

| 6. APPLICATION | 6. APPLICATION |
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| <p>(1) The Part is binding on Her Majesty in right of Canada</p> <p>(2) This Part applies</p> <p>(a) to the following organizations that engage one or more artists to provide an artistic production, namely,</p> <p>(i) government institutions listed in Schedule I to the <i>Access to Information Act</i> or the schedule to the <i>Privacy Act</i>, or prescribed by regulation, and</p> <p>(ii) broadcasting undertakings, including a <i>distribution</i> or programming undertaking, under the jurisdiction of the Canadian Radio-television and Telecommunications Commission; and</p> <p>(b) to independent contractors determined to be professionals according to the criteria set out in paragraph 18(b), and who</p> <p>(i) are authors of artistic, dramatic, literary or musical works within the meaning of the <i>Copyright Act</i>, or directors responsible for the overall direction of audiovisual works,</p> <p>(ii) perform, sing, recite, direct or act, in any manner, in a musical, literary or dramatic work, or in a circus, variety, mime or puppet show, or</p> <p>(iii) contribute to the creation of any production in the performing arts, music, dance and variety entertainment, film, radio and television, video, sound recording, dubbing or the recording of commercials, arts and crafts, or visual arts, and fall within a professional category prescribed by regulation.</p> | <p>(1) La présente partie lie Sa Majesté du chef du Canada.</p> <p>(2) La présente partie s'applique :</p> <p>a) aux institutions fédérales qui figurent à l'annexe I de la <i>Loi sur l'accès à l'information</i> ou à l'annexe de la <i>Loi sur la protection des renseignements personnels</i>, ou sont désignées par règlement, ainsi qu'aux entreprises de radiodiffusion - distribution et programmation comprises - relevant de la compétence du Conseil de la radiodiffusion et des télécommunications canadiennes qui retiennent les services d'un ou plusieurs artistes en vue d'obtenir une prestation;</p> <p>b) aux entrepreneurs indépendants professionnels - déterminés conformément à l'alinéa 18b) :</p> <p>(i) qui sont des auteurs d'œuvres artistiques, littéraires, dramatiques ou musicales au sens de la <i>Loi sur le droit d'auteur</i>, ou des réalisateurs d'œuvres audiovisuelles,</p> <p>(ii) qui représentent, chantent, récitent, déclament, jouent, dirigent ou exécutent de quelque manière que ce soit une œuvre littéraire, musicale ou dramatique ou un numéro de mime, de variétés, de cirque ou de marionnettes,</p> <p>(iii) qui, faisant partie de catégories professionnelles établies par règlement, participent à la création dans les domaines suivants : arts de la scène, musique, danse et variétés, cinéma, radio et télévision, enregistrements sonores, vidéo et doublage, réclame publicitaire, métiers d'art et arts visuels.</p> |

CORRESPONDING SECTIONS:

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| <i>SAA:</i> 6 | <i>CLC:</i> 4, 5, 6 | <i>PSLRA:</i> 2 |
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COMMENTARY:

The CLC applies to employers and employees in the federal private sector, while the PSLRA applies to the federal public sector. Note that the SAA applies to both the federal private and public sectors.

The *Status of the Artist Act Professional Categories Regulations* came into force on April 22, 1999 prescribing additional categories of professional self-employed artists entitled to benefit from the provisions of the SAA.

JURISPRUDENCE:

Act vs. Professional Category Regulations

2003 CAPPRT 044 (DGC), para. 49

The DGC has also argued that assistant directors are artists pursuant to 6(2)(b)(iii) of the *Act* as they contribute to the creation of a film or television production and are involved in all professional categories mentioned in the *Regulations* such as lighting, the art department, camera and sound. Given that the Tribunal has determined that assistant directors carry out an activity referred to in 6(2)(b)(ii) of the *Act*, it is precluded from including them under the *Regulations* (see paragraph 2(2)(b) of the *Regulations*).

Tribunal mandated to interpret Copyright Act

2002 CAPPRT 039 (TWUC), para. 66

[...] none of the parties dispute that the Tribunal is mandated, through subparagraph 6(2)(b)(i) of the *Act*, to interpret the *Copyright Act*. In light of this, and as the original panel stated in paragraph 53 of Decision 033, we concur that established principles of copyright law must govern the present decision.

