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The Honourable Tony Clement, Minister of Industry
Copyright and International Intellectual Property
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Re: 2009 Copyright Consultations

Introduction

The DOCUMENTARY ORGANIZATION OF CANADA | l'ASSOCIATION DES DOCUMENTARISTES DU CANADA (DOC) is the collective voice of independent documentary filmmakers across Canada. DOC is a national non-profit arts service association representing over 800 directors, producers and craftspeople in the documentary community, from all provinces and regions of our nation. DOC advocates on behalf of its members to foster an environment conducive to documentary production and strives to strengthen the sector within the broader film production industry.

DOC would like to thank the ministers of Canadian Heritage and Industry for the opportunity to comment on a key issue such as copyright reform and appreciate the efforts deployed to engage the Canadian public on this important policy matter.

As creators and copyright holders themselves, documentarians understand the importance and the need to be fairly compensated for their work when they licence their rights to various parties in the media industry. But documentarians' relationship to copyright is made more complex by the very nature of their art-form. In many instances, in the course of telling stories, documentarians need to access archival and other copyrighted material. Documentarians want copyright to create fair conditions for public use, but are also interested in the monetization of their work. If anyone in the industry understands the two sides of copyright, it is documentarians.

In this submission, DOC comments on Fair Dealing and how to create a copyright system that fosters fair copyright use for the public and the industry stakeholders. The first section of the submission discusses how the Canadian copyright act and related laws should be modified so that they can suit best practices for Fair Dealing. The second section addresses guidelines and principles for creating a copyright system allowing Canada to be competitive internationally and allowing the country to become a digital leader that maintains the civil, social and privacy rights of the Canadian public.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tina Hahn', written in a cursive style.

Tina Hahn, National Co-chair

A handwritten signature in black ink, appearing to read 'John Christou', written in a cursive style.

John Christou, National Co-chair

Encl. DOC Submission

1. Fair Dealing

Similar to other television and film producers, documentarians can be exempt from the need to obtain copyright licences for their productions through the Fair Dealing doctrine. The Copyright Act permits a fair dealing defense in the case of only five types of dealings: (1) private study, (2) research, (3) criticism, (4) review, and (5) news summary. Documentarians have to somehow make their production conform to these five cases, which aren't always suitable for productions that are, after all, meant for public exhibition. Compared to producers in other media production, documentarians rely on Fair Dealing for a larger portion of the content they produce, again by virtue of the art-form. Thus the outcome of these consultations are taken very seriously by our sector because any alterations to the system could dramatically affect the way this vibrant cultural industry operates.

Because of the relevance of Fair Dealing to its membership, DOC has been working to develop a "best practices" framework to guide documentarians in the application of the current Fair Dealing defense to the practices of documentarians. However, because of the limitations of the categorical approach to Fair Dealing, DOC is of the view that the development of "best practices" is not a replacement for reform of the law to meet the legitimate needs of documentarians.

In 2004, the Supreme Court of Canada devised a test evaluating whether the dealing is fair, based on 6 non-exclusive criteria: the Purpose of the Dealing, the Character of the Dealing, the Amount of the Dealing, Alternatives to the Dealing, the Nature of the Work and the Effect of the Dealing on the Work.¹ DOC considers that these 6 criteria should be the only method of judging whether a dealing is fair, instead of limiting the dealing to the stated 5 categories presently in the Copyright Act.

DOC finds it odd that Canada has not allowed for parody and satire to be exempted from infringement. The genres of parody and satire often require the use of copyrighted material to have their full affect, especially in our media-saturated age. Parody and satire also sometimes cross into the documentary industry in the form of a "mockumentary" and it is important that these forms of expression that enhance the freedom of expression and critical discourse receive the same exemptions. DOC suggests that parody and satire exemptions be created in the reforms of the Act.

