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**Film Industry Law - Who's who:
Ownership on the film's intellectual property rights
Girona – 16.11.2017**

How it all began



FROM SCRIPT TO SCREEN : RIGHTS INVOLVED IN MAKING A FILM IN ITALY



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Producer, composer and animator film rights in Serbia



Natalija Popovic

Who's who: Ownership on the film's intellectual property rights

- Overview to the situation in Germany -



Sven Preiss, LL.M.

Points to bear in mind

Serbia:

- Outside the EU
- Legislation regarding IP -traditional.
- Generally, authors more protected by law; producers protected by contract .
- Economy - not very strong.
- Small number of films made - 25 in 2016.
- Illegal downloading and streaming – very common despite being criminalized.
- Need to change legislation especially in respect of economical rights in film.

Legislation relevant to rights in films

- Two most relevant legislations – Law on Cinematography and The Law on Copyright and Related rights
- Law on Cinematography gives an outline to general cinematographic interest and gives definition who is the producer.
- IP rights in films are regulated by The Law on Copyright and Related rights.

COPYRIGHT: THE LINCHPIN OF THE FILM –MAKING PROCESS

Copyright shapes each stage of the film-making process (development, financing, marketing and distribution):

- it helps producers to attract funds;
- it enables the authors of the film to earn from their works;
- It spurs technological innovations and new ways to distribute films;



At the Italian national level copyright is regulated by the **law no. 633 of April 22, 1941**

FILM - A COLLABORATIVE WORK

➤ Film is a complex, collaborative work that results from the endeavors of a multitude of collaborators: scriptwriters, actors, directors, set and costume designers, music composers etc.

Case law: “Cinematographic work is a **collective work**” (Court of Rome n. 7918 - 15/04/2011) [as opposed to a composite work]



Legal framework

“The author of the plot, the author of the script, the composer of the music and the director shall be considered joint co-authors of a cinematographic work.” (Article 44 of law no. 633 of April 22, 1941)

THE PRODUCER: THE OWNER OF THE FILM

- The Film belongs to the Producer as the person responsible for transforming ideas into a marketable cinematographic work
- The Producer has the opportunity to make commercial gain from the exploitation of the film

Legal framework

*“The exercise of the exploitation rights in a cinematographic work shall belong **to the person who has organized the production of the work.**” (Article 45 of law no. 633 of April 22, 1941):*

“The exploitation rights pertaining to the producer concern the cinematographic exploitation of the produced cinematographic work”. (Article 46 of law no. 633 of April 22, 1941):

Case Law: *“The exploitation ex section 46 includes any possible form of utilization of the cinematographic work” (Court of Milan order dated 11/04/2011)*

What about the Producer in Germany?

No Copyright in the film!

But: ss. 88 (1) & 89 (1) German Copyright Act:

- Exclusive Exploitation Rights are deemed to be granted to Producer
- Again but: not any and all exploitation rights are covered, contractual agreements are necessary

- Producers in domestic films usually actors and directors and not production houses.
- Producers have economical rights on the videogram of the film. (related right)
- **IP rights according to Copyright Law belong to the authors and not to the producer.**
- **Copyrights on the film can be transferred to the producer only by a contract!** If it is not specified the rights belong to authors and not to the producer.

Balancing the protection of the Producer and the Authors

The Law foresees certain protection both for producers and authors:

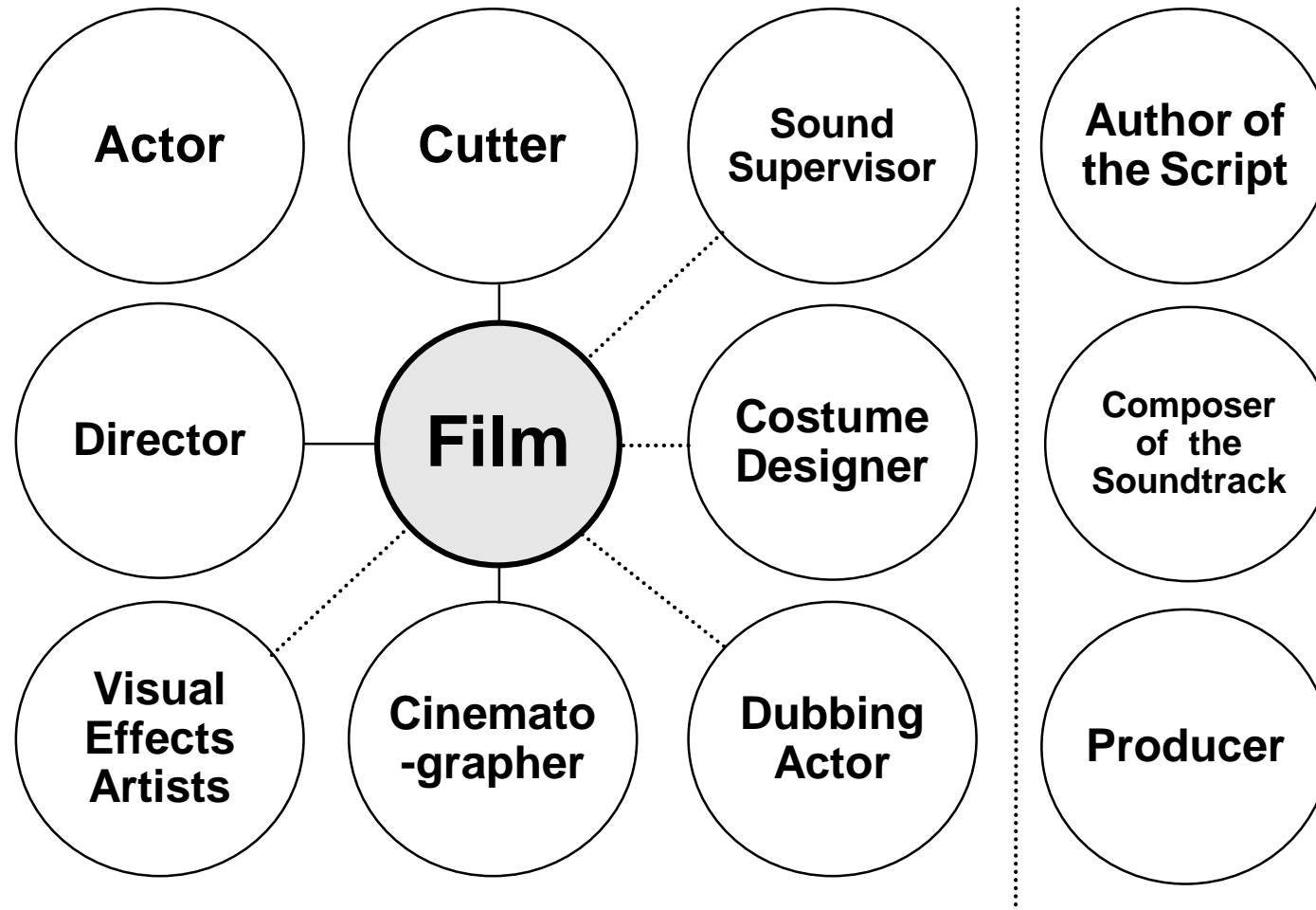
- Protection measures for producers:

1. if one of the original authors refuses or is unable to complete his/her own contribution to the film, the producer may hire another one;
2. Use of the rights of the music composer and the screenplay writer; since their work is separable from the film by their nature, they may only use them when this use does not infringe producer's rights (needs to be defined in the contract)

- Authors have a specific right of compensation from the person who owns the economical rights in the film.

(article 70 of Law on Copyright and Related rights)

Who is “author“ of a film?



Author's Copyright on Film in Germany

- **Two main requirements for being considered as author:**
 - Creative contribution
 - By a natural person

- **Sec. 7 German Copyright Act: « The author is the creator of the work »**
 - legal entities cannot be author of a film
 - Copyright itself cannot be assigned / « no work made for hire »
 - Possibility of assignment of exclusive exploitation rights to producers

WHICH RIGHTS FOR THE AUTHORS OF THE FILM?

- Article 46 of law no. 633 of April 22, 1941 is based on the rebuttable presumption that the Producer entered in multiple agreements with the co-authors of the film to define how the IP rights arising from their works will be used and remunerated. These agreements are known as the **chain of title**.
- The authors of the films remain in any case entitled to moral rights (namely, the right to attribution and the right to object to derogatory treatment of a work) and also to the right to equitable remuneration

LEGAL FRAMEWORK

“Moral rights may be asserted at any time by any one joint author; and the work, if unpublished, may not be published nor be modified or utilized in a form differing from that of first publication, without the consent of all the joint authors” (article 10 of law no. 633 of April 22, 1941)

*“Where the distribution rights are assigned to the producer, **the authors of cinematographic or assimilated works are entitled to equitable remuneration** from the distributing organizations for every use of the work that takes the form of communication to the public by electromagnetic waves, cable or satellite.” (article 46-bis of law no. 633 of April 22, 1941)*

