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Writers Guild of Canada

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COPYRIGHT CONSULTATIONS SUBMISSION*

Writers Guild of Canada*

The Writers Guild of Canada (“WGC”) supports a copyright regime which balances the needs and interests of consumers with the rights and protections of authors. Works should be widely available for use by consumers provided that authors are fairly remunerated for those uses. Rather than criminalize consumers’ actions, the WGC would prefer to see a Copyright Act that pre-authorizes common consumer uses of works in exchange for a revenue stream payable to authors and copyright owners by using the current Private Copying Levy as a model for a more expanded collective licensing scheme. Further, Canada should embrace a National Digital Strategy and implement reforms such that Electronic Rights Management should not be permitted to be removed, fair dealing should not be expanded by the inclusion of a ‘such as’ clause, parody and satire should cease to be infringing activities, shared authorship should be bestowed jointly on the credited writer and credited director of cinematographic work, and the WIPO Treaties should be implemented and subsequently adapted to Canadian circumstances, in no small part to avoid the hostile reception accorded to Bill C-61.

The Writers Guild of Canada (“WGC”) represents 2000 screenwriters working in film, television, radio and digital media.

* © 2009 Writers Guild of Canada. This paper is a revised version of the Writers Guild of Canada’s Copyright Consultations submission of September 11, 2009.

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WGC members are the creators of Canadian stories including indigenous dramatic series such as *Flashpoint*, acclaimed movies of the week such as *Mayerthorpe*, internationally successful children's programming such as the *Degrassi* series and digital productions such as the *Being Erica* video blog.

The WGC welcomes the opportunity to again be part of the government's public consultation on copyright reform. We understand that copyright reform is a complex process that has been ongoing for many years. We are hopeful that after this consultation the government will be in a position to implement the next stage in much needed reform and bring Canada's copyright laws on par with international standards.

The WGC's position on copyright reform can be summed up easily. The WGC supports a copyright regime which balances the needs and interests of consumers with the rights and protections of authors. Works should be widely available for use by consumers provided that authors are fairly remunerated for those uses. Rather than criminalize consumers' actions, the WGC would prefer to see a *Copyright Act* that pre-authorizes common consumer uses of works in exchange for a revenue stream payable to authors and copyright owners. Use of works for commercial gain must be authorized by the copyright owner or will be an infringement of copyright.

The *Copyright Act* requires substantial reform in order to make it consistent with international treaties and consistent with modern uses of copyright works. The WGC supports a two step process to copyright reform. The first step would include ratification of the WIPO treaties signed by Canada in 1996¹ and enactment of a *Copyright Amendment Act* which would amend the *Copyright Act* so as to bring it in line with the WIPO treaties. The second step would be a more comprehensive reform that would modernize Canada's copyright law.

The WGC's proposals for copyright reform are set out in greater detail below in relation to the government's five questions as part of their public consultation.²

¹ [WIPO Copyright Treaty](#), 20 December 1996, 36 ILM 65 ; [WIPO Performances and Phonograms Treaty](#), 20 December 1996, 36 I.L.M. 76. [*WIPO Treaties*].

² Gatineau - Round Table and Public Hearings on Copyright" (29 July 2009) <<http://www.ic.gc.ca/eic/site/008.nsf/eng/00439.html>>.

1. HOW DO CANADA'S COPYRIGHT LAWS AFFECT YOU?

The WGC represents 2000 freelance professional screenwriters working in film, television, radio and digital production in Canada. The product of each screenwriter's efforts is a copyright work. Under various collective agreements screenwriters retain the copyright in their scripts and exclusively license the right to produce an audio-visual work based on the script to the producer. While the producer owns the copyright in the finished film, television program, radio program or digital production, the screenwriter retains an ongoing royalty stream from the exploitation of the finished work based on the terms of the collective agreement. The screenwriter has an ongoing interest therefore in both the underlying script and the finished work and the wide exploitation of both to the public. Screenwriters, like most if not all cultural creators, take a financial risk when they write scripts. Even with a collective agreement they are not paid the full value of the hours of work that it takes to draft a script and the many rewrites that it takes to get a script to get into production.³ However, earning less than full value fees is the compromise necessary to ensure that the budget is financeable. Screenwriters make this bargain in the hope that future uses of their work will generate additional revenues over time.

