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# New Challenges for IP in the Film Industry

A Study on how the Swedish Film  
Industry manages Copyrights

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## Abstract

The film industry in Sweden is in constant change. This thesis focuses on the different authors in film projects and their rights. We have examined how the rights affect the development of the industry. Interviews have been made with five production companies and other people involved in the film industry in an effort to map out how the Swedish industry looks today and what challenges it is facing. Who the author is has a great influence on the financial and legal structure within the business.

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## List of Abbreviation

BK – Bern Convention

CA – Swedish Copyright Act

EU – European Union

GATT - General Agreement on Tariffs and Trade

IFPI - International Federation of the Phonographic Industry

IPR – Intellectual Property Right

NCB - Nordisk Copyright Bureau

PK – Paris Convention

SFI – Svenska Filminstitutet

SRe – Sveriges Regissörer

STIM – Svenska Tonsättares Internationella Musikbyrå

TF – Teaterförbundet

TRIPs - Trade Related Aspects of Intellectual Property Rights

TROMB - Teaterförbundets Rättighets- och Media AB

WCT - Wipo Copyright Treaty

WIPO – World Intellectual Property Organization

WTO – World Trade Organisation

# 1. Introduction

”Movies don't create psychos, movies make psychos more creative”<sup>1</sup>

## 1.1 Background

When Mauritz Stiller was producing the movie “Gösta Berlings Saga” in the 1920's it took him several days, perhaps a month to complete it after which it was distributed to a small number of cinemas. He produced more than ten movies a year. Today, it takes several months to create a movie and it is distributed not only to a large number of cinemas, but also distributed on VHS, DVD, at film festivals and on the Internet. Mauritz could not have guessed what was going to happen with the film industry, that someone could easily copy his film and distribute it among friends and also upload it to the Internet and make it available to everyone online. Maybe he would be fond of the idea, as it was not easy to distribute “Gösta Berlings Saga”. Cinemas were a luxury reserved for city people and in Sweden, only the bigger cities like Stockholm, Göteborg and Malmö could frequently show movies. In smaller places, the movie was not shown in cinemas but in churches or community halls. It took a long time for movies to reach the countryside. Today, with fast Internet connections, DVD etc, movies are available to the public and it is easier and cheaper to watch a movie this way. On the other hand, seeing a movie in the cinemas has become more expensive and is still a luxury to some people. It still takes time for movies to reach the countryside, but this is due to less interest (read less inhabitants) and it is an issue of affordability for the cinemas. Both in the US and Europe, the cinema audience decreases and this is of course a result of the increased access to the movies on the market and the different distributors competing to reach their target customers. One of the cinema industry's best slogans “movies are best seen in cinemas” is more important than ever in marketing, in order to retain the audiences.

The first movie premiere in Sweden was in 1896<sup>2</sup>. Films had not been seen as an art form with high cultural status in Sweden. A reason for the skepticism was that the potentially harmful effect of motion pictures on children had been discussed ever since the early days of the art form. In the beginning of the 20th century, one doctors stated that “Hysteria is an illness which among children is not rare, and I am convinced that the movies showed at the cinemas have as their purpose to spread this illness among children”<sup>3</sup>. These debates and the fact that the first movies were presented in the form of news and not as entertainment have strengthened the strong bond between the government and the film industry in Sweden. This development was mirrored in the rest of Europe, where film has always been strongly connected with cultural policy and governments have supported these arts since the birth of the industry.

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<sup>1</sup> *Scream*, (1996), directed by Wes Craven

<sup>2</sup> The premiere included several short movies, which were showed at the Malmö Exhibition (The Nordic Industry- and Handicraft exhibition).

<sup>3</sup> Timm, Mikael, *Dröm och förbannad verklighet, spelet om svensk film under 40 år*, (2003), p. 15

The United States also instituted certain restraints on the early film industry but these were not cultural- or industrial policy, as in Europe. Their purpose was to improve public morals, or at least, try not to make them worse!<sup>4</sup> This divergence is still big between the two continents and has affected the way the industries work. From the start, motion pictures have been strongly influenced by the government in Sweden. Since the 1960's the public authority SFI has controlled the governmental support. It was stated early on that art, such as film, is very expensive and the prioritized cultural policies are essential to the survival of the industry<sup>5</sup>. The Swedish film business is small and production companies have always been dependent on state subsidies. But there are significant developments in this field as well. With the advance of the digital era, the incentive structure for the industry has shifted towards capital from private investors instead of state subsidiaries.

Another thing that has changed over the years is the awareness of the rights involved in a film project. Actors involved in motion picture projects are now more careful and aware of their rights. For example, Harriet Andersson was not entitled to any copyright when she was filming "Sommaren med Monika" in 1953<sup>6</sup>. Many actors have "lost" large amount of money because they were not aware of their rights. Today actors and other people in the production have a different view and knowledge about copyright and what they can claim as their rights. If your performance can reach the whole world in the blink of an eye, it is harder to retain control and derive revenues from your work. This has increased the importance of maintaining control of your copyright. These developments have increased the perceived value of copyrights, and IPR awareness is key – not only for the author of a work but also for the production companies.

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<sup>4</sup> Timm, (2003), p. 18

<sup>5</sup> Timm, (2003), p. 11

<sup>6</sup> Interview with Christina Olofson, Stockholm 2005-12-13

## 1.2 Objectives

Our intention with this thesis is to map out the intellectual properties that are relevant in a film production. We want to find out the different properties and analyze them and their function. We also want to see how the production companies are dealing with these rights and analyze this as well.

We have chosen to address this thesis to the business actors in the film production industry. They will be the ones who will have most benefits of the content in this thesis. During this text we want to analyze the situation in a wide perspective, using the judicial arena, the business arena and also the administrative arena. We want to look upon the different aspects of the film business, the Intellectual Property Rights (IPRs), the economic aspects, the time limitations etc, and how they work together. The thesis does not direct to the consumers, the film audience, or the legislators.

During the work with the thesis there are some questions that we want to find answers to.

- What kinds of Intellectual Property Rights are involved in the film production?
- Who owns these rights?
- How are the rights protected?
- In what ways can the owner claim his/her rights?
- How are the film production companies managing these rights?
- Is it possible to handle these rights in a more efficient-, controlled- and/or financial structured way?

## 1.3 Delimitation

In this thesis we will focus on the Swedish film industry and its production companies. This business area is rather small in Sweden (25 movies/year). However, in order to make a complete map out, more companies than those we interviewed would have to be contacted. We do not compare with film industries in other countries, it would be too complex. Unfortunately, we do not have sufficient time to make such extensive map out in this thesis.

However, a certain international comparative study how the business works regarding agreements, financial structures and collecting IPRs will be made throughout the thesis.



In the definition film there are a number of different kinds of films included. In Sweden there are mainly three categories; feature film, short movie and documentary film. We have focused only on the first category, feature film.

The process from having a script includes different phases until the audience can see the movie on the screen. There are mainly five different phases during the film process: development, pre-production, production, post-production and distribution. We have chosen to focus our essay to the production phases, from pre-production to post-production.

## 1.4 Definitions

### 1.4.1 Feature film

Full length, fictional film (not documentaries or shorts), generally for theatrical (cinema) release.<sup>7</sup> A full length in Sweden means approximately 90 minutes (2000 meters). This length differs between countries.

### 1.4.2 Production company

A company that is responsible for the whole film project, from the start with the script until the end when the film is distributed.

### 1.4.3 Producer

The producer is the natural person, a company or another legal entity that executes the production of a movie by financing, develop project, shoot and complete it and by this obtain and control for the rights involved in the film process.

### 1.4.4 General Film Agreement "Filmavtalet"

General agreement between the Swedish government and the film industry. The latest agreement was signed in September 2005.

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<sup>7</sup> Litwak, Mark, *Dealmaking in the film & television industry 2nd edition*, Los Angeles (2002) p. 378

#### *1.4.5 Completion Bond*

A form of insurance, which guarantees completion of a film, in case the producer exceeds the budget. Completion bonds are sometimes required by banks and investors to secure loans and investments in a production. Should a bond be invoked, the completion guarantor may assume control over the production and be in a recoupment position superior to all investors.<sup>8</sup>

#### *1.4.6 The team*

The staff that is hired for the production of a film project includes; producer, director, actors, photographers, stage designers, music creators, sound creators, costume designers, make up artists, choreographers and editors. Those mentioned artists are what we call “the team” in our essay.

#### *1.4.7 Final cut*

The last stage in the editing process. The right to the final cut is the right to determine the final version of the picture<sup>9</sup>.

### **1.5 Method**

Since our first goal in this thesis is to map out the Intellectual Property Rights issues in the Swedish film industry, we looked into what companies that was active in this area. We selected five of them and interviewed people responsible for these issues. Those are Götafilm AB, Sonet AB, Moviola AB, Illusion Film AB and Cine-qua-non AB. Mentioned companies are rather similar in size, but they differ in production capacity. They produce 1-4 movies/year. By interviewing the companies, we wanted to broaden the understanding and the importance of the IPRs involvement in the business. We think that the selection of companies represents the industry and we had to limit the scope because of the amount of work this thesis requires. We realize that in order to be able to map out the whole Swedish film industry, more time would be needed.

To get a more extensive view of the legal aspects, we interviewed a lawyer at All Together Now AB. We have completed the interviews in person or via telephone. We have also posted follow-up questions to the interviewed people who kindly helped us to straighten out our questions. All people that have been interviewed in person have also been recorded.

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<sup>8</sup> Litwak, (2002) p. 375

<sup>9</sup> Litwak, (2002) p. 379

Once we completed the interviews, we sorted out and compared the similarities and differences among the companies IPRs strategies and management.

Due to the lack of literature and case law regarding this topic, the interviews have been of great importance.

## 2. Intellectual Property Rights

“I’m just a figment of your imagination.”<sup>10</sup>

### 2.1 Concept of Intellectual Properties

All production companies operating in the film industry are dealing with intellectual properties as a major source for their work. These properties are dealt with on a daily basis and are the foundation of the film projects. Without the intellectual property, the project is not worth so much and the company is, more or less, an empty box.

Intellectual property is a social construct invented for the purpose of allowing us to interact with and manage assets that do not exist as tangible phenomena. These assets have no physical form, and though they exist, and can potentially be worth a fortune, we cannot touch, or even see them. The concept intellectual property only exists because we say that it exists, because we communicatively share beliefs and we are loyal to these beliefs<sup>11</sup>. The most common intellectual properties that can be found in the economies today are copyright, patent, trademark, design, and know-how. The impact of the intellectual properties has strengthened over the past decades and even industries that work with physical products often have a balance sheet showing mainly intangible assets, rather than tangible assets, which was the strength in former industries. For film production companies, it is the opposite way, intangible assets are common in the balance sheet and have always been. Only properties like technical equipment and studios are tangible assets. But the importance of the intellectual properties has increased for these companies. Today, companies must protect their properties more carefully in this digital era, e.g. Internet has made it easier to get hold of a movie by simply downloading it from networks with no consent from the copyright holder. Since violation can be done more easily, the importance and value of the intellectual properties has increased. The major effort for the companies is to protect them and keep them inside the company or gain profit from them by licensing and spread copies of the work to the customers.

