2 What Next? The *Historical Time* Theory of Film History

Jane M. Gaines

Abstract
Our particular problem of technological change, from the photochemical to the so-called "digital," requires engagement with theories of history. Given that comparing emerging technologies a century apart raises the question of "differences of times," I turn to Reinhart Koselleck's theory of *historical time*, or the relativity of past, present, and future, with particular attention to the problem of *historical prognostication* or prediction. The case at hand compares motion picture film duplication 1897–1907 and contemporary cyberlocker storage technology as charged in their moments with "piracy" or illegal "taking." Thus intellectual property doctrine draws parallels between historically different "piratical practices" as evidencing responses to the problem of technological "newness." But Koselleck is canny as he challenges us to consider that paradoxically every new time is both new and "not so new."

Keywords: digital turn, motion picture film history, film piracy, cyberlocker storage technology, reproductive technologies, theories of history

Suddenly, the field of film and media studies, once so peripheral in the academy, is symbolically central.[1] Because the question *for* our time, *of* which we are daily reminded, is the sociality of audio and visual media. Then there is the question as to where "film history" fits in this new world picture as well as how that place translates into the academic scheme of

1 The paraphrase of Stuart Hall—"The socially peripheral is symbolically central"—is intentional. See Stuart Hall, "Cultural Studies and Its Theoretical Legacies," in *Essential Essays, Vol. I: Foundations of Cultural Studies*, ed. Stuart Hall and David Morley (Durham: Duke University Press, 2018), 71–100.

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things. Because in the academy we have a new role for which we may not have been prepared. And what is that? We are tasked with theorizing a historical transition from our specialization to whatever it is that comes next, moving as we are from photochemical exceptionality to digital ubiquity. So, let's ask: For how much longer can we afford to be specialists of the sort we have been? Because strangely, our photochemical object of study, once so arcane, has been swept up into the stream, literally meaning that, once digitized, that object is no longer exquisitely *unlike* but now *just like* everything else—just data.[2] Then what are the implications for motion picture film history? For one thing, if we are period specialists, our time frame has changed. In the technological transformation, "film history" (as the account of objects and events) is now stretched into the long cinema century, 1895 to 2012, the year of digital projection roll out.[3] But that is not all.

I. The "Film Called History"

> *If the film called history rewinds itself, it turns into an endless loop. What will soon end in the monopoly of bit and fiber optics began with the monopoly of writing.*
> —Friedrich Kittler, *Gramophone, Film, Typewriter*[4]

For a moment, let's think about the oddity of this statement. In Kittler, "the film" may supply a metaphor for "history," but despite the "loop" metaphor, "film" is "dropped out of the loop," so to speak. Note that in the next sentence Kittler uses an "end" and a beginning with "motion picture film" missing between "writing" and "bit and fiber optics." Perhaps there is a confusion between the Vitascope and the kinetoscope technologies, as though the media historian didn't know that the kinetoscope loop came *before* not *after* the projected image strip wound around reels. Then again, this illustration from the French *La Nature* (1894) suggests that a look inside the kinetoscope

2 See Lev Manovich, *Software Takes Command* (New York and London: Bloomsbury, 2013), 244, 248.

3 See Giovanna Fossati, *From Grain to Pixel: The Archival Life of Film in Transition*, 3rd rev. ed. (Amsterdam: Amsterdam University Press, 2018), 14.

4 In the original German: "Wenn der Film namens Geschichte sich rückspult, wird er zur Endlosschleife. Was demnächst im Monopol der Bits und Glasfaserkabel enden wird, begann mit dem Monopol von Schrift." Note as well as the datedness of fibre optics as up-to-the-minute in 1986 when *Gramophone, Film, Typewriter* was first published. Thanks to Malte Hagener for the German original. See Friedrich A. Kittler, *Gramophone, Film, Typewriter*, trans. Geoffrey Winthrop-Young and Michael Wutz (Stanford: Stanford University Press, 1999), 4.

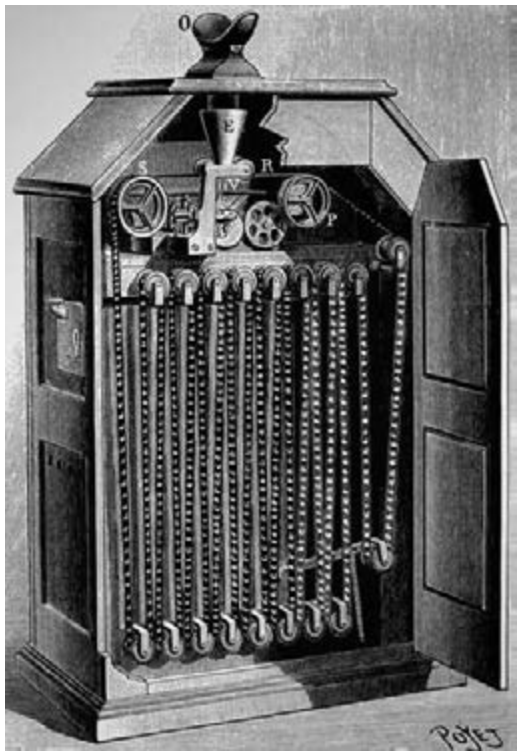

Fig. 2.1. Edison's Kinetoscope interior mechanism and celluloid film. *La Nature* (Paris, 1894).

reveals reels as well as loops.[5] And who would rewind without a take-up reel? But if "history" is like "the film" as celluloid strips wound around circular reels, it might seem to be endlessly looping but also *not* looping if, like the wound film strip, it has a head (writing) and a tail (bit and fibre optics). If it has a head and a tail it is therefore linear, although it may not spool out in a straight line. So Kittler's formulation is really two metaphors for thinking about the historiographic. In "writing" to "fiber optics" we see the conventional "from … to" linear paradigm.[6] But the circular "loop" metaphor for "history" suggests repetition and return, or events coming around "again and again."

Kittler's paradigm problem is our problem too, as having been experts on film form, we must now also be experts in something else—the miraculous

5 *La Nature* was a French-language popular science magazine founded in 1873.

