Brief presented to the Standing Committee on Canadian Heritage on

Remuneration Models for Artists and Creative Industries (*Copyright Act*)

AUTHORSHIP OF A CINEMATOGRAPHIC WORK

Recognizing the director and screenwriter as co-authors and first copyright owners of an audiovisual work

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I Introduction

The Directors Guild of Canada (DGC) is a national labour organization that represents key creative and logistical professionals in the film, television and digital media industries. It was created in 1962 as an association of Canada's film and television directors. Today, it has approximately 5,000 members drawn from 47 different craft and occupational categories, covering all areas of direction, design, production and editing.

Thank you for the opportunity to participate in hearings convened by the Standing Committee on Canadian Heritage on Remuneration Models for Artists and Creative Industries. The Canadian film and television industry is undergoing significant changes as it transitions to digital platforms. In this context, the writers and directors of audiovisual works are a foundational element of the screen-based industry value chain, however the DGC is increasingly concerned that these authors are not being fairly remunerated for the value of the productions they create.

We understand the Committee's mandate is to examine remuneration models and the opportunity for new access points for artists and creative industries in the context of the *Copyright Act* (the Act). The Directors Guild of Canada proposes that in order to ensure fair and equitable remuneration for all exploitation modes and distribution platforms, the Act should be amended to explicitly place Canadian creators at the centre of the ecosystem, by affirming that writers and directors are co-authors and first copyright owners of audiovisual content.

For more than ten years, writers and directors' guilds have been advocating for the recognition of the screenwriter and director as co-authors in the Act. We urge the Committee to view these consultations as an opportunity to reinforce the current copyright protection for writers and directors with a clarification that can be seen as a natural extension of the Act. This modification will not affect other creators or producers of audiovisual works. Moreover, this status for the screenwriter and director is consistent with current interpretations of the Act by Canadian and Quebec jurisprudence.

II Authorship of a cinematographic work: the screenwriter and the director are the first (co)-authors and owners of the copyright

The term "author" is not defined in the Copyright Act. For most works in which copyright subsists under the Act, the author is self-evident. For example, the writer of a novel, the sculptor of a sculpture, the painter of a painting and the composer of a musical composition is, in each case, clearly the "author" of the respective copyrighted work. In the case of a collaborative work such as a "cinematographic work", however, it is less clear who created or "authored" the work.

The text only says "*the author of a work shall be the first owner of the copyright therein*"[1]. Although the screenwriter and director are together responsible for giving a cinematographic

[1] The Act, s.13(1) ("Subject to this Act, the author of a work shall be the first owner of the copyright therein").

work "its original dramatic character[2]" and are thereby the first co-authors, the current version of the Act contains ambiguity with respect to who is the first owner of the copyright.

This issue is important because under the Act the term of copyright protection for a "cinematographic work" in which "the arrangement or acting form or the combination of incidents represented give the work an original dramatic character"[3] is directly tied to the life of its author. As well, the "author" of a cinematographic work is entitled to moral rights protection[4] under the Act and, with some exceptions, the general rule under the Act is that the "author" of a work is the first owner of the copyright therein.[5] Moreover, clarifying the positions as authors offers the potential for further policy tools to support creators, such as equitable remuneration for authors as is available in other jurisdictions, such as Europe, if and when that policy option needs to be considered.

a) An author is an individual

The definition of a cinematographic work within the Act and common film industry practice confirms that the author of a cinematographic work must be an individual and not a corporation or another entity. As demonstrated below, the Act does not expressly require the author of a work to be an individual but this requirement is stressed implicitly throughout the Act.

Moreover, the term of the Copyright (as described in section 6 of the Act) in itself constitutes evidence that the author is an individual: the term of the copyright for all cinematographic works "having an original dramatic character" is set as the life of the author plus fifty years[6]. This was recently confirmed by the ratification of the new Canada-United States-Mexico Agreement (CUSMA) which extended the protection to seventy years after the life of the author. As a result, it is clear that the Act requires the author of a cinematographic work to be a physical person credited with authorship and natural ownership or moral rights, rather than a corporation.

b) Defining the authorship: materialization of the creation in a concrete form

In many jurisdictions it is accepted that Copyright protects the expression of ideas. The author is the individual who arranges the ideas into their copyrighted form. In the case of a cinematographic work, the screenwriter and director are the key creative participants. According to the Act, they are co-authors responsible for "the arrangement or acting form or the combination of incidents represented give the work a dramatic character[7]", which is a clear description of their respective activities.

