Bill C-61 and Civil Liberties

Overview

Bill C-61 was introduced on June 12, 2008, shortly before the Parliamentary summer recess. The legislation is intended to bring Canada up to date with international treaty obligations and address new technologies, especially the digital reproduction and distribution of copyrighted materials.

The considerable opposition to Bill C-61 has focused on the protection of technological protection measures (TPMs, also known as digital rights management or DRM), digital locks intended to allow rights holders to control how their work is copied and distributed and to limit infringing use of these works. However, in doing so, **TPMs prevent a myriad of legitimate uses,** such as time and format shifting, or copies for personal use, educational purposes, review purposes, research, and parody. C-61 prohibits the removal of TPMs except under very limited circumstances, along with the creation and distribution of software or hardware tools that removes TPMs.[1]

Areas of Concern

Freedom of expression

Historically, Canada has recognized limited exemptions to copyright for certain purposes. For instance, educational exceptions allowed the copying of excerpts from books, while sound or video could be sampled for review purposes. While C-61 allows many of these uses in the absence of TPMs, **materials protected by TPMs may only be used at the grace of the rights holder.** If right are not granted, breaking the TPM to make use of the materials is prohibited. Among the many creative groups to suffer chilling effects would be documentary filmmakers, who often rely on footage from copyrighted sources[2], and "appropriation artist" who create new works by remixing and reinterpreting existing materials.

Computer programmers and security researchers also face challenges under Bill C-61. In a case pitting *2006 Magazine* against the Motion Picture Association of America, U.S. courts ruled that computer "source code" able to break the TPMs on DVDs is not protected speech under the First Amendment[3], and that the anti-circumvention provisions in the DMCA (Digital Millennium Copyright Act) did not raise First Amendment concerns. This decision came in spite

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[1] See C-61 s. 41.1 and the list of exemptions following.

[2] See the Documentary Organization of Canada, "DOC Deplores Newly Proposed Copyright Legislation: Proposed legislation causes more problems than it solves for filmmakers", June 12, 2008.
http://docorg.ca/policy.html

[3] See the history of *Universal v. Reimerdes* at the Electronic Frontiers Foundation website. *2006* elected not to bring an appeal to the U.S. Supreme Court.
http://w2.eff.org/IP/Video/MPAA_DVD_cases/

of provisions in the DMCA making exceptions for security research. Similar provisions in Bill C-61 leaves software developers and security researchers in uncertain territory. As in the United Sates, the security research exception to the anti-circumvention legislation depends on the research being approved by the rights holder.[4]

The U.S. experience has seen rights holders deny permission to publish research that exposes vulnerabilities in their TPM schemes, **chilling academic work on security and encryption.**[5]

Freedom of expression – access to works

Section 41 (a) of Bill C-61 define "technological measures" as a device that "controls access to a work" This grants rights holders not only the ability to control who can copy the work, but also to **refuse access to the work through TPMs.** This provision could be used to deny access to certain individuals or groups, and requires that ideas be shared with friends and colleagues through contractual relationships with third parties.

The Canadian Library Association (CLA)has expressed disappointment with Bill C-61, fearing it will turn libraries into digital locksmiths and force a return to paper copies.[6] Canadian libraries are increasing relying on digital material, from online journal and periodical databases to electronic interlibrary loans. Rather than making these resources more easily accessible to Canadians, **C61 limits access through mandatory TPMs on electronic materials.**[7]

The CLA also fears that **Canadians with perceptual disabilities will be disadvantaged** by the Bill, which allows the circumvention of TPMs to improve accessibility for the disabled (for instance, text-to-speech readers for the visually impaired and text-to-Braille machine for the hearing impaired) but prohibits the distribution of the tools that would make this possible.

