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Art of Defiance: Found Footage, Legal Provenance, and the “Aesthetics of Access”

Claudy Op den Kamp

Introduction

The focus of this visual essay will be the artistic practice of found footage filmmaking—defined as the practice of creating new films with extant material—and the relation of found footage filmmaking to the concept of “aesthetics of access.” Lucas Hilderbrand introduces this term in his 2009 publication *Inherent Vice*, in which he addresses the interconnected issues of copyright, preservation, and bootlegging.¹ He applies these issues and the aesthetics of access to the specific case study of VHS. When he speaks of aesthetics of access, he does so in reference to the formal characteristics of the image. For example, to compile the 1990 found footage film *Home Stories*, filmmaker Matthias Müller assembled footage from Hollywood melodramas from the 1950s and '60s (Figs. 14-20). He used a 16mm film camera to shoot the material directly off a television screen. This mode of production could have been favored for its visual effects or as a method to circumvent securing permission to re-use the film material. No matter the motivation, the resulting slightly degraded look of the duplicated material is a direct effect of the manner in which the material was accessed. It is in this sense that the term aesthetics of access will be used in this essay, which argues that the legal provenance of the material, as well as techniques of circumvention that are used when obtaining-material for compilation, can be traced through the aesthetic form of found footage films. In their new, amalgamated states, these films then question such concepts as ownership and authorship. Furthermore, and as will become evident later in the essay, they also emphasize the interdependent relationship between institutional context, copyright and film form.

The Non-Profit Institutional Context

The initial focus of this article will be on so-called institutional re-use, taking the EYE Film Institute Netherlands (EYE) as a specific case study. EYE is the sector institute for Dutch cinema and the national museum for film. Founded in 2010, it is a merger of four other institutions, including the former Nederlands Filmmuseum.² EYE has had a long interest in found footage filmmaking—filmmakers, such as Gustav Deutsch or Bill Morrison, have been explicitly invited to work with the collection, while found footage films by other filmmakers, such as Matthias Müller, Peter Tscherkassky, Yervant Gianikian, and Angela Ricci Lucchi, have been acquired for the permanent collection. “Found Footage” was also the theme of the inaugural exhibition and corresponding film program in EYE’s new building in Amsterdam in April 2012.

The institutional context allows the archive to become a place of rebirth, a place where cinematic heritage can become a raw ingredient for new films. In light of sensitive relations with donors and copyright holders, however, certain intellectual

¹ Lucas Hilderbrand, *Inherent Vice: Bootleg Histories of Videotape and Copyright* (Durham: Duke University Press, 2009).

² The names of the Nederlands Filmmuseum and EYE will be used in tandem to highlight the precise timing of the events described. Nederlands Filmmuseum indicates the institute prior to 2010; EYE will be used to indicate the period after 2010.

property restrictions relating to the material are respected. Nonetheless, this context is also one in which archivists can intervene. They can actively enforce access to some of the collection’s holdings despite legal restrictions.

Gustav Deutsch and the Film Archive

Austrian filmmaker Gustav Deutsch—born in Vienna in 1952—can be labelled as a filmmaker without a camera since many of his films start on the editing table. While editing, he creates a new story from extant film material, a practice he has pursued for more than twenty years. Deutsch works firmly within the institutional context of public archives, as opposed to other filmmakers who re-use film footage found outside of that institutional context. Examples include personal film collections, flea markets, video stores, or the internet.³

After completing the first installment of his *Film Ist* series (Figs. 5-6) in 1998, Deutsch was invited by the Nederlands Filmmuseum to work with their material.⁴ For several weeks he was provided with an editing table and unlimited access to the museum’s film collection and preservation staff. Deutsch considers cataloging systems too limited and too restrictive due to their tendency to focus on search topics such as genre, title, year, name of director, or a certain keyword. What Deutsch wants to find in archival film material is often very specific—for example, “man looks through peephole”—and the collections of most film museums will not have been cataloged and described on this level. Some of the scenes Deutsch seeks can only be retrieved when someone remembers seeing a particular occurrence of it in a larger film. Consequently, personal contact with archivists and other archive staff members is Deutsch’s starting point. The visual knowledge and memory they have of their collections result in the archive and its staff becoming a place of coproduction for the filmmaker rather than merely a place of research.

