IRIS plus
LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

An Introduction to Music Rights for Film and Television Production

by Francisco Javier Cabrera Blázquez

EDITORIAL

More often than one might expect, basic issues concerning music rights are unknown territory for producers of music works, film composers and musicians. Reading this IRIS *plus* is a first step towards understanding the complex legal matter. The article starts by explaining the legal position of the film composer, which comprises the questions of who holds copyrights, for how long and what kind. It thereafter focuses on issues around licensing and remuneration including the role of collecting societies. The article then looks at various aspects of piracy: a major concern for the audiovisual industry. Rightsholders are waging a war against a virtually invisible enemy who is paradoxically also their customer. In this battle, court rooms provide the battlefield and plaintiffs ask legislators to provide more efficient weapons and shields in the form of new legislative measures. The article ends with a look at recent legislative proposals of how to respond to piracy.

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I. Overture

In 1849, Richard Wagner, the most visionary of all composers (and probably the one who has influenced film music the most), expressed in his essay *Das Kunstwerk der Zukunft* (The Art Work of the Future) his idea of a "great Total Work of Art, which must comprise all forms of Art in order to use them as means, thereby destroying them in favour of achieving the common goal of all of them, namely the absolute, direct representation of the fulfilled human nature".[1] Wagner would later apply this idea to his own works, notably to his monumental opera cycle *Der Ring des Nibelungen*, a work which would leave its mark not only on the world of opera but also on Western culture as a whole.

The idea of a Total Work of Art seems to have found its perfect translation in cinema. Moving images, spoken dialogue and music are blended together in order to "achieve a common goal", the cinematographic work. It is no surprise that the most famous film composers of the Hollywood golden era (Korngold, Waxman, Steiner, etc), who fashioned the way we understand film music today, were all European immigrants, the offspring of the great line of European composers influenced by Wagner's ideas (Gustav Mahler, Richard Strauss, Giacomo Puccini...).[2] Nor is it surprising that the composer considered to be the first to write an original score for a film, Camille Saint-Saëns, was the author of more than ten operas including the well-known *Samson et Dalila*.[3]

Film music celebrated its centennial anniversary in 2008.[4] In its hundred years of existence, film music has elevated itself from the improvised piano accompaniments of the silent era to the art form we know today. Film music has attracted some of the greatest composers of the 20th century (from Saint-Saëns to Shostakovich, Prokofiev, Copland or Vaughn Williams) and is kept alive by great specialists such as John Williams or Ennio Morricone, just to name two of the most well-known among them. Many of these film scores go beyond the silver screen and have a life of their own on soundtrack albums, while the most popular are even performed live in concert halls all over the world.

But cinema is not only a cultural endeavour, it is also a commercial enterprise, in which money and rights play a prima donna role, and one in which today's composers are far from enjoying the privileged position opera composers once held. Music is a fundamental part of each audiovisual work, but film composers are not usually well known and seldom achieve star status. If the advent of television has opened up another field of work for composers, it has not necessarily improved their working conditions.

This article aims at providing a brief introduction to music copyright law as it applies to film and television production. This is a highly complex field of law, so that the aim of this article will simply be to provide a non-exhaustive general overview of legal issues. Firstly, the legal position of the film composer will be discussed, with special emphasis on the differences between the US and the various European copyright systems. Secondly, general rules about licensing and remuneration will be explained, with national examples from four different countries (US, Germany, France and the UK). An overview of issues regarding piracy will bring this article to its finale.

II. One Soundtrack, Two Possibilities

In order to enrich a film with a music soundtrack, a film producer has two basic options: 1.) to use pre-existing music, such as songs, classical music or production music;[5] 2.) to have a composer write original music for the film.

If the use of pre-existing music is required, the filmmaker (or the producer), mostly helped by a music supervisor, will select the musical works they would like to use and then contact the rightsholders to obtain a licence. They may either have performers (soloists, a rock band, a symphonic orchestra) record a pre-existing musical work for the purposes of the film production or use a pre-existing commercial recording of the musical work in question.

But in most cases, the producer or the filmmaker will ask a composer to write an original soundtrack which will accompany the visual and spoken parts of the film, supporting and enhancing them. This represents a completely different type of artistic choice: whereas in the case of pre-existing music, the producer knows precisely what he is acquiring, working with a film composer is rather an act of faith, since at the moment of signing the contract the producer will never know what the completed soundtrack will eventually sound like. That does not mean that producers and filmmakers do not have a say in shaping the soundtrack. As put by film composer Alan Silvestri: "You've got to remember what you are doing here. You're working for somebody, and you, the composer, are not going to be the one called on the carpet when the movie was supposed to make $40 million this weekend and it only made $150,000 [...] So if you think for a minute that the director is not going to have a whole lot to say about what kind of music goes into their film and how it sounds, you're kidding yourself."[6] First of all, this is a matter that is discussed beforehand between the parties involved. The filmmaker (sometimes the producer) will indicate the film scenes where music is required. Very often so-called temp tracks are used to provide guidelines to the composer as to the type of mood or style.[7] Moreover, in the contract signed with the composer, producers normally define the characteristics of the music they expect to be delivered by the composer. And in the end, a film producer will have the last word as to whether the music written by the composer will actually be used in the film.

III. Legal Position of the Film Composer

1. Copyright Ownership

Copyright ownership vests in the person who created the work. This is a basic rule of copyright law. In principle, the film composer is the author of his music. However, the definition of authorship is not the same in all countries. The most telling example is the US, where the agreement between composer and film producer determines the legal status of the composer. In most cases, the composer will work under a "work made for hire" contract. The US Copyright Act defines a work made for hire as "...a work prepared by an employee within the scope of his or her employment..." or "...a work specially ordered or commissioned for use as a part of a motion picture or other audiovisual work". In such a case, the parties must "...expressly agree in a written instrument signed by them that the work shall be considered a work made for hire".[8] If the composer is deemed to be an employee-for-hire, he shall not be considered the author of the work for copyright purposes. In such cases, the producer owns the copyright, while the composer will be remunerated through a composer's fee plus public performance royalties.[9] If the composer is hired as an independent contractor, then he will be considered as the author for copyright purposes.

