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THE FILM COLLECTOR, THE FBI, AND THE COPYRIGHT ACT

FRANCIS M. NEVINS, JR.*

WE ARE PRESENTLY IN THE early middle stages of a media revolution which will reach its climax when films, in one form or another, will be found in people's homes and under consumers' control in much the same way as books and phonograph records. Although the availability of home videotaping equipment represents a giant step forward in the process, the revolution began long before the invention of the Betamax. For well over twenty years hobbyist film collectors, currently between 20,000 and 120,000 in number,¹ have been purchasing sixteen and thirty-five millimeter prints of both copyrighted and public domain films, and have been screening these prints in their own homes for the private enjoyment of themselves, their family, and friends. When a collector grows tired of a particular film, he customarily swaps it for another print in someone else's collection, or sells it to another collector and uses the money to buy an additional print.² Unfortunately, collectors have been subjected to a great deal of legal harassment in recent years, not only in the form of actual and threatened civil suits for copyright infringement but also in the form of warrantless and totally illegal print confiscations by the Federal Bureau of Investigation (FBI). This Article will analyze current developments in both the civil and criminal law as they relate to the hobby of film collecting.

I. HOW PRINTS ENTER THE MARKET

The most common question asked by people who have never heard of the hobby is: Where do these prints come from? This is indeed a key question. A factual analysis of the routes by which film prints enter the collectors' market must precede any legal evaluation of collectors' practices.³

First of all, a considerable number of films are in the public domain, so that anyone may duplicate, sell, exhibit, lease, or make any other commercial use of any print. It is amazing how many thousands of films have become available in this way simply because no one bothered to renew the copyright.⁴

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¹ There are no established criteria for determining how many films one must own or how actively one must pursue the hobby in order to be classified as a film collector. The fact that many collectors keep low profiles has not made the task of estimating the group's size any easier.

² For a more detailed account of film collecting and its legal ramifications, see Nevins, *Copyright, Property and the Film Collector*, 29 *RUT. L. REV.* 2 (1975).

³ For a more detailed account of certain aspects of the material covered in this subsection, see Nevins, *Copyright, Property and the Film Collector*, 29 *RUT. L. REV.* 2, 4-7 (1975).

⁴ Some enterprising film devotees have come up with a quick and fairly reliable un-

Secondly, at one time or another the studios or their licensees have offered a wide variety of copyrighted films for sale or quasi-sale to the general public for non-commercial home screening.⁵ As more and more companies recognize the huge potential bonanza that the old films in their vaults might earn from this previously undreamt-of market, it is expected that they will eventually respond to the collecting phenomenon like businessmen and make all of their films available to the consumer in home-use format. The United States Government itself, through its Postal and Customs Services, has been known to auction off film prints that were unclaimed or damaged in transit.

As is well known, however, film studios do not routinely transfer title to copies of their product directly to the consumer, in the manner of book publishers and phonograph record manufacturers. Rather, they work through intermediaries, such as theaters and television stations, who are licensed to exhibit prints under certain conditions and for fixed periods of time. At the end of the contractual period the prints are commonly returned to the distributor or destroyed under affidavit of destruction. However, many contracts between television stations and distributors do not require return of prints, but permit the station to keep the print upon payment of a specified fee. Certain distributors do not object to making special arrangements with the station program directors which result in the director keeping the print after its run upon payment of a nominal salvage charge. Distributors whose business depends on selling exhibition rights to the stations are often willing to do such favors for key station personnel. If the station employee then sells or trades such prints to a collector or dealer friend, the prints may be resold any number of times without infringement upon the copyright holder's rights, although it is still illegal for any owner of the print to make commercial use of the film itself.

