

December 10, 2018

**Members of the Standing Committee on Industry,
Science and Technology**

Dear Sir/Madam,

Re: Canadian Media Producers Association submission to the statutory review of the *Copyright Act*

INTRODUCTION

The Canadian Media Producers Association (the “CMPA”) welcomes the opportunity to make submissions to the Standing Committee on Industry, Science and Technology (INDU) for its statutory review of the *Copyright Act* (the “Act”).

The CMPA is the country’s leading member-based advocacy organization for independent producers. We represent hundreds of companies engaged in the development and distribution of English-language content made for television, cinema, and digital media channels.

The independent production sector is a key contributor to Canada’s creative economy, creating more than \$3.3 billion in Canadian content production activity and 67,800 full-time equivalent jobs last year.¹ Canada’s independent producers play a critical role in strengthening Canadian identity and sovereignty in the Internet age and in establishing a vibrant digital content marketplace. To fulfil that role, independent producers require a modernized *Act* that incentivizes them to invest in compelling

¹ *Profile 2017: An Economic Report on the Canadian Film and Television Production Industry*, produced by the CMPA and the Association des producteurs de films et de télévision du Québec (APFTQ), in conjunction with the Department of Canadian Heritage, <http://cmpawebsite.wpengine.com/wp-content/uploads/2018/04/Profile-2017.pdf> (“Profile 2017”), p. 4.

Canadian content for the enjoyment of Canadians and audiences around the world.

NOW IS THE TIME TO UPDATE OUR COMMUNICATIONS FRAMEWORK

Our broadcasting, telecommunications and copyright legislative framework is the backbone of our current vibrant domestic market. But, we are now at a crossroads; a pivotal point in the digital economy. Over-the-top foreign platforms, like Netflix and Amazon, are drawing Canadian audiences and subscribers away from our domestic broadcasters and cable companies, causing reduced funding to Canadian programming. These issues are front and centre in the Government’s review of the *Broadcasting, Telecommunications and Radiocommunications Acts* and it is imperative to recognize the interplay between that legislative review and this one. Put simply, our system must be modernized to require foreign OTT services operating in our country to contribute to the production of Canadian content or there will be no more Canadian copyright to review.

ONLINE PIRACY AND THE NEED FOR INJUNCTIVE RELIEF

Creators, producers and other rightsholders require stronger tools under the Act to fight online piracy. Piracy remains a major issue in Canada. In 2015, approximately 267 million movies and TV shows were illegally downloaded using BitTorrent in Canada. Canada is ranked at 11 in the world for piracy of television – with over 2.5 billion visits to piracy sites in 2017.² A May 2018 ISED/Heritage Report noted that 26% of consumers reported consuming at least one illegal file online in the past three months, over half of whom claim they did it “because it’s free”.

Canadian rightsholders suffer harm from services that facilitate and profit from large-scale commercial online infringements by denying rightsholders the right to control the integrity of their works, how they are viewed, and the fair remuneration they are entitled to receive. Piracy diverts potential customers away from legitimate sources towards illegal services that do not negotiate or pay to acquire rights. All of this negatively affects rightholders’ revenues, leading to reduced employment and fewer opportunities for creators.

²https://static1.squarespace.com/static/5a68f49af6576e4326f50337/t/5aba7b21575d1f1ca382ed4c/1522170661046/FairPlay_Canada_CRTC_Report_2018_EN.PDF



There is no evidence that piracy is decreasing under the Notice and Notice regime. Rather, it is shifting forms. In 2017, an estimated 314 million pirated movies and television shows were downloaded using BitTorrent in Canada. Today, 30% of online piracy is from P2P download sites and 70% is from web-based sites (including host and link sites)³. There has also been an explosion in pre-loaded set-top boxes – fully loaded android boxes that let people stream content without paying for cable packages or online streaming services.

It is not always easy or possible for a copyright owner to enforce its rights against infringing services, given that those services are often sophisticated and able to conceal their identities and locations. Even if the infringing services were taken-down, the content can simply be reposted quickly.

The best solutions to combatting internet piracy are ones in which all players participate. Internet intermediaries are often best-placed to prevent against large-scale commercial copyright infringement. However, as a result of the “safe harbour” exemption in s. 31.1 of the Act, “network services” such as ISPs and hosting services are exempt from liability if they are only providing the technical means for the infringement to occur. As a result, these internet intermediaries often have little incentive to participate in solutions to prevent online piracy.

Section 41.27 of the Act limits the relief available from a search engine to injunctive relief, as long as the search engine has made only passive and automated reproductions of the copyrighted material and meets certain other conditions. That relief is limited to seeking action and proving infringement against the search engine itself, rather than permitting the rightsholder to seek an order requiring the search engine to block or de-index sites that make infringing content available.

To bring Canada in-step with international best practices,⁴ the Act should be amended to: (1) provide that intermediary exceptions only apply where the service provider is acting in a passive or neutral manner; and (2) ensure that Canada’s safe harbours do not protect intermediaries that have knowledge that their systems are being used for infringing purposes, but take no steps to stop it.

³ Note this is an increase from 56% in 2014.

⁴ See, for example, s. 512 of the DMCA of the US copyright regime. Under it, an ISP will lose its safe harbour if it does not take down and could be exposed to secondary liability for copyright infringement committed by its users. Therefore, ISPs in the US have a strong incentive to remove infringing content.



In addition, the Act does not specifically authorize Canadian courts to grant injunctive orders to require a hosting service or ISP to block access to infringing content (a “site-blocking order”), or to require a search engine to prevent an infringing site from showing up in its search results (a “de-indexing order”). The CMPA proposes that the Act be amended to expressly authorize a court to grant a site-blocking or de-indexing injunction against an intermediary, with worldwide effect. Clear, predictable and fair legislation providing for site-blocking and de-indexing orders would avoid the unnecessary and costly litigation which is otherwise required to protect copyright.