In European countries, there is no such "work made for hire" exception applying to this case, so the composer will be the author of his music for copyright purposes. The question is rather whether or not the composer is co-author of the audiovisual work. Again, the rule whereby the author is the person who created the work applies. Nevertheless, there are different national solutions to this issue. In the case of Germany, the prevailing opinion is that the original film music is to be considered a pre-existing work (*vorbestehendes Werk*, Art. 88 para. 1 UrhG and Art. 89 para. 3 UrhG).[10] The situation in the UK is substantially similar.[11] In France, however, Art. L.113-7 of the *Code de la propriété intellectuelle* (French Intellectual Property Code)[12] states that "unless proved otherwise", the author of the musical compositions, with or without words, specially composed for the work, is presumed to be one of the joint authors of an audiovisual work made in collaboration, together with the film director, the author of the script, the author of the adaptation and the author of the dialogue.[13] This is simply a presumption, so in cases where the creative contribution of the composer is insufficient he will not be considered as co-author of the audiovisual work.

2. Term of Copyright Protection

There is also a fundamental difference between the US and the European Union as regards the term of copyright protection. In the US, the term of protection will depend on whether or not the work was made as a work for hire. Under work for hire contractual agreements, the producer becomes the author of the work pursuant to the U.S. Copyright Law. The duration of copyright protection for "works for hire" created on or after 1 January 1978 is 120 years from the year of creation or 95 years from the year of publication, whichever is shorter. The copyright duration for other types of works written on or after 1 January 1978 is life of the author(s) plus 70 years. But as already stated *supra*, most cinematographic works are made under work for hire agreements, so that the film producer is the sole author of the film, including the soundtrack especially written for it.

In the EU, the so called Copyright Term Directive[14] harmonised the copyright term of protection. According to

Art. 1 of the Directive, the rights of the author of a literary or artistic work run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public. Producers of phonograms, film producers and broadcasting organisations are protected simply as holders of neighbouring rights, so their term of protection is substantially shorter, namely 50 years after the first fixation or publication of their works (first transmission in the case of broadcasters).

Partly responding to this imbalance, the European Commission made public, in July 2008, a controversial proposal to extend the term of protection for producers of phonograms (and recorded performances) from 50 to 95 years.[15] According to the Commission, "[t]he extended term would benefit performers who could continue earning money over an additional period. A 95-year term would bridge the income gap that performers face when they turn 70, just as their early performances recorded in their 20s would lose protection".[16] According to critical voices, the extended term would mainly benefit the producer of sound recordings rather than the performers themselves and would do nothing for innovation and creativity.[17] The Commission defended its proposal by stressing that the extension of the copyright terms "would generate additional revenue from the sale of records in shops and on the Internet. This should allow producers to adapt to the rapidly changing business environment which is characterised by a fast decline in physical sales (minus 30% over the past five yeas) and the comparatively slow growth of online sales revenue".

This is a political discussion that goes beyond the scope of this article. However, there is a puzzling side effect to this proposal: its only beneficiaries are the holders of neighbouring rights on sound recordings. On the other hand, the term of protection for film producers and broadcasting organisations and for audiovisual performers will remain the same, creating an imbalance inside the body of EC copyright legislation without any apparent reason. This would have perverse effects such as protecting the soundtrack album of a film for a longer period than the film itself![18]

3. Moral Rights

According to Art. 6*bis* para. 1 of the Berne Convention, the moral rights of an author include the "right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation".[19] In the case of composers, this applies fully only to their musical works. When it comes to an audiovisual work that includes their music, this legal protection seems to somewhat fade: composers do not have a say as to the final version of the film (final cut), and they do not even have a right to have their music actually included in the film, if the producer thinks otherwise. That was, for example, the case with *La marche de l'empereur*,[20] an Oscar-winning French documentary, which in its original version included a prize-winning, critically acclaimed soundtrack by Émilie Simon.[21] When National Geographic and Warner Bros. bought the distribution rights, they decided to change both the music and the narration of the documentary and thus appointed another composer, Alex Wurman, to write a new soundtrack.[22] A similar case came to litigation in Germany concerning the reuse of old films (without their original music) to produce a television series. In this case, the court stated that the moral rights of a composer are not infringed when the music is simply removed.[23] It is a different matter when the producer wants to adapt parts of the music, for example. for exploitation in a different country. Then the moral rights of the original composer may apply, if the modification of the work is prejudicial to the composer's honor or reputation. An example of this: in a case concerning the German broadcasting of the RAI series *Cristoforo Colombo*, the *Oberlandesgericht* (OLG) München decided that the German broadcaster did not have the right to introduce changes in the composer's music (such as cutting parts of it and introducing new music by another composer) since the changes made to the music destroyed the coherence of his creation and the intellectual-aesthetic impression of the work as a whole.[24]

IV. Licensing and Remuneration

It could be argued that licensing is essentially a money issue. But money issues can impose quite a heavy burden on artistic choices. In the words of Woody Allen: "I'm making films where everything, my salary, the whole film will be like a maximum of 14 or 15 million dollars and it's tough, because there's a lot of things I want to do that I can't do. You know they say when I did this next film that hasn't come out yet, Match Point, you're not going to be able to afford music. And I figured out a way, by using all opera, and that I was able to connive with an opera company that was putting out an Enrico Caruso album to get the music".[25] What could be considered to be a bold artistic decision (the sound of Caruso's vintage recordings is far from today's hi-fi standards) was merely the result of a clever business strategy (cutting music expenses by using royalty-free, public domain recordings). Seasoned Opera goers, however, might have been somewhat puzzled by the scene in the film show-

ing a performance of Verdi's *La Traviata* at Covent Garden, featuring soprano and tenor singing a duet to a piano accompaniment…