Another access route is provided by film salvage dealers. Many studios dispose of what they consider to be junk prints by chopping them into pieces and then transferring them in bulk to specialized companies whose business is to erase the images on the film stock and turn the stock into blank leader or magnetic tape or, in the case of black-and-white films, to retrieve their silver content by chemical process.⁶ Some contractors have apparently been able to reconstruct complete prints out of the fragments they receive, and have sold such prints to used-film dealers who in turn sell them to collectors.

official guide to the number of film copyrights that are not renewed by publishing bound, photocopied editions of the *Catalogue of Copyright Entries* covering motion pictures, annotated with renewal data as to each film that has in fact been renewed. Hundreds upon hundreds of films, according to these sources, are in the public domain today for nonrenewal. See J. MINUS & W. S. HALE, *FILM SUPERLIST: 20,000 MOTION PICTURES IN THE U.S. PUBLIC DOMAIN* (1973); B. WEBSTER, *PUBLIC DOMAIN FILMS: 1940 TO 1947 1/2* (1976).

⁵ See Trial Brief for Defendant at 64-66, *American International Pictures, Inc. v. Foreman*, 400 F. Supp. 928 (S.D. Ala. 1975).

⁶ See *United States v. Wise*, 550 F.2d 1180, 1184-85, 1192-93 (9th Cir. 1977); *United States v. Drebin*, 557 F.2d 1316, 1327-28 (9th Cir. 1977).

A further avenue of access is provided by the film processing laboratories which manufacture prints for the studios. If a studio orders, say, twenty fresh sixteen millimeter prints of a certain title, the laboratory might surreptitiously produce a few extra, and pass these on to used film dealers. Such prints would be originals, made from the legal negatives, and there would be no records of their existence.

Then there are the clearly dubious means of access, the temporary disappearances of prints from studio vaults, laboratories, theaters, or the mail for just long enough to permit the making of a duplicate negative in a private laboratory. Later, of course, "dupe" positives will be printed from this negative and sold to collectors. Also, film prints are often stolen from studio vaults, from the mails, or from heavy institutional users like the armed services, and sold to collectors without illegal duplication.

In short, there are many avenues into the collectors' market, some clearly legitimate, some clearly illegitimate, and some profoundly ambiguous. But there is no way to inspect a particular print to determine its origin. No print is labeled with a genealogical tag describing its roots, and indeed until 1970 the studios did not even keep records of how many sixteen millimeter prints of their films had been legitimately made. If a copyright holder brings an infringement suit against a person for the bare act of selling a film print without authorization, the origin of that print becomes a crucial issue.

II. THE FIRST SALE DOCTRINE

The reason why is grounded in a principle of copyright law known as the "first sale" doctrine.⁷ Under this rule, which was codified in section 27 of the 1909 Copyright Act⁸ and section 109(a) of the Copyright Act of 1976,⁹ once a particular copy of any copyrighted work has been transferred under conditions constituting a "first sale," then the copyright holder's exclusive right to vend that copy of the work¹⁰ is exhausted, and the "first sold" copy may legally be resold again and again thereafter. If not for this common sense doctrine, secondhand store proprietors would infringe upon the right to vend every time they sold a used book or phonograph record to a customer. All copies of a copyrighted work are likely to be virtually identical in appearance, however, and the transfer of such a copy is generally not accompanied by a document in writing such as in the transfer of real property. Consequently, it is all but impossible in any given situation to trace the chain of title to a particular copy in a possessor's hands and determine whether it had been the subject of a so-called

⁷ For a more detailed account of this doctrine and the cases thereunder up to 1975, see Nevins, *Copyright, Property and the Film Collector*, 29 *RUR. L. REV.* 2, 18-25 (1975).

⁸ 17 U.S.C. § 27 (1976), *superseded by* 17 U.S.C.A. § 109(a) (West Supp. 1977).

⁹ 17 U.S.C.A. § 109(a) (West Supp. 1977).

¹⁰ The exclusive right to "vend" is granted by 17 U.S.C. § 1(a) (1976). Under the new Copyright Act the analogous right is called the right "to distribute copies of phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C.A. § 106(3) (West Supp. 1977). For the formulation of the "first sale" doctrine under the new act, see text accompanying note 16 *infra*.

