

Department of Law
School of Economics and Commercial Law
The University of Gothenburg

Applied studies
20 credits, Spring 2003



Essay in Law

Law and Film - a Complicated Marriage

Intellectual Property as a Hindrance for the Artistic Freedom in Film

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Abstract

The purpose of this essay is to analyse, from a Swedish legal perspective, if the concept of intellectual property is a hindrance for the concept of artistic freedom in film and make suggestions on how such a problem can be handled. After using mainly a legal realism approach and both Internet and literature sources the conclusions are that intellectual property is a hindrance for the artistic freedom in film, due to the big influence that intellectual property has on what is transmitted through films, that this is a problem and that mandatory changes (legislation) should be done for artistic films.

Preface

The idea of this essay came during a break in a class in brand management from an intellectual property point of view. I had recently seen a film called *Steal this Movie* (2000), directed by Robert Greenwald, that is about Abbie Hoffman, who was a front figure in the hippie movement in the USA. The title of the film is a paraphrase from a book that Abbie Hoffman had written, called *Steal This Book* and in that book he argues that there should not be any intellectual property at all. Whereas I personally think his ideas are extreme I do think that there should be more discussion about intellectual property and how that concept should be constructed. There are after all other values that could and are in conflict with the concept of intellectual property.

That I chose to examine how intellectual property affects film (or rather the value of artistic freedom in film) comes from that I have a big personal interest in film and intend to get a degree in the subject. I have previously studied the subject of film studies for a year and am currently enrolled for yet another 20 credits (which will allow me to take a Bachelor of Arts in the subject). The lecturer before the break, when I got the idea for this essay, had argued as a matter of fact that using the concept of intellectual property is the only way forward and that it should be constructed extremely wide. As I deconstructed the lecturer's thoughts in the break it was natural for me when thinking of other values in possible conflict with intellectual property to think about artistic freedom in film. This idea later on then became developed into this essay.

As help for you as a reader I have put in extra effort in the structure of this essay. Among other things is in the beginning of each chapter a concise description of the purpose of the chapter, how the chapter is divided and what the chapter contains. This will help you as a reader to find specific information or specific parts of this essay. If you intend to read the entire essay (or an entire chapter) I strongly suggest that you do not read the concise description as it only contains information that will be stated below (in more detail) and therefore will almost feel redundant and tiresome. As each part of a chapter (that is of some length) also will state the purpose for that part, how that part is divided and what that part contains I ensure you that you will not miss anything.

With this in mind I only want to wish you an interesting reading,

Anders Blomberg, Gothenburg 2003-02-28

Table of contents

<u>ABSTRACT</u>	I
<u>PREFACE</u>	II
<u>CHAPTER 1 INTRODUCTION</u>	1
<u>BACKGROUND</u>	1
<u>PROBLEM DEFINITION</u>	3
<u>LIMITATIONS OF THE PROBLEM DEFINITION</u>	3
<u>PURPOSE</u>	4
<u>METHOD</u>	5
<u>DISPOSITION</u>	7
<u>CHAPTER 2 DEFINITIONS - A THEORETICAL BASE</u>	8
<u>INTELLECTUAL PROPERTY</u>	8
<i>A linguistic approach</i>	9
<i>A game approach</i>	9
<i>A group definition approach</i>	10
<i>A practical approach</i>	11
<i>A historical approach</i>	12
<i>My definition and the reasons for it</i>	13
<u>ARTISTIC FREEDOM IN FILM</u>	14
<u>CHAPTER 3 THE CURRENT SITUATION – DESCRIPTION</u>	17
<u>BEFORE THE FILM</u>	17
<i>Some perspectives - background</i>	18
<i>The law</i>	20
<i>Further understanding and complications</i>	24
<u>THE FILM</u>	25
<i>Some perspectives - background</i>	25
<i>The law</i>	27
<i>Further understanding and complications</i>	29
<u>AFTER THE FILM</u>	30
<i>Some perspectives – background</i>	30
<i>The law</i>	33
<i>Further understanding and complications</i>	35
<u>CHAPTER 4 THE FUTURE - ANALYSIS</u>	37
<u>IS INTELLECTUAL PROPERTY A HINDRANCE FOR THE ARTISTIC FREEDOM IN FILM?</u>	37
<u>DIFFERENT TERMS/CONCEPTS WITH DIFFERENT VALUES</u>	40
<i>The values underlying artistic freedom in film</i>	40
<i>The values underlying intellectual property</i>	41
<i>Is it a problem and if so, to what extent?</i>	42
<u>HOW TO ADDRESS THE PROBLEM?</u>	45
<i>Changes within the current system</i>	45
<i>Voluntary changes</i>	46
<i>Mandatory changes (legislation)</i>	47
<u>MY PERSONAL SUGGESTION</u>	48
<u>BIBLIOGRAPHY</u>	
<u>LEGISLATION</u>	
<u>FILMS</u>	
<u>LITERATURE AND OTHER SOURCES</u>	

Chapter 1 Introduction

The purposes of this introduction are several. The most important purposes are to describe what this essay is about, which question(s) I intend to answer, which method that have been used and what the disposition of this essay is. This chapter is divided into six parts where the first part is a background where I give a short historical explanation of the question(s) for this essay as well as a general background. The second part of this chapter is then the problem definition where the question(s) of this essay will be stated in detail, including several sub-questions that also will be answered in this essay. In the third part of this chapter, I will describe the limitations of the problem definition that I have done in this essay, and give the reasons for why I have made them. The limitations that I have made are important, since they will restrict the problem definition and limit the scope of this essay. I will then in the fourth part of this chapter go into the purpose of this essay, whereas the fifth part is a description of the method that I will use. The last part of this chapter is about the disposition that I will use in this essay, which also will serve as a short description of the main aspects that the different chapters will contain.

Background

It is a common belief that in order to understand the future one must know the present, and to understand the present, one must understand history. Personally I think that the sentence is false. I think that it is both possible to understand (or at least accurately predict) the future without any knowledge of the present situation and to know the present situation without knowing the history; it is just more complicated to do so. This short background is not an attempt to give a complete historical overview of the issues that are of interest for this essay, instead, it should be viewed as a way to put the problem definition for this essay into some perspective, as well as give a brief general understanding of the subjects that are involved in this essay. The reasons for this are of course that there is not enough time for or available space in this essay to write a complete history of the subjects and that there already exist several books in which authors have already done so. I have chosen to divide this background into three different areas, and each area will be presented in a separate passage below. The three areas are intellectual property (law), film (including artistic freedom in film) and what the conflict between intellectual property and artistic freedom in film is about. In the first passage I will however clear out some of the biggest misconceptions regarding intellectual property in order to make this essay more understandable.

There are three big misconceptions regarding intellectual property that first need to be understood. All three misconceptions come from the use of language. The first misconception is that intellectual property and intellectual property rights are synonyms. Intellectual property rights constitute a specific part (issues relating to rights) of the larger concept of intellectual property. However, since intellectual property is mainly a construction that relates to rights, the words are often used as

synonyms.¹ The second misconception is that intellectual property is referred to as being intangible whereas other property is not. This is simply a common way of talking that is misleading to someone who is not familiar with the subject. All property rights are intangible (since they are ideas), instead the distinction is made between the objects that the rights refer to. Intellectual property refers to property that is protected as intangible (although it has to be manifested in some way), whereas other property is protected as the tangible product. The difference is that intellectual property can (but does not need to) be applied to numerous different products (such as a story in a book can be printed in several books and turned into a film that can be sold on VHS-cassettes and DVDs), whereas other property relates to a single product or rather a single copy (such as a book or a DVD). The last misconception is that intellectual property is something new. This is simply not true as I will show in the next passage, but the reason why it is described as something new is because it is only recently that it has become of serious importance.

Intellectual property dates back to the Roman laws (possibly even earlier), and it is possible that the stoicism is the source for the Roman distinction between tangible and intangible objects.² Many philosophers have published different ideas on intellectual property and even more theories and ideas have been applied to the concept (this is the case with for instance Marx who did not publish anything about intellectual property, but his ideas have still been applied to the concept of intellectual property³). The most central question for intellectual property is whether or not the person who has created the intangible "object" shall be the "natural" owner of it. From a societal point of view, the question can be translated into if society should accept that ideas can be owned (if the statue of ownership/property shall be bestowed on the act of creation). As is the case with for instance patents and copyright, they have been designed as grants (of ownership) that are limited in time, but that is of course not the only construction that can be made. A philosopher such as Locke argues that there is always a choice how the rules in society shall be constructed regarding intellectual property, but that they should be constructed so that the person who made an intangible object should have a natural ownership to it.⁴

The Lumière brothers held the first public screening of a film for a paying audience in December 1895.⁵ Although it has been argued (successfully) that it was not the Lumière brothers who invented the film medium⁶, that screening marks the beginning of film as we know it today. In the beginning, films were, however, not considered as anything else than mere entertainment, and it was not until 1928 that films got some clear international recognition and protection.⁷ The notion that film could be considered as art

¹ I will in this essay use the word intellectual property as it is the main concept, but if necessary, where it otherwise would not be clear, I will use the term intellectual property rights.

² Drahos, Peter, *A Philosophy of Intellectual Property*, Aldershot, ISBN 1 85521 240 4, p. 16 f.

³ Drahos, p. 95 f. and 114.

⁴ Drahos, p. 42 ff, 47 ff and 68 f.

⁵ Nowell-Smith, Geoffrey (editor), *The Oxford History of World Cinema*, New York, 1996, ISBN 0-19-874242-8, p. 6 and 14.

⁶ Nowell-Smith, p. 6.

⁷ Ricketson, Sam, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, 1987, ISBN 0-582-46368-8, p. 553.

was in the USA not accepted until somewhere in the 1950s and 1960s.⁸ Films are, today, regarded as something much more than just mere entertainment. Besides being a commercial product, films are also viewed as an art form (and thereby a bearer of our culture) and a way to express views (argue for certain positions). Regarding artistic freedom in film, it is a concept that has been incorporated into the subject of film, from other previously accepted art forms, as film became accepted as a form of art. The general concept of artistic freedom in film is therefore not something unique for film, but there are some specific issues concerning the artistic freedom in film that are unique for this form of art.

The problem concerning film and intellectual property lies in the fact that film has (as already stated above) become something more than a commercial product. As films nowadays are viewed as a part of freedom of speech and freedom of expression as well as art, there is a conflict when someone owns and can control the content of a film (whether it is the story, images being used, music and so on). From this perspective, the concept of intellectual property has as a consequence that the common culture is owned and controlled, which is a problem for artistic freedom in film that stands for as much freedom as possible. On the other hand, film as a commercial product relies upon the protection of intellectual property in order to be financially viable. And it is this problem/conflict that this essay is about, and whether or not intellectual property is a hindrance for the artistic freedom in film.

Problem definition

The main question for this essay is:

Is intellectual property a hindrance for the artistic freedom in film, and if so, in which ways, and how should it be handled?

The main question can, however, also be divided into several sub-questions. So besides the main question, I also intend to give one (but not the) answer to what intellectual property is and what artistic freedom in film is as well as go into several possible solutions to the problem (if it existing). I will also extensively go through all applicable laws and show where intellectual property is restricting the artistic freedom in film, as well as show a lot of examples that are related to intellectual property and the artistic freedom in film. Other questions that will be answered are: Is it a problem if intellectual property is a hindrance for the artistic freedom in film? What are the main underlying values of intellectual property and artistic freedom in film? And in what ways, if any, is intellectual property a hindrance for the artistic freedom in film?

Limitations of the problem definition

⁸ Bauman, Shyon, American Sociological Review, 2001, Vol 66, p 405 f. as collected in Filmvetenskapliga metoder, FV4100, 2002.

There are three limitations of the problem definition that I have done in this essay. The first is that I will focus on the legal system of Sweden. The reasons for this are first of all that the problem definition otherwise would be too wide for the space and time available for this essay, and second, that since I am writing this essay as applied studies for my Swedish Master of Laws education, it seems therefore natural to focus on Swedish law. This limitation of the problem definition will however not mean that I will restrict myself from giving comments on different legal systems (when appropriate) occasionally in order to highlight certain situations, problems or similar.

The second limitation is that I will only analyse what is transmitted through film (that is story, image and sound), and how that is affected or otherwise related to intellectual property. This means that I will not go into a discussion about how films are produced (such as management of labour, employee contracts or funding schemes, all of which could be or include trade secrets), which cameras or computers are used in order to record the film, on which media the films are stored (hard disc, film etc.), which tools are used to edit the film and which apparatus are used to view the film. The latter three categories are undoubtedly influenced by intellectual property in for instance the way that they work and are designed. In most parts I will essentially uphold the difference between film studies and film science. Film science analyses the technical part of the film (for instance how the celluloid film is constructed), whereas film studies analyse the content of the film (for instance if it is a romantic comedy or not). The reasons for this limitation are the limited available space for this essay as well as to avoid a too technical essay that would need to mainly focus on technical issues (such as if a filter being used in a certain film is constructed due to a patent or if the product design of a camera has influenced the outcome of a film) rather than legal and business aspects. This also means that an interesting question such as if TV-stations have the right to broadcast commercials in-between the film falls outside this essay.

The third limitation is that I will only examine feature length films (roughly about one and a half hour or more) from the aspect that they are to be viewed on TV or on a screen (cinema). The reason for this is that films that are for instance made for the Internet or to be a part of computer games or video-games have such special implications that it would take too far in this essay to answer such questions (if such answers do exist). There are many problems that are specific to copyrighted material on the Internet and to analyse them would in itself be a big enough subject for an essay like this one.

Purpose

The purpose of this essay is primarily to answer the problem definition. However, I openly admit that this is not the only purpose. I also want to write an essay that can be looked upon by a practitioner as a guide/introduction to intellectual property issues and film. I hope that this essay will increase the knowledge transfer between the subjects of law and film, which I think currently is low. As I will conclude in the next part of this chapter, this is a subject that is hardly even mentioned from a Swedish law perspective.

Method

Since this essay combines two different subjects, namely law and film, the method I will use is quite different for the different subjects. Concerning law I will mainly use a legal realism approach (also called a legal sociological realism approach and a legal positivism approach), that has mainly been attributed to Jeremy Bentham.⁹ His utilitarian idea of justice stands in opposition to the classical and Christian understanding of justice and law. In essence, it means that laws are no more than commands from human beings and that it therefore is no necessary relationship between law and morality.¹⁰ Therefore, the way to understand law is to examine what the lawmakers intended and have decided (and not study other sources such as the bible or the current majorities in the society). The only source of justice from this point of view emanates from the sovereign state, but since power can be transferred (and have been by Act (1994:1500) concerning Sweden's Accession to the European Union), I will examine, describe and explain the law by studying (when appropriate) in order of importance EU-regulations (both primary and secondary), the Swedish constitution, Swedish laws, Swedish regulations and other Swedish sources of law (for instance governmental instructions, advice from authorities and doctrine). I will mainly use this method, since it is the method that the clear majority in the legal field (both when it comes to practitioners and Swedish legal educations) are using in order to examine the current legal situation in Sweden.

I will, however, go further than the legal realism approach and not only make an examination of the current legal situation and make analysis on how it is, I will also examine how it should be. This means that I will apply values to the current legal situation and make suggestions of possible solutions (after I have concluded if there is a problem). What I will do is to see if there is a possibility to change the current legal situation using arguments and values or if other changes needs to be done. The situation can be described in a conflict as that the legal realism approach is excellent at describing who has the right (how the situation is) and can be used in order to give an estimation on who will be right (how the situation will be). Who will be right is, however, affected by values (and norms) that are presented in the conflict (argumentation). The legal realism is, however, not good to use in order to explain in what direction and how the laws are changing (without new court cases or laws). Instead, changes come from argumentations in both conflicts (court cases) and within the legal community (what people believe to be the law). However, since this is an essay that mainly is within the business part of law, the most interesting question is normally: Who will get the money? Companies normally try to benefit economically in a situation and will not try to win even when they are right and probably will be right if they do not get the money (earn something on it after the costs for the legal procedure).

When it comes to the subject of film I will use a completely different method. I will mainly collect as many examples as possible of problems and similar between intellectual property and the artistic freedom in film. I will then take the example that I

⁹ Strömberg, Tore, Rättsfilosofins historia i huvuddrag, 3rd Edition, Lund, 1989, ISBN 91-44-18633-9, p. 58.