The most valuable thing for the production company is the right to produce the movie. If this foundation is built, the movie can be completed and the company can earn money on the finished production, which is a work created by the team. The original film is copied and distributed and the copied samples are tangible assets, you can feel the copy of the movie, hold it in your hand and physically put the disc, e.g. a DVD into your DVD-player. By having a copy of the movie in one’s disposal, one has not achieved the right to the intellectual property that the movie is built upon, only the physical copy.

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<sup>10</sup> *Men in Black* (1997), directed by Barry Sonnenfeld

<sup>11</sup> Petrusson, Ulf, *Intellectual Property and Entrepreneurship, Creating Wealth in an Intellectual Value Chain*, (2004) p. 53

By the great influence that intellectual property has in the world economies, deals about these properties are common and agreements are often between companies from different countries. With this development, the economies, the interests of merchandise and also the political interests has grown and changed in structure. The concept of intellectual property has had a great influence in this development and it becomes more and more important to different actors on the market. With this influence, the traditional systems in the business sphere have to be changed due to the concept of intellectual property. However, so far, intellectual properties are based on national legal systems and national legal cultures. Intellectual capital cannot, in the same way as other forms of capital, be separated from culture and language<sup>12</sup>. The American way of dealing with and protecting intellectual properties in the film industry differs a lot from the Swedish, due to the different cultures. The US has a more commercialized view of the film industry where money is most important, while Europe wants to honour the art of making movies.

## 2.2 Constructing capital in an intellectual value chain

Producers want to have control over their intellectual properties, in this case their film project. It is not necessary to keep all properties within the company, in order to maintain control. For example a film has to be distributed to render profit to the production company. Bringing the film on the market does not automatically means that control weakens. Having a structuralized business where the intellectual properties are organized will strengthen producers' control. This will result in better profits from the intellectual properties.

In order for Swedish production companies to complete a movie, co-producers are used and these producers want to have something in return, often the right to intellectual property. For the co-producer to be interested in the production, the producer needs to be able to claim intellectual capital and understand that the movie is valuable even before its completion. It is also important that the co-producer or even venture capitalists recognize intellectual property and other intangible assets of the production company thus motivating equity investments<sup>13</sup>. Both parties need to understand the complexity of the film production, what kind of IPRs that are involved.

In the Swedish film industry, independent venture capitalists are not that common, the productions are financed by other means, such as state subsidiaries. There are however some pioneers in this field. The production company, Isis Cataegis Pictures, (ICP) get all of their financial resources from venture capitalists. Their movies have had good turnovers and ICP has managed to give the investors 50% profit<sup>14</sup>.

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<sup>12</sup> Petrusson, (2004), p. 85

<sup>13</sup> Petrusson, (2004), p. 85

<sup>14</sup> Maria Domellöf-Wik, "Filmare utan statligt stöd", *Göteborgs Posten*, 2005-10-02

This action is more in line with the American way of creating financial means in a film project where private investors are most important.

In the film industry, many different kinds of intellectual properties can be found. The most important intellectual property is copyright, which permeates all the work within a film production. There are even other intellectual properties that are important and have increased in importance over the years. We can find trademark, which has a great impact on every business today, the film industry is not an exception. The business is today more competitive and the production companies are more aware of the importance of a strong trademark.

Design rights can be found in many film productions, e.g. “The Batmobile”. The car is used in the Batman movies and can be protected by design rights.

However, in our thesis we concentrate on the importance of copyright among the different intellectual property rights since the team’s contribution is subject for copyright protection.

### 3. The Process of Making a Movie

“Everything that has a beginning has an end.”<sup>15</sup>

We learned from our interviews and from literature<sup>16</sup> that there are mainly five different phases during the film process: development, pre-production, production, post-production and distribution. An important thing to remember when reading about the different phases is that one phase does not start when another ends, they are all connected and are floating into each other.

#### 3.1 Development

First there is a development phase, where the script author’s work is in focus. A film process starts when the producer receives a manuscript and starts to process the material together with the author. A manuscript could e.g. be based upon a book, a theatre play or it can be created on an independent story created by the author. In these situations important intellectual property rights are upheld by the author such as copyright for the script. For this copyright, the author is entitled royalties based upon the production. The royalties are achieved once the movie starts to render income. Often there is also a lump sum payment to the author when the production company decides to make a movie from his/hers script. When a script is based upon a book or theatre play it is important that the scriptwriter has permissions from the original author to the book or play in order to have the legal right to use it. These relations need to be settled before the production companies continue entering into phase two.

#### 3.2 Pre-production

In the second phase, the pre-production phase, financial funds are raised and the director is appointed. One of the director’s highest priorities during this phase is to cast the actors for the movie. The rest of the team needed for the movie is put together by the producer or the production company in cooperation with the director.

It is very important in this phase that the intellectual property rights are straightened out and regulated in agreements, preferably in written form.

Johan Fälemark, Illusion Film AB, explains that it has become more common that mainly actors use agents in order to secure their rights, both intellectual property and financial. The agent is involved during this pre-production phase when the rights are sorted out and the employment conditions are agreed upon.

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<sup>15</sup> *The Matrix Revolutions* (2003), directed by Andy Wachowski and Larry Wachowski

<sup>16</sup> Litwak, (2002), p. 26

In negotiations concerning matters between the actor and the production company, the agent represents the actor. This model is well-known and has been used a long time in the US.

As mentioned above, employment agreements between production companies and actors are agreed upon in this phase. In those agreements, except for the regulations according to the collective agreement, actors transfer their copyright to the production company to make it easier for the employer to distribute the movie without any further permission from the actor. It works the same way for other members of the team such as stage and costume designers. These agreements are to be signed before entering phase three.

Meanwhile the team is put together, the production company focuses on finding financial resources to the project. Fålemark stresses the importance of finding suitable investors, it is a prerequisite for the project to be able to continue.

In Sweden the producer works close to the director even when it comes to the financial part. If the director uses famous actors, it could be an incentive for investors to put money into the project. That will of course be beneficial to the production company and to the project as well.

The Swedish film industry is depended on state subsidiaries. Most resources spring from these funds. This has a cultural and political history. The government has formed the film industry in Sweden and still possesses influence. One of the most obvious ways to show this is the agreement, Filmavtalet, which is an agreement between the Swedish government and the film industry. In this contract it is decided how much money the government will spend on the film market in Sweden and how it will be divided. The economic funds are divided in three major parts: production, distribution and cultural activities. The latest agreement, signed in 2005, was decided to give extra support to women working in the field and to movies targeted for children<sup>17</sup>. The money granted from the government through Filmavtalet is administered by a special institution, Svenska Film Institutet (SFI). SFI divide the money to different funds and production companies can apply to these funds to get money.

Co-production is common in the Swedish film industry. Due to the fact that the companies operating in this market are small, their financial position is also weak. They need to work together to be able to complete a movie. It is not just the money that inspires the companies to work together; they can also learn from each other, use each other's skills, connections, actors etc. This benefits both culture- and financial exchange.

Fålemark explains that there are also possibilities raising money abroad. If there is collaboration between e.g. Sweden and Norway, money can be raised from both Swedish and Norwegian state subsidiaries. There are companies operating on the market that are only focusing on co-producing, one of the most

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<sup>17</sup> Maria Domellöf-Wik, "Film – en vinnare i regeringens budget", *Göteborgs Posten*, 2005-10-01



famous co-producer in Sweden is Film i Väst. Co-producers enter into a project with money or equipment and expect recoupment in some way.

As a security for the completion of the movie, it is common that the production company invests in a completion bond. This is often a claim from the investors to use a completion bond as a sort of security. If the project cannot be completed, the completion bond company will take over and make sure the movie will be completed.<sup>18</sup>

### 3.3 Production

The third phase is called production and that is where the movie starts to take form and the shooting takes place. As mentioned above, during this phase the rights concerning the team and the movie should already have been taken care of. It is during this phase that the actual movie is created and intellectual property rights are not mainly in focus. Instead, more practical issues are in focus such as working conditions according to employment and collective agreements.

### 3.4 Post-production

When the work at the shooting place is done, phase four starts. The movie shall be cut and music and sounds are edited. This is called the post-production phase. The intellectual property is once again in focus. The film editor works closely with the director when the movie is about to be cut. When the movie is finished in the editing room, sounds are added to the movie and the music is edited.

### 3.5 Distribution

The last phase is distribution. The movie is finished and are about to be distributed to different channels like the cinemas and video rental stores. The production companies use their connection through co-production and international cooperation to find suitable distribution channels.

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<sup>18</sup> More information about completion bond is found in chapter 7.10

## 4. Copyright

“You are arrested for being that ugly & for making that many copies.”<sup>19</sup>

In general, the Swedish law system is rather wide in its interpretations and the copyright regulations are not an exception. The regulations are not detailed and have left a large space of interpretation. Due to this lack of regulated legislation in the Swedish Copyright Act<sup>20</sup>, the film industry has come up with its own solutions in order to operate smoothly on the market. Some rules spring from praxis and other ones are written down in different agreements and especially the community agreements play an important role here. The most important thing is to remain the fundamental purpose of the copyright regulations, to protect creative work. However there are some rules in the CA, which are used in order to protect the film, which is important to consider when dealing within the business. In this chapter, we will give a brief introduction to the concept of copyright and also point out the importance that it plays for the film industry.

### 4.1 Historical background

It all began in the in the late 15th century in Europe when a rudimentary form of copyright was developed. This development took place at the time when Gutenberg invented the printing press. It started in Venice where sovereign rights were granted to tradesmen for the exclusive privilege to publish certain books. This system of granting "privileges" became a monopoly which quickly spread to other countries. It benefited both tradesmen and the state and gave the state some sort of control of the dissemination of religious and political content. This type of monopoly became a common practice in the 16th and 17th centuries.

In 1793 France adopted a legislation that was to serve as model for copyright statutes in many civil law countries. Throughout the 19th century almost all independent nations developed copyright laws, which recognized the author as the fundamental beneficiary for a limited period of time. General trends were toward increasing the classes of works eligible for protection, the broadening of exclusive rights in these works, and providing a longer term of copyright. Swedish legislators incorporated copyright protection into the Freedom of the Press Act in 1810.

