BRIEF
by the
Société des Auteurs et Compositeurs Dramatiques (SACD)
and the
Société Civile des Auteurs Multimédia (SCAM)

Submitted to the Standing Committee on Industry, Science and Technology as part of the statutory review of the *Copyright Act*

MAY 2, 2018

INTRODUCTION

On December 13, 2017, the federal government passed a motion to designate the House of Commons Standing Committee on Industry, Science and Technology to carry out the statutory review of the *Copyright Act*,[1] pursuant to section 92. On March 29, 2018, the Standing Committee invited copyright stakeholders to submit briefs. The Société des Auteurs et Compositeurs Dramatiques (SACD) and the Société Civile des Auteurs Multimédia (SCAM) (together known as SACD-SCAM) are responding to this invitation.

Established by Beaumarchais in 1777, SACD now represents 60,139 authors, including 1,421 Canadian authors, and it advocates for the material and moral rights of the entire profession. It is not a union, a business, or a publicly funded corporation—SACD is an international francophone corporation (Paris, Brussels and Montreal) that is responsible for negotiating, collecting and distributing royalties on behalf of its members, who are screenwriters, playwrights, composers, directors,[2] choreographers and stage directors.

SACD's repertoire includes live theatre, plays, choreographies, musical comedies, circus acts and shows, audiovisual works, series, comic strips, cartoons, short features, long features, radio shows and interactive creations.

SCAM was established in 1981 to manage the repertoire of audiovisual works that had previously been managed by the Société des Gens de Lettres (SGDL), founded in 1838 by a group of writers that included Victor Hugo, Balzac, Alexandre Dumas père and George Sand. Today, SCAM has 40,567 members, including 576 Canadian authors. SCAM's repertoire contains primarily audiovisual works, radio documentary programs and literary works.

SACD-SCAM's brief includes the following recommendations:

1) Adding a definition for audiovisual work and clarifying ownership
2) Extending the private copying regime to audiovisual works
3) Ensuring the digital sector contributes to funding culture
4) Extending protection for works to 70 years

[1] *Copyright Act*, R.S.C. (1985), c. C-42 (http://lois.justice.gc.ca/eng/acts/C-42/)
[2] [Translator's note: the French footnote explains that all masculine forms in the French text are to be considered gender-neutral.]

1) Adding a definition for audiovisual work and clarifying ownership

Audiovisual work

The *Copyright Act* gives the following definition for a cinematographic work:[3]

> "includes any work expressed by any process analogous to cinematography, whether or not accompanied by a soundtrack".

This definition is consistent with the one in the *Berne Convention for the Protection of Literary and Artistic Works* (the Berne Convention).[4] It is associated with processes and formats specific to cinematography and soundtrack formats.

Today, the cinema and television sector has become part of the audiovisual sector, making content available beyond traditional television and cinema formats, and the processes to create, produce, broadcast or sell these works have changed as a result.

The World Intellectual Property Organization (WIPO)[5] has long referred to audiovisual works instead of cinematographic works. In 2014, the Beijing Treaty on Audiovisual Performances[6] was adopted; it is an international instrument that takes into account changing techniques and technologies. In addition to referring to the term audiovisual, it includes the following definition:

"audiovisual fixation means the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be perceived, reproduced or communicated through a device." [emphasis added]

While Canada was not a signatory to the Beijing Treaty, it participated in WIPO's work prior to the signing of the treaty, and SACD-SCAM believes Canada can follow this model.

The French intellectual property code provides a very similar definition[7] to what is found in the Treaty, and the definitions in the American Copyright Act[8] are also more recent and very detailed. To update the Canadian *Copyright Act*, SACD-SCAM recommends adopting the following definition:

> **Audiovisual work: includes any cinematographic work and any other work that includes the embodiment of moving images, whether or not accompanied by sounds. [TRANSLATION]**

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[3] Section 2 of the *Copyright Act*.

[4] Article 2(1) of the Act of Paris of July 24, 1971. The Berne Convention came into force in Canada in 1928. It underwent a number of revisions up until the revision under the Act of Paris, which came into force in Canada in 1998 (http://www.wipo.int/treaties/en/text.jsp?file_id=283699).

