

Bill C-11, TPMs, Private Use and Statutory Damages

October 5, 2011 by [Bob Tarantino](#)

UPDATED BELOW

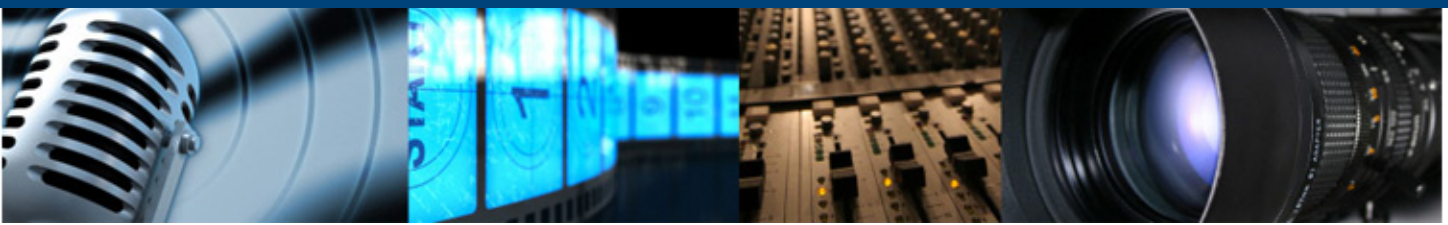
The *Montreal Gazette* ran an editorial today regarding [Bill C-11 \(the Copyright Modernization Act\)](#) ([The Gazette's View: Bringing copyright law into the 21st century](#)), which contains a glaring factual error regarding statutory damages and technological protection measures (TPMs). From the editorial [emphasis added]:

Less welcome, and the sticking point in previous attempts to pass this bill, is the blanket provision against breaking digital locks, even for purposes of personal use. **This includes picking a lock on a DVD purchased overseas to watch at home, or transferring a purchased e-book to read to another personal device. The bill provides for \$5,000 fines for even the smallest such violations.**

This provision was apparently included as a result of heavy pressure from U.S. authorities and in the interest of maintaining cross-border trade and exemption from protectionist measures that would prevent Canadian firms from bidding on U.S. government procurement contracts. It is unlikely that there will be many prosecutions under this article as long as violations are committed in the privacy of people's homes and not for any commercial purpose, but it is still a niggling restriction that caves in to the U.S. at the expense of the right of average Canadians to do what they wish to with their own property for their own enjoyment.

Bill C-11 contains no provision which would allow for the imposition of a \$5,000 fine for the described activities, nor does it contain any provision which would allow for a court to impose statutory damages were a plaintiff to commence an action for the circumvention of a TPM in the circumstances described in the editorial. The writers of the editorial seem to think that the statutory damages provisions of the revised Copyright Act would apply to "picking a lock on a DVD purchased overseas to watch at home, or transferring a purchased e-book to read to another personal device" - that conclusion is simply incorrect.

The proposed new Sections 41 and 41.1 would certainly make it an act of infringement to circumvent a TPM - but proposed Section 41.1(3) specifically states that a rightsholder cannot recover statutory damages from an individual who contravened that paragraph only for his or her own private purposes. The new statutory damages regime would set an absolute *maximum* statutory damages liability of \$5,000 (the number which seems to have caught the eye of the editorial writers) for non-commercial infringement - but proposed Section 41.1(3) says that the statutory damages mechanism does not apply at all to circumventions of TPMs which are done for private purposes.



There are certainly remedies other than statutory damages which a rightsholder could seek against someone who circumvents a TPM in the circumstances contemplated in the editorial but, as the *Gazette* editorial notes (refreshingly, in the context of the copyright reform debates), as a practical matter, the chances of such claims being brought are vanishingly small. Whatever other criticisms one might make of the TPM provisions proposed in Bill C-11, exposing individuals to \$5,000 of statutory damages liability for "even the smallest of such violations" is not a possibility.

A short note about terminology: the *Gazette* editorial uses the word "fine" to describe the non-existent \$5,000 "penalty" for which they think an individual could be liable. A "fine" is something imposed upon a wrongdoer by a state authority (Black's Law Dictionary: "a pecuniary punishment or penalty imposed by lawful tribunal upon person convicted of crime or misdemeanor"). Statutory damages are not "fines" - they are "damages", claimable only by a private plaintiff in a civil court proceeding. The copyright reform debates often get mired in terminological debates (is copyright infringement theft?), because words matter - describing statutory damages as "fines" is inaccurate and inflammatory. (The proposed revisions to the Copyright Act *do* contemplate fines for circumventing TPMs (in proposed Section 42(3.1), but those would only be available where the circumvention is done for commercial purposes.)

UPDATE (10.05.11): The *Gazette* editorial was published on October 1, 2011, not October 5, 2011, as I indicated in the first line of this post. Barry Sookman, on October 3, 2011, addressed the inaccuracy of the *Gazette's* statements in [Some observations on Bill C-11: The Copyright Modernization Act](#).

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