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<sup>19</sup> *Men in Black II* (2002), directed by Barry Sonnenfeld

<sup>20</sup> Lag 1960:729 om upphovsrätt till litterära och konstnärliga verk

## 4.2 International cooperation

As one can see, influence from different countries has meant a lot for the development of the Swedish copyright legislation. But most influence has the conventions and other international cooperation had. After the building of the Freedom of the Press Act, the next momentous event in copyright history was in 1886, when the development of the Berne Union began. The Berne Convention for the Protection of Literary and Artistic Works (BK: Convention de Berne pour la protection des oeuvres littéraires et artistiques) was the first step in the attempt to develop a worldwide copyright treaty. BKs basic structure and main principle is about the principle of territory, which means that the national legislation is used in the specific territory. However, the national legislation must meet certain minimum requirements stated in the BK for a nation to be permitted ratification. Another important principle is the principle about national treatment. It means that citizen in other BK member countries should have at least the same right to protection as the citizens in that country.

Due to the elderly statements in the BK, the copyright section was updated with the WCT (Wipo Copyright Treaty) to meet the level of today's technical relations.<sup>21</sup>

Another convention that is of importance in the development of IPRs is the Paris convention, (PK: Convention de Paris pour la protection de la propriété industrielle) from 1883, which handles industrial protection of IPRs such as patent, trademark, and design but not copyright. Both BK and PK are built up from the same values and structures but handles different kinds of IPRs.<sup>22</sup>

PK and BK are administered by WIPO (World Intellectual Property Organization). WIPO is a Specialized Agency, a part of the UN and have 170 member countries.

Some of the trade related important IPR-issues were pulled out from WIPO and incorporated into the GATT (General Agreement on Tariffs and Trade) negotiations. At the same time GATT was reconstructed to an international organization, WTO (World Trade Organization). From the above mentioned negotiations a new agreement, "Trade Related Aspects of Intellectual Property Rights" (TRIPs) was concluded. TRIPs are built on the same grounds as BK and PK, but are also covering important rules about enforcement of IPRs. The important thing in the TRIPs-agreement is that it contains specific rules to protect IPR-holders. The agreement emphasizes that an IPR is of no use if it effectively cannot be defended or protected.

Also the Rome Convention from 1961 covers the copyright protection area, but for performing artists, phonograph producer and radio broadcast companies, with other words neighbouring rights.<sup>23</sup>

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<sup>21</sup> Koktvedgaard, Mogens and Levin, Marianne, *Lärobok i Immaterialrätt, 8th edition*, (2004) p. 42

<sup>22</sup> Koktvedgaard, (2004), p. 45

<sup>23</sup> Koktvedgaard, (2004), p. 44

Sweden has signed and implemented all of the above mentioned conventions.

Since Sweden is a member of the EU, directives made by the community are to be followed by its member states. Since the membership in 1995, several directives concerning copyright have been implemented into national Swedish legislation. The latest, 2001/29/EG (Infosoc), is about downloading from Internet, multiplying for personal use etc, was the ground for changing the CA in July 2005. At this stage there is no complete harmonization on copyright within the EU but directives such as “Infosoc” brings the member states legislation closer. The development is facing this direction since other IPR areas have been harmonized such as design and trademark. This is due to the increasing co-operation between companies over the national borders and since this kind of co-operation includes also for copyright, especially for the film industry, a harmonization might be a good idea. However, copyright differs a great deal from both trademark and design right. Copyright has in opposite to design and trademark not only an economic right, copyright also has an moral right. This right is not obvious in all cultures and this makes the harmonization difficult. In many EU member countries, the author has both economical and moral right. However, in Anglo Saxon countries such as Great Britain and the US, the copyright includes only the economical right. This is one of the issues that differ in the discussion regarding copyrights between people who believe that film is a cultural expression and those looking at copyright as an entertainment product.

The big international interest from different organizations and authority bodies shows that questions about IPRs are important. It is of great importance that general rules are outlined and that parties stick to them. This international development also proofs that IPRs are valuable assets for many people, companies and authorities.

### 4.3 Concept of copyright

Copyright or droit d’auteur is basically the legal structure that protects the rights authors, composers, artists and other creative individuals achieve for their works. Requirements for acquiring copyright are stated in the 1§ CA. The copyright act has a very broad scope and protects literary and artistic works, such as books, novels, magazines, poems essays dramatic works, musical works, film works, photographs, paintings and so on.

The man or woman who has created the work is the author. For example, a composer, who creates a composition, has the copyright to the music. If the music contains lyrics, the writer has copyright to that text, the literary work. If the text is translated or the composition is edited, the translator and music editor

achieve copyright for their edited work.<sup>24</sup> In the film industry, there are four authors involved. They are, according to EC-directive 92/100/EC (Renting and lending); the director, scriptwriter, dialogue author and the composer. There are, however, more people entitled to copyright in the Swedish film business<sup>25</sup>, but these four mentioned are explicit identified in the legal framework.

For a work to receive copyright protection it must be independent and original (“Verkshöjd”). The originality requirement requires only that the author of the work has used some skills, creativity and effort in making the work; not that the thought or idea embodied in the work is novel or new. In three different EC-directives, a general view of the “originality” requirement for copyright is explained as “an authors own intellectual work”. This means that it should be almost impossible for two people independently of each other to create something that should be too similar to not be an original work.<sup>26</sup>

When working in a film process, there are creations which are not new and novel from scratch. Authors often use already existing works and change them to his/her own creation. A changed work can fulfill the requirements for copyright if the adapted is new and novel and independent, 4§ CA. It is important to locate who the author is for the original work and ask for permission before the work is adapted.

#### 4.4 Copyright protection

There is no formal requirement such as registration for copyright protection. It is also one of BKs important principle that no nations are allowed to make the copyright protection dependent of any formality requirements at all. It should only, as mentioned earlier, be independent and have originality.

For example, this lack of “proof” makes registration hard for an author to prove that he/she is the rightful owner of his or her work. This is clear if you compare with other IPRs such as patents and trademarks where registration is a requirement and it is written down and stored by authorities such as PRV<sup>27</sup> in Sweden and OHIM<sup>28</sup> in Spain.

#### 4.5 Time

The time limit for a copyright protection is something that has changed several times over the years. The latest change was after the implementation of the directive 93/98/EEG (Harmonization of Time Protection) when it stated that the scope of time for copyright is normally during the author’s lifetime and until 70 years after he or she dies. There are some exceptions from this rule, like the one for neighbouring

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<sup>24</sup> Tengelin, Sten, Pehrsson, Lars, Stannow, Henrik, Svensson, Carl Anders, Kjellin, Clas, *Rätt i medieproduktion*, (1996) p.58

<sup>25</sup> This topic is discussed more thorough later in this chapter

<sup>26</sup> Bernitz, Ulf, Karnell, Gunnar, Pehrson, Lars and Sandgren, Claes, *Immaterialrätt och otillbörlig konkurrens*, 9th edition, (2005), p. 42

<sup>27</sup> The Swedish Patent and Registration Office

<sup>28</sup> Office for Harmonization in the Internal Market (Trade Marks and Designs)

rights. Their protection lasts for 50 years from the performance, not after performer's death. For copyrights connected to a film, the rights are protected until the 70 years after the death of the last author, which is either the director, scriptwriter, dialogue author or the composer for the music, created especially for the film, 43§ CA<sup>29</sup>.

## 4.6 Dual protection

The copyright could be separated into two kinds of rights, economical and moral rights.

### 4.6.1 Economical right

The economical right is found in 2§ CA and could be divided into two separate rights, namely the right to produce copies of the work and the right to make it public.

Since the changes in the CA<sup>30</sup>, the right to make the work available to the public is specified in 2§ paragraph 3 CA and contain the right to:

- Right to transfer work to the public
- Right to perform a work in public
- Right to show copies of a work in public
- Right to distribute copies of a work to public

All the above-mentioned are important in the film industry, however in our thesis the right to show copies of a work in public 39§ CA, is the most important. This includes the right via the film to make the work publicly available in cinemas or in television and the right to reproduce spoken elements in text or translate it to another language. This is for both authors according to 1§ and artists with neighbouring rights, 45§ paragraph 3 CA. The above-mentioned does not apply to musical work. This right is transferred to the producer when the team members sign their agreements. It is efficient for the producer to receive those rights from the start. In this way the producer already have collected and secured the rights when the movie is about to be distributed.

Distributing works takes place when the public is offered the work in some way, for example when a work is up for sale, lease, rent or pledge.

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<sup>29</sup> Rosén, Jan, *Upphovsrättens avtal, 2nd edition*, (1998) p. 184

<sup>30</sup> Bernitz, (2005), p. 62

#### 4.6.2 Moral right

The moral right or “droit moral” is found in 3§ CA. This moral right is exclusive for copyright and is not found in any other IP regulations. The concept of copyright lays strongly in this special right but it differs between countries. In the US, copyright does not include any moral right at all while in Europe it is significant to this kind of right. However, there are other regulations in the US legislation, which protects similar interest as the moral right, e.g. the doctrine of defamation.<sup>31</sup>

The moral right could be divided into two separate rights. First, the author’s right to claim that his/her name should in good manner be clearly expressed when his or her work is shown in public. Secondly, the authors’ right to oppose that his/her work is altered or changed and shown in public in a way that might violate his/her reputation.

#### 4.7 Neighbouring rights

Neighbouring rights or “droits voisins” is found in 45-49a§§ CA. Those rights are assigned to people whose performance cannot be seen as literary or artistic work, but are in close connection with work that is literary or artistic and is copyright protected<sup>32</sup>. A significant difference from authors and people with the neighbouring rights is the lack of protection against imitation and adapting for the performing artists. In film production these people entitled to this right are many and important for the completion of the production.

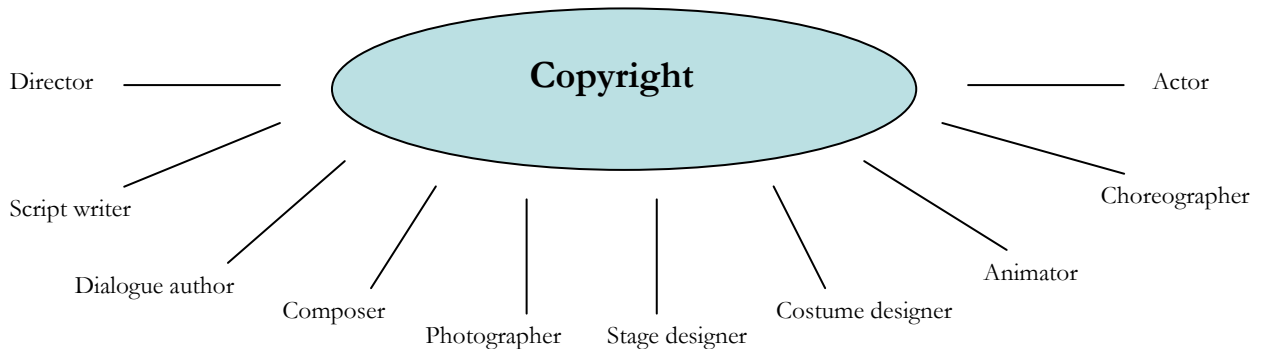
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<sup>31</sup> Litwak, (2002) p. 297

<sup>32</sup> Bernitz, (2005) p. 94

## 5. Copyright related to the Film Industry

”Never let anyone outside the family know what you're thinking.”<sup>33</sup>



*Figure 1 Picture over copyrights involved in the film industry*

There are many different copyrights involved in a film project. In this chapter we are going to sort them out and explain its purpose and use.