Music licensing issues can block entire productions from being distributed. Obviously, a solution is to replace the contentious music work with another work. An example of this is the opening music for Fox's series "House MD".[26] In television series, the opening title usually serves as a signature mark for the whole series, but this is not the case for the House series. In the US and in a few other countries, the opening theme to the series is an instrumental version of "Teardrop" by Massive Attack. However, in most countries (including some European territories), licensing issues prevented the producer from using "Teardrop", so that, instead, a composition written specially for the show, vaguely reminiscent of Massive Attack's hit song, is used for television broadcasting.[27]

In this chapter, a brief overview of licensing and remuneration rules will be given, with subchapters devoted to general rules, the role of collecting societies, as well as the particularities to be found in the US and three European countries, namely Germany, France and the UK. Finally, the thorny issue of licensing for User-generated Content services will be briefly discussed.

1. General Rules

As described *supra*, there are different ways of including musical works in a film. These differences have an impact on the way music rights are acquired for film production.

In the case of music composed especially for a film, the film producer will negotiate a fee with the composer to obtain a synchronisation licence. Often called "Synch" licence, it gives the licensee the right to use a musical composition as part of the film soundtrack. Normally, it also includes a reproduction right (also called mechanical right).[28] The Synch licence further defines the modes of exploitation of the work (cinema theatres, TV, DVD, online, etc.), its geographical scope (a given country/region/continent versus worldwide) and its duration (a limited period of time versus the term of copyright protection). The licence must be obtained from the original copyright owner, that is, the composer of the musical work as well as the writer of the lyrics. Since most composers/lyricists have their work administered by a publishing company through a music publishing agreement, the right to grant Synch licences is usually vested in the publishing company.

If the producer wants to use an existing sound recording containing the musical work in question, he will have to obtain a Master Use licence on the sound recording. The Master Use licence provides the licensee with the right to incorporate a sound recording into the film soundtrack and defines, *inter alia*, the modes of exploitation of the sound recording, the geographical scope of the licence and its duration. The Master Use right belongs to the producer of the recording, who has previously obtained all rights in the recording from performing artists through a recording agreement. In cases where the performing artists have produced their own recordings themselves, they are the owners of the sound recording. The Master Use licence does not extend to the use of the sound recording as part of a commercial soundtrack record. Should the film producer be interested in releasing a soundtrack record, he will have to acquire a separate licence to do so.

"Synchronisation" and "Master Use" are industry standard denominations for two types of licences, although variations of these denominations can also be found (Master Recording licence, Music Recording licence). But what is really important is that the rights assigned are clearly defined in a concrete licence agreement so that the producer can exploit the film commercially without legal hindrances.[29]

2. The Role of Collecting Societies

Composers (and music publishers) are remunerated through the Synchronisation fee paid by the film producer, and record companies are remunerated through the Master Use fee. But in most cases composers (and performers) rely on performing royalties for making a living. These are payments due for radio and television broadcasting, cable retransmission and other uses of films including their works. They also receive remuneration for the reproduction of the film (mechanical rights). These rights are normally in the hands of collecting societies, which are in charge of giving licences and receiving remuneration for the different uses of the musical work included in the film. Contracts between the composer and the producer usually include a clause whereby the producer has to provide a list of all musical compositions (so-called "cue sheet") to the relevant collecting society with detailed information about the music used in the film.[30]

In the case of television programmes, collecting societies provide broadcasters with blanket licences to facilitate the use of their entire repertoire (for broadcasting purposes only). Given that broadcasters use an enormous amount of

music in their programmes, it would be highly complicated for both broadcasters and collecting societies to negotiate the use of each musical work separately.

Furthermore, in countries where a copyright exception for private copying exists (such as, for instance, France and Germany), an adequate remuneration for acts of private copying is established by legislation. Collecting societies manage this remuneration scheme on behalf of their members.

3. National Examples

3.1 United States

As discussed *supra*, the agreement between the composer of the original soundtrack (often called the underscore) and the film producer determines the legal status of the composer: if he is deemed to be an employee-for-hire, he shall not be considered the author of his work for copyright purposes. In such cases, the producer owns the copyright, while the composer will be remunerated through a composer's fee plus exploitation royalties.[31] All rights retained by the composer under a work made for hire contract have to be specified in writing and signed by all parties.[32] If the composer is hired as an independent contractor, then he will be considered as the author for copyright purposes.

The composer will be remunerated through the composing and services[33] fee contained in most composer contracts, together with the right to receive royalties for, *inter alia,* public performance, mechanical reproduction, print rights on the music score, foreign exploitation and synchronization.[34]

Most composer contracts include a clause requiring that the composer be a member of a performing rights society. In the US there are three collecting societies that deal with the public performance rights of musical works:[35]

- ASCAP (American Society of Composers, Authors and Publishers)[36]
- BMI (Broadcast Music, Inc.)[37]
- SESAC[38]

The composer contract normally includes the right to distribute the film for broadcasting purposes (including free-to-air, pay-per-view, pay TV, satellite, cable), the right to show the film in US cinemas, and the right to include the musical work in trailers, previews and advertisements for the film.[39] Performing rights societies provide "blanket" licences to radio and television broadcasters, cable operators and other users of their repertoire, *inter alia* universities, restaurants, bars and hotels. However, they are not allowed to license cinema theatres in the US.[40] Therefore the film producer has to clear the cinema performance right directly with the rightsholder. As regards the right to show a film in cinemas outside the United States, public performance fees are to be paid by local cinemas to the relevant collecting society.

