"Free for the Taking? DVD Access to Silent Films in the Public Domain"

by Joe Gardner

Note: This is an edited and condensed second chapter of a dissertation which explored the representation and access to silent film histories through digital means, including DVD and video websites. The dissertation focused on different digital releases of moving images created during the "silent era" of the 1890s through late-1920s and how these new releases affect the overall filtration of cinema histories. This chapter is largely based on an interview conducted in September 2008 with Ned Thanhouser on the history of Thanhouser Film Company Preservation, Inc. and its DVD releases of 1910s motion pictures.

Until 1998, a slew of copyrighted U.S. works would fall into the public domain every January 1 in America. This meant these works were free of all copyright restrictions. This annual event resulted in all works published before 1923 to be free of copyright. With the passing of the Copyright Term Extension Act in 1998, this process ended and no works will fall into the public domain in this way until 2019 (95 years after 1923).[1] Still, this is advantageous for silent cinema, leaving nearly three decades of material free of copyright. Additionally, there are many other post-1923 silent films whose copyrights long ago lapsed and were not renewed, thus making them ineligible for the terms of the 1998 Act.

Although the idea of the public domain may sound like a glorious freedom that lets films loose from their copyright owner captors, it doesn't mean the physical owner of film material must freely give up what they have. The public domain can also mean films lose commercial value for their physical owners, resulting in "orphan films." In terms of film archiving and preservation, an orphan film could be many related things, often being

[1] Lolly Gasaway, "When U.S. Works Pass Into the Public Domain," 4 November 2003, <http://www.unc.edu/~unclng/public-d.htm>, (10 May 2008).

assumed to have no "commercial potential to pay for their continued preservation,"[2] including professional and amateur "documentaries, 'silent' movies, newsreels, ethnic films, avant-garde works, home movies, animation, anthropological footage, industrial films, and other independent works."[3] If there is no commercial interest in these orphan films, who will feel compelled to maintain their preservation and keep them from being lost to history? In the U.S., this has been combated in some ways by National Film Preservation Acts (in 1988, 1992, 1996 and 2005) and the establishment of the publicly supported National Film Preservation Foundation which oversees the distribution of grants given to archives, libraries and museums for orphan film preservation.[4] Still, once a film is physically "preserved," is it really of use if it's not being accessed, studied or otherwise used?

Film archivist and historian Paolo Cherchi Usai cites a figure that, "Less than 5 per cent of all the titles preserved in the average film archive is seen by scholars, and even less is requested by film festivals. Much of the remaining 95 per cent never leaves the shelves of the film vaults after preservation has been completed."[5] Relatedly, Emily Cohen rather dramatically describes film archives as "mass burial grounds of dying images."[6] In some ways, this relates to the fact that pre-1951 film produced in the West on its original nitrate stock is traditionally perceived to be in a very unsafe state, rapidly deteriorating and ready burst into flames. More importantly however, her statement

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[2] Annette Melville and Scott Simmon, "Film Preservation 1993: A Study of the Current State of American Film Preservation, Volume 1: Report," *Library of Congress*, June 1993, <http://www.loc.gov/film/study.html>, (1 August 2008).
[3] "What Are Orphan Films," National Film Preservation Foundation, <http://www.filmpreservation.org/preserved/orphan_films.html>, (1 August 2008).
[4] See "National Film Preservation Board," *Library of Congress*, 30 July 2008, <http://www.loc.gov/film/>, (1 August 2008).
[5] Paolo Cherchi Usai, *Silent Cinema: An Introduction* (London: BFI Publishing, 2000), pg. 69.
[6] Emily Cohen, "The Orphanista Manifesto: Orphan Films and the Politics of Reproduction," *American Anthropologist* 106, no. 4 (2004): pg. 719.

relates to the fact that even if a film print or negative has already been physically preserved onto a safety film stock, is being maintained in the best possible state and is even in the public domain, a film sitting on the shelf in an archive is still "dying" without human contact.