A problem when producing a movie is to collect all copyrights from all authors. The producer needs to collect them all<sup>34</sup> and secure them, which are a difficult and time-consuming task since all authors have individual ambitions and intentions. It is however of utmost importance that this succeeds or the whole project could be jeopardized.

Most people on the team are not entitled copyright according to 1§ CA. Some of those people are performing artists and receives neighbouring rights according to 45§ CA. There are however, people who are not entitled to either of the above mentioned rights according to law, but they will still achieve copyright through 1§ CA due to the business' own solutions. The director, scriptwriter, dialogue author, composer, photographer, stage designer, costume designer, animator, choreographer and actor are authors to work and therefore, entitled to copyright, either by 1§ or 45§ CA.

<sup>33</sup> *The Godfather*, (1972), directed by Francis Ford Coppola

<sup>34</sup> Rosén, (1998) p. 182



## 5.1 Director

The situations for directors is divided, they can achieve rights both from 45§ as neighbouring right and their works can also be seen as literature according to 1§<sup>35</sup>. According to legislation, the director has been seen as a performing artist and not an author with exclusive copyright. However, there are different opinions on this matter and by the directive 92/100/EEG (Rental and lending), the director is mentioned as one of the authors to a film<sup>36</sup>. The discussion has been focused on the novelty criteria, which is one requirement for copyright protection. If the director adds something new to the dramatic work, the director shall be entitled copyright protection. It is argued that the director shall receive protection without the novelty criteria. The fact that the director creates a movie from a written text shall be the only requirement for the protection, which should be received in every project since the director is always involved in the filmmaking. The director is not to be seen as an author to the film in the US, but has a position as a performing artist. However, there is no protection for performing artists and the director is not entitled to any copyright<sup>37</sup>.

## 5.2 Script writer

The script writer is the person who writes the plot for a movie. He/she can create this either from already existing works or independent ideas. Some script writers are hired to write a specific script for a specific movie, while others send in their independent work to a production company hoping for approval. Script are considered to be one of the more important works in a film production which entitles the script writer copyright according to 1§ CA.

## 5.3 Dialogue author

The dialogue author is the person writing dialogues between actors. He/she is often the same person as the scriptwriter. The dialogue author is also entitled copyright according to 1§ CA.

## 5.4 Composer

The agreements in the music business are more standardized than agreements in film projects. The Swedish market dominates by the agreement, General Music Agreement, signed by STIM (Swedish

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<sup>35</sup> Kocktvedgaard, (2004), p. 102

<sup>36</sup> Hammarén, Anna, *Teaterregi och upphovsrätt, särskilt om skillnaden mellan upphovsmän och utövande konstnärer*, (1997) p. 220

<sup>37</sup> Hammarén, (1997) p. 274

Performing Rights Society), Swedish Society of Popular Music Composers and Swedish Music Publishers Association. According to the General Music Agreement, the composer transfers all the copyright to the publishing company and the company can use the right to play the music all over the world. The publisher has a strong position compared to the composer in this case<sup>38</sup>.

If a film project wants to use an existing composition, the right to use the music is given by NCB, Nordisk Copyright Bureau. This organization administrates the mechanical copyrights for music for almost all composers. When the film team is permitted to use the music, it is on the terms made by NCB. Among these terms is the importance of keeping the moral right that belongs to the author, which means that the author's name shall be phrased.

If the producer wants to use a composer that is not a member of NCB, the producer shall contact the author and/or the music publisher. To get permission to foreign music can be hard and often takes long time. This can be solved faster if a Swedish music publisher has an agreement with a foreign music publisher concerning the copyrights to the film in Sweden. The permission can then be given by NCB through the Swedish sub publisher.

If the music is recorded on a CD or tape, an agreement with IFPI (International Federation of the Phonographic Industry) shall be written about the transfer of producer right. For the music performance on the movie, STIM is entitled of the payment.

If music is to be composed for the movie especially, a standard agreement is often used in order to secure the rights. If the composer is a member of NCB, they will have a great impact even here. It is likely that the composer is a member since the NCB system/STIM is the only way for composer to handle his/her rights on a national and international arena. Foreign as well as national composers will get the same payment according to the above mentioned system<sup>39</sup>. This is due to the wide co-operation between music actors on the global market. One important thing to remember is that permission for using the music has to be given by the author, not NCB, if the producer uses the music for the first time.<sup>40</sup>

## 5.5 Photographer

Photographers to stills are authors to their work and receive copyright, according to 49a§ CA. Concerning motion pictures, which are the pictures used when making a film, they are not included in this right. They are protected through film production in 1§ nr 4 or under the producer protection in 46§ CA<sup>41</sup>. However, when the movie is finished, it is common that pictures from the movie are spread for advertising and also for articles and books. These pictures are considered to be stills, not motion pictures, and they are

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<sup>38</sup> Koftvedgaard, (2004), p. 468

<sup>39</sup> Koftvedgaard, (2004), p. 469

<sup>40</sup> Tengelin, (1996), p. 67

<sup>41</sup> Koftvedgaard, (2004), p. 87-88

therefore treated by 49a§ CA. In Sweden, the practice in the film industry is that the main photographer receives a copyright to his/her work, but not the other assisting photographers.

### 5.6 Stage designer

The stage director receives copyright protection for his/her work. Before starting the shoot in an private location such as apartments, houses, permission from the owner is necessary. In Sweden, location agreements are used in order to achieve this permission. Filmmakers who shoot on location without securing prior permission from the owner risk legal liability<sup>42</sup>. The location agreement includes a guarantee that the production company shall leave the place in the same order as it was originally. If this is not the case, compensation to the owner shall be agreed upon. The owner is also entitled to a payment for lending out the property to the production company. The payment is paid in a lump sum and the owner is not entitled to royalties ones the movie is showed.

In Sweden, buildings, ships and bridges are free to use without permission, 24§ 2 paragraph CA. Without this regulation, it would be hard to handle outside shootings. The name of the place shall be mentioned, as good custom. Also art, like sculptures or wall paintings which are outdoors, can be used in films without permission, 24§ 1 paragraph, nr 1 CA. If a painting has a central role in the movie, compensation to the author shall be paid. According to the new 20a§ CA, from 2005, it is permitted to show and spread copies of a piece of art, to produce the art and to transfer it to the public, if this is not a major part in the movie. The same goes for art that is in the background of the shooting. As mentioned above is only permitted if the art is a copy that has been published or if the author himself has given the permission to use his piece of art in the shooting.

### 5.7 Costume designer

In a film production there are often a great number of actors that are hired to play in the movie, both main actors and extras. All these people need clothes and make up. The creators of the movie costumes are involved from the very beginning because the outfits need to be ready when the shooting takes place. In movies that are meant to take place in another decade or century, the creation of the clothes can take more time and effort than if it took place in present time. All actors need tailor made costumes, because nowadays we normally do not have clothes like that in our wardrobe. If the story takes place today, personal clothes are often used. To create costumes to a movie, which takes place in a fantasy world or decades ago, is a piece of art and the designer must study the fashion from the time and place it is supposed to take place. The costumes tell us a lot about the character and the clothes also need to be

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<sup>42</sup> Litwak, (2002) p. 43

created from a practical point of view. If the actor is supposed to fall into a mud hole, it will create more effect if he/she wears white clothes or if the character carries a sword, the sword needs to have a holder of some kind.

### 5.8 Animator

The creator of an animated movie is an author and receives copyright according to 1§ CA. His/her work fulfils the requirements for copyrights, which means that the art contains originality. The work is a combination of motion pictures and art. The status for animators and their animations has strengthened since computers are important tool in the process of making a movie. Today, animated movies are very popular, more and more production companies produce these kinds of movies today. This trend is due to the fact that animated movies are not just targeting children, but also adults.

### 5.9 Choreographer

This form of work is seen as a production but there is no practice in the Scandinavian countries concerning choreographs<sup>43</sup>. The choreographer receives a right according to 1§ CA. Dancers that performs in movies does also get a neighbouring right, 45§ CA, for his/her performance.

### 5.10 Actor

There are often many actors involved in film projects, both main actors and extras. To be as identical as possible to the real world, staffs need to be hired to act in the background. If a scene is supposed to illustrate a market place, it would be weird if only two people would be there. The main actors are appointed at an early stage. The director has the biggest influence here and often knows from the beginning what kind of person that will fit the character. These main actors have a neighbouring right to her/his performance according to 45§ CA. The extras, on the other hand, are not entitled of this right if they are not performing something independently and important to the story. The extras do not normally write agreements with the production company because they are often not hired for the whole production, only occasional. They achieve the possible payment right after the shooting is over.

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<sup>43</sup> Koftvedgaard, (2004), p. 102

### 5.10.1 TF and TROMB

Unions and other organizations play an important role in the film business. The most influential union is Teaterförbundet, TF, which most production employees are members of. They have created many agreements that are used in the business and the collective agreement between TF and employers permeate many regulations that are claimed by the union. According to the business, TF represent an odd party. They represent its members, who often are both employer and employees because the actors and directors often start up a company to collect their income.

Another task TF prepares, is to help their members collect royalties for their performance. A company called TROMB, Teaterförbundets Rättighets- och Medie Bolag AB, takes care of these matters. This company was created in early 1990s and is fully owned by TF. TROMB has been successful and is financially strong. The company works like a bank of rights. TROMB administrate the rights for the actor and make sure that the actor gets the royalties he/she is entitled to. The rights are transferred to TROMB and this agreement last for 5 years. If the actor has transferred the rights to the company, TROMB has to agree if the actor wants to transfer the rights to someone else. This put TROMB and TF in a strong bargain position. When an actor is hired by the production company for the movie, the producer “buy” the right to one “window”. This means the right to show the film at the cinemas. If the producer then wants to release the film on DVD, he/she then have to pay 14% of the additional incomes to TF (8% outside Sweden) which TROMB divide to the mentioned actor. Since the start of TROMB, the capital collected for the royalties has increased and it is easier for the actor to get the suitable compensation for his/her work today than before 1990. The production company has to give a report to TROMB, after the production is completed, with all the names of the involved actors.

Since TROMB is created to protect mainly the actors' interests, Sveriges Regissörer has talked about creating another “TROMB” which will be more satisfying for them.

## 5.11 Artistic work but no copyright

There are some persons working during a film project that are not entitled to any copyrights. They are however important persons for the film process and are closely related to the authors and performing artists.

### 5.11.1 Producer

The producer has a major role in the film production. The producer is the first one to be involved in the project. He/she is the connection between the different people in the team and has the overall control of the project. A producer needs to have skills in different fields, like economic, legal and culture areas.

There are different types of producers, executive producer and line producer. The executive producer has an overall responsibility for the project and is the dealmaker, and often the financier. He/she may be producing several film projects at once.

