Technological Protection Measures: Do the Anti-tampering Provisions Go Too Far or Not Far Enough?

Insight-Copyright Reform in Canada
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Purpose of TPM Provisions

- Enhance protection of works in the digital environment
- Enable the development of new business models for copyright-based works
- Implement the provisions of the WCT and WPPT (the “WIPO Treaties”)
- Harmonize Canadian laws with international standards
Does the Bill Meet the Stated Objectives?

- The TPM provisions take a minimalist approach to reform.
- The TPM provisions provide far less protection for creators and rightsholders than the legislation of any country that has implemented the WIPO Treaties.
- The amendments fall well below international standards for the protection of TPMs.
- The amendments will not enable Canada to comply with the WIPO Treaties.
- The shortcomings will materially affect the ability of Canadian creators, publishers and rightsholders to develop viable economic models to promote the creation and dissemination of digital cultural properties for the benefit of all Canadians.
What Article 11 of the WCT and Article 18 of the WPPT Require

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works [sound recordings], which are not authorized by the authors concerned or permitted by law.
What is Meant by Adequate Legal Protection

• Connotes the need to strike a balance between the interests of authors in achieving strong protection and the interest of others.

• The protection has to be sufficiently strong and meaningful to serve its purpose, the protection of rightsholders’ rights and interests.

• The measures create a performance requirement; they must be good enough to achieve the basic objective that is effective protection of the rights of copyrightholders. See, Reinbothe and von Lewinski, The WIPO Treaties, at p.143.
What is Meant by Effective Legal Remedies?

The remedies have to be expeditious so as to prevent circumvention and abuse and dissuasive so as to constitute a deterrent to further circumvention and abuse. See, Reinbothe and von Lewinski, *The WIPO Treaties* at p.144.
What Does WIPO Say is Needed to Implement the Treaties?

“Contracting Parties may only be sure that they are able to fulfil their obligations under Article 11 of the Treaty if they provide the required protection and remedies:

(i) against both unauthorized acts of circumvention, and the so-called “preparatory activities” rendering such acts possible (that is, against the manufacture, importation and distribution of circumvention tools and the offering of services for circumvention);

(ii) against all such acts in respect of both technological measures used for “access control” and those used for the control of exercise of rights, such as “copy-control” devices;

(iii) not only against those devices whose only – sole – purpose is circumvention, but also against those which are primarily designed and produced for such purposes, which only have a limited, commercially significant objective or use other than circumvention, or about which it is obvious that they are meant for circumvention since they are marketed (advertised, etc.) as such; and

(iv) not only against an entire device which is of the nature just described, but also against individual components or built-in special functions that correspond to the criteria indicated concerning entire devices.” WIPO Guide to the Copyright and Related Rights Treaties administered by WIPO Geneva 2003 at par. CT-11.16
## Summary Showing Canada v US and EU

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Remedies must be “effective, proportionate and dissuasive”. (Art.8)
Why Protect Against Circumvention Tools

• The greatest prejudice to rightsholders is the easy and broad availability of circumvention tools.

• The most effective remedy to circumvention related piracy is to target the manufacture and distribution of circumvention tools.

• The activity leading up to the circumvention of TPMs is usually done in the privacy of a person’s home or office. It is not feasible or desirable to undertake monitoring of private conduct to deter circumvention activity. See SOCAN v. Canadian Association of Internet Providers, 2004, SCC 13 per Lebel J.; BMG Canada Inc. v. John Doe, 2005, F.C.A. 193

• It is undesirable to force creators and artists to sue multiple individuals for their activities instead of the most prejudicial perpetrator – the entity trafficking in circumvention tools.
The International Norm of Countries That Have Implemented the WIPO Treaties is to Prohibit Trafficking in Circumvention Tools.

Countries and territories which have done so include:

- United States, Australia and Japan.

- European Copyright Directive as implemented (or in draft Bills) by every EU member state including Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Portugal, Slovak Republic, Slovenia, the Netherlands and the United Kingdom.

- These acts are also prohibited in the legislation of other countries including those of Belarus, Ecuador, Paraguay, Peru, Moldavia and Ukraine.

- Agreed to by Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua and the Dominican Republic as part of the Central American-Dominican Republic-United States Free Trade Agreement ("CAFTA-DR").
Bill Provides Very Weak Protection Against Circumvention Services

• Section 34.02(2) provides a remedy “against a person who offers or provides a service to circumvent, remove or render ineffective a technological measure...and knows or ought to know that providing the service will result in an infringement of the copyright or moral rights”.

• Creates an onus of proof that will make it very difficult for rightsholders to stop anti-circumvention services.

• The knowledge requirement is not simply knowledge that a technological measure might be circumvented by the use of a service. Rather, the knowledge is that providing the service would result in an infringement of copyright.

• No other country that has implemented the WIPO Treaties has required such a high standard of knowledge.
Common Approach to Dealing With Circumvention Services Has Followed WIPO Guide

• Almost all countries that have implemented prohibitions against circumvention services have created remedies where the service is (a) promoted, advertised or marketed for the purposes of circumvention, (b) has only a limited commercial significant purpose or use other than to circumvent, or (c) is primarily designed or produced, adapted or performed for the purpose of enabling or facilitating the circumvention of technological measures.

• This approach was adopted by the United States, by the European Union in the EU Copyright Directive, and by almost all of the member states which have implemented the WIPO Treaties.

• Ireland-gives rights and remedies against a person who “provides information, or offers to perform any service, intended to enable or assist persons to circumvent rights protection measures. Copyright and Related Rights Act No. 28 of 2000 S.3702(b).
Key is Whether the Service Will Result in Circumvention of a TPM

- Australia creates a right against a person who “provides, or by way of trade, promotes, advertises or markets, a circumvention service capable of circumventing, or facilitating the circumvention of, the technological protection measure, if the person knew or ought to reasonably have known that the service would be used to circumvent, or facilitate the circumvention of, the technological protection measure”.