[5] http://www.wipo.int/portal/

[6] Beijing Treaty on Audiovisual Performances, adopted on June 24, 2012 (http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295837)

[7] Article L112-2 of the Intellectual Property Code (IPC) (https://www.legifrance.gouv.fr/affichCode.do;jsessionid=1F0AFF2D7FDB9576A0E53070D13D85D3.tplgfr37s_2?idSectionTA=LEGISCTA000006161634&cidTexte=LEGITEXT000006069414&dateTexte=20171103) [AVAILABLE IN FRENCH ONLY] [WIPO TRANSLATION: http://www.wipo.int/wipolex/en/details.jsp?id=16750]

[8] U.S. Copyright Act, 17 U.S.C. § 101 (http://www.wipo.int/wipolex/en/details.jsp?id=15060)

Copyright ownership

For a number of years, SACD-SCAM and a number of other audiovisual industry stakeholders have been calling on the government to clarify the matter of rights ownership of a cinematographic work in the *Copyright Act*. As the Berne Convention leaves legislation in this area to each country individually,[9] many countries have had legislation in place for many years, including France, the United Kingdom and the United States, but Canada has not done so.

In Canada,[10] the author's identity often can be determined only by a tribunal after the work has been completed. There is very little case law in this area, and no general guidelines have emerged. Foreign legislation has not led to a general rule either.

Despite the lack of legal certainty in Canada, screenwriters are generally recognized as being the authors of the work. Therefore, SACD-SCAM has successfully negotiated general licences for all Quebec broadcasters on behalf of its members who are screenwriters.

However, this legal grey area penalizes directors, because some users of audiovisual works have taken advantage of the grey area to refuse to negotiate general licences with SACD-SCAM. As a result, directors are currently not receiving the full remuneration they deserve.

With the proliferation of digital environments and new users, we believe it will be very difficult, if not impossible, to make agreements and collect royalties on behalf of members who are screenwriters and directors in some cases unless a new definition for audiovisual work is introduced in the *Copyright Act*—one that specifies that an audiovisual work is a joint work and that includes a presumption of ownership for the screenwriter and director.

I. Joint work

The *Copyright Act* defines a "work of joint authorship" as follows:[11]

> "work of joint authorship means 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".

In the Berne Convention, there is no definition of work of joint authorship. In France,[12] there is no reference to either the intention or to the lack of distinction between contributions, and in the United States[13] the legislation refers to a joint work as being prepared with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

Canada requires that the contribution of the authors not be distinct from each other to be considered a work of joint authorship. This requirement makes it necessary to clarify the status of an audiovisual

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[9] Article 14bis (2)(a) of the Berne Convention
[10] Section 13(1) of the *Copyright Act*
[11] Section 2 of the *Copyright Act*
[12] Article L113-2 of the IPC
[13] U.S. Copyright Act, 17 U.S.C. § 101 (http://www.wipo.int/wipolex/en/details.jsp?id=15060)

work, which is unquestionably a joint work, especially when it comes to determining ownership and the duration of the protection.

II. Presumption of ownership for screenwriters and directors

One last point about legal grey areas: SACD-SCAM believes that the *Copyright Act* must absolutely recognize that screenwriters and directors have ownership of rights for audiovisual works.

A presumption in favour of screenwriters and directors would recognize their creative contribution and their general ownership of rights to audiovisual works. It would also strengthen SACD-SCAM's ability to negotiate general licences with both traditional users and new users on behalf of its members who are screenwriters and directors so that they can receive the remuneration to which they are entitled.

SACD-SCAM recommends therefore that these clarifications be added to the definition of audiovisual that was proposed earlier. As a result, the definition would read as follows:

> **audiovisual work: includes any cinematographic work and any other work that includes the embodiment of moving images, whether or not accompanied by sounds.**
>
> **An audiovisual work is a work of joint authorship and the screenwriter and director are deemed to be co-authors of the audiovisual work.** [TRANSLATION]

However, SACD-SCAM would not be opposed if this presumption of ownership also extended to the composer.

2) Extending the private copying regime to audiovisual works[14]

In 1997, despite calls from the sector to include audiovisual works in the regime, the government implemented a new system for copying for private use that addressed only music. It provided for the payment of levies on blank audio recording media sold in Canada, together with a general authorization to make copies of musical works for personal use. Today, the regime has not changed to match consumption habits, and only audio cassettes and CDs are subject to the levy. Given that consumers are turning away from using these formats, this regime is becoming less effective.

In 2012, rather than updating the regime and including a solution for digital use, a new exception was introduced in the *Copyright Act* that legalized the reproduction of works for private purposes without providing compensation for rights holders. In so doing, the government chose to protect the rights of consumers at the expense of the rights holders.

In 2018, consumers copy cultural content, including audiovisual works, all the time and everywhere. SACD-SCAM believes that authors of audiovisual works should benefit from levies on private copying, now more than ever, and especially in the current context when culture is underfunded and exceptions to the *Copyright Act* are multiplying.