An executive producer will often hire a line producer to work for him/her. The line producer was earlier called production manager. He/she is the person in charge of logistics for the shoot. He/she will hire the team, order supplies and equipment and make sure everything the director needs to produce the film is available when needed. During production, a line producer will only handle one project at a time<sup>44</sup>. The legislation does not separate the two types of producers. If the producers shall be entitled different rights depending on their responsibility and duties, it has to be regulated in agreements. According to the legislators and business, the producers are not entitled copyright. Legislators' opinion is that the director is the creative person who should be entitled copyright. They do not take the close cooperation with the producer into consideration.<sup>45</sup>

The producer protection in 46§ CA is seen as a complement to the complicated regulations concerning film production. There are many authors that are entitled to different copyrights. The production company shall respect all other copyrights involved in the film project, irrespective of the right according to 46§. Therefore, the producer tries to collect all the copyrights involved to get control of the rights<sup>46</sup>. To achieve control like this, a number of agreements are written between the different parties.

It is also important that the producer receives permission from all authors to already existing productions that are used in the movie. Not all work is created for the specific movie. If creating a basis with all collected copyrights, the production companies and other involved people will benefit from it.

#### 5.11.2 *Sound technicians*

Library music is always used in films, exceptions are few. This is an important instrument to use when the director wants to express and creates feelings. If the movie is scary, music are played more and more intensively to give the audience the scary feeling. In some movies, the music is very notable while in other productions, the library music is hardly notable at all. Library music is often recorded on a tape or CD and the producer gets the permission to use the sound through IFPI<sup>47</sup> the same way as for other music, see above.

In Sweden, and many other countries, it exist companies that are specialists on creating sounds. This is done by different methods to create the feeling. One method that has been used more and more is the use of digital instrument. There are many sounds created on computers and it is easy to add digital sound to the movie since the movie is also edited digitally. However, there are some that works outside the

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<sup>44</sup> Litwak, (2002) p. 151

<sup>45</sup> A further discussion about this issue is found in chapter 8.2

<sup>46</sup> Rosén, (1998) p. 182

<sup>47</sup> Tengelin, (1996) p. 68

computer world. They use psychical tools to create sounds, like a high heel shoe on a wooden piece to create a sound of a walking woman.

Sounds are often created to support the original sound to make it more obvious. When shooting a film it can be hard to capture all sounds and separate different sounds, especially when the shooting is placed outdoor.

All sounds to the movie are added when the shooting is finished and the film is cut or during the editing process.

### *5.11.3 Make up artist*

For the make up artist, it is important to create the right character through the make up. This can be hard especially when the character is old but not the actor, if the character shall have a wound or maybe even a mask.

### *5.11.4 Editor*

Finally, the editor also has a major role in the production. How the movie is cut is not something that is done in a flash, the editor must have an eye for the creative work. During the editing process, the editor is working side by side with the director.

## 6. Other Legal Areas

“If by my life or death I can protect you, I will.”<sup>48</sup>

Even though copyright is in focus when describing film projects, there are other legal areas that we consider interesting and wants to explain further. Those relevant areas are contract, labour and uniform commercial law.

The Swedish Uniform Commercial Law, (1990:931), can be applicable on intellectual property, because its regulation includes all personal property. However, the regulation does not fit very well for the special concept that intellectual property consist of.

Some of the complexities are that an intellectual property cannot be transferred, as other property because it is not physical goods and therefore, it is hard to apply the regulations about delay e.g., you can only in specific situations be late with the delivery. The rules that can best be used in the Uniform Commercial Law are the general rules regarding the relationship according to the agreement contractual obligations and the lack of responsibility.<sup>49</sup> In the film industry purchase of IPRs is a constantly recurring question. To be able to use a book for a script, the producer needs to purchase an option from the author. It also happens in the film business that authors are bought out and the economical rights are transferred to the production company. An argument for this transaction is the need for money. For the individual author it can be hard to negotiate for good royalties and it is easier, and faster, to get paid with a lump sum<sup>50</sup>.

As mentioned above the team consists of many people and they all have employment agreements with the production company. Most of the team members are employed for only a certain period of time, usually for the specific film project. Permanent employment for e.g. a director within a production company is rare in the business. The small number of employees who works within the companies shows this, often they are not more that 5 persons, working full time. The cost for the production company to have employees hired full-time would be too heavy to handle. But this also means that the preparations for a film project include a lot of contract writing since all the involved people shall have an employment agreement. This is often written but there are no regulations about it. If the employee wants a written contract, he/she shall receive one from the employer. Today, a union such as TF has developed a wide contract base that the Swedish film industry follows. Unions have a large influence in this process and most producers refer in the employment agreement to the relevant collective agreements that they are a part of. The collective agreement Film-, TV-, and Tape recording agreement 2004-01-01 – 2005-12-31 is

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<sup>48</sup> *The Lord of the Rings: The Fellowship of the Ring*, (2001), directed by Peter Jackson

<sup>49</sup> Levin, Marianne and Nordell, Per Jonas, *Handel med immaterialrätt*, (1996) p. 25

<sup>50</sup> Levin/Nordell, (1996), p. 24



still valid and most common when dealing with the different employees in the film project. There are detailed regulations about payment and also time frames, which is specific for this kind of business. Except for the regulations developed by the unions and the industry, there are some general rules that are applicable in employment relations. These rules are mainly regulated in the Employment Protection Act, (1982:80) and Employment Act (1976:580).

There are many individual contracts as well that are necessary for the business. These contracts are not connected to any collective agreements, but pure business-to-business related. There are no formal questions to consider when making the deals, but a recommendation would be to use written agreements, it would make it easier to proof what has been agreed in case of a dispute. General regulations concerning these agreements can be found in the Swedish Contract Act (1915:218).

## 7. Mapping out the Film Industry

“When a man who makes 450 dollars an hour wants to tell you something for free you should listen.”<sup>51</sup>

Our ambition with this thesis is to reflect the current situation in the film industry and we figured that the best way to find out is to interview involved people within the business. With those interviews, we wanted to investigate further to get a deeper understanding how it works today and how the industry thinks it will work in the future. This chapter is a summary of the information we received during the interviews.

### 7.1 Collecting IPRs

The most difficult thing for all production companies is to collect all the copyrights that are involved in the movie. The producer need to have all the rights on one hand, otherwise it will be hard to complete the project since there are several people who have different rights that they are going to claim, if not during the process, but later on when the movie is distributed. Not having all the rights means a great uncertainty and you might jeopardize the whole project.

Depending on how the ownership of movies is settled looks very different among Swedish companies. As for Cine-qua-non AB, the most important thing is to have as much ownership as possible. It will cost a lot and might take long time to produce, but this way will give the producer good control over the project.

- I have, for better and for worse, invested a lot into my productions, which means that I own a great part of them. This has always been important to me, says Christina Olofson, Cine-qua-non AB.

Having control over your companies IPRs is a fundamental source for success in order to be more structuralized and know better what it is worth. The money you gain from the movie will later on fall into your own pocket; you do not have to share the profit with many parties. However, it is hard today to get a film project financed without sharing some ownership. This is often an incentive for the investors to be a part of the project at all. Since the movie contains only of this different copyrights, they are the most valuable in the project and everybody wants a piece of them. Having the control of the rights also helps the producer to keep the numbers low and if the producer tries to put all eggs in one basket, and keep the production within Sweden, this will lower his/her costs as well. Other companies choose the opposite way of dealing with the ownership, e.g., Hans Lönnerheden, Moviola AB, wants to have as few or as many investors as possible in his projects, to spread the risk to different parties. This is beneficial if someone drops out and cuts down the invested capital, the situation will not have such huge impact on the project because the many parties. It is also easier to find a new partner willing to put in the lack of money if the

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<sup>51</sup> *The War of the Roses*, (1989), directed by Danny DeVito

amount is not that enormous. With a smaller group of investors the investments are bigger and the commitment from each partner will be more serious and that can be of great help in moments of crises. The different ways to handle the question of ownership are not due to the size of the company. Companies that are equal in size choose different types of strategies for different types of projects. It all depends on your experience in the film sector and how the company is build. If the employees have a more economical background, they will find a pleasing solution based on these aspects and if the producer and/or staff have a more creative part in making the movie, he/she will think differently. It is hard to please the investors and other involved people. According to Peter Possne at Sonet AB, everybody wants to own as much as possible with as little effort as possible. It is always a question of money, balanced with the ownership of rights. There are no rights or wrongs here, the most important thing is to balance the advantages and disadvantages of the different solutions and value them carefully.

Dealing with copyrights takes long time and lots of effort needs to be put in to collect them all at the same time. As a result of this, negotiations and writing of agreements often lasts during the shooting of the film. Some agreements are not satisfying enough and are therefore not signed until after the production. This uncertainty is definitely not good and creates a risk for the involved parties, especially for the producer who has the main responsibility for the completion of the movie.

In film projects the investors are often bigger companies than the production companies and therefore stronger. When dealing with these investors, negotiations must carefully be prepared. It is important that the producer know what he/she wants and is able to show the stronger party. This is not always the case, but it is important for a producer to have thought the situation through. Maybe strong companies are not what you necessarily need; there might be other ways to finance the project.

Since the end of the 1990s, the Swedish film industry has reached the international recognition with great success. For a small country like Sweden this means a lot to the film industry. All the interviewed people agreed that due to this development it is more important for the production companies to collect all the rights concerning the film project. It is also more important to show the international distributor that everything is prepared and secured in order to close the deal. International distributors and investors are more careful about the agreements and protective about the rights.

It takes a long time to collect all rights, but the hardest one to get is often the music. But these difficulties occur only when the music already has been published, not if the music is composed to this specific movie. This long period is due to the well organized protection system that is build for music. There is no identical system for the film industry, even though it is desirable. It is not usually the composer himself that administrates the right to his music but another company, a music publisher. This company is often

international, even though the composer is Swedish. It is also common that the Swedish producer wants a foreign song. As a result of this internationalisation in the music industry, it takes time for the Swedish producer to collect the rights connected to the film music but it is extremely important. Olofson points out the importance of the copyright to the music.

- If you use music in a movie before rights are taken care of, you could face big problems.

It is common with remakes in the film industry. Many movies with the same story have been showed in different versions. A recent example of this is the third version of the movie King Kong, which had premiere in 2005. In order to create the movie, the producer behind this new version had to locate the original work for the remake of King Kong. Is it the latest version (version two from the 70s) that is the original work for version three? Is there a book that is the original work? It can be hard to figure out the original work when collecting the copyrights for a film project. It is important to ask for permission from the author for his/her work, otherwise the producer would most certain get reprisals from the author. This should be done before the project begins. A negative answer from the author would eliminate the whole project. If the producer is insecure of who is the author of the original work, it is a good idea to hire a lawyer for this assignment.