In order to change the Copyright Act to reflect the above, the language of article 29 of the Copyright Act could be altered so that the 5 categories would be considered non-exhaustive examples. This alteration would greatly benefit documentarians for they would no longer have to limit their expressions to the aforementioned 5 categories, and the openness would allow for new and innovative kinds of documentaries to be created. Moreover, the non-exhaustive change in language would also allow for future expressions in different media to be

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CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13

included under Fair Dealing. Equally important would be the ability to refer back to existing jurisprudence on this matter.

The alteration would maintain the Fair Dealing doctrine form while allowing for all the benefits accrued under the American Fair Use system. Furthermore, it allows for the Copyright Act to be consistent with the rulings of the Supreme Court of Canada, namely, *CCH Canadian Ltd. v. Law Society of Upper Canada*.

1.1 *Digital Rights Management and Technological Protection Mechanisms*

Documentarians use copyrighted material that come in a multitude of formats from all over the world. Although many of these formats are easily accessible, they are often protected by rights organizations and for-profit archives that safeguard the material on behalf of the owners of the rights. There are also formats that have technological protection measures (TPMs) that prevent the copying of material regardless of whether its use is lawful or not. It is our belief that this should be a consideration in the case of a use falling under Fair Dealing.

In the digital age, such protection mechanisms take many forms, from digital rights management systems (DRMs) that allow users limited use of a file/format, to programming algorithms that remove any copyrighted material on Youtube.com regardless of its use.² Moreover, in order to create price differentials, the motion picture studios and DVD manufacturers collaborated in the creation of specific region encodings that can eventually lock DVD players on computers. Some DVD players only allow the user to switch the region a certain amount of times before becoming locked, forcing the user to replace the equipment. Meanwhile, some non-computer DVD players do not play any DVDs except those of the region where it was purchased. Such practices prevent consumers from purchasing domestic films abroad, and make foreign films unavailable in Canada.

However, documentarians may want to access these films to use as part of the content in their works. Under the current system, a filmmaker wanting to access material - even in the preliminary editing stages - is forced to circumnavigate the DRMs, committing an illegal offence in the US, just to do something lawful according to Canadian law. Anti-circumvention laws contribute to the declining of budgets of documentaries. It becomes more burdensome to access the material physically and legally, because producers have to clear the rights with various archives and rights organizations. This impacts budgets which can see up to 27% percent of a production's budget go towards clearing rights³; rights that should not have to be cleared at all in the absence of DRMs. DRMs hinder documentarians from producing higher quality projects, and consequently, impede

² For example, Warner removed a lecture by Laurence Lessig from Youtube.com because it included copyrighted material owned by Warner even though Lessig could have defended such use was fair under the American doctrine of Fair Use.

³ Cox, Kirwan. *Censorship by Copyright: Report of the Copyright survey*. 2005

Canadian cultural products from succeeding in a global market.

DOC recommends that an exemption for the purposes of Fair Dealing be included if DRM provisions are added to the Copyright Act. In addition, DOC also supports circumvention for any other non-infringing purpose. Examples include, and are not exclusive to, format shifting for private copying, format shifting to make material accessible for people with disabilities, and for cryptography study.

1.2 *The Proposed Internet Piracy Policing Methods*

With the advent of high capacity bandwidth, and video comprehension software, the amount of video on the Internet is growing exponentially. Public archives are available on the Web, and material once thought to be missing has reappeared. Such a cornucopia of materials should have ushered in a renaissance of documentary making around the world, especially in Canada where distance and travel costs are substantial barriers. However, the increased access has also been accompanied by increased control, law, and protection of copyrighted material.

Documentarians should have the right to use the material for their productions under Fair Dealing, but now face the added hurdle of various Internet policing methods operating in the interests of the rights holders. We deem some of these policing methods to be extreme such as kicking any user off the Internet for downloading copyrighted material 3 times, regardless of their use of the material (the 3-strikes graduated response). Others have *notice-and-take-down* systems that remove any infringing copyrighted material from a website if reported by the rights owner or organization representing the rights owner.

Similar to our recommendations for DRMs and TPMs, DOC advises approaching the question of policing the Internet for copyright infringement very carefully. DOC recommends implementing the voluntary *notice-and-notice* system suggested in Bill C-60, and outright opposes the creation of a 3-strike gradual response mechanism, which is currently being discussed in the U.K.