"first sale." When a copyright holder distributes copies of a work and then sues someone for selling copies of the same work without authorization, and there is no proof that what the defendant sold were infringing copies, it would be outrageous if the law required the defendant to prove that the precise copies he sold had been "first sold" by the plaintiff. Clearly, whoever has the burden of proof as to origin loses the case, and equally clear are the policy reasons why the courts have imposed the burden of proving absence of "first sales" on plaintiffs in copyright infringement cases arising out of alleged violations of the right to vend.¹¹

III. THE CIVIL PRECEDENT

The most important civil precedent with respect to the copyright aspects of the sale of film prints to collectors is *American International Pictures, Inc. v. Foreman*.¹² Seven of the major distributors brought simultaneous and identical infringement actions against Evan Foreman, a used-film dealer. The suits did not allege that Foreman manufactured or sold infringing copies, but only that he was selling prints of certain copyrighted films without authority. Foreman's defense rested on the "first sale" doctrine. At trial the studios presented proof merely that they were or represented the holders of copyrights in the films at issue, and that Foreman had sold prints of those films without authorization. As for the "first sale" issue, each studio supplied a single employee who took the stand and testified that his studio never sold prints of any of its films. If this testimony was to be believed, it followed by deduction that the studios had never "first sold" prints of the particular films at issue. The defense discredited these witnesses, however, by establishing on cross-examination that they did not know enough about the practices of their own studios to be able to make such sweeping declarations under oath. Furthermore, Foreman's attorneys argued that over the years the plaintiff studios had transferred huge numbers of prints — not necessarily prints of the films at issue — to television stations, salvage dealers, and other parties under circumstances which made those transfers "first sales" under section 27. If this argument was to be accepted, the court could reasonably conclude that some prints of the films at issue had probably been

¹¹ This country, with its free commerce and highly developed economy, has a legitimate interest in ensuring that goods of all types and descriptions, whether embodying copyrighted materials or not, move freely in commerce The movement of goods in commerce would be severely inhibited, if not stifled altogether, if each person handling a product in the chain of distribution were required, under peril of copyright infringement, to seek written permission of the purported copyright holder in order to pass the product on to the wholesaler, jobber, distributor, retailer or consumer. Not only would commerce in books and magazines and films come to a halt, but so would much other commerce. The ludicrous results which could be reached are demonstrated by the fact that the label on Donald Duck Orange Juice bears a legend reflecting a claim of copyright by Walt Disney Productions.

Trial Brief for Defendant at 8, *American International Pictures, Inc. v. Foreman*, 400 F. Supp. 928 (S.D. Ala. 1975).

¹² 400 F. Supp. 928 (S.D. Ala. 1975).
<https://engagedscholarship.csuohio.edu/clevstlrev/vol26/iss4/7>

transferred in the same way. The district judge agreed with Foreman, holding that the burden was on the plaintiff in such cases to establish by a preponderance of the evidence that no "first sales" of prints of the films at issue had occurred, and that the studios had failed to sustain that burden. The decision is now on appeal to the Fifth Circuit.¹³

Despite court reversals under the 1909 Act, the former FBI agents who now run the Film Security Office of the Motion Picture Association of America (MPAA) would like to scare collectors into believing that the Copyright Act of 1976, which went into effect January 1, 1978, has changed the law in the studios' favor. A full-page "Notice" was prepared by the Film Security Office in late 1977 and printed as an advertisement in *Variety* and several major film collector publications, claiming that under the new act:

Anyone trafficking in copyrighted motion pictures without authorization (whether as a buyer, seller, trader, copier, exhibitor, etc.) in violation of the exclusive rights conferred by federal law upon the owner of a copyright is an infringer — and is liable for all of the penalties provided by U.S. copyright law.¹⁴

This single sentence contains at least two false statements. First, the cases under the 1909 Act make it quite clear that the mere purchase or possession of a copyrighted film print is not an infringement, even if the print was illegally manufactured.¹⁵ Nothing in the new Act purports to change this long established doctrine. Second, there is absolutely no authority supporting the claim that the common collector practice of print-swapping constitutes infringement, for the simple reason that there are no cases on this point at all. The new Act is likewise silent on the matter.