Joint authorship

2002 CAPPRT 039 (TWUC), para. 80

[...] the Tribunal finds that although an editor and an author work together on a common project, they do not collaborate on a pre-concerted joint design, as this term is understood under the *Copyright Act*.

Joint Authorship

2002 CAPPRT 039 (TWUC), para. 87

[...] the evidence presented by the EAC and TWUC demonstrates that professional freelance editors who perform developmental and substantive editing on a work do not view themselves as joint authors. Accordingly, we can only conclude that editors who perform any kind of editing, from developmental and substantive editing to line and copy editing, do not intend to be joint authors. Given that the third criteria of the Neudorf test requires putative joint authors to intend to be joint authors with one another, had we adopted this test, our conclusion would have been the same: professional freelance editors would not be considered joint authors within the meaning of the *Copyright Act*.

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| <p><i>"Producers" within meaning of Act</i></p> | <p>1996 CAPPRT 014 (PWAC), para. 13 and 14</p> <p>A certification issued by the Tribunal to an artists' association entitles that association to enter into negotiations with organizations who qualify as "producers" within the meaning of the <i>Act</i>. These producers are defined in clause 6(2)(a) of the <i>Act</i>:</p> <p style="padding-left: 40px;">6(2) This Part applies</p> <p style="padding-left: 80px;">(a) to the following organizations that engage one or more artists to provide an artistic production namely,</p> <p style="padding-left: 120px;">(i) government institutions listed in Schedule I to the <i>Access to Information Act</i> or the schedule to the <i>Privacy Act</i>, or prescribed by regulation, and</p> <p style="padding-left: 120px;">(ii) broadcasting undertakings, including a distribution or programming undertaking, under the jurisdiction of the Canadian Radio-television and Telecommunications Commission; ...</p> <p>The Tribunal is of the opinion that the applicants' proposed sector, insofar as it purports to apply to all publishers and electronic information-distributors who are Canadian entities or who have their principal place of business in Canada or who establish an office in Canada, exceeds the jurisdiction of the Tribunal and therefore cannot be approved. The sector definition has to be limited to producers within the jurisdiction of the <i>Status of the Artist Act</i>.</p> |
| <p><i>"Artist" within meaning of Act</i></p> | <p>2004 CAPPRT 048 (CAEA & NCC), para. 19</p> <p>The legislation applies to "independent contractors determined to be <i>professionals</i> according to the criteria set out in paragraph 18(b) [...]" (Our emphasis). It is therefore unlikely that someone whose primary occupation, for example, is teaching or event organizing could be considered a "professional" under the legislation unless they meet one of the criteria set out in paragraph 18(b) [...]</p> |
| <p><i>Jurisdiction of the CRTC</i></p> | <p>1996 CAPPRT 014 (PWAC), para. 19 to 21</p> <p>Subclause 6(2)(a)(ii) makes it clear that the Tribunal's jurisdiction mirrors only the broadcasting portion of the CRTC's jurisdiction and does not include those aspects of the CRTC's jurisdiction which flow from its responsibility for telecommunications. Accordingly, for a producer to come within the Tribunal's jurisdiction, it must be either a government institution or a broadcasting undertaking.</p> <p>To determine whether a producer is within the Tribunal's jurisdiction over broadcasting undertakings, it is necessary to examine the CRTC's jurisdiction over broadcasting. Since 1991, the <i>Broadcasting Act</i> has defined broadcasting as:</p> <p style="padding-left: 40px;">... any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place. [(ss.2(1)).</p> <p>The key elements of this definition mean that, to be a broadcasting undertaking, the entity must transmit programs via radio waves or other means of telecommunication for receipt by the public by means of a broadcasting receiving apparatus.</p> |

Jurisdiction of the CRTC

1996 CAPPRT 014 (PWAC), para. 27

The intent of the *Act*, in the Tribunal's opinion, is to limit the Tribunal's jurisdiction to broadcasting undertakings as they are defined by the CRTC. The Tribunal therefore finds that it does not have the jurisdiction to determine that a service constitutes broadcasting if the CRTC has not already made this determination.