Composers who are members of foreign collecting societies may choose on a per film basis between the different performing rights societies for licensing matters in the US. According to reciprocity agreements between collecting societies, a US composer will be treated outside the US in the same manner as a foreign composer (member of a relevant collecting society) is treated in the US.[41]

In the United States, commercial recordings are usually made as a work made for hire: the artists participating in the recording session are hired under an employment agreement whereby the recording company becomes the original holder of all rights in the sound recording. In cases where the recording is not a work made for hire, the performers either retain sole copyright ownership in the recording, or have joint ownership with the record producer.[42] Unlike in other countries (see *infra*), musicians do not receive performing royalties in the US. However, a national collective bargaining agreement signed between the American Federation of Musicians (AFM),[43] the major record companies and many independent record companies states, *inter alia*, that if a sound recording was made by an AFM signatory and the recording is re-used for another purpose (e.g. for inclusion in a film), additional fees (so-called union re-use fees) will have to be paid. In such cases, the film producer will pay musicians' fees through the AFM. Singers[44] will be remunerated through SAG (Screen Actors Guild)[45] or AFTRA (American Federation of Television and Radio Artists).[46] This can also be an issue when producing a soundtrack CD.[47]

3.2. Germany

GEMA (*Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte*),[48] the collecting society for authors and publishers of music in Germany, holds exclusive mechanical and public performance rights to musical works in its repertoire, so that exploitation rights for music, the composer of which is a member of the GEMA, have to be obtained from the collecting society itself and not from the original rightsholder or music publishing company. This covers exploitation of the musical works included

in a film, for instance for public performance in cinemas, broadcasting or DVD distribution. In other words, cinemas, broadcasters, video distributors or VoD-platforms have to clear the necessary exploitation rights in the music works from GEMA in order to exploit the film (besides the distribution agreement signed with the film producer). In the case of Synch rights for cinematographic works, the authors and publishers transfer the Synch right to GEMA as part of their membership agreements but this right can be withdrawn by them on an *ad hoc* basis so that they can negotiate an agreement directly with the film producer.[49] The Synch right cannot be withdrawn from GEMA in the case of broadcasters' own or commissioned productions. However, when third parties are involved in the production or when television productions are to be used by third parties, the author/publisher of the soundtrack has to give his/her authorisation. This is the case, for example, in audiovisual co-productions.[50]

Public performance and mechanical rights on the musical work are not part of the Synch licence and have to be obtained from GEMA.

GEMA provides blanket broadcasting licences (*Pauschalverträge*) for broadcasters' own or commissioned productions which include synchronization, public performance and mechanical rights.[51]

Film and television production companies often ask the film composer to sign a "publishing agreement" with them, with the aim to "cash back" a fraction (up to 40%) of the public performance royalties of the composer. This is considered to be a way of financing the music costs (so-called *Refinanzierungskonzept*).[52] Such contractual clauses are generally considered invalid because they are disproportionately disadvantageous for the composer.[53] A decision in this regard was made by the Court of Appeal (OLG) of Zweibrücken in a case concerning the public broadcaster ZDF.[54]

Since not all composers are GEMA members, some film productions actually use so-called "GEMA-free music". In such cases, producers do not have to ask GEMA for permission to use the music nor to pay any royalties to GEMA. However, according to the case law of the *Bundesgerichtshof* (German Federal Supreme Court), the producer has to prove that the music used in the film is actually GEMA-free. If the legal situation is not clear, it is presumed that the music belongs to the GEMA repertoire.[55]

The Master Use right for a cinematographic production is granted by the record company, while in the case of a television production it is granted by the GVL (*Gesellschaft zur Verwertung von Leistungsschutzrechten*),[56] the collecting society for performing artists and phonogram producers in Germany. Like GEMA, GVL has signed agreements with broadcasters for the provision of blanket licenses concerning mechanical and public performance rights.[57]

3.3. France

As discussed *supra*, the composer of the music specifically written for a film is considered as one of the co-authors of the film. However, as opposed to the other co-authors of the audiovisual work, the film producer do not benefit from the presumption of assignment of exploitation rights.[58] These rights are normally held by the *Société des auteurs, compositeurs et éditeurs de musique* (SACEM).[59] SACEM is the collecting society for authors and publishers of music in France.

The French *code de la propriété intellectuelle* (Intellectual Property Code) does not recognise the existence of a separate synchronisation right and such a right has never been established by case law. The Synch right is considered to be part of the reproduction right.

Authors of musical works (or their publishers) can negotiate individually the reproduction right for cinematographic works.[60] If the publishers do not have the right to give reproduction licences, these can be obtained from the *Bureau des autorisations vidéographiques et cinéma de la Sacem-Sdrm*.[61]

Performing rights payments for cinema exhibition and television broadcasting are usually made by the cinema exhibitors and broadcasting companies directly to the SACEM, which then distributes them between the rights-holders of the film soundtrack.[62]

Television broadcasters have signed a *contrat général de représentation collectif* (general collective representation contract) with three collecting societies representing authors of the audiovisual sector: SACD, SCAM and SACEM, which provides a blanket licence. These have joined forces in the *Société pour l'administration du Droit de Reproduction Mécanique des Auteurs, Compositeurs et Editeurs* (Society for the administration of the mechanical reproduction right of authors, composers and editors – SDRM),[63] which administers these general contracts with broadcasters and receives a blanket licence fee from each of them. This blanket license covers only broadcasting to French territory and not broadcasting to other countries or subsequent exploitation of the work in other formats or via other platforms. The blanket

licence fee is a percentage (normally 5%) of the broadcaster's revenues.[64] The SDRM then shares the licence fee between the three collecting societies (so-called *partage intersocial*).

In the case of the composer of the original soundtrack of a film, the sharing of exploitation rights is 1/3 to the lyricist, 1/3 to the composer and 1/3 to the music publisher. If there are no lyrics and the composer is his own publisher, then the whole fee belongs to him.[65] In some cases, the producer may want to become music publisher in order to reap 1/3 of the composer's exploitation rights. In such cases, he will also have all obligations pertaining to a music publisher.

