

BRIEF

prepared by the

Société des auteurs de radio, télévision et cinéma



for the

Standing Committee on Industry, Science and Technology in connection with the

FIVE-YEAR REVIEW OF THE COPYRIGHT ACT

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SARTEC defends the interests of French-speaking audiovisual authors in Canada. Recognized under both provincial legislation (1989) and federal legislation (1996) on the status of artists, it lobbies government bodies, negotiates collective agreements, advises authors, promotes respect for their work, and provides them with various services. It represents more than 1,450 authors who conceive and write our films and television programs.

On the occasion of the five-year review of the *Copyright Act* (the Act),¹ SARTEC would like to make five main recommendations.

1. Eliminate the unfair exceptions that are hurting authors

The number of exceptions to copyright has increased steadily from 6 before 1988 to about 40, taking up 64 (or 40%) of the Act's 162 pages. More than a third of the exceptions apply to audiovisual works. Over the last few decades, the government has bowed to pressure groups asking for exemption from the Act.

It is worth reviewing the validity and effects of those exceptions in light of the Act's fundamental goal, which is to provide authors with the rights and remedies to ensure that they receive decent compensation for the use of their works.

We note that the exceptions² are not "user rights"³ and that their proliferation, generally without compensation, places Canada in violation of its obligations under international agreements. Consequently, an in-depth examination of the consequences that the exceptions have for the normal exploitation of works and the rights-holders' legitimate interests is needed.

2. Expand the private copying regime to include audiovisual works

The private copying regime applies only to sound recordings of musical works,⁴ while the evolution of digital reproduction technologies promotes the unauthorized reproduction of audiovisual works.

¹ Ss. 29.23, 29.5 (c), 29.6, 29.7 (1), 29.7 (3), 30.5 (d), 31 and 32.1 (d) of the Act.

² All of the exceptions in the Act can be found under the "Exceptions" heading. The Act contains no reference, either explicit or implicit, to the idea that those exceptions may constitute "rights," as the Act has no provisions setting out the nationality or other criteria that would be required to benefit from such rights, no provisions covering the transfer of such rights and no remedies for the violation of such rights, including time limits for the exercise of such remedies.

³ In addition, it absolutely must ensure, as required by every international copyright agreement to which Canada is a party, that the limitations and exceptions included in the Act are strictly confined to "certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder,"³ also referred to as the "three-step test."

⁴ Part VIII of the Act.

Like most countries (more than 80%) that have this regime,⁵ Canada should expand it to include reproductions of audiovisual works, regardless of medium, including equipment, and regardless of the purposes for which the copy is made: listening to it or viewing it later,⁶ or reproducing it on another medium.⁷

Canada should also abolish the new private copying regime specified in section 29.22 (“Reproduction for private purposes”) or, failing that, apply fair royalties to it in order to fulfil its international commitments.⁸

3. Maintain first ownership of a cinematographic work

As in the case of any category of work, the Act does not specify the identity of the first owner of the copyright on a cinematographic work, but it does stipulate that, without exception, that owner is the work’s “author.”⁹ These two fundamental principles of the Act have never been questioned.

In Canadian case law, the “screenwriter” and the “director” are identified as co-authors of the cinematographic work,¹⁰ a conclusion that is perfectly consistent with the treaties to which Canada is a party, including the Berne Convention. That acknowledgement is the fruit of multiple studies by committees of experts¹¹ for the purposes of the Stockholm revision of the Berne Convention in 1967, which produced Article 14*bis*.

⁵ WIPO - International Survey on Private Copying – Law and Practice 2016 (<http://www.wipo.int/publications/en/details.jsp?id=4183>).

⁶ S. 29.23 (“Reproduction for later listening or viewing”).

⁷ S. 29.22 (“Reproduction for private purposes”).

⁸ According to a recent international study, the most effective way of guaranteeing audiovisual authors fair compensation is to include the right to compensation in legislation. Of the EU’s 28 member states, 19 have introduced compensation systems for audiovisual authors, mainly for cable retransmission (mandatory collective rights management under Directive 93/83/EEC) and private copying: (<http://fr.cisac.org/Actus-Media/Communiqués-de-presse/Les-organisations-audiovisuelles-devoilent-une-nouvelle-etude-juridique-internationale-appelant-a-une-remuneration-equitable-pour-les-auteurs-audiovisuels>).

⁹ The only exception remaining in the Act (other than the case of works prepared or published by or under the direction or control of the Crown) is that of a work, of any category, created by the author under a contract of employment, in which case the employer shall, in the absence of any agreement to the contrary with the employed author, be the first owner of the copyright on the work created by that employed author in the course of his or her employment, though that author remains the author of that work.

¹⁰ *Jean-Claude Chéade Inc. v. Films Rachel Inc. (syndic)*, [1995] AQ No. 1550 (QSC); see also *Lachance v. Productions Marie Eykel inc.*, 2012 QCCS 1012 (CanLII) and 2014 QCCA 158 (CanLII).