¹⁰ Strömberg, p. 57 f.

find to be the most highlighting or interesting to the certain situation, problem or similar. The examples will therefore be very selective and not accurately depict all films. The reasons for this are that it would be impossible to cover all films and that it would be highly unnecessary, since the films are only examples and not a complete study. I have also decided to choose as famous films as possible (mainly Hollywood films). The reasons for this are that it will allow me to do less explanations of the films (when appropriate), that there is more material available and also that it will ensure that I do not need to give as many confirmations (as they are already publicly known facts). I will also often use Internet sources when it comes to film examples, since they are so relatively new. The fact that Internet sources are less reliable has been taken into account and where the examples are extra important I have tried to use printed sources (or double check the information using more than one source).¹¹

The last issue concerning the method is about the literature, which is almost non-existing. There are no books that cover the legal issues of intellectual property and how that influences film from a Swedish law perspective, let alone a consequence analysis of the same issue. Instead, the books available for this essay have been books about intellectual property laws in general (or certain parts of intellectual property law) that have focused upon describing the current legal situation for all kinds of phenomena. Issues relating to film have at best been mentioned, but most often only implied, if that. There is, however, one exception and that is a book called *Aktuella frågor om film* that is a collection of two legal theses (written as applied studies such as this essay) about two specific issues of intellectual property law and film (the protection for manuscript writers and idealistic right (droit moral) in film).¹² Available for this essay have also been books about foreign legal systems and intellectual property in general (mostly from an Anglo-Saxon perspective). These books have mostly served as background reading and further understanding (mainly business perspectives) of intellectual property. Whereas these books have not been mentioned specifically I do want to mention the book *The Economics and Management of Intellectual Property* by Ove Granstrand. The book is written by a Swedish professor but mainly focuses on the historical and present situation in the USA and Japan¹³ (as well as giving a few hints about the future). In my view, this book gives a good insight into the business perspectives of intellectual property (mainly from a technology-producing company's point of view) and the book has influenced my views on the business perspective of intellectual property.

¹¹ On the day of handing in this essay I had only lost one Internet source but I decided to keep the information and highlight the problem in footnote 81. I have also decided to use official Internet sources for a few films when listing influences for those films since I regarded that information as reliable. The reason for this is that influences normally mean costs for the production company (in order to obtaining rights to that influence) and therefore there is normally no interest for the company in stating more influences than was used.

¹² Haraldson, Frekrik, och Ehrén, Charlotte Lilliestierna, *Aktuella frågor om film*, 1998, ISBN 91-7223-027-4, p. 3 and p. 91 f. (marked in the text as 1 (81)).

¹³ Granstrand, Ove, *The Economics and Management of Intellectual Property*, Cheltenham, 1999, ISBN 1 85898 967 1, p. xiii f.

Disposition

This essay has been divided into four main chapters (where the first chapter is this introduction chapter). There are several reasons for this. The main reason is to follow a logical structure where I first construct the basis for the essay, then build the theoretical ground followed by a description of the current situation, including both the laws and a general understanding, as well as give several examples, and then in the last chapter make the analysis. Another reason is to allow already knowledgeable readers in this field or readers with a specific interest to go directly to the current system or the analysis. The chapters are constructed as following:

The second chapter is focused on a deeper understanding of the different concepts/terms artistic freedom in film and intellectual property. As will be evident, there is no consensus what the concept/term intellectual property contains or stands for and it is therefore especially important to start this essay with examining some of the current discourse and explain the meaning that the concepts/terms will have in this essay. This means that the chapter will serve as a theoretical base from which I will draw conclusions later on in the essay.

In the third chapter I will go on and see how the current situation is. I will divide the current situation in three areas and give a background, describe the current legal situation as well as give a further understanding for all three of these areas. The main focus of this chapter will be on how the legal system is created and how this affects the artistic freedom in film. I will in this chapter also give a few examples to highlight certain issues and also show some specific problems concerning film (including filmmaking) and intellectual property.

I will then in the last chapter of this essay make the analysis. Questions that will be examined are for instance if intellectual property is a hindrance for the artistic freedom in film, if it is a problem if intellectual property is a hindrance for the artistic freedom in film and which the underlying values of intellectual property and artistic freedom in film are. I will also in this chapter analyse which possible solutions there are (if there is a problem) as well as give my own suggestions.

Chapter 2 Definitions - a theoretical base

In order to be able to construct anything one must first build a foundation. That is what this chapter is about, a way to build a theoretical base. The chapter is divided into two parts where the terms/concepts of intellectual property and artistic freedom in film are examined. I will both take up some of the current discussion concerning the terms/concepts as well as clearly state what the terms/concepts mean in this essay. As both terms/concepts are essential for this essay, this means that this chapter also serves as a theoretical base from which conclusions later on in this essay will be drawn. The main purpose with this chapter is therefore not to make a deep analysis of the terms/concepts but to put the terms/concepts in perspective and clearly show the meaning that they have in this essay.

Intellectual property

The first thing that shall be noticed is that there is no consensus concerning what intellectual property is. There are literally hundreds of definitions, if not more, of what intellectual property is or how it shall (or could) be viewed. To compile all the different definitions and views is a task that is almost impossible and rather useless. The term intellectual property and the underlying phenomena are so new (relatively) that there will take a long time before a more generally accepted understanding of the concept of intellectual property has been created. I will below take up a few examples of different definitions of what intellectual property is in order to not only show the complexity of the term, but also give a general understanding. In the end of this part of the chapter I will also state my own definition of the term as well as give the main reason why I have adopted the view that I have in this essay.

It will be evident below that different approaches (perspectives) result in different answers and that my choice of approaches and examples has highly influenced what I have written. The reason why I decided to do it the way that I did was that I felt that it would give a broad view of the issue of intellectual property while also serving both as background and source of reference for my own definition in the last section of this part of the chapter. I have also deliberately chosen examples from an individual, a small organisation (non-governmental), an encyclopaedia (produced by a company), a government and an international organisation (with almost the same number of member states as the United Nations¹⁴). The main reason for this was to see to that very different views were heard and to make sure that the examples also gave an as broad view as possible. I am nevertheless fully aware of the fact that the somewhat arbitrary choices that I have made have highly influenced the material and the way that I have described intellectual property. I therefore wish to stress that it is not *the* answer (but *an* answer) to what intellectual property is.

¹⁴ According to information collected from <http://www.un.org/Overview/unmember.html> on the 19th of January, 2003, the United Nations had 191 member countries and according to information collected from <http://www.wipo.int/members/members/index.html> on the 19th of January, 2003, the World Intellectual Property Organization had 179 member states.

A linguistic approach

The linguistic approach means that the essential element of creation comes from the communicative understanding of people. In short: how people talk about something and how they understand it. Language is after all the tool that we use in order to convey messages and information. By defining the new concept as people are using it (or will accept to use the word if they are not yet using it), it is assured that it will be accepted directly. With time, the meaning can of course be changed or an alternative use of it can become more accepted.

The main problem with intellectual property from a linguistic approach is that the subject being defined does not exist, at least not in the sense that one can touch it. It is therefore more difficult to have some sort of consensus about it than it would be if there was a tangible phenomenon that people could agree upon was intellectual property. But the mere fact that the concept includes the word intellectual means that it is something intangible, even though there might be tangible copies of it. However, the complication with intellectual property is that it is the concrete manifestation of the ideas that can be protected (become intellectual property). A book is an ordinary product and that includes the ink that has been used to fill the pages with words. But the words that have been put into sentences that for instance form a story, that is the concrete manifestation of the intellectual property. It is the same with a painting where the frame, the canvas and the paint is property in the ordinary sense of the word but when put together (in a certain way) into a painting, that is what constitutes the concrete manifestation of intellectual property. A definition of intellectual property that shows understanding of this problem is a definition from a group that call themselves Jacsen7: Intellectual property is “a concept based on the public's willingness to bestow the status of property to an act of creativity.” The definition continues with that it “[m]ore simply put... [means] [p]roducts of the mind... [that is] [i]ntellectual assets.”¹⁵

A game approach

As with almost everything in society, it can be argued that people try to benefit themselves. If we accept the notion that people are self-serving (including trying to benefit groups, countries etc. that they belong to) it is much more easy to view the concept of intellectual property as a game. A game that is played by a very large amount of players and where the object is to get an as good (read the most benefits for the person and/or the group) interpretation of a definition as possible. If we adopt this view,

¹⁵ "What is intellectual property (IP)?", collected from <http://edie.cprost.sfu.ca/~jacsen7/whatisIP.html> on the 19th of January, 2003. The web-page is made by a small group that call themselves Jacsen7 and CopyRong (!) that according to their web-page consists of a group of students at Simon Fraser University. The definition is also referenced as being paraphrased from (SFU) CMNS 253 lecture 6, as presented by Paul Wolstenholme: 1995_, 12 October and A Guide To Copyrights. OPIC: 1994. The unreliability of the source has no real bearing on this essay since it is only an example of a way to argue something and therefore does not need to be as accurate.

we can then analyse why definitions have been designed in certain ways (see the underlying power struggle and the different players' agenda) and possibly also see where the definition is heading or stagnating.

But it is also so that the way that people argue or in this case are trying to define a concept depends on their situation. If you are a CEO, you will naturally want to benefit businesses (and especially "your" firm), so you would probably argue for the need of intellectual property to be accepted as an asset, and the need for a definition that would include business value. The way you would argue would be that you want it due to various reasons, such as it would create more jobs and a better economy for everyone. If you were an artist, you would argue in a completely different way. Maybe something like a director of technology for Geffen Records (a small record company) named Jim Griffin did in the program "Crusading for Art in a Digital Age":

Griffin: ... And then I got to thinking, you know, the real definition of intellectual property is art. The vast majority of intellectual property is art. And in fact, properly put, I suppose all intellectual property is better thought of as art. Whether we're dealing with the design of a computer chip--it could be the recipe for making some very ethicacious drug that would cure lots of illnesses or it could be the instructions to a piece of software or the way that a painting was painted. The image of the painting, the sound of a song, the text of a book, all of this is intellectual property and I'm just going to refer to it as art, to refer to creative expression.¹⁶

A group definition approach

Intellectual property is a concept that is being used frequently.¹⁷ Not only as legal terminology or a tool but also as for instance part of business concepts. The need to handle issues relating to intellectual property is growing in importance as the economic impact of intellectual property is growing. One of the efforts to ensure the protection of the value in intellectual property was to create the World Intellectual Property Organization (WIPO). This becomes even clearer when the organisation explains its purpose as "dedicated to promoting the use and protection of works of the human spirit". WIPO is one of 16 specialised agencies of the United Nations, which currently administers 23 international treaties and has 179 states as its members.¹⁸

Part of the work of WIPO has been to get some consensus of what intellectual property is as well as create and administer treaties in the field of intellectual property. WIPO as a group has therefore needed to make some sort of majority decision-making system where more important members have had more influence. This comes from the need to

¹⁶ Easton, Jaelyn, "Crusading for Art in a Digital Age" a radio show on the on-line channel MetaHollywood on LATimes.com that was transcribed on, mirrored on and collected from <http://www.cc.jyu.fi/minidisc/971017transcript.htm> on the 17th of January, 2003. The unreliability of the source has no real bearing on this essay since it is only an example of a way to argue something and therefore do not need to be as accurate.

¹⁷ Intellectual property as a term had more hits on Google.com on the 17th of January 2003 than for instance the word hunger, the number eleven or the names Bill Clinton, William Jefferson Clinton, William Clinton, Hillary Rodham Clinton and Hillary Clinton combined.

¹⁸ Information collected from <http://www.wipo.org/about-wipo/en/> on the 17th of January, 2003.

balance that as many countries as possible agree and that certain countries (that for various reasons are more important) must agree in order to get treaties to become effective.¹⁹ Therefore, which is the case with groups consisting of a lot of members with different views, one has to find the smallest common denominator upon where as many countries as possible can agree or include everything so that everything all members want to include are included. This means that a definition will either be smaller (not include as much) or be wider (include everything). I think that it is evident in the WIPO definition that it has been based upon the smallest common denominator rather than a definition that have included everything since it is specific and clear in nature and is not open for free interpretations.

Intellectual property refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce.

Intellectual property is divided into two categories: Industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and Copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs.²⁰

A practical approach

Theories are often a good tool to use when creating definitions. They can for instance be used in order to give a further understanding as well as broadening the mind and give even more insight. But sometimes it is better to define something in order to get some reaction (to cause some behaviour). A practical approach means that you want something to happen and knowingly make a definition that at least helps to create the action that you want. The difference between a game approach and a practical approach is that you are not trying to make a universal definition but your own, so that for example your firm works more efficiently or family members stop using or start using pens instead of crayons (this can be accomplished by for instance defining crayons as hazardous for the environment even though they might or might not be).

The definitions that one creates using a practical approach are primarily done as a practical way of supporting one's own gains, not as a way of creating a permanent definition (even though this could also become the case if everyone started to accept the

¹⁹ As WIPO uses international treaties it is up to every country to join (or not) that treaty meaning that all countries theoretically are equal. However, the work in WIPO is done in committees (which means that countries that can provide a lot of expert will have more influence) and the processes open for lobbying from countries. This was also the case when the USA joined the Berne Convention for the Protection of Literary and Artistic Works (which was as late as in 1989) they immediately started to lobby for changes with some successes according to Samuelson, Pamela, *Challenges for the World Intellectual Property Organisation and Trade-Related Aspects of Intellectual Property Rights Council in Regulating Intellectual Property Rights in the Information Age* as printed in Imparato, Nicholas (editor), *Capital for our time*, 1999, ISBN 0-8179-9582-5, p. 325 f. and 329 f.

²⁰ "About Intellectual Property", collected from <http://www.wipo.org/about-ip/en/> on the 17th of January, 2003.

definition). It is still a case of when people are trying to be self-serving, but it is done on a smaller level than a game approach. But it could still be regarded as a game approach, only on a smaller level and without the same main goal (that is a permanent or widely accepted definition). When the British government made the following definition of intellectual property, I think that it is clear that they wanted to enhance people's acceptance of intellectual property (likely because it is generating wealth to the UK), but also in a limited sense make people start using the tools of intellectual property (applying for grants to for instance trademarks), but I also think that it is clear that the British government did not intend that this definition would be *the* definition and apply to all situations (if nothing else because it is rudimentary and unspecified):

Intellectual property, often known as IP, allows people to own their creativity and innovation in the same way that they can own physical property. The owner of IP can control and be rewarded for its use, and this encourages further innovation and creativity to the benefit of us all.

In some cases IP gives rise to protection for ideas but in other areas there will have to be more elaboration of an idea before protection can arise. It will often not be possible to protect IP and gain IP rights (or IPRs) unless they have been applied for and granted, but some IP protection such as copyright arises automatically, without any registration, as soon as there is a record in some form of what has been created.²¹

A historical approach

Another possible approach for a definition is to try to define the new concept of intellectual property by trying to make it fit in with earlier concepts that are much more accepted. The advantage with this approach is that one can create a huge system that works with only a few truly fixed points of reference, like a cobweb. This also means that a person in the system will find it more difficult to question the new concept since it is so intertwined with the entire system. This in turn means that it will be easier for persons in the system to accept such a definition, because something else means that they will have to question the system that they are a part of.

The main negative aspect with this approach is that it is hampering for the creative side of a new concept. Since it is intertwined and understood through other concepts, it means that even if it will work better and more efficiently than earlier concepts, it will still be a part of the system, and therefore, it will also follow the same rules and restrictions as the rest of the system. This means that a new concept can only maximise the potential of the existing system, and not go outside the boundaries and create something truly new and even more efficient. An example of a definition of intellectual property that is using the historical approach (in this case defining it from earlier concepts of ownership and intellectual) can be found on the web-based version of the Canadian Encyclopedia under the entry intellectual property:

²¹ "What is intellectual property or IP?", collected from <http://www.intellectual-property.gov.uk/std/faq/question1.htm> on the 17th of January, 2003 that is an official governmental web page of the British government.

This term is used to describe rights which protect the results of intellectual and creative activity: items such as a new product, a book or painting, or a marketing slogan.

Normally, property ownership involves 2 essential elements: control over the property by the owner and the ability to exclude others from using or interfering with the property. In intellectual property, these elements must be adapted. The underlying idea usually takes some external form; for example, the invention is seen in a product or process; the design in a pattern or shape; the trademark in a name or logo. In most cases, the owner of the right must register the creation of the property and mark the idea in order to inform the public of the existence of the right.²²

My definition and the reasons for it

As I have shown above, there are a many ways to conceive intellectual property. In all the examples above I have stated that they are approaches and the reason for this is that the examples should be viewed as methods of getting definitions and reasons why they are constructed as they are and not as relative or absolute truths. The fact that the examples might be truths in the sense that they accurately depict the current understanding for a certain group in the given context of today is not of interest. What is of interest is the basic understanding that the term/concept of intellectual property and the underlying phenomena are so new (and debated) that it can in some ways be what the person, group, country etc. wants it to be (within reason). This also means that I, as a person writing this essay, can construct my definition as I want it to be (within reason). It also means that with no certainty of the definition I have to choose or construct a definition in order to create clarity and make conclusions that are understandable.