Other parties to the discussion of copyright reform have argued that copyright terms should be shortened or that copyright should be extinguished entirely.⁴ Their arguments are generally based in the idea that copyright protection prevents other creators from being inspired by the existing works to create new works.⁵ The catchphrase is that "copyright kills creativity." However, this is far

³ Writers Independent Production Agreement ("IPA") between the Writers Guild of Canada and the Canadian Film and Television Production Association and the Association des Producteurs de Films et de Télévision du Québec, 2006-2008

⁴ See e.g.: Canadian Internet Policy and Public Interest Clinic, "Copyright Consultations Submission" (13 September 2009), <<http://www.ic.gc.ca/eic/site/008.nsf/eng/02666.html>>.

⁵ See e.g.: Lawrence Lessig of Creative Commons, presentation to TED conference <http://www.youtube.com/watch?v=7Q25-S7jzgs> and http://www.freshcreation.com/entry/copyright_kills_creativity/

from the truth. A creator never knows how long a work will be actively exploited or whether a work's popularity could be revived. The term of copyright protection exists to give the author, their estate and/or copyright owner sufficient time to exploit the bulk of the economic potential from the work. That is their right as the author or their assignee. Protection also encourages the creation of new works as publishers and distributors can only rely on a limited number of public domain works to fill their catalogues. The argument that creativity depends on public domain works is specious as copyright does not protect ideas but merely one author's embodiment of the ideas. Screenwriters know this well as copyright has helped to protect their works while leaving them free to be inspired by other protected works in film, television, magazines, music and so forth. When a screenwriter intends to actually copy elements of another work then in those cases the right to copy the work needs to be licensed. Copyright protection is effective in balancing the needs of creators to use other works and protect their own works.

Many of the common uses of a screenplay or the work based on the screenplay are allowed uses and compensated for under collective agreements and/or contract. These are known as primary uses. This would include but is not limited to, broadcasting the film or television program, producing a DVD, downloading it through iTunes and even printing the screenplay in book form. However, there are many more common uses of the works which are happening every day and these uses are not allowed under the *Copyright Act* and also do not generate any compensation to authors or producers. These would be uses such as saving to the hard drive of your personal video recorder ("PVR"), copying programs to multiple iPods in the home, making your own DVD and filesharing through programs such as BitTorrent. They are known as "secondary" uses. The WGC wants consumers to have all of these common uses of screenwriters' works and more because it means a larger audience for their work. WGC screenwriters are not interested in toiling away in obscurity. However, they also want to be paid for those uses.

The most fundamental principle of copyright law is that the creator of a work has the exclusive right to control the copying of a work and by extension the right to earn revenues from that work. Copyright laws were originally enacted because new printing presses made it a lot easier for people to make copies of books. As it turned

out, both those who were authorized to print the books and those who were not could easily make copies. The digital world we live in now is as far ahead of Gutenberg printing presses as those presses were ahead of manual transcription by monks. Digital formats make it very easy for anyone and everyone to copy and distribute copyright works. This has fundamentally changed society to a similar degree as the sudden easy access to printed works changed 15th Century Europe. Without any technological expertise kids and adults can create copyright works and copy copyright works. We have a society now where creation is not limited to a few.

However, what some fail to see is that creation of high quality work is still primarily restricted to a few skilled creators. Anyone can create a low budget independent film in their bedroom and distribute it virally through YouTube and BitTorrent. But only professional creators and production teams can create the mainstream movies, television shows and digital productions that most audiences depend on for their entertainment. Even U.S. web hits like *Dr. Horrible*⁶ and *The Guild*⁷ were created by professional screenwriters (Joss Whedon and Felicia Day respectively) who developed their storytelling skills in mainstream television, and then donated their time or worked at reduced rates in the hopes of generating revenue through downloads and DVD sales. There may have been viewings for free as promotional vehicles (for example, *Dr. Horrible* was available for free for one week before only being available by paid download) but both projects have solid business models for generating revenues based on use. The Internet is an exciting new distribution method of getting entertainment directly to the audience but that audience should still pay for their entertainment.

