

**THE CANADIAN FILM AND TELEVISION
PRODUCTION ASSOCIATION**

**SUBMISSION TO
THE STANDING COMMITTEE ON CANADIAN HERITAGE**

**Re: Review of the *Copyright Act* in response to the October 2002
Minister's report, *Supporting Culture and Innovation:
Report on the Provisions and Operation of the Copyright Act***

15 September 2003

Christine Fisher, Clerk
House of Commons Standing Committee on Canadian Heritage

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House of Commons
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The Canadian Film and Television Production Association (CFTPA) is pleased to provide its comments to the Standing Committee on Canadian Heritage regarding the statutory review under section 92 of the *Copyright Act* in response to the Minister's October 2002 report entitled *Supporting Culture and Innovation: Report on the provisions and operation of the Copyright Act*. The CFTPA requests to appear before the Committee to elaborate on the views expressed in this submission.

The CFTPA represents the interests of over 400 companies engaged in the production and distribution of English-language television programs, feature film and multi-media products in every region of Canada. Our member companies are significant engagers of Canadian creative talent and bring together the writers, directors, production designers, directors of photography, performers, music composers, editors, production crew and post-production lab crafts people that contribute their arts and skills to our productions. As content creators, copyright, the protection of intellectual property rights, is fundamental to the economics of producing in Canada, particularly in view of our efforts to compete in the global marketplace with a relatively small home market base.

The Government of Canada's stated objectives in undertaking a statutory review of the *Copyright Act* are to provide better copyright protection, to ensure that the legislative is responsive to technological innovation, and to establish a fair, clear and efficient framework for the creation and dissemination of copyright-protected works. A number of factors – including rapidly changing technology, globalization, international treaties and trade agreements – have a profound impact on those who create works of intellectual property.

The Copyright Board of Canada is the economic regulatory body that establishes the royalties to be paid for the use of copyrighted works where the administration of such copyright is entrusted to a collective administration society. The scope of its work is enormous and the complexities of its wide-ranging portfolio are immense. It is of enormous value to our industry. As part of the copyright review process, CFTPA would welcome the introduction of measures (revisions to the filing cycle, increased staffing, etc.) that would improve the Board's ability to publish tariffs in a timely manner that is at minimum coincident with the start of the period the tariff covers.

The Association's submission addresses three key copyright concepts: authorship of films and videos (A.1.1); educational exemptions to copyright protection (B.2.7 and B.2.9); and the application of a private copying regime for audiovisual works (B-3, identified as a medium-term legislative goal, related to the Act's responsiveness to issues arising from the use of digital technologies).

Authorship of film and television products

Section A.1.1 asks whether the *Copyright Act* should be amended to specify who is the author in a film or video. Since "the author" is the first owner of copyright in the work, this matter is of critical importance to the CFTPA. The Association has long maintained that the producer is the author of an audiovisual work. The producer is the person (in the greater legal sense, including corporations) who takes on the overall risk of creating the work, of assembling the creative team to realize the project, of securing the financing and of overseeing the completion and distribution of the work. As a result, it is the producer who is entitled to be first owner of copyright.

The various programs, policies and support measures that have been put in place in this country since the early 1970s to enhance the production of Canadian drama, documentary, children's and performance programming are all predicated on this notion as a matter of first principle. The *Broadcasting Act* recognizes and endorses the essential role of the independent production community in the creation of Canadian film and television programming. Public and private funding sources (whether equity investment, grants or loans) recognize the key creative role of the producer function. The Canadian Television Fund and Telefilm Canada's programs in support of television and film development and production, distribution, marketing, aboriginal projects, and international treaty co-productions are all contingent on producer having copyright in the work. The federal, provincial and territorial tax credit regimes and the retransmission royalty collectives are all based on the same premise.

If the Government were to uphold a position that any person other than the producer should be recognized as the "author" of an audiovisual work, this could be perceived as a significant irritant by Canada's biggest trading partner in audiovisual works, the United States. America's copyright legislation clearly and unequivocally states that the producer is the author and first owner of copyright in audiovisual works.

Further, as much as 35% of Canada's production output in 2001/2002 (\$1.8 billion of \$5.1 billion) was attributable to foreign location production (US productions that are shot in Canada). The Canadian government recognizes the significant economic benefit of such productions by providing financial incentives by permitting foreign studios that choose to produce in Canada to deduct a portion of their qualified Canadian labour expenditures. The Foreign Services Production Tax Credit, formerly pegged at 11% was increased to 16% in the February 2003 budget.

Canadian content production also strongly benefits from sales to the US market. These transactions are based on fundamental assumptions about producer ownership of copyright.

If Canada were to put in place a copyright system that is based on a different premise, this would create a serious anomaly within the North American environment. Canada's active participation in NAFTA is clearly an expression of the Government's desire to facilitate trade with its largest partner. While copyright ownership is not an obvious feature of trade, *per se*, a move to introduce new beneficiaries into the copyright structure could be seen as hostile to US production interests and inconsistent with how Canadian productions are financed.