6 See Elsaesser's critique of "from … to," which he says characterizes all of the first standard histories, in Thomas Elsaesser, "The New Film History as Media Archaeology," *Cinémas* 14, no. 2–3 (2004): 93. In "The Inevitability of Teleology: From *le Dispositif* to Apparatus Theory to *Dispositifs* Plural," *Reserches sémiotiques/Semiotic Inquiry* 31, no. 1–3 (2011): 46, I argue somewhat differently for seeing the unavoidability of "from … to" paradigms.

materiality of the apparently immaterial computational.[7] More difficult in the "digital turn," of course, is *how* this shift to the computational is indicated, that is, what signs of it are in evidence and where is it that we might continue to look for them. But that is not all, as I said. There is yet an unspoken expectation. We stand back in an attempt to gain distance on our historical present. In attempting this, however, the burden is on us not only to organize knowledge and to analyse trends. The burden is on us *to speculate*. Yes, to speculate. This doesn't mean, however, that we get on the bandwagon of Thomas Elsaesser's "next big thing."[8] We never did want to get *on* the bandwagon, anyway, for we would be too late. The goal is not to get *on* it, it is to get *ahead of it*, get *before* it in order to project the shape of things to come. Of course, it's a question of how we interpret trends and shifts. And undoubtedly some will say that we should be analysing phenomena for, after all, that is what we have been trained to do. But in analysing we are never *just* analysing, especially in comparing two phenomena a century apart as I attempt below. Yes, we may think that we are just analysing, but we are not. *We are also predicting*. Some, quite rightly, will object. The future as such cannot be researched, they will say, and, after all, the proper historian can only work in the realm of empirical verifiability. Further objection might be made that since future time *does not exist* it is therefore ridiculous to take up the empirical study of events that have yet to happen or, what's more, may never happen. And yet, *we do go there*. As historical analysts we are engaged with the possibility of things yet to come, however implicitly. And what is our concern about getting an analysis right (as opposed to wrong) other than an admission that we're making a prediction? Consider, in this regard, the way field scholars foregrounded prediction in the very titles of their books on the "cinema to come" and the "future of movies."[9]

If the "history of motion picture film history" occasions an assessment of where we have been, it surely also means that we are critiquing the means and methods of knowledge production itself. The approach named *media archaeology* has licensed that critique and in so doing has also underwritten a double relation to knowledge production. Here one thinks of Foucault,

7 See Jonathan Sterne, *MP3: The Meaning of a Format* (Durham: Duke University Press, 2012), 7, on how processes of magnetic inscription are made invisible within hard drives and consequently this invisibility makes these processes seem "immaterial" to users.

8 See Elsaesser, "The New Film History," 89.

9 See Chuck Tryon, *On-Demand Culture: Digital Delivery and the Future of Movies* (New Brunswick: Rutgers University Press, 2013); Francesco Casetti, *The Lumière Galaxy: 7 Key Words for the Cinema to Come* (New York: Columbia University Press, 2015); David Bordwell, *Pandora's Digital Box: Films, Files, and the Future of Movies* (Madison: Irvington Way Institute Press, 2012).

who conducted his empirical research into the sanatorium while critiquing the methodological straightjacket of traditional historiography. We, too, undertake archival research while critiquing "the archive." This double approach invites us to take the "histories of history" to mean not intellectual histories of a field of knowledge but rather Foucault-inspired undertakings now termed *media archaeology*.[10] In the spirit of "histories of history," the following is as much a challenge to *media archaeology* as an exercise defined as such.

Foucault is also an invitation to think about "theories of history." Schooled as we have been in the post-structuralist legacy of film theory we are ideally positioned to conjoin the question of the technological advent with the philosophical problem of *historical time*. However, this requires not just Foucault but also Heidegger. And thus my segue—with trepidation given that this text was written for a conference in Marburg—into the terrain of German philosophy in order to reference Martin Heidegger's *Being and Time*. Different schools of thought continue to rotate around as well as to deviate from Heidegger's orbit. Think, for instance, of the new philosophy of history that has produced that contradictory term "deconstructive historian."[11] For a theory of *historical time*, however, I rely on Reinhart Koselleck who overlapped historically with Heidegger although he is more closely associated with Carl Schmitt.[12] I conclude with the relevance of Jacques Derrida's lecture notes on *Being and Time* to a theory of *historical time*.[13] And although we find variations on the concept here, vestiges of Heidegger can be glimpsed in all.[14]

10 For an overview of current approaches to media archaeology, see Wanda Strauven, "Media Archaeology: Where Film History, Media Art, and New Media (Can) Meet," in *Preserving and Exhibiting Media Art: Challenges and Perspectives*, ed. Julia Noordegraaf et al. (Amsterdam: Amsterdam University Press, 2013), 68–73.

11 Keith Jenkins and Alun Munslow, eds., *The Nature of History Reader* (New York and London: Routledge, 2004), 12–15.

12 For background on Koselleck's reception in English, see Niklas Olsen, *History in the Plural: An Introduction to the Work of Reinhart Koselleck* (New York and Oxford: Berghahn Books, 2012).

13 See Thomas Dutoit, "Editor's Note," in Jacques Derrida, *Heidegger: The Question of Being & History*, trans. Geoffrey Bennington (Chicago: University of Chicago Press, 2016), xv–xix, on these handwritten lecture notes delivered between 1964 and 1965 at the École normale supérieure and the challenges of deciphering as well as translating them but also Derrida's plan to write a book on Heidegger titled *The Question of History*.

14 Althusser and Balibar appear to take the term from Heidegger although without citing him; Ricoeur offers one of the most useful but least critical summaries of Koselleck's concept of *historical time*. See Louis Althusser and Étienne Balibar, "The Errors of Classical Economics: Outline of a Concept of Historical Time," in *French Philosophy since 1945: Problems, Concepts, Inventions*, ed. Étienne Balibar and John Rajchman, trans. Arthur Goldhammer et al. (New York

Koselleck warns that *historical time* is not an easy concept. For *historical time* is nowhere to be found in empirical sources and is distinct from the biological time of the planet and the life of its species. *Historical time* for Koselleck is social and political, and has to do with human customs and institutions, the rhythms of everyday life, as well as the actions and the "suffering" of human beings.[15] Above all, *historical time* for him is not singular but plural modes, multi-layered, and, most importantly, relational as in past to present and present to past and future.[16] So what value is there in Koselleck's notion of *historical time* for the "historiographic stretch of motion pictures," from photochemical film to digital media, from mechanical to computational, from exhibition to access? Before addressing this question, however, I should ask why turn to Koselleck now, although it may be enough to say that in the English-speaking world interest in Koselleck is somewhat belated. In the moment associated with Hayden White in the US and Keith Jenkins in the UK, Koselleck was left out, suspiciously missing from the "linguistic turn" in historical studies.[17]

From Koselleck's work, less philosophy of history than "theory of history," I want to take up three conceptualizations.[18] Two of these are broad and the third more particular: (1) "New Times," closely related to Koselleck's theoretical umbrella termed (2) *historical time*, and (3) *historical prognostication*, an offshoot reliant on both of these conceptualizations. My own interest in *historical prognostication* or prediction stems from a comparative technological exercise I've undertaken whose features continue to perplex me. This quandary boils down to how to compare the newness of two technologies a century apart. Elsewhere I have approached this comparison by means of

and London: The New Press, 2011); Paul Ricoeur, *Memory, History, Forgetting*, trans. Kathleen Blamey and David Pellauer (Chicago: University of Chicago Press, 2004), 296–305.