It is true, of course, that the *selling* of a print of a copyrighted film without authorization may be an infringing act, but as we have seen, the *Foreman* decision on the burden of proof with respect to "first sale" makes a successful right-to-vend action against a seller of prints next to impossible. The Film Security Office, however, has entered a rebuttal on this issue. "Don't rely on the *Foreman* case," its Notice advises collectors, because under the new Copyright Act:

Congress has expressly disavowed the *Foreman* decision and has

¹³ The district court's decision has been cited with approval in *United States v. Bily*, 406 F. Supp. 726, 732 n. 9 (E.D. Pa. 1975), and in *M. NIMMER, NIMMER ON COPYRIGHT §139.5* (1976). For a case somewhat contrary, see *Avco Embassy Pictures Corp. v. Korshnak*, 189 U.S.P.Q. 303 (N.D. Pa. 1974).

Since this Article was first written, the Fifth Circuit handed down a decision reversing the District Court. *American Int'l. Pictures, Inc. v. Foreman*, [1978] Copyright Law Rep. (CCH) ¶ 25,024. The Fifth Circuit decision is analysed in the Appendix *infra* at 559.

¹⁴ The Notice was printed, among other places, in *The Big Reel*, December, 1977, at 64; and in *Film Collector's World*.

¹⁵ *Foreign & Domestic Music Corp. v. Licht*, 196 F.2d 627 (2d Cir. 1952); *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*, 274 F. 932 (S.D.N.Y. 1921), *aff'd*,

clearly stated its intent that "the burden of proving whether a particular copy was lawfully made or acquired should rest on the defendant." . . . In other words, it is not enough for you to just demonstrate the source from whom you acquired the prints and that you paid for them, but you will be held responsible for showing that the seller (and his seller) had the right to sell the particular prints.¹⁶

As before, the writers of the Notice have misstated the law and the facts in an attempt to frighten collectors. In reality, the "first sale" doctrine is carried over intact into section 109(a) of the new law, which reads in part as follows: "The owner of a particular copy . . . lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy."¹⁷ This formulation, like the analogous language under the old Act, leaves open the question of who has the burden of establishing ownership of a particular copy and the lawfulness of its making. Nothing in the new Act itself purports to change the *Foreman* decision on this issue. However, the House Judiciary Committee Report on the new Act contains a paragraph which reads as follows:

During the course of its deliberations on this section, the Committee's attention was directed to a recent court decision holding that the plaintiff in an infringement action had the burden of establishing that the allegedly infringing copies in the defendant's possession were not lawfully made or acquired under section 27 of the present law. *American International Pictures, Inc. v. Foreman*, 400 F. Supp. 928 (S.D. Alabama 1975). The Committee believes that the court's decision, if followed, would place a virtually impossible burden on copyright owners. The decision is also inconsistent with the established legal principle that the burden of proof should not be placed upon a litigant to establish facts particularly within the knowledge of his adversary. The defendant in such actions clearly has the particular knowledge of how possession of the particular copy was acquired, and should have the burden of providing this evidence to the court. It is the intent of the Committee, therefore, that in an action to determine whether a defendant is entitled to the privilege established by section 109(a) and (b), the burden of proving whether a particular copy was lawfully made or acquired should rest on the defendant.¹⁸

Two things must be kept in mind about this paragraph of legislative history. First, despite the implication of the MPAA Notice to the contrary, it is not a part of the Copyright Act, and courts are not required to

¹⁶ See note 14 *supra*.

¹⁷ 17 U.S.C.A. § 109(a) (West Supp. 1977).

¹⁸ H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 80-81 (1976).

follow it. Second and much more important, even if a court wishes to give effect to the legislative intent as embodied in the quoted paragraph, the Committee quite clearly intended to change the *Foreman* rule on burden of proof *only* in cases in which there are "allegedly infringing copies in the defendant's possession" and the defendant claims to be the owner of such copies with the right to resell them. In other words, if the plaintiff can make out a *prima facie* case that what the defendant sold were infringing copies, then the burden shifts to the defendant to establish that he is the lawful owner of the copies in question. Restricted to this precise situation, the paragraph from the Committee Report makes a certain amount of sense. It must be recalled, however, that Evan Foreman was not sued for selling infringing copies, but rather for the bare act of selling! The studios did not even claim that he was selling pirated prints. Obviously, the draftsman of the quoted paragraph was seriously confused about the issues in the *Foreman* case. But in any event the Report does not evidence an intent to alter the allocation of burden in the actual *Foreman* situation in which the defendant is sued merely for selling. The Report does indicate that when the studio establishes that a defendant was selling infringing copies, then and only then will he be required to substantiate any claim that he was the copies' lawful owner.