Since this is an essay in law, I choose a definition that is constructed from what is the most legally interesting point of view, which is what can be upheld by a court of law.²³ I have also tried to make the definition as wide as possible (meaning that it is even wider than WIPO:s definition above), in order to make the essay as open for interesting issues as possible (and not define interesting phenomena as being outside the scope of the essay). As a last choice I also decided not to go into any details concerning what is covered by my definition, but only give examples thereof. The reason for this was to not narrow down the scope of the essay, while showing differences between my definition and primarily the WIPO definition (such a difference is the fact that I include contracts between entities as something that can create intellectual property). My definition of intellectual property is therefore:

Intellectual property is all ownership (and similar) that at a given time can and will be upheld by a court of law, that relates to intangible phenomena which means for instance copyright, trademarks, design protection but also contracts that between entities can create ownership (or similar) since the contracts also can be upheld by a court of law.

²² Collected from <http://www.thecanadianencyclopedia.com/> on the 17th of January, 2003.

²³ Law can nevertheless be interesting to use as a tool for argumentation (to motivate) in other situations such as public international law where no court has jurisdiction (but the UN has) and where the decisions ultimately are based on politics rather than the understanding of law see Detter, Ingrid, *The Concept of International Law*, 2nd edition, 1993, Stockholm, ISBN 91-38-50194-5, p. 2 f. and p. 25 f.

Artistic freedom in film

It is not a problem to define artistic freedom in film.²⁴ The term is uncomplicated and a simple definition is the right for an artist to create art by expressing him- or herself in any way and method possible using film.²⁵ This means that artistic freedom in film is simply a combination of the freedom of speech and the freedom of expression. The specific words used in order to describe the definition might change, but the content of the definition is the same.²⁶ However, the term artistic freedom in film cannot be understood without putting the term in perspective using words such as censorship and restriction.²⁷ The reason for this is that artistic freedom in film has never been, and will never be, completely unrestricted. There are many restrictions of the artistic freedom in film that need to exist in order for a society to function. If artists were allowed to randomly kill people in order to create realistic death scenes, society would probably collapse. The discussion concerning artistic freedom in film and restrictions (and censorship) are however not focused on issues like that, because it is generally accepted that most laws are not allowed to be broken in order to create a film. The reason that I refer to most laws is that it seems increasingly common to for instance trespass (or not leave private property when told to do so) in order to get good material for mainly documentaries.

Instead, the main discussion is mostly focused on pornography, especially child pornography, and sometimes on violence (even though TV and films are no longer the main target of accusations of making people, most often children, commit violent crimes, instead, it is video games and computer games that most often are the main targets)²⁸. As already mentioned, it is the relationship between intellectual property and

²⁴ Normally the term artistic freedom is used instead of the term artistic freedom in film even when there are issues relating to film that are being discussed, but I have chosen to use the more narrow term since this essay is about film and that there exist issues that are of interest concerning artistic freedom in general that are not of interest concerning films such as the right to be able to use different media.

²⁵ The more general term of artistic freedom means the same but it is not restricted to film.

²⁶ Even though there are considerable differences in reality, especially concerning what is art and what is not.

²⁷ As one of the most influential philosophers, when it comes to the idea of freedom of speech, John Stuart Mill puts it: "An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard" (the quote collected from Acton, H.B. (ed.), *John Stuart Mill Utilitarianism, On Liberty, Considerations on Representative Government*, 1992, ISBN 046 87024 6, p. 123), meaning that restrictions have to be made to even to freedom of speech and press, given certain conditions.

²⁸ In the book *TV är bra för barnen* written by Margareta Rönneberg (Falun, 1997, ISBN 91-88594-65-3), which is based on a doctor's dissertation by the author (see p. 7) it is not only stated that both TV (and thereby including film) and computer games are good for children (see p. 18 and 155 ff.) but she also goes through the debates in the Swedish society concerning harmful media. "During the 20th century the threats has been pulp literature, films, radio, comics, TV, videos, computers, computer games, role playing and virtual reality. The arguments have in large been the same. One has warned of isolation, stress, reduced language ability, increased violence, moral decay and that the fantasy are inhibited by all image media." (My translation, from p. 158.)

artistic freedom in film that will be analysed in this essay, but I do think that a short description of the current discussion about artistic freedom in film is of interest for this essay, since it also puts the concept of artistic freedom in film into perspective. The current discussion was somewhat summed up and exemplified by a section in the article "The art of making a scene in a room which is no longer there" by Sara Arrhenius. I think that she has captured the current main discussion in Sweden in an informative way and that the quote shows some of the complexity in the discussion:

At the show "Organising Freedom" (2000) at Moderna Museet, the Norwegian artist Bjarne Melgaard showed a complex video installation called All Gym Queens Deserve To Die. A short video sequence where a man is sucking on a little girl's arm caused a scandal and heated discussion on the limits of artistic freedom, pornography and child abuse. Quite a few critics used themselves as a point of reference – "that's where I draw the line" – when claiming that the work had passed an ethical limit, and not to some kind of universal moral principles. Right and wrong have moved inside the individual and come across more like ways of life, or lifestyles, than an abstract law encompassing everyone. The question is how the relationship between artistic freedom, morality, and law is negotiated within such a framework...²⁹

There are, however, many aspects that the current main discussion does not cover, that are relevant aspects concerning restrictions (and censorship) of the artistic freedom in film. One of these relevant aspects is the one of governmental censorship that exists in Sweden in the form of Act (1990:886) about Examination and Control of Films and Videos. In short, the law states, with a few exemptions, that all films and videos shall be examined and approved in order to be allowed to be shown at a public assembly or an open gathering.³⁰ The law allows the National Board of Film Censors³¹ to ban a film completely or partially for all (even adults) or certain audiences (based on age groups), if the film is considered to have a brutalising effect.³² Another relevant aspect is the one of criminal offences, such as child pornography crime and illegal description of violence in chapter 16 sections 10 a and b in the Criminal Code (1962:700) of Sweden.³³ The sections in the code regulate for instance that it is illegal to spread child pornography, images of sexual violence (or force) as well as moving images that depict close-up (or a sequence of some length) of severe violence against humans or animals.³⁴

The issues that I have mentioned above are however not the only restrictions (or censorship) that exist on the artistic freedom of film. The examples above do not even mention one of the main restrictions on artistic freedom in film, which concerns property rights. After all, the fact that an artist cannot steal the items needed for a film,

²⁹ Arrhenius, Sara, "The art of making a scene in a room which is no longer there", collected from <http://www.anthology-of-art.net/generatio/02/arrh.html> on the 27th of January, 2003.

³⁰ According to 1§ of Act (1990:886) about Examination and Control of Films and Videos.

³¹ My translation of the Swedish authority "Statens Biogrambyrå".

³² According to sections 1, 4, 5 and 6 of Act (1990:886) about Examination and Control of Films and Videos, also note that to have a brutalising effect is nowadays the only criterion to examine for the National Board of Film Censors.

³³ My translation of "Brottsbalken".

³⁴ Both the criminal code and the censorship law relate to violence and work together so that films that have been approved do not fall under the criminal code according to chapter 16, section 10 paragraph 3 of the code but censorship might be decided even if the moving images do not constitute a crime in accordance to RÅ 1996 ref. 4 and JK 1994 s. 122.

but in fact needs to get some sort of right or ownership to the items that s/he uses, means a huge restriction, at least in the sense that it will cost a lot of money to acquire such rights or titles. Another main restriction is the individual's right to choose a profession, at least in the sense that people are not forced or obligated to participate in the making of a film. It might not seem like a big problem since there is no shortage of film actors (they do expect payment though), but I am sure that if filmmakers could choose freely, they would rather (or at least to higher degree) like to have the most known celebrities, politicians or similar in their films (even for small parts). This essay is also about another possible hindrance of the artistic freedom in film, namely intellectual property, but that is an issue that I will explore in the following chapters.

Chapter 3 The current situation – description

Films today are much more than just a mere form of entertainment. In this chapter I will explore films in general, from several perspectives, but mainly from a filmmaking point of view. That means that it is the handicraft and legal questions concerning it that will be in focus. The chapter is divided into three parts that follow a logical order of a film's commercial life. The first part concerns issues before the film is made, the second the film in itself and the third issues after the film. This essay is as already mentioned about the implications that intellectual property has on film³⁵, and therefore it might seem strange to talk about issues *after* the film as important *for* the film. But as I will show below, aspects after the film are important for how films are constructed and what they contain for several reasons.

The structure of this chapter is also in a sense a logical structure of the progress of the lawmakers and the creation of laws. As with almost all new fields (as for instance business and technology), laws are created or construed by the legislators *after* the development of that new field. Often laws are created to respond to something, such as an unclear situation or otherwise unfavourable situation. It is seldom so that the laws are created before, in an act of anticipation of future developments. It is also so that the content of a law often goes from uncertainty to clarity with time. This is done for instance by court rulings and acceptance of all parties to a certain state of for instance business. Something that has existed over a longer period of time is therefore often more clear from a legal perspective than a new event. The idea of the film that is examined in the first part of this chapter is an area that has been around for a long period of time (relatively unchanged), and it is therefore a rather clear area of law. The second part, which is about the content of the film, has changed over time to a greater extent, as different parts of a business such as the value of copyright and trademarks have increased in importance. This means that the second part of this chapter is more problematic and uncertain than the first part.

The last part of this chapter is relatively new, especially as an important part of filmmaking. That other income related to a movie (such as toys, clothes, games etc.) is higher than the revenues from screening and selling the movie itself is a new phenomenon that will affect the films, but that is so new that no rules have yet been made. The question is (as with all new events) if it is satisfactory that there are no laws, but that is a question that will be answered in the next chapter.

Before the film

This part of the chapter focuses upon questions related to intellectual property and film before the filming of the film actually even takes place. The aspects that will be examined are even before the planning of which actual props (items used in the films), people and location(s) to use. In essence, this part of the chapter is about the idea/vision

³⁵ For a more precise description of the topic of this essay, see chapter 1 under "Problem definition".

of the film. Questions that will be answered are for instance: What are the legal problems concerning aspects before the film and intellectual property? From where is information/inspiration collected for films? Why are the legal problems concerning the issues before the film rather uncomplicated? And why are earlier adaptations for the screen of the same work especially problematic if the film is relatively known?

This part of the chapter is divided into three different sections. The first section puts the issue of intellectual property before the film in some perspectives and thereby also serves as a background. The second section is a description of the law concerning these issues whereas the last section gives a further understanding of the problematic issues involved as well as taking up further complications.

Some perspectives - background

Based upon a book by X is a common line that is often used when it comes to film. The reason for this is rather obvious. Most (it can even be argued all) films are a way to communicate something. And in order to communicate, you must have something to communicate. Books are in many ways ideal in this aspect. They have a certain length³⁶, enjoy a somewhat public appeal³⁷ (both by the believed qualities of certain authors and as the works are spread) and normally only have one owner of the intellectual rights (or two if the author have transferred his or her right as will be evident below). Just to mention two current examples of books that have been turned into films are *Harry Potter and the Sorcerer's Stone* (2001) directed by Chris Columbus and *The Lord of the Rings: The Fellowship of the Ring* (2001) directed by Peter Jackson.³⁸

But books are not the only source for films. Inspiration can be drawn from various sources and most often it comes from several sources. It is even more complex than direct sources since even when one source such as a book has been used, that book might have various sources. Simply put, our culture is so complex and intertwined that it is hard to speak of a single source as the entire source for information for a film. Nevertheless, single sources of information for a film that are of interest concerning intellectual property are ballets (uncommon but an example is *Swan Lake* (1996) directed by Matthew Bourne), board games (also uncommon but *Dungeons & Dragons* (2000) directed by Courtney Solomon is a recent example), cartoons (in addition to

³⁶ The format is, however, often a bit too long (but it is easier to cut (destruction) than to create).

³⁷ Studies from 2001/2002 shows that 8 out of 10 adults in Sweden read at least one book for pleasure every year (6 out of 10 do it every month), that the average time spent on books by adult book consumers are between 50 and 70 minutes per day, and for Swedish children, 7 out of 10 either read themselves or are read to (the average time for these children to be "exposed" to books are 16 minutes per day) according to "Svenskarnas läsvanor", *Svenska Dagbladet* 11th of November, 2002, collected from http://www.svd.se/dynamiskt/Kultur/did_3516962.asp on the 25th of February, 2003.

³⁸ Both titles are excellent examples of books turned into films, in so far that they both were books that were too long to be filmed in their entirety (and certain parts of both books have been cut despite the fact that both films are over two and a half hours long) and that both books are popular best-sellers written by famous authors (which is attractive for commercial films since they are more likely to earn more). Another factor that is similar for the books behind the films, is that they are a part of a series of books, which means that both books have already been followed by sequels.

feature length cartoons, other recent examples can be found such as *Spider-Man* (2002) directed by Sam Raimi), computer/video games (an example is *Final Fantasy: The Spirits Within* (2001) directed by Hironobu Sakaguchi and Moto Sakakibara³⁹), music albums (very uncommon but examples exist such as *Pink Floyd The Wall* (1982) directed by Alan Parker), musicals (nowadays rare but an example is *Jesus Christ Superstar* (2000) directed by Gale Edwards), newspaper articles (also uncommon but a recent example is *City by the Sea* (2002) directed by Michael Caton-Jones⁴⁰), other films (actually uncommon as the most important source⁴¹ but an example is *Cruel Intentions 2* (2000) directed by Roger Kumble⁴²), poems (uncommon but adaptations of Homer's *The Odyssey* as well as *Beowulf* (1999) directed by Graham Baker are examples), radio shows (nowadays uncommon but a present day example is *The Shadow* (1994) directed by Russell Mulcahy⁴³), TV-shows (a recent example is the MTV show turned film called *Jackass: The Movie* (2002) directed by Jeff Tremaine) and so on. It is even so that a theme park attraction at Disneyland called the Country Bear Jamboree is the inspiration for the film *The Country Bears* (2002) directed by Peter Hastings.⁴⁴ Perhaps it is best to get used to this new source of information, because it is also rumoured that *The Pirates of the Caribbean* (2003) directed by Gore Verbinski, which is a Disney film still under production, also is based upon and has a story about a theme park attraction that exists in a Disney theme park (with the same name as the film).

And the examples mentioned above are just for entire films. The source of information for parts of a film can be taken from even a wider choice of references. A source that should not be neglected, that has not yet inspired an entire Hollywood movie, is commercials. Commercials, especially TV advertisements, reach an extremely large audience since they are most often short as well as direct and shown repeatedly. The fact that commercials are so spread means that commercials are an important reference when it comes to media, at least in the Western world. The main problem has been, however, that commercials have been national in the sense that they have been

³⁹ It is questionable if the story in the film is based on the game, but it is nevertheless unquestionable that the film is based on the game and the characters in the games, at least in so far that the story has been conceived with the game (and the characters in the game) in mind.

⁴⁰ Information collected from the home page of the film <http://citybythesea.warnerbros.com/story.html> (collected on the 26th of November 2002).

⁴¹ This is due to the fact that the first film (the one that the second is based upon) also normally is based on a source and that the source for the first film is more important for the outcome of the second film than the first film. Meaning that there is a stronger causality between the source of the first film and the second film, than it is between the first film and the second film.

⁴² The film that influenced *Cruel Intentions 2* is *Cruel Intentions* (1999) directed by Roger Kumble that is based on the novel *Les liaisons dangereuses* by Choderlos de Laclos. The adaptations that are made by Roger Kumble of the 18th century French novel in the first film are clearly visible in the second. It is my view that the second film is more influenced by the first film than the novel due to for instance the placement of the main characters within a family, re-use of several spoken lines and that both films are placed in a semi-school present-day New York environment unlike the novel.

⁴³ The character of the Shadow was originally introduced in a few detective novels and then turn into a cartoon, it was however broadcasted as a radio show for almost 30 years as the character developed and became famous, see Sörenson, Elisabeth, "Sinne för skuggors svarta magi saknas", Svenska Dagbladet, 11 November 1994.

⁴⁴ See <http://disney.go.com/disneyvideos/liveaction/countrybears/index2.html> under movie info - production notes for further information.

explicitly made and shown for a national audience. But this is changing, as the cultural differences between different parts of the Western world are diminishing and companies are growing increasingly international. This means that almost everyone knows and understands certain commercials, meaning that they will be useful tools for creation of films. Films can after all not show everything and must rely on general characterisations and that the audience has certain understandings (simply put, we laugh when someone falls in a comedy but not necessarily in an action film).

