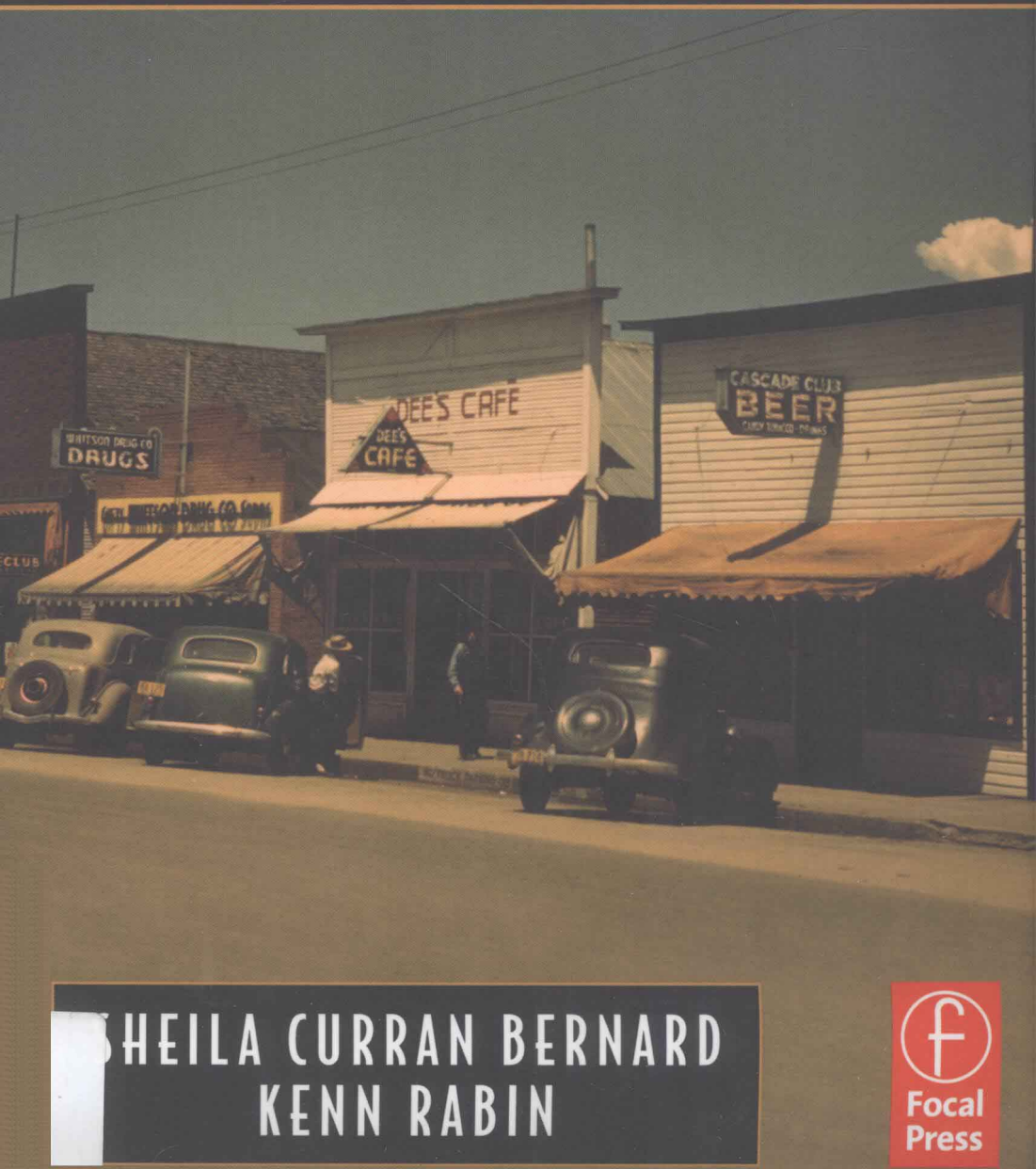
ARCHIVAL STORYTELLING

A Filmmaker's Guide to Finding, Using, and Licensing Third-Party Visuals and Music



SHEILA CURRAN BERNARD
KENN RABIN

Focal Press

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Sheila Curran Bernard
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More Praise for *Archival Storytelling*

One of the best—and most needed—texts I have seen in a while. . . . The challenge is to keep what is a fairly technical aspect of filmmaking interesting without compromising the quality and depth of information. The authors have done an exceptional job in this regard by the careful interweaving of interviews with researchers, filmmakers, and legal experts through the factual material. . . . There is the strong sense of being in the presence of experienced filmmakers and researchers who accept that while there are standard practices, archival use and intellectual property laws etc. are contingent fields in which each case must be assessed and dealt with on its merits.