IV. THE CRIMINAL PRECEDENTS

The publication of false and misleading legal notices is far from the worst sin of the MPAA Film Security Office. Much more frightening has been the manner in which the former FBI agents who administer this office have used their colleagues in the Bureau as a sort of private goon squad to harass film collectors. Dozens of hobbyists have seen their homes invaded and their prints confiscated without search warrants by federal agents acting at the Film Security Office's behest. The films confiscated are not pornography but mainstream American genre movies — Westerns, suspense pictures, adventure and horror films, musicals, cliffhanger serials, and even comedies like the "Three Stooges" pictures. The collectors are not charged with a crime, but often find that the cost of suing for the return of their confiscated prints will approach or exceed the prints' value, and resign themselves to being victimized.

The only basis for FBI involvement in the hobby of film collecting is the rarely-used provision in the copyright law dealing with criminal infringements. Under the 1909 Act, it was a federal misdemeanor, punishable by a fine of between \$100 and \$1,000 or imprisonment for up to one year or both, to "willfully and for profit" infringe a copyright or to "knowingly and willfully aid or abet such infringement."¹⁹ Under the new Act the crime consists of infringing a copyright "willfully and for purposes of commercial advantage or private financial gain,"²⁰

¹⁹ 17 U.S.C. § 104 (1976).

²⁰ 17 U.S.C.A. § 506(a) (West Supp 1977).

and the penalty for criminally infringing a motion picture copyright is considerably stiffer than the general criminal infringement penalties under either the old Act or the new.²¹ The clearest example of criminal copyright infringement, of course, is the unauthorized mass duplication of a copyrighted work, followed by sale of the infringing copies. This is classical piracy of the sort that has plagued the sound recording industry for years, and the Government has had little trouble in getting convictions against such "record pirates" upheld on appeal.²² Unfortunately, the FBI seems either unable or unwilling to concentrate its attention in the film field on the buccaneers who make and systematically sell illegally-reproduced film prints. Indeed not a single one of the three "film piracy" decisions reported to date deal with duplication and sale. Rather, all three were prosecutions for the bare act of selling prints without authorization — the same practice which was upheld civilly in the *Foreman* case. Like Evan Foreman, the criminal defendants grounded much of their argument on the "first sale" doctrine.

In the earliest of the trio, *United States v. Wise*,²³ the defendant was charged with seven counts of infringement arising out of his sales of one print of each of seven recent big-budget movies like *Funny Girl* and *The Sting*. Unlike the plaintiffs in *Foreman*, who had merely produced witnesses to testify that *in general* prints are not sold, the prosecution in *Wise* brought forth executives from the studios holding copyrights in the six films at issue, who testified that no prints of *these particular films* had ever been sold. After hearing such testimony, and after scrutinizing every contract entered into by the copyright holders with respect to prints of those films which might arguably have constituted "first sales" under section 27, the trial judge held that a "first sale" had occurred with respect to one of the films but that the ambiguous television and "V.I.P." contracts vis-a-vis the other six films were licenses, not transfers of title, and convicted Wise on those six counts. On appeal, the Ninth Circuit found that studio transfers with respect to two of the six films amounted to "first sales," but sustained Wise's conviction on the remaining four counts.