Whether audiences pay for use of copyright works or not, revenues are flowing, however, to the distributors of the works. The Internet Service Providers benefit from more audio-visual media being downloaded and uploaded through the Internet as it allows them to charge more for bandwidth. DVD and PVR manufacturers, as well as hard drive and iPod manufacturers all benefit from the public's need for storage media for copyright works. While some

⁶ The Internet Movie Database, "Dr. Horrible's Sing-Along Blog" online: <http://www.imdb.com/title/tt1227926/>>.

⁷ The Internet Movie Database, "The Guild" online: <http://www.imdb.com/title/tt1138475/>>..

consumers do not want to pay for use they are paying more and more for access. It seems patently unfair that these distribution and storage media providers benefit from common consumer uses of copyright works but the creators and producers do not. This illogic is prompting more and more stakeholders to advocate collective licensing to redress the financial imbalance.

It also seems unfair to us that the current Private Copying Levy applies to only sound recordings and to limited forms of storage media.⁸ There is no legal principle that restricts private copying to only sound recording. At the time of the last copyright reform only sound recordings were being copied by consumers to blank cassettes as they made their own mix tapes. As the world has evolved and most copyright works are now available in digital form they are being copied for private use through a wide variety of methods. There is no legal justification for retaining the limitation on eligible works and storage media. Moreover, the Private Copying Levy is a system that has been very effective in compensating creators and producers of musical works for additional uses of their works. There has been no public backlash from the levy and in fact many members of the public are even unaware that they are paying it. Would consumers continue to pay the levy if they were made aware? Do Canadians want to compensate creators for the uses of their works. We believe so.

2. HOW SHOULD EXISTING LAWS BE MODERNIZED?

Collective Licensing

The first question addressed the copyright problems we are dealing with. In answering this second question the WGC sets out our proposals for solutions. The WGC proposes that the *Copyright Act*⁹ be amended to allow common consumer uses of copyright works and in return use the current Private Copying levy as a model for a more expanded collective licensing scheme. There are other models in other jurisdictions which have created collection regimes for secondary uses

⁸ Canadian Private Copying Collective, "Current Tariff" online: <<http://cpcc.ca/english/currentTariff.htm>>.

⁹ *Copyright Act*, R.S.C., 1985, c. C-42 [*Copyright Act*].

based on authorship.¹⁰ Such legislation allows authors to collect their share of cable retransmission monies, blank cassette levies and rental rights monies.¹¹ The WGC is familiar with these regimes as it established the Canadian Screenwriter Collection Society (“CSCS”) in 1999 in order to collect some of these monies on behalf of our members primarily in Europe. The amendments should be technologically neutral to allow for developments in media and consumer uses but should apply to all forms of copyright works. Unlike Bill C-61,¹² introduced during the previous Parliament, there should not be a specific list of exemptions from infringement but an expansive allowance of use by consumers provided that it is truly for private use. The Copyright Board would set the tariff and it would be a reasonable additional fee similar in proportion to the current private copying tariff (for example, 24 cents on cassettes and 29 cents on CDs). A number of collection societies, such as CSCS, SOCAN and Access Copyright to name just a few, already exist. A new collection society or societies could be created which would collect the suggested new tariffs on behalf of creators and owners and distribute that money to the existing collection societies who choose to participate. The model exists and can be easily expanded to cover new uses and all works. All creators need to have their rights recognized and to share in their own revenue streams.