There are of course many ways to "access" a film, from reading books about it to actually visiting an archive holding a copy of it. Another form of access is via DVD, which assumes people watching silent films on TV sets and computers. It also assumes that there are DVD producers who, in the case of public domain silent films, are releasing films often with very little commercial incentive to do so. In this chapter, I will attempt to explore some of the issues surrounding DVD access to public domain silent cinema and the many roadblocks that make this form of access no easy process. This will largely come from recollections of DVD producers and historians themselves. In particular, I will use a case study to focus on the efforts of Thanhouser Company Film Preservation, Inc., a non-profit organization dedicated to rescuing the "orphans" of a 1910s silent film company from the depths of public domain and historical anonymity. The public domain may release films from copyright tyranny, but it is a complicated web of action and chance that allows these films to still show up on history's radar. .

I. Advantages and Disadvantages of Public Domain Silents on DVD

In some ways, the public domain could be seen as a burden to DVD producers who spend large amounts of time and money to release silent films that might otherwise go unreleased. They work with film archives and collectors who own physical film prints to reconstruct films to resemble an intended state (often a "original release" version). With

public domain films however, there can be a large risk in making the investment in that there isn't always a way to protect work from being plagiarized. Although DVD producers can create new copyrights to public domain silent film texts by adding tinting and new music, other DVD companies are able to cash in on titles already produced by undoing these changes and releasing new copies. For example, many of silent film restorer and home video producer David Shepard's Cecil B. DeMille DVDs made for Image Entertainment were copied and reproduced by Passport Video in 2007 in a completely legal way.[7]

Sometimes this unlimited ability to copy public domain films is a bigger problem when DVDs perpetuate the myths that silent films were terrible quality in both content and visuals. Unlike some of the "boutique distributors" of silent films like David Shepard, Kino Video and Milestone Film and Video, many low-budget public domain DVD producers who strictly work with public domain titles don't always have access to high quality material stored in film archives or with collectors. Often times they utilize 16mm reduction prints made from 35mm materials, all of which may or not be multiple generations away from original production materials. Some releases may lack contextual liner notes and might carefully avoid stating their sources, instead focusing on the film titles as if they are unproblematic "original" release versions of films. For example, Alpha Video's 2001 DVD of *Nosferatu* (1922) calls it "THE ORIGINAL SILENT VAMPIRE CLASSIC" although its actual source is a low quality print made from the Museum of Modern Art's 1947 recut version, which has been circulating on 16mm in the U.S. for years.[8] Considering that the cheap DVDs often appear on the video store shelf or

[7] Thanks to David Pierce for pointing this out to me.
[8] Patalas, Enno "On the way to *Nosferatu*," *Film History* 14, no. 1 (2002): pg. 31.

on Amazon.com right next to the higher quality releases, they are still versions which people may unwittingly buy and perhaps unquestioningly assume to be "authentic" representations of silent film quality.

For another example, three 1914 silent films relating to the original *Wizard of Oz* books have received numerous low-budget releases on VHS and DVD.[9] *The Patchwork Girl of Oz, The Magic Cloak of Oz* and *His Majesty, the Scarecrow of Oz* were feature films produced in 1914 by L. Frank Baum's Oz Film Manufacturing Company in Hollywood, based on Baum's popular fantasy *Wizard of Oz* book series for children. In an apparent effort to make photoplay versions of his stories available to children who couldn't afford his rather high-priced, lavishly illustrated books, Baum set up the motion picture company whose films only now reach us today in a myriad of 35mm and 16mm prints and copies located in various film archives.[10] The available DVD versions of these films, however, all include the same editing and visual damage likely stemming from the same source, 16mm reduction prints from Murray Glass's Em Gee Film Library. According to Glass, he bought 35mm nitrate prints from Baum's family (probably in the 1950s, he recalls) and after making 16mm safety reduction copies, donated them where they are now kept in the Library of Congress.[11] From these 16mm copies come more 16mm copies which are for sale and then further copied by others onto more film, VHS and DVD.

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[9] On DVD, this includes St Clair Entertainment (2008), Brentwood Home Video (2001, 2005), Alpha Video (2005), Reelclassicdvd.com (200?) and Warner Bros. (2005), which includes the silents as "extras" on their deluxe set for *The Wizard of Oz* (1939).

