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Exemption for Documentary Filmmakers to Circumvent Technical Protection Mechanisms in Bill C-11

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Preface

The Documentary Organization of Canada/l'Association des documentaristes du Canada proposes an exemption (hereafter referred to as the Exemption) intended for documentary filmmakers to circumvent technical protection mechanisms (TPMs) on digital media (or any future media platforms) for the purposes of accessing the material under Fair Dealing provisions.

DOC urges the Canadian government to seriously consider incorporating the Exemption into Bill C-11. Not only does it conform to the government's public policy objectives for copyright modernization, but it will also increase Canada's ability to compete in a rapidly evolving industry: audio-visual production.

Why do documentary filmmakers need to bypass TPMs?

Documentary filmmakers have an atypical relationship with copyright. They are both users and creators of copyrighted materials. As users of copyright, they access and licence copyrighted materials to be incorporated into their works. As creators of copyrighted materials, they licence their copyright to finance and collect revenue for their expressions.

Documentary filmmakers support TPMs as a form of protecting copyrighted materials from pirates. Without copyright protection and enforcement mechanisms, the primary revenue model for

documentary filmmakers would be compromised. In fact, the absence of enforcement mechanisms would compromise the entire documentary financing model, because the value of the filmmaker's copyright would be depreciated.

However, from a creator's standpoint, TPMs pose a serious problem. They prevent documentary filmmakers from accessing the materials they need in order to produce their works. If they cannot produce their projects, there is no documentary film industry.

The Exemption Conforms to Public Policy Objectives

WIPO Compliance

The WIPO World Copyright Treaty requires each member country to create legal protection for technical protection mechanisms. It allows each member country to determine its own exemptions. The US Copyright Office already created a similar exemption for documentary filmmakers and a Canadian exemption would bring Canada into WIPO compliance.

Fostering Creativity and Innovation

In order to foster creativity and innovation, creators need the necessary tools to succeed. The Exemption would provide documentary filmmakers access to materials they need to help create insightful, thought provoking and innovative projects. Lack of fair access to content would restrict competition for documentary filmmakers and create real hardships for the industry.

Technologically Neutral

The government properly wants to reform copyright in a technologically neutral manner. The Exemption is written so that it can be applied to current digital devices and future media.

Prevents Piracy

As outlined above, copyright law is fundamental to the documentary industry of which TPMs are an integral part. By giving the tools for circumvention to creators that respect copyright, the Exemption limits the potential for piracy.

Other Policy Objectives

Alignment with American Legislation

U.S copyright law has already created an exemption for documentary filmmakers to bypass TPMs for particular purposes, namely the comment and criticism of film clips. Canada should follow that lead and harmonize its copyright law with its largest trading partner.

Equal Footing with our American Competitors

By harmonizing copyright legislation, Canadian companies will be able to compete more effectively and also work together with their American counterparts based on the same legal principles and practices. This fosters international competitiveness, international cooperation, and trade.

Strengthening the Marketplace of Ideas

Increased access to materials for documentary filmmakers facilitates the creation of more documentaries, which ultimately strengthens the marketplace of ideas. The Canadian public sphere will be further enriched through access to compelling stories with competing points of view that represent the diverse viewpoints of Canadians.

Documentary Filmmaking and Copyright

Acquiring Materials

Understanding the context of why a documentary filmmaker needs to bypass a TPM requires an understanding of how documentary filmmakers presently access materials for their productions.

Whether using photos, moving images or sound, documentary production employs a variety of media to tell a story. There are multiple ways for documentary filmmakers to acquire the rights to incorporate the various media into their project.

Licensing

In most cases, the filmmaker must licence the materials from the content owner. The filmmaker pays the content owner a licence that outlines the conditions of use of the material: the duration of the clip, the term for its use, the distribution platforms, the territories, etc.

Lapsed Copyright

If the copyright of the material has expired (life of the author plus 50 years), the expression enters into the public domain. The filmmaker does not need to pay a licence.

Orphan Works

The author/owner of the copyright of the material is difficult or impossible to locate. If the filmmaker demonstrates due diligence in locating the author and fails to do so, the clip does not need to be licenced.

Fair Dealing

If the documentary filmmaker is using the material for the various fair dealing purposes (research, private study, commentary, criticism, and news reporting), and can defend the use of the material for that purpose, the filmmaker does not have to licence the clip. (Please see

DOC's Fair Dealing and Copyright: Guidelines for Documentary Filmmakers.)

Presently, a documentary filmmaker can access most materials through archives, stock houses, and different forms of media. They can licence the clip from its owner. They can circumvent a TPM, and make a copy of the material needed for their documentary under the Fair Dealing provisions of the Copyright Act.

