Writers Guild of Canada

Written Answers to Questions to the Standing Committee on Canadian Heritage on Remuneration Models for Artists and Creative Industries (*Copyright Act*)

November 12, 2018

I. Introduction

The Writers Guild of Canada (WGC) is pleased to provide written answers to questions pursuant to our appearance before the Standing Committee on Canadian Heritage (the Committee) at Meeting 126, held on October 23, 2018, regarding the Committee's study entitled "Remuneration Models for Artists and Creative Industries", undertaken in connection to the statutory review of the *Copyright Act* (the Act).

The WGC also looks forward to filing a written brief in support of our comments in this matter.

II. Written Answers to Questions

The WGC is pleased to respond to the following question, provided to us by the Clerk of the Committee via email on October 26, 2018:

> ***Neal McDougall***
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> *In your presentation, you say we need to clarify the role of author and screenwriters and said that producers are not authors. How do you reconcile or respond to the view express by the Canadian Media Producers Association?*

The WGC strenuously disagrees with the view expressed by the Canadian Media Producers Association (CMPA), namely, that the producer is or should be the author of cinematographic works for the purposes of the Act, and not jointly the screenwriter and director. We submit that the CMPA's view is simply incorrect.

Section 5 of the Act provides that copyright can only subsist for "original" works. The author of a work should therefore be the individual who gives the work its "original" character. Collins Essential English Dictionary[1] defines an "author" as either the person who writes a book, article or other work, or "an originator or creator". Professor David Vaver argues that the author of a cinematographic work should be whomever was responsible for creating its original dramatic character.[2] Authorship is a *creative* endeavour. Black's Law Dictionary, defines a "work of authorship" as the product of creative expression[3]. Chief Justice McLachlin of the Supreme Court of Canada noted "an original work must be the product of an author's exercise of skill and judgment".[4]

It is jointly the screenwriter and director that exercise an author's skill and judgement to create an original work under the Act. 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. The director imagines the world of the story and the people who inhabit

[1] Collins Essential English Dictionary, 2nd edition.
[2] David Vaver, *Copyright Law* (Toronto: Irwin Law Inc., 2000) at 82.
[3] *Black's Law Dictionary*, 8th ed., s.v., "work".
[4] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at para. 25, [2004] 1 S.C.R. 339.

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 as rendered in audiovisual form.

In her presentation to the Committee on behalf of the CMPA, Erin Finlay said:

> *Finally, we strenuously oppose the writers' and directors' efforts to be made joint authors of copyright in a cinematographic work. The market has long ago worked out this question, and no change is required to the Copyright Act regarding the authorship or ownership of a cinematographic work.*

The WGC submits that the question of authorship under the Act is a question of law and of fact, which is not something for the "market" to "work out". To the extent that the question of authorship is an interpretation of the Act, it is a matter for courts of law to determine. To the extent that the question of authorship can be clarified in the Act, it is a matter for the Parliament of Canada to determine, based on the factual reality of who does the work of an author. "The market" has not performed and cannot perform either of those roles. Indeed, we struggle to understand what it means to say that "the market has…worked out" the question of authorship under the Act, anymore than what it would mean to say that the market has worked out the question of what are the legal meanings of theft, or breach-of-contract, or negligence, or motor vehicle speed limits, or the Notwithstanding Clause in the Canadian constitution. The market doesn't "work out" the meaning of the *Copyright Act*—the *Copyright Act* establishes the law and courts interpret that law. The Act sets the intellectual property ground rules that helps allow a market in intellectual property to function; the market does not determine the content or meaning of the Act itself. As we will expand upon below, it is a matter of fact that screenwriters and directors do the work of authors, and it is a matter of law that the Act already reflects this. We simply propose that the Act be clarified to this effect.

In his presentation to the Committee on behalf of the CMPA, Stephen Stohn said:

> *For decades, the producer has been treated as the author throughout the Canadian and, importantly, United States industries.*

This comment begs the question: Treated as the author by *whom*, for *what purpose*, and *which* producer? To the extent that Mr. Stohn may be saying that the producer has been treated as the author throughout Canada *by the law* for the purposes of the *Act*, this is simply incorrect. 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.*.[5] 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. As the only judicial decision on this question in Canada, this case establishes the legal reality in Canada.