To explain our position, we would like to cite an analogous situation, which applies in the case of sound recordings. Under the *Copyright Act*, the “maker” of a sound recording – the person who undertakes to make the necessary arrangements for the first fixation of the sounds, which is clearly the record company – is the first owner of copyright. The existing legislation already contains a parallel definition of maker in relation to a cinematographic work. It would be logical to extend this principle to the person who undertakes the arrangements necessary for the first fixation of an audiovisual work. This person is the producer.

The notion that entitlement to the benefits of copyright should be shared by those with technology-facilitated access or those having a moral underlying interest as a creative participant in the production process holds the potential for a far more significant negative impact. The implications of broadening the first owner beyond the producer would result in a vast number of changes to other government legislation, regulations and policy at the Department of Finance, CRTC, the Canadian Audio-Visual Certification Office at Canadian Heritage, Telefilm Canada, Canadian Television Fund, National Film Board of Canada, etc.

CFTPA would like to emphasize that first ownership in the hands of the producer in no way disenfranchises other players. Copyright is a resilient concept and can be the source of negotiated agreements to share benefits. This is the foundation of all labour agreements that the Association has with the unions and guilds that participate in the creation of film, television and new media productions, and the basis for the contracts involved with the commercial exploitation of the production.

Educational exemptions

Sections B.2.7 and B.2.9 of the Report address issues concerning educational exemptions, including extending the exception for educational use to material that is freely available on the internet and permitting the showing of films and videos on the premises of an educational institution.

CFTPA acknowledges that public policy may dictate that, in certain instances, copyright material for educational purposes can only practically be made available via compulsory licensing, subject to fair remuneration being paid to a collective for such use. To this end, the Educational Rights Collective of Canada has established principles, rights and tariffs governing the use of copyright material in an educational environment. Where such a collective is in place, nothing should impinge on the ability of the collective to receive fair and reasonable compensation on behalf of its membership.

Extension of the private copying regime to audiovisual products

Section B.3 addresses matters related to the private copying special regime for music, introduced by Bill C-32. Technological developments (digitization, the Internet, file compression) have made access to cultural products much easier. But this should not mean free access. There has been much coverage in the print and broadcast media in recent days concerning actions being taken by the music recording industry to protect itself from the illegal copying of music files.

Among the points raised for discussion on page 31 of the Report is whether the private copying regime should be expanded to include audiovisual works. CFTPA wholeheartedly endorses this view. CFTPA notes the enormous inequity in the present legislation between music creators and creators of audiovisual products with reference to blank tape levy compensation. From our perspective, the principle of fair compensation for use must be extended to the unauthorized copying of television, new media and film productions.

Conclusion

The Minister's October 2002 report noted the profound impact on traditional notions of copyright policy and law that have been brought about by such factors as digital copying and the use of the Internet as a means of providing immediate, worldwide transmission. The CFTPA has long supported the implementation of ISAN as a means of providing Canadian content creators with a tool for protection against the unlicensed copying of their work.

The International Standard Audiovisual Number is an important and efficient means of tracking registered audiovisual works. ISAN provides a unique, internationally recognized, permanent identifier for feature films, television programs, broadcasts of live events, educational and training films, commercials and multimedia works. The number serves to identify audiovisual works across national boundaries and language barriers, regardless of the format in which the work is disseminated.

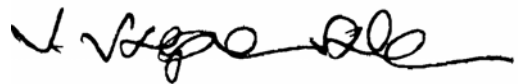
Among other benefits, the existence of ISAN provides the foundation for the electronic exchange of information, an essential ingredient in the fulfillment for tracking, rights clearance and delivery of works online. Without this tool, there is no standardized or common lexicon with which users and rightsholders can speak to each other, no ability to identify with certainty a work that a particular user may wish to access. ISAN has particular value in identification and tracking the use of audiovisual works through computerized databases, such as those used by copyright collectives in their administration of various royalty regimes. The Government's encouragement of ISAN registration for Canadian audiovisual works will have immeasurable positive impact in all of these activities as well as anti-piracy applications.

There is one further point that the Association would like to make. As we have stated in previous appearances before the Standing Committee, CFTPA considers it unusual that two different government departments have oversight of copyright. Consumer and technology interests (which rest with the Department of Industry) are often philosophically at odds with the interests of producers and the creative community (which falls within the responsibilities of the Department of Canadian Heritage). The matter is further compounded by the fact that many of the technological issues ultimately come under the regulatory purview of the CRTC, which answers to both Industry and Heritage. In our view, it would be more appropriate if either the Department of Industry or Canadian Heritage or a reconstituted Department of Communications were given sole responsibility for copyright matters.

CFTPA endorses the Government's intention to protect and enhance knowledge as a factor in Canada's economic success and cultural development. The Section 92 review of the copyright legislation is an important and necessary means of achieving this goal. The Association welcomes this opportunity to provide our views and will be pleased to participate in the upcoming review process.



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