SARTEC

Société des auteurs de radio, télévision et cinéma

Brief to the Standing Committee on Canadian Heritage

Regarding its Study of

Remuneration Models for Artists and Creative Industries

In Connection with the

Five-Year Review of the Copyright Act

December 2018

SARTEC has prepared the following brief for the Standing Committee on Canadian Heritage as a complement to the brief it prepared for the Standing Committee on Industry, Science and Technology (INDU) in connection with the five-year review of the Copyright Act (the Act).

In our INDU brief, SARTEC asked the government to eliminate unfair exceptions adversely affecting creators, extend the private copying system to audiovisual works, maintain the presumption of copyright ownership for cinematographic works, lengthen the copyright protection period, and enhance respect for audiovisual intellectual property rights to combat piracy.

As the committee studies remuneration models for artists and creators, it must also consider additional information about the work authors do as scriptwriters. We have seen authors' compensation for writing and broadcasting their works decrease despite the increased number of platforms.

Before sharing our recommendations for modernizing the Act to better serve our culture and our economy, we would like to tell the committee about SARTEC's mission, its members' work, how they are paid, and why they are finding it harder and harder to do their job.

SARTEC's mission

Established in 1949, the Société des auteurs de radio, télévision et cinéma (SARTEC) protects the professional, economic and moral interests of authors working in French in Canada's film and TV sector. Recognized under provincial (1989) and federal (1996) legislation on the status of the artist, our organization makes representations to government authorities, negotiates collective agreements, advises authors, and helps ensure that their work and services are valued.

SARTEC has over 1,450 members, self-employed authors who create and write our films and television programs, among other things.

Scriptwriting as a profession

Scriptwriters are authors who create and write films, television shows and documentaries. Fiction writers create the plot and describe the characters, including what motivates and inspires them, their behaviour, their relationships and how they interact with and talk to each other, how they change over time, the circumstances of their birth, and perhaps even their death. Scriptwriters set out the film scene by scene, including its setting in place and time and its soundscape. Some scriptwriters even select existing pieces of music or compose their own songs for the soundtrack.

AS ALFRED HITCHCOCK SAID, "TO MAKE A GREAT FILM, YOU NEED THREE THINGS: THE SCRIPT, THE SCRIPT AND THE SCRIPT."

Script complete and funding in place, the scriptwriter's work is the starting point for the creation of the audiovisual work, a roadmap for the dozens or even hundreds of people collaborating on the project.

The director directs the actors, set and sound designers, and technicians. The director's choices influence the style, rhythm, tone and sound of the film, bringing the work to life. We believe that, in accordance with Canadian case law, the act should specify that the scriptwriter and the director are presumed to be copyright co-owners of the film or television work. Sometimes, scriptwriters direct films based on their own scripts.

In many cases, self-employed scriptwriters assume the risk of creating a script themselves. That itself is an art. To keep screenwriting as a profession alive in Canada, scriptwriters must be able to monetize their work in a way that makes taking on the risk of being a creator worthwhile. The act must allow them to mitigate that risk so they can continue to create and make a decent income in the digital economy. It must make the dream of becoming a scriptwriter attainable for young people who have the desire, the talent and the courage to pursue it.

Our members write series such as *Fugueuse* (Michelle Allen), *Faits Divers* (Joanne Arseneau), *Toupie et Binou* (Dominque Jolin), *L'Écrivain public* (Michel Duchesne), *Les Hauts et les bas de Sophie Paquin* (Richard Blaimert), and *19-2* (Joanne Arseneau, Réal Bossé, Danielle Dansereau, Claude Legault), and motion pictures such as *La Passion d'Augustine* (Marien Vien), *Le Déclin de l'empire américain* (Denys Arcand), and *Les Rois Mongols* (Nicole Bélanger), and documentaries such as *Ados, sexe et confidences* (Louis-Martin Pepperall) and *L'Érotisme et le vieil âge* (Fernand Dansereau).

Some of our members are famous here at home and internationally, their work distributed in cinemas, on television and via digital platforms, but people like Denys Arcand, Xavier Dolan and Fabienne Larouche, who have achieved fame in the film and television industries, got their start as part of a community of authors. We want to ensure that members of that community get the respect they deserve.

