Writers Guild of Canada

Submission to the Standing Committee on Industry, Science and Technology on the 2018 Statutory Review of the *Copyright Act*

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I. Introduction

The term "author" is not defined in the *Copyright Act* (the 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 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"[1] is directly tied to the life of its author. As well, the "author" of a cinematographic work is entitled to moral rights protection[2] under the Act and, with several exceptions, the general rule under the Act is that the "author" of a work is the first owner of the copyright therein.[3] 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 like Europe, if and when that policy option needs to be considered.

The Writers Guild of Canada (WGC) submits that the screenwriter and the director of a cinematographic work should be considered the "co-authors" of a cinematographic work with an original dramatic character and the Act should be amended accordingly.

II. Who is the Author of a Cinematographic Work?

A. The Screenwriter and the Director should be the Individuals Recognized as the Co-Authors of a Cinematographic Work

In order to determine who is the author of a cinematographic work, it is necessary to review the purpose of the Act (i.e. what types of works the Act is designed to protect). Section 5 of the Act provides that copyright can only subsist for "original" works. The author should therefore be the individual who gives the work its "original" character. Collins Essential English Dictionary[4] defines an "author" as either the person who writes a book, article or other work, or "an originator or creator". Professor David Vaver[5] argues that the author of a cinematographic work should be whomever was responsible for creating its original dramatic character.[6] Authorship is a creative endeavour. Black's Law Dictionary, defines a "work of authorship" as the product of creative expression[7]. Chief Justice McLachlin of the

[1] The Act, s.11.1 and. s.6.
[2] The Act, s.14.1 and s.28.1.
[3] The Act, s.13(1) ("Subject to this Act, the author of a work shall be the first owner of the copyright therein").
[4] Collins Essential English Dictionary, 2nd edition.
[5] Professor David Vaver is an Emeritus Fellow of St Peter's College and former Director of the Oxford Intellectual Property Research Centre. Before coming to Oxford, he taught for some 20 years in Canada (UBC (1971, 1978-85) and Osgoode Hall Law School (1985-98) and before that at the University of Auckland (1972-8). Professor Vaver has written extensively in intellectual property law, including two texts - Intellectual Property Law: Copyright, Patents, Trademarks (Toronto: Irwin Law 1997) and Copyright Law (Toronto: Irwin Law, 2000). His most recent work is a 5-volume compilation of leading IP articles, Intellectual Property Rights: Critical Concepts in Law (Routledge, 2006). Professor Vaver's inaugural lecture Intellectual Property: The State of the Art appears at (2000) 116 LQR 621.
[6] David Vaver, *Copyright Law* (Toronto: Irwin Law Inc., 2000) at 82.
[7] *Black's Law Dictionary*, 8th ed., s.v., "work".

Supreme Court of Canada noted "an original work must be the product of an author's exercise of skill and judgment".[8]

Under the Act, the author of a "cinematographic work" is distinct and separate from the author of an underlying work (such as, for example, a novel or other literary work) upon which the cinematographic work is based. In such an example, there is separate copyright protection for each of the novel, the screenplay and the film. The author of the novel may have no participation in the preparation of the screenplay or in the making of the film. The actors do not read lines directly from the novel in the normal course and the author of the novel, as opposed to the screenwriter, will often have no role of any kind in the filmmaking process. Similarly, there is a separate copyright in film sequels and in each episode of a television series. Even if previous films or television shows in a series may contain elements, copyrightable or otherwise, that may be used in subsequent productions, each film or episode still has its own copyright, with its own "author" under the Act.

(a) Screenwriter as Author

Whether creating original stories, sequels or subsequent episodes of a series, or adapting from books, plays or real events, the screenwriter imagines a world and makes countless creative choices: choosing the specific place and time in that world to begin and end the story, setting the mood and theme of the piece, choosing the unique characters who will inhabit the world, giving characters personal histories, personalities, actions and words to speak. All of this becomes the script, the textual foundation for every cinematographic work. Without the screenwriter, there would be no stories to tell in the cinematographic work, no characters for the actors to play, no words for them to speak and nothing for them to do. Until the screenwriter writes, no producer, director, actor, or crew member can do what they do.