Distribution in another medium

1996 CAPPRT 014 (PWAC), para. 29

The Tribunal's jurisdiction would also extend to these writers [freelance periodical writers] when a government institution or a broadcasting undertaking distributes one of their works in another medium. This would include government institutions that put a freelancer's article on the Internet as well as broadcasting undertakings who use the article in a broadcast, on their Internet site or in a commercial on-line database.

Multimedia production

1996 CAPPRT 016 (WGC), para. 30

Since it is the intent and purpose of the *Status of the Artist Act* to offer the benefits of collective bargaining to artists working as independent contractors, the Tribunal is prepared to give a broad and inclusive reading to the term "multimedia". The Tribunal therefore finds that it has jurisdiction to include multimedia productions undertaken by a producer who is otherwise subject to the *Status of the Artist Act* within the scope of the sector sought by the applicant, and that it is appropriate to do so.

Broadcasting undertakings

1996 CAPPRT 016 (WGC), para. 27

The Tribunal accepts the applicant's argument that the reference in the *Act* to broadcasting undertakings refers not to the activity but to the organization. The Tribunal understands the *Act* to mean that it applies to all artistic productions produced by one of the organizations referred to in clause 6(2)(a). One type or organization subject to the *Act* is any broadcasting undertaking under the jurisdiction of the CRTC. The Tribunal interprets this to mean that once an organization is brought within the ambit of the *Act*, any and all of its activities that involve artistic production are included, whether they are broadcast related or otherwise.

Third party contracting

1996 CAPPRT 016 (WGC), para. 28

...The Tribunal is of the view that the finding in *CLRB et al. v. Paul L'Anglais Inc. et al.* must be confined to its own facts. In that case, the Supreme Court of Canada upheld a decision of the Quebec Court of Appeal [reported at 122 D.L.R. (3d) 583] which held that the activities of two subsidiaries of Télé-Métropole Inc. (a federally regulated television broadcasting business), one of which engaged in selling sponsored television air time and one that produced programs and commercial messages for a number of customers, were not an integral part of the broadcasting undertaking and therefore not within the competence of Parliament or, consequently, of the Canada Labour Relations Board. The Tribunal can envision circumstances in which productions undertaken by a third party under contract to a broadcasting undertaking could be vital, essential or integral to the broadcaster, and thus within the federal regulatory sphere.

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| <i>Peer recognition</i> | <p>2003 CAPPRT 041 (APVQ-STCVQ), para. 301</p> <p>The NFB argues that only artists recognized as such by their peers should be recognized as artists within the meaning of the <i>Act</i>. Although it is correct to say that, historically, some persons were recognized as artists by their peers or by third parties with whom they established a relationship, the <i>Act</i> does not make this distinction.</p> |
| <i>Choreographers</i> | <p>1996 CAPPRT 010 (CAEA), para. 35 and 36</p> <p>Choreographers and assistant choreographers are required by the terms of the Canadian Theatre Agreement to carry out a number of functions that relate to the creation of a production: they rehearse and direct all dance sequences. Whether this direction merely involves carrying out the artistic vision of a director or requires a degree of interpretation by the choreographer or assistant choreographer may vary from time to time. The Tribunal's reading of the CTA [Canadian Theatre Agreement] left it with little doubt that the functions of these professionals include "directing...in any manner" a work contemplated by paragraph 6(2)(b)(ii). Accordingly, the Tribunal finds that it does have the jurisdiction to include the professions of choreographer and assistant choreographer, as described in the CTA, in a sector for bargaining.</p> <p>Furthermore, the Tribunal is of the opinion that choreographers would also qualify for inclusion in a sector by virtue of paragraph 6(2)(b)(i) of the <i>Act</i>. This paragraph provides that Part II of the <i>Status of the Artist Act</i> applies to independent contractors who are authors of dramatic works within the meaning of the <i>Copyright Act</i>. The <i>Copyright Act</i> (R.S.C. 1985, c. C-42, as am.) defines a dramatic work as including choreographic work that is fixed in writing or otherwise.</p> |
| <i>Periodical writers</i> | <p>1996 CAPPRT 014 (PWAC), para. 16</p> <p>In the Tribunal's view, periodical writers are authors of literary works within the meaning of the <i>Copyright Act</i>, and the purchase of their works by a publisher or producer with the intent that it be disseminated to the public in some fashion is sufficient to bring the author within the scope of ss. 18(b) of the <i>Act</i>.</p> |
| <i>Translators</i> | <p>1996 CAPPRT 016 (WGC), para. 17</p> <p>The Tribunal accepts that translation is a very specialized profession which requires a comprehensive understanding of a text in both the source language and the language into which it is to be translated, as well as familiarity with both cultures. To convey the meaning and style of the original work faithfully, a literary translator must have much of the same dramatic flair as the original creator. The Tribunal therefore finds that literary translators are artists within the meaning of paragraph 6(2)(b)(i) of the <i>Status of the Artist Act</i> and therefore that they are eligible for inclusion in the proposed sector.</p> |
| <i>Copyists</i> | <p>1997 CAPPRT 019 (AFM), para. 31</p> <p>Copyists are persons with musical training who copy out the instrumental parts of a score. The work of a copyist is neither a performance nor is it a function that is subject to copyright. The Tribunal is, at present, entitled to include in a sector only those artists</p> |

