



DOC Proposes Documentary Filmmaker Exception to Bill C-11

February 29, 2012 by Bob Tarantino

Kudos to The Documentary Organization of Canada (DOC), which has released a proposed Exemption for Documentary Filmmakers to Circumvent Technical Protection Mechanisms in Bill C-11. I commend their efforts to do something which is not as common as it could be in Canadian copyright debates: actually proposing statutory language to address their concerns.

The DOC proposal is in response to the "technological protection measures" (TPM) provisions of Bill C-11, which, subject to certain limited exceptions, would make it an act of infringement to circumvent a TPM. Suffice it to say that the TPM provisions of the bill are the most contentious in the draft legislation. DOC argues that incorporating protection for TPMs into the *Copyright Act* (Canada), and more particularly making their circumvention constitute copyright infringement with no allowance for a fair dealing exception to such deemed infringement, constitute a "serious problem" because they "prevent documentary filmmakers from accessing the materials they need in order to produce their works". The DOC proposal goes into detail about the technical problems faced by documentary filmmakers who wish to make use of, for example, short clips from DVDs for inclusion in their documentaries and who would be forced to employ non-circumventing means to access the clips (basically, they would have to re-film the clip - which is apparently a lot more technically complex, and expensive, than you might have imagined).

This is the text of DOC's proposed "documentary filmmaker" exception to Bill C-11's TPM provisions:

41.1X (1) Notwithstanding Paragraph 41.1.(1)(a) herein, documentary filmmakers, may circumvent technological protection measure in order to incorporate copyrighted material into new works for the purposes of Fair Dealing (outlined in section 29 of the Copyright Act) provided that:

- a. The documentary filmmaker is not able to to access the copyrighted material after reasonable attempts to do so and must therefore circumvent the technological protection mechanism; and
 - a. i) the documentary filmmaker has lawfully obtained the work, the performer's performance fixed in a sound recording or the sound recording that is protected by the technological protection measure; or
 - ii) if an orphaned work or a work that is unavailable for purchase to the public that is protected by the technological protection measure, the documentary filmmaker has made best efforts to legally obtain the material; and in all cases
- b. the documentary filmmakers has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use of the material in the documentary.



(2) However, a person acting in the circumstances referred to in subsection (1) is not entitled to benefit from the exception under that subsection if the person does an act that constitutes an infringement of copyright or an act that contravenes any Act of Parliament or any Act of the legislature of a province.

(3) Paragraph 41.1(1)(b) does not apply to a person who offers services to the public or provides services for the purposes of circumventing a technological protection measure if the person does so for the purpose of incorporating the material into a new documentary work for the purposes of fair dealing.

(3) [sic] Paragraph 41.1(1)(c) does not apply to a person who manufactures, imports or provides a technology, device or component for the purposes of circumventing a technological protection measure purpose of incorporating the material into a documentary work for the purposes of fair dealing; and uses that technology, device or component only for that purpose.

One might quibble with the specifics of the drafting (e.g., I'm not entirely sure how subclause (2) is intended to operate, since it seems to short-circuit the effect of subclause (1)), but I think the proposal, like [DOC's Guidelines to Fair Dealing Practices for Documentary Filmmakers](#), is a productive exercise and should be applauded. Hopefully the proposal will engender many responses.

The proposal would, if enacted, certainly be beneficial to documentary filmmakers. My biggest concern (and this is not a criticism of DOC, who are doing their job by advocating for their members and other stakeholders) is that proposals like this clutter the Act - to the extent possible, we should avoid particularism in copyright statute drafting even if only to make the Act less byzantine (if you're ever bored, take a waltz through the "libraries, archives and museums" provisions of the Act; to witness the *reductio ad absurdum* of copyright drafting, see Section 32.2(2) of the Act, the "agricultural or agricultural-industrial exhibition or fair" provision). We would be better served by principles-based exceptions (e.g., circumvention of TPMs is not an infringement if done for a fair dealing purpose) - but since such an approach goes against the trend-line, the DOC proposal is likely the best we'll be able to do in the short term.

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