—Bruce Sheridan, Chair, Film & Video Department,
Columbia College

I've been making historical documentaries for many years, yet I learned new things from this book. This is the definitive guide for archival research for documentary filmmakers. An invaluable resource.

—Mark Jonathan Harris, Distinguished Professor,
School of Cinematic Arts, University of Southern California,
and writer/director, *The Long Way Home* and *Into the Arms of Strangers*

Long overdue, this is the resource guide we've been waiting for. Connecting the nuts and bolts of the search for a shot with the current challenges of new media and fair use, *Archival Storytelling* brings the past right up to the present.

—Gail Dolgin, co-producer,
Daughter from Danang and *Summer of Love*

It's hard to imagine a more organized, comprehensive dissection of Byzantine material. The authors have produced a tremendous guide for all who use archival resources. Best of all, because of their effort, I believe more individuals will be able to access and properly utilize such material. This book will serve filmmakers and, in turn, the public for years to come.

—Thomas Speicher, Video Production Developer,
Pennsylvania College of Technology, and producer, *Degrees That Work*

Not simply a "how-to" manual, it is also a discussion of ideas, issues, and history that creates an enjoyable text even when the subject matter becomes complicated. . . . The real world examples, the roundtable discussions, and the exploration of ideas and issues surrounding the technical aspects are very welcome and well done.

—Dustin Ogdin, filmmaker, Spoke Digital Films

Praise for Bernard's *Documentary Storytelling*

With the availability of high-quality affordable cameras and editing equipment, documentary filmmakers today enjoy a freedom in shaping their films that their counterparts a decade ago couldn't have imagined. As the new aesthetic is shaped, Sheila Curran Bernard's brilliant and effective *Documentary Storytelling* . . . aims to guide the Errol Morrises of tomorrow with great advice and practical knowledge that every documentarian would benefit from.

—BackStage

With all the buzz over blockbuster docs, Focal Press serves up a perfectly timed winner in a much-neglected area. True to the nature of the beast, the book is more about filmmaking as a whole, and how and where storytelling weaves into the overall process. It succeeds in covering every aspect without belabouring any. Not only does Bernard write from the viewpoint of an award-winning filmmaker (she's a writer, director, and producer), but the last 100 pages include extensive interviews with a wide range of acclaimed documentarians.

—*Canadian Screenwriter* (Writers Guild of Canada)

[A] pragmatic exploration of the role of narrative in nonfiction filmmaking . . . In writing this volume Bernard demonstrates to documentarians how story can be more effectively incorporated into every level of nonfiction filmmaking from conception to development and pre-production, in the field and in the editing room. Her discussions incorporate many examples from contemporary documentaries to illustrate a variety of salient points.

—*Documentary* (International Documentary Association)

While documentaries are nonfiction, they are certainly not objective, and even the smallest choices in writing, filming, interviewing, narrating, or scoring can drastically alter the perspective of the film, and in turn, the audience. Bernard is keenly aware of the power of persuasive images, and her insistence on complexity and integrity is a consistent theme throughout the book.

—*The Independent* (Association of Independent Video and Filmmakers)

Archival Storytelling

Acknowledgments

Filmmaking is highly collaborative, and we each owe a debt of gratitude to the many individuals and organizations with whom we've worked and from whom we've learned over the years. We want to specifically thank the individuals consulted during the preparation for this book, and especially those whom we interviewed; all were extraordinarily generous with their time and expertise. We are also grateful to the Graduate Program in Journalism at the University of California, Berkeley; the MFA Program in Documentary Film and the Film and Media Studies Program, both at Stanford University; and the Center for Internet & Society at Stanford, for hosting two exciting afternoons of panel discussions on the legal and ethical issues of archival storytelling for our benefit. We learned a great deal not only from the panelists but also from the students and filmmakers who joined us. At Focal Press, we are grateful for the enthusiasm and expertise of senior editor Elinor Actipis and a remarkable team including Michele Cronin, Dawnmarie Simpson, and Cara Anderson. We need to thank our manuscript reviewers, including Dustin Ogdin, Bruce Sheridan, Thomas Speicher, and others, for being so generous with their time and insight. Any errors in this book, however, are ours, and we'd be grateful if you'd bring them to our attention at www.archivalstorytelling.com.