defined by subclauses 6(2)(b)(i) and (ii) of the *Status of the Artist Act*, and the work of copyists does not fall within either of these categories. While these individuals clearly contribute to the creation of a production, as envisioned by subclause 6(2)(b)(iii) of the *Act*, regulations under that subclause have not yet been promulgated. Consequently, the Tribunal is unable to deal with this aspect of the application now.

1997 CAPPRT 019 (AFM), para. 34

Music librarians

The Tribunal is of the view that the functions of a music librarian are not covered by the provisions of subclauses 6(2)(b)(i) or (ii) of the *Status of the Artist Act*. Thus, unless regulations are promulgated under subclause 6(2)(b)(iii) to make it possible, the Tribunal does not have the authority to include music librarians in the sector, despite the fact that they clearly have a community of interest with musicians.

1997 CAPPRT 020 (GMO), para. 27

Arrangers

Are arrangers authors of musical works within the meaning of the *Copyright Act* (R.S.C. 1985, c. C-42), and therefore covered by subparagraph 6(2)(b)(i) of the *Status of the Artist Act*? The *Copyright Act* defines a musical work as "any work of music or musical composition, with or without words, and includes any *compilation* thereof." The expression "compilation" includes "a work resulting from the selection or *arrangement* of ...musical... works or of parts thereof". In the light of the foregoing, the Tribunal finds that arrangers are covered by subparagraph 6(2)(b)(i) of the *Status of the Artist Act* and that they can be included in the sector.

1997 CAPPRT 020 (GMO), para. 30 and 31

Copyists

Copyists are musicians who transcribe individual scores from a master score. Because copyists do not create or arrange musical works, the Tribunal is of the opinion that copyists are not authors of musical work within the meaning of the *Copyright Act*. Similarly, copyists, functioning in this capacity, are not performers. The function of copyist is therefore not covered by the terms of subparagraph 6(2)(b)(i) or (ii) of the *Status of the Artist Act*.

With respect to the bargaining sectors it can certify, the Tribunal is, for the time being, limited to the categories of artists listed in subparagraphs 6(2)(b)(i) or (ii) of the *Act* and the function of copyist is not included in either of these categories. Although copyists clearly contribute to the creation and production of artistic works as contemplated by subparagraph 6(2)(b)(iii) of the *Act*, regulations prescribing the other categories of artists who may be covered by the *Status of the Artist Act* have not yet been adopted. The Tribunal therefore cannot, for the time being, include copyists in the sector proposed by the applicant.

1997 CAPPRT 020 (GMO), para. 32

Music librarians

Music librarians are musicians whose function is to manage musical scores. This function can be compared with that of the librarian who deals with books. As a rule, music librarians are instrumentalists who assume the additional task of music librarian, for which they receive extra pay in addition to their regular musician's pay. In large orchestras, however, music librarians sometimes perform this function full time and do not play.

Although music librarians are usually musicians, when they act in their capacity as music librarians they are neither performers nor authors of artistic or musical works. The Tribunal is of the view that it cannot include music librarians in the proposed sector for the same reasons given in the preceding paragraph with respect to the copyists.