The law

Legal questions that are of interest regarding issues before the film can be summed up into four areas. These areas are: What is protected, to what extent does protection exist, if protection exists how (and to what extent) can a right of use (or ownership) be obtained and from whom can such a right of use (or ownership) be obtained. As I have shown in the section "Some perspectives - background" above, there are a lot of sources that have been used in films and even more that are imaginable. I have therefore chosen to focus this description on information from video games, computer games, TV-shows, literary works, radio shows, performance art (including ballet and theatre), films and commercials. This description can also be viewed as a general description of the current legal situation but I do want to stress that such a general description only applies if no other regulation exist. An example of such a specific law that will not be examined is Act (1992:1685) on the Protection of Layout Designs in Semiconductor Products, that according to 1§ of the Act offers protection for layout designs in semiconductor products (under certain conditions), which theoretically could be shown in for instance a do-it yourself-movie (DIY-movie) for TV. In the end of this section I will also go into the question of international works.

If we start with what is protected, Act (1960:729) on Copyright in Literary and Artistic Works article 1 states that anyone who has created a literary or artistic work shall have copyright to that work, regardless of whether it is a fictional or descriptive representation in writing or speech, a computer program, a musical or dramatic work, a cinematographic work, a photographic work (or another work of fine art), a work of architecture (or applied art) or a work expressed in some other manner. Essentially, it means that the form of the expression is of no interest.⁴⁵ What it does mean, however, is that it has to be a work, meaning that it is independent and original as well as has a sufficiently distinctive character. This general rule is modified in article 5, regarding composite works that has a copyright that shall be without prejudice to the rights in the individual works, and article 4 where it is stated both that a person who has made a translation (or an adaptation) of a work or converted it into another literary or artistic form shall have copyright in the work in the new form⁴⁶ and that a person who has, in

⁴⁵ A few exceptions of no interest for this essay are given in article 9 and 10 in the same law.

⁴⁶ The article continues with that the person's right to control the new work shall be subject to the copyright in the original work, meaning that rights for this new work shall not interfere with the previous right. Since the original work might not have copyright anymore, this is the case when it comes to old books, this might not interfere with the new right see SOU 1956:25 p. 133 f. and prop. 1960:17 p. 76.

free connection with another work, created a new and independent work, has a copyright that shall not be subject to the right in the original work. It should be noted that travesties and parodies are works in their own right.⁴⁷ To what extent and if the work is independent, new or of distinctive character is of course an issue that needs to be examined in every case. What can be said, however, is that applied art has a more stringent evaluation than other forms of works.⁴⁸ It should also be mentioned that protection is awarded regardless of the "literary value" of the work, meaning that good and bad taste are of no interest.⁴⁹

If we continue with the question to what extent protection exists, it should first be noted that it is the work that is protected. This means that subjects, motifs, ideas, thoughts, experiences or stated facts as well as techniques, styles, manners and similar are not protected.⁵⁰ Article 2 states that the extent of protection offered by copyright shall include the exclusive right to control the work by reproducing it and by making it available to the public. This includes translations, adaptations or making the work available in another literary or artistic form or by other technical means. Basically, the provision states that the person owning the copyright can control all aspects of the work. There are, however, several exceptions that are stated in articles 11-26(i)§§ but none of them apply to this situation before the film.⁵¹ It shall also be remembered that the protection is limited in time. The main rule, which is stated in article 43, is that copyright in a work shall exist until the end of the 70th year after (the year in which) the author died. There are, however, several exceptions of interest. Article 43 states in the case of films that copyright exists until the end of the 70th year after the death of the last deceased of the principal director, the author of the screenplay, the author of the dialogue and the composer of the music (the latter if specifically created for the work). In article 44, it is stated regarding authors that have not been mentioned (or are otherwise unknown) that copyright shall exist until the 70th year after the work was publicly available (unless the author does get known before this, then, the general rule applies). A last exemption of interest is in article 44a, which states that if a work is published after the death of the author, it will hold a copyright until the 25th year after the publication. That the copyright exists only for a limited period of time means that a lot of older work have no rights, but the exemptions mean that it is not enough to only check the death of the author to be sure that the work holds no copyright.

The third question is how (and to what extent) a right of use (or ownership) can be obtained. The main rule that is stated in article 27 is that copyright may be transferred entirely or partially by the owner of the copyright. There are, however, several limitations of this main rule. There are two different kinds of limitations that are of interest for this essay. The first limitations are semi-optional (meaning that they shall be applied if not certain provisions are met) and are often called *droit au respect* (or the

This also means that the requirement that the work has to be new does not apply to work when receiving copyright under this provision.

⁴⁷ According to SOU 1956:25 p. 124 and 136 f. and prop. 1960:17 p. 76 f.

⁴⁸ See Koktvedgaard, Mogens, and Levin, Marianne, *Lärobok i Immaterialrätt*, 2000, Göteborg, 6:2 edition, ISBN 91-39-20210-0, s. 68 f., who also discusses the requirements for a work more generally.

⁴⁹ See SOU 1956:25 p. 67 f.

⁵⁰ See SOU 1956:25 p. 64 ff. and Prop. 1960:17 p. 48 f.

⁵¹ I will, however, go into article 23-25 in the next part of this essay under the section "The law".

respect rights). Article 3 states that if a work for instance is made available to the public (as is the case with this essay), the name of the author shall be stated to the extent and in the manner required by proper usage.⁵² This is not a problem for films since it only means stating the name of the author normally at the end (or sometimes at the beginning) of the film. The problem is instead with the other limitation stated in article 3, namely that a work may not be changed in a manner that is prejudicial to the author's literary or artistic reputation or to his or her individuality (it may not be made available to the public in the manner stated, either). This semi-optional rule can be waived by the author (this right remains even if the author sells his or her rights to the work) and only in relation to uses which are limited as to their character and scope. However, as adaptation for a film is considered a legitimate reason for waiving the rights, this provision is not problematic as long as the author agrees.⁵³

The second limitations are however fully optional (meaning that they only apply if nothing else is stated).⁵⁴ So if nothing else is agreed upon, article 28 states that a contract regarding transfer of copyright does not include the right to transfer the copyright to others or alter the work. The copyright according to the same article may, however, be transferred if it forms a part of a business and is transferred together with the business or part thereof. However, it is also stated that the liability (for the seller of the company) for the fulfilment of the agreement remains. In article 39, it is stated that a transfer of a right to record a work shall include the right to make the work available to the public through a film (in cinemas, on television or otherwise) and to make spoken parts of the film available in textual form or to translate them into another language. Besides it being fully optional, this provision also does not apply to musical works, according to the article. This means that one has to be careful so that all necessary rights are covered by a transfer of right, and also make sure to either follow the provisions in article 40 or agree upon something else. Because article 40 states that if the right to use a work for a film (intended for public showing) is transferred, then the person to which the rights are transferred shall produce the film and make it available to the public within a reasonable time period. If that is not done or the film is not produced within five years (even if there is no fault on the part of the person to which the right was transferred to), the author may rescind the contract and keep the payment that is received. If the film is not produced within the reasonable time frame and the author has suffered damage that is not covered by the original payment, such damage shall also be compensated.

The last question is from whom can such a right of use (or ownership) be obtained, and it might seem like it is a question of only practical nature. That is to find and make sure that it is the right owner(s) of the work that is the person(s) that the contract is

⁵² This rule applies forever in the sense that a literary or artistic work may not be put on the market (made available for the public) under a title, pseudonym or signature that easily could be confused with a work or its author which has previously been made available to the public according to article 50. This means that all works are protected when it comes to title, pseudonym and signature against similar works as long as they are sufficiently known to the public so that they may be easily confused about the author or the work. If the work is obscure, then nobody will relate to the work. See also NJA 1974 s. 94 and NJA 1993 s. 263 for further information.

⁵³ According to SOU 1956:24 p. 127 ff.

⁵⁴ According to article 27 (regarding articles 39 and 40) and article 28.

concluded with. There are, however, more problematic issues than that. First of all (which has already been mentioned above), there are some semi-optional rights that remain with the author (meaning that a contract with the author needs to be concluded under some circumstances even if the author has transferred as many rights as possible to another person). Secondly, in some fields (as is the case with music) immaterial rights are routinely transferred to organisations such as STIM (Föreningen Sveriges Tonsättares Internationella Musikbyrå) and NCB (Nordic Copyright Bureau)⁵⁵ (meaning that what the author may agree upon is or can be limited by the contract that the author has signed with the organisation). Thirdly, there is often a problem in determining who has any rights to the work, especially when it comes to films.⁵⁶ The alternative to use (and change) only old works (where the normal duration of copyright has passed as previously described) also has some restrictions, since not all rights to a work ends after time⁵⁷. There are, however, considerably fewer rules regarding these works but the same rules apply to the new and changed version as to other new works.

Regarding international works: they are handled in a different way but have in practice the same protection as Swedish works. In articles 60 and 61 of Act (1960:729) on Copyright in Literary and Artistic Works, it is stated that the act only applies to Swedish works (with a few minor exceptions). In article 62, the government is permitted on condition of reciprocity (or when it follows from an agreement with a state or an intergovernmental organisation which has been approved by the parliament) to see to that Act (1960:729) on Copyright in Literary and Artistic Works may be applicable in relation to other countries. (The government is also allowed to do the same regarding act to works and photographic pictures that first was published by an intergovernmental organisation and also to unpublished works and photographic pictures which such an organisation may publish.) This has been done in the International Copyright Regulation (1994:193). The regulation states that under some conditions and for some entities, protection shall be offered under the Swedish act (or parts thereof) if The Berne Convention for the Protection of Literary and Artistic Works (in article 2), The Universal Copyright Convention (in article 7), the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (in article 13, the convention is also called the Rome Convention), the European Agreement on the Protection of Television (article 16) or Agreement of Trade-Related Aspects of Intellectual Property Rights (article 18) applies. There are also some provisions regarding works by the United Nations. What this means is that almost all copyrighted works (at least from the most important countries in the world when it comes to film) will have the same protection as Swedish works.

⁵⁵ I will come back to this issue under "The law" in the next part of this chapter.

⁵⁶ Koktvedgaard, p. 97 f., which is also the reason why contracts that regulates these issues are done routinely in the case of films.

⁵⁷ See article 51 that states that after the lifetime of the author a work that is performed or reproduced in a manner which violates cultural interests can be subject to an injunction prohibiting use (under penalty of a fine) by court (under some provisions). This provision has, however, never been applied and has so far only been relevant for the voluntary retraction of some Duke Ellington records according to Koktvedgaard, s. 138.

Further understanding and complications

This is, as mentioned, a rather uncomplicated legal field. Of course, there will always be problems in determining in specific cases if the information in a film is an infringement of another person's copyright, but since it is such an early stage in the production of a film, decisions can be made in order to stay clear of problems. A specific problem with films is if there exist earlier adaptations for the screen of the same work. This is especially problematic if the film is relatively known (rather new or widely spread). Since a person can be unconsciously influenced it is important to make sure that the source for the film has not been contaminated by influences from the other screen versions (which are also works with independent rights as has been concluded above in the section "The law"). This specific problem was for instance problematic in the film *Cruel Intentions* (1999) directed by Roger Kumble, which is based upon the novel *Les liaisons dangereuses* by Choderlos de Laclos (a French 18th century novel that therefore did not have any protection). Roger Kumble who both wrote the screenplay and directed the film struggled with the fact that he had to use the novel and not be influenced by earlier adaptations of the same novel.⁵⁸ Both *Valmont* (1988) directed by the famous director Milos Forman and *Dangerous Liaisons* (1988) directed by Stephen Frears (starring for instance Glenn Close, John Malkovich, Michelle Pfeiffer, Keanu Reeves and Uma Thurman) are well-known and spread versions (due to for instance the famous director in the first film and the famous actors in the second). As I will discuss in more detail in chapter 4 in the part "Different terms/concepts with different values" under the section "Is it a problem and if so, to what extent?", this is actually rather important. The likelihood that someone would have noticed an infringement and that someone who had the authority, means and will to protect the rights from these earlier works was a lot higher with these two films than with other film adaptations of the novel such as *Nebezpečné známosti* (1980) directed by Miloslav Luther and *Kiken na kankei* (1978) directed by Toshiya Fujita.⁵⁹ Also, it is more likely, as was the case with Roger Kumble, that the person writing the script has seen more famous works (and therefore could unconsciously have been influenced).

Another problem, which is briefly touched upon above in the section "The law", is that sources of information are not necessarily owned by one person. This is not a new problem for the film industry. Remakes of films often take inspiration from the earlier adaptation(s) as well as the original source for the film (for instance a book). This is of course a problem in the sense that it is harder to get a hold of the rights from all persons. Nevertheless, it can also be treated as an asset, which is the case in the DVD version of *You've Got Mail* (1998) directed by Nora Ephron⁶⁰. The DVD has been designed in such a way that key scenes can be compared with the earlier versions of the same scenes in *The Shop Around the Corner* (1940) directed by Ernst Lubitsch and *In the Good Old Summertime* (1949) directed by Robert Leonard and Buster Keaton. The problem is, however, increasing, as the line between different entities' ownership of intellectual

⁵⁸ Information collected from the audio commentary 80 minutes into the film on the zone 1 DVD version with ISBN 0 7678 4503 X.

⁵⁹ Information collected from entries under each film on www.imdb.com as of the 11th of December 2002.

⁶⁰ The DVD-version zone 1 with ISBN 0-7907-4089-3.

property becomes more blurred. A recent and good example is the best-selling novel *The Bvlgari Connection* by the famous author Fay Weldon. Behind the book is a product placement agreement where the author agrees to mention at least a dozen times the Bvlgari company name.⁶¹ It is even so that the title of the book includes the name of the company. I will come back to this example in the next section of this chapter. What is important (for this part of the chapter) is that since different rights are more and more intertwined, a more detailed search of the source needs to be done in order to dejunkify the source and make sure that all owners of the intellectual property that you want to use are under contract (or otherwise controlled).

The film

This part of the chapter focuses on issues relating to what can be viewed, heard or otherwise detected in the film. The aspects that will be examined are those that relate to the film in itself. In essence, this part of the chapter is about all that is contained in the images and sounds of the film (and to some extent what was not shown due to legal rules). Questions that will be answered are for instance: Why are trademarks not restricting for filmmaking in Sweden? Why is the right to use certain music in a film normally negotiated with organisations instead of with musicians? And why is it a problem with colorizing old black and white films?

This part of the chapter is divided into three sections where the first section puts the issue into some perspectives (and also serves as background) whereas the following section is a description of the legal situation concerning the issue and the last section gives further understanding of the issue as well as presents further complications.

Some perspectives - background

The author Lawrence Lessig starts his book *The Future of Ideas* with a three-page introduction to the field of copyright by writing about the film director Davis Guggenheim and about filmmaking in general. The picture that Lessig creates is that of an artist that cannot create until everything is cleared legally. Guggenheim is quoted stating that he has several people on his payroll whose sole purpose is to make sure that all items in a shot are cleared legally by the lawyers. Guggenheim also states that today if any piece of artwork, furniture or sculpture is recognised by anyone who has the rights to show it must be cleared and royalty paid. Lessig then chose to focus on the issue of freedom (creativity) rather than economic burdens and Guggenheim is quoted stating that his personal costs are creativity as the worlds he tries to create in his films suddenly are completely generic (and void of normal elements) and anything else has to

⁶¹ Information from Kirkpatrick, David D, "Words From our Sponsor: A Jeweler Commissions a Novel" as collected from <http://www.nytimes.com/2001/09/03/business/media/03BOOK.html> on the 20th of June 2002.

be somehow justified.⁶² The end of the introduction in the book about filmmaking is a longer quote by Guggenheim:

I would say to an 18-year-old artist, you're totally free to do whatever you want. But – and then I would give him a long list of all the things that he couldn't include in his movie because they would not be cleared, legally cleared. That he would have to pay for them. [So freedom? Here's the freedom]: You're totally free to make a movie in an empty room, with your two friends.⁶³

This picture that Lessig creates is however not entirely true. It is possible to build an entire film in clay such as *Chicken Run* (2000) directed by Peter Lord and Nick Park, to draw it such as *The Jungle Book 2* (2003) directed by Steve Trenbirth or to make it in any other material or way such as muppets. Often when muppets are used, there are some humans in the film, which was the case with *It's a Very Merry Muppet Christmas Movie* (2002) directed by Kirk Tatcher where Kermit the frog, Miss Piggy and the rest of the muppets play most but not all of the characters in the film. Nevertheless, just because it is drawn or created in another fabric or way does not mean that it is cleared from legal issues. The film *Twelve Monkeys* (1995) directed by Terry Gilliam where the props were made for the film only was stopped after twenty-eight days because a court of law in the USA found it necessary due to a claim of compensation. The claim was regarding compensation for the use of a piece of furniture in the movie that resembled a sketch of a piece of furniture that an artist had created some time ago. And there are a lot of other examples of claims of compensation that have "threatened" film including *Batman Forever* (1995) directed by Joel Schumacher because Batman's car was driven through an (alleged) copyrighted courtyard and *The Devil's Advocate* (1997) directed by Taylor Hackford (that was stopped for two days) because an artist claimed that one of his art pieces was in the background.⁶⁴

The examples above come from American law, but the legal situation is not all that different in Sweden as I will describe in the section below. The legal tools and the willingness to apply them are in some ways different but the main question remains. The potential (and in some cases very real) conflict between mainly copyright (but also in a very limited sense design and trademark protection) and the artistic freedom (freedom of speech and freedom of expression) is equally important here as in the USA. For every time a copyrighted work is created there exists less artistic freedom (since some use can be hindered). To portray a culture where images and design are so intertwined not only with the lives that we live but also who we are, what we want to be and how we are understood by others means that there is a lot of restriction of the artistic freedom. We not only design our homes in a certain way and dress in certain clothes, but we also listen to certain music and watch certain TV-shows (or not). And whereas copyright (and design protection) only exists for a certain amount of years so does normally the culture it is connected with (only a few copyrighted or design protected works become classics and live on). To put it in simple terms, it is not possible in a film to replace a home of today with an early 20th century home and think

⁶² Lessig, Lawrence, *The Future of Ideas*, 2001, 1st edition, ISBN 0-375-50578-4, Random House, New York, p. 3-5.