The appellate court's decision, however unfavorable to Wise personally, made several points which were bound to be of benefit to potential future defendants. Firstly, the court held that if the Government cannot establish the source of the films sold by the defendant, it will not be permitted to take the short cut attempted by the studios in *Foreman* — to rely on generalized testimony that prints are not sold — but

²¹ The general penalty for criminal infringement under section 506 of the new Act is a fine of up to \$10,000 or imprisonment for up to one year or both. The penalty for criminally infringing a sound recording or motion picture copyright under the same section is a fine of up to \$25,000 or imprisonment for up to one year or both, provided that the infringement is the defendant's first such offense. For subsequent offenses the penalty rises to a maximum fine of \$50,000 and a maximum prison term of two years.

²² See *United States v. Taxe*, 540 F.2d 961 (9th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977).

²³ 550 F.2d 1180 (5th Cir. 1977).

must prove the absence of even a single "first sale" of a print of each film in question. Thus, only if industry witnesses are available who can testify from firsthand knowledge about "the specific films involved in the alleged infringement"²⁴ does the prosecution have a chance of success. *Wise* makes a conviction for selling prints of older films virtually inconceivable.

Secondly, the decision imposes on the trial court the duty to scrutinize every contract entered into by the copyright holder for the exhibition or distribution of prints of each film at issue which might arguably constitute a "first sale." True, the *Wise* court's view of what do and do not constitute "first sales" was rather generous to the film industry, but the court's language seems to suggest that the older and less popular the movie, and the less potential it has for "license revenue," the more likely it is that a court will find ambiguous contracts respecting the film to be "first sales."²⁵

Thirdly, willfulness, as we have seen, is an essential element in the offense of criminal copyright infringement. *Wise* held that in order to satisfy its burden on this element the Government must prove beyond a reasonable doubt that the defendant "knew that the film which he sold had not been first sold by the copyright owner."²⁶ This is a heavy burden indeed, and although the Government presented a strong case on scienter in the *Wise* prosecution, such evidence simply doesn't exist in the case of occasional print sales by hobbyist collectors.

*United States v. Drebin*²⁷ was a similar prosecution, charging unauthorized sale of prints of six recent major films like *Paper Moon* and *The Way We Were*. Defendants were convicted by a jury on all counts, and the convictions were sustained by the Ninth Circuit in a decision written by Judge Jameson, who had also authored the *Wise* opinion. As in *Wise*, the court showed a strong tendency to classify all ambiguous studio contracts as licenses rather than sales. Amazingly, the defendants did not challenge the sufficiency of the evidence on the issue of willfulness, and consequently there is no discussion in *Drebin* of how the Government attempted to prove that the defendants knew that no prints of the six films had been "first sold."²⁸

In the most recent and in this author's view the most important of the cases on point, *United States v. Atherton*,²⁹ the defendant was charged with selling prints of five recent big-budget films, including *The Exorcist*. As usual, the government made no attempt to establish

²⁴ *Id.* at 1190.

²⁵ "Although appellant produced evidence of several sales of films by studios, they were films which had been produced many years ago and were not recent box-office attractions, which are generally not sold until all readily obtainable license revenue has been extracted from them." *Id.* at 1195.

²⁶ *Id.* at 1194.

²⁷ 557 F.2d 1316 (9th Cir. 1977).

²⁸ The court in the later case of *United States v. Atherton* stated that "the evidence with respect to [Atherton's] knowledge of first sale, unlike the evidence in the *Wise* and *Drebin* cases, was slight." 561 F.2d 747, 752 (9th Cir. 1977) (emphasis added).

²⁹ 561 F.2d 747 (9th Cir. 1977).

the source from which Atherton had acquired his prints, but relied on testimony from studio executives that no prints of the five films had ever been sold. However, the convictions obtained in this case were reversed on appeal in a noteworthy opinion by Judge Shirley Hufstедler, who held that certain transfers to television networks, industry personnel, and salvage companies that had admittedly been entered into by the copyright holders vis-a-vis four of the five films constituted "first sales." With respect to the fifth movie, uncontroverted studio testimony established that at the time Atherton sold a print of *The Exorcist*, that film had not been the subject of a single television or "V.I.P." contract or salvage transfer. Nevertheless the court reversed Atherton's conviction on that count also, on the ground that the Government had failed to prove that Atherton knew there had been no "first sales" of *The Exorcist*. Judge Hufstедler pointed out that on retrial of that count the prosecution would have an opportunity to remedy the defect in its evidence on the scienter element.³⁰