Let's look at how and why SARTEC negotiated collective agreements for them.

Minimum conditions negotiated by SARTEC

We regularly hear from members who tell us that, without the minimum conditions SARTEC has negotiated with producers, they would be unable to negotiate acceptable working conditions for themselves. Script writers very much want their scripts to become film or television productions. That is exactly why they write them. Some of them give up their copyright for peanuts if it means their script will be brought to life on screen. Afterward, they suffer the bitter disappointment of not being recognized as the creators of their successful works and may give up on the profession as a result.

That is why the collective agreements SARTEC has negotiated with producers and producers' associations under the Status of the Artist Act prohibit assignment of rights but, on payment of an author's fee, a production fee and royalties, grant producers licences to produce a film or television work based on the script. SARTEC agreements allow for licensing for other purposes and give authors the option to collect royalties from producers or producers' associations for the exhibition of the works in Canada and internationally so that the authors may continue to benefit economically from their work.

Our agreements with producers include a compensation reserve that enables collectives such as the SACD and the SCAM to collect royalties on behalf of scriptwriters for the exhibition of their works from francophone broadcasters in all countries, including Canada.

The SACD and the SCAM also have broadcast agreements with Quebecois, French, Belgian and Swiss broadcasters, as well as some broadcasters in Spain, Poland, Bulgaria and Italy. Agreements with respect

to retransmission and private copying rights, etc., apply to even more countries.[1] Generally speaking, the SCAM and the SACD cover only francophone countries.

There is a difference between royalties collected from producers by SARTEC and those collected by the SACD and the SCAM: for sales to broadcasters not covered by the SACD or the SCAM, in Canada or abroad, SARTEC collective agreements dictate that the author is entitled to a percentage of the producer's share (often 5%).

In television, that percentage applies to the producer's gross revenue, but in film, it applies to net revenue (once the investors have been repaid). Producer-paid royalties are common in television but rarer in the film industry except where provided for by rights other than those set out in the basic licences. For example, the right to broadcast a film is in the basic licence, but the right to authorize a remake is not. In some cases, authors negotiate a share of gross revenue. Royalties paid by producers to SARTEC for authors may include rebroadcast payments (for agreements with producer-broadcasters), sales to non-francophone countries, DVD sales, etc.

SARTEC receives a monthly distribution report from the SACD and the SCAM with respect to broadcast rights in the Canadian francophone space. Works produced outside of SARTEC contracts are not included, but there are very few of them. Members whose works are broadcast in Europe also receive broadcast and private copy royalties from Europe.

Unfortunately, there is still no audiovisual private copy regime in Canada even though technological advances make piracy easy, thereby depriving Canadian copyright holders of revenue. That is why we are also asking the government to enable Canadians to collect royalties for private copies in Canada and to modernize the Act to enhance respect for audiovisual intellectual property.

SARTEC's recommendations

SARTEC wishes to make five recommendations in connection with the five-year review of the Copyright Act (Act).[2]

1. Eliminate the unfair exceptions adversely affecting authors.

Prior to 1988, there were six exceptions to authors' rights. The current Act has nearly 40, which now take up 64 of the Act's 162 pages—nearly 40% of it. Over a third of the exceptions apply to audiovisual works. In recent decades, the government has given in to lobby groups demanding exemptions from the Act.

Let us review the rationale for and the impact of these exceptions in light of the basic purpose of the Act, which is to give authors the rights and recourse they need to ensure they receive decent compensation for the use of their work. Let us remember that these exceptions[3] are not "users' rights"[4]

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[1] https://www.sacd.fr/sites/default/files/territoires_intervention_av.pdf

[2] Subsections 29.23, 29.5(c), 29.6, 29.7(1), 29.7(3), 30.5(d), 31 and 32.1 of the Act.

[3] All the exceptions in the Act are listed under "Exceptions". However, the Act neither explicitly states nor implicitly suggest that these exceptions may constitute "rights". No provision of the Act sets out criteria, such as nationality, for benefiting from such rights, requirements for the transfer of those rights, or recourse in case of violation, nor does it set out a limitation period for pursuing recourse.