⁶³ Lessig, p. 5.

⁶⁴ Lessig, p. 4.

that nobody will notice. Intellectual property is therefore at least a theoretical big problem for the artistic freedom in film.⁶⁵

The law

There are almost endless amounts of different products, images, sounds etc. that can be and are shown in films. To sort the legal questions I will first go into the restrictions that the Design Protection Act (1970:485) and the Trademark Act (1960:644) creates. These laws in Sweden are, as I will show, not that imposing on filmmaking, but are still important to know in order to avoid legal problems. I will then go into the main law that is restricting and that is Act (1960:729) on Copyright in Literary and Artistic Works. I have already above in the part of the chapter called "Before the film" in the section "The law" gone into most details surrounding this law and I will therefore only take up a few aspects that do not follow the main rule. In the end of this section I will also go into the question of international works.

Design protection is a right that comes from the registration by the person who has created a design (or someone who has bought the rights from that person) according to article 1a in the Design Protection Act (1970:485).⁶⁶ According to article 5, the protection offered by the act means that nobody may, without previous authorisation by the person holding the right, use the design and this includes for instance manufacturing, marketing and the use of a product in which the design protected object is a part of or used on. There are, however, exceptions and the one that is of interest for this essay is article 7b which states that a product may be used if it has been put on the market within the European Economic Area by the person holding the rights or with that person's permission. For filmmaking, this means that it is not a problem to use (film) a product that has design protection as long as it has been put on the market by the person holding the rights or with that person's permission. It is not, however, allowed to make props that look like design protected objects, no matter if they have been put on the market or not. This causes problems with creating props that are similar to the problems relating to copyright below (with the exception of duration and that design protected objects are in a register) and I will therefore come back to this problem below. It should also be noted that the design protection is an economical protection and that there are no provisions regarding for instance the mentioning of the use of protected goods.

The Trademark Act (1960:644) protects through registration (or if it has been established on the market in accordance with article 2) to sole right to use a trademark (which is a symbol for the purpose of distinguishing goods or services) in accordance with article 1. As article 4 states that the protection shall be (there are other provisions in articles 5-11 and 15 that limits the scope of the protection) that no person may in the course of business activities use a symbol which is the same or confusingly similar to the protected trademark for the goods or services that has been registered (or for the

⁶⁵ I will come back to this question more in depth in chapter 4.

⁶⁶ Regarding what can be protected I will explore that question in the next part of this chapter under the section "The law".

goods or services that the symbol has been established on the market in accordance with article 2). This means for instance that films cannot promote similar goods (have commercials in the film for them) or use other film companies name. As I do not think that a film company normally would like to use another companies name (and thereby give them credit), it is my understanding that Trademark Act (1960:644) is not restricting filmmaking in Sweden hardly at all.

Regarding Act (1960:729) on Copyright in Literary and Artistic Works it covers a lot of things that can be a part of a film such as building, music and performances etc. The main rules (which for instance means that one must always have permission to use copyrighted works) has already been stated in the previous part of this essay under the section "The law". There are however four exceptions of what was stated in the in the previous part of this essay (under the section "The law" that should be noted and those are regarding buildings, art, quotations and music. Regarding buildings, houses, ships, bridges etc. they may be freely film and made available to the public in accordance with article 24 (it should however be noted that name of the building and similar shall be stated to the extent and in the manner required by proper usage in accordance with article 3). For art that are arts permanently situated outdoors or at a public place, it is the same as for buildings, that they can be filmed freely and shown to the public also in accordance with article 24. It is also allowed to film in natural environment both inside and outside (meaning that art does not need to be removed) as long as the art are not motivated, play a part in the film and similar (meaning that the art is of minor importance to the contents of the film or the television program) in accordance with article 20.

A general exception is the right to quote. The right allows anyone to quote a work that has been made available to the public if (and only if) it is done in accordance with proper usage (and to the extent necessary for that purpose) in accordance with article 22. This means for instance that a film may quote another film and thus create some sort of intertextuality. It should however be noted that the right to quote do not mean that an entire work may be "quoted" only a small part thereof. Even if I previously touched upon the subject of music in the previous part of this chapter under the section "The law" I do which to make some further statements. Regarding music it actually falls under the main rules (meaning the permission must be obtained to use the work). However, music is still treated differently then most other forms of copyrighted works and the reason for this is that immaterial rights are routinely transferred from the musicians to some organisations (regarding the right to conclude agreement concerning use and the right to collect and receive payment for such contracts). Normally the right to play music are handled by STIM (Föreningen Sveriges Tonsättares Internationella Musikbyrå) but in the case of music in films it is handled by NCB (Nordic Copyright Bureau).⁶⁷ If the music is recorded on tape, CD or similar a contract with IFPI (International Federation of the Phonographic Industry) also needs to be concluded for the producing right for the transfer of the music.⁶⁸ This organisation of the intellectual property regarding music means that music is much more accessible (although for a price) then most other forms of intellectual property. I also want to mention the

⁶⁷ Kocktvedgaard, p. 110.

⁶⁸ Kocktvedgaard, p. 398.

provision in article 45 that states that a performing artist's performance of work (literary or artistic) may not without authorization be film. This means that the right to the person performing the music also must be obtained if it is going to be shown in the film.

When it comes to international works most of them are treated in the same ways as Swedish works. Regarding copyright see the previous part of the chapter under the section "The law" (at the end) and for design protection which is only given after registration as concluded above there are two different rules that are of main interest namely the EU design protection regulation and the Paris convention on industrial protection (1884). The second offer works from the members the same kind of treatment while the other harmonise different EU countries legislation. There probably will be EU protection for design in a short period of time.⁶⁹ This means unless the design are registered by the Swedish Act that they do not get any protection here.

Further understanding and complications

As the more and more intellectual property rights between works get more and more intertwined, there are increasing problems for films as well. In the previous part of this chapter in the section "Further understanding and complications" I mentioned the book *The Bvlgari Connection* by Fay Weldon as an example. As previously stated behind the book is a product placement agreement between the Italian jewellery company Bvlgari and Fay Weldon and where the author has agreed to mention the company name Bvlgari a dozen times. But this is not all that Fay Weldon does in the book. She also describes in detail some of the jewellery that Bvlgari in the book has created.⁷⁰ Although it is not sure that the descriptions are of actual Bvlgari jewellery (and not something that Fay Weldon has created) or that those pieces of jewellery have some sort of protection, in this case design protection, it is possible that they might. If the pieces of jewellery in fact had protection (which they might), then there would be a problem when creating the film. If Fay Weldon would have sold the rights to film the book the filmmakers would most likely not have contacted the Bvlgari company (unless they wanted some sort of product placement agreement or similar) since trademarks normally can be filmed without problem as concluded in the previous section. As the props of the pieces of jewellery most likely would be made after the descriptions that Fay Weldon had made (normally films tend to be close to the books), those props would be in conflict with the design protection, meaning that the Bvlgari could make claims for compensation.

Another problem (that is a specific problem for film) is the usage of old films whether or not it is as a smaller part in a new film, a compilation work of older works or when old films are released again (this time on DVD). The main problems are that the original formats of the films often are not suitable today (especially not for TV) and that colouration and the integrity of images in old films often have been compromised

⁶⁹ Kocktvedgaard, p. 271 ff.

⁷⁰ Kirkpatrick, in the article is also a quote as an example from the book "a sleek modern piece, a necklace, stripes of white and yellow gold, but encasing three ancient coins, the mount following the irregular contours of the thin worn bronze."

(colouration has been lost entirely on a lot of old films). The problem is that both a change in the shape and colour of the film are forbidden unless otherwise agreed upon in accordance with article 28 in Act (1960:729) on Copyright in Literary and Artistic Works. Restoration is not in itself an alteration (since it merely means changing the work back to its original state) but if it is not exactly the same as the original, then it is a change of the work, meaning that a right to do the change needs to have been or be concluded. With older works, it is not only so that contracts that include the right to make changes are rare (since such legal provisions did not exist at the time, but on the other hand contracts shall normally be interpreted in accordance with the legal situation at the time they were concluded⁷¹) and it is also often hard to know who owns the rights.

After the film

This part of the chapter focuses upon questions related to intellectual property and film that at least used to happen after the film has been made. This part of the chapter could just as easily have been called issues surrounding the film. The aspects that will be examined are those that are not related to the film per se but that can or in some cases have influenced the film. It is phenomena like computer games, video games, toys, cookie jars, related commercials, action figures and everything else that is part of the hype surrounding a film. In essence, this part of the chapter is about the commercialisation of the film that is not related to the film in itself. Questions that will be answered are for insistence: what impacts do product placement and similar⁷² have on the artistic freedom in film, what if any laws exist in this field and why should one have a bottle of Krazy Glue handy?

This part of the chapter is divided into three different sections. Like previously, the first section offers some perspectives, whereas the second one is a description of the current legal situation and the last section offers a further understanding of the problematic questions involved. As already mentioned in the beginning of this chapter, there are no specific laws concerning the issues in this part of the chapter. The second section is however important in so far that it shows that laws still have some influence although cause a very limited effect on this field.

Some perspectives – background

Films are part of an economic reality. They are in some senses a product like any other. There are, however, some differences between a film and a lot of other products, meaning that some aspects of the film make it a rather unique product. Normally when

⁷¹ Contracts may be interpreted or amended after the conclusion of the agreement see for instance 36§ in the Swedish Contract Act (1915:218).

⁷² Product placement agreement and similar (such as purchasing views) are not intellectual property per se, however normally intellectual property is a central aspect in product placement agreements and the agreements do influence the artistic freedom in film. I will therefor, in short, take up take up the most central aspects of these issues from an artistic freedom in film perspective.

film is considered as a product it is the showing on the cinema, the rental of a film from a video rental store or the purchase of a DVD or VHS-cassette (or similar) that is considered. Possibly the purchasing of films to be broadcasted by TV channels also is considered. But as it is today, this is far from describing the whole picture. Today, the main income for the major films comes from side-products that are sold as a part of a bigger concept. It is the computer games, video games, toys, cookie jars, action figures and what have you that make up for the biggest profit. In a sense, a film has become a big commercial for other products. Maybe it is not so surprising then that the main income for cinema owners comes from the sale of popcorn and similar.⁷³

In line with this trend of selling a lifestyle the films are also selling its audience. Product placement agreements (that I have previously touched upon) are only one part of the sale of the audience. Today views can be bought. It can be done by selection, as is the case with the American military defence department that lends military equipment, expertise and personnel to films that they think are supporting their views (or the view they want the audience to have regarding a certain issue such as the importance of a good military defence). Films like *Black Hawk Down* (2001) directed by Ridley Scott could not have been made without the support of the army (at least not without an extreme budget and even then some equipment would not have been allowed to be used).⁷⁴ It can also be done directly as is the case with the TV-show "The View" where the makers of Campbell's soup made an agreement with the Disney owned company ABC (one of the largest TV-channels in the USA) that people during discussions in the show should talk about the Campbell's soup and arrange so that the soup was continuously mentioned.⁷⁵ The reason why I am not using a film as an example is that I have not found a clear case where a film directly has been changed or made in a certain way because someone has paid for it. But since it lies in the interest of all parties that direct changes of a film to include a certain view (not the mere adding of products) is to be kept secret, I imagine that it does exist a lot of the time. For artistic freedom in film, beside the most obvious impact (that the messages, objects etc. are included in the film), this means mainly two things, first of all that there will be more films done for "attractive" audiences (such as groups with strong purchasing power, that are homogeneous or politically uncertain) because these films will generate more income from product placement and similar (and therefore are less of a risk to produce)

⁷³ This is true at least in the USA according to Lovinger, Robert, "Fewer blockbusters attract fewer moviegoers", collected from <http://www.s-t.com/daily/09-00/09-24-00/a01wn005.htm> on the 26th of February, 2003.

⁷⁴ The film was given the full co-operation by the military in the USA, even including training of actors. In order to get such a support the military was given the right to veto every aspect of the film, see for instance Talbot, Ann, "*Black Hawk Down*: naked propaganda masquerading as entertainment", collected from <http://www.wsws.org/articles/2002/feb2002/hawk-f19.shtml> on the 18th of February, 2003 and Sokalski, Walter and other USASOC public affairs members, "Army trains 'Black Hawk Down' Actors" (sic!), collected from <http://www.dtic.mil/armylink/news/Mar2001/a20010307bhdtraining.html> on the 18th of February, 2003.

⁷⁵ "FAIR ACTION ALERT: In the Soup at the View: ABC allows corporate sponsor to buy talkshow content", collected from <http://www.fair.org/activism/the-view.html> on the 18th of February, 2003. The source is originally a *Wall Street Journal* article: Branch, Shelly, "Product Plugs—'M'm M'm Good'?", *Wall Street Journal*, November 14, 2000, that is collected from and mirrored on <http://myphlip.pearsoncmg.com/cw/mpviewce.cfm?vceid=2193&vbcid=1944> as part of school material on the 18th of February 2003.

and second of all that there will be more homogeneous film in general (since companies, authorities etc. often have similar values and that certain values such as anti-commercialisation will not be supported).

A good example of a scene that is done as a promotional scene (in this case to show how handy a tube of glue can be) exists in the film *The Wedding Planner* (2001) directed by Adam Shankman. The film is a romantic comedy and the scene is 57 minutes into the film and features both the main characters (the two that become a couple in the end of the film). She (Maria called Mary) is a wedding planner and he (Steven called Steve or Eddie) is supposed to get married (to another woman) and they are walking in a statue garden in order to choose a statue for his wedding. After an accident when he leans on a statue, it falls down and during the fall the penis of the statue breaks off. As a guard in the garden is on his way Mary states that they have got to get to work and that they should fix the statue. Steven then says (transcript from the English subtitles): "What do you got? Oh, of course. Krazy Glue. Why didn't I bring Krazy Glue, in case his pecker fell off?" The scene then continues with that Steven gets stuck (presumably because of the glue) as he tries to put the penis back into place and they have a hard time explaining what they are doing to the guard (especially as when Steven finally gets unstuck from the statue the penis is glued to his hand). In the box that the DVD came in is then distributed a discount coupon for 35 cent on any instant Krazy Glue® product and the main message states: "*Something Borrowed, Something Blue, Something Fixed with Krazy ® Glue!* See how Krazy Glue saves the day in Sony Pictures' 'THE WEDDING PLANNER.'"⁷⁶

The line between if the scene above was written in advance in order to get an anticipated endorsement of a certain product (or later used for that purpose) alternatively if the scene was added afterwards in order to get the endorsement is more of a theoretical issue than a practical one. In the audio commentary it is stated that the scene originally was scripted as a scene where a swan would chase Steven and Mary in the statue garden but that it got changed because it would be too much problem with a swan handler and that the actor playing Steven did not think the scene was masculine enough. The sister of the director then suggested the new contents of the scene. However, when the director and the two writers (of the script) continue to discuss the scene on the audio commentary, they state that parts of the scene were shot a long time after the rest of the film. In fact the images where Mary puts the glue (the Krazy Glue bottle is clearly visible) on the penis in Steven's hands were shot only one month before the film was released using other actors.⁷⁷ As it is only the hands that are visible, a viewer of the film will not notice the change. This means that it is highly likely that the endorsement of Krazy Glue came before the images where the Krazy Glue bottle is visible (possibly after the rest of the film was shot) and that the images of Mary using the Krazy Glue bottle were filmed and included in the film as part of the endorsement. The dialogue that mentions the product by name was however shot with the original

⁷⁶ Subtitle comes from and the coupon is in the box to the zone 1 DVD-version with ISBN 0-7678-6328-3, included in the box is also a discount coupon for flowers with the promotional code IDO.