In the information age, it is counter-productive for a democratic state to implement any system that would deny its citizens access to the media and information. Moreover, it is also in direct conflict with Article 19 of the United Nations Universal Declaration of Human Rights that provides all people the right "to access information and idea through any media".⁴ Now that the majority of all business and finances are conducted directly and indirectly through the Internet, expelling Canadians from the Internet would negatively affect our economy, standard of living, our culture, and erode the fundamental democratic principles of our society.

⁴ United Nations' Universal Declaration of Human Rights, article 19: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

In the midst of the current copyright consultations, some stakeholders are referencing documents that are not only circumspect in their methodology but also, ironically, could be considered copyright infringement.⁵ Meanwhile in order to push Canadian laws into conformity, some stakeholders have referred to the United States Trade Representative's Special 301 report wherein Canada was placed on the priority watch list. The report has been rejected by the Canadian government for its biased opinions and lack of credibility⁶. Finally, as governments around the world are trying to understand their digital populations and file-sharing, they are relying on biased and inaccurate information circulated by the music industry lobby.⁷

It is clear that the industry has yet to develop a sound and objective way of researching peer-to-peer file-sharing traffic. DOC recommends that the government of Canada abstain from implementing any system of Internet piracy policing until impartial research with sound methodologies are conducted.

The social, economic, cultural, and political networks that are generated by the Internet are too valuable to jeopardize based on inaccurate and cursory research. In order for a balanced system of copyright to be created, it must serve the interests of both the Canadian public and the rights-holders and as such, shaping policy on this matter must not be unduly influenced by powerful market lobbies.

⁵ The Conference Board of Canada recently was commissioned by the CRIA to study Canada's digital environment. The resulting reports included word for word analysis and data from International Intellectual Property Alliance 2008 Special 301 report without proper citations. These reports have been discontinued because of the accusations of plagiarism.
<http://www.thestar.com/business/article/642208>

⁶ "In regard to the watch list, Canada does not recognize the 301 watch list process. It basically lacks reliable and objective analysis. It's driven entirely by U.S. industry. We have repeatedly raised this issue of the lack of objective analysis in the 301 watch list process with our U.S. Counterparts." an official at the Department of Foreign Affairs to a House of Commons committee in 2007 as found in the minutes of the 39th PARLIAMENT, 1st SESSION, Standing Committee on Public Safety and National Security, Tuesday, March 27, 2007.
<http://cmte.parl.gc.ca/Content/HOC/committee/391/secu/evidence/ev2806944/secuev35-e.htm#T1150>

⁷ According to a BBC 4 radio show, the statistics about the amount of online illegal file-sharing being used by the UK government are inflated and poorly calculated. The research consultants of the British Phonogram Institute concluded that 7 million people conducted illegal file-sharing. However, the basis for that statistic is somewhat dubious. A survey of 1176 homes found that 11.6% of respondents admitted to using illegal file sharing software. The figure was then inflated to account for survey participants lying; 11.6% was altered to 16.8%. Furthermore, there was an inflation of the online population in the UK. It was about 33.9 million, but the figure was inflated to 40 million. The host of the show conclude that the estimated number of illegal file-sharers must be closer to 3.9 million. As found on More or Less BBC 4 radio show podcast:
http://www.bbc.co.uk/iplayer/episode/b00mcwv5More_or_Less_04_09_2009/

DOC proposes that one way of achieving a balanced view on this matter would be for the government to be actively involved in commissioning independent research on Canada's digital environment rather than relying on the industry to produce the information.

2. Fair Compensation and Fair Copyright

DOC's defence of Fair Dealing does not imply that it supports Free-Dealing or piracy for that matter. It is very important that creators be compensated for the commercial use of their productions.