## 7.2 To buy out the economical right

When collecting all the rights there are many people to deal with. Often there are no complications when their rights are collected. Poa Strömberg, All Together Now AB, points out a few occasions when there have been difficulties with stage design. This has happen in the making of multiple productions and low budget movies. Because of the long time period these projects lasts, the same designer might not be involved all the time. When a designer quits, the production company uses the designer's work for the remaining productions. The new stage designer cannot claim that he/she has created something with originality because he/she enters as a stage designer in a production where the character is already set. The first designer wants credit for his/her work and the rights connected to it. It is a matter of dispute between the producer and the stage designer. Paying the designer a lump sum for his/her work often solves this issue and the rights stay within the company. This can only be done with the economical right, not the moral right. Another reason why these kinds of productions use the buy out concept is often because it is a requirement from investors. It is a security for the investors to know the budget and more detailed numbers, which are important since the projects with multiple productions take long and that low budget movies cause higher uncertainties. To buy-out is not something that is common in the Swedish film industry, only in special cases.

### 7.3 The production team

In the beginning of the film production, the team is hired in order to make the completion of the movie possible. There are several different professional categories involved in the project and all together 20-30 people work on the team. All employees are hired for only that specific time the movie need to be finished, that means only temporary employment for the project.

Hillevi Råberg, Illusion Film AB, says that it differs among the companies how the economy in the specific project is handled. If there is no employee with economical skills this position is usually filled with external help during the project. The producer has the overall responsibility of the budget and a financial assistant takes care of the day-to-day business. This is a common solution within the business and it is more or less a requirement when a completion bond is used, depending on the daily detailed financial reports that should be handed in to the company that offers the completion bond.

Using a famous name, as a well-known actor or a director, in attempt to increase the value of the movie is not common in Sweden. Olofson explains that it is more important for private investors than, for example, SFI, which is more interested in the story. Of course, it is a triumph if famous people want to be involved in your production and this might help to increase the important amount of audience. But this is probably not the major determining factor for the future of the movie. In Sweden, the actors' names do not attract audience as in the US. Many movies, starring the most popular actors, have not been successful, it is the story that matters.<sup>52</sup> In the US, it is more important that famous people are involved since the movies there are more dependent on the private investors. A famous actor starring in an American movie can carry all of the profit in the production<sup>53</sup>. Famous actors are more expensive than inexperienced actors. As mentioned, it is probably worth using a famous actor in the US, however it might not be profitable enough in Sweden. Production companies must find this balance that suits their specific production.

### 7.4 Producer vs. Director

The producer has no copyright connected to the film. In the European way of dealing with film, the director has the right to the film. This differs from the Anglo-Saxon countries where the producer is entitled to these rights. Since the Swedish film industry is moving towards a more international market, even this way of thinking is changing. The battle for the final cut is a discussed issue in Sweden.

- It is an ongoing battle, says Olofson.

The directors are shocked because the right to the final cut is important, it is an incentive for the director to get credit for his/her creative work that is done. The director is involved from start to finish of the

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<sup>52</sup> Henrik Larsson, Svenska filmare uppträder i flock, *Norrländska Socialdemokraten*, 2005-12-29

<sup>53</sup> Svenska filmare uppträder i flock, *Norrländska Socialdemokraten*, 2005-12-29

movie and has great influence during the whole process. The critical voices uphold that it is only the economical interests that impel this development and that it is then easy to put the creativity aside<sup>54</sup>. This is the case in US where the commercialization is the strongest engine. Producers and private investors try hard in Sweden right now to change the structure. For a long time, American lobbyists have tried to change the system in Europe in order to give the right to final cut to the producer. Olofson explains that these lobbyists, located in Brussels, have especially focused on the eastern part where the film industry is not that old, or at least, not that developed as in other European countries. The American lobbyists support film producers with money and also technical equipment. They also try to incorporate the American film culture in other parts of Europe, e.g. France, by setting up American production companies in France.

For the producer/production companies, it might feel hard not to have the final cut, because they are often the ones that start the process, finds a good script, hiring a suitable director and are involved in the whole process. Lönnerheden says that the producer has the major responsibility for the completion of the movie, not the director. It may seem unfair that they do not have any rights to the production.

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<sup>54</sup> Kulturnyhetera, SVT, 2005-12-19

## 7.5 Awareness of the copyrights

Among the team members there is a greater awareness of the copyrights involved in a film production today. Not only does the producer know that he/she is dealing with valuable properties, nowadays the authors know, in a much larger extent than before, what they are entitled to. It is well known among actors, costume designers, directors, scriptwriters, choreographers, composer, animators and photographer that they can claim right to royalties, based on their performance. However, other members of the team can also claim different intellectual property rights, sometimes successfully, sometimes not. Since there are no, or few, guidelines in CA, the business creates the business atmosphere or, rather, the individual's opinion on what they can claim as copyrights is the guidance for the development. Some members of the team are tough and know exactly what they can claim while others use agents. This is an American way of settling businesses in the entertainment sector, and this has spread around the world and by now even to Sweden. To use an agent has become more common lately. Actors and directors are the ones who use agents the most. Since the popularity for agents has increased, there are several agent bureaus operating on the market. The agents experience and backgrounds differs, some have the legal knowledge and some spring from the business. It is a good thing that they have different skills but this can also be a disadvantage. The quality and professionalism vary a lot among the agents and a client need to be careful when picking an agent.

All interview people agree about the development of agents. It is easier to deal with agents than their client and it is also satisfying for the actor not to negotiate with the producer. It is easier for an agent to claim the rights for the actor than the actor himself. It is also easier for the producer to discuss how much an actor is worth to the project than to tell the actor right away. This system is an advantage because the producer and the actor are avoiding a direct conflict and there are no hard feelings when the film shooting starts. It is important to have a good chemistry between the different players in the film project. A result of the usage of agents is that negotiations are more complicated and demanding in time, in an already stressful environment with tight deadlines. Strömberg mentions another disadvantage, which is working as an agent is not a lucrative business. The agents live on commission, which creates uncertainty, both for agent and client. Possne says that in the US it has gone too far, the climate there is now that the agent opposes deals concerning their clients that are not profitable enough for themselves.

## 7.6 Legal assistance

Since the film production companies in Sweden are rather small in size, few of them have their own legal staff. There are several reason for that, the first that comes to mind is the high cost that is normally paid for lawyers, companies cannot afford to hire a lawyer fulltime. Production companies have a hard time to

have anyone hired fulltime and the lawyer is not a key person for the activities within such companies. Therefore they are not prioritized in the day-to-day business. The second reason is that the industry has not been based on legal issues traditionally, which is the opposite of the US tradition. Significant for the film industry is that parties shake hands and do not involve legal aspects into the production stage, only in a small amount. This is a business where everybody knows each other and trust is a holy word.

-If you do not stick to the rules you could soon be out of business, says Possne.

A result of this is that many producers write their own agreements and take care of the negotiations themselves without legal expertise. For example, only since the last decades actors are entitled to royalty for his/her work. Today this is regulated in the written agreements but when there was no royalty, written words were apparently not necessary. Between the producer and director or the scriptwriter, there was only word and mutual understanding, written agreements were not needed, according to all interviewed people. This was the way the film industry worked for a long time and, partly, still works. But something has changed during the past years, actually. Before the mid 80s, legal aspects got behindhand. Today, legal assistance is more used in the film productions. Agreements appear to be written, with the team, with co-producers, the investors and others. Companies do not dare to take that risk that comes with an oral deal; too much money and IP are jeopardized. The interview people were all of the same opinion, the climate has definitely become harder and parties need to watch their back.

As we stated above, not many companies have their own legal staff and therefore they seek help externally when necessary. One problem here is that in Sweden there are not many lawyers specialized in combination film and law. This is probably the outcome of the way the industry has been built. Lawyers have traditionally not been hired for specific film matters. However, as in other businesses lawyers have been hired for other legal areas like company- and labour law. The lack of the expertise within the film area is a problem according to Olofson and even Strömberg. Some companies hire international lawyers, especially when there are international parties involved in the production. But the use of Scandinavian lawyers appears to be the solution for some Swedish companies. The film climate is rather similar in Scandinavia, lawyers within this area have the similar experience and thinking and are ranked almost equal, but Denmark is way ahead and is a little bit tougher than the rest of Scandinavia. Good Swedish lawyers are requested and the most hired Swedish lawyer is Strömberg. He and his colleagues are often hired for the administrative process for the production companies. His focus lies on writing agreements for the companies and look over the legal situation in the film process. However, most of the time, the deals between different actors in the production are already done when Strömberg is hired. This is also a sign that the business takes care of the negotiations by itself. Since many of the Swedish production companies hire Strömberg, there are sometimes situations where challenge occurs. It does not happen often but it apparently involves a risk. This is not a major problem but there are situations when Strömberg need to



decline a case due to the challenge risk. The fact that there are few lawyers operating on the film arena includes other risks than the challenge. For example, the industry might not develop as fast when lawyers are using the same administrative and legal tools. If there is no competition, it will not be as efficient as it could be. Strömberg agrees, this is a problematic situation, he also stresses the importance to have someone to exchange ideas and experiences with.

## 7.7 Contracts

The structure in writing agreements has mainly changed over the past 15 years. In the beginning of the 90s there were no agreements at all or if there were, they were very short and simple with no or few regulations. This left a wide interpretation for the parties, which could lead to large difficulties if there were any problems between the parties. On the other hand, since agreements were not detailed, it took shorter time to write them and the parties did not need legal expertise. Today the agreements are more detailed and the interpretations are not wide.

It is more common today that individual agreements, has become more of a standardized character. The unions (mainly TF) and the business have together created the standards for the agreements. Often the producer, who follows the above-mentioned examples, writes the agreements but the development has caused the industry to be more aware of the rights and legal complexity. Therefore a lawyer is sometimes hired to write a contract. Hire an external resource is mostly done only when it is about co-production with companies outside Sweden.

The agreements with team members are often short, a page or two with referral to the collective agreement. The production companies are constantly using the regulations from the unions as a base in their team agreements. However, sometimes an agreement with the director could be a bit more extensive. Agreements where royalty is an issue, the length and complexity of the agreements are more extensive in general. They include important copyrights, which need to carefully be considered before the parties sign the agreement.

Helena Wirehed, Götafilm AB, says that co-production agreements are the trickiest. Such agreements are tricky because of all details and often many parties, both Swedish and foreign involved in the project that has to agreed upon. All rights involved in a film production have to be collected and controlled by the producer before he/she concludes any agreements with co-producers. This is often a requirement from the co-producers, they do not want to finance a film that is not prepared and secured.

For productions that are expected to be international distributed, it is important that all documents are well constructed, otherwise it could be difficult to convince international distributors to agree. This business is pretty narrow and competitive and things must happen fast!

As mentioned before, unions have a large impact on the film industry, especially concerning employment agreements for their members but also the financial question after the completion of the movie, the royalties. Unions have, in our interviews, been criticized for their ability to adapt to changes within the business, for example there are today no regulations about distribution of film via Internet. They have also been criticized for their persistency to keep everything by the books, no matter what, even if there are other ways that are more efficient and suitable for both the producer and the team.