TPMs, ERM, s, DRMs

The *Copyright Act* should still protect works from commercial infringement. Provisions against commercial piracy should be harshly enforced as it robs creators and producers of revenues while in most cases undermining the quality of the work. Authors and owners of copyright works should be entitled to protect those works from commercial infringement. The difficulty lies in determining what is commercial infringement and what is allowed consumer use and whether consumers are allowed to break locks that are intended to

¹⁰ See International Confederation of Societies of Authors and Composers (<http://www.cisac.org>) and Société des Auteurs et Compositeurs Dramatiques (<http://www.sacd.fr/>) in France

¹¹ See e.g.: *French Intellectual Property Code*, L132-20-1

¹² [Bill C-61](#), *An Act to Amend the Copyright Act*, 2nd Sess., 39th Parl., 2007-2008 [Bill C-61].

protect only against commercial infringement. This is a murky area and the WGC does not have any clear answers on this issue but would like to point out a few concerns.

The phrase Digital Rights Management (“DRM”) is a broad term that encompasses Electronic Rights Management (“ERM”), digital watermarks, Technological Protection Measures (“TPMs”) and digital locks. These are different concepts, as Bill C-61 attempted to make clear.¹³

While TPMs and the ability of creators to protect their works from commercial infringement while still allowing a wide variety of consumer uses is a thorny issue, ERMs or digital watermarks should be more straightforward. ERMs are used by creators, producers and collection societies around the world to track use and therefore royalties.¹⁴ An important component of collective licensing is the ability to track use in order to accurately calculate the royalties payable. This is not “Big Brother” invading consumers’ computers with invasive code to implant viruses or invade privacy as has been alleged. This is the ability to know as accurately as possible, much like Amazon or iTunes knows, just how many copies of a work are being used whether commercially or by consumers. While ERMs can be combined with digital locks to restrict infringing access to works, the ERM itself does not affect access. Creators and producers right to include and maintain ERMs on digital copies of copyright works must be protected in any copyright reform. Neither consumers nor commercial entities should be entitled to remove ERMs for any reason.

We suggest that the days of digital locks that restrict access are actually limited. Many previous practitioners such as iTunes and major record companies, have bowed to market demand and removed the locks. While the WGC continues to believe that authors and makers have the right to protect their copyright works we also believe that the marketplace will take care of overzealous digital locks which prevent allowed uses. For that reason we suggest that it would be short sighted to amend the *Copyright Act* to deal with the complex issue of digital locks and inevitably alienate one segment or another of the public. Digital locks will inevitably become a non-issue.

¹³ *Ibid.*

¹⁴ See International Standard Audiovisual Number (<http://www.isan.ca>)

Fair Dealing

Stakeholders have suggested that the solution to easy distribution of consumers to digital copies of works is to expand fair dealing to include all consumer uses of works. Stakeholders within the educational community want fair dealing expanded to both make it easier to access and copy copyright works for study and criticism and to reduce the cost of licensing those works.¹⁵ It has been proposed by stakeholders that the solution to these various problems is to redraft fair dealing to include “such as” descriptive language rather than the current itemized list,¹⁶ similar to the “fair use” language in the U.S. *Copyright Act*.¹⁷ The American expansive definition of “fair use” has led to many court cases over the years as it leads to a case by case assessment of fair use. Should Canadian law go down that path it would put an inordinate financial burden on the public to litigate in order to determine the scope of fair dealing. The current limited list still requires occasional Copyright Board or court interpretation, which allows the *Copyright Act* to adapt to changes in technology and use. The government should not expand it further.

Nor should fair dealing be used to avoid the effort and cost of licensing copyright works. Both the educational sector and documentary producers have argued that it is too difficult to license excerpts from copyright works and therefore fair dealing should be expanded.¹⁸ The WGC has great difficulty with an argument for changing law that is based on “ease of use.” Laws should be amended because it would be just and fair to do so – not to make life easier for one group of people (users) at the expense of another (creators). Ease of use is not a good enough reason to weaken an author or owner’s

¹⁵ See e.g. Canadian Association of Research Libraries, “Copyright Consultations Submission” (9 September 2009), online: <<http://www.ic.gc.ca/eic/site/008.nsf/eng/02005.html>>.

¹⁶ See e.g. Michael Geist, “Copyright Consultations Submission” (13 September 2009), online: <<http://www.michaelgeist.ca/content/view/4377/125/>>.

¹⁷ *Copyright Act*, 17 U.S.C. (1976).