In the case of pre-existing sound recordings, a Master Use licence can be obtained either through the recording company directly or through one of the collecting societies for producers of phonograms in France:

- SCPP (*Société Civile des Producteurs Phonographiques*);[66]
- SPPF (*Société des Producteurs de Phonogrammes en France*).[67]

For audiovisual works made to be shown on French television, the above-mentioned agreements between broadcasters and the SACEM-SDRM allow television producers to use any work from the SACEM repertoire without asking for a Synch licence. However, it may be advisable to ask authors and performers for authorisation in order to not infringe upon their moral rights.[68] In any event, the television producer has to obtain a Master Use licence from the record producer (or the relevant collecting society).

3.4. United Kingdom

Music copyrights are collectively managed by PRS for Music.[69] Formed as The MCPS-PRS Alliance in 1997 (the PRS for Music brand was adopted in 2009), PRS for Music brings together two collecting societies:

- Mechanical-Copyright Protection Society (MCPS)
- Performing Right Society (PRS)

Both societies collect and pay royalties to their members when their music is exploited in recordings, distributed to the public, performed or played in public, broadcast or made available online. PRS for Music administers (i) the general performing right; (ii) the broadcasting right; (iii) the right of cinematographic exhibition; (iv) the right of mechanical reproduction and diffusion; (v) the cinematographic production right; (vi) the exploitation rights resulting from technical developments or future change in the law.

There is also the Phonographic Performances Limited (PPL),[70] which manages the public performance and broadcasting rights of phonogram producers and performers. It also issues blanket licences for broadcasting.

PRS members assign in full their public performance rights to the PRS, which licenses broadcasters and cinemas for the public performance of works in their repertoire. It issues blanket licences for broadcasting of all music works registered with the PRS.

The mechanical rights are administered by the MCPS, which acts as an agent for composers and publishers and licences the right to copy the composition and issue copies to the public. However, many MCPS members reserve the right to negotiate Synch licences themselves. It also issues blanket licences for broadcasting of all music works registered with the MCPS. If the work is not registered with these societies, then the Synch right must be negotiated directly with the authors/publishers. In any event, the Master Use right must be negotiated with the owner of the sound recording.

The commissioning broadcaster has to indicate whether the music to be used in the production is covered by one of the existing blanket licences (issued by either PRS, MCPS, PPL). Otherwise the procedure for obtaining a licence is the usual one described *supra*.

4. Licensing Music for User-generated Content

New technologies allow the man in the street to become producer of his own content (e.g., videos, music, podcasts and blogs). Internet host providers put at their disposal simple and inexpensive ways of bringing this content to the public. In particular so-called User-generated Content (UGC) services such as Google Video,[71] YouTube,[72] DailyMotion,[73] MySpace[74] or Flickr[75] allow people to upload easily and share video clips, photos or music on dedicated platforms. These services derive income from advertisements posted on their websites.

UGC services simply provide the means of uploading content in order to make it available to the public. But "user-generated" does not necessarily mean that the content was actually created by the user. Because the uploaded content is not checked before it is published, users can upload practically whatever they like, no matter whether it is self-

created content or the work of somebody else and, in the latter case, irrespective of whether or not they hold the rights to the work.

Many of the works found on UGC services are copyrighted (e.g. extracts from films or television shows) and made available by users without the authorisation of the rightsholders. But a lot of them are actually created by users themselves. The problem is that, frequently, these videos also include commercial music. In such cases, the creators of these videos need to understand that the rules explained *supra* on the licensing of music also apply to works uploaded to a UGC service, no matter whether they are home videos or student films. Failing to obtain a Synch and Master Use licence may result in copyright infringement.[76]

Most people uploading to UGC platforms are not trained as lawyers and therefore may not be expected to know the intricacies of copyright law. The fact that there is no simple, inexpensive way of obtaining the required licences does not make things easier.[77] Yet, many of these users do not even care whether or not they are infringing copyrights.

However, videos posted on UGCs are short in length and poor in quality, so it could be argued that they cannot really damage rightsholders' economic interests. Rightsholders who choose not to act against these acts of infringement may benefit from this free publicity and even use UGC services as a platform for self-promotion. They can also derive some profit by licensing content to UGC services. Accordingly, in recent times, major content providers such as the BBC, Universal Music Group or Sony Music Group have signed licensing agreements with UGC sites. Collecting societies in Europe have also signed agreements in the same direction.

But the first signs of discontent have already surfaced: in March 2009, YouTube announced that it would block premium music videos in the UK, in other words, those that had been supplied or claimed by record labels, since their previous licence from PRS for Music expired, and they had been unable to come to an agreement to renew it on terms that were economically sustainable for YouTube.[78] According to PRS for Music, Google (YouTube's owner) took this step because they wished to pay significantly less for the PRS licence, despite a massive increase in YouTube viewing.[79] And industry sources indicate that this dispute could spread to other UGC sites such as MySpace.[80] In the background looms the fundamental question of whether or not free-to-view business models are economically sustainable, and how rightsholders should be remunerated for non-commercial uses of their works. As the old saying goes, "there ain't no such a thing as a free lunch"…

V. A Burning Issue

A poll among composers as to what the biggest danger to their profession is would likely result in an almost unanimous answer: "Internet piracy". Indeed, there is a vast number of works shared on p2p networks or uploaded to video portals daily without any regard for copyright. This is a major concern not only for creators but also to the content industry as a whole. This problem started as a conundrum for the recording industry but has spread to the audiovisual industry as well.