[10] W. E. Wing, "From 'Oz, the Magic City'," *The New York Dramatic Mirror*, 7 Oct 1914, n.p., L. Frank Baum Papers, Special Collections Research Center, Syracuse University Library.

[11] Murray Glass, 7 May 2008, personal e-mail; Murray Glass, 31 July 2008, personal e-mail.

With every new copy, whether on film, video or digital, more problems may be introduced to the visual appearance of the films. Cherchi Usai details a number of the problems that can occur in silent film copying, especially when full frame silent films were made to fit into sound film aspect ratio parameters (which include a soundtrack where there was image on 35mm silent films).[12] This occurs frequently in *His Majesty, The Scarecrow of Oz*, leading one IMDb reviewer to exclaim, "Baum's inept adaptation of a couple of his Oz books is a sad sight indeed. Shots are poorly framed, often excluding some of the actor's faces from view."[13] The fact that anyone would think silent filmmakers were so incapable shows that sometimes a DVD release will be accepted as representing the "original" film even if it is many blurry and deteriorated generations separated from it.

Considering the high expense of traveling to visit to a film archive holding these *Oz* films (which may or may not require additional legitimate research qualifications) or a $549.50 16mm print,[14] however, low-budget DVDs can arguably afford to provide a more widespread range of film access to the average film viewer. Even if it is poorer quality versions of the film, is this better than barely anyone seeing the film? Unlike canonized films such as *Nosferatu* or *Metropolis* (1927), it is unlikely anyone is going to conduct a major restoration project and produce a deluxe DVD set of any of the *Oz* films. These *Oz* films might exist free of copyright, but without guaranteed commercial success, who or what organizations have enough interest and resources to bring them to the attention of others? This is the issue with many silent films now in the public domain and

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[12] Cherchi Usai, *Silent Cinema*, pg. 60.
[13] Tom Russell, "Inept," *IMDb*, 5 August 2001, <http://www.imdb.com/title/tt0004099/usercomments>, (1 May 2008).
[14] The cost of *Patchwork Girl* and *Scarecrow* from Em Gee in Murray Glass, *Catalog 93* (Reseda, California: Glenn Photo Supply, 1993), <http://emgee.freeyellow.com/cat93.pdf>, (1 May 2008).

to further examine these issues, I'll now explore the history of Thanhouser Company Film Preservation, Inc., an organization which has brought about new forms of access to the largely unseen (in recent decades) work of a 1910s film company.

II. Bringing Access to the Work of the Thanhouser Film Company

From 1909 to 1917, the Thanhouser film company located in New Rochelle, NY produced over 1000 films, from one-reelers to features in many different fictional narrative genres which were released globally.[15] At some point after ending the company he founded, Edwin Thanhouser let the remaining original film negatives be destroyed due to high storage costs.[16] Decades later in the late 1980s, Ned Thanhouser, Edwin's grandson, discovered through watching a PBS special on silent cinema, that, contrary to always being told the films "didn't exist," distribution prints had actually survived in many different archives and collections. Initially spurred to simply see the films and the "legacy of his grandparents," Ned Thanhouser's quest to locate all existing films eventually led to the desire in the mid-90s to expose the historic films via VHS video and later DVD.

In 1995, Thanhouser incorporated into a 501(c)(3), non-profit organization (Thanhouser Company Film Preservation, Inc.) in order to sell his films on video, be able to gift money to the company and be able to protect the money earned. Today there are 38 of the roughly 190 located surviving copies and fragments of Thanhouser films on

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[15] David Q. Bowers, *Thanhouser Films: An Encyclopedia and History 1909 to 1918*, CD-ROM (Portland, Oregon: Thanhouser Company Film Preservation, Inc., 1997).

[16] Ned Thanhouser, 8 September 2008, recorded interview. All other quotes and Thanhouser Film Company Preservation, Inc. facts are from this interview unless otherwise noted.

DVD in nine volumes, with three more volumes in development for the company's 100th anniversary in 2009. His corporation, in addition to putting out videos and later DVDs, has a website which includes further educational materials in order to study the Thanhouser company and early silent cinema. At least one full film is downloadable on the organization's website,[17] and others films from the DVDs are available with over 6000 other titles through a TV/film on-demand service called Vudu. Through these combined efforts, Ned Thanhouser describes his mission as "to increase access to these film gems, spread the word about the pioneering exploits of Thanhouser Company and the film legacy buried in these archives,"[18] another allusion to archives as a burial ground for orphan films.

