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Brief Submitted by the Association québécoise de la production médiatique to the Standing Committee on Industry, Science and Technology

December 7, 2018

The AQPM represents 150 independent film, television and web production companies in Quebec.

In 2016-17¹, film and television production in Quebec, accounted for a total volume of \$1.8 billion, and was the direct and indirect source of more than 36,400 full-time equivalent jobs.

The AQPM wishes to submit this brief to the members of the Committee as part of their parliamentary review of the *Copyright Act*. The Association also wants to point out that it is a member of the Coalition for Culture and Media and that it supports all its proposals.

1. Ownership of Copyright on Audiovisual Works

Current Situation

The *Berne Convention* stipulates the autonomy of countries in establishing ownership of copyright on cinematographic works². Canadian legislation is silent on this issue. Consequently, only the courts have the power to determine the authors of a cinematographic work. Few cases have been identified, so there are no clear rules.

Several countries identify the author of an audiovisual work in their national legislation. In the United States³, the United Kingdom⁴, Australia⁵ and New Zealand⁶, which are countries with a copyright philosophy similar to Canada's, the producer is designated as the sole owner of copyright, with the exception of the United Kingdom, where the owners are the producer and director.

¹ *Profil 2017 Rapport économique sur l'industrie de la production de contenu sur écran au Canada*, pages 16 and 23 (<https://www.aqpm.ca/85/profil>) (2017 Profile)

² Paragraph 14^{bis} (2)(a) of the *Berne Convention for the Protection of Literary and Artistic Works*

³ Copyright Act, 17 U.S.C. § 101 (<https://www.law.cornell.edu/uscode/text/17>)

⁴ Section 9 of the Copyright, Designs and Patents Act 1988 (Chapter 48) (<https://www.legislation.gov.uk/ukpga/1988/48/contents>)

⁵ Subsection 98(2) of the Copyright Act 1968 (<https://www.legislation.gov.au/Details/C2017C00180>)

⁶ Paragraph 5(2)(b) of the Copyright Act 1994 (<http://www.legislation.govt.nz/act/public/1994/0143/latest/DLM345634.html>)

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In Canada, however, producers are not legally recognized as right holders. As a result, they must produce and exploit cinematographic works on the basis of an uncertain model and manage the risks that come with that. To limit this, collective agreements⁷ between associations representing screenwriters, directors and music composers, among others, with the AQPM were clarified on behalf of its members. Generally, the producer obtains user and operating rights in exchange for payment of fees and/or royalties.

Definition of Cinematographic Work

One might wonder whether the category "cinematographic work" is still the appropriate term to include all works created in the audiovisual sector. The AQPM believes that, as defined, the term "cinematographic work" is not technologically neutral because it refers to traditional production techniques (cinematography) rather than to the work itself. **That is why we recommend that the category of "audiovisual work" be created and defined as "animated sequences of images, with or without sound, in which cinematographic works would be included."**

In order to identify the author of an audiovisual work, it must also be qualified. Is it a work in itself, a collaborative work, or a compilation of several underlying works? Is the script and the music, for example, an inseparable whole, or are they separate works that are integrated into a larger whole than its constituent components? So who holds the rights to the whole?

Producer, First Owner of Copyright on an Audiovisual Work

The producer is the orchestra conductor of the audiovisual work. He/she is the only one present from the development of the work to its final delivery and even after, when it is exploited. He/she manages, administers, selects and supervises all aspects of the production of the work in collaboration with the principal artists and artisans involved. By establishing the funding structure and the selection of the people to be hired, the producer determines and guides the content of the audiovisual work. Through his/her daily involvement in the creative development of the cinematographic work, he/she participates in the creation of the work itself.

Whether it is fiction, a variety show, a performance capture or a documentary, the nature of the participation by the artists and artisans will be different. The components of a work also vary: original or existing music, original or adapted texts, archives, existing or original works of art. The combinations are infinite, and there are many people who can claim to be the author of a component of a work. The producer must ensure that all rights to the work are held through appropriate agreements. While he/she plays an important creative role, he/she is also solely responsible for fulfilling contractual commitments to third parties including the financial partners and the production team. The producer is the ultimate decision-maker.

⁷ Under the *Act respecting the professional status and conditions of engagement of performing, recording and film artists*, R.S.Q. c. S-32.1. It should be noted that the legal situation in the rest of Canada is different.

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The producer exploits the audiovisual work and must guarantee to distributors and broadcasters that he/she has all the rights to do business with them. He/she must therefore hold a clear title in order to grant licenses to Canadian or foreign third party buyers⁸.

The AQPM is calling for the producer to be recognized as the first owner of copyright on audiovisual works. It would then be appropriate to specify that a corporation may be the first owner of copyright on this type of work.

Other Legislative Solution

The AQPM has already asked that the uncertainty surrounding copyright ownership be resolved. Today, it fears the instability being caused by an inadequate legislative solution to the ecosystem that has been established to compensate for the silence of the *Copyright Act* (CA). The recognition of the producer as the first owner of copyright on an audiovisual work appears to be the most appropriate solution. If the Committee members were to decide to reject it, they should ensure that the proposals put forward do not interfere with how the industry operates.