Human Agency and Creative Consequences

In public archives, there is often a dichotomy between the intellectual ownership and the physical ownership of archival material. Public audiovisual archives own many physical works of film, whereas the copyright owner to these might be someone quite different. When it comes to orphan works, for instance—works that might still be within the period of copyright but without an identifiable or locatable rights holder—the archive will often not grant the filmmaker the legal permission to re-use those works without further research into who owns the copyright. However, based on the exclusive ownership of source material and a capacity to act, an archive can grant a filmmaker the “material” permission for re-use. Archivists seem to tread a fine line between being able to enforce access and what is colloquially termed as “gatekeeping.”

³ Information relating to Deutsch’s working methods is taken from the (unpublished) transcripts of two semi-structured interviews by the author with the filmmaker. The first one took place in March 2010 in Gorizia, Italy and the second one in April 2010 in New York, USA.

⁴ Gustav Deutsch, *Film Ist. 1-6*, 16mm, color, b/w, 60min, 1998; *Film Ist. 7-12*, 35mm, color, b/w, 90min, 2002; *Film Ist. A Girl & A Gun*, 35mm, color, 93 min, 2009. For Deutsch’s full filmography: <http://gustavdeutsch.net/>.

The human agency of an institution's archivists can have creative consequences for filmmakers. Archivists have a capacity to act—that is, they can intervene in and actively enforce access to some of the collection's holdings despite, for instance, apparent legal restrictions. They analyze whether it is worth the risk of clearing the rights for a particular re-use, even as it is sometimes unclear what exactly those risks might entail. There is, for example, the possibility of an infringement claim—often with monetary consequences—if a rights holder were to come forward. The risks might also include jeopardizing relations with current and future donors and rights holders.

In the case of Deutsch, a key example is found in the stag films he re-used in his 2009 work *Film Ist. A Girl & A Gun*. These are brief, silent, and explicitly sexual films that were produced in the first half of the twentieth century, mostly illicitly due to censorship laws. The films in question formed part of the film collection at the Kinsey Institute for Research in Sex, Gender and Reproduction at Indiana University. The institute created initial creative obstacles for the filmmaker by restricting access to some of their holdings and thus “pre-selected” his range of possible choices. It also declared the films on human sexual behavior shot in the 1940s and 1950s by Alfred Kinsey himself off-limits to the filmmaker. Remarkably, these films are not available for anyone to watch, even on the archive's premises. Deutsch's interpretation of this policy is that the institute is afraid that Alfred Kinsey might retrospectively be labelled as a pornographer. What is lost by gatekeeping material in this way is exactly the possibility for such a historical re-interpretation. In the worst-case scenario, the film material will deteriorate and ultimately disappear for good. In the case of Deutsch's production process, the institute discovered it did not own the rights to the particular stag films that the filmmaker intended to re-use. Based on their exclusive ownership of the—mostly anonymous—source material and a risk assessment, they nonetheless granted him the “material” permission for re-use. Instead of a licensing fee, they ultimately charged him an archival handling fee.

In contrast, a rights holder refusing their permission for re-use or significantly slowing down the process of re-use is nothing out of the ordinary. This is the rights owner's prerogative. One example in Deutsch's experience involved an emeritus professor who produced and owned the rights to a medical film that the filmmaker wanted to re-use. A lengthy letter exchange between the two ensued but the rights owner did not want to see his scientific work re-appropriated in an artistic context. In this case, Deutsch ultimately needed to look for alternative footage.