These existing Thanhouser films are all in the public domain and, before Ned Thanhouser's efforts to bring wider access to some of them, could easily be seen as orphan films as described earlier this chapter. Although they were certainly mainstream fare when they were new, their commercial prospects have long faded. If unpreserved original nitrate film is discovered, its physical preservation will be funded in part by portions of the proceeds from past video and DVD sales. However, the majority of the other surviving films are actually already "preserved" in the physical sense as being the best possible copies available (and they are being kept that way through proper storage and other archival procedures). The main problems here then is that they are not necessarily preserved in the social sense, and so they could fall off history's scope. Even when films exist, are in the public domain and have overcome the physical archive preservation hurdle, public contact with orphan films is still not guaranteed. It is true that

[17] *The Evidence of the Film* (1913) at <http://www.thanhouser.org/films/Evidence.asf>, (7 September 2008).
[18] Ned Thanhouser, 5 May 2008, personal e-mail.

interested parties could view the films at their various archives including the Library of Congress (Washington, D.C.), National Film and Television Archive (London), Nederlands Filmmuseum (Amsterdam), The Museum of Modern Art (New York) and the George Eastman House (Rochester, New York), but this is not a very realistic option for people not attempting serious research. Again, the efforts of DVD makers can counter this lack of access to the less academic silent film fan.

At the time Ned Thanhouser began, it seems that practically no Thanhouser films had any sort of "home" dissemination. One exception he later discovered was a 8mm copy of *Dr. Jekyll and Mr. Hyde* (1912), which had been produced through Blackhawk Films small gauge film distribution. In order to bring this and other Thanhouser films into new distribution on video, it required a very long process and much expense, a strong indication as to why the efforts of film archivists and preservationists are often hindered in their goals. For Thanhouser, he says, "It took years working with the archives to establish my credibility and my motives about what I was going to do with the films." As these films are not sitting nice and ready as camera negatives in one spot, but in many spots and in many formats and states of completeness, "getting the films" becomes another issue. 35mm and 16mm safety prints have been the primary formats Thanhouser has received which often entail expensive shipping. For one example, it once cost around $160 for three 35mm from the Museum of Modern Art. Additionally to transfer these three films to a broadcast quality video format at a company with the proper equipment, it cost around $300-400. Other film archives have only given Thanhouser various videotape formats such as ¾-inch U-matic, Digital Betacam, Betacam SP and one-inch.

After obtaining films in some form, to create his first six volumes of video in the mid-90s, Thanhouser next had to do the mastering of his final products. It required expensive by-the-hour tape-based editing at a third party production house. This only involved laying down the picture, the music and adding titles, but still cost thousands of dollars, according to Thanhouser. Duplication was also expensive due to the cost of blank VHS, as well as the cost of someone putting labels on the tapes. After starting DVD production in 2004, he can now sell three volumes of films (each volume containing one to two hours of footage) on DVD for the same cost as one volume on video. Although the expensive costs of transferring film to broadcast quality video (like Digital Beta) are still part of the equation, visual quality is much higher on DVD and editing can be done by Thanhouser at home thanks to today's availability of consumer computer products for editing.

Starting with the seventh through ninth DVD volumes of films, Thanhouser uses Final Cut Pro software to ingest the films into a Macintosh computer after having converted everything into MiniDV, another digital video format. After a film is edited together on the computer (as sometimes the direct transfers from films include duplicated scenes or come on separate tapes), Thanhouser sends off the films to receive specially licensed and newly composed music scores. Many times with silent DVD releases it is complained that the music is nothing like the original, but in the case of these DVDs, the other alternative (watching the films in silence) is perhaps just as historically inaccurate. Considering that the booklets inside the DVD volumes state that the music is newly composed, it's not as if there is any deception is intended, unlike for example, the *Nosferatu* and *Oz* releases discussed above, which make no comment on their use of new

music. This production aspect is also a significant cost, which can reach several thousands of dollars and includes the price to have the music composed, performed and recorded on high quality equipment. Finally, in the DVD making process, Thanhouser uses DVD Studio Pro software to create a DVD menu system. Next, he creates labels and other DVD art, duplicates them at local copy stores, duplicates the DVDs on a home duplicating machine and puts together his sets.

