

TOO GOOD TO BE FORGOTTEN: THE COPYRIGHT DICHOTOMY AND THE PUBLIC-SECTOR AUDIOVISUAL ARCHIVE

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Abstract

Film archives own, or hold on deposit, many physical works of film, whereas the copyright holder to these might be someone quite different. The colourisation debate of the late 1980s in the US and *ALS TWEE DRUPPELS WATER* (*THE SPITTING IMAGE*, NL 1963, Fons Rademakers), an embargoed film in a public-sector archive, are both examples of this copyright dichotomy between material and intellectual property. The examples expose the archive as a vulnerable place. On the one hand, the archive cannot guarantee a fixed and stable environment for cinematic memories. On the other hand, an inhibited visibility of important works of film that are arguably crucial to an understanding of the history of film is the result if a film archive cannot provide access to its holdings. The examples provide new insights into the wider cultural implications of the intellectual property (IP) system. They demonstrate how IP underpins understandings of public accessibility to (a limited range of) primary source material and their subsequent potential for history making.

1. Introduction

In characterising the 1950s of European film archiving, co-founder of the Cinémathèque de Toulouse Raymond Borde describes ‘the arrival of a redoubtable character in the sleepy and peaceful landscape where the film archives reside: the rights holder’.⁴⁸ He refers to rights holders as alligators hiding in the swamps where the archives peacefully conduct their historic mission of cultural preservation.⁴⁹ The time that Borde depicts is one in which secrecy belonged to the prevailing attitude of film archives.⁵⁰ Collections often originated from dubious sources and archives kept their treasures secret. Most of these public-sector institutions did not have a real accessible catalogue and rights holders who might find out about or interfere with some of the holdings were seen as a nuisance. The 1980s brought a change with a new generation of archivists spearheading the major archives, and the higher degree of transparency and a sense of collaboration in their work also extended to the relationship with third party rights holders.⁵¹

In this paper we will look closely at two relatively recent examples of the fragile and sometimes tense relation between copyright holders and the film archive. Rights holders can (and have the right to) change the form and version of films with the advent of a new technology. The colourisation debate of the late 1980s in the US is an illustration of this right. Alternatively, copyright holders might keep films out of the public realm altogether. The tension between rights holders who can execute control over their intellectual property versus the remit of the safeguarding institution of the material property is most palpable in the public-sector archive. We will look at an example of the public (un)availability of an embargoed film in one of those archives despite the institution’s financial responsibility for the continued preservation of the work. Both examples expose the film archive as a vulnerable place: contrary to popular belief it is not a safe haven that can protect a film and guarantee its audience’s memories. Access to archival materials is a constructed process in which human agency plays an important role.

47 Claudy Op den Kamp is a Postdoctoral Research Fellow at Swinburne Law School, Australia. For insightful comments, thank you to Egbert Barten, Leontien Bout, Jake Goldenfein, Dan Hunter, and Ronny Temme.

48 Borde, Raymond (1983) *Les Cinémathèques*. Lausanne: Editions L’Age d’Homme; p. 121 (author’s translation).

49 *Ibid.*

50 Kuyper, Eric de (2013) ‘Werken bij een Filmarchief / Filmmuseum, of: Schizofrenie als opdracht’, in: Cinémathèque royale de Belgique (ed.) *75000 Films*. Crisnée: Editions Yellow Now, pp. 121–137; p. 121.

51 *Ibid.*

2. The copyright dichotomy

Copyright has a significant impact on the circumstances in which archival material is made publicly available and influences access policies of archival institutions.⁵² As a result, archives are involved in what Ronan Deazley has termed the ‘significant opportunity for interplay between the ownership of the physical object [...] and the ability to control the subsequent use and dissemination of the work.’⁵³ Both in the EU and in the US, copyright currently lasts for a term of 70 years beyond the death of the author. In general, this means that the majority of all films are still under copyright, so the fear that Raymond Borde expressed in regards to the interference of rightsholders to archival holdings wasn’t entirely unfounded. ‘The ownership of the copyright is independent of the ownership of the physical medium in which the work is expressed, and so it is perfectly possible for one person to own copyright in an object physically owned by another.’⁵⁴ This copyright dichotomy between material and intellectual ownership is most palpable in a public-sector archive, particularly in the resultant tension for access to archival material. Although nowadays specific limitations as well as (partial) transfer of rights are usually laid down in a contract with the donating party, generally, these types of institutions own the rights to very little material. The British Film Institute, for instance, estimates that the material to which it owns the rights plus the material that is out of copyright combined amounts to little more than 5% of the whole of the national collection.⁵⁵ The archive’s opportunity for the interplay between the ownership of the physical object and the ability to control the dissemination of the work mentioned above is shaped significantly by the rights holders.