Another example in which the decision-making processes of archivists played a significant role was the production of Peter Delpet's 1990 film *Lyrical Nitrate*. Delpet—who was the deputy director of the Nederlands Filmmuseum at the time of the film's production—was interested in telling the story of three misconceptions about early film: silent film was mostly shown in color; it shows unexpected fluidity when projected at the correct speed; and it does not solely consist of slapstick. *Lyrical Nitrate* uses the Nederlands Filmmuseum's Desmet film collection as a hook to tell this story. These silent films, approximately 900 in number, are still part of EYE's collection and in 2011 they were inscribed in the UNESCO Memory of the World Register. The films of the Desmet collection had entered into the public domain at the time of the production of *Lyrical Nitrate*, and so there would be no need to ask rights owners for permission for re-use. The Nederlands Filmmuseum, however, exclusively owned the

physical material and could restrict access on a material level. When Delpout made the film he was firmly on the inside of the archive, and this allowed him to negotiate access to the material. He agreed with the then-director to use only material that had already been preserved, thus limiting his choices at the time of compilation.

The filmmaker had privileged access not only to material that had already been preserved, but also to other, less obvious material. In a recent reflection, written some twenty years after the film’s production, Delpout argues that “[a]ccess is the secret to any documentary.”⁵ All fragments of *Lyrical Nitrate*— apart from the closing sequence— originate from the Desmet film collection. The spectacular finale of *Lyrical Nitrate* (Figs. 1-4) shows the random flickering pattern of decaying nitrate. According to Delpout, this scene would never have ended up in the film had he not worked in the film archive.⁶ The filmmaker chanced upon the decomposing scene in his other daily archival activities. Despite— or perhaps because of—its advanced state of deterioration, the scene was the only title specifically preserved for compilation into *Lyrical Nitrate*.

Found footage filmmaking can be seen as a practice that keeps “collections in the public eye and [that makes] them matter to modern audiences.”⁷ In the case of *Lyrical Nitrate*, the institute that housed and exclusively owned the nitrate source material helped to facilitate access to historic footage. It also facilitated a particular film historical narrative through its policy of allowing film fragments to be incorporated into newly amalgamated work, thereby highlighting archival lacunae. By writing film history “with the films themselves,” found footage films continually pose central questions: What is film? And, by extension, what is film history? And even, what is the function of the film archive?⁸ By attempting to strip films from the history with which they were previously associated, found footage films foreground such concepts as authorship and ownership.⁹ The practice of filmmakers working outside of an institutional archival context brings these questions into clear focus.

Outside the Archives

Traditionally, analog found footage films have been concerned with “showcasing the potential of films that have fallen from the mainstream.”¹⁰ Because of new and innovative ways of accessing more canonical films, current—digital— found footage practices are no longer practices of re-using leftovers. Several contemporary filmmakers ignore or actively position themselves against the constraints of copyright

⁵ Peter Delpout, “An Unexpected Reception: Lyrical Nitrate Between Film History and Art,” in *Found Footage: Cinema Exposed*, ed. Marente Bloemheugel, Giovanna Fossati and Jaap Guldmond (Amsterdam: Amsterdam University Press/EYE Film Institute Netherlands, 2012), 218–224, 223.

⁶ *Ibid.*, 220.

⁷ Patrick Russell, “Re:found footage,” British Film Institute (BFI), April 22, 2014, accessed September 26, 2016, <http://www.bfi.org.uk/news-opinion/bfi-news/re-found-footage>.

⁸ Giovanna Fossati, “Found Footage: Filmmaking, Film Archiving and New Participatory Platforms,” in *Found Footage: Cinema Exposed*, ed. Marente Bloemheugel, Giovanna Fossati, and Jaap Guldmond (Amsterdam: Amsterdam University Press/EYE Film Institute Netherlands, 2012), 177–184.

⁹ Eli Horwatt, “A Taxonomy of Digital Video Remixing: Contemporary Found Footage Practice on the Internet,” in *Cultural Borrowings. Appropriation, Reworking, Transformation*, ed. in Iain Smith (Nottingham: Scope: An Online Journal of Film and Television Studies, 2009), 76-91.