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[14] Part VIII, sections 79 to 88 of the *Copyright Act*

SACD-SCAM is therefore calling on the government to breathe new life into the copying for private use regime by expanding it to all devices used by consumers and by providing for compensation for audiovisual rights holders.

A WIPO study[15] established that, in 2016, of the countries that have a private copying regime, nearly 80% had a distribution scheme for audiovisual works that applies not only to a recording medium, but also to memory cards and devices. We would be following in the footsteps of France, Germany, Italy and Spain,[16] to name only a few.

3) Ensuring the digital sector contributes to funding culture

Currently, in the audiovisual sector, broadcast distributors (cable companies, satellite providers, etc.) need to contribute to the creation of audiovisual content based on their subscription revenues. However, these revenues are declining, while digital consumption of audiovisual content is increasing exponentially. Despite the additional contribution to the Canada Media Fund announced in the budget on February 27, 2018, culture funding is no longer in step with consumption habits.

It is extremely important and urgent that all digital stakeholders contribute to funding not only audiovisual content, but all cultural content. Similar to broadcasting distributors, they deliver it to their subscribers or give access to that content and they profit from it. In the same way, just like broadcasting distributors, they should contribute a percentage of their revenues to go toward funding culture.

In addition, more cultural content is offered by foreign companies than by domestic companies. Foreign e-commerce companies that offer cultural content, such as Netflix or iTunes, are not subject to Canadian sales tax, even if their subscribers are Canadian. In the last budget, Minister Morneau emphasized the importance of tax equality and announced that the government would take steps with other countries to find tax solutions to e-commerce. To level the playing field and to reflect the new ways people consume cultural content, we are asking the government to impose Canadian sales tax on foreign e-commerce companies and to put some of the funds collected toward funding culture.

4) Extending protection for works to 70 years[17]

The general rule in the Berne Convention[18] is that protection is extended for the length of the author's life plus 50 years after their death.[19] This is a minimum condition, but Canada chose to adopt this duration and has maintained it up until now.[20] However, the United States,[21] France[22] and the United

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[15] WIPO - International Survey on Private Copying – Law and Practice 2016 http://www.wipo.int/publications/en/details.jsp?id=4183t

[16] Spain just re-introduced its private copying levy system: http://www.saa-authors.eu/en/news/412-saa-welcomes-reintroduction-of-private-copying-levies-in-spain

[17] Sections 6 to 12 of the *Copyright Act*

[18] Article 7(1) of the Berne Convention

[19] Section 6 of the *Copyright Act*

[20] With one exception: subsections 23(1) and 23(1.1) of the *Copyright Act*

[21] U.S. Copyright Act, 17 U.S.C. § 302(a) (https://www.law.cornell.edu/uscode/text/17/302))

[22] Article L123-7 of the IPC

Kingdom,[23] for example, introduced legislation outlining that works are protected for the life of the author plus 70 years after their death.

Since digital broadcasting became available online or on mobile devices, and thanks to initiatives such as Québecor's Éléphant[24] or the new Canada Media Fund YouTube channel Encore+,[25] audiovisual works are accessible to the public for much longer, and the need to protect them for longer periods of time is more important than ever.

Extending the duration of the copyright protection to 70 years is a matter of fairness: it would protect authors better and increase the value of a copyright. Canada understands this, because it did so in 2015 for musical performances and sound recordings.[26]

Therefore, we call on the government to follow the lead of other countries and to continue making strides to increase the general protection for authors in Canada to 70 years for all categories of works, including audiovisual works.

CONCLUSION

In conclusion, SACD-SCAM believes that, in order to ensure the *Copyright Act* evolves and is more in line with the reality and the needs of the audiovisual sector, the government must add a definition for audiovisual work, clarify ownership provisions and increase the duration of protection for works to 70 years after the author's death. It should also adapt culture funding to new digital consumption habits and revitalize the copying for private use regime.

We thank the House of Commons Standing Committee on Industry, Science and Technology for giving us the opportunity to submit our recommendations and comments as part of this statutory review of the *Copyright Act*.

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[23] Article 12(2) of the Copyright, Designs and Patents Act 1988 (https://www.legislation.gov.uk/ukpga/1988/48/part/I/chapter/I/crossheading/duration-of-copyright)
[24] http://elephantcinema.quebec/ (also available on iTunes)
[25] https://www.youtube.com/EncorePlusMedia (available since November 7, 2017)
[26] Sections 23(1) and 23(1.1) of the *Copyright Act*

[Logo: SACD]

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