3. The colourisation debate

Some of the tasks and roles of the archive came under tension and were exposed in light of the colourisation debate in the US in the late 1980s. The debate instilled the fear that the black and white films that everybody knew might be replaced by colourised copies, with no access to the black and white originals in the archive.

Although experiments with colourisation were being done for some years, the controversy really picked up speed when media mogul Ted Turner bought the MGM and RKO film libraries in 1986 and 1987 respectively, including the copyright to the films. Turner quickly announced he wanted to colourise the films. Films originally shot (and later instilled in audiences’ collective memory) in black and white were colourised with the help of digital technology. A video copy of the film was colourised, while the original black and white film elements were left ‘untouched’:

The team’s first task was to take the best available copy of the film and transfer it to one-inch videotape. For the purpose, Turner had a freshly minted print struck from the original negative. This pristine celluloid copy was then dubbed onto videotape, and a digital computer was used to further enhance the picture by removing any discernible blemishes.⁵⁶

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- 52 Hudson, Emily, and Andrew Kenyon (2007) ‘Digital Access: The Impact of Copyright in Digitisation Practices in Australian Museums, Galleries, Libraries and Archives’, *UNSW Law Journal*, 30(1), pp. 12–52.
- 53 Deazley, Ronan (2006) *Rethinking Copyright: History, Theory, Language*. Northampton; Cheltenham: Edward Elgar; p. 124.
- 54 Hunter, Dan (2012) *Intellectual Property. The Oxford Introductions to U.S. Law*. New York: Oxford University Press; p. 41.
- 55 General counsel of the BFI Richard Brousson, quoted in Derclaye, Estelle (ed.) (2009) *BILETA conference*. The University of Winchester Law School, 30 March [Online]. Available at: http://works.bepress.com/cgi/viewcontent.cgi?article=1023&context=estelle_derclaye (Accessed 9 March 2016).
- 56 Edgerton, Gary (2000) ‘The Germans Wore Gray, You Wore Blue: Frank Capra, Casablanca, and the Colorization Controversy of the 1980s’, *Journal of Popular Film and Television*, 27(4), pp. 24–32; p. 28.

Not only were potential returns high because colour titles, as opposed to black and white ones, could be programmed on television in prime time;⁵⁷ Turner had his own television channels to distribute the materials, which presented a gigantic 'corporate coalition that controlled both the copyrights and the ancillary markets.'⁵⁸

The decision to colourise these films seems to be fuelled by an arguably more important factor. A large amount of the black and white titles were about to enter into the public domain. But as colourised, derivative, works they were granted another 75 years of copyright protection:

One of the major advantages of the colorization process and its competitors was that by adding color to black-and-white films, it was possible to copyright them as new titles, thus adding additional years of copyright life to a copyright protected black-and-white feature and starting a whole new copyright life for a film already in the public domain. Of course, the colorization process [did] not affect the copyright status of the black and white original.⁵⁹

The Library of Congress confirmed the difference of the colour-converted *CASABLANCA* (US 1942, Michael Curtiz) from the original by awarding a new copyright to the Turner Entertainment Company in July 1988, a decision in which it was determined that a minimum of three added colours to a black-and-white film were needed to legally copyright the new version as a separate work.⁶⁰

Colourisation as a method to extend the duration of copyright protection exposes the copyright holder of a film as the most powerful party in relation to the public accessibility of the title, irrespective of who owns the films 'creatively', or materially. Colour conversion, and a new copyright, made an investment seem profitable:

It's only feasible to convert to color if you own the world rights, since the cost would be prohibitive for small markets. ... [Turner] might have hesitated to pay 1.2 billion USD for a film library if the pictures had soon lapsed into the public domain. By converting them to color, though, he could get a fresh copyright, which would be valuable for years to come in the broadcast and cassette markets. ... [T]he companies were trying to conjure private property out of the public domain.⁶¹

The arguments for colourisation often took a teleological stance: if the original filmmakers would have been able to, they would have shot the films in colour, based on the underlying idea that black and white would be a primitive version of a colour film. Most of the filmmakers themselves initially deemed the process interesting; Frank Capra, for instance, was an early adopter. When it became clear, however, that their permission was not needed for the colourising process, as in most cases the filmmakers were not the rights holders or the

57 Slide, Anthony (1992) *Nitrate Won't Wait: A History of Film Preservation in the United States*. Jefferson: McFarland & Company.