¹⁰ Nico De Klerk, “Designing a Home; Orphan Films in the Work of Gustav Deutsch,” in *Gustav Deutsch*, ed. Wilbrig Brainin-Donnenberg and Michael Loebenstein (Vienna: Filmmuseum Synema Publikationen, 2009), 114.

law. Instead of asking for permission to re-use material, they have found alternative ways to obtain their source material, circumventing both archives and rights owners. New non-institutional possibilities to access films have arguably become the only manner in which certain films and artworks have been produced. Examples include Chris Marclay's *The Clock* (Figs. 28-29), Nicolas Provost's *Gravity* (Figs. 30-33), and Vicky Bennett's *The Sound of the End of Music* (Figs. 34-35).

Marclay employed a group of six assistants who watched a plethora of films on DVD from a local London video store. The assistants captured scenes showing clocks or mentioning time in order to provide the artist, each day, with a new selection of clips.¹¹ As there had been no previous objection to any of Marclay's appropriation art, copyright clearance was not taken into consideration when producing *The Clock*.¹² Since finishing the piece, the artist has not received any infringement claims, which is perhaps surprising in light of the piece's commercial success. Copyright in the context of visual art institutions and of the potential transformation of found footage filmmaking practices is a topic worth exploring more deeply, as is that of rights in derivative works and compilations. Unfortunately, they both remain outside of the scope of this article.

Nicolas Provost explained his compilation practice at the opening of his retrospective exhibition in Amsterdam, Netherlands, in April 2008. He claimed that he never would have been able to produce his works if he had been dependent on a film archival institution for his source material. Such a manner of working would have entailed getting permission from rights owners, a practice he circumvented by obtaining footage from the local video store. Similarly, in her presentation at the Recycled Film Symposium, held in Newcastle, United Kingdom, in March 2010, Vicky Bennett explained that she initially worked on a "local level." She meant that she used to work predominantly with the genres of educational films and documentaries, most of which originated on VHS. Currently, however, DVDs and broadband internet have enabled her to work re-using major blockbusters as well.

The Question of the Archive

Film scholar David Bordwell has recently argued that different ways of accessing material outside of the institutional archival context have eradicated the "economy of scarcity:"

Throughout the 1970s and early 1980s, an economy of scarcity still ruled. Most films, even recent commercial hits, could be found only in studio libraries and public or privately maintained film archives. ... A procession of new technologies, starting in the 1970s, radically and forever changed access to films, [such as] cable television, ... VHS, [and] DVD. ... With so many films

¹¹ Daniel Zalewski, "The Hours; How Christian Marclay made the Ultimate Digital Mosaic," *New Yorker*, March 12, 2012, accessed September 26, 2016, <http://www.newyorker.com/magazine/2012/03/12/the-hours-daniel-zalewski>.

¹² Ibid.

easily available on digital formats, people who relied upon archives have found other options. . . . Home video abolished the economy of scarcity.¹³

While this affects educators who rely on teaching film history with DVD, for instance, it also has affected the contemporary practice of found footage filmmaking. In an analog era, found footage films made within a public institutional context were often defined by non-canonical content and high quality reproduction. In the case of EYE, Delpeut’s *Lyrical Nitrate*—as well as the first two installments of Deutsch’s *Film Ist* series—can be seen as representative examples. Outside of that context, however, alternative ways of obtaining source material than from an archive — and less than ideal reproduction methods—were ultimately reflected in the final form of these films. A clear example of such an aesthetics of access is Matthias Müller’s *Home Stories*, for which the filmmaker shot 16mm film off a television screen. Another example is Thom Andersen’s 2003 video essay *Los Angeles Plays Itself* (Figs. 21-27) about that city’s portrayal in the history of film. Andersen compiled low-resolution video due to the fact that he was not able to obtain formal permission from the studios for re-using the Hollywood narrative film material in high resolution.¹⁴

In a digital realm, found footage filmmaking within an institutional context is still often defined by non-canonical content and high quality reproduction. A representative example is the last installment in Deutsch’s series *Film Ist. A Girl & a Gun* (Figs. 7-13). It is the works that are made outside of that context, however, that have undergone a dramatic transformation. High quality reproduction and the potential for a shift towards canonical content has quickly brought the role of the traditional archive into question for found footage filmmakers. The aesthetics of access in these works is defined on both a formal and on a content level; the aforementioned works by Marclay, Provost, and Bennett are all prominent examples.