Of the 38 Thanhouser films released onto DVD, one one-reeler has made it onto the U.S. National Film Registry—*The Evidence of the Film* (1913). The print of this film was discovered in 1999 in a movie theatre that was being destroyed in Superior, Montana, and, thanks to the Internet, workers found the Thanhouser website and contacted Thanhouser. The film was able to be donated to the Library of Congress in exchange for a 35mm safety print. In 2001, the Librarian of Congress, Dr. James Billington, added it to the National Film Registry, a list which every year since 1988 includes 25 new films with "cultural, historical, or aesthetic" significance.[19] The significance of *The Evidence of the Film* seems to be that its plot revolves around the accidental filming of a crime by a film company. This allows it to uniquely show views inside the Thanhouser film editing rooms, as well as other shots of 1910s film equipment and practices. Being on this registry also ensures preservation "for all time," through the Library or through the collaboration with other film institutions.[20] Again, however, all of these things together still don't guarantee wide dissemination or special release treatment by the Library or National Film Preservation Board. Its only release so far is through the Thanhouser DVDs.

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[19] Craig D'Ooge, "Librarian of Congress Names 25 More Films to National Film Registry," 18 December 2001, <http://www.loc.gov/film/nfr2001.html>, (30 July 2008).
[20] Ibid.

III. What Kind of Access?

One issue not well addressed here is the question of who are the people watching these DVDs? For whom is all this "access" and how do these viewers interact with the DVD material? Thanhouser states that he publishes advertising in two film magazines, *The Big Reel* and *Classic Images*, which designates specific audience types that could be knowledgeable about this. With most of the DVD sets being strictly available on the Thanhouser website, this could draw another limiting path to the DVDs that perhaps mainly pre-established silent film enthusiasts discover.

One ultimate goal in Ned Thanhouser's distribution is presenting "complete films that tell a story from beginning to end […] to make those available to a broader audience, so that you preserve the kind of movies they were 100 years ago […]." This is related to another goal of his, to show people how filmmakers 100 years ago represented society, especially in the way certain films represent child labor and gender relations. Some film scholars would likely argue that all of these aspects (storytelling style, societal representations, etc.) are inseparable from knowing the history of the physical film print from which they were derived, perhaps declaring that DVD could never be the ideal way to seriously watch or study a film because it's too far away from the original filmic materials.[21] Still, without further research on viewers and the ways they actually use the DVDs, it would be unwise to say that the DVD viewing experience of these films isn't worth it. If film archives are seen as burial grounds, these scholarly-vs.-entertainment tensions may seem less important compared to the expensive efforts to just get these

[21] See related thoughts in Cherchi Usai, *Silent Cinema*, pg. 150.

films seen by anyone. It is even possible that for some viewers, after they are exposed to the DVDs, they may be inspired to do further serious academic research in film history that would lead them back into the very archives that the films came out of.

While archives are rarely intentional burial grounds, many public domain silent films found inside of them are never going to be the guaranteed financial DVD successes that are found in the canonized *Metropolis* crowd, and thus the incentive to get them "out" in this way is much less. Ned Thanhouser himself asserts that more money had to be put into the original 1990s videotape sets than was gotten out of it, and still today with the DVDs, a third of the revenues comes from sales and the other two-thirds must come from himself. In this case-study, it is seen as fortunate that there are people and organizations willing to "adopt" orphan films from different archives and commit the necessary years of effort, time and money to give them a potentially far-reaching form of DVD access. These DVDs are able to then hopefully intermingle with consumers' other forms of access to a film's context through historically researched books, articles and websites. In the case of Thanhouser, the preservation company's website provides many further resources for those who are interested in acquiring more historical context. While DVD, with its digitally compressed images, is never a format for physical preservation (leave that to 35mm film), it is still currently an imperative format for the social preservation of many public domain silent films that might otherwise very rarely, if ever, be seen.

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