58 Edgerton, Gary (2000) 'The Germans Wore Gray, You Wore Blue: Frank Capra, Casablanca, and the Colorization Controversy of the 1980s', *Journal of Popular Film and Television*, 27(4), pp. 24–32; p. 25.

59 Slide, Anthony (1992) *Nitrate Won't Wait: A History of Film Preservation in the United States*. Jefferson: McFarland & Company, p. 124.

60 Edgerton, Gary (2000) 'The Germans Wore Gray, You Wore Blue: Frank Capra, Casablanca, and the Colorization Controversy of the 1980s', *Journal of Popular Film and Television*, 27(4), pp. 24–32.

61 Klawans, Stuart (1990) 'Rose-Tinted Spectacles', in Miller, Mark Crispin (ed.) *Seeing Through Movies*. New York: Pantheon Books, pp. 150–185; p. 175.

film had already lapsed into the public domain and no permission was needed at all, most of them became vehemently against the practice.⁶²

The arguments *against* colourisation included ethical aspects as the practice would condone a so-called falsification of history. Anthony Slide explains that copyright holders were seen to have an 'ethical responsibility'⁶³ to protect and preserve the artistic integrity of black and white films. Colourisation was seen as 'cultural vandalism and a distortion of history' and an 'unwarranted intrusion into the artistry of the cinematographer.'⁶⁴ The filmmakers in their arguments against the practice focussed on the rights of the mass audience, whose sensibilities would be corrupted if they were deprived of the original black and white versions.⁶⁵

Turner relished in the controversy and welcomed all sorts of accusations, provocatively telling reporters at a press conference in the summer of 1988 that he 'colorized CASABLANCA just to piss everybody off.... I wanted to do it and it's mine.'⁶⁶ The audience, in turn, did not seem to care all that much: they watched the broadcasts and they bought the videotapes, but had lost interest by the early 1990s as soon as the novelty wore off.⁶⁷

For several decades, film archives have preserved colour films in black and white as an established preservation and restoration practice, both for monetary reasons as well as for long-term chemical stability reasons.⁶⁸ Although film scholars have addressed these preservation details in the context of film historical practices,⁶⁹ they have gone by fairly unnoticed and have, surprisingly, never been framed in the context of a possible distortion of film history.

Motion pictures have also been a television staple for decades. Distortions and alterations, such as panning and scanning,⁷⁰ lexiconning,⁷¹ and other editing functions, for instance, have been used to present theatrical films in television format.⁷² These techniques, although creatively controversial in their own right and often opposed by the filmmakers themselves, have also never been framed in the context of a potential distortion of film history before.

So why was the inverse of the standard archival practice, the colourisation of black and white films, such a controversy? Was it perhaps the realisation that the archive could not be a safe haven for an 'official' film history that was so unsettling? Was the controversial part of the matter