Similar to the rest of the traditional audio-visual sector, documentarians are having trouble dealing with the transition into the digital age and finding models to develop and monetize work in this new environment. The Internet has radically altered how we make and consume audiovisual material. There are new distributors, new broadcasters, and new audiences. Regulations implemented for a system dating back to before this sea change no longer apply. The Internet is neither television nor radio, and it will not conform to the rules of those media. Moreover, the lines between public and private use have blurred.

The Internet allows Canadian cultural products to circulate worldwide which is something to cheer about as consumers' curiosity drives them to explore cultural offerings beyond the usual dominant cultural products. If there is much to rejoice about in regards to that prospect, there is also a sad correlation which is that no revenue flows back to creators. In our opinion, the massive amount of non-monetized or illegally distributed media products point to the fact that rights holders have failed to meet the needs of the market where consumers are clamoring to have goods available to consumers on all platforms. By not making these products readily available, consumers have found other ways to find what they are looking for, namely on the grey market. Although painted as "pirates" and criminalized, it is our view that many consumers would have opted for a legal approach to obtaining material had it been offered to them.

One of the ways in which copyright hinders the flow of cultural products to the public is the over-licencing of incidental use of music, video-clips, and other copyrighted material, and the limited terms of licences. Many high quality Canadian programs may never reach the public because of the high price of licencing the material, and the limited period allowed by the licences that are negotiated. For example, a documentarian may only afford limited licence for the music or a video-clip for their production, and then may not be able to distribute the production outside of that limited time. In order to re-release the film after the licence has expired, the producer would have to pay for an extended licence, or edit the documentary so that the previously licenced material is no longer in the film. The costs of either avenue are sometimes too high for the producer, and the film is never released to the public.

A more popular example of this is the release of the DVDs of the show *The Wonder Years*. This particular program is known for its use of classic rock and period music, integral to the atmosphere and authenticity of the program. The original licences for the music of the TV show have long since expired, and in order to re-release the show as a DVD, new licences must be negotiated. However, because the substantially increased licence fees for the music demanded by the music rights collectives, nobody can afford to purchase them. As a result, the DVDs or monetized streaming episodes of the show are not available to the public, even though they would be willing to purchase them. Pirated DVDs of *the Wonder Years* are available for purchase online, but there are no legitimate copies available to the public.

In addition to innovative content creation and dissemination, it is important to recognize that the opportunities provided by the digital age are driven by the need for consumer satisfaction and the ongoing search for new models of monetization and not so much by copyright control. DOC recommends that the future Copyright Act be technologically neutral and flexible enough so that any changes to the channels of communication and methods of distribution can be considered under the jurisdiction of copyright. DOC welcomes new business models that would monetize the use of copyrighted material produced by our creators via these new distribution methods.

The World Intellectual Property Organization Copyright Treaty (WCT) and the World Intellectual Property Organization Performers and Phonogram Treaty (WPPT) were designed with the copyright issues of the 21st century in mind, namely, the protection of copyright on the Internet, expanding copyright protection to computer software, and criminalizing the circumvention of DRMs. Many stakeholders accuse the Canadian copyright system of being outdated and backwards because our Parliament has yet to ratify these treaties. But these treaties were written over 10 years ago and many things have changed since. DRMs have been abandoned by the music industry, and they have only proven to create consumer dissatisfaction. Perhaps it is time that WIPO update its treaties to align with the current environment, rather than have Canada ratify treaties that do not serve the interests of its citizens.

As much as some stakeholders would like the government to believe, the ratification of these treaties is not a simple band-aid to fix a broken system, but rather a way of avoiding the major overhaul of copyright to accommodate the unique business models the Internet has to offer. DOC recommends that if Canada does intend implement the WIPO treaties, it implements the WPPT, and the most bare minimum of the WCT, or a very nuanced and subtle implementations of the WCT. Canada should implement the provisions of the treaty that are in line with a balanced international response, instead of reacting to powerful lobby groups.

Conclusion

DOC would like to thank Heritage Canada and Industry Canada for the opportunity to express our concerns about a vital piece of legislation for Canadian content creators. This is a unique time to recognize the possibilities that new forms of distribution offer, while providing Canadian content creators a balanced copyright framework on our own terms.

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