[4] It is essential, as required by all international agreements on copyright to which Canada is a party, that the limitations and exceptions in the Act be strictly confined to "certain special cases that do not conflict with a normal

and that, in the absence of compensation, their existence is a violation of Canada's international agreements. A thorough review of how these exceptions affect the normal exploitation of works and the legitimate interests of rightholders is in order.

2. Extend the private copying regime to audiovisual works

The private copying regime applies only to audio recordings of musical works[5], but digital reproduction technology makes the unauthorized reproduction of audiovisual works possible.

Like the majority of countries (over 80%) that adhere to this regime[6], Canada should extend it to cover the reproduction of audiovisual works on any platform, including equipment, regardless of the purpose for which the copy is made: for later listening or viewing[7] or for reproduction on another medium.[8]

Canada should also abolish the new private copying regime set out in subsection 29.22, Reproduction for private purposes, or, at the very least, subject it to fair payment in compliance with international obligations.[9]

3. Maintaining first ownership of cinematographic works

As with all types of works, the Act does not specify the identity of the first owner of copyright in a cinematographic work. However, it does state that, with few exceptions, that owner is the "creator" of the work.[10] These two basic principles of the Act have never been called into question.

Canadian case law identifies the scriptwriter and the director as co-authors of the cinematographic work.[11] This is consistent with the treaties Canada is party to, including the Berne Convention. Recognizing co-authorship was the result of numerous studies by expert committees[12] leading up to the 1967 Stockholm Revision of the Berne Convention, which resulted in Article 14.[see note 12]

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exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder", also known as the "three-step test".

[5] Copyright Act, Part VIII.

[6] WIPO, International Survey on Private Copying – Law and Practice 2016, https://www.wipo.int/publications/en/details.jsp?id=4183.

[7] Subsection 29.23, Reproduction for later listening or viewing.

[8] Subsection 29.22, Reproduction for private purposes.

[9] A recent international study concluded that the most effective way to ensure fair remuneration for audiovisual creators is to legislate the right to remuneration. Nineteen of the 28 EU member states have audiovisual creator remuneration systems in place that cover cable retransmission (mandatory collective management pursuant to 93/83/EEC) and private copying (http://www.cisac.org/Cisac-Home/Newsroom/News-Releases/Audiovisual-organisations-unveil-new-international-legal-study-supporting-fair-remuneration-for-audiovisual-authors).

[10] The only remaining exception in the Act (other than works prepared or published by or under the direction or control of the Crown) is that of a work in any category created by the author while employed. Barring agreements to the contrary between the employer and the employed author, the employer is the first owner of copyright of works created by the author under employment although the author retains authorship.

[11] Jean-Claude Chehade Inc. v. Films Rachel Inc. (1995) 34 C.P.R. (3d) 305 (Quebec Supreme Court); see also Lachance c. Productions Marie Eykel inc., 2012 QCCS 1012

[12] See, for example, E. Ulmer, "Consultation sur la cinématographie et le droit d'auteur," *Le Droit d'auteur*, 1953, p. 97; G. Lyon-Caen, "Le Cinéma dans la Convention de Berne," *Le Droit d'auteur*, 1959, p. 217; G. Lyon-Caen, "Nouvelles observations au sujet de la protection international des œuvres cinématographiques," *Le Droit d'auteur*, 1962, p. 153; "The protection of cinematographic works," *Le Droit d'auteur*, 1961, pp. 19, 62, 86;

Our collective agreements are based on this legal foundation, which does not prevent producers from exploiting works based on scripts created by SARTEC members who agree to such exploitation under fair conditions that they may negotiate collectively and individually as authors. That is the primary purpose of copyright around the world.

The Canadian regime is the rule, not an exception, as many countries have laws recognizing both scriptwriters and directors as authors.

Nevertheless, some seek radical changes to the legal foundation that would recognize the producer of the cinematographic work as the first owner of copyright and even its author.

Such proposals would change the legal foundation, not uphold it.[13]

SARTEC strongly opposes any attempt to water down the Act in any way that grants first ownership of copyright to anyone other than the authors of an audiovisual work. SARTEC simply wants to uphold the legal foundation. As such, our organization supports the ARRQ's proposal[14], which is in line with proposals from the DGC, the SACD, the SCAM and the WGC.