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- 62 Directors spearheading the crusade against colourisation were, amongst others, Frank Capra, Woody Allen and John Huston; director Orson Welles, on the other hand, could base himself on a clause in his contract that prevented any tampering with his work and so, he could prevent the colourisation of *Citizen Kane* (Slide, Anthony (1992) *Nitrate Won't Wait: A History of Film Preservation in the United States*. Jefferson: McFarland & Company).
- 63 Slide, Anthony (1992) *Nitrate Won't Wait: A History of Film Preservation in the United States*. Jefferson: McFarland & Company; p. 127.
- 64 Ibid.; p. 129.
- 65 Edgerton, Gary (2000) 'The Germans Wore Gray, You Wore Blue: Frank Capra, Casablanca, and the Colorization Controversy of the 1980s', *Journal of Popular Film and Television*, 27(4), pp. 24–32.
- 66 Slide, Anthony (1992) *Nitrate Won't Wait: A History of Film Preservation in the United States*. Jefferson: McFarland & Company; p. 126.
- 67 Edgerton, Gary (2000) 'The Germans Wore Gray, You Wore Blue: Frank Capra, Casablanca, and the Colorization Controversy of the 1980s', *Journal of Popular Film and Television*, 27(4), pp. 24–32.
- 68 Read, Paul, and Mark-Paul Meyer (2000) *Restoration of Motion Picture Film*. Oxford: Butterworth-Heinemann.
- 69 See for instance Lameris, Bregt (2007) *Opnieuw belicht: de pas de deux tussen de filmmuseale praktijk en filmhistorische debatten*. PhD Dissertation, Universiteit Utrecht.
- 70 This is a process by which theatrical motion pictures, composed for viewing on large screens, are altered to fit on the narrower television screen (United States Copyright Office (USCO) (1989) *Technological Alterations to Motion Pictures and Other Audiovisual Works: Implications for Creators, Copyright Owners and Consumers*. Report of the Register of Copyrights, p.6. [Online]. Available at: <http://digitalcommons.lmu.edu/elr/vol10/iss1/1/> (Accessed 9 March 2016).)
- 71 Ibid. This technology involves the electronic time compression or expansion of a motion picture in order to fit the picture into broadcast time slots.
- 72 Kohs, David (1988) 'Paint Your Wagon-Please!: Colorization, Copyright, and the Search for Moral Rights', *Federal Communications Law Journal*, 40, pp. 1–38.

related to the stability of the established film canon? Colourisation created new versions that could be protected for copyright and there was a real fear that it was these new colourised versions that would live on exclusively in favour of the black and white versions that audiences had become familiar with. And in turn, the idea that certain titles can only be accessed in a way or in a version that differs dramatically from the way the film is generally remembered shakes the very idea of what a film archive is. As opposed to a place that helps preserve the stability of the film canon, it became to be seen as a mere warehouse for copyright holders' property.

One of the outcomes of the colourisation controversy was the establishment of a national film commission with the purpose of building a National Film Registry, a canon of distinguished films. 'The National Film Preservation Act, part of a Department of the Interior appropriations bill, create[d] a 13-member panel that could name up to 25 movies a year to be included in a national registry of classic films,'⁷³ which are 'culturally, historically, or aesthetically significant films,'⁷⁴ showcasing the range and diversity of American film heritage to increase awareness for its preservation. Whether the name of the bill reflected what it was supposed to do has been questioned:

The name of the bill [The National Film Preservation Act] is, of course, a misnomer. It has nothing whatsoever to do with film preservation. All the bill does is have the Librarian of Congress, in collaboration with his appointed panel, select 25 films a year *which can still be altered in any way by their copyright owners.*⁷⁵

The Act, however, could and can also not protect the so-called safety of the film titles: 'The longest anyone would be able to thwart the colorization process would be a period equal to the duration of the copyright in the film itself. After this period [...] the film falls into the public domain and anyone is free to make a colorized version.'⁷⁶

So, the real question underpinning the colourisation controversy seems to be what 'official' film history is or where it might reside:

Films made in the black and white era capture and record the heritage and culture of a time now passed. To present altered versions of these films, it is said, is akin to presenting an altered version of American history. Instead of educating the young as to the worth of these original films and their era, colorized films instead present a faddish and distorted view of history.⁷⁷

Part of that fear might even be justified: given the tremendous financial investment required for colorisation, 'it is likely to be the colored version, which will, perhaps exclusively, be marketed. The public cannot [easily] go into the archive and see the original black and white print. As a result, original black and white works might indeed be effectively replaced by colorized

73 NYT (1988), 'Reagan Signs Law on Film', *New York Times*, 28 September 1988.

74 Slide, Anthony (1992) *Nitrate Won't Wait: A History of Film Preservation in the United States*. Jefferson: McFarland & Company, p. 131.

75 Ibid.; p. 131, *author's emphasis*. In the UK, the situation was dealt with differently. A call for action by the British government brought a response from the Department of Trade and Industry: 'Where copyright still subsists then it is a matter for the copyright owner, and not the Government, to decide whether or not to allow coloured reproductions to be made.' (Slide, Anthony (1992) *Nitrate Won't Wait: A History of Film Preservation in the United States*. Jefferson: McFarland & Company; p. 129.)

