ARRQ

ASSOCIATION DES
RÉALISATEURS
ET RÉALISATRICES
DU QUÉBEC

Brief

submitted by the

Association des réalisateurs et réalisatrices du Québec

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to the

Standing Committee on Industry, Science and Technology

in connection with the

review provided for in the *Copyright Act*

December 10, 2018

Introduction

The Association des réalisateurs et réalisatrices du Québec (**ARRQ**) is a professional union of freelance directors with over 750 members who work primarily in French in cinema and television and on the internet. The ARRQ defends the professional, economic, cultural, social and moral interests and rights of all directors in Quebec, including by negotiating collective agreements with various producers.

In connection with the review provided for by the *Copyright Act* (**Act**), the ARRQ proposes that the Act be amended to reflect current law by clarifying that directors and scriptwriters are authors of the cinematographic work and the first owners of the copyright therein. The effect of that change would be to enhance the ability of directors and scriptwriters to obtain equitable remuneration by allowing them to bargain from a firmer foundation, individually or through collective agreements, with the persons responsible for the commercial exploitation of the works. The amendment proposed by the ARRQ is supported by the FRIC and is in line with the proposals made by the DGC, the WGC, the SACD-SCAM and the SARTEC.

The ARRQ also supports the proposals by the SARTEC and the SACD-SCAM, including the proposals to extend the private copying regime to cinematographic works and to extend the protection of works to 70 years.

The director is one of the authors of a cinematographic work

The Act is silent as to the identity of the author of a cinematographic work. In fact, the Act never expressly names the author of a work, be it literary, dramatic, musical or artistic. It simply says that "the author of a work is the first owner of the copyright therein."[1]

A cinematographic work is generally considered to be a work of joint authorship.[2] The persons who give a work its *original* character, that is, who bring their *skill* and *judgment* to the work, can be considered to be authors of a cinematographic work.[3]

The Quebec and Canadian case law holds that if there are multiple candidates for the title of author of a cinematographic work, the director and scriptwriter will generally be among them.[4] As author of the cinematographic work, alone or with others, the director will be the first owner of the copyright, with the other co-authors, where applicable.[5]

As owner of the exclusive rights, the director may, in principle, control the exploitation of their work, with any other co-owner. That means that the director may permit (or prevent) the distribution of their work and grant (or retain) limited or exclusive rights in the work. If another person who does not have the status of author wishes to be able to exercise rights in the work, they must obtain such rights by contract.[6]

In Canada, under the Act and the case law, the maker of a cinematographic work who has made no original creative contribution to the cinematographic work – whose role is limited, for example, to the transactions needed for financing and distributing the work – has no exclusive

[1] Act, subsection 13(1).
[2] Defined in section 2 of the Act as "a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors (*oeuvre créée en collaboration*)". See *Lachance v. Productions Marie Eykel inc. et al*, 2012 QCCS 1012, aff'd 2014 QCCA.
[3] See *CCH Canadian Ltd. v. Law Society of Upper Canada,* 2004 SCC 13 at para. 16.
[4] See, e.g., *Jean-Claude Chehade Inc. v. Films Rachel Inc. (syndic)*, [1995] JQ No 1550.
[5] Act, subsection 13(1).
[6] Act, subsection 13(3).

rights in the work and must therefore obtain such rights by contract from the first owners of the rights in the work, one of whom is the director.

Ambiguity concerning ownership of the copyright in the cinematographic work

Under the Act and the Canadian case law, the director is considered to be one of the first owners of the copyright in the cinematographic work and one of its co-authors. That position is consistent with the European copyright tradition (as opposed to the American copyright tradition) which holds that the status of author of the work attaches to the person of its creator: in relation to a cinematographic work, the director and scriptwriter.[7]

In practice, however, there is a degree of ambiguity on this subject in Canada. In particular, some argue that the maker of the cinematographic work is, if not the author, at least the first owner of the copyright, as is the case in practice in the United States, for example.[8]

Those who argue that position say that the director has no copyright to assign to the maker to allow the exploitation of the cinematographic work. One version of that position was maintained by the AQPM in this consultation process.