15 See Reinhart Koselleck, *Futures Past: On the Semantics of Historical Time*, trans. Keith Tribe (New York: Columbia University Press, 2004), 2, which explains my interest in taking *historical time* as an approach to the theorization of melodrama. For more, see Jane M. Gaines, "Even More Tears: The Historical Time Theory of Melodrama," in *Melodrama Unbound*, ed. Christine Gledhill and Linda Williams (New York: Columbia University Press, 2018), 325–39.

16 See Koselleck, *Futures Past*, 2.

17 On Koselleck's reception in the US, see Stefan-Ludwig Hoffmann, "Koselleck in America," *New German Critique* 44, no. 3 (2017): 167–187. His major essays were translated into English in the early 2000s, but the last essays only in 2018. On this, see Sean Franzel and Stefan-Ludwig Hoffmann, "Introduction: Translating Koselleck," in Reinhart Koselleck, *Sediments of Time: On Possible Histories*, trans. and ed. Sean Franzel and Stefan-Ludwig Hoffmann (Stanford: Stanford University Press, 2018), ix–xxxi.

18 See Hayden White, "Preface," in Reinhart Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts*, trans. Todd Samuel (Stanford: Stanford University Press, 2002), on the term "theories of history" as opposed to "philosophy of history."

what I call the "differences of times," the present of necessity differentiating itself from the past as well as from the future that it is "not yet."[19] What can a theory of *historical time* tell us about two technologies at their advent? It may be, however, thinking of technologies, that the historical phenomena in question are *incomparable*, and incomparable in two senses of the term, the so-unlike-as-to-be-impossible-to-compare or the novelty that is so much more amazing than what has gone before as to be just *incomparable*. Let's be honest, however, and reveal what is behind such a comparison, for what we really want to know is what havoc *has been* and *will be* wrought by the amazing digitization of everything. Thus I propose to think the technologies in question on arrival, that is, appearing in the "now" as distinguished from the "before now," even astoundingly as "never before," that is, in terms of the relative "difference of times," one way into which is to ask how copyright grapples with new technologies.

II. Two Media Pirates a Century Apart

Elsewhere I have called the pre-copyright period in US film history the "heyday of copying."[20] More precisely, I would now date early motion picture "piracy" as concentrated in the years 1897 to 1907. As I said, my interest is in testing the validity of comparing this "copying heyday" with the 2005 appearance of cyberlockers, a new storage technology turned into a shady business whose founders were similarly charged with "piracy."[21] There are eerie parallels between these two so-called "pirates" a century apart—Philadelphia's Siegmund Lubin, the early cinema "Pirate King," and "cyberpirate" Kim Dotcom, founder of the cyberlocker business Megaupload Ltd., in 2020 still fighting the US Department of Justice (DOJ) in a series of lawsuits filed in 2012 when the DOJ raided his New Zealand compound.[22]

19 See Jane M. Gaines, "Copying Technologies: Two Pirates, Two Centuries," in *Oxford Companion to Early Cinema*, ed. Charlie Keil and Rob King (Oxford University Press, forthcoming), where I take up the 1902 and 2012 cases of motion picture "piracy" relative to the charge of unauthorized "copying" in more detail.

20 See Jane M. Gaines, "Early Cinema's Heyday of Copying: The Too Many Copies of *L'Arroseur arrosé*," *Cultural Studies* 20, no. 2–3 (May 2006): 227–44.

21 See Gaines, "Early Cinema's Heyday," on the copying "heyday" as well as Peter Decherney, *Hollywood's Copyright Wars: From Edison to the Internet* (New York: Columbia University Press, 2012).

22 Legal commentary on Megaupload has been slow to appear. The best overview is the documentary *Kim Dotcom: Caught in the Web* (Annie Goldson, 2017). That the raid was in violation of New Zealand law and that the US and New Zealand do not have an extradition treaty contributes

Like Lubin before him, Dotcom, actually German ex-patriot Kevin Schmitz, built a lucrative business. Megaupload by 2012 was leasing forty-three data centres with 180,000 regular users and averaging 50 million site visits per day. The other fascination this case holds is the outrageousness of Dotcom's inventive circumvention of US copyright law, for, quite unbelievably, he got around the very provisions of the Digital Millennial Copyright Act of 1998 (DMCA) by following the letter of the statute. How? Prolific users in the "Uploader Rewards" programme could earn as many as five million reward points that would be worth up to $10,000 in cash, an especially delicious parody of consumer rewards deals.[23] Megaupload could not be indicted on this basis, however, because it was their customers who uploaded copies of the popular film *Ghostbusters*. Under the DMCA, since the web host is not liable for the actions of users, Megaupload couldn't be found in violation of copyright on this basis.[24]

"The Internet in its nature shocks real-space law," writes copyright historian Lawrence Lessig.[25] Legal historians, it seems, are as concerned about the "disruption" of tradition and the "end of copyright" as film and media historians are worried about "rupture," the most extreme form of which is another "end"—the so-called "death of cinema."[26] But a word of caution about comparisons between legal history and technological history given

to the international intrigue although this legal saga is too peripheral to my argument to take up here. See also Enigmax, "The Mega-Money World of Mega-Upload," *TorrentFreak*, June 6, 2010, http://torrentfreak.com/the-mega-money-world-of-megaupload-100606; Adi Robertson, "Kim Dotcom Getting Copies of Data Seized in Megaupload Raid," *The Verge*, 9 September 2014, http://www.theverge.com/2014/9/9/6128457/court-rules-police-must-give-km=dotcom-access-to-megaupload-files; Chris Cook, "New Zealand Supreme Court Knocks Back Kim Dotcom's Appeal over Illegally Gained Evidence in MegaUpload Case," *Complete Music Update*, February 4, 2020, https://completemusicupdate.com/article/new-zealand-supreme-court-knocks-back-kim-dotcoms-appeal-over-illegally-gained-evidence-in-the-megaupload-case/.

23 *United States of America* v. *Kim Dotcom*, 2012 WL 149764 (E.D. Va.), 2. On the relevance of DMCA reform, see Ross Drath, "Hotfile, Megaupload, and the Future of Copyright on the Internet: What Can Cyberlockers Tells Us about DMCA Reform?" *John Marshall Review of Intellectual Property Law* 12, no. 205 (2012): 204–41.

