

THE USE OF MUSIC IN THE AUDIOVISUAL WORKS

This article provides an overview of the use of musical works in film and audiovisual work.

The music in a broader sense (musical piece, the musical composition, recordings and performances) is the result of creative activity of different individuals. Among the many individuals and organizations that operate within the music industry are the composer who composes the music, the musicians who perform the music and/or create the text and the companies and professionals who create and record the music (e.g. music publishers, producers, studios, engineers, record labels, retail and online music stores, performance rights organizations). Thus, the musical composition or music in a broader sense consists of the works of several different individuals or organizations.

Musical work consists of the following elements, which may not always occur together (i.e. there are musical works, with no text, etc.):

- composition, which is created by a composer;
- lyrics or text, written by the author, who may or may not be the composer;
- musician, who performs the piece of music in an instrument(s);
- the performer (singer or vocalist), who performs music known as songs that can be sung either with or without accompaniment by musical instruments;
- producer of a phonogram (producer, publisher, etc.) is a person who has recorded the music.

This memo uses the term "musical work" or a "piece of music" in a broader sense, or considers such a complete musical work, which is written by the composer, with or without lyrics, which is performed by a singer and recorded by a phonogram producer.

According to the Copyright Act (the CA), the musical work consists of the following rights that are can be used and exploited as single rights:

1 Copyright: a piece of music exists in the form of a composition in musical notation or as a single acoustic event. The copyright in and to the composition belongs to the composer as the author of a composition - it is a work of music in the narrower sense – the author of lyrics shall enjoy copyright in the lyrics:

1.1 According to CA, the moral and economic rights of an author shall initially belong to the author of a work. Copyright in a work arises upon the creation of the work by the author of the work. Moral rights and economic rights constitute the content of copyright. The moral rights are inseparable from the author and are not transferable. The economic rights are transferable as single rights or rights for a charge or free of charge.

1.1.1 The moral rights of an author are: right of authorship, right of author's name, right of integrity of the work, right of additions to the work, right of protection of author's honour and reputation, right of disclosure of the work, right of supplementation of the work, right to withdraw the work.

1.1.2 The economic rights of an author are: right of reproduction of the work, distribution right, right of translation of the work, right of alteration of the work, right of collections of works, right of public performance, right of exhibition of the work, right of communication of the work, right of making the work available to the public.

2 The term of protection of copyright shall be the life of the author and seventy years after his or her death, irrespective of the date when the work is lawfully made available to the public.

3 Related rights (or **neighbouring rights, droits voisins**):

3.1 In addition to copyright, the CA defines a separate "related right" concept, which can be called just

the rights that are separate from copyright, but these rights usually derive from copyright and these rights are somehow related to copyright. Copyright Act provides for performers, producers of phonograms, broadcasting organisations, producers of the first fixation of a film, a persons who, after the expiry of copyright protection, for the first time lawfully publishes or lawfully directs at the public a previously unpublished work, and for persons who publishes a critical or scientific publication of a work not protected by copyright, the related rights in the results created by him or her (object of related rights). It should be emphasized that these are separate rights from copyright and the exercise of related rights does not limit the exercise of copyright by the author or his or her legal successor.

3.2 By performing a piece of music by musician or by singing a song by singer, the musician or singer are not authors but they enjoy the right of performers. According to CA, the performer means an actor, singer, musician, dancer or another person or groups of persons who acts, sings, declaims, plays on an instrument or in any other manner performs literary or artistic works or works of folklore or supervises other persons upon the performance of works, or a person who performs in variety shows, circuses, puppet theatres, etc.

3.2.1 Performers shall enjoy moral and economic rights in the performance (interpretation) of works.

3.2.2 Moral rights: right of authorship of the performance, right to a stage name, right of inviolability of the performance, right of protection of the performer's honour and reputation with respect to the performer's performance.

3.2.3 Economic rights of performers: A performer has the exclusive right to use and to authorise or prohibit the use of the performance of a work and to obtain, for such use, remuneration agreed upon by the parties and an agreement between the parties.

4 Upon a recording of a performance of a piece of music by a producer (or publisher) of a phonogram (sound recording) the producer shall enjoy the rights of producers of phonograms.

4.1 The producer of a phonogram (sound recording) is an individual or organization on whose initiative or responsibility a first legal recoding of the sound arising from the performance or other sound occurs.

4.1.1 the rights of producer of aphonogram: has the exclusive right to authorise or prohibit:

- the direct or indirect, temporary or permanent, partial or total reproduction of the phonograms in any form or by any means;
- the importation of copies of phonograms;
- the distribution of phonograms to the public;
- the rental or lending of copies of phonograms;
- making the phonograms available to the public in such a way that persons may access the phonograms from a place and at a time individually chosen by them.

4.2 The related rights shall not expire before the end of a period of fifty years:

- for the performer, as of the first performance of a work. If a recording of the performance is lawfully published or lawfully communicated to the public within this period, the rights of the performer shall expire in fifty years as of the date of such publication or communication to the public, whichever is the earliest;
- for the producer of phonograms, as of the first fixation of a phonogram. If a recording of the phonogram is lawfully published within this period, the rights of the producer of phonograms shall expire in fifty years as of the date of the first lawful publication. If, during the term specified in the first sentence, no lawful publication has occurred and the phonogram has been lawfully communicated to the public, the specified rights shall expire in fifty years as of the date of the first lawful communication to the public;

Therefore, the musical work or a piece of music in a broader sense is protected by law by different types of rights. If the musical work or part of it to be used in the film, it is necessary to obtain the licenses and authorizations from all right holders mentioned above, i.e. composer, author of lyrics, if

any, performers and producer of phonogram. For the synchronization of a picture and music (the synchronization right), the consent should be procured from all right holders.

Generally it is common practice around the world that the music rights are collectively managed, which means that the musicians are represented by societies in licensing and collecting fees for exploitation of their works by others. In Estonia the rights of composers are collectively managed by Eesti Autorite Ühing (Estonian Authors Society - www.eau.org EAÜ). EAÜ is created in order to simplify the licensing process between musicians and users. In addition, EAÜ represents foreign authors in Estonia. Thus, EAU is entitled to license the use of works of foreign authors. Performers and the producers of phonogram are represented by collecting societies as well (www.eel.ee and www.efy.ee), but it must be emphasized that many of the performers and producers of phonogram are not represented by the collecting organizations, rather than the licenses are granted directly by producers.

If you wish to use existing music in film, it is first necessary to determine whether the copyright in the music is still valid, or whether there has been 70 years since the death of the author or 50 years in case of sound recordings and phonograms. In cases where the copyright has expired, it is considered a public domain and the piece of music can be used for free, i.e. no license or any other permission is further needed.

If the music is protected by copyright or related rights, the users should:

1. contact EAÜ and explain in which film what music will be used. It is essential to know the name of the piece of music, its authors, performers and producer of phonogram;
2. to identify the performer of the music and the producer of phonogram and who owns their rights. After that it is necessary to submit an application for use of music in the film, specifying all important aspects of usage;
3. In case if you have a license from author of the work, but it is not possible to obtain the license from producer of phonogram or rightholder of a performer's rights, it is can be considered to ask other performer to perform the piece of music and record the music itself;
4. Under no circumstances the music should not be adapted, modified or in other ways changed without having the permission from right owners.

It should also be noted that there are many works that are public domain itself, but the performance and recordings are not. Obvious examples are the the symphonies that are created prior to 20th century by authors who already been dead for over 100 years, but the rights of performers (orchestras) and the rights of producers of phonogram (recordings) are fully valid.