*Painting,
sculpting,
engraving,
drawing,
illustration,
photography
and textile art*

1997 CAPPRT 021 (RAAV), para. 22

The Tribunal is of the view that it can include in the sector proposed by the applicant artists whose form of expression is painting, sculpture, engraving, drawing, illustration, photography and textile art, because all these forms of expression are covered by section 2 of the *Copyright Act* and can be subject to copyright. For the reasons stated above, the Tribunal is of the view that the artists that practice these disciplines have common interests and constitute a sector that is suitable for bargaining.

*Installation,
video art*

1997 CAPPRT 021 (RAAV), para. 28

As for the artists who practice installation, the Tribunal is of the view that although an installation is a work that is not necessarily permanent, it can be fixed and could therefore be subject to copyright. Video art is a work that can be permanent and can be fixed and thus subject to copyright. Consequently, the Tribunal is of the opinion that installation and video art are artistic works akin to those enumerated in section 2 of the *Copyright Act* and that it can include them in the proposed sector.

Performance art

1997 CAPPRT 021 (RAAV), para. 26

The Tribunal is of the opinion that an artist who practices performance art can be akin to a performer, a category of artists covered by subparagraph 6(2)(b)(ii) of the *Act*. An artist who practices performance art “performs” before a public.

Editors

2002 CAPPRT 039 (TWUC), para. 77

The Tribunal finds that the conclusions of the Court in *Boudreau v. Lin, supra*, and the evidence indicate that an editor collaborates with an author only in the sense that he or she assists the author in perfecting a work [...]

Editors

2002 CAPPRT 039 (TWUC), para. 86

In light of the above, we find that the original panel erred when it certified a sector that included professional freelance editors whose contribution was in the nature of joint authorship, as these editors are not authors within the meaning of the *Copyright Act*, and therefore not artists within the meaning of the *Act*.

*Authors,
composers,
author-
composers*

2003 CAPPRT 043 (CGFC), para. 45

“Musical work” is defined under section 2 of the *Copyright Act* (R.S.C. 1985, c. C-42, as amended) as “... any work of music or musical composition, with or without words, and

includes any compilation thereof.” On this basis, the Tribunal finds that authors, composers and author-composers are authors within the meaning of the *Copyright Act* and are therefore artists pursuant to subparagraph 6(2)(b)(i) of the *Act*.

2002 CAPPRT 037 (APASQ), para. 167

*Stage managers,
assistant stage
managers*

[...] the Tribunal concludes that the functions of stage managers and assistant stage directors include “directing ... in any manner” a work. Accordingly, they are “artists” pursuant to subparagraph 6(2)(b)(ii) of the *Act*, even if this direction is carried out under the supervision of the stage director.

2003 CAPPRT 041 (APVQ-STCVO), para. 311

*First assistant
directors*

Even if part of the duties of the assistant director or first assistant director is administrative or involves coordinating, the Tribunal finds that it may include this profession under subparagraph 6(2)(b)(ii) of the *Act* because the evidence shows that these individuals are called upon to direct actors, if only in secondary roles or as background performers, and that they may be called upon to direct other aspects of the production.

2004 CAPPRT 048 (CAEA & NCC), para. 27

*Master of
ceremonies*

While it cannot be said that Mr. Girard was portraying a character or that he helped to shape the production, he did, however, entertain the audience through his comic timing and improvisation, skills required of performers generally. This was not a private social event or a conference but an important entertainment venue where well-known performers were appearing. The NCC has stated that it did not engage Mr. Girard because of his acting skills but rather because of his genial nature and personality. We do agree that there is no requirement that a master of ceremonies be an actor or someone professionally trained, however we reject the notion that someone totally inexperienced could carry out the function in the context of this type of production. In our view, Mr. Girard was required to “perform” as that term is envisaged in sub-paragraph 6(2)(b)(ii) of the *Act*.

2002 CAPPRT 037 (APASQ), para. 139 and 140

*Set, costume
lighting and
sound designers*

Paragraphs (a) to (e) of section 2 of the *Regulations* provide for certain professional categories comprising professions in which the practitioner contributes directly to the creative aspects of the production by carrying out one or more of the activities set out in that section. *Inter alia*, paragraph 2(1)(a) of the *Regulations* refers to sound and lighting design; paragraph 2(1)(b) refers to costume design; and paragraph 2(1)(c) refers to set design (“scénographie”). The parties do not dispute that scénographie includes set design (“conception de décors”).