24 For background on the first challenges the cyberlocker represented for the copyright regime, see Ramon Lobato, *Shadow Economies of Cinema: Mapping Informal Film Distribution* (London: Palgrave Macmillan, 2012); Ramon Lobato and Leah Tang, "The Cyberlocker Gold Rush: Tracking the Rise of File-Hosting Sites as Media Distribution Platforms," *International Journal of Cultural Studies* 17, no. 5 (2014): 423–35; and Nick Marx, "Storage Wars: Clouds, Cyberlockers, and Media Piracy in the Digital Economy," *Journal of e-Media Studies* 3, no. 1 (2013): 1–27.

25 Lawrence Lessig, *The Future of Ideas* (New York: Vintage Books, 2001), 199.

26 See Monika Dommann, *Authors and Apparatus: A Media History of Copyright*, trans. Sarah Pybus (Ithaca: Cornell University Press, 2019), 5 and 7, on media history and copyright; Gaudreault and Marion challenge the "death of cinema" by counting how many times over a century "cinema,"

that while the latter with its interest in technological advents is caught up in the political economy of the social, the former, by convention, ignores social conditions. Where the two histories might be considered together (despite the reluctance of legal theorists) is in the evolution of what social science takes to be "legal norms."[27] Here, "piracy" plays an odd part, not only as aberration from a norm of copyright "respect," but as an indicator of the well-kept secret of reproductive technologies, from photography and phonography to computation. The secret that every user knows? These machines make copying easy. Still, we wonder what the machine that projects the motion picture film print has in common with the storage service that systematizes access to popular moving image works—two such unlike delivery systems, not to mention conditions of reception.[28] They both cause trouble as a consequence of their unanticipated newness. Thus, what we might not have considered here is relative modes of time, that is, the what "was" relative to the advent of the copying technologies in question. Both of these piracy cases illustrate the precariousness of market control which depends upon regulation on the basis of copyright's short-term monopoly grant—the ostensible "protection" that insures profitability. The technologies in question here endanger the very basis of regulation. Two modalities of time issues emerge: new and unanticipated capacity to duplicate then circulate and the disjuncture between legal past and technological present, which is where I will start.

Returning to the copyright skirmishes between industry leader Thomas Edison and upstart Siegmund Lubin, one has to remember that judges can't be relied upon to grasp the finer points of technological operations. Indeed, the struggle regarding the extension of copyright protection from lithographs and photographs to motion photography is a historical lesson in deference to legal precedent despite technological change. For it is here that we see copyright doctrine looking *backward* to precedent, and the reverse—nascent motion picture companies looking *forward* to new business

variously defined, has already died; see André Gaudreault and Philippe Marion, *The End of Cinema? A Medium in Crisis in the Digital Age* (New York: Columbia University Press, 2012).

27 Dommann refers to the law's doctrinal dedication to itself and use of "ahistorical" concepts as well as its proclaimed insularity from social conditions. This is "incomprehensible," she thinks, because the law is focused on that which is "outside the law" (*Authors and Apparatus*, 9–10). I take up her additional point that what social science takes up are "legal norms" rather than the law per se. The kinds of "legal norms" that interest her emerge during "media transformation" and evolve.

28 In the last decade a range of studies addressed the "future of the movies" by comparing delivery systems. See note # 9. Bordwell, *Pandora's Digital Box* and Tryon, *On-Demand Culture*.

in film print sales. To be more specific, market control hinged on the legal difference between a photograph and motion photography at the turn of the century. Now we might object that kinetograph inventor William Kennedy Laurie Dickson also wrestled with the difference between the still photograph and moving pictures. However, the inventor's challenge was the technical problem of registration.[29] In contrast, the judge in *Edison* v. *Lubin* (1902) struggled with legal doctrine, which led him to approximate motion pictures to "a photograph," the single category of protection available to film companies at the time since only the photograph was protected under the 1865 statute. Paradoxically, if the motion picture was a *plural* "aggregate of photographs" it was not *a* singular photograph and therefore was not covered by the relevant statute. The resulting legal uncertainty contributed to the market free-for-all in which every US company got "in on the game" of duping and remaking each others' films, from Méliès' *Trip to the Moon* (1902) to so many Biograph, Edison, and Lubin pillow fights. In retrospect, this hold up based on legal intractability seems rather ridiculous but what we have here is a case of temporal disjuncture—present statutory doctrine deferring to the 1865 historical past when confronted with unexpected technological change, but also differential rates of change, as we will see.

But "differences of times" (the past impinging on the present) challenge us to think how to grasp the two advents at the beginning and at the end of the century, and by the "time we get to" the cyberlocker, something has already happened in the century's middle, for after motion pictures, broadcasting needed to be approximated to "performance," and after that another new technology "shocked" existing law—the videotape recorder. That law was stunned by the question of the legality of "off-air" taping of copyrighted television shows, giving rise to the dispute staged in *Sony* v. *Universal Pictures* (1984).[30] It is now, then, not only technological transformation of the delivery system from mechanical to computational but also a question of "use." Bringing us up to date are the lawsuits against Megaupload beginning around 2012 filed by copyright owners 20th Century Fox, Viacom, and Disney.[31] Megaupload's bogus "uploader rewards" confirms that "use" is now an established copyright consideration. Yet a century after *Edison* v. *Lubin*

29 See Paul Spehr, *The Man Who Made Movies: W. K. L. Dickson* (New Barnet: John Libbey Publishing, 2008), ch. 12.

30 *Sony* v. *Universal Studios, Inc.*, 480 F. Supp. 464 US 417 (1984).

31 *Twentieth Century Fox Film Corp., Disney Enterprises, Inc., Paramount Pictures Corp., Universal City Studios Productions LLLP, Columbia Pictures Industries, Inc., and Warner Bros. Entertainment, Plaintiffs* v. *Metaupload Ltd., Vestor Ltd., Kim Dotcom, Mathias Ortmann, and Bram Van Der Kolk*, April 7, 2014.

(1902), copyright is still about property-like claims to ownership, despite the exponential increase in apparent propertylessness that epitomizes cloud computing. So new, yes, but not so new given the persistence of ownership.