Ambiguity maintained by the present wording of the Act

The present text of the Act contributes to that ambiguity, at least in part, by referring to the maker several times in contexts that could lead to confusion.

The "maker" is defined in section 2 of the Act as, "in relation to a cinematographic work, the person by whom the arrangements necessary for the making of the work are undertaken (*producteur*)".

The concept of maker essentially appears in only three places in connection with a cinematographic work:

(1) In paragraph 5(1)(*b*), which provides that copyright in a cinematographic work exists where "the maker, at the date of the making of the cinematographic work, (i) if a corporation, had its headquarters in a treaty country,[9] or (ii) if a natural person, was a citizen or subject of, or a person ordinarily resident in, a treaty country". While this ties the maker's nationality to the existence of copyright in the work, it does not suggest that the maker could be considered to be the author of the work.

(2) In paragraph 34.1(1)(*b*), which provides that where the existence of copyright or the plaintiff's title to copyright is put in issue in proceedings under the Act, "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". Here, the maker in question is apparently the maker of a sound recording. However, because the paragraph does not specify this, and because the general definition of "maker" includes the maker of a cinematographic work, this leads to ambiguity.

(3) In paragraph 34.1(2)(*c*), which provides that where the existence of copyright or the plaintiff's title is put in issue in proceedings under the Act, and no assignment of the copyright, or licence granting an interest in the copyright, has been registered, "if, on a

[7] See, for example, Directive 2006/115/EC, article 2(2), which provides that in the Member States of the European Union, the principal director of a cinematographic work is considered as its author or one of its authors.

[8] Although the American legislation does not provide for presumptions as in France, an audiovisual work is generally described as "work for hire" in contracts between the maker and the various artisans of the cinematographic work, the effect of this being not only to transfer the exploitation rights to the maker, but also to identify the maker as the author of the work.

[9] Treaty countries include Berne Convention countries, UCC countries, WCT countries or WTO Members.

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". That paragraph does not create a presumption that the maker holds the copyright; it creates a presumption only of the status of maker.

The concept of "maker", applied to a cinematographic work, is of clearly limited use in the present version of the Act; however, it nonetheless contributes to maintaining the ambiguity regarding ownership of copyright and the identity of the author of the cinematographic work:

- by allowing the nationality of the maker to be made a condition of the existence of copyright, a situation normally reserved for the author of a work (paragraph 5(1)(*b*));
- by not specifying that the maker, the presumed author of the work in relation to which no assignment or licence has been registered, is the maker of the sound recording and not the maker of the cinematographic work (paragraph 34.1(1)(*b)*); and
- by introducing a presumption in favour of the maker in a section that otherwise provides presumptions concerning the status of author and ownership of copyright (paragraph 34.1(2)(*c*)).

Value of a limited amendment to the Act

The ambiguity described in the preceding section impedes the ability of Quebec and Canadian directors, as creators of cinematographic works, to obtain equitable compensation for their work.

The economic context in the audiovisual industry is based on individual and collective bargaining between the initial rights holders and the persons in charge of exploiting the cinematographic works. Under current practices, creators grant licences or assign their copyright to the makers in charge of exploiting the cinematographic works.

The effect of denying directors and scriptwriters the status of author or of first owners of copyright in the cinematographic work, for example, by granting that status to the maker, as the AQPM proposes, would be to significantly reduce the ability of directors and scriptwriters to bargain equitable remuneration with makers.

In addition, if granting ownership of copyright to the maker were not accompanied by a revision of the method of remunerating directors and scriptwriters, for example, by introducing a right to equitable remuneration governed by a collective administration of copyright regime like the one provided by the Act for sound recordings, the result would be expropriation at the expense of the real creators in the cinematographic industry.