4. Duration of protection

SARTEC is pleased that, in the new CUSMA, Canada has committed to extending the duration of copyright protection in the Act to 70 years after the author's death, which is the norm in most countries.

"Rapport du Groupe d'étude pour la protection internationale des œuvres cinématographiques," *Le Droit d'auteur*, 1962, p. 38.

[13] Those seeking to recognize the producer of a cinematographic work as the work's first owner of copyright and author frequently refer to provisions in U.S. copyright law that may grant that status to the producer of an audiovisual work in accordance with two provisions respecting "works made for hire". However, such individuals very conveniently forget to mention the following:

- In the United States, copyright of a work belongs to the author of that work.
- In the United States, those who have made a creative contribution to a work are the authors. In the case of cinematographic works, that includes the scriptwriter and the director, but not the producer (unless the latter also contributes as author, in which case he or she will be credited as such).
- It is only through an exception that creates a legal fiction, and only if all criteria of that exception are met, that the producer of a cinematographic work is reputed, by virtue of the exception, to be not only the owner of copyright under the exception but also the author of the cinematographic work.
- This legal presumption effectively transfers the authorship and ownership of first copyright of those whom U.S. law recognizes as the true authors of the cinematographic work to the producer, who is merely a presumptive author by virtue of a legal fiction. For that to happen, the law allows that, other than in the case of this exception, those who made a creative contribution to the cinematographic work, including the scriptwriter and the director, are the true authors and therefore the owners of copyright by virtue of their authorship, and then transfers those rights to the producer if the conditions allowing the exception are met.
- Logically, then, if the conditions are *not* met, the situation is exactly the same as in Canada: those who made a creative contribution to the cinematographic work, including the scriptwriter and the director, are the true authors and owners of copyright.

[14] To that end, SARTEC supports the **Amendments proposed by the ARRQ** (see appendix).

5. Enhancing respect for audiovisual intellectual property

SARTEC has grave concerns about respect for copyright in Canada, especially on the internet. To show that its commitment to promote Canadian culture is sincere, the government must adopt measures that allow copyright owners to use best practices to combat those who infringe copyright on a large scale.[15]

SARTEC is calling for a "notice and takedown" regime requiring internet service providers (ISPs) to take down all unauthorized content. Risk mitigation for ISPs[16] has the unintended effect of demotivating them to solve the problems their services make possible, so it is important to rewrite the provisions limiting their liability.[17]

ISPs are in the best position to prevent mass piracy, and they should not be allowed to benefit from limited liability when they know their services are being used for illicit purposes. The law must oblige them to block all access to piracy sites and exclude such sites from their search engine results.

[15] See paragraph 8(3) of Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001, on the harmonisation of certain aspects of copyright and related rights in the information society, which states that "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." Section 97A of the Copyright, Designs and Patents Act 1988 states that "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."

[16] See, for example, paragraphs 31.1(1) to (3) and (6) (network services), which were added to subparagraph 2.4(1)(b), paragraphs 31.1(4) to (6) (hosting), subsection 41.27 (location tools) and, on top of that, paragraph 41.25(3), which protects all ISPs.

[17] See note 16.

APPENDIX

Proposed Amendments (in relation to recommendation 3)