Sheila wishes to thank Kenn for agreeing to this enterprise and committing to many enjoyable hours of detail-filled, long-distance collaboration, along with a very productive trip to the Bay Area. She thanks her friends and colleagues in Boston, New York, Plainfield, Princeton, Washington, and beyond, as well as every member of the extended Bernard family, especially Kathleen and David, and of course, Joel D. Scheraga.

Kenn wants to thank Sheila for her sharp mind, good spirits, and unerring sense of structure and economy. Thanks also to Robin Jacobson and to all his teachers and mentors on the journey. Too many names, but special thanks for inspiration to Martin Smith, Raye Farr, Jerome Kuehl, Bill Moyers, Lynne Farnell, Judith Vecchione, the late Henry Hampton, and Jon Else. He dedicates his work on this book to the memory of L. Richard Ellison.

Sheila Curran Bernard
Kenn Rabin
September 2008

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CHAPTER 1

Introduction

Filmmakers tell stories—about the past, the present, even the future. Some stories are invented, while others are drawn in part or entirely from real life. In many cases, this storytelling is bolstered by the use of archival materials—motion picture, stills (including artwork and graphics as well as photographs), sounds, and music—that were created by someone other than the filmmaker. These archival (or "third-party-owned") materials may be amateur or professional in origin. Under this definition, a commercially-recorded song used in a film's soundtrack, a home movie found in the attic of the filmmaker's grandfather, or a photograph obtained from the local historical society would all be considered "archival."

In some cases, the use of archival material adds real-world verisimilitude to fictionalized storytelling. For example, the Academy Award–nominated *Good Night, and Good Luck*, directed by George Clooney, incorporated television footage (including news, entertainment shows, and commercials) from the 1950s in its portrayal of the work of journalist Edward R. Murrow. In *The Queen*, director Stephen Frears's look at the British royal family in the wake of Princess Diana's death, actors portrayed Queen Elizabeth, Prince Charles, and Prime Minister Tony Blair, but Diana was present on screen only as she appeared in archival news footage.

In documentary programs, archival materials may be used as visual (and aural) *evidence* of the past. The multipart series *Eyes on the Prize* used news footage, independent films, period music, and more to tell stories of America's civil rights movement. Werner Herzog's *Grizzly Man* relied on a video diary, shot by naturalist Timothy Treadwell, to explore the psyche of a man who would risk his life to live among wild

bears. One of the most powerful moments in Alex Gibney's *Enron: The Smartest Guys in the Room* comes from an audio recording in which Enron traders can be heard telling power company executives to shut down parts of California's electric grid.

At other times, archival materials are used to fill a general need for visuals without being specific to time or place. This can provide a valuable and even entertaining context for a subject. Filmmaker Michael Moore, for example, uses advertising, public relations, and news footage to humorous effect in *Bowling for Columbine.*

Archival materials may also be used not to invoke the past but instead to augment a filmmaker's exploration of the present. For example, while it can be more expensive to purchase footage than to shoot it, there are times when it makes sense to do so to overcome limitations of budget, access, or skill. A filmmaker working in central Ohio, for example, might seek to acquire modern-day aerials of the Manhattan skyline simply because the expense of traveling to New York, renting a helicopter, and hiring a crew—all the while hoping for good shooting conditions—can be prohibitive. Someone making a film about zoo animals in Scotland might want to acquire footage that shows related animals living wild in remote locations. Footage of space exploration, the inner workings of certain powerful corporations, or extreme weather conditions are all examples of material that you might prefer to acquire rather than film yourself.

What Are Archival Materials?

This range of acquired images and sound generally described as *archival audiovisual materials* might include:

- *Illustrative* moving images, such as "beauty" shots of famous landmarks, sunsets, time-lapse photography (flowers opening, night falling over a city), and aerial photography (motion picture shot from a helicopter, blimp, or other aircraft). These are often owned by commercial enterprises and sometimes by the individuals who shot them.
- *Historical* moving images and stills, such as footage and photographs of newsworthy events. In general, the greater the importance of the moment and those involved, the more likely it is that you can find this material at commercial entities, such as television networks or newsreel houses. But historical images exist for a wide range of events, some of which may have never reached the national news and instead were documented by local crews

and archived at local television stations, libraries, historical societies, and even personal collections.