76 Kohs, David (1988) 'Paint Your Wagon-Please!: Colorization, Copyright, and the Search for Moral Rights', *Federal Communications Law Journal*, 40, pp. 1-38; p. 19.

77 Ibid.; p. 36.

copies.⁷⁸ Not all of the filmic evidence that is kept in the archives is accessible. The colourisation debate made it obvious that what was extant was not necessarily available and that which was available was not necessarily publicly accessible. Some of the material was now under threat to only be publicly accessible in a different form.

The colourisation debate brought to light the powerful position of the rights holder and the dichotomy between intellectual ownership and material ownership (and what perhaps could be called the audience's 'cultural' ownership). Moreover, the archive was exposed as a vulnerable place:

the innovative technologies that brought about the ability to replicate and exhibit films inexpensively also created the capacity for people outside of the archival setting to alter the content and meanings of canonical films. [...] Colorization technology also revealed a significant and troubling fact about the cinematic artefact: powerful people and new technologies could dramatically alter films sitting safely in the archive. The film archive... hardly guarantees a fixed and stable cinematic memoryscape.⁷⁹

Not only the archive was on shaky ground, but also the writing of film history, as 'filmic meaning was not necessarily tied to or correlated with the cinematic artifact protected in the archival vault.'⁸⁰ What colourisation emphasised is that the film archive 'could not maintain, protect, or help to construct a singular cinematic meaning for any film.'⁸¹ The stability of the cinematic canon was called into question if films could easily be altered and their carefully constructed place in film history could be unsettled. The colourisation debate threatened the established position of the archive, as well as questioned and undermined the film's and the film archive's status as a primary source.

4. The embargoed film

Another example where the copyright dichotomy between intellectual and material property is palpable is the embargoed film in the public-sector archive. *ALS TWEE DRUPPELS WATER* (THE SPITTING IMAGE, NL 1963, Fons Rademakers) was such a film; a film under copyright and initially not publicly available, as specified by the restrictions of the copyright holder. Despite the remit of the public-sector film archive that safeguarded the film's material of preservation, restoration and dissemination, it took nearly four decades for the film to return to the screen. With the intervention of the safeguarding archive's archivists, the title is currently regarded as one of the most important post-WWII Dutch feature films.

Director of the film Fons Rademakers needed 40% additional funding for his film to supplement the financing he received from the national Production Fund for Dutch Films (*Productiefonds voor Nederlandse Film*) and approached several rich industrialists.⁸² He ultimately found a partner in beer tycoon Freddy Heineken who was looking to break into film producing and wanted to finance the additional budget himself exclusively.⁸³ By financing and producing the film, Heineken became the rights holder of the film.

The film was an international success, not in the least because of cameraman Raoul Coutard's work, who had just finished such hits as *À BOUT DE SOUFFLE* (F 1960, Jean-Luc Godard) and

78 Ibid.; p. 30.

79 Jones, Janna (2012) *The Past is a Moving Picture. Preserving the Twentieth Century on Film*. Gainesville: University Press of Florida; pp. 18–19.

80 Ibid.; p. 78.

81 Ibid.

82 Barten, Egbert (2002) 'Een verloren klassieker', *Skrien*, 34(8), pp. 22–24.

83 Ibid.

JULES ET JIM (F 1962, Francois Truffaut).⁸⁴ The film played in competition at the International Film Festival in Cannes in 1963 with such films as Visconti's *IL GATTOPARDO* and *OTTO E MEZZO* by Fellini⁸⁵ where it was nominated for a Golden Palm.

A few years later, in 1966, the film was broadcast on Dutch television for the first and only time. In search of more control over his creative efforts, Rademakers put in a request to acquire the film's rights from Heineken, but the request was denied. Heineken allegedly did so in order to retaliate against an ex-girlfriend who had played a role in the film and who had broken off the relationship. Effectively, this meant that as the rights holder, Heineken withdrew the film from circulation and what was considered, according to Dutch newspaper *Het Parool*, a 'courageous film noir of European stature',⁸⁶ vanished behind the vault doors of the *Nederlands Filmmuseum*.

