): 117.
34. *Rio Rita: 'Rio Rita Remake on RKO Schedule'*, *New York Times* (3 March 1937): 27. Trade and story costs: Richard Brownell Jewell, 'A History of RKO Radio Pictures, Incorporated' (Ph.D. diss., University of Southern California Communication-Cinema Graduate School, 1978), 527, 531.
35. The Paramount version was Rowland V. Lee's *The Secret Hour* (1928), while MGM produced Victor Sjöström's *A Lady to Love* (1930).
36. See: 'Screen News Here and in Hollywood', *New York Times* (19 February 1943): 22. *The Animal Kingdom* was remade as *One More Tomorrow* (1946) with Ann Sheridan and Dennis Morgan, and *Of Human Bondage* (1946) starred Paul Henreid and Eleanor Parker. The *Times* article states that *The Animal Kingdom* was purchased for star Alexis Smith. *Of Human Bondage* was remade a second time in 1964 with Kim Novak and Laurence Harvey by Seven Arts for MGM release, which made it nearly impossible for many years to identify which company was the owner of the 1934 version. Joan Leslie appeared opposite Fred Astaire in RKO's *The Sky's the Limit* (1942), and John Garfield starred in *The Fallen Sparrow* (1943) for RKO.
37. Thomas F. Brady, 'Bulletins From Hollywood', *New York Times* (3 May 1942): X3.
38. 'Screen News: Metro is Closing Deal for Roberta and Irene', *New York Times* (14 May 1945): 20.
39. Thomas F. Brady, 'MGM to Do *Little Women*', *New York Times*, 21 February 1948, p. 9. Mervyn LeRoy directed MGM's 1949 version, which featured June Allyson, Peter Lawford, Margaret O'Brien, and Elizabeth Taylor.
40. Copyright Office Assignment Records, RKO Teleraudio Pictures, Inc. to Twentieth Century-Fox Film Corporation, vol. 978, pp. 89–95 (17 December 1956). Fox also had to purchase broadcast television rights to the 1939 film from C&C Television Corp., and buy out Leo McCarey's 25 per cent interest in the original story.
41. 'Pepe le Moko' in Pauline Kael, *5001 Nights at the Movies* (New York: Holt, Rinehart and Winston, 1982), 454.
42. *Pepe Le Moko*: Copyright Office Assignment Records, Paris Film Production to Loew's Incorporated, vol. 403, pp. 58–67 (29 October 1937). Robert Hakim signed for Paris Film Production. In this agreement, Loew's' rights to the property concluded on 28 January 1947.
43. 'Algiers' in Kael, 11.
44. MGM missed a few silent films, including the 1920 version of *Dr. Jekyll and Mr. Hyde* with John Barrymore, and Barrymore's 1924 version of *Beau Brummel*.
45. Letter from Frank F. Kolbe, Pathé Exchange, Inc. to Columbia Pictures Corporation, dated 3 July 1935. Included in Copyright Office Assignment Records, Pathé Exchange, Inc. to Columbia Pictures Corporation, vol. 334, 281.
46. Agreement, '*No, No, Nanette*', Warner Bros. Pictures, Inc. and RKO Radio Pictures, Inc., 27 June 1940. Agreement, reassignment, release and quitclaim, '*No, No, Nanette*', RKO Radio Pictures, Inc. and Warner Bros. Pictures, Inc. (19 November 1947). Photocopies in author's collection.
47. Percy Hutchinson, 'Love and War in the Pages Of Mr. Hemingway', *New York Times* (29 September 1929): BR3.
48. Copyright Office Assignment Records, Ernest Hemingway, Laurence Stallings and A.H. Woods to Paramount Publix Corporation, vol. 786, 97–110 (17 September 1930, received by the Copyright Office on 5 April 1951).
49. William K. Everson, Program notes, New School for Social Research, series 12, program 4 (15 October 1971). Available through CineFiles, the Pacific Film Archive's film document image database. [http://www.mip.berkeley.edu/cgi-bin/cine\\_film\\_detail.pl/cine\\_img?26364+26364+7012](http://www.mip.berkeley.edu/cgi-bin/cine_film_detail.pl/cine_img?26364+26364+7012) Accessed 15 October 2006.
50. Edwin Schallert, '*Farewell to Arms* Re-Showing Proposed', *The Los Angeles Times* (25 April 1938): 11.
51. Philip K. Scheuer, 'Hemingway Film Expurgated But Remains Masterpiece', *Los Angeles Times* (9 June 1938): 15.
52. 'Newest Trend In Hollywood', *Washington Post* (28 August 1938): TT2.
53. 'Studios Exchange Story Properties', *New York Times* (15 June 1946): 24.
54. Copyright Office Assignments Records, Warner Bros. Pictures, Inc. to Paramount Pictures Inc., vol. 605, pp. 66–68 (15 April 1946).
55. Thomas F. Brady, 'Twain's Yankee', *New York Times* (21 December 1947): X5.
56. Behlmer, 423.
57. Jewell, 63.
58. For example, see 'Universal Takes Over Domestic Distribution of RKO Product', *Motion Picture Herald* (26 January 1957): 12, and 'RKO Teleraudio Studios Sold to Desilu Films', *Chicago Daily Tribune* (21 November 1957): D7.
59. Email, Randy Gitsch to author, 28 October 2006. The author was fortunate to have the opportunity to visit the RKO archive on Vermont Avenue in Los Angeles