In short, the government must prove five elements in a copyright prosecution: "(1) Infringement of a copyright, (2) of a work that has not been the subject of a 'first sale,' (3) done willfully, (4) with knowledge that the copyrighted work has not been the subject of a 'first sale,' and (5) for profit."³¹ All elements, of course, must be established beyond a reasonable doubt. In view of the case law, it is obviously impossible for the government to obtain a criminal conviction against the typical hobbyist film collector who sells a few items in his collection now and then in order to obtain funds for additional prints. But the purpose or at least the effect of the FBI confiscations is not to obtain evidence against criminals. Rather, it is to terrify collectors and to short-circuit the difficulties the *Foreman* rule places in the way of a civil suit by the studios. Having confiscated a collector's films, the agents generally notify the Film Security Office, and the appropriate copyright holders' representatives file a motion in due course asking the court to turn over the seized prints to them. Their theory, of course, is the totally discredited one that no film print is ever "first sold." If the collector is willing to pay a copyright attorney to resist the motion, he is quite likely to win in view of the *Foreman* rule. Many collectors, however, fear that they will wind up paying more to the lawyers than the prints themselves are worth, and decide to cut their losses. Even though the cases support the collector, the collector loses *de facto* simply because the Film Security Office managers have deceived their former colleagues in the FBI, whose agents have never been known for their copyright expertise, into believing that prints of copyrighted films, like hard drugs, are contraband per se, illegal to own and subject to seizure where found.

Early in 1977 a teen-age film collector and supermarket clerk named Robert Frischmann placed an ad in a collector newspaper offering a few of his prints for sale. The ad was read by someone in the Film Security

³⁰ *Id.* at 752. It has since been reported that Mr. Atherton has pleaded guilty to infringing the *Exorcist* copyright in return for a suspended sentence.

³¹ *United States v. Atherton*, 581 F.2d 747, 749 (9th Cir. 1977).
<https://engagedscholarship.csuohio.edu/clevstlrev/vol26/iss4/>

Office, who alerted the FBI. A team of agents posing as collectors visited Frischmann's St. Louis home, without a search warrant, and offered him \$200 for one of his prints. As soon as the transaction was over the agents flashed their badges, took their money back, seized the print they had purchased and all other prints in plain view, and left. Unlike most collectors, Frischmann chose to fight. His suit filed in Federal District Court seeks declaratory, injunctive, and substantial monetary relief against the individual agents, the United States Attorney for the district, the federal government, and the Motion Picture Association of America.³² If his action is successful, the FBI may be forced to study a little elementary copyright law before making any further print seizures.

V. CONCLUSION AND PROGNOSIS

The recent mass marketing of home videotaping equipment such as the Sony Betamax opens the world of film collecting, albeit in different format, to countless men and women less affluent than the typical sixteen millimeter hobbyist. Even though the building of a library of film cassettes taped from one's own television set does not require the intermediacy of a used-film dealer as in traditional collecting, it is this author's prediction that many persons and organizations will appear on the scene, some licensed by copyright holders and some acting on their own, offering cassettes of all sorts of theatrical and television films, uncut, uncensored, unpolluted by incessant commercials, and therefore much more desirable than most of what can be recorded from the home screen. Those consumers who are fortunate enough to own both a videocassette recorder and one of the new gigantic television screen systems will be able to enjoy both the large clear image insisted on by the traditional collector and the minimal per unit cost and ease and economy of storage prized by the Betamax devotee.

Consumer control over the films seen in the home is the most important media revolution of our time, promising all sorts of changes in the ways we think about, deal with, and relate to the films that are so much a part of our lives. It is an all but accomplished fact, opening up possibilities of great new revenues to copyright holders and others and of new kinds of enjoyment to cinephiles. The prevention of classical piracy — the systematic unauthorized duplication and sale of film prints for profit — is itself a proper function of government, but to go beyond this function and seek to discourage the private possession of films per se is not a legitimate purpose under either the civil or criminal provisions of the Copyright Act.³³ The spirit of the medieval monks

³² Frischmann v. United States, No. 77-0960-C(A) (E.D. Mo.) (filed Sept. 6, 1977).