It has been argued that this is just the result of the content industry not being able to adapt to the online world. Some even go as far as to propose that musicians should make a living solely through live performances and use recordings as publicity for their concerts. Needless to say, this assertion is highly disputed by the industry. A political and macroeconomic analysis of the consequences of piracy goes beyond the scope of this article. Nevertheless, a few considerations about the situation of film composers will be briefly made.

Performing musicians are indeed remunerated when they go on tour. But composers are often not the best interpreters of their own works. And there is the very special case of film music, which is not made for live performance, its *raison d'être* being mainly the accompaniment of an audiovisual work. As explained *supra*, most film composers, and especially those working on European film productions, mostly rely on exploitation royalties to make a living. They are particularly affected by piracy since works shared illegally on the Internet do not result in any royalty being paid to them. Besides, arguably fewer cinema tickets or DVDs are sold because of piracy, and VoD services suffer from unfair competition from pirate downloads.

There are two basic options to fight against piracy: technology and litigation.

The first option raises a fundamental question: Can technology beat piracy? Or using a now famous sentence: "Is the answer to the machine in the machine"?

Technical measures exist that are commonly known under the name of Digital Rights Management Systems (DRMs). DRMs enable rightsholders to control access to and

use of their content. As with any other technological measure, DRMs can be circumvented. And whenever the content industry introduces a new technological protection measure, there is always someone who finds out how to crack it. In fact, so far DRMs have not stopped p2p piracy, and some experts believe that they will never do so.

But if DRMs are, as some argue, ineffective in preventing piracy, one may ask why they are still being used? Of course, the content industry is determined not to put content online without technological protection. And even if technological protection will never be 100% secure, it can be argued that this protection may be enough at least to "keep honest people honest". But there are further reasons for using DRMs: they enable price discrimination and a diversification of the offer for the (legal) consumer. DRMs are especially needed to provide VoD services.[81]

Filtering content is also an option. That is at least what the current trend seems to be. What is not clear yet is whether filtering actually works, especially in cases where the content or transmission is encrypted. But automatic filtering of content may also have unwanted negative effects, for example, blocking content that is actually legal because a copyright exception applies to that particular case. Moreover, it is not yet clear whether these filters will actually work, especially with older audiovisual content, or whether they can be circumvented by users (as has happened with many DRM solutions). Only time will tell.[82]

But it is obvious that relying only on technical protection measures is not going to solve the piracy issue. The next step is, therefore, taking those who engage in copyright infringement to court. However, it is complicated and possibly not particularly productive to chase individual infringers, since they amount to such an overwhelming mass of individuals. In the case of user-generated content, asking the service provider to remove content each time it is uploaded does not necessarily guarantee that the films will not turn up elsewhere.[83] Having a court decision may be a warning for other infringers, but it is not clear that this strategy is really working. Not to mention the unpopularity of such measures in PR terms.

A more global, preventive approach seems to be required. In this regard, France is currently on the verge of introducing a system of *riposte graduée* ("graduated response"), an "essentially pedagogical system which aims at substituting criminal prosecution currently faced by Internet users which infringe on copyrights".[84] The idea is to entrust an administrative authority, the *Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet* (High Authority for the Distribution of Works and the Protection of Rights on the Internet – Hadopi) with the task of preventing and sanctioning piracy. Rightsholders whose rights have been infringed could refer the matter to the Hadopi. The authority would start by sending personalised warning messages to those committing piracy. The Hadopi would sanction those who failed to stop their illegal activities or those of the users for which they were responsible. The authority may then propose a transaction or suspend the Internet subscription for a fixed period of time.

This draft piece of legislation has already been attacked by consumer protection groups. They state that it infringes basic rights of consumers, like freedom of information, right to privacy and personal data protection. It is also argued that the act will be ineffective and become obsolete the very day it is enacted. The government argues that, according to polls, society in general understands and backs these measures. Recent developments in the UK, Italy and Ireland suggest that, at least at government and judiciary levels, the graduated response system has support beyond the French borders.[85]

VI. Coda

Film music, as any other art form these days, is going through an exciting and revolutionary phase in which technological developments are changing the way music is produced and consumed. Rightsholders of music used in film and television (and most particularly film composers) face a contradiction: thanks to the diverse modes of exploitation currently available (cinema, TV, mobile devices, DVD, VoD), sources of remuneration have multiplied. However, as a nasty side effect of this technological revolution, piracy is changing the economic balance of the whole industry and sapping those very sources of remuneration. In this ambiguous situation, rightsholders require more than ever a knowledge of what their rights are in order to negotiate with film producers agreements which do not turn to be disadvantageous for them in the end. They also need ways of ensuring that the global piracy phenomenon does not dry up their already scarce sources of remuneration.

The outcome of this revolution is yet to be seen, but one thing is clear: as long there are films, there will be film music. Paraphrasing a song made popular by Michael Curtiz's *Casablanca*, "the fundamental things apply, as time goes by!"

Film music is a hundred years old. Many happy returns!

