The May white paper

Proposed Copyright Changes Favour Film Industry

by Lesley E. Harris

Increased protection for films and filmmakers is offered by the Federal government's proposals for revision of the copyright law as set out in *From Gutenberg To Telidon,* the white paper on copyright issued in May of this year. Underlying these proposals are the need to encourage creativity and provide protection to technological innovations not adequately provided for under the existing law. And films or, more formally, cinematographic works, are one of the technological developments not sufficiently protected under the antiquated 1921 *Copyright Act* which represents the existing copyright law in Canada along with any subsequent judicial decision. Since the act came into force on January 1, 1924, it has only undergone minor amendments.

Over the last 27 years, the Federal government, as the government responsible for copyright in Canada, has undertaking four major studies on copyright, including the May white paper. These comprise a Royal Commission *Report on Copyright* in 1957, a *Report on Intellectual and Industrial Property* by the Economic Council of Canada in 1971 and *Copyright in Canada : Proposals for a Revision of the Law* by A.A. Keyes and C. Brunet in 1977 prepared on behalf of Consumer and Corporate Affairs Canada. In addition, Consumer and Corporate Affairs commissioned more than twenty papers examining specific areas of copyright from a legal as well as an economic point of view. The white paper, *From Gutenberg to Telidon,* was jointly prepared by the departments of Communications and Consumer and Corporate Affairs. If it seems like a promising step towards a

Lesley E. Harris is completing her law degree at Osgoode Hall, specializing in copyright law.

much-needed revised Canadian Copyright Act, enactment of any new Act will, however, depend very much on the priority given to it by the new government. Meanwhile, a somewhat confusing and insufficient state of copyright protection remains for certain types of works such as films. This is best exemplified by a comparison of the existing law with that proposed by the white paper.

Under the present law four main classes of works are given copyright protection. These include every original literary, dramatic, musical and artistic work. The owner of the copyright in these works possesses the cinematographic or film rights. The cinematographic right includes the right to make the cinematographic version of the work as well as the performing right. If maker, his film may constitute an infringement of an earlier work. A film, even one that is an infringement of an earlier work, is entitled to copyright protection in itself as either a dramatic or artistic work. Copyright protection in a film will entitle the owner of the film to the remedies available in the Act where one or more of the individual photographs have been copied, the film has been copied or the film has been publicly presented by cinematograph without the copyright owner's permission.

The white paper presents a new treatment of cinematographic films. It proposes to treat cinematographic works as a separate category of original work entitled to the full protection granted the traditional works of literary, dramatic, musical and artistic works. This will replace the present protection of films as a derivative right to one fully protected as a traditional work, thus eliminating the need to protect cinematographic works as dramatic or artistic works.

Under the present law, a film is protected as a dramatic work where the arrangement or acting form or the combination of incidents represented give the work an original character. Original means that the work must not be copied from another work or that the work must originate with the author. Originality is a factual determination dependant upon the work and labour put into the film. It is well established that newsreels or sport events contain no original character because there is a lack of original character in the filming of such events. In the absence of such original character, copyright may still exist in the film as a series of photographs, photographs being protected as artistic works. In such a case, each of the separate pictures constituting the film will be entitled to copyright protection as an artistic work.

If cinematographic works are to be treated as a distinct category of work and given full protection, the term "cinematographic works" will require a new definition. The present definition of cinematographic works includes any work produced by any process analogous to cinematography. Case law defines cinematographic films as a negative and photograph, or a series of negatives and photographs, in material form having a more or less permanent endurance. Under this definition it is difficult to treat videotapes as cinematographic works since there is no technical similarity in the production processes of a videotape and a film. Videotapes do not involve photographs or a visible image on the tape, nor is there a resulting negative. However, in many cases a videotape is used in the same function of or as a replacement of a cinematographic work – yet it is treated differently for copyright purposes. The while paper recognizes this problem and proposes to define the terms "cinematography" and "process analogous to cinematography" broadly to include any means by which such works are produced, irrespective of the technological process utilized. Under this definition videotapes may be treated as cinematographic films for the purposes of copyright protection. The United States has taken a similar approach in their 1976 *Copyright Act* by treating both films and videotapes as "audio visual works."

Ownership of copyrighted works under the present Copyright Act is governed by the general rule of vesting initially in the author of the work unless otherwise mentioned. The author of a dramatic film is not expressly provided for in the Act, but appears to be the film's producer. The author and first owner of copyright in a non-dramatic film (one being protected as a photograph) is the owner of the negative from which the photograph was directly or indirectly produced at the time when the negative was made. In most cases, this will be the producing company.

It will no longer be necessary to provide two bases for ownership of cinematographic works

since the white paper proposes to treat them as one distinct category of work. This allows the white paper to clarify the situation by expressly providing that the author of a cinematographic work be the producer. In addition, there will be a definition of a producer as the person principally responsible for the arrangements undertaken for the making of the work. Under this definition ownership will attach to the person who causes the work to be, since it is the producer who organizes the people who synergize in the creation of the film. The authors of the white paper feel that this approach to ownership allows the various contributors to retain copyright in their individual contributions where such work is subject to copyright – and provided that there has not been an assignment of the copyright to the producer through a contractual arrangement.

The present term of copyright protection also depends on the classification of the film as a dramatic or artistic work. Films that constitute photographs are protected for fifty years from the making of the original negative from which the photograph was directly or indirectly derived. Films that constitute dramatic works are protected for the life of the author plus fifty years.