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[2] Copyright Act, Section 11.1.
[3] The Act, s.11.1 and. s.6.
[4] The Act, s.14.1 and s.28.1.
[5] The Act, s.13(1) ("Subject to this Act, the author of a work shall be the first owner of the copyright therein").
[6] The Act, s.6 and 11.1.
[7] The Act, s.11.1

The screenwriter commits to paper an original story or adapts an existing work (such as a novel or play) based on a series of creative choices and organizes elements into a copyrightable form. Positioned at the inception of an audiovisual work, the screenwriter sets the place and time, mood and atmosphere, describes the characters, building the world they live in and bringing them to life. The script is the foundation of a cinematographic work: without the screenwriter there would be no characters, no words and no actions. And without a written script, the director and their creative team cannot move ahead with the production of an audiovisual work.

The director, in turn, is responsible for all the aspects of the creation: working with the performers, designers, cinematographers, composers and editors, making the creative choices that will determine the tone, style, rhythm, point of view and meaning of the story recorded on film or a digital medium. A cinematographic work is the reflection of the personality of its authors. If the author's footprint is detected, then originality arises from it, making it a work of authorship and the product of an intellectual creation.

The defining criteria for copyright protection is that copyright can only subsist for "original" works, according to section 5[8] of the Act. Therefore, the author, also originator and creator, should be the individual who gives the work its "original" character as the Act defines it.

c) An Author is different from a Maker

In the Copyright Act, the "maker" has an indirect definition which lacks clarity. Besides being the person responsible for recording a sound, the maker is *"the person by whom the arrangements necessary for the making of the work are undertaken[9]"*. This description contributes to the ambiguity between naming the director or the producer author of the work.

However, within the context of the film and television industry, we must differentiate the "author", from the "producer"/ "maker" as the person or entity in charge of the financial and administrative responsibility for a film or television programme[10]. While the producer can have a "financial creativity" and an artistic participation in the project of a cinematographic work, producers cannot be the person responsible for the "original dramatic character" of the work.

d) European copyright legislations recognize the screenwriter and director as co-authors of an audiovisual work

Since 2006, all the member states of the European Union recognize the principal director of a film or an audiovisual work as an author and accordingly grant the associated intellectual property rights. This provision made the director the main creator of a film, leaving to the E.U. member states the decision to use national laws to designate co-authors such as the screenwriter. This harmonization clarified the author status of the director already existing in the

[8] The Act, s.5, Works in which Copyright may Subsist
[9] The Act, Article 2
[10] *Collins Essential English Dictionary*, 2nd ed., *s.v.* "producer".

1992 European Copyright Directive[11]. Moreover, the French, Italian and Spanish copyright legislations already ruled the screenwriter and director are presumed co-authors of an audiovisual work.

III The film and television business requires predictability to function and operate

Common industry practice with regards to agreements and contracts has developed in such way that no producer, studio, broadcaster or distributor would invest in a production without the assurance of having secured the rights necessary to exploit it. Licensing and the orderly exploitation of rights is at the centre of the film and television industry. These rights need to circulate in order to generate revenues, ensure investments are recouped and profits are realized.

Furthermore, it is not unusual to have several producers working simultaneously on the same production. Which of the credited producers would then claim the title of author? It is impracticable to deem the various roles of executive producers, co-producers, line producers, associate producers, supervising producers as co-authors. Moreover, the executive producer credit is a title which often includes distributors, financiers, previous rights holders and others not directly involved in the actual production process. In comparison, there is generally one primary director who holds a specific function, which is universally recognized and understood.

a) The producer retains ownership of the exploitation rights

The Copyright Act deems the “producer”/ “maker” to be the first copyright owner in the course of an employment or in the case of commissioned works, with the exception of a cinematographic work. In this situation, through the transfer of economic rights, the producer is able to use the rights of a cinematographic work, and to subsequently enter into agreements to license the exploitation rights to distributors and make sales to distribution platforms.

Being the copyright holder is different from the ownership of the work itself. On one hand, we acknowledge that producers are more interested in ownership than authorship, as their role is to make the work financially viable and profitable; and on the other hand, the authorship remains in the possession of the co-authors of the work. For this reason, protecting the authorship of a cinematographic work will preserve a balanced relationship between all the actors participating in the ownership timeline, or “chain of title”.

b) How business is conducted in the Canadian system does not affect authorship

The ownership timeline starts when a producer options an existing copyrighted work or by hiring the services of a screenwriter. Later in the process, the producer can apply for federal and provincial film and video production tax credits programs. The domestic tax credits guidelines

[11] Directive 92/100/EEC, repealed and replaced by Directive 2006/115/EC, *on rental right and lending right and on certain rights related to copyright in the field of intellectual property,* Article 2(2).

often require that the producer “owns” at least fifty percent of the copyright. This is the expression of the “transfer of rights”. Throughout the production process, the producer needs the ownership of the rights, but not the “authorship”. This transfer acknowledges that producers are disposing the existing rights and are the logical second holders. In other words, producers are rights aggregators.