1) *Das große Gesamtkunstwerk, das alle Gattungen der Kunst zu umfassen hat, um jede einzelne dieser Gattungen als Mittel gewissermaßen zu verbrauchen, zu vernichten zu Gunsten der Erreichung des Gesamtzweckes aller, nämlich der unbedingten, unmittelbaren Darstellung der vollendeten menschlichen Natur.* Richard Wagner, *Das Kunstwerk der Zukunft*, 1849, Kap. 5.
2) Erich Wolfgang Korngold, once a *Wunderkind* in his early Viennese years (often compared to Mozart, he wrote his opera *Die tote Stadt* at age 23) represents the perfect example of the influence of Wagner, Strauss and Puccini translated onto the silver screen. Korngold himself implicitly acknowledged this by saying that Puccini's opera *Tosca* was "the best film score ever written". See Albrecht Dümling, *Zwischen Außenseiterstatus und Integration - Musiker-Exil an der amerikanischen Westküste*, in Hanns-Werner Heister/Claudia Maurer Zenck/Peter Petersen (ed.), *Musik im Exil - Folgen des Nazismus für die internationale Musikkultur*.
3) For a detailed account of the development of film music see Mervyn Cooke, *A History of Film Music*.
4) Saint-Saëns' music for *L'Assassinat du duc de Guise* (1908) is considered to be the first original music score composed especially for a film.
5) Production music (sometimes called Library music) is the name given to the music owned by production music libraries and licensed to customers for use in film, television, radio and other media. See: http://en.wikipedia.org/wiki/Production_music
6) Alan Silvestri, quoted in Richard Davis, *Complete Guide to Film Scoring – the Art and Business of Writing Music for Movies and TV*, p. 91-92.
7) A temp(orary) track is a soundtrack normally created by the music editor out of pre-existing music for illustration purposes during the post-production process. The composer is often required to create a soundtrack that resembles the mood or style of the temp track. As an example, the temp track for *Star Wars* was Gustav Holst's orchestral suite *The Planets*. See Richard Davis, *op.cit.*, p. 96-99.
8) 17 U.S.C. sec 101. See http://www.copyright.gov/title17/92chap1.html#101
9) Daniel O'Brien, *How do I get the rights to use a song/music in my film?*, available at: http://www.filmmaking.net/FAQ/answers/faq96.asp
10) Axel Nordemann, *Die Werkarten*, in Ulrich Loewenheim (ed.), *Handbuch des Urheberrechts*, p. 135.
11) Pascal Kamina, *Film Copyright in the European Union*, p. 94.
12) *Code de la propriété intellectuelle* (French Intellectual Property Code), available at : http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006069414&dateTexte=20090410
13) This Article also includes the author of a pre-existing work as a co-author of the audiovisual work, if the latter is an adaptation of the pre-existing work.
14) Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0116:EN:NOT
15) Proposal for a European Parliament and Council Directive amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0464:EN:NOT . The Commission also proposes a uniform way of calculating the term of protection of a musical composition which contains the contributions of several authors. The proposal provides for the term of protection of a musical composition to expire 70 years after the death of the last surviving author, be this an author of the lyrics or a composer of the music.
16) Press release of the European Commission, *Intellectual Property: Commission adopts forward-looking package*, IP/08/1156, 16 July 2008, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1156&format=HTML&aged=0&language=EN&guiLanguage=fr
17) See Joint Press Release by European Academics (11 March 2009), *The Proposed Directive for a Copyright Term Extension*, available at: http://www.cippm.org.uk/downloads/Press%20Release%20Copyright%20Extension.pdf
18) Johannes Kreile, *Der Richtlinienvorschlag der EU-Kommission zur Schutzfristverlängerung für ausübende Künstler und Tonträgerhersteller aus Sicht der Filmhersteller*, Zeitschrift für Urheber- und Medienrecht, 2/2009.
19) Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 (with amendments), available at: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html
20) http://www.imdb.com/title/tt0428803/fullcredits
21) http://emiliesimon.artistes.universalmusic.fr/
22) Cinezik, *interview avec Alex Wurman*, available at: http://www.cinezik.org/compositeurs/index.php?compo=wurman-ent
23) OLG Hamburg „Otto – die Serie". This case is discussed as part of an interesting collection of case law in Butz Peters, *Fernseh- und Filmproduktion – Rechtshandbuch*, p. 498-510.
24) OLMünchen „Cristoforo Colombo". See Butz Peters, *op.cit*, p. 509-510.
25) Paul Fisher, *Interview: Woody Allen for "Melinda & Melinda"*, available at: http://www.darkhorizons.com/interviews/736/woody-allen-for-melinda-melinda-
26) http://www.fox.com/house/
27) See http://en.wikipedia.org/wiki/House_(TV_series)
28) The mechanical rights for video distribution are sometimes negotiated separately as a Videogram license, see Vlad Kushnir, *Legal and Practical Aspects of Music Licensing for Motion Pictures*, Vanderbilt J. of Entertainment and Tech. Law [Vol. 8:1:71 2005], available at: http://law.vanderbilt.edu/publications/journal-entertainment-technology-law/archive/download.aspx?id=1749
29) The importance of precisely defining the terms of a licence is analysed more in detail by Ventroni as regards Video on Demand rights, see Stefan Ventroni, *Copyright Clearance and the Role of Copyright Societies*, in IRIS *Special*, *Legal Aspects of Video on Demand*, European Audiovisual Observatory, 2007.
30) See Shawn LeMone and Mike Todd, *Everything You Need To Know About Cue Sheets*, available at: http://www.ascap.com/playback/2005/winter/features/cuesheets.aspx . See also Christian Czychowski, *Musikverlagsverträge*, in Ulrich Loewenheim (ed.), *Handbuch des Urheberrechts*, p. 1216.
31) Daniel O'Brien, *How do I get the rights to use a song/music in my film?*, available at: http://www.filmmaking.net/FAQ/answers/faq96.asp
32) Jeffrey Brabec and Todd Brabec, *Music, Money, Success & the Movies*, available at: http://www.ascap.com/filmtv/movies-part1.html
33) Services may include arranging and orchestrating the score; conducting an orchestra to record the work; producing, supervising, and editing the recording of the score; and delivering the final, fully edited and mixed master recording in accordance with the film's postproduction schedule. The extent of the services provided by the composer and the amount paid for the services will be negotiated in the contract with the producer.
34) The composer will negotiate further royalties if he is also the producer of the soundtrack album or the conductor/performer on the album.

