

Who Owns the Copyright in a Canadian Film?

Answer: It depends (and that's the problem).

By Stephen Fraser*

“It depends” is not an unusual answer to any question posed to a lawyer. But there are certain questions that need a straight (if not easy) answer. Who owns the copyright in a Canadian feature film, TV series or other audiovisual work is one of those questions.

Many people assume that the owner is the producer or the production company set-up by the producer for the project. However, it is not safe to assume anything about copyright ownership of a “cinematographic work”. This is how the Canadian Copyright Act categorizes films, TV programs and other creative works made using a process “analogous to cinematography.” For simplicity, this column will refer to it all as film.

Copyright law and copyright reform have become hot topics of discussion. Copyright is complicated; doubly so in Canada because the Copyright Act is, at its core, an antiquated statute mixed with a series of phased-in revisions that have failed to effectively update it. In an ideal world, the Copyright Act would be rewritten, as the UK and the US have done with their copyright laws in the last 50 years. A new phase of revisions of Canada’s copyright law is under way in Ottawa. Now is the time to get a straight answer.

Starting with the basics, the first owner of the copyright in a Canadian film is its “author”. Which begs the question, who is the author of a film? The Copyright Act does not specify! Lawyers occasionally have to turn to decisions of old lawsuits to guide them. A number of these cases go back nearly two centuries, and were decided at a time when cinema did not even exist.

Compared to other countries, and even other domestic entertainment industries, Canada’s copyright law does not provide a clear answer as to who owns the copyright in a film. This is a problem for several reasons.

Uncertainty over who owns the copyright in a film affects its “economic value”. While the film stock, tape or other media on which a film is stored are important, these media are only the means by which the film is delivered. Copyright is what creates the economic value in the film. Put simply, copyright is what allows the production company to stop others from copying the film. It is this economic value that banks lend against, and what broadcasters and exhibitors license to bring the film to their audiences.

As there is no clear answer in Canadian copyright law to the question of copyright ownership in a film, producers must take a series of important steps to ensure that their ownership is clear. Anyone who could be considered the “author” of any part of the film, from the obvious (writers, directors, designers), to the not so obvious (extras, set painters), must sign a contract with the production company. If the transfer of copyright is not in writing, or if there is nothing in writing showing that use of the copyrighted

element was “cleared”, the producer places the whole production at risk. No bank will lend money against the creation of a film unless there is a clear showing that the production company seeking the loan owns, or will own, the copyright in the film.

The value of a copyright does not end when the production is finished and any loans and deferrals are paid off. Copyright protects a film for a long time. In Canada, that period is 50 years after the death of the “author” of the film. There’s that “author” coming up again. This is not necessarily a bad thing if maximizing the length of time a copyright lasts is the goal. When there is more than one author, the rule tends to be that the fifty years is calculated from the date the last author dies. On the other hand, it is not difficult to imagine the problems this situation would cause.

For sake of illustration, imagine the star of a film is a one-year-old baby. Her emotional crying scenes result in a Genie award (the youngest recipient ever). But she grows up to become an undercover agent and dies unknown at the age of a 101. Tack on 50 years for the term of copyright (resulting in a grand total of 150 years of protection) and that makes the 95-year term of copyright for most US films seem short. Now ask this: How would the owner of the copyright in that film, much less a bank, know when the copyright ended in order to measure the film’s economic value?

In the United States, the Copyright Act includes a concept called the “work made for hire”. It makes the producer the first owner of the copyright in a film if there is a written contract between the producer (or the production company) and any author of the film (the question of authorship is not as much of an issue because of the larger reserve of decided case law in the U.S.). With a work made for hire, there is no transfer of copyright problem because the first owner of copyright is the producer. While it still requires a written agreement, the contract does not have to deal with the issues that exist when an author transfers her/his copyright. Moreover, works for hire have a different copyright time period in the U.S. - 95 years. There’s no need to figure out who was an author on a film and which of them was the last to die.

It may come as a surprise to some Canadian producers that Canada does not have a work made for hire provision in its copyright law. There is something similar in the Copyright Act, but it does not go nearly as far as the more specific U.S. work for hire. Canadian producers would have to enter into an employment relationship with all the authors (there it is again) of a film to get the equivalent treatment as producers enjoy in the U.S. That proposition becomes expensive. The vast majority of people who work on a film in North America are independent contractors and not employees of the producer. At a time when workers in the U.S. film industry are seeking to keep productions closer to home, finding the means to make it easier for Canadian producers to make films in Canada is vital.

Canadian producers sometimes look to their U.S. counterparts with envy. Stephen Stohn is the Chair of the Copyright and International Policy Committee of the Canadian Film and Television Production Association. He explains that “it is the producer who raises the financing, takes the ultimate risk, and who engages the services of all those involved

in creating” a film. Stohn continues, “In today’s highly competitive and rapidly changing environment, Canada should not place its producers at a disadvantage to their American counterparts: Canada’s copyright law should clearly provide that the first owner of copyright in an audiovisual work is the producer.”

Parliament knows how to pass laws to do this. The Canadian music industry has benefited from the clarity that the “maker” of a sound recording is the owner of its copyright. In fact, the definition of a “maker” of a film already exists in the Copyright Act. It is the person who makes the arrangements to have the film made. Does that not sound like a film producer?

Logically, only a small step is required to clear up the problem: make the producer/maker of a film its first copyright owner.

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