For each category of creators identified in the CA as having ownership of copyright on an audiovisual work⁹, the legislator should ensure that this does not create new rights or new royalties, in cases where collective or individual agreements signed between the producers and the creators involved are already in effect. **This clarification should be accompanied by a legal presumption in favour of collective agreements.**

Since Canada has yet to sign the Beijing Treaty on Audiovisual Performances, the same legal clarifications and presumptions concerning performers should be included in the CA when the treaty is eventually implemented.

Finally, to ensure the stability and smooth operation of the industry, the CA should absolutely provide for legal transfers in favour of the producer. It would be effective as soon as a contract is signed between a producer and a person who could be called the “author of the audiovisual work” for the entire term, in all territories and markets and for all the rights required to exploit that work. The producer would then become the assignee of the exclusive rights to exploit the work. **It would also be appropriate to recognize the producer as the person who produced the master tape of the work (copy “0”), like the sound recording producer, with all the associated rights.**

⁸ See, for example, tax credit requirements

<https://www.canada.ca/en/canadian-heritage/services/funding/cavco-tax-credits/canadian-film-video-production/application-guidelines.html> ; https://www.laws-lois.justice.gc.ca/eng/regulations/C.R.C.%2C_c._945/section-1106.html

⁹ Beijing Treaty on Audiovisual Performances adopted June 24, 2012
(https://www.wipo.int/treaties/en/text.jsp?file_id=295837)

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2. *Better Counter-pirating Measures*

A recent report on piracy¹⁰ found that Canada ranks 11th for piracy of television series, with 2.5 billion visits to illegal sites, 90% of which are online video-on-demand sites.

It has long been argued that piracy would cease once a legal supply was accessible and affordable. This claim has turned out to be false with piracy skyrocketing around the world, even though a legal supply is available. A study by CEFRIO¹¹ illustrates this well. In 2017, more than half (53%) of Quebec households connected to the Internet now subscribe to a paid online viewing service for movies, shows or series, an increase of 13% over 2016. The most popular services are Netflix, Club Illico and Tout.tv Extra, at an average cost of \$10 per month.

The AQPM is a member of the FairPlay¹² Canada coalition, which, last fall, filed a motion with the CRTC¹³ to create an independent oversight body and adopt measures to disable access to piracy sites. On October 2, the CRTC rejected the coalition's motion, noting its lack of jurisdiction. It is therefore essential that measures to combat piracy be strengthened in the CA.

Putting in Place a Notice, Removal and Access Blocking System for Piracy Sites

In January 2015, the federal government implemented the notice system.¹⁴ This system has not proven itself to be effective in stopping piracy, and **a notice and removal system should be put in place** so that the ISP directly removes content for which no authorization has been given.

The legislator should also put in place a **remedy that would allow, in certain circumstances, ISPs whose services are used to infringe copyright to be required, through an injunction, to block access to sites that allow piracy when they are informed of it.** Sections 2.4 (1)(b), 31.1 and 41.27 of the CA should be amended if applicable.

Removal of the distinction between commercial and non-commercial purposes for pre-established damages

Since it can be difficult to prove damages incurred as a result of copyright infringement, the CA allows the rights holder to opt for pre-established damages¹⁵. In 2012, the legislator significantly reduced the pre-determined amounts for violations committed for non-commercial purposes. The AQPM objected at the

¹⁰ Annual Piracy Report —TV Canada, 2017, prepared by Muso TNT Ltd (https://static1.squarespace.com/static/5a6cf478edaed87d3b78d1c6/t/5aba7b8faa4a9908edd01a03/1522170770758/FairPlay_Canada_CRTC_Report_2018_EN.pdf)

¹¹ NETendances 2017, Le portrait numérique des foyers québécois en 2017 du Centre facilitant la recherche et l'innovation dans les organisations (CEFRIO) (<https://cefrio.gc.ca/fr/enquetes-et-donnees/netendances2017-portrait-numerique-foyers-quebecois/>)

¹² <https://www.fairplaycanada.ca/>

¹³ Motion before the CRTC

(<https://static1.squarespace.com/static/5a6cf478edaed87d3b78d1c6/t/5a6f350471c10beb5b4537aa/1517237511355/Francjeu+Canada+CRTC+Report+2018-01-29+FR.pdf>)

¹⁴ Section 41.25 and subsequent sections in the CA

¹⁵ Section 38.1 of the CA

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time and still considers that there should be **only one class of damages, with penalties of \$500 to \$20,000¹⁶ for each violation regardless of the purpose pursued.**

Private Copying for Audiovisual

According to the World Intellectual Property Organization (WIPO)¹⁷, 31 countries had a private copying system in their national legislation in 2016, 80% of which was for audiovisual works.

In 2012, Canada missed an opportunity to follow the international trend by enhancing its private copying system to make it a compensation tool adapted to digital consumption. It is time to remedy this situation.

We call on the government to expand the scope of the Canadian private copying system¹⁸ to include audiovisual works, to require royalties on all media, memory, and devices used by consumers to copy works covered by the system, and to stipulate that the producer is one of the rights holders.



Helen Messier
Chair-Executive Director

¹⁶ Paragraph 38.1(1)(a) of the CA

¹⁷ WIPO - International Survey on Private Copying — Law and Practice 2016
(<http://www.wipo.int/publications/en/details.jsp?id=4183>)

¹⁸ Section 79 and subsequent sections in the CA

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