¹⁸ See e.g.: Documentary Organization of Canada, “Copyright Consultations Submission” (11 September 2009) online: <<http://www.ic.gc.ca/eic/site/008.nsf/eng/02499.html>> and Canadian Association of University Teachers <<http://www.caut.ca/uploads/IP-Advisory3-en.pdf>>.

copyright or reduce their revenues. It is understandable that both sectors would want it to be easier to license individual works however the solution is not to expand exemptions. Precedents exist for collective licensing that provides users with one stop shopping for a bundle of works. Access Copyright is a collection society that represents many authors and publishers of literary works (i.e. books, magazines, newspapers) and provides educators as well as members of the public with single use or blanket licences.¹⁹ SOCAN is a collection society that represents songwriters and music publishers and licenses music for a variety of purposes.²⁰ These copyright collectives collect the licences from users and distribute the royalties to the copyright authors and owners that they represent. Users do not have to locate owners or try to determine what might or might not be available. They are voluntary collectives though some works may still be outside the collective and in those cases users do need to license the works directly. A similar collective for audio-visual material would likely solve the problem for both the educational and documentary sectors.

The WGC would like to see parody and satire cease to be infringing activities however this does not require an expansion of fair dealing. The *Copyright Act* can be amended to allow for a specific exemption for parody and satire. Creators in a healthy, democratic society do need to be able to incorporate excerpts from other works in order to make points through parody or satire. This too, however, should not be used as an excuse to widen the definition of fair dealing and send the public to the courts to determine what it means.

Authorship

The *Copyright Act* has a few anomalies which need to be fixed. Bill C-61 attempted to fix the anomaly whereby the first owner of a photograph was deemed its author.²¹ We presume that the next amendment to the *Copyright Act* will also address this anomaly so that photographers can finally be the author of their own work.

¹⁹ Access Copyright, “About Us” online: <http://www.accesscopyright.ca/Default.aspx?id=35>.

²⁰ SOCAN “What We Do” online: http://www.socan.ca/jsp/en/pub/about_socan/what_we_do.jsp.

²¹ Bill C-61, *supra* note 13 at s. 10.

Additionally, the Act has yet to address the authorship of audio-visual work. It is silent on this point. This anomaly of authorship needs to be addressed as well. A principle of copyright law is that the first owner of copyright is the author and the term of copyright is based on their life.²² Without the designation of an author the term of copyright for cinematographic works is only 50 years.²³ This gives cinematographic works a much shorter term than most other forms of works, which are based on the author's life plus 50 years. Foreign collection societies, which distribute monies to authors and other creators for uses of works, distribute monies on Canadian productions to CSCS (referred to above). But CSCS cannot reciprocate by distributing monies on foreign productions because the Canadian *Copyright Act* does not identify the author. Canada is behind in living up to our international obligations.

The WGC and the Directors Guild of Canada ("DGC") have agreed that the writer and the director are the key creative participants in the filmmaking process and are together responsible for giving a cinematographic work its original dramatic character. Therefore the WGC and the DGC have agreed to a position of shared authorship in the cinematographic work between the credited writer(s) and the credited director. We look forward to implementing this amendment to ensure that writers and directors share in revenue streams based on authorship.

WIPO Treaty

Finally, Canadian copyright law must be brought up to international standards. Canada must live up to its international obligations. The Canadian government must immediately ratify the WIPO Treaty.²⁴ The WIPO Treaty is general enough in language that Canada can adopt its principles but still carve its own path. Specifically, the obligation to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures for the protection of authors' rights"²⁵ does not

²² *Copyright Act*, *supra* note 9.

²³ *Ibid.*

²⁴ *WIPO Treaties*, *supra* note 1.

²⁵ *Ibid.*

need to mean tough DMCA style remedies against breaking digital locks. Canada can create its own interpretation of that obligation. As well, “effective legal remedies against removing or altering electronic rights management information”²⁶ does not state exactly what those remedies must be. We cannot be seen to be a safe harbour for piracy. The first step towards restoring our reputation will be ratification of the WIPO Treaty. Then we can adapt its principles to our own laws and our society.