- in the mid-1980s, and spend a day with John Hall and Vernon Harbin.
60. A complete list of these public domain RKO titles is: *Conspiracy*, *Inside the Lines*, *Lawful Larceny*, *Dixiana*, *Leathenecking*, *Half Shot at Sunrise*, *Check and Double Check*, *The Pay-Off*, *The Silver Horde*, *Sin Takes a Holiday*, *Danger Lights*, *Hook*, *Line and Sink*, *The Royal Bed*, *Beau Ideal* (all 1930), *The Painted Desert*, *Lonely Wives*, *Millie*, *Kept Husbands*, *The Lady Refuses*, *Behind Office Doors* (all 1931).
  61. Clive Hirschhorn, *The Universal Story* (New York: Crown, 1983), 96.
  62. Ibid.
  63. The other films in this group with expired copyrights are *Air Devils*, *The Devil's Party*, *Western Trails*, *Outlaw Express*, *Young Fugitives*, *Danger on the Air*, and *Prison Break*.
  64. Stuart Byron, 'Yesterdays of Roach, Man & Product, Cited Assets in 'Going Public' Move', *Variety* (27 November 1968): 15.
  65. In addition to *Topper Returns*, the other features affected were *Road Show* with John Hubbard and Carole Landis, and *Broadway Limited* with Victor McLaglen. The remainder of the titles were Roach Streamliners, low-budget four and five reel films that fell somewhere between extended shorts and truncated features. These titles include *Tanks a Million*, *Niagara Falls*, *All American Co-Ed*, *Miss Polly*, *Fiesta*, and *Hayfoot*. After filing twelve renewals on 8 January 1970 for films produced in 1942 and 1943, the company later allowed Roach's films from 1947 and 1948 to lapse into the public domain.
  66. Email, Richard W. Bann to author, 16 October 2006.
  67. Another film from this period with the same problem is the sixth in the series of *Road* pictures with Bing Crosby and Bob Hope, *The Road to Bali* (1952), distributed by Paramount but copyrighted by Crosby and Hope. In this case, Bob Hope's attorneys forced the Copyright Office to grant a copyright renewal certificate, as the mistake was made by the Copyright Office. The renewal was granted under the 'rule of doubt' which means that the Copyright Office will not stand behind the renewals in court. As a result, public domain distributors have ignored the renewal and the film is treated as being in the public domain. The renewal application for *The Road to Bali*, RE-105-899, lists a publication date of 1 January 1953, and a note 'C.O. [Copyright Office] Records (Numbered Appln. in file, CCE and CCC) annotated to reflect 1952 year date in Copyright Notice. Certificate issued by Copyright Office not annotated. See UB [unfinished business] File.' This file could not be located by the Copyright Office when requested by this author in 1991.
  68. Richard W. Stevenson, 'Orion Pictures Enters Bankruptcy Court', *New York Times* (12 December 1991): D17, and 'Layoffs Announced At Orion Pictures', *New York Times* (27 February 1992): C26.
  69. Letter, Nancy H. Lawrence, Acting Head, Renewals Section, Examining Division, Copyright Office, to Krystle Houston, MGM, Legal Dept. 30 December 1998. Thanks to Eli Savada for bringing this to my attention.

**Abstract: Forgotten faces: why some of our cinema heritage is part of the public domain, by David Pierce**

When a copyright expires or is not properly renewed, a work falls into the public domain and can be freely reproduced, distributed, and displayed. David Pierce explains how a number of classic films from the studio era entered the public domain, including *A Fool There Was*, *Phantom of the Opera*, *Night of the Living Dead*, *Charade*, *Love Affair*, *Farewell to Arms*, *A Star Is Born*, *Dixiana*, *Topper Returns*, *Royal Wedding* and *Father's Little Dividend*.