To the extent that Mr. Stohn may be saying that some other party or parties—or all parties—in Canada have treated the producer as the author for some other purpose, we submit that this is both wrong and irrelevant. For its part, the WGC has never treated producers as authors, and to the contrary we have

[5] [1995] J.Q. no 1550 (QL).

been arguing that screenwriters are authors for over 20 years, including in submissions to government in 1999, 2001, 2003, and 2009. Moreover, as we've indicated above, neither "the market", nor private individuals, nor anybody other than Parliament (in its role in making the Act) or the courts (in their role in interpreting the Act) can meaningfully determine the wording and/or interpretation of a statute such as the *Copyright Act* or any part thereof. The rules of Canadian content funding programs, for example, such as those of the Canadian Film or Video Production Tax Credit (CPTC) under the *Income Tax Act*, may require that the Canadian producer(s) retain copyright ownership in the production, but that is *not* the same thing as saying that producers are authors under the *Copyright Act*. As discussed in more detail below, producers can and do acquire such ownership in industry-standard business agreements with screenwriters and directors, and that would continue under the WGC's proposed amendment. Such a practice is and would continue to be consistent with the CPTC or other funding programs. Authorship and ownership are two distinct concepts, and a requirement that Canadian producers obtain *ownership* under one Act or set of rules does not endow them with *authorship* under the *Copyright Act*.

Finally, Mr. Stohn's comment refers to how producers are treated with respect to authorship in the United States. Mr. Stohn is correct that, under U.S. law, producers—or, more often, corporate entities, such as production studios—are considered authors. However, the present discussion is with respect to Canadian law, not U.S. law, which differ from each other substantially. The United States is an international 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.[6] There is no similar concept in the Canadian Act regarding a deemed transfer of authorship in the case of an employment relationship. Further, the term of copyright in the U.S. for an audiovisual work, unlike Canada, is not tied to the life of the "author". The U.S. approach is also inconsistent with that of many European states, such as France, Italy, and Spain, all of which define authors as individuals in key creative roles, including the screenwriter and the director. The U.S. approach is therefore anomalous from an international copyright law standpoint, incompatible with the Canadian Act, and should not be followed in Canada.

Stephen Stohn further said:

> *Television and filmmaking are collaborative endeavours. Producers bring together all the creative elements to get a project from concept to screen. We hire and work closely with all the key creative roles. We work with the screenwriters—we love the screenwriters—to turn ideas into scripts. We hire directors, whom we equally love, to help turn scripts into projects. We also love and work with the actors. Who can imagine a show without the actors and their creative input? We hire the production designers who make the sets, the wardrobe designers, the composers and the musicians. Who can imagine a show without music? It's vital. We work with editors and crews, among many others, to shape the project and bring our collective vision to the screen.*
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> *Screenwriters, directors, and all the other contributors are important partners of producers, and we value all those relationships tremendously. After all, television programs and feature films are the ultimate collective works.*

[6] U.S.C. tit. 17 § 201 (2000).

The WGC submits that the question at hand is not who is "vital" to a production, or who we "cannot imagine a show without", or who "brings together" the work of others but, simply, who is an author. To answer that question, we submit that the test is *not* who is "necessary", "unimaginably absent", or who does the hiring, nor should it be. Rather, as described above, the test should be as articulated by the Supreme Court of Canada: "an original work must be the product of an *author's exercise of skill and judgment*".[7]

Virtually every production engages a production accountant, whose job includes ensuring that every member of the cast and crew is paid for their days, weeks, or months of work. Indeed, the production accountant's job is vital, since a production that does not pay its cast and crew will not have a cast and crew to carry on the production after the first pay period. Yet this role involves no creative, authorial contribution to the final production whatsoever. On the contrary, their job is virtually identical from one production to the next, not matter its content, and in fact the accountant may not know what the film or TV show they're working on is even about in order to do their job. The same could be said for drivers that ensure that key cast and crew make it to set on time, gaffers that ensure electrical systems operate safely and effectively, or camera assistants whose job is to ensure that cameras operate in good working order. All of these roles are vital, because the production could not effectively continue without them. None of them, however, are authors.

Ironically, Mr. Stohn's comment lists the many creative roles involved in a production, only to argue that, in fact, *none* of them are authors, since the CMPA's position is that only producers are authors. It is puzzling to us why Mr. Stohn and the CMPA would emphasize how important these contributors are in the context of a discussion of authorship under the Act, only to then conclude that they are not that important after all for these purposes, because only the producer truly is. Further, there are often *many* producer roles on a given production, but the CMPA does not clarify *which* producer(s) should be considered authors. An Executive Producer might only help to arrange financing, a Line Producer might only work on a few episodes and/or work in a production logistics capacity only, or a producer credit might be purely a courtesy credit. Would they *all* be considered authors by the CMPA? If not, which ones count and which don't, and on what basis? This is not explained.