Conclusion

The practice of found footage filmmaking has changed extensively over the past few decades. Archives can act as an impediment or catalyst to found footage filmmakers in providing them access to unique material. Greatly expanded access to video content outside of that context has altered found footage filmmakers’ need to work through audiovisual archives. It is advanced modes of circumvention that have brought this opposition between institutional and non-institutional practices more clearly into focus.

Tracing the legal provenance of archival material through the aesthetic form of found footage films has shown the particular interaction between copyright and the archival institution’s permission culture. A focus on circumvention in found footage filmmaking—resulting in films that challenge traditional conceptions of authorship and

¹³ David Bordwell, “A Celestial Cinémathèque? or, Film Archives and Me: A Semi-Personal History,” in *75,000 Films*, ed. Nicola Mazzanti (Brussels: Yellow Now, 2013), 76–78.

¹⁴ Thom Andersen, “Get Out of the Car” (discussion during the session “CalArts Faculty: At the Digital Intersection” at *Reimagining the Archive* symposium, UCLA, Los Angeles, California, November 12-14, 2010).

ownership—has illustrated that it is the role of the traditional archive as mediator of content that is at stake.

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Figures 1-4

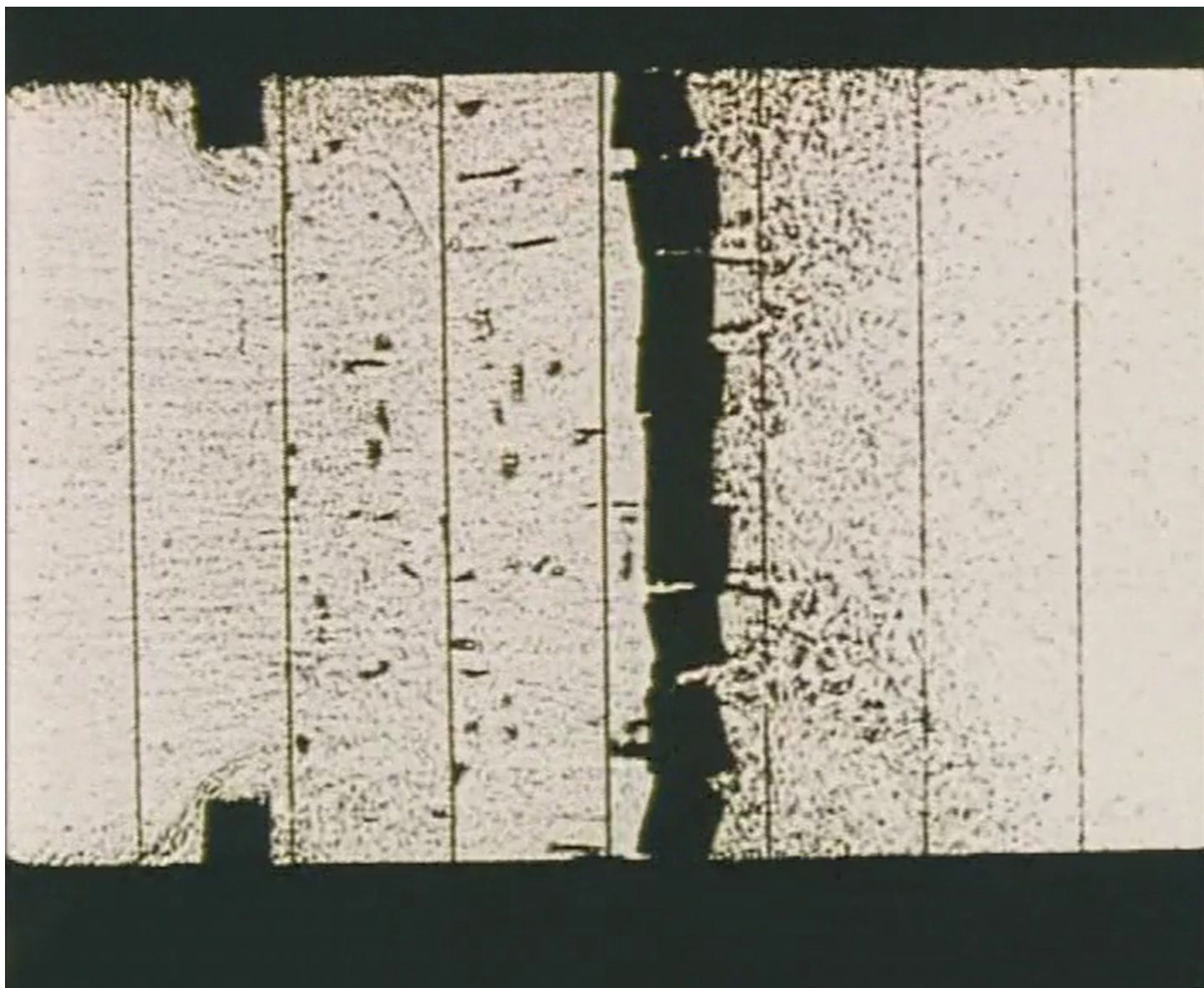
Peter Delpout, *Lyrical Nitrate* (1990, The Netherlands)