If there is one place that the social enters the law it is where "use" begins to figure in the history of copyright doctrine and thus seen "over time" in the cinema century in the transformation of the distribution of popular film and television. Here is an admission that copying technologies (from the photograph to moving pictures to video) testify to ever increasing ease of duplication as seen in the legal shift from "theft" to "uses." By the time, post *Sony* v. *Universal* (1984), we arrive at the Megaupload cases, it is not only businesses that are accused of "piracy," but "users" as well.[32] Whether we're considering the book, the music, or the film and television industry, "use" of copyrighted material has historically seen entertainment product as "works of authorship."[33] Given proprietary "authorship," copyright translates into ownership disputes, new conflicts arising all over again. So new, yes, but not so new either. Now, to turn to our second issue—the total unpreparedness for limitless copying.

We're suddenly back to our prognostication question. Here Motion Picture Producers of America (MPPA) anti-piracy watchdog Jack Valenti speaks the unspoken: reproductive technology threatens the very profit basis of the entertainment industry.[34] But by the time Valenti gasps: "Ten thousand copies as pristine as the original," it is already too late. So why was the MPPA, the ultimate example of Hollywood-in-bed-with-Washington, so unprepared? Legal historian Lawrence Lessig has argued that at the inception of networked computation, culture industries failed to see that "to upload" is also "to copy."[35] Again, here are our two historical repeats—the unreadiness of the law to regulate the ever-increasing reproductive function and the disjuncture between legal doctrine and technological capability. In her overview covering several centuries, Monika Dommann sees this as early as the shift from the seventeenth-century letterpress to recording technologies based on photography. As she summarizes the centuries-old

32 More recently, however, entertainment producers-distributors have taken another view. See Ernesto van der Sar, "Rapidshare Aims to Convert Pirates into Customers," *TF*, March 26, 2010, https://torrentfreak.com/rapidshare-aims-to-convert-pirates-into-customers-100326/.

33 See Jane M. Gaines, *Contested Culture: The Image, the Voice, and the Law* (Chapel Hill: University of North Carolina Press, 1991), ch. 1.

34 For an overview of anti-piracy campaigns, see Kelly Gates, "Will Work for Copyrights: The Cultural Policy of Anti-Piracy Campaigns," in *The Contemporary Hollywood Reader*, ed. Toby Miller (London and New York: Routledge, 2009), 486–99.

35 See Lessig, *The Future of Ideas*, 199–211.

pattern, although economic regulations were "permanently eroded by technology," despite the impossibility of regulating the unregulatable, codes were "yet continuously expanded."[36] There is then a kind of futility to legal exercises dictating "use" and as well as to controlling copyright's short-term monopoly grant extended to the owners of works of culture. Dommann concludes, describing this never-ending exercise, that the legal edifice withstands the disruption as evidenced in the way it "requires constant reinforcement" in response to every new media phenomenon.[37]

So my interest here is admittedly not what one might expect. Clearly it is not opportunities for capital but neither is it really doctrinal disputes which in the end for us only provide an example of temporal disjuncture between advent and regulation. More importantly, legal history offers another angle on the problem of technological "newness." This is because it is about time lag as disjuncture, or "then" related to "now," the precedent held over and newly applied to that to which it may not actually apply. Copyright law, however, is painstakingly slow to evolve, sluggishly stubborn to respond to the technological upgrade, the exigencies of the market, or the enthusiasm of users to "share." Concomitantly, we want to know where to start if we want to develop a theory of history as it relates to technological change. Because, as I am arguing, comparing emerging technologies always raises the "differences of times" question which is finally not just about precedent per se. It is, however, about relative times as in how "now" is like or unlike "then," and if we have this now, "What later?" Yet thinking new technologies together with copyright doctrine may also be about the futility of "time and time again" as much as the futurity of "What next?"

What these copying technologies have in common is that they were legally unanticipated—whether we find this in the internet's "shock" or photography's "surprise."[38] That historians of copyright would in the current decade come to see copyright pirates as in the technological vanguard only confirms our premise.[39] Lessig has even proposed that every technology can expect a period of piracy.[40] But what is "vanguardism" other than to be

36 See Dommann, *Authors and Apparatus*, 8.

37 See ibid., 186.

38 The reference is to the original French title of Bernard Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law*, trans. Elizabeth Kingdom (London: Routledge, 1979): *Le droit saisi par le photographie* (Paris: Maspéro, 1973), or *The Right Seized by the Photograph*, alternatively "surprised" by the photograph.

39 See Lobato, *Shadow Economies of Cinema*.

40 See Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Creativity* (New York: Penguin Press, 2004). Lessig even wrote a brief in support

in anticipation of the technological future? In addition, the problematic of the lag is also, from another point of view, a vantage relative to expectation as we will see below. For the vantage of the incomparable or amazing is so close to the unanticipated. And here it would seem that "piracy," the very epitome of a "legal norm," is not exactly a violation of the law. After all, "piracy" is just an accusation of extra-legal activity, and *only* that in times characterized by the absence of doctrinal certainty. Furthermore, "piracy" is to be expected given the uncertainty of the applicability of copyright law at each juncture when new technologies (photography, motion pictures, streaming services) take the law "by surprise."

III. *Historical Time* Theory

1. "New Time" and the Relocation of the Future Relative to the Past

Turning back to Koselleck, we get a longer view and more distance on technological vanguardism. Koselleck studied what he termed "*Neue Zeit*" ("new time") or "*Neuzeit,*" alternatively, "New Times." What was his interest? He wants to know, relative to ancient and medieval times, how another time, a new temporality, has been experienced as what we call "modernity." Whereas earlier periods would have lived "time" according to a recurring past or the expectation of sameness, this "new time" was unlike the time before. This "new time," over the past three hundred years, Koselleck thinks, has been increasingly oriented towards a future time. Or, as he puts it, the more a time is "experienced as a new temporality," or as "modernity," the higher the expectation placed upon the future.[41] What has happened and is happening given the modern concept of "history in general" is another perspective on time in which the future and the past have been "relocated" vis-à-vis one another.[42] In Koselleck this "relocation" is read in the discrepancy between

of Megaupload. See "Affidavit," *United States of America* v. *Kim DOTCOM, et al.* His "copyleft" position was based on the idea that the cyberlocker accommodated "non-infringing as well as infringing uses," and this argument needs to be historically situated relative to US statutory as well as case law which evidences ever more convoluted stretching in order to achieve the desired outcome. Here we see a foundational doctrinal principle as a built-in tension, consequence of a contradiction. To put it simply: while profit requires restriction, innovation requires availability and circulation but then restriction all over again. From the point of view of media history, restriction versus availability translates into a vacillation between regulation and unregulated usage.