Mr. Stohn's comment also conflates several different types of roles that are already recognized as different and distinct under the Act. Mr. Stohn mentions actors—"Who can imagine a show without the actors and their creative input?", he says—yet the Act already recognizes actors (and others) as "performers", and *not* authors. Performers may have certain rights in their own performances, but the Act clearly recognizes that "performers' performances" are a separate category than works of "authorship".[8] Moreover, producers themselves are already recognized in the Act as "makers". 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] A "maker" in the Act is "in relation to a cinematographic work, the person by whom the arrangements necessary for the making of the work are undertaken".[10] A producer is clearly a "maker", and a maker is clearly distinct from an author under the Act, since they have different meanings, are used differently, a maker can be a

[7] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at para. 25, [2004] 1 S.C.R. 339.
[8] The Act, Part II.
[9] Collins Essential English Dictionary, 2nd ed., s.v. "producer".
[10] The Act, s.2.

corporation[11] while an author cannot, and the French translation of "maker" in the Act is "*producteur*". **The Act clearly contemplates these three different types of roles—author, performer, and maker—and endows them with different rights, and one does not become one of these roles simply by virtue of being one of the other two.** Screenwriters and directors are, jointly, authors. Producers are makers.

Finally, Mr. Stohn says, "We work with the screenwriters—we love the screenwriters—to turn ideas into scripts." It is widely held, however, 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. The argument that producers provide ideas that screenwriters turn into scripts, is frankly an admission that producers provide non-copyrightable elements which screenwriters turn into copyrightable "works" under the Act, with screenwriters being the authors of those works. An author is one who creates a work, not one who simply provides ideas.

Naturally, a producer may *also* write or direct, in addition to being a producer, and if they did so then they would be considered an author under the Act, but their authorship would come from their role as screenwriter and/or director, not from their role as producer. The existence of "hyphenate" roles like "writer-producer" or "producer-director" does not change the nature of the specific roles on either side of the hyphen.

Stephen Stohn further said:

> *I'll put this in context. As you know, I produce Degrassi. We have now delivered 525 episodes over nearly 40 years. The most recent four seasons have been licensed originally to Netflix, where they're seen in 237 territories, in 17 different languages. It has been a success story.*
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> *To suggest that, for example, a screenwriter we hired to write episode 487, long after the characters, settings, formats, scenes, plot, storylines and music have already been in place for years and years, ought to be considered the author of that episode is simply wrong. However talented that screenwriter may be, she is working off a foundation—an ongoing foundation—and creative expression that has been built up over many years by many different contributors.*

Mr. Stohn is simply wrong, because if, as he implies, authorship cannot vest in a subsequent episode of a production, be it Episode 487 or Episode 4, then such episodes cannot have authors at all, in which case producers have no better claim to their authorship as anybody else. Yet this would contradict the CMPA's claim that producers are authors in all cases.

Mr. Stohn's comment also implies that *only the producer* could have been involved in the production from Episode 1 through to Episode 487, and therefore somehow this continuity alone establishes the producer's authorship. Firstly, mere continuity of involvement over the course of a series does not in itself create authorship in it or in each of its episodes. The same production accountant may have been involved with a series from the beginning, but that mere continuity does not make a production

[11] The Act, s. 5(1)(b)(i).
[12] See *Donoghue v. Allied Newspapers Ltd.* (1937), [1938] 1 Ch. 106 at 109.

accountant an author. Secondly, there is no reason why the same producer must be involved in all of those episodes, rather than a screenwriter and/or director. Producers can and do change from season to season, as much or even more so than screenwriters and directors. Indeed, Stephen Stohn himself has sold his production company, Epitome, to DHX, along with *Degrassi* itself.[13] The current series, *Degrassi: Next Class*, credits multiple producers (including Mr. Stohn), and is presumably now owned and controlled by DHX. Who is the author of *Degrassi: Next Class,* according to the CMPA's position? Is it still Stephen Stohn, despite the fact that he apparently no longer owns the rights to the series, contrary to Mr. Stohn's "ownership" argument above? Is it DHX, despite that company not having been involved from Episode 1 of the franchise, contrary to Mr. Stohn's "continuity" argument above? Does it simply have *no* author, because so many elements were established earlier in the franchise's history, despite this being an impossibility under the Act? And what about other examples, such as when a producer is involved in Season 1 of a series but then passes away and their work is carried on by others? Would a deceased producer be considered the author of Season 2, despite having had nothing to do with the production of that season by virtue of being deceased?