The effects of that ambiguity and of the threats of expropriation resulting from proposals like those made by the AQPM are particularly important in circumstances in which we are seeing multiple forms of exploitation of works on various platforms and where Canadian copyright is under heavy pressure from other jurisdictions, in particular the United States, that assign ownership of copyright to the maker (but where collective agreements provide for royalties to directors).

These concerns reflect the goals stated by the Ministers, Mr. Bains and Ms. Joly, in their letter to the chair of the Standing Committee on Industry, Science and Technology, and in particular the following two questions that are intended to guide the review of the Act:

- *How can we ensure that the Copyright Act functions efficiently to foster a marketplace that is transparent, promotes innovation and access for users, and supports creators in getting fair market value for their copyrighted content?*

- *[H]ow can our domestic regime position Canadian creators, users, and innovators to compete on and harness the full potential of the global stage?*[10]

It would be wise, as part of the review of the Act, to remedy the ambiguity concerning the status and rights of the director in a cinematographic work in Canada.

The ARRQ proposes to amend section 34.1, which introduces presumptions concerning the status of author and first owner of copyright. The amendment proposed in the appendix is intended to specify clearly that unless otherwise proved, and where no assignment or licence has been registered, the director is one of the presumed authors of the cinematographic work and one of the first owners of the copyright in the cinematographic work, in accordance with the interpretation adopted by the Quebec and Canadian courts. The effect of an amendment of that nature would be to protect all directors and scriptwriters, whether or not they are members of the ARRQ or another professional organization.

That amendment certainly does not introduce novel concepts; it would simply confirm the current law and validate industry practices. Eliminating the ambiguity concerning the identity of the authors and first owners of the copyright in a cinematographic work would bring stability to the existing model, which relies on standard contracts and collective agreements that allow for effective transfer of copyright to the persons in charge of exploiting cinematographic works.

The clarification that would be provided by the amendment would further facilitate the collective administration of copyright in cinematographic works, in particular by simplifying the discussion before the Copyright Board (**Board**) regarding a future draft tariff, since the Board would then not need to rule as to the first ownership of copyright in a cinematographic work and could focus on the amount of the royalties and the terms and conditions of use of the works. That possibility would be particularly effective since the anticipated reform of the Board, introduced by Bill C-86, promises to modernize and revitalize the Board.

In addition, the proposed amendment of section 34.1 would not call for amendments to the most fundamental sections, such as the definition of cinematographic work or section 13 concerning ownership of copyright. It would result in what are very modest changes and would not have a great effect on the general scheme of the Act, given that cinematographic works already have special status in the Act and the maker is expressly identified in it. The change would also be less complex than adding provisions relating to a right to equitable remuneration, which would be necessary in order to avoid expropriation of the rights of creators in the event that the maker were assigned the status of author or copyright owner.

[10] Letter from the Minister of Innovation, Science and Economic Development and the Minister of Canadian Heritage, submitted to the Committee concerning the Copyright Act, December 14, 2017, at p. 3. Our emphasis.

APPENDIX

Proposed Amendments

(a) Proposed amendments

Presumptions respecting copyright and ownership

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.

(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.

(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.

Where no grant registered

(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,

(*a*) in the case of a performer's performance, a sound recording, a communication signal or a work other than a cinematographic work,

(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

Présomption de propriété

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) 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) 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.

Aucun enregistrement

(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*)** dans le cas d'une œuvre autre qu'une œuvre cinématographique,

(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.

(b) Proposed amendments, final version

Presumptions respecting copyright and ownership

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.

(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.

Présomption de propriété

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) 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.

Where no grant registered

(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,

(*a*) in the case of a performer's performance, a sound recording, a communication signal or a work other than a cinematographic work,

(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;

(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.

(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.

Aucun enregistrement

(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 l'a été enregistré sous l'autorité de la présente loi :

***a*)** dans le cas d'une œuvre autre qu'une œuvre cinématographique,

(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) 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; et

***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.