⁷⁷ The audio commentary is on the zone 1 DVD-version, with ISBN 0-7678-6328-3, 57 minutes into the film.

actors and therefore it is possible that the endorsement could have been concluded before the film was shot.

But these are not the only examples of commercialisation. Since games and other side-merchandise are of higher value in terms of income it is very likely to think that characters and events in the film are made in order to for instance make a good video game, not in order to make a good movie (even though they are not mutually exclusive in any way). In *Star Wars: Episode I - The Phantom Menace* (1999) directed by George Lucas there is an almost 9 minutes sequence where Anakin Skywalker is racing in a spaceship-race.⁷⁸ This sequence in my mind has little to do with the plot and could have been cut considerably. Then again, there was also made a video game just from this racing sequence called *Star Wars Episode I Racer*⁷⁹ and from a perspective of selling such a video game it is very logical to have the sequence in the way it is done. By including the sequence in the film and thereby showing (in length) the way that this particular form of racing is done (or rather how to play the video game) it is a good way of promoting the game. That it is a good way of promoting the video game also comes from the fact that the sequence is rather intense, especially when it comes to the music and sound effects.

The law

There are no laws that apply to the situation relating to the transfer of film characters, images and events from one work to another. On the contrary, the main rule is that economic powers shall be able to do business as they want (or rather see economic gains in). Freedom of business is a fundamental right in any liberal market economy. So the mere transfer of a the character(s), image(s) and event(s) of a film to underwear, computer games, toys, books, board games, teapots etc. etc. is not a legal issue. There are, however, three laws that could give such as the previous mentioned goods protection and those laws are Act (1960:729) on Copyright in Literary and Artistic Works, Design Protection Act (1970:485) and the Trademark Act (1960:644).⁸⁰ These laws also state provisions that have to be followed in order to get protection. The protection differs depending upon law and object. I will below go into a few provisions in a general way that are of importance from the view that they are aspects that might influence the film.

There are two provisions for what can be registered as a protected design, namely that it is new and has a distinctive character according to article 2 in the Design Protection Act (1970:485). If it is a part of a combined product, then it is only the visible part that will

⁷⁸ The sequence comes approximately 56 minutes into the film and the information was collected from the Swedish subtitled VHS-version of the film with article number 89680-1 (widescreen rental version).

⁷⁹ Fredrickson, Eric, the editorial review, collected from [http://www.amazon.com/exec/obidos/tg/detail/-/B00000J2OO/qid=1046341912/sr=1-2/ref=sr_1_2/103-8314488-7068621?v=glance&s=video games](http://www.amazon.com/exec/obidos/tg/detail/-/B00000J2OO/qid=1046341912/sr=1-2/ref=sr_1_2/103-8314488-7068621?v=glance&s=video+games) on the 27th of February, 2002.

⁸⁰ Computer programs have also increasingly been protected by patents even though explicit provisions in 1§ in the Swedish Patent Act (1967:837) stating that computer programs cannot be subject of a patent, see RÅ 1990 ref. 84 and Koktvedgaard, p. 203 ff. Computer and video games have so far hardly been subject to this form of protection, mainly due to tradition and not due to the provision in the law.

be considered regarding the provisions in accordance with article 2a. A design shall be regarded as new if it at the time of the application (if another application has been done in another country it is possible to use the priority day instead under certain provisions in article 8 and 8b) were no other identical designs available (there are exceptions in article 3 but they are not of interest). In article 4 and 4b, there are also some more rules regarding when a design shall not be registered. What is of interest for this essay are that neither any designs that without authorisation contain a trademark, firm name or another sign which has been established on the market by another entity nor contains something that violates a work that holds copyright. It is also so that designs shall be regarded as identical if they are only different in unessential aspects according to article 2. A distinctive character is defined in article 2 as the overall impression that a knowledgeable user has of the design in question and all other designs that have been made public at the time of the application day (or the priority day as previously mentioned). Article 2 also states that special consideration shall be made regarding the possible variations that can be done by the designer of the particular design, meaning that objects that can easily be varied almost indefinitely need to be more differentiated against other designs than products that cannot be that varied.

What this means for filmmaking is that design that is directly shown in the film needs to be protected before the film is shown to the public (or removed from the film) due to the fact that the design needs to be new in order to get protection. It also means that if side products from the film shall be made that also have parts in them that fall under copyright (such is for instance almost always the case when a book has been turned into a film and then the film has been turned into a computer- or video game) that rights from the copyright holder have been obtained as well. It also means that if dolls and similar based on characters in the film shall be made (with design protection), the characters shall be made in such a way that they are distinctive from other designs known at the time for registration. This means that there is pressure to make the lead characters as distinctive as possible. A character that has been designed with distinctiveness in mind was Darth Maul in *Star Wars: Episode I - The Phantom Menace*.⁸¹

Regarding the other two relevant regulations there are a few provisions that has to be observed as well. In the Trademarks Act (1960:644) in article 1 (regarding trademarks created through registration) and article 2 (regarding trademarks that have protection due to that they has been established on the market) there is one common provision of interest and that is that the potential trademark must be distinctive (meaning that it must differs enough so that it is not confusingly similar with another trademark, that previously has protection, for goods and services of the same or similar kind). In Act (1960:729) on Copyright in Literary and Artistic Works in article 1 (that is amended for

⁸¹ This information was collected from the home page of Star Wars, but is no longer available there. I included this information nevertheless since it is an interesting curiosity. Even if I had not have seen the interview Darth Maul would have still been interesting due to the fact that it clearly was a character that looks enough different (and spectacular) to separate the character from other characters, even though it is a variation of a devil's head, which is something that has been varied to a very large extent. The information that the character Darth Mould is distinctive and designed to be unique (but not necessarily in order to get protection) is still available on the Star Wars home page see "Undressed to kill", collected from <http://www.starwars.com/eu/news/2000/07/news20000726b.html> on the 26th of February, 2003.

certain kinds of copyrighted works by article 4) there are two provisions for a work that is of interest and those are that the work must be independent and original. These provisions would be very unlikely to cause any problem regarding object that comes after the film and almost the only aspect that is of interest is that if there is a will to create a trademarks from main characters (or similar) that it have to differ from earlier trademarks. But this is not something unique for films nor does it cause that much problem (it might change the physical appearance on the main character (or similar) however).

Further understanding and complications

The commercialisation of films is not anything new. It is just the method and the extent that is increasing. The traditions of eating popcorn and candy (which is a sort of commercialisation) go way back in time and at least in old films, there are several scenes that show movie owners screening desert films and increasing the heat in order to sell more drinks. It is possible to argue that feeding messages into films in order to boost certain issues and increase sales as well as linking consumer goods with films are somewhat extreme (or at least that it is questionable to not show the real intentions), but on the contrary, they are logical economic considerations. Compared with the methods that have been tested, they are not even that extreme. For instance there are constantly tests with subliminal messages. The idea is that an image is screened so fast that the eye notice it but the conscious part of the brain does not. A recent example of a film that has both included subliminal messages (although as a ironic/comical comment) and has commented on the implications of subliminal messages is the film *Fight Club* (1999) directed by David Fincher.⁸² What should be noted is that subliminal messages are not forbidden in Sweden and the reason for this is probable that the effects of subliminal messages are questioned and that it is not commonly practised. Other countries have taken other measurements such as Russia which does not only have a law (but two) that forbids subliminal messages and have applied the rules by for instance temporarily closing a TV-station.⁸³

The methods currently used do however cause some strange phenomenon sometimes. I do not think it was a coincidence that when I walked out of a movie in Australia, a record store (that was open from midday into the night) was located just outside and also happened to have the soundtrack to the film I had just seen on both display and sale. Though it might seem anecdotal and a little bit strange there are several even more strange events that has occurred due to the commercialisation of films. Just to take another of these strange phenomenons in films (that is due to intellectual property concerns) is the fact that in the film *Demolition Man* (1993) directed by Marco

⁸² Wise, Damon, "Menace II Society", collected from <http://www.edward-norton.org/fc/articles/empire.html> on the 26th of February, 2003 and Chan, Andrew, a review of *Fight Club*, collected from http://www.filmwritten.org/reviews/1999/fightclub_ac.htm on the 26th of February, 2003.

⁸³ The information is from the on-line news site AnaNova, "Russian TV company suspended over subliminal messages" collected from http://www.ananova.com/entertainment/story/sm_40825.html on the 26th of February, 2003.

Brambilla there are several scenes that has been changed from the American version, when released on versions intended outside the USA. The change is that the restaurant chain Taco Bell has been replaced by Pizza Hut and this includes dubbing and changing the logos during post-production.⁸⁴ Perhaps some films should rather be viewed as long commercials that are selling a lifestyle (that comes with a lot of goods and values) then examples of an art form.

⁸⁴ "Trivia for Demolition Man (1993)", collected from <http://us.imdb.com/Trivia?0106697> on the 28th of February, 2003.

Chapter 4 The future - analysis

As already shown in the last chapter, there are many ways that intellectual property influences the artistic freedom in film. As already mentioned, issues that come after the making of a film relating to intellectual property have been taken into account and have or could also have influenced the film. The question is, however, if the influence that intellectual property has over the artistic freedom in film constitutes a hindrance in the same or if it is something that is less than a hindrance. The first part of this chapter will focus on that question and also analyse in what ways, if any, that intellectual property is a hindrance for the artistic freedom in film.

It is not necessarily so that even if intellectual property is a hindrance for the artistic freedom in film that it shall be addressed or is problematic. Perhaps the reasons why the intellectual property laws are created in the way that they are, are to protect something that has an even higher value than the artistic freedom in film. After all, as already concluded in the second chapter of this essay, there are a lot of restrictions to the artistic freedom in film that have been accepted by all, such as that it is not allowed to kill a person in order to make a realistic death scene and that people have the right to refuse to take part of a film (not that they can prevent all images of them to be used but that they can refuse to be an actor or otherwise help in the making of the film). In the second part of this chapter I will examine these issues and also analyse to what extent, if any, there is a problem if intellectual property is a hindrance for the artistic freedom in film.

The third and following part of this chapter is unlike the earlier chapters and parts of this essay not focused on today but the future. There is after all not very productive to conclude that there is a problem if suggestions on how they should be solved, avoided or at least otherwise handled are not given. The third part of this chapter is focused on if there is a possibility to handle the issues relating to the conflict between intellectual property and the artistic freedom in film in a good way within the current legal system, if changes to the system need to be done or if accepting the problem and do voluntary changes is the way to handle it (all of this given that it is a problem which will be examined in the second part of this chapter). The focus for the third part of this chapter is how the problem *can* be addressed whereas the last part of the chapter will consist of my own suggestions, where I will discuss my own views of how the future *should* be constructed. I will primarily base my conclusions on the analysis and conclusions drawn in the earlier parts of this chapter, but also connect to previous chapters in this essay.

Is intellectual property a hindrance for the artistic freedom in film?

The question posed in the title of this part of the chapter is a very interesting issue. When does something that is problematic turn into something that could hinder in this case the artistic freedom in film? Or more simply put: how much of a problem constitutes a hindrance? In order to determine this in the particular case at hand, one must first see how much in this case intellectual property influences the artistic freedom in film. A film can be divided into several different parts (such as beginning, middle and

end). I have chosen to view the film as the completion of five different parts. Those parts are the story (the plot in the film not including the characters), the characters, the items (all non-human tangibles shown in the film), the images (all images that have not been produced for the film) and the music. The reason why I have chosen those five parts (and in the way that I have) is that I think that they are separate entities that basically could be all that is shown in a film (but there are most often other parts such as lists of the people involved in the film and humans that are in the film as humans and not characters, often referred to as extras). I will below individually go into all five of these parts and conclude whether or not they are influenced by intellectual property (including what types thereof and how much). In the end of this part of the chapter, I will also make a conclusion whether intellectual property is a hindrance for the artistic freedom in film or not.

When it comes to the story (the plot in the film not including the characters), this is something that is clearly influenced by intellectual property. The artistic freedom is severely limited by the fact that for instance all new books have copyright (unless the author has explicitly stated that it shall be part of the public domain). It is not possible to choose just any story and film it. So unless the story is written for the specific film (whereas that copyrighted work can be used) or an old story that no longer has protection is used (if amended or changed, the new work might have copyright), intellectual property will have a huge influence both of what can be agreed upon (authors often want or have demands on for instance the size of the budget and which actor shall play which character) and the prize for the story (from zero to infinity), which means that both the economic aspects (such as other restrictions that come from for instance outside financing and the demand for profitability) and the artistic aspects (how the film will look and what it contains) of the film will be influenced.

The characters are also very much influenced by intellectual property. As with the story, it is not possible to take the characters and film them since characters from for instance books normally have copyright. It is, however, normally easier to create new characters than a story since characters are normally less complex than an entire story, old characters (that no longer have any protection) are normally easier to use (or amend) than old stories since a lot of human traits (such as greed) are the same over time and there are also a large number of stereotypes (such as a femme fatale) that are almost ready-made characters. In the specific case it might, however, be just as hard to create the characters as the story. However, the visualisations of a character are also important for both marketing in general and the sales of side-consumer goods (such as T-shirts). Although it is probably not common today, the uniqueness of the visualisation of a character is crucial for instance in order to get design protection and it means that future aspects (for instance the manufacturing of the T-shirt just mentioned) of intellectual property also could influence the characters (at least the visualisation of them).

If we continue to the items (all non-human tangibles shown in the film), most of these are of course influenced by intellectual property (in the way that they look and function due to for instance design protection and patents). But the way that the items are designed and function are only in a very limited sense restricting on the artistic freedom in film (with the exception of how for instance the lighting and the camera are used for

filming work⁸⁵). Instead, the main problem regarding the items is not intellectual property rights but ordinary property rights which allow the owner of an item to refuse that someone takes it and uses it in a film (the cost that it takes to acquire the property and that some property cannot be obtained is a huge problem). Intellectual property has nevertheless a very big impact on this field as well since all photos, pictures, paintings, sculptures and basically all forms of art are in one way or another protected mainly by copyright. This means that this part of the film also will be both financially (such as the costs for acquiring the rights to show the art piece) and artistically (for instance not being able to show art pieces that rights cannot be obtained for) influenced.

When it comes to images (all images that have not been produced for the film), these are just as problematic from an intellectual property perspective as the story with one exception. Since films are often produced by firms that also have or are producing other films, the firms often already own rights to other images. This means that securing a right to use is often more easy and less expensive. However, the problems are the same, since it could cost money to secure the rights (which as mentioned means more demands due to the fact that more money needs to be raised for the film), and that it is an artistic limitation in for instance not being able to show images to which rights cannot be obtained for.

The last part of the film that I will examine is the music part of the film. As with the story where it is possible to create it just for the film, it is possible to make new music for a film either by composing it (whereas the copyrighted work can be used) or to make a new performance of old music (whereas that particular performance will get copyright). It is also possible as in the case with the story to use old material that does not have protection (in this case old recordings/songs). But unlike the problems with stories, there is only one main problem with music and that is economic (the cost for acquiring the rights to use other people's music and what consequences it have for raising that money) and not artistic. The reason for this is that a huge amount of music is available through organisations that make contracts with the musicians (or labels) to take up payment and conclude contracts for right of use. There are some restrictions concerning the use of the music, but the main and big influence from intellectual property comes from the costs of acquiring rights to it.

After having examined all five parts of the film that I have chosen to examine, it is clear that intellectual property is not a small influence or the reason for minor problems concerning the artistic freedom in film. Instead, it is a major influence in most aspects of the filmmaking, how the film will look and what the film will include. Since artistic freedom in film means the right for an artist to create art by expressing him- or herself in any way and method possible using film⁸⁶, it is clear that intellectual property is not a minor hindrance for the artistic freedom in film but a major hindrance. In fact, intellectual property has much more influence and is much more a hindrance on the artistic freedom in film than any other restriction I have mentioned in chapter two (under the section "Artistic freedom in film") where I previously discussed restrictions

⁸⁵ This is however something that is outside the scope of this essay as stated in chapter 1 in the part "Limitations of the problem definition".

⁸⁶ See chapter 2 in the part called "Artistic freedom in film".

and censorship. As shown above, almost everything in the film is either directly or indirectly influenced by intellectual property and it is therefore quite clear that intellectual property is a hindrance for the artistic freedom in film.