These questions cannot be satisfactorily answered, because they are based on the incorrect premise of the CMPA's position. The simple fact is that every work has an author, whether it is the first novel, film, painting, song, or episode of a series, or a subsequent sequel, episode, or derivative work, and the fact that the work may have been based on pre-existing elements, whether those elements were themselves copyrightable or not, does not change that essential fact. Individual episodes of a TV series are individual "works" under the Act—they each have their own copyright and their own authors. Those authors, for cinematographic works, are jointly the screenwriter and director, because their role is the same, whether as part of a serialized work or not.

This can be further illustrated through what may be a popularly known recent example—that of a sequel to a Hollywood feature film. Ridley Scott directed *Blade Runner*, a feature film released in 1982. Canadian filmmaker Denis Villeneuve directed its sequel, *Blade Runner 2049*, released in 2017. Both of these films were ultimately based on a novel, *Do Androids Dream of Electric Sheep* by Philip K. Dick, and Denis Villeneuve's 2017 sequel is based on certain elements of the 1982 Ridley Scott film. But under copyright law, *Blade Runner 2049* is still its own work, with its own copyright, and has its own authors, which under Canadian law would be Denis Villeneuve and the screenwriters, Hampton Fancher and Michael Green. The fact that films like *Blade Runner 2049* are based on previously created elements doesn't mean that they aren't new works, or don't have authors. Indeed, the producers of *Blade Runner 2049* would be surprised to hear that their film, as a sequel, is not a work protected by copyright, or is somehow only protected under the copyright of the original *Blade Runner,* which will expire 35 years sooner! TV episodes, just like sequels, are based on earlier materials, yet they are their own works and they have their own authors. Indeed, even wholly original works not based on pre-existing materials still follow long-established dramatic rules and conventions, such as having protagonists and antagonists, conflict, narrative, an act-based structure, and ageless themes. All art owes a debt to what came before it, but that doesn't deprive it of authorship for the purposes of copyright.

Moreover, being a sequel or subsequent episode doesn't suddenly turn the *producer* into the author. Under Canadian law, Denis Villeneuve is still an author of *Blade Runner 2049.* It is *not* the case that Ridley Scott is an author of the 1982 *Blade Runner*, as its director, but suddenly the producer is

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

somehow the author of *Blade Runner 2049*, and not Denis Villeneuve, just because it's a sequel. The directors, Scott and Villeneuve (and the screenwriters)—are the authors in *both* cases for their respective films. The same goes for Episode 487 of *Degrassi*. The screenwriter and director of Episode 487 of *Degrassi* are jointly the authors of Episode 487 of *Degrassi.* That screenwriter and director of that episode are not authors of the entire *Degrassi* series itself, just of the episode(s) they write and direct. But the mere fact of serialization doesn't transform a producer's role into an author's.

Stephen Stohn further said:

> *A producer's copyright is the foundation for all private and public funding sources for film and television projects in this country and in the United States. Authorship and ownership of copyright in the cinematographic work is what allows the producer to commercialize the intellectual property. Ultimately, we cannot do our jobs as producers if we are not considered, as we are today, authors of the cinematographic work.*

Firstly, as noted above, producers are *not* today considered authors of the cinematographic work. A Canadian court of law decided this question 23 years ago, and the WGC has held this view for about as long.

Secondly, this very fact clearly contradicts Mr. Stohn's argument, because it demonstrates that authorship in the hands of screenwriters and directors does *not* prohibit producers from commercializing productions or intellectual property, in Canada or elsewhere, and has not done so for the past 23 years. Indeed, 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*, not even the CMPA, and producers already contract for the rights to adapt those screenplays into film or TV productions as a matter of course. Films, television, series, and sequels are regularly produced due to standard contracting and chain of title. This also happens where multiple screenwriters, directors, producers, or production companies are involved, such as, as noted above, when *Degrassi* producer Epitome was sold to DHX, along with *Degrassi* itself. Screenwriters and directors don't seek clarification on authorship so that they can "hoard" their rights or prevent the commercialization of their works. That would be contrary to their own interests. Screenwriters and directors seek clarification on authorship, in part, so that they can bargain effectively with producers, on a more level playing field, to transfer those rights to producers to exploit.

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 the current reality 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.

III. Conclusion

Let us not be confused by the conflation of performers (actors), makers (producers), and authors (screenwriters and directors). The issue is the identity of authors under the Act. Screenwriters and directors are the co-authors of cinematographic works in Canada.

We thank the Committee for this opportunity to share the views of the WGC, and are happy to participate in any further discussions or activities in this matter.

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.