The white paper suggests that the term of copyright protection not be based upon the life of the author as in the present situation with respect to films that constitute dramatic works. Because producers often incorporate production companies, which are then considered the authors of the film, it is not feasible – and in some cases not possible – to determine the life of a corporation since a corporation is a legal entity which has a personality and existence separate from its members and may exist either in perpetuity or for a limited number of years. The authors of the white paper also do not agree with the term of protection being based on the date from which the negative is made, as is the case with films that are protected as artistic works. They recommend instead that the term of protection for cinematographic works extend until the expiry of *either* the period from the date of first publication until the end of that year plus fifty years thereafter, *or* in instances where the work is not published, the period from creation until the end of that year plus seventy-five years thereafter. Publication under the present Act means the issue of copies of the work to the public but does not include the performance in public of a dramatic work of the exhibition in public of an artistic work. The white paper proposes to retain this definition which does not include cinematographic works. Keyes and Brunet in their study in 1977 agreed with the white paper in keeping the definition of publication. In addition, however, they recommended that publication with regard to films be defined to provide for all manners in which films are in practice made available: by lease, rental, sale or licence.

Included in the proposals is a new important right of public renting. Under the existing copyright law, the buyer of a copy of a protected work may rent that copy to others without consent of the copyright owner, unless there is an agreement to the contrary. There is concern that with the increasingly popular film and videotape rental industry that the benefits from it are not accruing to all the right parties. While the rental dealer makes a profit and the consumer pays less than the purchase price for the film or videotape, the copyright owner rarely receives any compensation from this arrangement. The copyright owners of these works believe that, since they share in the creation of these works, they should have the right to control the rental of copies as compensation for a new method of exploiting their works. The proposals in the white paper suggest that any new Act provide a rental right; however, that is limited to the *commercial* renting of films and videotapes (as well as sound recordings). In addition, there will be a provision to permit the Governor in Council to extend this right to other types of works. Any exclusive right to authorize the rental of specified works such as the one proposed would allow copyright owners to negotiate agreements with proprietors of rental businesses for the payment of a fee and to keep records of rental activities. Consumer rights would not be affected by a rental right, though it is most probable that any extra costs will be passed on to them. Pub- recordings or films could continue to do so and could charge the borrowers of such works nominal amounts to cover pur-

chase and administrative costs.

If the rental right is included in the new Canadian Copyright Act, it would put Canada ahead of many of other countries' copyright laws, including the United States. The U.S. Copyright Act, which was recently revised in 1976, contains the "first sale" doctrine whereby once a tape is sold by a studio to a dealer, the studio loses the right to a share in the rental profits from that tape. Under the white paper's proposals, the studio would be given a right to share in such rental proceeds.

Because of Canada's international copyright obligations there is some concern with providing a rental right in the proposed Copyright Act. The two international conventions, the Universal Copyright Convention and the Berne Convention, to which most developed countries adhere, including Canada, provide for national treatment. This means that nationals of convention-member states are entitled to copyright protection according to the law of each member state. Therefore, if the Canadian copyright law contains a rental right, copyright owners of works in the United States would be able to enforce such rights with respect to works sold in Canada. Because Canada imports a large number of films, this provision would result in more money being paid out of the country than to copyright owners in Canada. This, however, may be resolved by providing the rental right outside copyright law – as has been proposed with respect to the public lending right of books. A law outside the Copyright Act would not be against Canada's international obligations and would not result in any money going out of Canada with regard to the public renting of films.

The white paper also suggests changes to the remedy provisions of the Copyright Act. These recommendations, based on the theory that an unenforceable right is of little value, are complicated and detailed and perhaps deserve more attention than given here. Among the more significant changes to the remedies provisions are the proposals to strengthen the criminal sanctions by increasing fines to correspond to inflation and subjecting serious offenders to longer terms of imprisonment. This rejects Keyes and Brunet's proposal in 1977 to abolish summary remedies. Although the criminal sanctions are used less frequently than the civil remedies, they are extremely important with regard to film and video piracy, two growing problems. Piracy can be very profitable especially in large-scale operations and the out-dated fines which exist today may seem petty to the infringer making a large revenue. The present maximum fine of $200 may seem more like a licence fee than a fine and, to the infringer, may be less costly and troublesome than obtaining the permission of the copyright owner. The proposed maximum fine of $25,000, however, may be an adequate deterrant to the pirate. If not, the white paper also recommends, a two-to-five-year term of imprisonment in lieu of the present two-month term for piracy. Of course, imprisonment will only be ordered in cases of serious or repetitious offenders.

Although the significant proposals of the white paper as they relate to the film industry have been highlighted here, by no means has every provision that any new Copyright Act would possess concerning films and filmmakers been covered. Films are intricate works dependant upon many facets of creation. The parts of the film which integrate to result in a cinematographic work are often themselves subject to copyright protection. The screenplay is subject to protection as a literary work, the music may be protected as a musical work, the sound-track as a mechanical contrivance and the sets too are protected as artistic works. Already computers are being used to produce images which result in films, and protection of films produced by this process might well include consideration to copyright protection of computers. Because of the rapidly changing technological society we live in, it is important that any new Copyright Act allow for periodic evaluation and revision in order to keep up to date, especially if the new Copyright Act is to remain in force for sixty more years. The proposals in the white paper seem to have left room for advanced technologies while reflecting the needs of the modern film industry. However, these proposals are not carved in stone and one will have to be patient with the slow revision process of copyright law until such proposals or alternative ones are cast into legislation. ●