The Tribunal finds that set, costume, lighting and sound designers contribute directly to the creative aspects of the production, and consequently persons who are engaged in those professions are artists under subparagraph 6(2)(b)(iii) of the *Act*.

2002 CAPPRT 037 (APASQ), para. 143, 145 and 146

The Tribunal also understands that in some productions, the set designer may be responsible for props design, and delegate to someone else the job of assembling or selecting props. It is clear that, in that case, the contribution of the propsman does not “contribute directly to the creative aspects of the production”, since the artistic choices will have been made by the set designer.

[...]

*Propsmen, props
designers*

In the Tribunal’s view, the fact that no awards are presented is not conclusive evidence that the position does not exist. ADC itself explained that the position of sound designer has only recently been recognized, illustrating that functions evolve. The fact that one person may agree to carry out both positions does not mean that in another situation these functions might not be assigned to two people. The Tribunal is of the opinion that there is in fact a separate activity that may be called props design. However, it must be understood that the person who performs this function must report to the stage director, just like other designers in a production, and his or her work must include the creation or transformation of objects as well as research in order to develop a whole concept that expresses the vision of the stage director.

[...]

The Tribunal finds that props design is an activity that is akin to set design. Therefore, this position is covered by paragraph 2(1)(c) of the *Regulations* and the props designer is an artist under subparagraph 6(2)(b)(iii) of the *Act*.

2002 CAPPRT 037 (APASQ), para. 150

*Puppet
designers*

First, designing the puppet-theatre is similar to theatrical set design. On the other hand, as Mr. Lacroix testified, when the designer draws the puppet, creates the puppet’s image and conceptualizes its clothing, the work resembles that of a costume designer. Whereas these two functions are clearly covered by the *Regulations*, in paragraphs 2(1)(b): costumes, coiffure and make-up design, and 2(1)(c): set design, the Tribunal concludes that puppet design is a function covered by the *Regulations* and the puppet designer is an artist under subparagraph 6(2)(b)(iii) of the *Act*.

2002 CAPPRT 037 (APASQ), para. 160

*Assistant set
and costume
designers*

The evidence demonstrates that the individuals who work as assistant set and costume designers are usually independent contractors. These professionals meet the criterion of contributing to the creative aspects of a production as set out in subparagraph 6(2)(b)(iii), since the proposed sector relates to the performing arts, dance and variety entertainment. The artistic skills described by Mr. Gaucher illustrate the direct contribution made by these assistants to the creative aspects of a production. The Tribunal finds, based on that evidence, that this creative contribution is sufficient for these functions to be covered by paragraphs 2(1)(b) and 2(1)(c) of the *Regulations* and that set and costume design assistants are artists under subparagraph 6(2)(b)(iii) of the *Act*.

2002 CAPPRT 037 (APASQ), para. 164

Set painters

The Tribunal accepts APASQ's evidence that while set painters follow the artistic instructions given by the designers, their work involves a significant element of artistic adeptness. Based on this creative contribution, the Tribunal concludes that set painters contribute directly to the creative aspects of a production, and thus meet the criteria set out in subsection 2(1) of the *Regulations*. The Tribunal rejects the argument made by the intervenors TAI and the NAC, that set painters merely perform "support" duties, having regard to the detailed analysis done by the Tribunal in respect of the positions of assistant set and costume designer [see paragraph 158]. As the set painter's work complements that of the set designer's, the Tribunal concludes that it is covered by paragraph 2(1)(c) of the *Regulations* and the set painter is an artist under subparagraph 6(2)(b)(iii) of the *Act*.

2003 CAPPRT 041 (APVQ-STCVQ), para. 313

Directors of photography

The evidence shows that the director of photography has a primary role in developing the artistic and stylistic design of the film. Moreover, the director of photography works closely with other creators. These two factors are sufficient to allow the Tribunal to find that this profession contributes directly to the creative aspects of the production and is covered by paragraph 2(1)(a) of the *Regulations* (category 1: camera work, lighting and sound design).