41 See Koselleck, *Futures Past*, 3.

42 See ibid., 4.

our experience of things and the anticipation of things for which we have as yet had no experience, with an ever-shortening gap between the two.[43] Among other things, he sees our increased awareness of the "weight of the future" as an "effect of technological-industrial transformation."[44] Whether today we attribute this future awareness to industrial technology or not, what is altered is our investment in a future time. However, let's note that this near synonymity between technology and modernity explains why "technological modernity" may be used to explain "technological modernity" to the tautological degree that the term "modernity" has lost what few analytical teeth it might have had. Worse, technological change is often both an effect and a cause: consequence and determinant, or as often a symptom of "modernity." Koselleck's term "New Times," however, allows another vantage, encouraging as it does a comparison of the "modes of time" to which I turn next.

2. *Historical Time* as the Relativity of Past, Present, and Future

Second, in Koselleck, the concept of *historical time* could be called a theory of the relativity of times, each mode of time defined by the others, a relationship that reminds us of what we forget but know all too well: that there is no present without its status relative to the past that it *will come be* and the future that it *cannot just yet be*. Some will recognize in any theory of *historical time* Heidegger's three "ecstases," ever and always in play: past, present, and future.[45] And I do mean "in play" for the three never stand alone and constantly change places. Here we might think of the difficulty of trying to study either of our two pirates, past or present—alone without the other—from either historical end point or starting point, especially given the pressure stemming from sheer expectations placed on the technological future, not to forget the "future of cinema." While each mode of time modifies the other, there may be a weighting towards one of the three.

43 Koselleck's original terms are "*Erfahrung*" and "*Erwartung*," which may resonate with German speakers. Thanks to Malte Hagener.

44 See Koselleck, *Futures Past*, 3.

45 Heidegger scholar Magda King, in explicating the philosopher's own formulation of the "three ecstases of temporality," comments on one relevant passage: "The difficulty of this passage is not to be mitigated, nor can Heidegger be reasonably blamed for what is, after all, the ungraspable nature of time itself." Magda King, *A Guide to Heidegger's* Being and Time, ed. John Llewelyn (New York: State University of New York Press, 2001), 223.

3a. *Historical Prognostication* and the Paradox of "New Times"

Thus to the third concept which is the centre of my interest here. Beyond the theory of *historical time* that posits three alternating modes of time there is in Koselleck an intriguing approach to what could be called *historical prognostication*. And I am daring to pick this up from the suggestive hints he drops. But to get to "foretelling the future" we will need to pause just a moment to *admit* something to ourselves. We must admit (as I began by urging) that one of the unspoken motives of historical research *is to project*, that is, based on the technological formations of the past, to anticipate the direction of innovation toward the future. Such projection is sometimes achieved by means of *historical hold over*: the telegraph becomes the telephone; television at its inception is briefly called "image radio."[46] We read printed "books" on paper and now also read e-"books." Thus Friedrich Kittler's theory of history suggests the present as consequence of the past, monopoly begetting monopoly: "What will soon end in the monopoly of bit and fiber optics began with the monopoly of writing."[47] Let us concur that this is historical prediction, however finessed.[48] Koselleck—and I'm sticking my neck out here—is more important to us than Kittler, and not only because his scheme is finally more grand. It is also because any "history of technology" especially needs to consider what theories of history are operative.[49] Technology, historically synonymous with "modernity"/modernization, as we have seen, is above all implicated in the question of future times.[50]

46 Rick Altman references "image radio," but also "screen radio." See Rick Altman, *Silent Film Sound* (New York: Columbia University Press, 2014), 16.

47 Kittler, *Gramophone*, 4.

48 Beyond this chapter is the question of the genealogical in the sense of ancestry, as in the search for precursors of "digital cinema" which might return us to telephony and the kinetoscope in an attempt to "grandfather" in ancestors. Or, considered as variation on "the present as the outcome of the events of the past," there is technological artefact excavation to determine historical DNA on the assumption that genetic make-up can be traced in digital descendants.

49 Benoît Turquety argues for going beyond the ontological "What is it?" since "digital cinema" is more of a "historical epistemology" question. See Benoît Turquety, "Toward an Archaeology of the Cinema/Technology Relation: From Mechanization to 'Digital Cinema,'" in *Techne/Technology*, ed. Annie van den Oever (Amsterdam: Amsterdam University Press, 2014), 63.

50 See Bruno Latour, *Down to Earth: Politics in the New Climatic Regime*, trans. Catherine Porter (Cambridge: Polity, 2018), 16, on what he calls the "great modernization project," which may now appear impossible because "there is no Earth capable of containing its ideal of progress, emancipation, and development." In 2020 we may be less apt to anticipate future "possibility" than to expect "no possibility at all" in a future time. Latour's hypothesis is that the modernization that led to globalization is likely the end of the Earth.

But let me back up to connect the problematic of *historical time* with Koselleck's theorization of what we are calling "New Times." There is a feature too little remarked upon in our comparisons between old and new technologies: It is the "over time" phenomenon, as in what happens or transpires, as we say, "over time." Already, the field has proposed technological history as consideration of "when old was new," as well as expected obsolescence.[51] But there has been less work on, more precisely, this feature of the "over time what then" as in "over time," by means of repetitions and returns, the new will "no longer" be what it once was when it was received as innovation or wonder or revelation. One example of technological transformation "over time" might be Tom Gunning's theory as to how a novelty becomes "second nature." The new thing, as he says, becomes "second nature" when, after use and "over time," we become habituated to it.[52] But that's not all, as I keep saying. Because right here, right at the recognition of "newness," there also appears to be the *paradox* of "New Times," to extrapolate from Koselleck. Paradoxically, every new time is not so new. It is that, on the one hand, every time, on arrival, is "always new, insofar as every present differentiates itself from every past and every future." Yet on the other hand, with "time" we reference seasonal cycles and the predictable planetary pattern of the earth's rotation.[53] Here, as well, is the aspect of daily life lived as the "time and time again" of ritual event and custom. Now to restate the *paradox* of "New Times": *Every* time is immediately felt to be a new time as different from the last, but it is also always a repetition, *a time again and again*. Every time arrives as a new time, a time unlike past times, but, in spite of that, a time like other times. In a comparison of technological advents—motion picture film duplication and distribution and cyberlocker streaming services—the new appears to disrupt regulatory doctrine. But that is not new. The technology appears anew and yet disturbs the law all over again.

51 On "when old was new," see Wendy Hui Kong Chun, "Introduction: Did Somebody Say New Media?," in *New Media/Old Media*, ed. Wendy Hui Kong Chun and Thomas Keenan (New York and London: Routledge, 2006); on "What is new?," see Lisa Gitelman and Geoffrey B. Pingree, "Introduction: What's New about New Media?," in *New Media, 1740–1915*, ed. Lisa Gitelman and Geoffrey B. Pingree (Cambridge, MA: MIT Press, 2003); see Thomas Elsaesser, *Film History as Media Archaeology: Tracking Digital Cinema* (Amsterdam: Amsterdam University Press, 2016), on obsolescence.