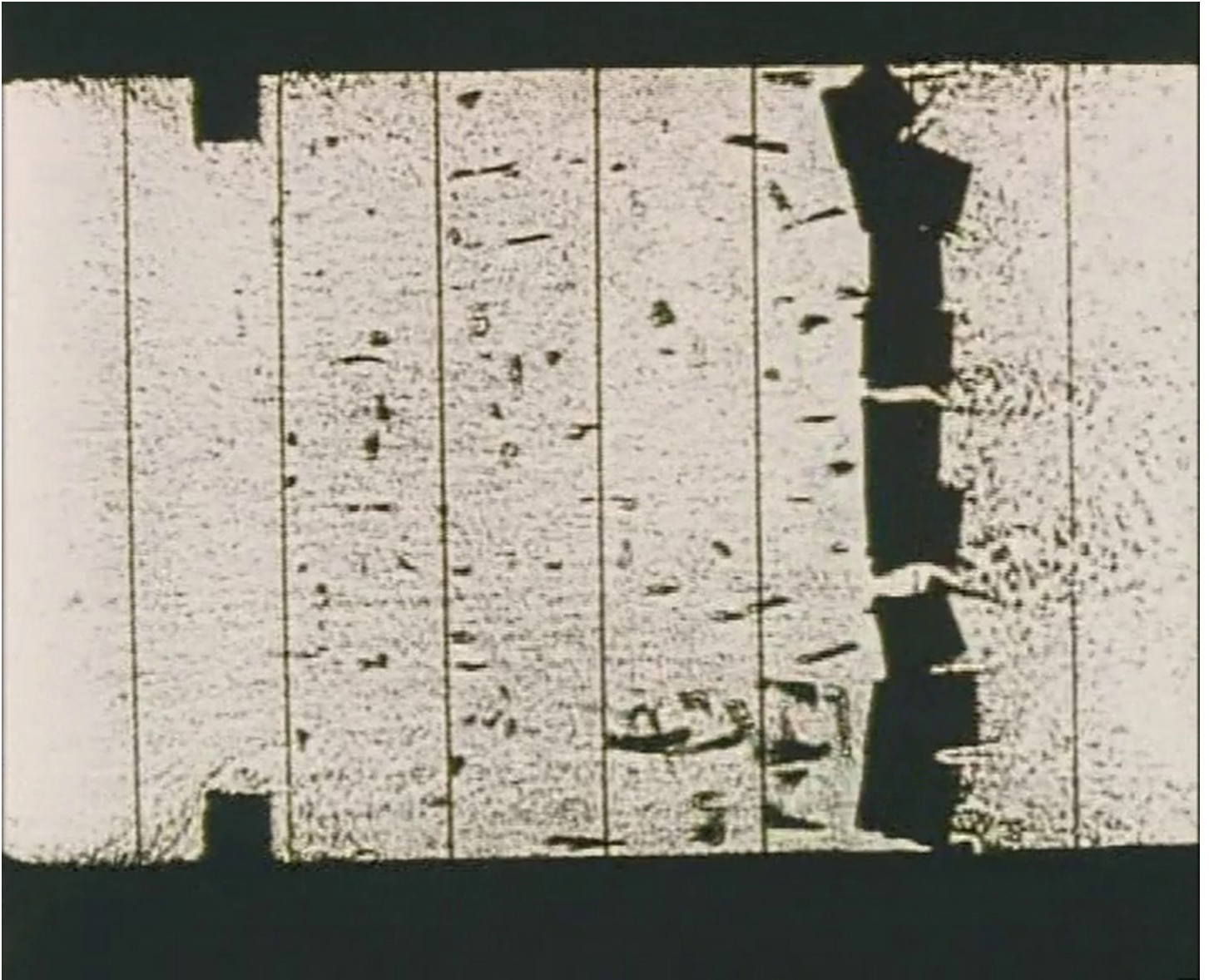




Figures 5-6

Gustav Deutsch, *Film Ist. 1 Movement and Time* (1998, Austria)



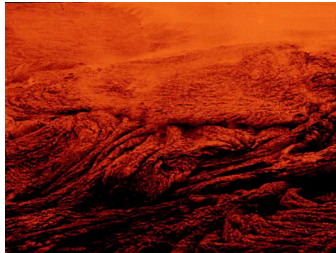
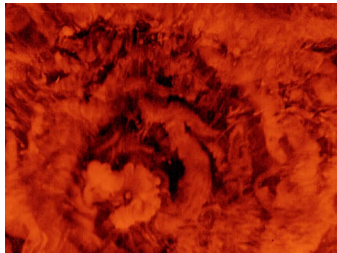
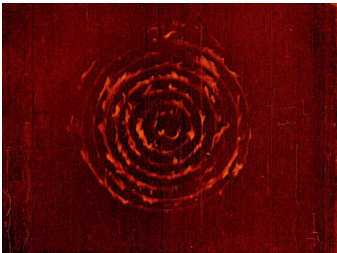


Figures 7-13

Gustav Deutsch, *Film Ist. a girl & a gun* (2009, Austria)









Figures 14-18

Matthias Müller, *Home Stories* (1990, West Germany)





Figures 19-23

Thom Andersen, *Los Angeles Plays Itself* (2003, United States)





Figures 24-25

Thom Andersen, *Los Angeles Plays Itself* (2003, United States), remastered in HD





Figures 26-27

Chris Marclay, *The Clock* (2010, United Kingdom)



The image shows a YouTube video player interface. At the top left is the YouTube logo with 'AU' next to it. To its right is a search bar with a magnifying glass icon and the text 'Search'. The main video area displays a still from the film 'The Clock', which is a 24-hour loop of a clock face. The clock is illuminated with a blue light, and the hands are positioned at approximately 10:15. In the top left corner of the video frame, there is a white graphic consisting of a circle with a crosshair and the letters 'O', 'F', and 'O' arranged around it. Below the video player, the title 'Christian Marclay The Clock 10h15 Nuit Blanche théâtre de Chaillot' is displayed. Underneath the title is the channel name 'BEENHERE DONETHAT' next to a circular profile picture icon. A red 'Subscribe' button with a play icon and the number '103' is visible. On the right side, the view count '40,822 views' is shown.



Figures 28-31

Nicolas Provost, *Gravity* (2008, Belgium)







Figures 32-33

Vicki Bennett, *The Sound of the End of Music* (2010, United Kingdom)