Different terms/concepts with different values

As I have already mentioned above, the fact that intellectual property is a hindrance for the artistic freedom in film (which I concluded in the previous part of this chapter) is not enough to conclude whether or not it is a problem, since some restrictions on the artistic freedom in film are necessary such as the fact that an artist may not shoot people randomly (pun intended) in order to get a good scene. It might be the case that the values underlying the term/concept of intellectual property are so strong that they should prevail. The question if it is a problem depends upon which values that the two terms/concepts protect and how those values are regarded by the society of today. In order to answer the question, whether or not it is a problem between artistic freedom in film and intellectual property and to what extent, I will first examine what in my view are the main underlying values that the two terms/concept have and then in the end of this part of the chapter make a conclusion. The reason that I have chosen to only take up what in my view are the main underlying values is that it is not enough space in this essay to make a full analysis as well as that, by concentrating on the main values, I will have the possibility to give a more concise but still accurate image that will allow me to show more clear differences between the two terms/concepts.

The values underlying artistic freedom in film

There are three main values that are underlying the term/concept of artistic freedom in film and in no particular order those are the protection of art (as a cultural bearer), the protection of an open society (that is a prerequisite for democracy) and the protection of the freedom of the individual to express him- or herself (including both freedom of speech and expression). The first value that I mentioned above is perhaps the most obvious one. That the term/concept of artistic freedom in film protects the art form of film is as already concluded obvious. The notion that all art forms (at least one as accepted as film) have influence of our culture and is part of our culture is also widely accepted. Although a little more questioned but still very accepted is the idea that a rich culture enriches the life quality of the citizens who live in the culture. It is even possible to argue that the true measurement of how good a society is constructed is the quality and quantity of the culture in that society.

The second value that I mentioned above is the protection of an open society (that is a prerequisite for democracy) and is slightly less obvious than the first value that I mentioned. One aspect of being free is to be able to make one's own choices. The harshest punishment in our society is imprisonment, which means that the person subject to the punishment is no longer allowed to go where s/he chooses, to do what he or she chooses (even though there are some choices) and live the life that he or she chooses. In an open society, the people in it must be free in order to make the choices

that they want (within reason which is the reason for such punishments as imprisonment), otherwise it is no longer an open society but a closed society where people are more important as a group than as individuals. Democracy in its most fair form means one person, one vote with equal importance (I think that this is self-evident and even though this is something that is questioned it is mostly questioned from an efficiency point of view). It is also so that such a system relies upon that people may make their own choices, which also include that they need to be able to get information. This means that film serves a dual purpose, both as something that the individuals can do with their lives and as something that they want to see (both in the sense that it is a source of information and as entertainment). This underlying value can therefore be summed up as the protection of the making of film, which is a prerequisite for the existence of film, is something that needs to exist in open society (which in turn is a prerequisite for democracy).

The last value that I mentioned above is the protection of the freedom of the individual to express him- or herself and I have already touched upon this issue in the previous passage. Freedom of speech and freedom of expression are as fundamental for an open society as the right to make life choices and be able to access information, but they are also important in their own right, not only as a part of an open society and democracy. Again, it is a question of what creates life quality but also a question of being free. To be able to express oneself and say what one wants (both within reason) is something that is regarded as very important, both for the life quality and the freedom of the individual. The opposite is a society that is not allowing its citizens to be true to themselves (at least not express the views that they might have) or to be free (both in the sense that they cannot say or express what they want and in the sense that it stops the citizens to form an information base (since everything they will hear is one-sided propaganda) upon where they can make their own life choices).

The values underlying intellectual property

Intellectual property is a term/concept that spans over several different phenomena, but from the view of what is interesting regarding artistic freedom in film, there are two main underlying values. Those values in no particular order are the protection of the economic value of film and the protection of art (as a cultural bearer). The most obvious value underlying intellectual property is of course that it protects the economic value of film. After all, intellectual property can be viewed as a way “to bestow the status of property to an act of creativity”⁸⁷. Even though there is no consensus in defining the term/concept of intellectual property in that way, it is nevertheless important to realise that the way that the concept of intellectual property works in practice is that it allows a manifested idea to become property (under certain conditions). Since property both can be sold much more easily and be more efficiently protected than ideas it ensures that the value of, in this case, film becomes much greater (which also ensures that more films are created in order to create even more value). The idea is that the more economic

⁸⁷ See footnote 15 and also chapter 2 in the part called "Intellectual property" under the section "A linguistical approach" for more information.

value that society creates, the more values of other kind can be created (money, at least from a societal point of view is a way to create something, not a goal in itself).

The second value that I mentioned above is the protection of art (as a cultural bearer) and this underlying value of the term/concept of intellectual property is actually two different approaches with the same goal. Both approaches have as its goal to protect art, since it is a bearer of culture (that it also has an economic value for the benefit of society (and in turn the citizens of the society) has already been discussed in the previous passage). The idea is that films that both are an influence on and a part of our culture will enrich our lives and possibly even are a measurement of the quality of our society. The first approach is a direct approach meaning that art, in this case films, are offered protection (with certain limitations) by laws. By doing this it ensures that art is in some ways protected as it is so important for our culture. The second approach is a practical approach and is aimed at ensuring that more art are produced. The way this is done is by giving art, in this case films, the status of property (under certain conditions with some limitations). The idea is that, in this case, filmmakers will have enough financial return in order to be able to work with films as a profession and film companies to have sufficient financial incitements to produce more films. The aim is on production in order to enrich our culture and not to create economic values to society at large (which is discussed in the previous passage).

Is it a problem and if so, to what extent?

In order to answer the question that I have posed in the heading of this section I will below analyse the fact that both terms/concepts are designed in order to protect art (as a cultural bearer) and what implications that have. I will also go into the restrictions that intellectual property has on the artistic freedom in film and discuss them against the benefits that come from intellectual property. I will especially discuss the conflict between the common cultural heritage and economic reward for creation. I will in the end sum up and make a conclusion regarding if it is a problem that intellectual property is a hindrance for the artistic freedom in film, as concluded in the previous part of this chapter, and if so, to what extent (both regarding general areas and particular forms of films).

There is an old saying that states that there is nothing new under the sun; what this means is that something truly inventive is something extremely rare. What culture is all about is to mix and match as well as re-use and re-form our shared cultural language(s) and reference(s). It also seems to be an understanding of this amongst the legislators since for instance copyright does not protect subjects, motifs, thoughts, experiences, stated facts, techniques, styles, manners, ideas and similar⁸⁸ but that it is the individual manifested idea meaning the form that is protected.⁸⁹ From this perspective, the consequence of intellectual property is to own the common culture. Even if the individual parts of that what is owned are small compared with culture at large,

⁸⁸ See SOU 1956:25 p. 64 ff. and prop. 1960:17 p. 48 f. and chapter 3 under the part "Before the film" in the section "The law".

⁸⁹ See SOU 1956:25 p. 64 ff. and prop. 1960:17 p. 48 f.

meaning that at least culture is not controlled by a few, it is still a problem. As designed objects and copyrighted material get more intertwined with the identity of society and people, meaning that the entire culture is affected, it is becoming increasingly important that artists can portray society and that includes intellectual property that is part of society. It is from this perspective as if it was not allowed to use the colour green. The term/concept artistic freedom is from this perspective essential in order to ensure that at least non-commercial art and culture (in this case non-commercial films) can exist as well as be a part of the ongoing changes of society and not something that portrays society as it were (only being able to use material when intellectual property protection has run out).

On the other hand, there is the problem with financial insecurity (free-riders) and the economical situation of the artists. It costs a lot of money to produce a film (some of which are however costs for intellectual property as mentioned above) and this means that there normally is a need to at least get a return that equals the costs. If films did not have any protection, it would be extremely hard to do so. The films would most likely be copied immediately (to a wider extent than they already are) and people would try to benefit on other people's work (the free-rider problem). This would both mean that the returns would be low for the film (meaning that films either have to be produced more cheaply or not at all) and the income from films would be low for society as well. When it comes to the economic situation of the artist, it is easy to argue that without having the financial possibility to do something it is not possible to exercise any rights. The argument is that just to *have* a right does not mean that you *will* (or can) exercise that right. A restriction on the artistic freedom in film that ensures that the artist still can exercise that right (with some restriction) and have financial opportunity to do so (meaning that they will exercise the remaining part of the artistic freedom) can from this way of arguing be viewed as a possibility, not a restriction for the art. The restrictions on form or content that intellectual property causes to films may not necessarily be something bad either, since it could increase creativity (forcing, in this case, filmmakers to be more creative and not use old material) and not restrict it. The problem that intellectual property causes is from this perspective a challenge. However, the fact that intellectual property by some can be looked on as a challenge does not mean that it changes the fact that for the majority, it is a restriction.

If we instead look on the main issues that are problematic to *handle* with intellectual property from an artistic freedom in film perspective (not necessarily the ones that *are* the main problems), those are mainly three. The first is the story (including the characters) that is mainly problematic if it is made for the film (the problem is to check if the story might violate someone else's copyright). The second problem is if actual products, images of others and so on are used (the problem is to know who has any rights and to what) while the third problem is if actual products are not used (the problem is to check if a prop would violate someone else's design protection right). The second and the third problems can at a first glance seem as either or but films can contain products and props. If we then divide films into two categories (artistic films and commercial films) there are some differences when it comes to handling the main problematic issues. The commercial films (where the profit is the main thing) with the bigger budgets can much easier afford to buy copyrighted works, to buy products and to make props when necessary (mainly when it comes to art and similar if rights have not

been obtained). The solution lies in extra costs. For artistic film (where the message or challenges to the art form are the main thing) that option is normally not open. So it is clear that if we look upon it from a handling of the main problems perspective that there is a big difference between artistic films and commercial films.

But are the problems that have been discussed in chapter 3 really problems or are they just potential problems? After all, are entities willing to sue or try to get financial settlement from filmmakers and film companies for intellectual property rights? The answer to that question is mixed. One aspect is that there are few court cases in Sweden regarding these issues. This could of course mean that settlements are done secretly or that there is not so big of a problem. Trying to sue a film could for instance be regarded as something that would result in bad PR (films are after all also considered as an art form). It is here important to notice that is a big difference between small and relatively unknown films on one hand and big and known films on the other hand. Small films will likely be less sued (and if they would lose would have to pay less damages) and the reason for this is that an infringement will not be noticed that much. Big films on the other hand will more likely be sued (both because it will be more noticed and that there probably are money to get from suing the company) and probably pay higher damages (as they are often also considered as commercial products and not as art). This would talk for that big films are the ones that face a problem for being sued but the risk (although) not as big is still there for small films (the real gain from suing a small film might for instance be to stop it completely). Also important is that if suing a small film, it could attract attention and thus increasing the damage that might be made, whereas if the small film was not sued, the infringement might not be noticed by anyone. The mere threat of suing a small film might be problematic as it could mean personal liability unlike with bigger films (that at least should and can be constructed as a company with no personal liability). So the question if it is a potential problem or not is therefore not really important as it is the risk that is important.

What conclusions can then be drawn from the arguments stated in this part of the chapter? As concluded in the previous part of this chapter, it is clear that intellectual property is a hindrance for the artistic freedom in film in that the concept of intellectual property creates a lot of restrictions on the artistic freedom. But it is also clear that intellectual property is necessary to protect the commercial aspect of film. For films that are mainly commercial (in themselves products) it stands to reason that the protection offered in order to ensure the commercial aspects also is maintained when it comes to the production. I do not think that this is a problem within the film industry either when it comes to copyright (with the possible exception of art). Product design is, however, a problem for the film industry for this kind of films if props are intended to be used. Since commercial films are economic by nature, this is however yet another expense that the film industry has to live with since there are not enough reasons to change protection offered for other products. For artistic films, the problems are mainly with copyright but also with product design. Since artistic films do not have the same budget (financial opportunity), they are much more limited by intellectual property.

To answer the questioned posed in the heading of this section (is it a problem and if so, to what extent?): Yes, it is a problem and the problem is a general one. When it comes to handling copyright and design protection, this causes a lot of problems for all kinds

of films (even though commercial films can easier solve that problem) and there are a lot of issues, such as the fact that in order to portray our culture one must have a lot of rights to use intellectual property since it is so intertwined in our lives (who we are and who we want to be) and owners of intellectual property can refuse to allow the intellectual property to be used, when it cannot be handled at all. From a theoretical level the problem is of course major as concluded in the previous part of this chapter. But after having analysed the underlying values, it is clear that the problem that intellectual property is a hindrance for the artistic freedom in film is not as big. Commercial films that themselves are products must have the protection in order to guarantee that they will continue to be produced and therefore it is not really a problem that they have to accept the same protection for other works, especially since it is normally a problem that can be handled with money. For the artistic films it is however a big problem that intellectual property is a hindrance of the artistic freedom in film.

How to address the problem?

As concluded in the previous part of this chapter, it is a problem that intellectual property is a hindrance for the artistic freedom in film⁹⁰ even though it is not as great of a problem than one could have expected after reading the first part of this chapter. This means that the problem needs to be addressed in some way or another. There are three ways that the problem can be addressed (handled). Those ways are: To do it within the current system, make voluntary changes or do mandatory changes (legislation). I will below go into all three of these available ways that the problem can be addressed and take up some of the main pros and cons for and against the different solutions. I want to stress that the pros and cons are to a high degree linked with the problem and the extent of the problem that I concluded in the previous part of this essay and should be read with that understanding. I also want to point out that any conclusions that might be drawn from this part of the chapter will be analysed in the next part of this chapter.

Changes within the current system

It might seem strange for a person who has not studied the subject of law that changes can be made within a legal system. The idea is that law is law and when an act has been passed then it just will be applied in the way that it has been passed until new legislation is introduced. This is however far from the truth. Since no law can cover every situation that could happen in reality laws are almost always written in general terms. This means that it is always possible to argue in the individual case before a court that something should be viewed in a certain way (so that the laws are applied in a favourable way). However, it is not only the reality that makes application of laws to a certain case uncertain, it is also the fact that laws are written in words. Words can always be interpreted and whereas in Sweden laws are accompanied by preparatory works where the purposes of the law are explained, it does not mean that everything is thought of (as

⁹⁰ As concluded in the first part of this chapter called "Is intellectual property a hindrance for the artistic freedom in film?".

mentioned in chapter 1 in the part "The method", the absolute majority of practitioners in the Swedish legal field uses a legal realism approach where the intentions of the lawmakers are the tool used to analyse how laws should be applied). Even where the reality and the wording of the law is certain, changes can still be made by setting the law aside either by that there exist another regulation that is of higher dignity (for instance all EU-regulations take precedence over Swedish regulations) or there are strong enough values to set the law aside (which is the case with patents on computer programs that today are accepted even though there is a specific regulation that states that computer programs may not be subject to patents)⁹¹.

The pros for changes within the system in this case are mainly two. The first is that changes within the system can be done without a majority decision by the legislators. In a world where money is regarded as, if not always the most important aspect, one of the most important aspects, it is hard to influence legislators to make changes that will limit the scope of what is a product and thereby limit the value of what used to be intellectual property. The second pro argument is that a change within the system means that all entities will be forced to follow the change. Unlike voluntary changes (that will be addressed in the next section), a change within the system is applicable to all since it is the way that the legal situation is applied (constructed).

The cons with changes within the system in this situation are mainly three. That first is that is very unlikely that it will take place. The actors who defend intellectual property (those who benefit from the economic protection of that intellectual property) are both economically stronger and otherwise more influential than the artists who produce artistic films. Since diminishing the rights to intellectual property even in limited cases could set a dangerous precedence (from the defenders' point of view), they would probably put down a lot of effort in trying to stop such a turn of event. Also, since it is (at least potentially) a lot of money involved and a lot of money to be gained from the protection of intellectual property (which is economically beneficial to the society), it is even more unlikely that courts or similar will change the way existing regulations are applied (at least not in the direction of less intellectual property). The second con is that a change that comes from within the system is less certain to last than changes in the legislation. The law can after all be applied in the original way again (if the change does not come from that the law is set aside by a law of higher dignity) if other values are introduced. The last con is that changes within the system create uncertainty. Whereas some courts may accept that the law is set aside (or interpreted in another way), all courts might not. Until there is a precedence from the highest court, this means that the situation will be uncertain for this reason as well.