Copyright ownership is not defined by market practices, but by the Canadian Copyright Act and the courts of justice. Canadian film and television producers often complete their financing, coproduce and distribute projects with the support of foreign producers, broadcasters, studios and distributors. When a producer collaborates with US entities, the Canadian copyright still applies, which means that in contrast to the US copyright law where the copyright belongs to the production company, the screenwriter and director remain first co-authors of audiovisual work.

c) Related or neighbouring rights

The Committee asked us to provide examples of related rights or “droits voisins” (in French) within the Canadian audiovisual industry. While performers and makers of sound recordings are eligible for related rights in the Copyright Act[12], film and television producers are not subject to related rights in Canada. In other words, related rights are effective for both the performance and exploitation of a musical work but not the exploitation of an audiovisual copyrighted work. In Europe, both the Directive 2006/115/EC regarding rental and lending rights and the European Copyright Directive 2001/29/EC recognize related rights for producers of audiovisual works, thus demonstrating that the producer is not the initial owner of the copyright itself.

The distinction between copyright and related rights is significant as the latter are often dubbed “entrepreneurial rights”. This is an additional demonstration acknowledging the status of first copyright owner for the screenwriter and director of an audiovisual work. As the Canadian film and television rights ecosystem functions properly, we do not see the need to expand the scope of related rights in the Act. However, it should be noted that the change we are proposing would not impact the latitude of possible Committee recommendations should there be a modification targeting related rights, neither does this proposal diminish the capacity to make further changes within the Act.

d) A stronger Copyright Act will provide the basis for equitable remuneration from each exploitation mode

Recognizing this joint authorship status would enhance protections for all screenwriters and all directors with regard to the exploitation of their works on all platforms and will provide a framework for protection of creators in the context of the rapid growth of new usages and changes in the distribution of audiovisual works, especially in relation to remuneration models.

[12] *S19 (1) If a sound recording has been published, the performer and maker are entitled, subject to subsection 20(1), to be paid equitable remuneration for its performance in public or its communication to the public by telecommunication, except for a communication in the circumstances referred to in paragraph 15(1.1) (d) or 18(1.1)(a) and any retransmission.*

Through collective agreements, like those negotiated by DGC and other guilds and unions, Canadian screenwriters and directors sign over their exploitation rights and routinely waive their moral rights. These agreements provide for fair compensation both for their expertise and the future use of their works. Moral rights are essential to protect the work and the author's integrity, but they cannot be monetized. Recognition of screenwriters and directors' moral rights explicitly with the proposed change would therefore not reduce the ability of producers to exploit the production.

IV Proposition for a targeted modification of the Act

Under pressure from other jurisdictions, including the United States, the current version of the Canadian Copyright Act creates an ambiguity likely to harm Canadian directors' capacity to protect and assert their rights as natural authors and first-owners of the copyright.

The proposed amendment could be achieved with a limited modification to article 34.1 of the Act, responsible for the ambiguity regarding authorship, without requiring a change to more fundamental articles. Moreover, this change will not affect the status of the maker (or producer of a cinematographic work), who will continue to exploit freely audiovisual works within the same framework, nor it will have an impact for other categories of authors.

Accordingly, the DGC recommends the following change to the Act:

- A modification to article 34.1 which will introduce a presumption to confer the screenwriter and director the first copyright owner and co-author status for a cinematographic work;

- Leave unchanged article 2 (definitions of a cinematographic work and of the maker/producer), article 5 (conditions to obtain the copyright) and article 11.1 (duration of the copyright).

V Conclusion

The adjustment we are advocating for will safeguard all directors working in Canada, not just those covered by labour organizations such as the DGC. It would cause no disruption to the status quo in our industry, no change to the way business is typically conducted, but would bring predictability in the system and would promote stronger, more transparent copyright protection, ensuring that those rights will continue to be respected when content is distributed on any future platform. All directors and writers will be recognized as authors and have their work protected under Copyright.

Ultimately, this clarification will also establish Canada as a jurisdiction with clearly defined rules, thereby enhancing our export potential and freeing distributors and production companies to fully exploit the economic value of audiovisual works.

The main objective of the Copyright Act is to protect the intellectual property of creators and authors and allow them to enjoy their full rights. The current re-examination of the Act by the Standing Committee is an opportunity to give back Canadian creators their status as authors and legitimate bargaining power in order to ensure fair remuneration.

The proposed modest legislative amendment would suffice to achieve recognition of the writer and director as the co-authors and de facto first copyright owners of a cinematographic work. This modification to the Act is consistent with the objective expressed by the Ministers Bains and Joly in their letter to the President of the Committee responsible for the review of the Act to "empower creators to leverage the value of their works and investments[13]".

The Directors Guild of Canada appreciates the opportunity to provide these comments.

All of which are respectfully submitted.

Directors Guild of Canada

Dave Forget
National Executive Director

[13] Letter by Navdeep Bains, Minister of Innovation, Science and Economic Development, and Mélanie Joly, Minister of Canadian Heritage, addressed to Dan Ruimy, MP and Chair of the Standing Committee on Industry, Science and Technology, on December 13, 2017