The reason why Heineken withdrew the film is unimportant, however, the fact that he could is significant. The rights holder as the sole decision maker in what happens to a film, as opposed to for instance the director, is a direct re-run of the example in the previous section, in which 'the right to exploit his creative contribution or object to an alteration of the same, is not the director's to assert.'⁸⁷ It is the rights-holder's.

After the film had been withdrawn from public viewing, it was screened a few times at special occasions, such as a Rademakers retrospective, after express permission by Heineken. One could also see the film in private viewings at Heineken's if he gave permission, however, further public cinema and television screenings were out of the question. Heineken obstructed the film's television broadcast in the 1980s, for instance.⁸⁸ Rademakers learned from his experience on *ALS TWEE DRUPPELS WATER* and decided to produce all his subsequent films himself.⁸⁹ This meant that he was the copyright owner and therefore in charge of what would happen to the films.

In the meantime, the *Nederlands Filmmuseum* carried the financial responsibility for the continued preservation of the work. Heineken passed away in early 2002 and negotiations were re-opened between archivists at the *Nederlands Filmmuseum* and Heineken's heirs, who agreed to the restoration and re-distribution of the film.⁹⁰ The film re-premiered in September 2003 at the Netherlands Film Festival in Utrecht after having been out of the (Dutch) audience's collective memory for nearly four decades. It was heralded for its complex portrayal of the Second World War, as opposed to other films of the same era. *DE OVERVAL* (*THE SILENT RAID*, NL 1962, Paul Rotha), for instance, confirmed the prevailing Dutch image of the war: sober and humble heroes who defended themselves against the occupiers. *ALS TWEE DRUPPELS WATER*, however, suggested deeper philosophical questions of whether right and wrong, betrayal and resistance are what they seem, and whether a morally correct choice is at all possible.⁹¹ The film is now considered one of the most important post-war Dutch feature films.

84 Welgraven, Co (2001) '...ging ALS TWEE DRUPPELS WATER achter slot en grendel', *Trouw*, 26 March 2001.

85 Barten, Egbert (2002) 'Een verloren klassieker', *Skrien*, 34(8), pp. 22–24.

86 *Ibid.*; p. 23.

87 Kohs, David (1988) 'Paint Your Wagon-Please! Colorization, Copyright, and the Search for Moral Rights', *Federal Communications Law Journal*, 40, pp. 1–38; p. 10.

88 Driel, Anne van (2003) 'Ach, zo'n gerucht doet het goed voor de film', *de Volkskrant*, 23 August 2003.

89 Beerekamp, Hans (2002) 'Wie kent de film van Freddy?', *NRC Handelsblad*, 4 January 2002.

90 Bracht, Maarten van (2012) 'Freddy's motieven' [Online]. Available at: <http://www.vpro.nl/boeken/artikelen/vpro-gids/2012/oktober/de-donkere-kamer-van-damokles.html> (Accessed 9 March 2016).

91 Schoots, Hans (2004) *Van Fanfare tot Spetters. Een cultuurgeschiedenis van de jaren zestig en zeventig*. Amsterdam: Uitgeverij Bas Lubberhuizen.

5. Conclusion

The examples in this paper have highlighted a certain instability of the film archive as a safe(guarding) place for potential historical sources, both in terms of the memories attached to certain versions of films and the availability of the physical material. Issues of intellectual property can be seen to underpin understandings of public accessibility. Powerful rights holders might change the form and version of films with the advent of a new technology or might keep films out of the public realm altogether. If films are potentially available but not publicly accessible, their possibilities to engage with the dynamics of history and to reach their potential for history making will be limited.

What the examples also have alluded to is another dichotomy: the dichotomy between film history as professed by textbooks and the actual holdings of a film archive. An inhibited visibility of important works of film that are arguably crucial to a more fully understanding of the history of film is the result if a film archive cannot provide access to its holdings. The film archive can be seen simultaneously as a result of a particular historical narrative as well as contributing to one, and the partial picture of sources is part of that historical narrative. Examining the film archive as a safe(guarding) place for potential historical sources exposes both film history and intellectual property as historically and culturally contingent concepts. The idea of what film history is or where (official) film history resides might have to start with the idea of its interconnectedness with the system of intellectual property.

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