- *Personal* moving images and still photographs include a wide (and with changes in technology, growing) body of materials, including home movies, home videos, and snapshots owned by individuals or families.
- *Commercially-owned* photographs of any kind, generic or specific, including press photos, stock photos from agencies, wire service photos, celebrity service photos, and others.
- *Graphics* such as antique maps, fine art (including paintings, textiles, and such), editorial cartoons, movie posters, and newspaper headlines. Flat art may be used to augment visuals for events that predate the invention of photography or to provide context and commentary on historical events. (How were artists responding to political or social upheaval or other events?) A newspaper headline may serve when there is no film or still coverage of an event; a headline can also quickly and efficiently push the story ahead.
- *Music*, including music not created expressly for your project (as a "work for hire" by a composer, for example), and preexisting recordings that come from CDs or other sources not originally recorded by you.
- *Sound*; for example, the "wild" (unsynchronized) audio of events in lower Manhattan on September 11, 2001, or a radio broadcast of Edward R. Murrow reporting on the London blitz in the 1940s. Wild sound can be used to bring still images to life; it can also help to evoke a time period in a feature film (as when filmmakers place actors in front of a radio to listen to an actual historical speech or news broadcast).

Who Uses Archival Materials?

When people think of archival use, they probably think first about historical filmmakers such as Ken Burns and Lynn Novick, whose World War II series, *The War*, premiered on American public television in 2007. But a surprisingly diverse group of people uses archival materials, including not only documentary filmmakers but also advertising agencies, public relations firms, news organizations, fiction filmmakers, makers of educational material, students, and the general public. Any time you order a photograph from the collection of ship images at Ellis Island, or search through military records at Ancestry.com, or visit

a local museum or historical society, you're benefiting from the preservation and accessibility of archival materials.

Among the most influential users of archival materials are advertising agencies, whose (relatively) high budgets have shaped today's market and, to some extent, driven prices up. These agencies tend to rely on commercial stock houses; while fees may be higher than elsewhere, turnaround times are often shorter. In contrast, independent filmmakers may have less money but more time to do the digging that's often required to find material in alternative, less expensive places.

Nearly *all* filmmakers, at some point in their careers, will want to use third-party materials or will be asked to license their own work to someone else. And despite perceptions, this use does not need to destroy your budget or schedule. With some creative thinking and perseverance, even filmmakers with limited funding should be able to find useful and affordable materials.

Who Owns Archival Materials?

The short answer is: everybody, from you and your family (those boxes of photographs you've been meaning to sort, along with home movies, audiotapes, school papers, and more) to some of the wealthiest individuals, institutions, and corporations in the world. Bill Gates, the U.S. government, and the British Crown are just a few of the world's notable collectors.

Challenges of Archival Storytelling

The complexity of finding, using, and licensing archival images and sound can be daunting, even to experienced filmmakers. The following are some of the challenges filmmakers routinely face:

- The rights to the photo, footage, or music you want to use are either not available or the license fees are so expensive you can't possibly afford them.
- You've seen footage you'd like to use but have no idea who created it or where to find it.
- You found footage that was perfect, but people in the image are singing a song, and now you have to negotiate *separately* for permission to use that song.
- Although you cleared the necessary rights for your film four years ago, some of them were time limited and are now expiring, so you can no longer sell or distribute your film.

- You've got archival material in hand that works well in your film, but the identity of the rights holder can't be found.
- You've discovered that someone else has incorporated portions of your work in their program without your consent.

We'll address these issues and others in the following pages, drawing not only on our own experiences but also those of other filmmakers, legal experts, film and music researchers, insurance executives, and others.

The Importance of Access

Although it can be difficult to find and use third-party sounds and visuals, it's our hope that in offering strategies for doing so effectively and economically, we can encourage filmmakers to continue to make the effort. This is *our* heritage, and filmmakers have a right and even, arguably, a responsibility to draw on that heritage in the creation of new work. "When we stop allowing each generation to be actively involved in interpreting and reinterpreting history, then we're creating a real disservice for everyone involved," filmmaker Orlando Bagwell, a program officer in the Media, Arts, and Culture Unit at the Ford Foundation, said in a 2005 interview. "That's when history is really exciting; when each generation has its chance to consider it in terms of their times and needs and experiences." The good news is that a lot of talented, determined people are working to find effective and creative ways to resolve many of these issues, and we explore many of their efforts in these pages.