Even where characters or other elements already exist, in a copyrightable form or not, the screenwriter must choose how or even whether to use them, what story to place them in, and what dialogue they will speak, among many other things. Even for an entirely original work, many elements and conventions also already exist, like the notion of a protagonist and antagonist, or a multiple-act structure, or the conventions of a given genre. The above is true for other media as well, such as novels or paintings, but it does not deprive novelists of authorship of their novels, or composers of authorship of their compositions, it does not deprive screenwriters of authorship, and it certainly does not confer authorship upon producers.

(b) Director as Author

The director imagines the world of the story and the people who inhabit that world and makes creative choices to realize that story in the audio-visual medium. He or she directs actors, designers, cinematographers, composers and editors, stages the action and makes choices which may determine the tone, style, rhythm, point of view and meaning of the story rendered in audiovisual form.

(c) Producers Are Not Authors (They Are "Makers")

[8] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at para. 25, [2004] 1 S.C.R. 339.

Collins Essential English Dictionary, defines "producer", in relation to film and television, as "a person with the financial and administrative responsibility for a film or television programme".[9] Financial creativity, while certainly admirable, is not the type of creativity which lends a work its "original dramatic character". Raising funding and arranging for distributors is clearly an important aspect of the production process, but it is not creative, in the artistic sense, and it is not authorship. No one would suggest that the author of the painted ceiling of the Sistine Chapel is the Catholic Church rather than Michelangelo. Michelangelo is the author of this work, despite the fact that the Catholic Church commissioned and financed the work.

Moreover, the Act already recognizes the producer's role: it is as a "maker", which is, "in relation to a cinematographic work, the person by whom the arrangements necessary for the making of the work are undertaken".[10] A maker is clearly distinct from an author under the Act—they have different meanings, are used differently, a maker can be a corporation[11] while an author cannot, and the French translation of "maker" in the Act is "producteur". The Act clearly contemplates that these are two different roles. A maker is not an author simply by virtue of being a maker.

(d) Copyright protects expressions of ideas

It is widely held that copyright protects expressions of ideas, and not the ideas themselves.[12] While producers may, on occasion, provide screenwriters and directors with ideas and concepts, it is the screenwriters and directors who in turn express these ideas and concepts and together create the cinematographic work which embodies their expressions.

B. Canadian Case Law

There is one Canadian judicial decision which discusses the concept of authorship in relation to a cinematographic work. This is the Superior Court of Quebec's decision in *Les Films Rachel Inc. v. Duker & Associés Inc. et al.*.[13] In this case, Justice Julien determined that the joint screenwriter/director was the author of the film and, as such, was entitled to copyright ownership. Justice Julien noted that although the producer made an essential contribution to the work, his contribution was not creative and could therefore not be considered authorship.

C. International Copyright Statutes

The European Union ("EU") and several foreign jurisdictions have legislated on this issue. In the EU, a Directive was adopted in 1992 which requires that the principal director be recognized as one of the authors of a cinematographic or audiovisual work, and which authorizes each EU signatory country to determine which other persons if any, are credited as authors or co-authors.[14]

France's copyright statute provides that, unless proved otherwise, the following are presumed to be joint authors of an audiovisual work: 1) the author of the script, 2) the author of the adaptation, 3) the

[9] Collins Essential English Dictionary, 2nd ed., s.v. "producer".
[10] The Act, s.2.
[11] The Act, s. 5(1)(b)(i).
[12] See *Donoghue v. Allied Newspapers Ltd.* (1937), [1938] 1 Ch. 106 at 109.
[13] [1995] J.Q. no 1550 (QL).
[14] 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).

author of the dialogue, 4) the author of the musical composition, with or without words, specially composed for the work, and 5) the director.[15]

The United Kingdom's copyright regulations provide that an author shall be, "in the case of a film, the producer and the principal director".[16] Although the U.K.'s legislation categorizes the producer and director as co-authors, this should be considered in light of the fact that the U. K. legislation used to provide that the author would be, in the case of a film, "the person by whom the arrangements necessary for the making of the recording or film are undertaken". This is the same as the definition of "maker" under the Canadian Act and, under the Canadian Act, the concept of maker is separate and distinct from the concept of author.