Copyright legislation-additional protection for all authors

Article 70

- (1) If the profit made by exploiting a work of authorship is evidently disproportionate to the contractual remuneration, the author or his/her heir shall have the right to request the contract to be modified for the purpose of eliminating such disproportion.
- (2) If the author's remuneration is not agreed upon and if the profit made by the use of the work of an author exceeds the costs of its use, allowing therewith the payment of author's remuneration, the author or his/her heir shall have the right to request the contract to be modified by including such remuneration in the contract.
- (3) The right referred to in paragraphs 1 and 2 of this Article shall become unenforceable two years after the existence of such disproportion and /or profit made by the use of work of an author became known, but not later than six years from the end of the year in which the disproportion had arisen, and/or profit has been made.
- (4) The author and/or his/her heir may not waive in advance the right referred to in Paragraphs 1 and 2 of this Article.
- (5) In order to exercise rights referred to in Paragraphs 1 and 2 of this Article, the user of the work of authorship shall have a duty to present credible information on economic effects of the use of a work of authorship to the author, and/or his/her heir within period not exceeding a month as of the day of the request.

THE LAW ON COPYRIGHT AND RELATED RIGHTS

Article 11

- (1) The scriptwriter, director and chief cameraman shall be regarded as co-authors of a film.
- (2) If music is an essential component of a film (musical film) and it has been composed for such film, then the composer shall be regarded as a co-author of that film as well.
- (3) In a cartoon and/or animated film, or in a film where drawings or animation are its essential elements, the main film-animator shall also be deemed to be the co-author of the film.

Is the director author of the film?

**Creative
contribution?**

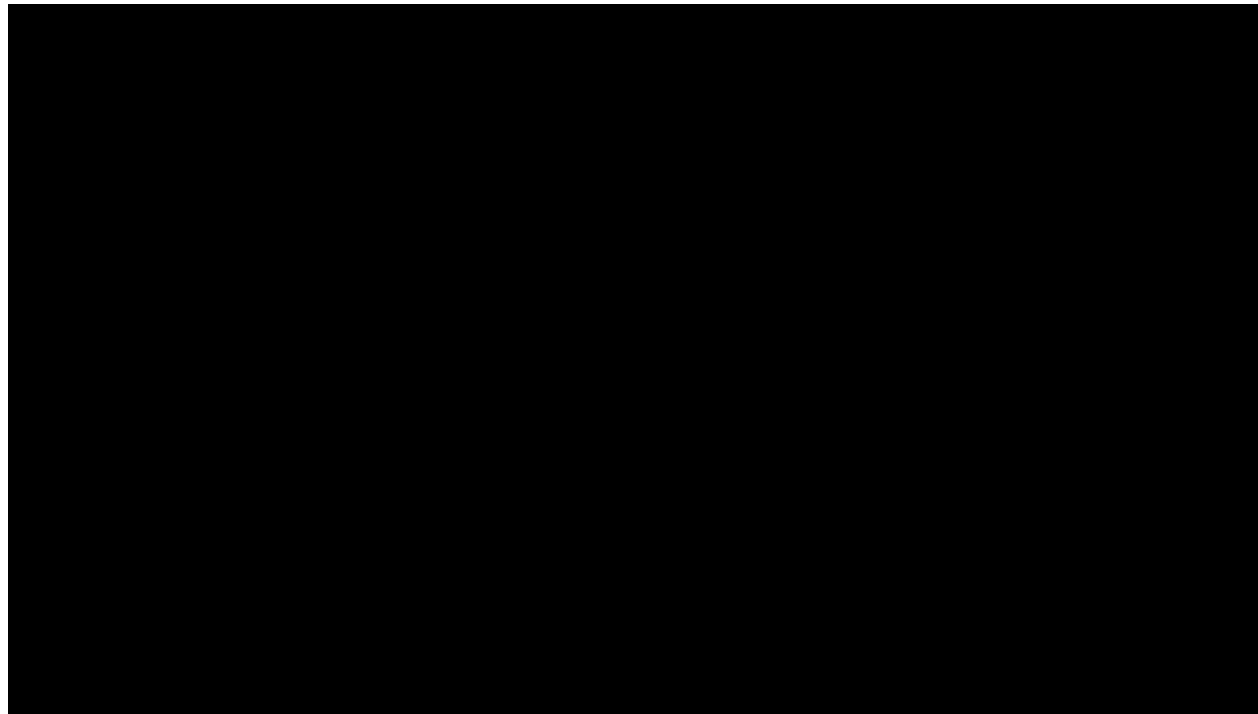
**By a natural
person?**



Yes! Thinking of films like “Jaws”, who would doubt that?
(Federal Supreme Court (BGH) 24.11.1983 - I ZR 147/81)