The Impact of Technology

Fifteen years ago, a researcher or producer had to visit an archive to see what material was available, much of which was news or other mainstream content. Today's researcher can do a growing amount of investigation online, using the Internet to find an unprecedented variety of elements for film storytelling: text, music, high-resolution digital photography, and moving images. (Over time, more and much longer clips will not only be viewable online but will be downloadable to your edit room.) These materials can not only be archived (stored), but also scooped up (ripped) from cyberspace instantly and then edited or sequenced into any story or playlist we wish, using software that even 10 years ago was expensive, complex, and reserved for professionals—and is now both inexpensive and user-friendly. The resulting edited or "mixed" images and sound can be saved (burned) and stored

locally, or delivered (published, distributed, or exhibited) instantly via broadcast or DVDs, or made available to anyone via new (but increasingly mainstream) venues such as YouTube, Facebook, Flickr, and others. Ultimately, it can play not only on television sets and computer screens, but also on iPods, cell phones, and whatever technology comes next.

Such freedom also requires responsibility, and it is our hope that this book, by clarifying and defining such terms as *fair use*, *copyright*, *intellectual property*, and *Creative Commons*, can better prepare media makers to not only protect their own creative rights but also to understand and respect those of others. At the same time, we hope this information will further prepare readers to fight for the accessibility and affordability of materials that are, at present, slipping out of reach.

Reading Between the Images

An interesting aspect of archival footage is the information it unintentionally conveys. Some of the earliest surviving snippets of captured movement depict intimate and ordinary moments of daily human life. These were created as "tests" for the newly-invented medium of motion pictures: a sneeze, a kiss, a train pulling into a station, an image of New York Harbor from a circling vessel. Almost immediately, however, the power of film to record larger events was recognized: Early film cameras focused on the battlefields of war, the aftermath of a catastrophic earthquake in San Francisco, the stunt of electrocuting an elephant to argue for the safety of direct versus alternating electrical current, and the spectacle of space travel as imagined by French filmmaker Georges Méliès.

But look more closely at these early motion pictures, whether they capture actual or staged events. Edwin S. Porter's early drama, *The Great Train Robbery*, reveals more about the geography of Essex County, New Jersey, in 1903 (where the exteriors were filmed) than about the activities of cowboys and train robbers in the Wild West. Filmmaker D.W. Griffith's early short, *The New York Hat*, offers a look at the clothes, traffic, and even sunlight on a New York street in 1912, while it also exhibits the talents of many individuals who would go on to great renown.

Any visual record of the past is likely to have value. A colleague in charge of a local television news archive (1950s through 1970s) in a major American city was running out of storage space for her collection. She was encouraged to eliminate such items as the evening news stories about random apartment fires from over 50 years ago. She refused. "How are we going to know what a city fire truck looked like 50 years ago, or the firemen's uniforms, or what equipment they had

and didn't have?" she asked. Archival materials can provide the historian, film historian, and sociologist with unexpected treasures. They truly are a window into our past.

On the other hand, archives face some very real and pressing challenges. Even as collections continue to grow, space is limited, money and time are tight, and technology continues to evolve, rendering materials in one format obsolete and requiring their migration to another. In addition, all audiovisual materials deteriorate over time, so archivists must be concerned with their preservation—a goal that at times may be viewed as conflicting with pressure to make (or keep) collections accessible for use by scholars, filmmakers, and others.

The Camera Can Lie

Even as archival images can be used as evidence of the past, they also require careful scrutiny and analysis. All too often, there is a tendency among filmmakers and their audiences to take photographs and motion picture footage at face value as unmediated depictions of actuality. Instead, it's important to explore such critical questions as why, for whom, and by whom the images were shot. Many filmmakers use newsreel footage, for example, without knowing that it was sometimes staged, with actors portraying figures of recent history. Some of the world's most iconic images were created for the purposes of propaganda or public relations. Conversely, there are iconic moments that many people believe they've seen on film, and archivists tear their hair out trying to find them—*but they were never filmed.*