Impact of Bill C-11 in the Current Documentary Production

Context

Sections 29.22(1).c, and 41.1.a of Bill C-11 restrict filmmakers from making copies of materials that are protected by TPMs. This unduly compromises the documentary market, because it prevents access to materials. If Bill C-11 is passed in its current form, it will interfere with the business of documentary production.

Documentary filmmakers will not be able to access the materials they need to create their production, and they will be denied their Fair Dealing rights.

In addition, there are existing practices that restrict the freedom of documentary filmmakers' use of content. Combined with the proposed measures for TPMs, documentary filmmakers would face inordinate obstacles to accessing content.

Restrictive Licencing Contracts

All major stock footage, archives, broadcasters, and film studios licence their materials with a non-derogatory clause under which the licensor is restricted from commenting or criticizing the material, the owners of the material, the industry that relates to the material, and

other related parties. Therefore, even when a documentary filmmaker legally obtains the material, the filmmaker is precluded by licence from using the materials for the purposes of criticism.

No Practical Workarounds

All DVDs, Blu-ray Discs, and digital video transmissions (streaming video) are protected by TPMs. Thus, filmmakers cannot choose whether or not they want to purchase materials with, or without, TPMs. They must find a way to copy the clip or use a work-around of sufficient quality to meet broadcasters' and distributors' quality standards. Low-quality clips not only compromise the integrity of the project, but also impact whether or not they will secure a broadcast or distribution deal.

VHS

The distribution of VHS tapes for industrial use has ended. Studios no longer release their films on VHS . Consequently, a filmmaker cannot easily access clips from VHS, nor can they tape clips from DVDs.

Scan Conversion (Video-taping the Screen)

To work around the problem, a filmmaker must turn to a technical solution that is complex and costly: the filmmaker must rent a long, pitch-dark, oblong room; a high-end quality camera equipped with a zoom with a qualified operator; and a team of video and sound engineers to reconstruct the clip after it is filmed. Equipment rentals, space, and human resources combined make each clip cost thousands of dollars. The final result is a degraded clip that would be rejected by broadcasters and film distributors.

Presently, even the highest quality workaround does not yield the same quality as a clip extracted from a DVD (or other video discs).

Renders Fair Dealing Rights Inaccessible

Documentary filmmakers will be unable to avail themselves of Fair Dealing if the copyrighted material they intend to use is protected by TPMs. As more materials become digitized, there will be fewer ways for documentary filmmakers to access analog copies of copyrighted materials. All DVDs and Blu-ray Discs have TPMs; and so do E-books. Soon it will be the case with photos, and other necessary materials for documentaries. Under these restrictions, documentary production will be exceedingly challenging. Copyright law will work against the very principles of being fair and balanced.

Summary

Without the Exemption, documentary filmmakers will be hindered financially, legally, and the quality of their products will suffer.

Documentary filmmakers will face a triple-bind:

- If the documentary filmmaker chooses to use a workaround to access the clip, he or she will incur costs to access a lower quality clip that may jeopardize the commercialization of the work.
- If the documentary filmmaker licences the clip, thereby signing a contract that includes a non-derogatory clause, he or she may not be able to tell the story in the manner that was intended.
- If the documentary filmmaker chooses to break the digital lock for purposes stipulated under Fair Dealing purposes, he or she risks being fined for violating copyright law.

In certain circumstances, documentary filmmakers need to bypass TPMs to make their projects in accordance with the rights they have always enjoyed under copyright law as provided by Fair Dealing (Fair Use in the US). Fair Dealing is a right that balances copyright for the users of copyrighted material. If C-11 is passed without some real consideration for the realities of the documentary film industry, our documentary industry will be disadvantaged to compete on a global scale, and suffer domestically against global imports.

(Please see next page for Draft of Potential Language of the Exemption: Appendix A)

Appendix A: Draft of Potential Language of the Exemption

Purpose	Clause
<i>Introducing the persons who can avail themselves of the exemption</i>	41.1X (1) <u>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:</u>
<i>Non-practicality</i>	a. <u>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</u>
<i>Legally obtained the copyrighted material, and due diligence in legally obtaining the copyrighted material</i>	a. <u>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;</u> <u>or</u> <u>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</u>
<i>Requirement of the material for the documentary</i>	b. <u>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.</u> c.
<i>Non-Application</i>	<u>(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.</u>
<i>Services</i>	<u>(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.</u>
<i>Technology, device or component</i>	<u>(3) 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.</u>