### 7.8 Financial aid

There are different ways to raise money to a film. The most desirable are the state subsidiaries. Before the latest Filmavtal, SFI sponsored a film production and no reimbursement was required, but the rules for “SFI-money” have changed and the production companies have to return the money they received from SFI. Still, the terms are more generous than the ones coming from private investors, SFI does not require payback until other investors have received their money. Today, approximately 25% of the total film production budget comes from the government. The effect of the business because of the new system is uncertain but according to Olofson, it makes sense. She says that it is a healthy relationship to the film economy and there is also an ethical meaning as well. If a movie turns out to be successful and grants lot of money, SFI shall get its investment back and in turn spend those money to help other film projects. Since the film is often depending on the funds from SFI, it can be hard for a production to even get started. SFI can create status quo for film projects because of their power to support the film projects that they like and believe in. SFI is a strong operator in the business, but it is in turn dependent on the governmental finances and Filmavtalet. Today there are three consultants for feature films at SFI, which means that if one has denied an application for support, than there is a chance that one of the other consultants will permit the application<sup>55</sup>.

In the US the most common way is to raise money from private investors, however, they want their invested money back with interest. Possne mentions that when SFI wants to get its money back, it would probably be more common to turn to venture capitalists even for Swedish producers. Today, the Swedish film industry uses private investors in larger extent than before.

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<sup>55</sup> Since 2006 and the new “Filmavtalet”, the number of consultants, working with feature film, has increased from two to three people.

Except the private investors and the state subsidiaries, both national and international, there are more parties interested in a Swedish film production, it could be the region (Film i väst, Filmpool Nord etc.), TV companies, distributors (Sandrews, Triangelfilm, Sonet) and Scandinavian and international companies.

When the movie is finished, royalties should be divided. Royalties could be agreed through individual agreements, for example a director should have a fixed amount for his work but gets only about half of the amount. The remaining is part of the financing of the movie for which the director gets a share in the movie. The actors and other team members entitled to royalties, they get the payment from TROMB.

In co-producing agreements it is defined who will collect and distribute the income from a movie. It has become more common that the producer agree with a collecting agent to take care of the collecting and distribution. All relevant agreements are sent to the collection agent who takes care of all work. This is an objective solution and the collecting agent gets a pre-defined percentage of the incomes in commission.

### **7.9 International cooperation**

International co-operation is today not common within the Swedish film industry. This is because films produced in Sweden are not that attractive to foreign team members. This is a fact when looking into how many foreign actors this far has been participating in Swedish films. However, producers are in need of financial aid, and to raise more money they can look outside Sweden, to e.g. Denmark or any other of our Scandinavian neighbours. Lönnerheden explains that their system works similar to ours, where institutes like SFI help funding films. To get money from e.g. the Danish institute the Swedish producer need to co-produce with a Danish producer. In Europe, to be considered as a co-producer, each country needs to put in at least 20% of the budget. A requirement can also be that some team members must be citizen of the co-producing country.

The involvement with authors in co-productions deals can be hard to negotiate about. It is complicated for the production companies when the investors demand large control over the production. It is important to bear in mind that the more co-producers involved, the harder it is to keep control of the production and make profit.

### **7.10 Completion bond and other insurances**

Completion bond is a more than 50-year-old “invention”. It started in 1951 in London, at this time Film Finance, a private corporation was created by a group of producers and they offered a completion bond. This completion bond was a possible solution for producers who were afraid to put their own private

assets as a security for a bank loan that was supposed to finance their film. Film Finance is the most common completion bond company operating on the Swedish market today.

#### *7.10.1 The procedure*

The producer asks a distributor for money to make the movie. If the movie costs for example 10 000 000 SEK, he/she might get 11 000 000 SEK, but not until the movie is finished, if he/she cannot put up any security. The movie is not a security in itself; it has no value until it is finished. The bank has the same opinion when the producer wants a bank loan. It is most often co-producers who force the producer to agree upon a completion bond.

To solve this, Film Finance guarantees that the movie will be completed for a fee of 3,5% of the production budget. This completion bond Film Finance offers works as a security for the bank loan. When the movie is completed and delivered the completion bond ceases, the bank gets paid and the producer hopefully owns a part of the movie.

If the producer fails to complete the movie, Film Finance takes over the project for completion. It takes care of everything and has a prioritized claim when the movie is finished and starts rendering money.

A producer has to pay minimum 400 000 SEK for the completion bond, which should cover Film Finances costs for reinsurance, administration and legal fees.

Film Finance head office is located in Los Angeles and branch offices are located around the world even in Sweden represented by Lönnerheden. Film Finance has guaranteed approximately 4000 movies this far. It works well in Sweden but some minor trouble at the banks regarding access to the production company's bank account if Film Finance has to take over.

There are different opinions about the need of a completion bond among the people we have interviewed. Fälemark thinks that a completion bond can be of use if the project is worth 20-25 000 000 SEK. Strömberg thinks that it would only be necessary with a completion bond if the producer is inexperienced or if international investors/distributors are involved. They often demand a completion bond. Strömberg mentions that a second alternative to a completion bond within a co-production could be that one of the bigger co-producers is willing to fill the gap if needed.

Olofson stresses the importance of using a loss of profit insurance. If actors or any other member in the project cannot perform, the shooting may have to be cancelled. It will delay the movie, which is expensive, and in that case a loss of profit insurance will compensate those costs. Ordinary insurance companies offer this kind of solution.

## 8. Analyze

“There's no end to the possibilities!”<sup>56</sup>

### 8.1 Authors

According to the CA 1§ author is defined as the person who creates a literary or artistic work. For a work to receive copyright protection it must attain a certain level of originality (“Verkshöjd”). The originality requirement requires only that the author of the work has used skill, creativity and effort in making the work; not that the thought or idea embodied in the work be novel or new. As one can see, Swedish legislation in this area is not defined in detail, which gives room for interpretation about who is entitled to copyright. Usually, the creative and mental efforts of several different people contribute to the creation of a work within a film project. The employees use their artistic skills to fulfill their tasks and the resulting intellectual property is hard to define. The team gets credit for their creative efforts as individuals, with the result that they own their copyright. The production company, the employer, does not hold exclusive rights to the creations, as is otherwise the case in most employer/employee relations.

At a first glance, you might think that all people involved in film projects are entitled copyright for their artistic work, yet this is not automatically the case in Sweden. The European Council harmonizing the term of protection of copyright and certain related rights and provided guidelines for member states to define authors of films,<sup>57</sup> which contained a list of definitions of the authors in a film production. This directive was implemented in the CA in 1995.<sup>58</sup> It states that four people are entitled to copyright, and are therefore authors. This change extends the duration of copyright based on the lifespan of four categories of people, explicitly suggesting them to be co-authors of the work. These mentioned persons are the director, scriptwriter, dialogue author and the composer. Even before this directive was implemented, these people were in practice already entitled to copyright, but it was satisfying for them that the even the legislators accepted them as authors. This official recognition strengthened their bargaining positions in negotiations with producers based on their claims to copyright.

In addition to the legal recognition of the four mentioned authors, the industry also recognizes actors, costume designers, photographers, animators, choreographers and stage designers as authors. Individuals in these categories are often entitled to claim either copyright or neighbouring rights. Sometimes the allocation of copyright is also explicitly regulated through contractual means.

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<sup>56</sup> *The Cable Guy*, (1996), directed by Ben Stiller

<sup>57</sup> 93/98/EEG

<sup>58</sup> §43, CA

Since the concept of authorship is open to wide interpretation in the CA, there is great flexibility when deciding who is entitled to copyright in a film project, and the entitlement can vary based on the specific film project. For example, a make up artist may receive copyright if his/her creation is sufficiently original and important to the film that it has attained a status where it could be considered an independent work, according to the CA. This is not a common situation but it can be the case if the film's make-up creations are characteristic for the film, such as "How the Grinch Stole Christmas"<sup>59</sup> or "The Planet of the Apes"<sup>60</sup>. The wide scope of interpretation can also have negatively impact on the industry and may lead to competition within the team, since so many put their souls and creative ideas into their work. If authorship is clearly regulated in agreements, this will reduce the risk of disharmony within the team, between the team and the producer and with other participants, such as special interest organizations and labour unions.

Agreements such as these do not differ much among production companies. It is custom since it is defined even in the collective agreement, which is strictly followed among the production companies.

## 8.2 The right to final cut

As it stands today, those people entitled copyright or neighbouring rights according to law and practice typically include the director, script writer, dialogue author, the composer, actor, costume designer, stage designer, photographer, animator and choreographer. However, this practice undergoes constant change and we are now seeing increased influence from other people, who can make no copyright claims based either in the law or the practice most prominently the producer. He/she is not entitled copyright; however, this is heavily discussed in Sweden. Swedish production companies and investors want a system where the producer receives the right to the final cut. Today, this right is assigned to the director. In the Anglo Saxon countries, the situation is the opposite; the right to final cut is assigned to the producer and/or investors. The European way of handling these issues is the same as in Sweden.

Since the birth of feature film, the way of looking at film as an art form differs between different cultures. In Europe the film industry has been considered culturally important but not a goldmine for the economy - by Europe we refer primarily the western countries (except Great Britain) and primarily France. This is natural since the history of film production began here and the movies have been an important cultural influence for France. It is different in the US, where the film industry plays an important role in the economy and film is treated as entertainment products. There are significant differences between the aforementioned continents and their created different systems, is exemplified by the copyright to final cut.

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<sup>59</sup> *How the Grinch Stole Christmas*, (2002), directed by Ron Howard

<sup>60</sup> *The Planet of the Apes*, (2001), directed by Tim Burton

The director plays an important role in the creative process of making a movie. The script that is used as the basis for the initial project does not by itself constitute sufficient material to shoot the movie but has to be supplemented with the director's creative work. The main role for the director is to complete the transformation from a script to the new media, the film<sup>61</sup>. The director selects, with assistance from other people, the desired actors and/or other important people for the film and he/she contributed the primary creative work that goes into the making the movie. For this work, the director is entitled to claim the right to final cut. This system also helps provide an incentive structure for the director, as the right to claim copyright will spur him or her to increase the quality of the work. This may be lost if he/she loses the copyright.