Copyright legislation in Italy provides that "[t]he author of the subject, the author of the scenario, the composer of the music and the artistic director shall be considered as co-authors of a cinematographic work."[17] Both the screenwriter and the director, among others, are credited as co-authors, while the producer is not. The Spanish copyright statute names as co-authors of audiovisual works: 1) the principal director, 2) the writers of the theme, the adaptation, and the scenario/dialogue, and 3) the authors of the musical compositions created specifically for the work.[18]

The United States is an anomaly with respect to its treatment of authorship of an audiovisual work. The United States *Copyright Act* provides that in the case of a "work made for hire", the employer or other person for whom the work was prepared is considered to be its author.[19] There is no similar concept in the Canadian Act regarding a deemed transfer of authorship (as opposed to ownership) in the case of an employment relationship. Further, the term of copyright in the US for an audio-visual work, unlike Canada, is not tied to the life of the "author". The US approach is therefore anomalous, from an international copyright law standpoint, and incompatible with the Act and should not be followed in Canada.

D. No Disruption of the Business

The WGC's proposal will not disrupt how the film and TV business operates, in Canada or internationally. As noted above, this proposal is already the law and has been since 1995,[20] so if it hasn't disrupted the business in the past 23 years it won't now. Moreover, nobody argues that novelists aren't the authors of their novels or composers aren't the authors of their music, and certainly nobody argues that publishers somehow can't sell books or recording companies can't sell music just because these authors are the first owners of their works. That's because these authors transfer their rights in industry-standard business deals. Similarly, nobody argues that screenwriters aren't the authors of their screenplays, and

[15] *Code de la propriété intellectuelle* (Intellectual Property Code) J.O., July 3, 1992, art. L.113-7.
[16] *Copyright, Designs and Patents Act 1988* (UK), 1988, c.48, s.9(1), s.9(2)(a), as amended by *The Copyright and Related Rights Regulations 1996* (UK) S.I. 1996/2967, s.18(1) ("Copyright Regulations"). The *Copyright Regulations* implement, among other things, the Council Directive No. 92/100/ECC of 19 November 1992 on "rental right and lending right and on certain rights related to copyright in the field of intellectual property".
[17] Law No. 633 of April 22, 1941, for the *Protection of Copyright and Other Rights Connected with the Exercise Thereof*, as subsequently amended, Article 44.
[18] *Revised Law on Intellectual Property, regularizing, clarifying and harmonizing the applicable statutory provisions*, approved by Royal Legislative Decree 1/1996 of April 12, 1996, Article 87.
[19] U.S.C. tit. 17 § 201 (2000).
[20] I.e. *Les Films Rachel Inc. v. Duker & Associés Inc. et al.* [1995] J.Q. no 1550 (QL).

producers already contract for the rights to adapt those screenplays as a matter of course. Films, television, series, and sequels are already produced due to standard contracting and chain of title. This happens where multiple screenwriters, directors, producers, or production companies are involved, such as when *Degrassi* producer Epitome was sold to DHX, along with *Degrassi* itself.[21]

Industry standard contracts and business deals ensure that ownership of copyright is transferred to the parties best positioned to exploit it. The WGC's authorship proposal simply clarifies that copyright starts in the hands of its creators, so they can enter into those deals effectively. In the interest of ensuring that there is no *perceived* disruption of the business, however, the WGC would support its proposed amendment being made on a prospective basis, and not being applied retroactively, which would maintain the common law *status quo* with respect to the issue for contracts entered into prior to the proposed amendment.

The Writers Guild of Canada is the national association representing approximately 2,200 professional screenwriters working in English-language film, television, radio, and digital media production in Canada.

[21] https://www.dhxmedia.com/newsreleases/dhx-media-acquires-degrassi-producer-epitome/