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DIRECTORS GUILD OF CANADA

**Brief presented to the
Standing Committee on Industry, Science and Technology**

AUTHORSHIP OF A CINEMATOGRAPHIC 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 recent opportunity to participate in hearings convened by the Standing Committee on Industry, Science and Technology on the Statutory Review of the Copyright Act. As stated in our appearance before the Committee, in order to ensure fair and equitable remuneration on all content distribution mediums and platforms, the Copyright Act should be amended in order to explicitly place Canadian creators at the center of the ecosystem, by affirming writers and directors as authors and first copyright owners of audiovisual content.

This status for the screenwriter and director is consistent with current interpretations of the Act by Canadian and Quebec jurisprudence. What we are advocating for is a minimal change that can be seen as a natural extension of the Act.

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

The author's status of a cinematographic work is not clearly defined in the Copyright Act¹. While the authorship for most creations is self-evident, such as a painting or literary work, in the case of a collaborative work such as a "cinematographic work", it is less obvious who is responsible for its authorship. The text only says "*the author of a work shall be the first owner of the copyright therein*"². Although the screenwriter and director are together responsible for giving a cinematographic work "its original dramatic character"³ and thereby be the first co-authors, the current version of the Act contains ambiguity with respect to who is the first owner of the copyright.

¹ Copyright Act, R.S.C. 1985, c C-42, as amended.

² The Act, s.13(1) ("Subject to this Act, the author of a work shall be the first owner of the copyright therein").

³ Copyright Act, Section 11.1.

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 years⁴. 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 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 character⁵”, which is a clear description of their respective activities.

The screenwriter commits to paper an original story 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.

⁴ The Act, s.6 and 11.1.

⁵ The Act, s.11.1

The defining criteria for copyright protection is that copyright can only subsist for “original” works, according to section 5⁶ 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”*⁷. 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 programme⁸. While the producer can have a “financial creativity” and an artistic participation in the project of a cinematographic work, he cannot be the person responsible for the “original dramatic character” of the work.

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.

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 grant him the associated intellectual property rights. This provision made the director the main creator of a film, leaving to the 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 1992 European Copyright Directive⁹. Moreover, the French, Italian and Spanish copyright legislations already ruled the screenwriter and director are presumed co-authors of an audiovisual work.

⁶ The Act, s.5, Works in which Copyright may Subsist

⁷ The Act, Article 2

⁸ *Collins Essential English Dictionary*, 2nd ed., s.v. “producer”.

⁹ 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).

III 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 center of the film and television industry. These rights need to circulate in order to generate revenues and ensure investments are recouped and profits are realized.

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) A stronger Copyright Act will provide an equitable remuneration from each exploitation mode

Recognizing this joint authorship status would enhance protections for screenwriters and 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.

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 NAFTA negotiations, 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 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 change we're advocating for would cause no disruption to the status quo in our industry, no change to the way business is typically conducted, but it would acknowledge our moral rights as individuals and creators and would promote stronger, more transparent copyright protection and ensure that those rights will continue to be respected by any future platform.

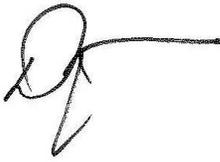
The proposed modest legislative amendment would suffice to achieve recognition of the writer and director as the co-authors and de facto first copyright owners of a cinematographic work. This modification to the Act is consistent with the objective expressed by the Ministers Bains

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 investments¹⁰”.

The DGC appreciates the opportunity to provide these comments.

All of which are respectfully submitted.

Directors Guild of Canada

A handwritten signature in black ink, appearing to read 'Dave Forget', with a long horizontal stroke extending to the right.

Dave Forget
National Executive Director

¹⁰ Letter by Nadveep Bains, Minister of Innovation, Science and Economic Development, and Mélanie Joly, Minister of Canadian Heritage, addressed to Dan Ruimy, MP and president of the Standing Committee on Industry, Science and Technology, on December 13, 2017