(a) Proposed amendments

Presumptions respecting copyright and ownership	**Présomption de propriété**
34.1 (1) In any civil proceedings taken under this Act in which the defendant puts in issue the existence of the copyright, copyright shall be presumed, unless the contrary is proved, to subsist in the work, performer's performance, sound recording or communication signal, as the case may be.	**34.1 (1)** Dans toute procédure civile engagée en vertu de la présente loi où le défendeur conteste l'existence du droit d'auteur, l'œuvre, la prestation, l'enregistrement sonore ou le signal de communication, selon le cas, est, jusqu'à preuve contraire, présumé être protégé par le droit d'auteur.
(2) Except in respect of cinematographic works, in any civil proceedings taken under this Act in which the defendant puts in issue the title of the plaintiff with respect to the copyright, the author, performer, maker or broadcaster, as the case may be, shall, unless the contrary is proved, be presumed to be the owner of the copyright.	**(2)** Sauf en ce qui concerne les œuvres cinématographiques, dans toute procédure civile engagée en vertu de la présente loi où le défendeur conteste la qualité du demandeur, l'auteur, l'artiste-interprète, le producteur ou le radiodiffuseur, selon le cas, est, jusqu'à preuve contraire, réputé être titulaire de ce droit d'auteur.
(3) In any civil proceedings taken under this Act with respect to a cinematographic work and in which the defendant puts in issue the title of the plaintiff to the copyright in such work, the scriptwriter and the director shall be presumed to be the co-authors of the cinematographic work and, unless the contrary is proved, shall be presumed to be the co-owners of the copyright in such work.	**(3)** Dans toute procédure civile engagée en vertu de la présente loi au regard d'une œuvre cinématographique où le défendeur conteste la qualité du demandeur, le scénariste et le réalisateur sont présumés être les co-auteurs de l'œuvre cinématographique et, sous réserve d'une preuve contraire, sont présumés être les cotitulaires du droit d'auteur sur cette œuvre.
Where no grant registered	**Aucun enregistrement**
(2) Where any matter referred to in subsection (1) is at issue and no assignment of the copyright, or licence granting an interest in the copyright, has been registered under this Act,	**(2)** Dans toute contestation de cette nature, lorsque aucun acte de cession du droit d'auteur ni aucune licence concédant un intérêt dans le droit d'auteur n'a été enregistré sous l'autorité de la présente loi :
(*a*) in the case of a performer's performance, a sound recording, a communication signal or a work other than a cinematographic work,	***a*)** dans le cas d'une œuvre autre qu'une œuvre cinématographique,
(i) if a name purporting to be that of the author of the work, the performer of the performer's performance, the maker of the sound recording, or the broadcaster of the communication signal is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author, performer, maker or broadcaster; and	**(i)** si un nom paraissant être celui de l'auteur de l'œuvre, de l'artiste-interprète de la prestation, du producteur de l'enregistrement sonore ou du radiodiffuseur du signal de communication y est imprimé ou autrement indiqué, de la manière habituelle, la personne dont le nom est ainsi imprimé ou indiqué est, jusqu'à preuve contraire, présumée être l'auteur, l'artiste-interprète, le producteur ou le radiodiffuseur; et

(ii) if no name is so printed or indicated, or if the name so printed or indicated is not the true name of the author, performer, maker or broadcaster or the name by which that person is commonly known, and a name purporting to be that of the publisher or owner of the work, performer's performance, sound recording or communication signal is printed or otherwise indicated thereon in the usual manner, the person whose name is printed or indicated as described in subparagraph (ii) shall, unless the contrary is proved, be presumed to be the owner of the copyright in question; and

(*b*) in the case of a cinematographic work,

(i) if names purporting to be those of the scriptwriter and director appear in the usual manner, the persons so named shall be presumed to be the co-authors of the cinematographic work and the co-owners of the copyright in the work; and

(ii) if, on a cinematographic work, a name purporting to be that of the maker of the cinematographic work appears in the usual manner, the person so named shall, unless the contrary is proved, be presumed to be the maker of the cinematographic work.

(ii) si aucun nom n'est imprimé ou indiqué de cette façon, ou si le nom ainsi imprimé ou indiqué n'est pas le véritable nom de l'auteur, de l'artiste-interprète, du producteur ou du radiodiffuseur, selon le cas, ou le nom sous lequel il est généralement connu, et si un nom paraissant être celui de l'éditeur ou du titulaire du droit d'auteur y est imprimé ou autrement indiqué de la manière habituelle, la personne dont le nom est ainsi imprimé ou indiqué est, jusqu'à preuve contraire, présumée être le titulaire du droit d'auteur en question;

***b*)** dans le cas d'une œuvre cinématographique,

(i) si des noms paraissant être ceux du scénariste et du réalisateur y sont indiqués de la manière habituelle, ces personnes sont présumées être les co-auteurs de l'œuvre cinématographique et les cotitulaires du droit d'auteur sur l'œuvre en question; et

(ii) si un nom paraissant être celui du producteur d'une œuvre cinématographique y est indiqué de la manière habituelle, cette personne est présumée, jusqu'à preuve contraire, être le producteur de l'œuvre cinématographique pour les fins de l'article 5(1) b) de la présente loi.