¹¹ Including E. Ulmer, Consultation sur la cinématographie et le droit d’auteur, [1953] D.A. 97; G. Lyon-Caen, Le cinéma dans la Convention de Berne, [1959] D.A. 217, G. Lyon-Caen, Nouvelles observations au sujet de la protection internationale des œuvres cinématographiques, [1962] D.A. 153; The Protection of Cinematographic Works, [1961] D.A. 19, 62, 86; Rapport du Groupe d’étude pour la protection internationale des œuvres cinématographiques, [1962] D.A. 38.

Our collective agreements depend on this rule of law. This does not stop producers from using works based on scripts written by SARTEC members who agree to that use, under fair and equitable conditions, which their status as authors allows them to negotiate, collectively and individually. That is the primary reason for copyright worldwide.

In fact, the situation in Canada is the rule and not the exception; screenwriters and directors are recognized as authors in the laws of many countries.

However, some people are trying to challenge that rule of law and make radical changes that will result in the producer of the cinematographic work being designated as the first owner of the copyright or even the work's author!

Those demands are aimed at changing the rule of law, not reaffirming it.¹²

SARTEC therefore strongly opposes any attempt to corrupt the Act by assigning first ownership of an audiovisual work to anyone but its authors. It asks only that the rule of law be confirmed, and in that case, it supports the proposal made by the Association des réalisateurs et réalisatrices du Québec (ARRQ),¹³ which is also consistent with those made by the Directors Guild of Canada (DGC), the

¹² Those who are attempting to establish the concept that the producer of a cinematographic work is the first owner of the copyright on that work or even its author often refer to U.S. copyright law, which may indeed grant that status to the producer of an audiovisual work through two provisions concerning "works made for hire."¹² However, those people conveniently neglected to mention the following:

- The rule in the United States is that the copyright on a work belongs to the author of that work;
- The rule in the United States is also that those who make a creative contribution to a work are its authors, which, in the case of cinematographic works, includes the screenwriter and the director, but not the producer (except where the producer contributes to the work's creation as an author, in which case he will be a copyright owner, but only as an author);
- Hence, it is only through an exception that creates a legal fiction, and only if all the requirements of that exception are met, that the producer of a cinematographic work will be "deemed," by virtue of that exception, to be not only an owner of copyright subject to that exception but also the author of the cinematographic work;
- The effect of this legal presumption is to transfer authorship and first ownership from those recognized in U.S. law as the real authors of the cinematographic work to the producer, who has been made the presumptive author by a legal fiction, an operation a *sine qua non* of which is that the law must first admit that, if not for the application of that exception, those who made a creative contribution to the cinematographic work – the screenwriter and the director – are its real authors and therefore the owners of the copyright associated with their authorship and subsequently transfer that status to the producer if the conditions to which the exception is subject are met;
- It follows that if the conditions of the exception are not met, the rule still applies and the situation is exactly the same as in Canada, which is that those who made a creative contribution to the cinematographic work – the screenwriter and the director – are its real authors and therefore the copyright owners.

¹³ To that end, SARTEC supports the proposed amendments in the appendix to the ARRQ's brief.

Société des auteurs et compositeurs dramatiques (SACD) / Société civile des auteurs multimédia (SCAM), and the Writers Guild of Canada (WGC).

4. Term of copyright protection

SARTEC is satisfied with Canada's commitment in the new United States-Mexico-Canada Agreement (USMCA) to extend the term of copyright protection in the Act to 70 years after the author's death, which is the standard in most countries.

5. Improve compliance with audiovisual intellectual property rights

The copyright compliance situation in Canada, particularly on the Internet, is extremely worrisome. To demonstrate the sincerity of its commitments to promote Canadian culture, the government should take measures, based on current best practices, that will help rights-holders combat mass copyright infringement.¹⁴

SARTEC requests first and foremost that a *notice and takedown* regime be instituted so that Internet service providers (ISPs) can be compelled to take down any content whose use has not been authorized. In addition, the provisions restricting the liability of ISPs¹⁵ should be revised, as they are having the pernicious effect of removing any incentive for ISPs to solve the problems made possible by their services.¹⁶

ISPs are in the best position to prevent mass piracy, and they should not be allowed to avail themselves of diminished liability when they know their services are being used for illicit purposes. Lastly, the authorities should be able to force them to block access to any site that permits piracy and to remove such sites from their search engine results.

¹⁴ In particular, see Article 8, section 3, of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, which reads, "Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right." and section 97A of the *Copyright, Designs and Patents Act 1988*, which reads, "The High Court [...] shall have power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright."

¹⁵ In particular, see subsections 31.1 (1) to (3) and (6) ("Network services"), along with sections 2.4 (1)(b), 31.1 (4) to (6) ("Hosting") and section 41.27 ("location tools"), and to top it all off, subsection 41.25 (3), which protects all ISPs.

¹⁶ See note 15.