52 See Tom Gunning, "Re-newing Old Technologies: Astonishment, Second Nature, and the Uncanny in Technology from the Previous Turn-of-the-Century," in *Rethinking Media Change: Aesthetics in Transition*, ed. David Thorburn and Henry Jenkins (Cambridge, MA: MIT Press, 2003), 39–60.

53 See Reinhart Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts*, trans. Todd Samuel (Stanford: Stanford University Press, 2002), 148.

Let's add a corollary to the paradox of "New Times" and call it the *proximity of old to new*. Koselleck says of the repetition that "precisely that which is new in it [...] turns into the everyday and loses its meaning as a new time."[54] That the "new" might be so close to the "becoming old" may not have occurred to us exactly. Yet the cinema century provides multiple examples of a novelty getting "used up" such that when a technology becomes everyday it is "no longer new." Circulating as commerce, it loses its function as a novelty—think moving pictures, sound-on-film, colour television, or QuickTime. To repeat Koselleck's paradoxical principle another way: the recurrence that produces the "over again" (no longer new) also produces the "again" (as new). A somewhat more controversial example might be how historians take the "cinema of attractions" and project that concept forward onto the present blockbuster. In Tom Gunning's original theorization, the "cinema of attractions" is said to "come again" in the 1990s "Spielberg–Lucas–Coppola" cinema of "special effects." But here I want to point to the inadequacy of Gunning's formulation in which the "cinema of attractions," as he says, "goes underground" after 1906.[55] For the "underground" relies on the metaphor of space rather than that of time and thus too neatly avoids the present differentiating itself or the "differences of times" problematic. What theory of history is operative here, if any? In short, we need to think the relativity of times. Implicated would be comparisons between the original "cinema of attractions" and later "attractions" that suggest that the earlier phenomenon was in some way superior to contemporary special effects.[56] We suspect in such cases either the dismissive "not new" or "not as good as the original," neither of which takes account of the paradoxical "never entirely new," as we will see.

But wait. In Koselleck there is also an exception to this paradox of "New Times" in which the "always new" on arrival is yet "again" via the repetition of times. The exception comes to our attention with the emphasis on *historical prognostication*. For intriguingly Koselleck declares that "history is always new and replete with surprise."[57] However, he qualifies, that if we are not

54 Ibid., 150.

55 See Tom Gunning, "The Cinema of Attraction: Early Film, Its Spectator and the Avant-garde," *Wide Angle* 8, no. 3–4 (Fall 1986): 70.

56 Sobchack and Bukatman imply that the first "cinema of attractions" was superior to the later special effects. See Vivian Sobchack, "'Cutting to the Quick': Techne, Physis, and Poiesis and the Attractions of Slow Motion," and Scott Bukatman, "Spectacle, Attractions, and Visual Pleasure," both in *The Cinema of Attractions Reloaded*, ed. Wanda Strauven (Amsterdam: Amsterdam University Press, 2006).

57 See Koselleck, *The Practice of Conceptual History*, 135.

so surprised, and predictions "turn out to be true," it would follow from this that (and I almost don't dare to repeat this): "history is never entirely new." To repeat: "history is never entirely new." And from "never entirely new" Koselleck transitions to the assertion that there must be "longer-term conditions or even enduring conditions within which what is new appears."[58] There are, he goes on, long lasting structures and persisting processes that extend beyond singular events, the singular being where historical surprises occur—the Berlin Wall comes down and the Soviet Union collapses. This sets up Koselleck's theory of history that strives to explain the success of prediction, the underpinning of which is the principle of "interplay between singularity and repetition."[59] This singular-multiple figure, in turn, is reliant on a structure of temporal stratification or layering that he would continue to develop over his career.

3b. *Historical Prognostication* and the Theory of Three Time Layers

Let me briefly sketch out this temporal stratification structure as a means of double-checking the problem of *historical prognostication*, or the prediction of things and events thought to be unpredictable. *Historical time* is multi-layered, and, what is more, the distinct layers are subject to what Koselleck terms different "velocities of change."[60] Very broadly, he proposes three layers: The first layer is the short-term "before and after" in the day to day in which prognoses are difficult to make (and where historical surprises occur). Middle-term trends constitute the second layer, effectively "conditions" which might seem impervious to the actions of change-agents, here exemplified by "modes" or "techniques of production" as well as "revolutionary" upheaval. As applied to our historical research and writing, this would operate on the first and second layers—the first a discovery of an aberration that could complicate the narratives of progression (or regression as in "attractions" to "special effects"). For instance, we might find evidence that the kinetoscope (whose heyday was 1894–1896) persisted as an attraction into the 1920s in the exterior foyer of the motion picture theatre as this image shows. Then, the second layer would be our Marxist analysis of the capitalist "mode of production" as it explains both work place "speed-up" and dizzying rates of change that produce technological obsolescence, the exception to which would be residual media.

58 See ibid.
59 See ibid., 136.
60 See ibid., 135.

Fig. 2.2. Kinetoscope machines exterior motion picture theatre, 1920s.

Let's admit the agony of toggling between the first and second layers which defines one pattern of academic work. So if you're frustrated with the first two layers you may be more intrigued by Koselleck's third layer. Now this third layer will *not* likely resonate for readers if I refer to it as the "metahistorical duration plane," Koselleck's term.[61] This third layer, however, deserves our attention as the most persistent and enduring of structures. Here Koselleck locates "juridical conditions" which affords me one explanation for the gap between intellectual property doctrine and technologically new forms of property. That explanation? Layers of time shift at different rates. But more intriguing is Koselleck's recourse to anthropology to describe this third layer, one so much slower than the others, that is, slower given his theory of relative "velocities of change."[62] And how else to locate recalcitrant resistance to change other than by recourse to deep culture where anthropology finds its patterns?[63] What does anthropology reveal to him? The stubbornness of human beings. Koselleck is convinced that human behaviour is slowest to change. Behaviour lags behind technological invention.