35) The US terminology for collecting societies dealing with licensing of public performances for composers and songwriters is "performing rights societies".
36) http://www.ascap.com/
37) http://www.bmi.com/
38) http://www.sesac.com/ . Concerning SESAC's name: "For history's sake, we can tell you the name originally stood for Society of European Stage Authors & Composers, a fitting moniker back in 1930 when the company was founded to serve European composers not adequately represented in the United States. Today, however, the company is known simply as SESAC".
39) Jeffrey Brabec and Todd Brabec, *op.cit.*
40) See Alden-Rochelle, Inc. v. ASCAP 80 F.Supp. 888, 898 (S.D.N.Y. 1948).
41) Jeffrey Brabec & Todd Brabec, *op.cit.*
42) Vlad Kushnir, *op.cit.*
43) http://www.afm.org/
44) Signature Sound, *11 Most Frequently Asked Questions about Music Licensing*, available at: http://www.signature-sound.com/11quest.html
45) http://www.sag.org/
46) http://www.aftra.com/
47) Film Score Monthly, *Why Some Soundtracks Aren't on CD*, available at: http://www.filmscoremonthly.com/handbook/6.asp
48) http://www.gema.de/
49) Art. 1 i) (1) of the *GEMA Berechtigungsvertrag* (GEMA Membership Agreement), available at: http://www.gema.de/fileadmin/inhaltsdateien/urheber/formulare/gema_berechtigungsvertrag.pdf
50) Art. 1 i) (3) *GEMA Berechtigungsvertrag*.
51) Oliver Castendyk, *Sendeverträge*, in Ulrich Loewenheim (ed.), *op.cit*, p. 1597.
52) Philipp Kümpel, *Filmmusik in der Praxis: Komponieren – Produzieren – Verkaufen*, p. 258-259.
53) Christian Czychowski, *op.cit.*, p. 1215.
54) Decision of the Oberlandesgericht Zweibrücken of 7 December 2000 (4 U 12/00). See Butz Peters, *op.cit*, p. 498-510.
55) This is called *GEMA-Vermutung* (GEMA-presumption). See http://www.gema.de/musiknutzer/musiknutzer-information/
56) http://www.gvl.de/
57) Oliver Castendyk, *op.cit.*, p. 1601-1602.
58) Art. L.132-24 of the French Intellectual Property Code. For a detailed description of the presumption of assignment of rights to the film producer in French law see Pascal Kamina, *France*, in IRIS *Special*, *Creativity Comes at a Price – the Role of Collecting Societies*, European Audiovisual Observatory, 2009.
59) http://www.sacem.fr/ . Despite being considered as co-authors of the audiovisual work, composers are represented only by the SACEM, and do not belong to the *Société des auteurs et compositeurs dramatiques* (society of dramatic authors and composers – SACD), whose members are authors of stage and audiovisual works. See Pascal Kamina, *op.cit.*
60) Art. 2 of the SACEM Statutes, available at: http://merlin.obs.coe.int/redirect.php?id=11677
61) See http://merlin.obs.coe.int/redirect.php?id=11678
62) For the calculation of the payments for cinema exhibition, see http://merlin.obs.coe.int/redirect.php?id=11679
63) http://www.sdrm.fr/
64) Benjamin Montels, *Contrats de l'audiovisuel*, p. 123-124.
65) Art. 57-61 of the SACEM *Règlement général* (General Regulations), available at: http://merlin.obs.coe.int/redirect.php?id=11677
66) http://www.scpp.fr/
67) http://www.sppf.com/
68) Benjamin Montels, *op.cit.*, p. 136.
69) http://www.prsformusic.com/
70) http://www.ppluk.com/
71) http://video.google.com/
72) http://www.youtube.com/
73) http://www.dailymotion.com/
74) http://www.myspace.com/
75) http://www.flickr.com/
76) In the US, an ongoing legal dispute (Lenz v. Universal) may provide an answer to the question whether the fair use doctrine applies to non-commercial use of music on videos posted on UGC services. See http://www.eff.org/cases/lenz-v-universal
77) An interesting account of the legal hurdles faced by users of UGC services when actually trying to obtain licences can be found in Mirko Vianello, *Lizenzierung von Musik in nutzergenerierten Videos – Der steinige Weg zur Verwendung im Internet*, MMR (Multimedia und Recht), 2/2009.
78) YouTube Blog, *YouTube, the UK and the Performing Rights Society for Music*, available at: http://www.youtube.com/blog?entry=oT85lN5Dkmo
79) PRS for Music Statement in relation to Google/YouTube announcement, available at: http://www.prsformusic.com/about_us/press/latestpressreleases/Pages/PRSforMusicStatementGoogleYouTube.aspx
80) Jemima Kiss, *YouTube rights row over music videos could spread to MySpace*, available at: http://www.guardian.co.uk/technology/2009/mar/10/youtube-performing-rights-society-music
81) There are a couple of interesting legal questions concerning competition law and consumer protection in this regard. See Francisco Javier Cabrera Blázquez, *Digital Rights Management Systems (DRMs): Recent Developments in Europe*, IRIS *plus* 2007-1, available at: http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus1_2007.pdf.en
82) See Christina Angelopoulos, *Filtering the Internet for Copyrighted Content in Europe*, IRIS plus 2009-4, available at: http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus4_2009.pdf.en
83) The solution chosen by some big media companies such as TF1 in France or Viacom in the United States has been to sue UGC sites, arguing that they are actually publishing the content uploaded by users and are therefore liable for copyright infringement. For further information on this topic see Francisco Javier Cabrera Blázquez, *User-Generated Content Services and Copyright*, IRIS *plus* 2008-5, available at: http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus5_2008.pdf.en
84) *Projet de loi favorisant la diffusion et la protection de la création sur internet* (Draft act on the promotion of the Distribution of Works and the Protection of Rights on the Internet), available at : http://www.culture.gouv.fr/culture/actualites/dossiers/internet-creation08/6%20-%20Projet%20de%20loi.pdf
85) However, the graduated response system is at odds with certain proposals made during the debate at EU level on the revision of the Telecoms Package and therefore depends on its final outcome. See Christina Angelopoulos, *op.cit.*