Harmonization on an European Level: European Court of Justice (ECJ) 09.02.2012 – C-277/10
(Luksan v van der Let)

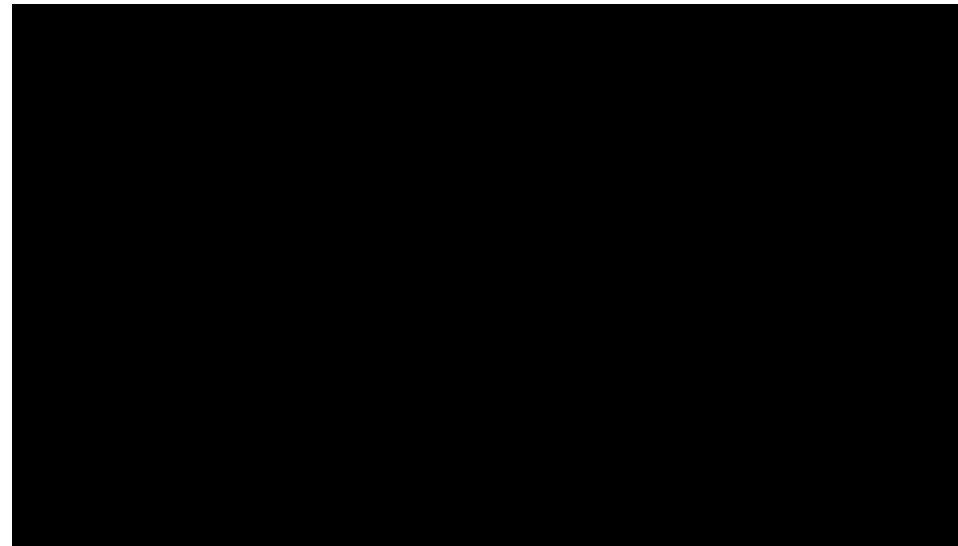
What about the Cinematographer?



Yes!

Federal Supreme Court (BGH), 22. 9. 2011 - I ZR
127/10 „Das Boot“

And the Composer of the Soundtrack?

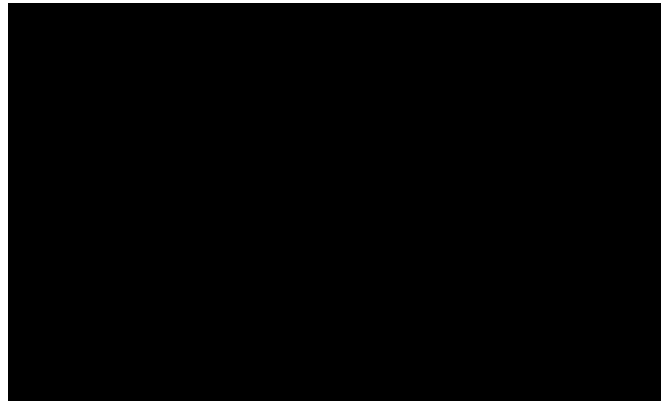


No!

But: Copyright to pre-existing work

Composer's rights

- The composer (in addition to the screenwriter, director and director of photography) is protected if the two **cumulative** conditions are met:
 - a) If the music was composed originally for the film
 - b) If the music is an essential part of the film



- Film music composer protection weaker in comparison to other authors

What do you think about the Dubbing Actor?



- It depends on:

**Room for
interpretation
by the Dubbing
Actor**

**Importance of
the role**

- Yes, with regards to the dubbing of Johnny Depp in « Pirates of the Caribbean »

(Federal Supreme Court (BGH),
10. 5. 2012 – I ZR 145/11)

And what about other participants?

Sound
Supervisor
?

It
depends!

- More than mere technical participation?
- Creative possibilities?

Federal Supreme Court (BGH), 13. 6.
2002 - I ZR 1/00 - Mischtonmeister



And what about other participants?

Sound
Supervisor
?

It
depends!

Cutter?

Yes!

- Creative contribution?
- Of a natural person?



Federal Supreme Court (BGH), 28. 10. 2010
- I ZR 18/09 – Der Frosch mit der Maske

And what about other participants?

Sound
Supervisor
?

It
depends!

Cutter?

Yes!

Costume
Designer
?

It
depends!



- Can the work be exploited separately?
- Has the work been created for the film?
- Creative contribution?