The Canadian Radio-television and Telecommunications Commission (CRTC) recently issued its decision on the FairPlay Coalition’s application to address piracy, determining that it does not have the jurisdiction under the *Telecommunications Act* to implement the proposed website blocking regime.⁵ The CRTC found that the proposed regime would create conflicts with Parliament’s intent with respect to remedies under the *Copyright Act*.⁶ As such, in order to implement such a regime – which was supported by a very large number of stakeholders in the creative industries - the above amendments are required.

This solution would be consistent with international standards. Article 8(3) of the EU InfoSoc Directive instructs member states to “ensure rightsholders 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”.⁷ A number of member states and other jurisdictions have implemented Article 8(3) or its equivalent into their domestic laws⁸.

⁵ Telecom Decision CRTC 2018-384, online: <https://crtc.gc.ca/eng/archive/2018/2018-384.pdf> (the “Fairplay Decision”)

⁶ Fairplay Decision, para. 57.

⁷ Directive 2001/29/ED of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, online at http://www.wipo.int/wipolex/en/text.jsp?file_id=126977 (the “InfoSoc Directive”), Article 8(3).

⁸ See for example, Greece, Belgium and Austria. Article 8(3) of the Directive is embodied in section 97A of the U.K. Copyright, Designs and Patents Act 1988, which authorizes courts to grant a site blocking injunction against a service provider that is aware that another person is using the service to infringe copyright.



RETRANSMISSION

The CMPA is the sole member of the Canadian Retransmission Collective, which has filed a comprehensive submission with the Standing Committee asking, *inter alia*, to make the retransmission regime set out in section 31 of the Act technologically and location neutral. The CMPA fully endorses the CRC's submission which seeks to modernize the retransmission regime.

OWNERSHIP OF A CINEMATOGRAPHIC WORK

The Directors Guild of Canada (DGC) and the Writers' Guild of Canada (WGC) correctly advised this Standing Committee that the current Act does not specify the "author" of a cinematographic work. However, the market has worked out this question long ago and as such, there is no need for any change to the Act with respect to the authorship or ownership of a cinematographic work. Any such change would severely damage the producers' ability to license, sell monetize, and otherwise exploit a cinematographic work. If the Committee is inclined to recommend such a change, it ought to expressly recognize the producer as the author or owner of a cinematographic work.

Rights ownership and exploitation constitute the foundation of the business model for independent production. For many years, government programs, policies and support measures for the production of Canadian programming presume - and, indeed, require - that the producer be the first copyright owner of a film, television or digital work (ie. a "cinematographic work"). Public and private funding sources (whether in the form of equity investment, grants or loans) recognize the key creative role of the producer function, and require that the producer own copyright. For example, the Canada Media Fund and Telefilm Canada's programs in support of television and film development production, distribution and marketing, and international treaty co-productions are all contingent on the producer having copyright in the work. The federal, provincial and territorial tax credit regimes and the retransmission royalty collective societies are also all based on the same premise.

U.S. copyright case law clearly recognizes that the producer is the author and first owner of copyright in



a cinematographic work.⁹ Recognizing any person other than the producer as the author of a cinematographic work could therefore create a needless trade irritant with Canada’s largest trading partner. This is of particular concern in light of the fact that in 2016/17, foreign location shooting in Canada accounted for an additional \$3.76 billion in production volume, creating an estimated 77,000 full-time equivalent jobs.¹⁰ Canadian content production also strongly benefits from sales to the US market, which is based on the fundamental presumption that producers own the copyright in their programs.

On October 3, 2018, the DGC and the CMPA ratified their new Standard Agreement and the question of authorship or ownership of a cinematographic work was not even raised by the DGC in bargaining. The WGC has for many years negotiated with the CMPA regarding the ownership of copyright in development, scripts and finished programs as between writers and producers. The WGC Independent Production Agreement¹¹ provides that the screenwriter owns copyright in the script¹²; gives the Producer and Writer the right to further negotiate copyright ownership in a development proposal, concept or bible¹³, and agrees that for her script, the writer retains the “author’s share” of any secondary use payments for retransmission, performance, communication to the public, private copying, rental and lending rights collected and distributed by collective societies.¹⁴ Of course, these are simply the minimum protections bargained for by the writers: nothing in the agreements precludes the writer and producer from negotiating a higher share of rights for the writer. In exchange for the recognition of these rights and share of royalties in favour of the screenwriter, the IPA does not transfer the screenwriter any copyright interest in the cinematographic work. The market in Canada has already long ago worked out the authorship or ownership of a cinematographic work. As such, there is no need for any change to the Act.

⁹ See for example, *16 Casa Duse LLC v. Alex Merkin et al*, US Court of Appeals, 2d Circuit, June 29, 2015, Docket No. 13-3865, online: <https://cases.justia.com/federal/appellate-courts/ca2/13-3865/13-3865-2015-06-29.pdf?ts=1435588205>

¹⁰ *Profile 2017*, p. 77-79.

¹¹ Available here: <https://cmpa.ca/wp-content/uploads/2017/10/WGC-IPA-2015-2017.pdf> (the IPA).

¹² IPA, section A701.

¹³ IPA, B202, Animation Section 309.

¹⁴ IPA, A709, Animation Section 206, 218, 807.



We thank the Standing Committee for this opportunity to provide our written submissions on the review of the *Copyright Act*, and would be pleased to answer any questions you may have.

Best regards,



Erin Finlay
Chief Legal Officer