The producer is also involved in the film project from the start often even before the director. He/she often the one who initiate the entire process; they find a good script, hire a suitable director and is involved in the whole process. One thing that distinguishes the director from the producer is that the producer is not always involved in the creative process. The director is hired especially for the individual job while the producer has an administrative responsibility for the entire project. He/she takes care of all agreements, collecting involved copyrights on one hand and hold the responsibility of negotiating distribution terms. This division of duties does not necessary exclude the producer from playing an important role in the creative process of making the movie. He/she can be involved in the administrative and the creative work. For smaller film productions, the director and the producer typically work close together and the categorical distinguish between the director and the producer is not as significant. Producers tend to argue that they are entitled to copyright because of their creative participation in the film production from the early start until the end of the process. It may seem unfair that they cannot make any copyright claims to the end-product. This is a question of artistic work and originality. Finding a good script, hiring a skilled director – does these activities hold sufficient significance for the product to constitute originality? If the contribution of the producer does not meet this criterion of originality, then there is no work according to the CA, and the producer is not an author. This also differs among producers, as their differences are not limited to their titles (executive or line producers) but some of them are also more involved in the creative work than others. Who determines if the producer's work will be creative and original? It is a difficult question, probably no one could decide this. A possible solution could be that either all producers get the same right to final cut or none of them do. The uncertainties regarding the producer's roles and tasks, and whether or not these fulfill the requirements for copyright protection is another argument not to give the producer the right to final cut.

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<sup>61</sup> Hammarén, s 223

### 8.3 Effect on the financial structure

As mentioned earlier a director has the right to final cut and it is therefore important for him/her to be aware of what happens within the project all the way to distribution. In order to assure themselves of retained control, directors sometimes enter into co-production deals. It is not always a good solution to involve directors in such deals. Investors, such as venture capitalists, would rather limit the number of people who are granted control of copyrights, as it is easier if all eggs are kept in one basket. If the right to final cut would be assigned to producers, the bargaining position of the directors would be weaker and they could more easily be outmaneuvered. In that case directors might not even want to be a party in the co-production deal. In the US, many investors claim that the director should not be included in co-production deals<sup>62</sup>, and the director is generally not entitled to final cut. Investors can see the advantages of assigning the right to the producer in Europe as well. The financial discussion between the producer and the investors would be more efficient, and investors would get better control over the final version of the movie.

Other investments in film projects are also affected by the right to final cut, but not to the same extent as those of private investors. For a long time Swedish film has been an issue for the government and the financial support from SFI is important to film production companies. SFI decides which project it wants to support by looking at the script and story, not the right to final cut. However, SFI was founded with the purpose of supporting movies with high inherent cultural value and the SFI consultants might see a risk if the producer is allowed to have the right to final cut. The quality of the movie might be jeopardized if the economical aspects are more important than the cultural.

According to the new “Filmavtal<sup>63</sup>”, the free financial support from SFI will be changed into invested capital. This capital is expected in return when profits on the project exceed 135% of the invested amount and private investors have been compensated. This change is positive for the industry, since the money that SFI invest returns and is re-invested in new film projects. At the same time, this could be a problem for production companies if they do not earn as much money as earlier, when money was given to them unconditionally. However, most Swedish films are not that profitable and therefore, this would not be a big problem. In this new system the producers of “best-sellers” will probably be the biggest losers, because they will in practice be the ones that have to return the money to SFI.

Overall this system seems to have positive implications for the industry. The question is; what will be the government’s next move? Will the conditions be as generous as they are now with the limit of 135% or will the government put itself on equal footing with private investors and demand their compensation earlier? One argument is that the whole film business should be financed 100% from governmental funds.

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<sup>62</sup> Litwak, Mark, *Dealmaking in the film & television industry 2nd edition*, Los Angeles (2002) p. 182

<sup>63</sup> Nytt filmavtal äntligen klart, *Göteborgs Posten* 2005-09-16



This solution primarily appeals to the interests of directors. Instead of the production companies putting effort and focus on arranging optimal financial arrangements, the emphasis would be on the creative process. The producer might not be as interested in the right to final cut if he/she does not have the incentive to use that right to earn money. However, such a system would limit the interest in the industry from the market and the competition among production companies would stagnate. To be able to create this system, the criteria for awarding a film project must be modified. More consultants would be needed for the increased amount of work and they to have a wider influence on which movies are granted support. The government would otherwise have too much influence on what kind of movies they want to support. Time will tell and changes will most certainly be presented in the next "Filmavtal", which is anticipated for 2010<sup>64</sup>.

In recent years, successful investors have been those companies, which support a specific region. Different municipalities own these companies and its business idea is to invest in films as co-producers. They do not only want to gain profit in monetary terms but also recoupage from the producers shooting and spending money in the region. These companies constitute a middle ground between private investors and governmental funds, and have interest in both supporting movies and turning a profit. They are affected by the development of the right to final cut in the same way as private investors, but on the other hand, the final cut discussion has no effect on the money spent on regional resources such as restaurants, hotel and school.

#### **8.4 Internet – a disturbing element?**

In the mid 1990s, a new film distribution channel was created when the Internet was brought into "ordinary" people's lives. However, to watch a film, or distribute it, via the Internet requires a high-speed Internet connection, a condition which was not prevalent when 56k-modems were the only connections available for home users. Nowadays, broadband-connections are almost standard and approximately 50% of Swedish residents have a broadband-connection at home<sup>65</sup>. With this connection home users can view streaming video, such as SF Anytime, and download huge amount of data, e.g. a video file containing a movie. This way, distributors reach a larger group of customers interested in film, not just the cinema audience or DVD- and VHS-rental or purchase customers. Even though the Internet is a flexible means of distribution, it has its drawbacks. The music industry is well aware of these drawbacks, primarily the fact that music has, for over a decade, been downloaded illegally via file-sharing programs. Music files are a lot smaller than a video file, which is approximately 200 times as big as a music file. This is the main

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<sup>64</sup> Nytt filmavtal äntligen klart, *Göteborgs Posten* 2005-09-16

<sup>65</sup> <http://www.pts.se/Nyheter/pressmeddelande.asp?Itemid=5368>

reason why films have only been subject to illegal download for the last couple of years, when broadband connections with high-speed connections became available at affordable prices. The music industry has been struggling with these piracy issues and has tried different solutions to prevent illegal copying and downloading. They have tried everything, from physical copy protection to the latest protection – DRM (Digital Right Management). Another way of dealing with illegal downloads is to provide alternative venues to download music online in a legal way from portals such as iTunes or the new Napster. As stated before, the film industry has only been subject to piracy for a few years; a way to prevent illegal downloads has not yet been presented, or legal alternatives with iTunes or Napster. Both the music industry and the film industry need to find a suitable solution for customers, distributors and authors.

The discussion about piracy is mainly about prices, as customers think a CD or DVD is too expensive and the industries are of the opinion that they need the high prices in order to make sure that production, distribution and royalties will be taken care of.

It is hard for an author to profit from his/her work when e.g. a film is illegally uploaded to the Internet, as the author loses control of his/her copyright and Internet copies render no royalties. If authors do not get royalties or any profit for their work, they lose their incentive to create further work and further creative development will stagnate<sup>66</sup>.

This problem is also a sensitive situation for the investors. They invest money into a movie, which could later be downloaded illegally from Internet via file-sharing networks. We can foresee a problem here if authors and production companies cannot control their rights, as some investors might think that the film industry is too risky with a far too uncertain return on investments. The funds from SFI would then be even more important and the government would have more influence in film productions. However, if a system for legal downloading is constructed in a functional way, this would help the business to keep better control of their rights. In return the production companies would more easily be able to find necessary financial resources. People within the industry are positive to this solution and believe that a working system will be developed and used in a near future<sup>67</sup>.

## 8.5 Final words

Strong cultural influence affects the Swedish Film industry, as film is a cultural expression. The director has a prominent position due to his/her work efforts and is one of the most important team members. At

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<sup>66</sup> Nöjesvärlden om tio år, *Göteborgs Posten* 2006-01-09

<sup>67</sup> Nöjesvärlden om tio år, *Göteborgs Posten* 2006-01-09

the same time the producer is also a key person in the film making process but is not entitled to copyright, even if he/she has influence and works closely with the director in the creative process. We think it is unfair that a person, such as the producer would not be entitled to copyright according to 1§ CA solely due to his/her title. The legislation in the CA defines the author in film production to be the director, which was stated in the directive 93/98/EEG. In other words, to be entitled to copyright, you must have the right title on your business card.

The final cut is a director's right and the producer will have a hard time convincing the industry or legislators that final cut should be assigned to the producer. Some people are afraid that this change of owner will make the industry prioritize economical aspects more over cultural aspects.

These issues are in practice often solved by the industry itself. At the moment this is providing satisfactory solutions for the corporate actors, however, we would like to express a word of warning. The Swedish industry is small with few involved companies and agreements between the parties are characterized by homogeneity and simplicity

Such agreements work as long as the industry interactions are limited to a national arena. When, on the other hand, international agreements are to be concluded, these are more extensive and detailed. In these situations it is almost a requirement to use an advisor to look after the company's interests. The lack of such legal assistance is, or is about to become, a problem for the production companies in Sweden. In order to deal with these challenges, it is necessary for production companies to structure their businesses around the principles of deriving optimal value from their property. Having a structured library of agreements is necessary for control of the copyright. If the Swedish film industry does not learn how to capture intellectual properties and exploit their full value, it will be hard to survive in the international arena. One solution would be to use companies such as All Together Now in order to secure rights and handle administrative matters. Another solution would be to take on an additional staff member who is with the project from beginning to end, and who would have the necessary legal skills and ability to manage creative work. This is necessary in order to operate in different fields because it is too expensive to employ in-house legal staff.

## 9. Conclusion

“There can be only one!”<sup>68</sup>

The determination of authorship is a question that greatly affects the film industry. The legal and financial structures within the industry need to emanate from the definition of authorship. The primary conflict in this matter is between the creative team, which wants to expand the copyright assignation as far as possible, and the investors who want to keep the number of copyrights limited.

In the beginning of this thesis, we thought that more people involved in the team would be entitled to copyright. It quickly became apparent showed that legislators and the film industry were of another opinion. Since the law gives the industry a wide range for individual interpretation, it affords the production companies an extensive possibility to choose who is entitled to copyright.

In the analysis, we have focused on the effects the authorship has on the industry. To better analyze this, we have chosen a current issue - the discussion about the right to final cut. We believe this topic illustrates the possibilities and pitfalls within the industry in a descriptive way. It also illustrates the differences between law and practice. The purpose is not to come up with practical solutions, but rather to illuminate the problems and try to foresee upcoming changes within the industry.

A great deal has changed within the film business and there is more to come. The evolution of the digital era and Internet as a major tool will bring about further changes in the film industry. Probably things we cannot even imagine today. We are probably as unaware of the future as Mauritz Stiller was, nearly 80 years ago. Even though, the film industry has been operating in the Swedish market for a hundred years, this is only the beginning of the journey.

We have learned a lot during our work with the thesis, both from literature and articles, but what have proven most valuable have been the interviews. With help from the interviews, we got a deeper understanding on how the film industry works. It was interesting to map out how the business manages the involved copyrights, what they evaluate in film projects and prospect thoughts.

We would like to take the opportunity to thank all of the people interviewed. We appreciate that all of you were able to set aside some of your valuable time to help us complete this thesis.

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<sup>68</sup> *Highlander*, (1986), directed by Russel Mulcahy

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Filmavtal 2006

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