Voluntary changes

What separates voluntary changes from changes within the system is that changes within the system can be made against the will of certain actors. Voluntary changes, on the other hand, come from voluntary agreements between parties or positions of certain

⁹¹ See RÅ 1990 ref. 84 and Koktvedgaard, p. 204.

parties. There are a lot of ways that voluntary changes can be made. Certain intellectual property rights holders could state that they accept a certain use under certain conditions, a group of intellectual property right holders could form an independent entity to either offer for free, at a limited cost or charge in full for licenses to use the intellectual property just to mention a few constructions. Since the current situation means that access to intellectual property is almost always prohibited, even a change so that a license can be obtained (for full price), such as STIM (Föreningen Sveriges Tonsättares Internationella Musikbyrå) regarding music is an improvement since it means that intellectual property will be accessible (even though there will still be restrictions, since the costs for obtaining the right will normally mean certain restrictions on the artistic freedom in film, see the previous part of this chapter).

There are mainly two pros with voluntary changes and the first is that voluntary changes can be done with as little as one entity. This means that voluntary changes are easier to obtain than other solutions, and it also means that it is more likely to take place, especially if there are economic benefits. The second pro argument is that voluntary changes are made on the terms of the company (groups of companies etc.) that agrees to the change. This means that a company could separate different types (or certain parts) of intellectual property into those types (or parts thereof) that it would allow to be part of a voluntary change and those that it would not. Since the company has complete freedom, it also means that the company is likely to agree to a voluntary change.

The main cons with voluntary changes are also three. First of all, a voluntary change might not even influence the situation since it does not apply to all (not even the most important). Meaning that if voluntary changes are made, it does not necessarily solve the problem, if a single company or a small group of companies have made a voluntary change it could quite possibly be so that it would hardly affect anything. Secondly, a voluntary change can be withdrawn whenever the company behind it so wishes (if something else has not been agreed upon), which means that it exists a lot of uncertainty with a solution such as a voluntary change. The third con argument is that it is not very likely that voluntary changes are made unless there are economic motives.

Mandatory changes (legislation)

As I already stated in chapter 1 in the part "The method", laws are only commands from human beings. The laws are written in a socio-economic context, most often as a response to something, meaning that there is a choice in how the laws are constructed. Mandatory changes simply mean that new regulations (that either change existing regulations nor amend them) are introduced. This can be done in several ways but it nevertheless means some form of legislation.

The biggest pro argument with mandatory changes is that they are mandatory. If new legislations are introduced, it means that all entities must follow it. This means that normally, mandatory changes are the most efficient way to change the current legal situation. As a second pro argument, mandatory changes are often the only way to change the legal situation when there are strong interests that do not wish to make changes.

Especially when there are strong economic interests against a change, mandatory changes are the only way forward (and as will be evident below, normally not a way forward either). The last pro argument that applies specifically to this case for mandatory changes is that changes that relate to culture that do not cost the government anything (or reduce the income significantly) are more likely to be made by mandatory changes than by changes that involve companies that will lose on the changes.

The cons with mandatory changes are mainly three. First of all, mandatory changes take time. There is (almost) always some sort of study or investigation (often several) as well as certain procedures before a law can be constructed and passed. Secondly, there is normally some uncertainty with new legislation since it has not been applied in courts and therefore it is harder to make accurate predictions on how the legislation will be applied (by courts or similar). The last con argument is that it is unlikely that a mandatory change will take place, since it normally must be done with a majority decision by the legislators. As previously mentioned in this part of the chapter under the section "Changes within the current system", it is hard to influence legislators to make changes that will limit the scope of what a product is and thereby limit the value of what used to be intellectual property. It is harder to convince someone to destroy values that generate revenues to not only private enterprises (and individuals) but also indirectly to the government.

My personal suggestion

This last part of both this chapter and this essay is about my own conclusion; the part where I draw my own conclusions from the earlier parts of this essay. The difference between this part and other parts of this essay is, however, that this part is even more subjective than the rest (even though it is a goal which one should try to achieve it is only a chimera that one as a writer can be objective⁹²). Already in the beginning of this theses in the first chapter in the section "Method" I wrote that "laws are no more than commands from human beings and that it therefore is no necessary relationship between law and morality" and that this "is a essay that mainly is within the business part of law [and therefore] the most interesting question is normally: Who will get the money?" One of the conclusions that one can draw from those two statements are that nothing is written in stone and that all concepts and laws can be changed given that there are strong enough values for it. This includes the legal construction (concept) of intellectual property because it is just that: a construction (concept).

As I have concluded in the first and second part of this chapter it is a problem that intellectual property is a hindrance for the artistic freedom in film (even though the problem is somewhat limited). This means that the problem needs to be addressed in one

⁹² It is even quite possible to argue that it is better that author state that they are subjective (and the reasons for it and in what ways) then try to be objective since this means that a reader of the text more easily can analyse the text and understand what the writer is trying to communicate.

way or another. My suggestion for changes can be summed up by three proposals⁹³ and those are⁹⁴:

1. A limited right to get a forced license to copyrighted work for artistic films

With limited I mean that a forced license should only be allowed for films where the licensed part is just a small part of the film and not the whole film. I would doubt that a change in the law to allow for this kind of forced license would mean that there would be a lot of court cases on the subject. Instead, it is my belief that the parties would come to some sort of agreement regarding these issues (meaning that filmmakers that makes artistic films will have a better negotiation position). Also, since I do not propose that the forced license would be given for free and that it is only for artistic films (films that are not commercial), I think that it would not be done in that many cases. This provision would nevertheless be important since it would allow artists to use the copyrighted works that they wanted if they were prepared to pay for them.

2. That design protection shall be limited so that props for artistic films are not hindered

A special problem that I have addressed previously (in chapter 3 under the part “The film” in the section “The law”) is that it is very hard to know if someone has created a similar work, in this case design before. Every time a prop is constructed for a film it could be constructed in a way that is similar to a design protected object without that the person constructing it is aware of it. For commercial films this is part of the cost associated with filmmaking, but for artistic films it is a problem that is too big. Since costs for a lawyer (or similar) to check for design protection for every prop is too big for filmmakers of artistic films, the current legal situation means that either props will not be made or that the filmmaker has to take a chance. Since owners of design protected objects are unlikely to earn much money (even as a group), if any, on design protected objects in artistic films, to change the provision would hardly mean any loss of income (design protection is constructed as an economic right only⁹⁵) while the artistic freedom in film is strengthened (as the possibility to create props without having big potential problems is created).

3. That cases concerning films (that relate to freedom of speech) are treated in the same way as cases concerning the freedom of press

Cases concerning freedom of the press are handled by Stockholm’s district court (my translation of “Stockholm’s tingsrätt”) and done before a jury. Since both the jury and the judges has to agree in order to for a ruling to be against a person that are facing the conflict before the court relating to freedom of press it is less likely that it will succeed. As the rules are constructed in a way that limits the freedom of speech, to make a change

⁹³ I have not done specific proposes that could be implemented as they are, instead should my proposals be seen as starting points for discussions.

⁹⁴ All proposals are given under the provision that it would be allowed to do the suggested change without breaking any international convention that Sweden are a part of.

⁹⁵ As concluded in chapter 3 in the part “The film” under the section “The law”.

that would allow for cases concerning artistic films (in issues relating to freedom of speech) to be handled in such a way would mean that the laws would be interpreted more favourably for the interest of freedom of speech. This means that filmmakers of artistic films would be more protected (since both the jury and the judges have to agree) than they would be otherwise.

Together the three proposals above address both copyright and design protection⁹⁶ as well as strengthen the protection for freedom of speech (which is a central part of artistic freedom in film)⁹⁷. As is obvious all changes that I have suggested must (or rather is most likely to) be made by mandatory changes. In the third part of this chapter I discussed the different ways that changes in this case can be addressed. While I do not think that changes cannot be made in any other way than mandatory I do think that it is unlikely that they will (not only because they have not done so yet but also because there is money involved in these issues). The problem is also so big for artistic films that it is not satisfactory that just a few companies will make the changes necessary for if not solving the problem so at least limit the effect. For those that wanted an answer to the question who will get the money my hope is that the changes I have suggested will lead to that those “who gets the money” are the persons who own or control intellectual property rights and the companies that produce films (and indirectly, the society) whereas for instance freedom of speech and expression are protected and the conditions for art are improved.

⁹⁶ Trademark protection in Sweden are only in a very limited sense a restriction of the artistic freedom in film as concluded in chapter 3 in the part “The film” under the section “The law”.

⁹⁷ See chapter 2 in the part “Artistic freedom in film” and chapter 4 in the part “Different terms/concepts with different values” under the section “The values underlying artistic freedom in film”.

Bibliography

Legislation

Act (1960:729) on Copyright in Literary and Artistic Works
Act (1990:886) about Examination and Control of Films and Videos
Act (1992:1685) on the Protection of Layout Designs in Semiconductor Products
Act (1994:1500) concerning Sweden's Accession to the European Union
Criminal Code (1962:700) of Sweden
Design Protection Act (1970:485)
International Copyright Regulation (1994:193)
Swedish Contract Act (1915:218)
Swedish Patent Act (1967:837)
Trademark Act (1960:644)
JK 1994 s. 122
NJA 1974 s. 94
NJA 1993 s. 263
Prop. 1960:17
RÅ 1990 ref. 84
RÅ 1996 ref. 4
SOU 1956:25

Films

Batman Forever (1995) directed by Joel Schumacher
Beowulf (1999) directed by Graham Baker
Black Hawk Down (2001) directed by Ridley Scott
Chicken Run (2000) directed by Peter Lord and Nick Park
City by the Sea (2002) directed by Michael Caton-Jones
Cruel Intentions (1999) directed by Roger Kumble
Cruel Intentions 2 (2000) directed by Roger Kumble
Dangerous Liaisons (1988) directed by Stephen Frears
Demolition Man (1993) directed by Marco Brambilla
Dungeons & Dragons (2000) by Courtney Solomon
Fight Club (1999) directed by David Fincher
Final Fantasy: The Spirits Within (2001) directed by Hironobu Sakaguchi and Moto Sakakibara
Harry Potter and the Sorcerer's Stone (2001) directed by Chris Columbus
In the Good Old Summertime (1949) directed by Robert Leonard and Buster Keaton
It's a Very Merry Muppet Christmas Movie (2002) directed by Kirk Tatcher
Jackass: The Movie (2002) directed by Jeff Tremaine
Jesus Christ Superstar (2000) directed by Gale Edwards
Kiken na kankei (1978) directed by Toshiya Fujita
Nebezpečné známosti (1980) directed Miloslav Luther

Pink Floyd The Wall (1982) directed by Alan Parker
Spider-Man (2002) directed by Sam Raimi
Star Wars: Episode I - The Phantom Menace (1999) directed by George Lucas
Steal this Movie (2000) directed by Robert Greenwald
Swan Lake (1996) by Matthew Bourne
The Country Bears (2002) directed by Peter Hastings
The Devil's Advocate (1997) directed by Taylor Hackford
The Jungle Book 2 (2003) directed by Steve Trenbirth
The Lord of the Rings: The Fellowship of the Ring (2001) directed by Peter Jackson.
The Pirates of the Caribbean (2003) directed by Gore Verbinski
The Shadow (1994) directed by Russell Mulcahy
The Shop Around the Corner (1940) directed by Ernst Lubitsch
The Wedding Planner (2001) directed by Adam Shankman
Twelve Monkeys (1995) directed by Terry Gilliam
Valmont (1988) directed by Milos Forman
You've Got Mail (1998) directed by Nora Ephron

Literature and other sources

"About Intellectual Property", collected from <http://www.wipo.org/about-ip/en/> on the 17th of January, 2003

Arrhenius, Sara, "The art of making a scene in a room which is no longer there", collected from <http://www.anthology-of-art.net/generatio/02/arrh.html> on the 27th of January, 2003

Bauman, Shyon, *American Sociological Review*, 2001, Vol 66, p 405 f. as collected in *Filmvetenskapliga metoder*, FV4100, 2002

Chan, Andrew, a review of *Fight Club*, collected from http://www.filmwritten.org/reviews/1999/fightclub_ac.htm on the 26th of February, 2003

Detter, Ingrid, *The Concept of International Law*, 2nd edition, 1993, Stockholm, ISBN 91-38-50194-5

Drahos, Peter, *A Philosophy of Intellectual Property*, Aldershot, ISBN 1 85521 240 4

Easton, Jaclyn, "Crusading for Art in a Digital Age" a radio show on the on-line channel MetaHollywood on LATimes.com that was transcribed on, mirrored on and collected from <http://www.cc.jyu.fi/minidisc/971017transcript.htm> on the 17th of January, 2003

"FAIR ACTION ALERT: In the Soup at the View: ABC allows corporate sponsor to buy talkshow content", collected from <http://www.fair.org/activism/the-view.html> on the 18th of February, 2003. The source is originally a *Wall Street Journal* article: Branch, Shelly, "Product Plugs—'M'm M'm Good'?", *Wall Street Journal*, November 14, 2000, that is collected from and mirrored on

<http://myphlip.pearsoncmg.com/cw/mpviewce.cfm?vceid=2193&vbcid=1944> as part of school material on the 18th of February 2003

Fredrickson, Eric, the editorial review, collected from http://www.amazon.com/exec/obidos/tg/detail/-/B00000J2OO/qid=1046341912/sr=1-2/ref=sr_1_2/103-8314488-7068621?v=glance&s=video games on the 27th of February, 2002

Granstrand, Ove, *The Economics and Management of Intellectual Property*, Cheltenham, 1999, ISBN 1 85898 967 1

Haraldson, Frekrik, och Ehrén, Charlotte Lilliestierna, *Aktuella frågor om film*, 1998, ISBN 91-7223-027-4

<http://citybythesea.warnerbros.com/story.html>, collected on the 26th of November, 2002

<http://disney.go.com/disneyvideos/liveaction/countrybears/index2.html> under movie info - production notes

<http://www.thecanadianencyclopedia.com/>, collected on the 17th of January, 2003

<http://www.un.org/Overview/unmember.html>, collected on the 19th of January, 2003

<http://www.wipo.int/members/members/index.html>, collected on the 19th of January, 2003

<http://www.wipo.org/about-wipo/en/>, collected on the 17th of January, 2003

Koktvedgaard, Mogens, and Levin, Marianne, *Lärobok i immaterialrätt*, 2000, Göteborg, 6:2 edition, ISBN 91-39-20210-0

Lessig, Lawrence, *The Future of Ideas*, 2001, 1st edition, ISBN 0-375-50578-4, Random House, New York

Lovinger, Robert, "Fewer blockbusters attract fewer moviegoers", collected from <http://www.s-t.com/daily/09-00/09-24-00/a01wn005.htm> on the 26th of February, 2003

Nowell-Smith, Geoffrey (editor), *The Oxford History of World Cinema*, New York, 1996, ISBN 0-19-874242-8

Ricketson, Sam, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, 1987, ISBN 0-582-46368-8

"Russian TV company suspended over subliminal messages" collected from http://www.ananova.com/entertainment/story/sm_40825.html on the 26th of February

Rönneberg, Margareta, *TV är bra för barnen*, Falun, 1997, ISBN 91-88594-65-3

Samuelson, Pamela, *Challenges for the World Intellectual Property Organisation and Trade-Related Aspects of Intellectual Property Rights Council in Regulating Intellectual Property Rights in the Information Age* as printed in Imperato, Nicholas (editor), *Capital for our time*, 1999, ISBN 0-8179-9582-5

Sokalski, Walter and other USASOC public affairs members, "Army trains 'Black Hawk Down' Actors", collected from <http://www.dtic.mil/armylink/news/Mar2001/a20010307bhdtraining.html> on the 18th of February, 2003

Strömberg, Tore, *Rättsfilosofins historia i huvuddrag*, 3rd Edition, Lund, 1989, ISBN 91-44-18633-9

"Svenskarnas läsvanor", *Svenska Dagbladet* 11th of November, 2002, collected from http://www.svd.se/dynamiskt/Kultur/did_3516962.asp on the 25th of February, 2003

Sörenson, Elisabeth, "Sinne för skuggors svarta magi saknas", *Svenska Dagbladet*, 11th of November, 1994

Talbot, Ann, "*Black Hawk Down*: naked propaganda masquerading as entertainment", collected from <http://www.wsws.org/articles/2002/feb2002/hawk-f19.shtml> on the 18th of February, 2003

"Trivia for Demolition Man (1993)", collected from <http://us.imdb.com/Trivia?0106697> on the 28th of February, 2003.

"Undressed to kill", collected from <http://www.starwars.com/eu/news/2000/07/news20000726b.html> on the 26th of February, 2003

"What is intellectual property (IP)?", collected from <http://edie.cprost.sfu.ca/~jacsen7/whatisIP.html> on the 19th of January, 2003

"What is intellectual property or IP?", collected from <http://www.intellectual-property.gov.uk/std/faq/question1.htm> on the 17th of January, 2003

Wise, Damon, "Menace II Society", collected from <http://www.edward-norton.org/fc/articles/empire.html> on the 26th of February, 2003

www.imdb.com