The ability to read and question archival imagery is an important part of basic media literacy. Viewers should be aware that the elements of a film, including the historical elements, are subject to manipulation at many stages of their creation, from the moment they're originally shot to their use, decades later, in a documentary or dramatic film. Sent to shoot a mob, the original camera operator may have shot tight and close, creating an impression of a crowd where none existed. Intent on portraying an individual's guilt, a news photographer may have used unflattering angles and harsh lighting or perhaps worked in a darkroom to juxtapose two unrelated images. Farm Security Administration photographers, sent out in the 1930s to capture images of farmers and laborers, often photographed them from low angles to make them look more noble. More recently, filmmaker Martin Scorcese set out to make a concert film of the Rolling Stones, but his team carefully selected and even suggested outfits for some audience members who would appear in the front rows, ensuring that they (in particular, the women) would

be younger and more stylish than is reportedly typical for a Stones concert. Fifty years from now, as a result, *Shine a Light* may offer a reliable visual record of the Stones performing, but a flawed record of the group's following.

In addition, users of archival visuals—moving images in particular—can and often do alter color, speed, even background sound. With the right sound effects, a peaceful archival street scene can become the site of conflict, as shots and screams are heard. This footage, with its new audio track, may then be used by a subsequent producer, and unless he sufficiently authenticates his archival find, the facts of the original scene may become even further distorted.

Who Owns the Past?

Some filmmakers, especially those who've been priced out of using third-party images and music that they believed were critical to their films, are angered by the notion that these materials can be protected for many decades as "intellectual property." In time, however, many of these same filmmakers struggle to determine what to charge when others want to use *their* footage as third-party material in new works, or they're dismayed to find that their footage was used in ways they didn't authorize and for which they weren't compensated.

Throughout the book, we explore intellectual property issues with the help of leading figures. In particular, we look at key areas of property law that can benefit filmmakers, most notably the *public domain*—materials that are not under copyright protection, either because they weren't eligible for it, copyright was not sought, or copyright has expired. There is a surprisingly vast and diverse body of such materials available, if you know where to look. (Not that it's always available to you, as a filmmaker, for free. *Ownership* also makes a difference. One collection recently tried to charge a filmmaker upwards of $4000 to use two illustrations by Leonardo da Vinci, who died in 1519—and that was their discounted price!) We also look at a legal *exception* to copyright in the United States, a principle known as *fair use*, in which copyrighted materials can be used for specific purposes and in reasonable quantities without licensing.

With that said, many important collections have been privatized or are part of someone's investment strategy, rendering our collective history as a "product" for which significant money can be sought. Archives are big business. Corbis, a privately owned digital stock photography company founded in 1989 by Microsoft founder Bill Gates, owns licensing rights to roughly 100 million images. According to a 2006 *Business*

Week article, "Bill Gates' Corbis is the feisty No. 2 in the $2 billion market for managing photos, video, and other imagery for the advertising, marketing, and publishing industries." Corbis's primary (and much larger) rival, Getty, went up for sale in January 2008 and sold, according to *The New York Times*, for $2.4 billion.

When Do You Need to Think About Archival Materials?

In general, films start out as ideas or concepts, or perhaps a broad attraction to a situation or subject. An experienced filmmaker begins to explore these broad areas and find a *story* or *stories* through which to present the subject and its themes. At the same time, the filmmaker begins to consider the *approach*—how she'll tell the story. Will there be interviews? Animation? Archival footage or stills? Music? How will these materials be used, what role will they play in the film, how critical is it that the filmmaker obtain *exactly* the images or sounds being considered?

It's fair to say that most filmmakers think about both archival images and music later in a production than they should. This is a problem for two main reasons. First, archival materials can often inspire new or different thinking about a film's subject or story. Second, the route to finding, licensing, and acquiring masters of third-party materials can be complicated and costly. The more time you leave for this work, the better able you'll be to handle obstacles *and* the more likely it is that you'll be able to find suitable, lower cost and even rights-free alternatives where necessary.

Ideally, you should be thinking about third-party materials from the start of a project. In many cases, a beginning awareness of archival resources informs your film storytelling even at the outline and treatment stage, *before* you shoot. If you're going to write fundraising proposals or present "pitch" documents to production executives or others with the power to "greenlight" your film, you need to know if your plans are realistic. Does footage of that deep-water archeological excavation even exist? Do you anticipate a wide commercial release for your film, and if so, do you expect to be able to raise enough money to pay rights fees for expensive Hollywood clips? You may want to refer to archival materials as you shoot. And certainly during the various stages of editing—assembly, rough cut, fine cut, picture, and sound lock—you'll be making archival choices and probably conducting additional research as your storytelling goes in unanticipated directions.