³³ Thus, it is in keeping with the policy of the act for courts to be careful not to chill dealing in creative works, when that conduct approaches, but does not cross the borderline of infringement The non-infringing use and dissemination of creative material is considered not merely innocent activity but a public benefit. Any attempts at enforcing the Act which chill or unduly burden noninfringing use of copyright works, contradict the policy of the Act.

who tried to discourage literacy and the wide private ownership of books lives on, at least for the moment, in the bodies of the Hollywood bureaucrats who are responsible for the harassment of film collectors. Eventually, social and technological forces will consign these obstructionists to the dustbin of history with their monkish ancestors. Slowly but surely, the combined power of law, technology, and economic self-interest will lead to the open, widespread, and inexpensive availability of virtually any film a consumer might want to own, and thereby bring to completion the foremost media revolution of our time.

APPENDIX

On July 17, 1978, the United States Court of Appeals for the Fifth Circuit reversed the District Court's decision in the *Foreman* case discussed in Part III of this article.¹

The appellate court's decision is rather sloppy and ill-informed and betrays a basic unfamiliarity with copyright principles. For example, Judge Godbold's discussion of the legislative history of Section 109(c) of the new Copyright Act² indicates his unawareness of the factual errors described on pages 552-53 of this Article. Elsewhere in his opinion he makes two absurd suggestions: that a copyright certificate alone constitutes *prima facie* evidence that no first sales have occurred;³ and that *purchasing* a copy of a copyrighted work that has not been the subject of a "first sale" may constitute copyright infringement.⁴ But these are mere dicta, and it is hoped that they will not mislead other courts in the future.

The essence of the appellate decision concerns the burden of proof on the "first sale" issue. The court held that "the person claiming authority to . . . vend generally must show that his authority to do so flows from the copyright holder."⁵ The court specifically ruled that mere possession of a print of the film is not sufficient to meet the burden. But nowhere does the opinion clearly state to what length a defendant must go to prove that authority. Once the plaintiff produces a valid copyright certificate and credible testimony that no prints of a particular film were ever "first sold," then the defendant "must produce evidence to show" that a first sale occurred with respect to one or more prints of *that particular film*. If the defendant can establish such a first sale, the court stated, the burden *may* then shift back to the studio plaintiffs to show that the particular copies sold or offered for sale by the defendant had *not* been the subjects of "first sales."⁶ If the defendant can establish that he purchased his print of a particular film from such sources as a film library or a junk dealer, then the court states that the burden *may* shift back to the plaintiffs to "trace title backward to an illegitimate acquisition."⁷ Despite the murkiness of the language, the Fifth Circuit decision clearly requires a defendant in a civil right-to-vend case to show *something* about how he obtained *the particular film prints* for which sale he has been sued. Furthermore, the decision requires the trial court to make specific findings of fact as to whether any prints of *each specific film* involved in the suit have ever been "first sold." And a necessary implication of the ruling — at least to this writer — is that a defendant in a right-to-vend action must be given great latitude during the discovery phase of the action, to the point of receiving copies of every scrap of paper in the studio plaintiffs' possession that might

¹ American Int'l Pictures, Inc. v. Foreman, [1978] Copyright Law Rep. (CCH) ¶ 25,024.

² *Id.* at 15,117 n.1.

³ *Id.* at 15,119.

⁴ *Id.* at 15,118.

⁵ *Id.* at 15,119.

⁶ *Id.*

⁷ *Id.*

tend to show a “first sale” of even a single print of any film involved in the suit. Since studio records as to older films are generally a shambles, plaintiffs might be discouraged from bringing *Foreman*-type suits in the future except perhaps for alleged infringement of recent movies where studio records may be in better order. Finally, it must be remembered that the Fifth Circuit decision applies only to civil actions, and in no way affects the government’s burden in criminal copyright infringement prosecutions as that burden has been described in Part IV of this article.