Animator's rights

- In Serbia the film animator is: equally rightful co-author of a film not only when the film in question is an animated film, **but when animation represents an important part of the film.**

(Paragraph 11, sections 3 of Serbian Copyright and related rights Law.)

- The interesting characteristic of Serbia's regulation is that the **film in question does not need to be a fully animated film, but the animation has to have special significance in the film.**
- No case law to reveal more about the interpretation of this standard.
- Probable solution: “reasonable man ” assumption.



FUNDING AN ITALIAN FILM

When the Producer has a clear chain of title, it comes to securing the necessary funds to produce a film

→ NATIONAL FUNDS:

- **FUNDS FOR FEATURE LENGTH FILMS OF CULTURAL HERITAGE:** the funds are granted in favor of films of cultural relevance pursuant to Legislative Decree 28/2004;
- **FILM TAX CREDIT FOR PRODUCER:** the tax credit consists of the possibility of setting off payable taxes (corporate tax, Income tax, regional tax) with the credit accumulated thanks to investments in the film.
- **CO-DEVELOPMENT FUNDS:** dedicated funds for the development of projects co-produced by Italian and foreign producers (i.e. Italy-France feature film co-development fund);

→ REGIONAL FUNDS:

- Single Italian Regions (i.e. Apulia, Piedmont etc.) allocate annual funds to support the productions of Italian films which are produced on regional soil



DISTRIBUTION OF THE FILM

- The most eclectic IP asset the producer holds is **the right of communication to the public** regulated by articles 16 and 16 bis of law no. 633 of April 22, 1941
- The right of communication to the public shall govern radio and television broadcasting, including satellite broadcasting, cable retransmission as well as *“the making available of the work, in such a way that members of the public may access them from a place and at a time individually chosen by them”*. Such definition refers to the transmission on “point to point” telematic networks (such as on demand services).
- Each individual act of communication requires a separate authorization.
- Producers typically enter into agreements with cinema/TV distributors against remuneration



THE RIGHTS VALUE CHAIN

THE TRADITIONAL RIGHTS'S VALUE CHAIN

Merchadising: books, games, gadgets (3 to 7 weeks before theatrical release) → **Cinema Release** (3 to 20 weeks) → **DVD release** (1 to 6 months later) → **Pay-Tv** (6 moths later) → **Terrestrial network television** (6 months later)

BUT

The Online Economy is introducing new possibilities of exploitation:

- Video-On-Demand (VOD);
- Streaming services (e.g. Netflix);
- Distribution by DVB-H technology (mobile phone broadcasting);
- Self – distribution with new media (i.e. You Tube).



NEW PERSPECTIVES FOR THE ITALIAN CINEMA

The new statute on cinema and audiovisual sector is set forth by “*Franceschini Law*” published On 26 November 2016.

- **The main pillars:**

- 1) introduction of the Consolidated Film and Audiovisual Fund aimed at financing Italian cinema and audiovisual industry, the amount of which will be no lower than EUR 400 million per year;
- 2) abolition of introduction of automatic contributions, in favor of production companies and companies distributing Italian cinematographic;
- 3) Creation of the Higher Council for films and audiovisual works;
- 4) the introduction of six different kind of tax credits to incentivize cinematographic and audiovisual production and distribution, post-production companies, etc.
- 5) the development of movie-theatres and digitalisation of artistic heritage. Restructuring existing movie-theatres and new openings will be funded by an extraordinary plan of EUR 120 million in five years.

Conclusion - Current law and future steps

- As mentioned, government is trying to attract more foreign film makers but certain changes are bound to happen to make this policy even more effective.
 1. On a general scale, the inescapable change concerning the tolerance level of online infringements of all films in regard to illegal downloading and streaming.
 2. The change in legislation alone is probable, but is abandoning the more “traditional” approach the right way to go? Should the ownership structure change?
 3. The future looks very interesting and with some changes bound to happen in years to come.
- At the moment, contract between producer and authors-very important!

Outlook to German Copyright and Films

- **Major copyright reform became effective March 2017**
- **Introducing further rights to information for authors and performing artists**
 - Film Producers: Get your Rights Management System straight!
- **Right to further exploitation of copyrights after 10 years**
 - Lucky (lobbying) film producers: not applicable to contracts concerning films!



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Q&A

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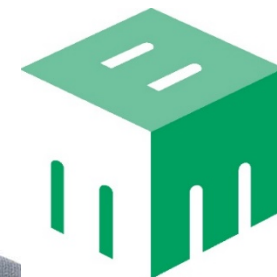
Thank you !

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Thank you for your attention!

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