61 See ibid., 143.
62 See ibid., 135.
63 See ibid., 143.

In my analysis, this third layer is where ideology functions. Fleshing this out, however, requires going beyond Koselleck. While his examples are the "truth of proverbs," as, for instance "Pride goeth before a fall," we can suggest a host of aphorisms addressing the problematic of change.[64] Common-sense wisdom weighs in, shaping how ordinary people adapt and modify their experiences of leaving home, saving money, or using new devices. In wide circulation, for instance, are the ideas that "What goes around comes around" and that there is "Nothing new under the sun," or equally banal, "Here we go again." No, Koselleck cautions, do not underestimate empty "words of wisdom."[65] So it may be that not only are we analysts of trends but we are also participants in the culture we analyse. How quick we are to agree that multi-tasking is "killing the ability to concentrate" and to concur that digital devices are "shortening attention spans." Or we may claim that our devices are dividing us while in the same breath say that they are bringing us together.[66]

Historical prognostication: Now what are the implications for our research? Koselleck's layer theory of historical change or "rates of change" underwrites our own exercises in historical prediction. It is only insofar as these "formal structures" are themselves repeated that historical prognoses become possible.[67] To wit: "It is not only the formal repeatability of possible history that guarantees a minimum amount of prognostic certainty, but success also depends on taking into account the multilayeredness of historical courses of time."[68] Taking revolution as his example, he finds the "singularity and repetition" pattern in the way that while "[e]very revolution is unique," within the concept of revolution one finds "repetition," "return," and even "cyclical movement."[69]

Since Jacques Derrida has found similar principles in *Being and Time*, this deserves some final attention. Derrida also finds in Heidegger's theory of history this multi-layering but adds to the differentiation between the layers certain rhythmic qualities. Each historicity has its "own movement and temporal rhythm: the historicity of equipment, of technology, the historicity of institutions," types of art, and artistic styles.[70] It is even that each layer

64 See ibid.

65 See ibid., 145.

66 This common-sense view is encapsulated in Sherry Turkle's title *Alone Together: Why We Expect More from Technology and Less from Each Other* (New York: Basic Books, 2011).

67 See Koselleck, *The Practice of Conceptual History*, 135.

68 Ibid., 143.

69 See ibid., 136.

70 Jacques Derrida, *Heidegger: The Question of Being & History*, trans. Geoffrey Bennington (Chicago: University of Chicago Press, 2016), 208.

with its own type of concatenation produces something more political in that the layers evidence a "fundamental inequality of development."[71] Finally, in Derrida, Heidegger is found to have conceived historicity as a "circularity," a coming around "that surprises us not like the unforeseeable caprice of a new fashion, of a new or simply future mode."[72] Here it would seem is Koselleck's singular "surprise," rather like "unforeseeable caprice," albeit placed within the larger pattern of "circularity" or repetition. But perhaps we should pause here to ask about the meaning of "unanticipated" as opposed to "anticipated." Then consider what we do with two slightly different meanings of "unanticipated"—the "unforeseen" as opposed to the "beyond expectation"? We might think of the relatively unanticipated digital projection "roll out" of 2011–2012 referenced earlier. Then we can compare this "surprise" with another "unforeseen" technological development, my favourite example of which is the unprecedented computational capacity to copy. Then again, "unforeseen" might even apply to the "wrong" or incorrect prediction. One recalls here the 1999 "wrong" prediction of the Y2K computer systems world disaster. Here was the prediction that led to technological preparedness in the West and the highly ideological corollary that because Third World computers were likely not set to the year 2000, computer system dysfunction would produce airport disaster on January 1, 2000, in nations like India. That disaster did not happen.

In conclusion, let me say that I am of two minds about Koselleck's theory of *historical prognostication*. This is because if historical predictions are borne out this could become support for an argument that history is a science which is where I will not go.[73] But the other part of me finds productivity in the *question of* historical research as prediction of the future. And here is exactly where Koselleck's third layer is most useful. That layer, most resistant to change, is a layer to which we all unthinkingly contribute. It is likely that even given our sharp analytical awareness we subscribe to an idea that "the more things change, the more they remain the same." And this goes for my project of comparing two piracies a century apart. The very project commits to the discovery of "time and again" repetition before I have even started. I admitted that I was stumped. Then again, if the present features the new but not so very new at all, we're back to Kittler's "loopiness" of history.

71 See ibid., 143.

72 See ibid.

73 From the point of view of film and media studies, the best challenge to history as science is Philip Rosen, *Change Mummified: Cinema, Historicity, Theory* (Minneapolis: University of Minnesota Press, 2001).

Now what do I say about the OCFH (one click file host) development of the cyberlocker access to cloud storage, continuing, despite shut downs, to be wildly popular with movie fans worldwide? In a recent study, servers were located in eight countries and 151 streaming cyberlockers found linked to thousands of crowd-sourced "indexing websites." Remarkably, the authors of the study characterize their data as just a "slice" of the streaming cyberlocker "ecosystem."[74] What global video piracy has to do with the piracy of the first decade of motion pictures is not a phenomenon outside of what I have proposed as an explanatory *historical time* paradigm. Yet even that paradigm is only too reducible to a level of common-sense ideas to which we all subscribe. To say that "history repeats itself" is both a totally empty truism *and* a valid analytical approach to incomparable inventions a century apart.

I do not know if I am glad or sorry that we have been "found out."

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74 Ibosiola et al. say that post-Megaupload the cyberlocker "ecosystem" has grown; see Damilola Ibosiola, Benjamin Steer, Albaro Garia-Recuero, Gianluca Stringhini, Steve Uhlig, and Gareth Tyson, "Movie Pirates of the Caribbean: Exploring Illegal Streaming Cyberlockers," *Proceedings of the Twelfth International AAAI Conference on Web and Social Media* (2018), 131–40, https://ojs.aaai.org/index.php/ICWSM/article/view/15008/14858. See also Nan Zhao, Loïc Baud, and Patrick Bellot. "Exploring Cyberlockers Content," *International Journal of Multimedia and Image Processing* 4, no. 3–4 (September/December 2014) for a discussion of the content.

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About the Author

Jane M. Gaines is Professor of Film, Columbia University, and Professor Emerita of Literature and English, Duke University, both in the USA. In 2018 she received the Society for Cinema and Media Studies Distinguished Career Award. She is the author of three award-winning books: *Contested Culture: The Image, the Voice, and the Law* (University of North Carolina Press, 1991), *Fire and Desire: Mixed-Race Movies in the Silent Era* (University of Chicago Press, 2001), and *Pink-Slipped: What Happened to Women in the Silent Film Industries?* (University of Illinois Press, 2018). Her articles on intellectual property and piracies, documentary theory and radicalism, feminism and film, early cinema, and critical race theory have appeared in *Cinema Journal*, *Screen*, *Critical Inquiry*, *Cultural Studies*, *Framework*, *Camera Obscura*, and *Women and Performance*.