3. BASED ON CANADIAN VALUES AND INTERESTS, HOW SHOULD COPYRIGHT CHANGES BE MADE IN ORDER TO WITHSTAND THE TEST OF TIME?

When certain lobby groups first started calling for an American DMCA-style amendment to the *Copyright Act*, the Canadian public fiercely objected. In one of the first uses of social networking to affect social change, Michael Geist created the Fair Copyright for Canada Facebook Group.²⁷ There are at this moment over 88,000 members of this group. The size and rapid growth of the group forced the government to ensure that any copyright amendment bill reflected Canadian values and interests. This event should be remembered by all parties as we discuss possible amendments and look to the *Digital Millennium Copyright Act*²⁸ for guidance and equally for warnings. We must develop distinctly Canadian copyright laws.

The WGC suggests a few principles to guide distinctly Canadian copyright reform. One is that copyright law is evolving and will of necessity have to be updated and reformed every generation or so. It is unlikely that this generation can amend the law so that it can withstand the test of time. Perhaps the pursuit of this timeless goal is what has delayed previous attempts at reform. We should be as forward thinking as possible but know that the law will need to be updated from time to time.

²⁶ *Ibid.*

²⁷ Michael Geist, “Fair Copyright for Canada” online: <<http://www.facebook.com/group.php?gid=6315846683>>.

²⁸ *Digital Millennium Copyright Act*, 17 U.S.C. (1998).

One way to be forward thinking is to be technology neutral. No amendment should make specific references to formats which will quickly go out of date. Filmstrips evolved into VHS cassettes which have evolved into DVDs and will one day be replaced by some other storage medium. Bill C-61 was too limiting in its use of specific formats such as VHS cassettes and PVRs.²⁹ General language can be interpreted by the Copyright Board and the courts until such time as a specific amendment is required.

4. WHAT SORTS OF COPYRIGHT CHANGES DO YOU BELIEVE
WOULD FOSTER INNOVATION AND CREATIVITY IN CANADA?

As stated above, the WGC firmly believes that creativity and innovation thrive in a culture where they are rewarded. Fair compensation for creators means that they have the resources and incentives to continue to create and further innovate. Consumers desire easy access and use, and creators want wide distribution and audience. A culture that supports this exchange while compensating creators rewards both consumers and creators. Collective licensing has worked well in other aspects of copyright law such as private copying and now must be extended to all works to create in Canada a sustainable culture of creativity and innovation.

5. WHAT SORTS OF COPYRIGHT CHANGES DO YOU BELIEVE
WOULD BEST FOSTER COMPETITION AND INVESTMENT IN CANADA?

Canada should ratify the WIPO Treaty so that we can live up to our international obligations and avoid being slandered as a haven for piracy.³⁰ This would encourage media companies to invest in Canada and distribute their goods here. Protecting copyright and rewarding creators through collective licensing will foster creativity and by extension competition.

²⁹ Bill C-61, *supra* note 12.

³⁰ See e.g.: CBC News, "Canada on U.S. piracy watch list" (30 April 2009) online: <<http://www.cbc.ca/technology/story/2009/04/30/copyright-piracy.html>>.

6. WHAT KINDS OF CHANGES WOULD BEST POSITION CANADA
AS A LEADER IN THE GLOBAL, DIGITAL ECONOMY?

Canada needs a National Digital Strategy and creators need to be part of the discussion that informs it. To date, the chief voices at the table in the conferences and brainstorming sessions around the Strategy have been bureaucrats, academics and representatives of technology companies. Innovative content is a key component of the Canadian digital economy. A digital infrastructure is not just about email and e-commerce. Canadians are going online and accessing other digital platforms to enjoy content. Copyright reform is an important component of any National Digital Strategy but reform that supports creation and innovation and does not effectively devalue it by opening up more content to free, unprotected access.

Canada can lead the global digital economy by rewarding innovation and creativity. Fair compensation to creators through collective licensing will encourage creators to be on the forefront of innovation, and ensure Canada produces the kind of compelling, professional content that will draw international audiences.