On a more positive note, the **notice-and-notice system** should remain in place if BillC-61 is amended, with the possible addition of a penalty for filing false notice. Under this system, when an internet provider receives notice of infringement from a rights holder, the notice is forwarded to the customer whose alleged activities gave rise to the notice. If this process is followed, the materials remain with the customer. The American approach of notice-and-takedown requires that the ISP immediately remove the infringing material to preserve its immunity from liability for

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[4] See C-61 s. 41.13 and 41.15, providing exemptions for encryption and security research, respectively. Section 41.13 requires informing the rights holder of the research, but not their consent, while 41.15 requires the consent of the owner of a system.

[5] There have been several notable cases of research chill in the U.S. under the DMCA. See especially Dr. Edward Felton's difficulties in presenting research on music TPMs and the arrest of Russian security researcher Dmitry Sklyarov upon his arrival in the U.S. to present his research at the security conference. The EFF has details of these access and others: "Unintended consequences: Seven Years under the DMCA", April 6, 2006. http://www.eff.org/wp/unintended-consequencs-seven -years-under-dmca

[6] "Canadian Library/Association Disappointed with New Copyright Legislation", CLA, June 12, 2008. http://www.cla.ca/AM/Template.cfm?Section=News1&CONTENTID=5346&TEMPLATE=/CM/ContenDisplay.cfm

[7] See Bill C-61 s. 20 (5.01) (a)-(c), which requires that libraries secure digital materials with TPMs to allow only one print copy, prevent the sharing of materials between individuals, and require that the files be deleted after five days.

infringement. This has created a chill in the United Sates, where users whose material is erroneously removed are forced to take action to keep it available to the public.[8]

Privacy – TPMs

The Privacy Commissioner of Canada has noted that some TPM schemes collect personal information as a part of the authorization process, beyond the information required to authenticate the user.[9] While C-61 allows TPMs to be broken for the purpose of protecting user privacy[10], distributing the tools to break TPMs is still prohibited. As most users lack the technical expertise required to design their own tools to break the TPM, the **privacy protections under C-61 are largely empty.**

Privacy – Mandatory data retention

One of the most overlooked areas of the bill requires that internet service providers (ISPs) retain data on subscribers that rights holders claim have infringed upon the right's holder's copyrighted material. Section 41.26 (1) of Bill C-61 will require internet service providers who receive notice from rights holder of a specific violation to:

> Retain records that will allow the identity of the person to whom the electronic location belongs to be determined, and do so for six months beginning on the day on which the notice of claimed infringement is received or, if the claimant commences proceedings relating to the claimed infringement and so notifies the person before the end of those six months, for one year after the day on which the person receives the notice of claimed infringement.

C-61 creates a regime of **mandatory data retention that is unbalanced by judicial oversight.**

Conclusions and Recommendations

In its current form Bill C-61 is fatally flawed and must be modified to strike an appropriate balance between the rights of copyright holders and the public. Appropriate steps by the government would include:

Full recognition of rights to privacy and freedom of expression – Bill C-61 creates overly broad protections for digital locks and prohibitions on the tools to open these locks, undermining any exemptions for privacy and expression. Protections for free expression and privacy must take priority over protections for digital locks.

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[8] See the EFF's "Unsafe Harbors: Abusive DMCA Subpoenas and Takedown Demands", September 2003. http://www.eff.org/wp/unsafe-harbors-abusive-dmca-subpeonas-and-takedown-demands

[9] See Privacy Commissioner's Fact Sheet, November 2006. http://www.pricom.gc.ca/fs-fi/02_05_d_32_e.asp

[10] See Bill C-41 s. 41.14 (1)

For the purpose of infringement - Ratification of WIPO (World Intellectual Property Organization) requires restrictions on circumvention of TPMs, but not to the degree seen under Bill C-61. It would be sufficient to restrict the circumvention of TPMs for the purpose of copyright infringement, which, when combined with strong user protections, could avoid many of the unintended consequences of Bill C-61.

Watching the watchers – Requiring oversight by a court or a competent tribunal, of any data retention by ISPs could protect the privacy of Canadians.

Consultation with the public – The last public consultation on copyright in Canada were held in 2001, months before the release of the first generations of iPods. The digital world has changed dramatically since then, and fresh consultations are needed to bring Canadian citizens' voices into the reform process.

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