- There is no requirement that there be a knowledge of infringement.

- Further, under the Australian legislation there is a presumption that the defendant knew, or ought reasonably to have known, that the circumvention service to which the action relates would be used to promote, advertise or market the circumvention service or to facilitate the circumvention of, the technological measure. See, S.116A(1).

- Australia agreed to remove knowledge qualifiers with respect to circumvention services as part of the Australia-US Free Trade Agreement. See Article 17.4.(7).
Bill Doesn’t Protect Against Circumvention of Access Control Technological Measures

• “[A]ccess probably will become the most important right regarding digitally expressed works, and its recognition, whether by the detour of prohibitions on circumvention of access controls, or by express addition to the list of exclusive rights under copyright, may be inevitable”. J. Ginsburg, Chronique des etats-unis, R.I.D.A., January 1999, p. 147 at p. 171.

• Protection of access control TPMs under the WIPO Treaties is justified, as Contracting Parties must provide adequate and effective protection against the circumvention of effective technological measures “that restrict acts” in respect of works including the act of gaining access to works.

• Most of the states and regional organizations that have implemented the WIPO Treaties have adopted (or have bills) to provide protection for access control TPMs including the United States, the European Community and its member states such as Luxembourg, France, Germany, Greece, Latvia, Lithuania, Slovak Republic, Slovenia, The Netherlands and United Kingdom and parties to the Central American-Dominican Republic-United States Free Trade Agreement.

• Most states have specific exemptions such as for encryption research and processes to ensure no abuses.
Bill Provides Weak Protection Against Copy Control TPMs

- Section 34.02(1) confers rights against a person who without consent “circumvents, removes or in any way renders ineffective a technological measure protecting any material form of the work... for the purpose of an act that is an infringement of the copyright in it...”

- Under the WIPO Treaties Contracting Parties are required to protect TPMs against circumvention of those measures that are used to control unauthorized acts.

- The TPMs to be protected include all those “that restrict acts in respect of” works without any requirement that there be any act of direct infringement or an act done for the purpose of infringement.

- A rightsholder will not know whether the circumvention is for the purpose of one of the exemptions in the Act such as a fair dealing. If the rightsholder can establish an act of infringement the act would already result in a cause of action for unauthorized infringement.

- In practical terms the proposed amendment provides little protection for rightsholders.
Common Approach to Protecting Copy Control TPMs

The requirement that a rightsholder prove that a technological measure has been circumvented for the purpose of an act that is an infringement is at odds with, and creates a standard that does not conform with, the internationally generally accepted methods used by other jurisdictions to provide protection against the circumvention of copy control TPMs.

Other jurisdictions provide remedies against the circumvention of effective technological measures that are used by authors “in connection with the exercise of their rights” “and that restrict acts” “which are not authorized by the authors concerned or permitted by law”. They do not require a showing that the circumvention acts are for the purpose of infringement.

EU Copyright Directive - Member States are required to provide adequate legal protection against the circumvention of any “effective technological measure”.

There is no additional requirement to establish that the circumventor also did so for the purposes of infringing copyright.

This model has been generally followed by Member States implementing the EU Copyright Directive including Cyprus, Germany, Greece, Latvia, Lithuania, Luxembourg, Slovenia, and the Netherlands.
Provision Providing Remedy for Distributing Works That Have Been Circumvented Adds Little (if anything) to Existing Remedies

- Section 34.02(3) of the proposed amendments would create remedies against a person that knowingly takes steps to “traffic” in works and other subject matter that have been circumvented.

- The remedies provided by this subsection are inadequate to make up for the failure to provide adequate legal protection and effective legal remedies against the circumvention of technological measures.

- These remedies only apply after a technological measure has already been circumvented and the unprotected work or subject matter is being distributed. It applies once the economic interests of rightsholders have already been prejudiced and does nothing to avoid or provide any new remedies to address the situation.

- The activities set out in subsections (a) to (d) of Section 34.02(3) would invariably infringe one or more of the rightsholders’ existing rights, including those set out in Section 27(2) that deal with secondary infringement.

- Other countries that have implemented the WIPO Treaties have extensive secondary infringement provisions related to circumvention tools, Australia and Ireland being two examples.

- No country has sought to comply with the WIPO Treaties by purporting to grant a remedy against the distribution of circumvented works instead of circumvention tools.
There are no criminal sanctions against persons found to have engaged wilfully and for the purpose of commercial advantage or private financial gain in any circumvention activities.

- U.S. – The DMCA enacted criminal offences with serious penalties that apply to any person who violates the anti circumvention provisions (wilfully and for purposes of commercial advantage or private financial gain).

- European Union – Under the EU Copyright Directive member states are required to have remedies that are “effective, proportionate, and dissuasive”. On this basis, member states have enacted criminal sanctions including Cyprus, Denmark, Finland, Germany, Greece, Italy, Slovenia, The Netherlands, and United Kingdom.

- Australia – Has criminal sanctions that apply to a range of activities where the person knows or is reckless as to the activity in question.

- In government’s consultation paper on digital copyright issues the government described the “most basic form of prohibition” as including criminal sanctions “in certain cases with commercial motivations, where the scale of circumvention has consequences for the copyright sectors as a whole”. Consultation Paper on Digital Copyright Issues, June 22, 2001.

- RealNetworks obtains injunction in US under DMCA against Streambox that distributed VCR product that enables end-users to circumvent access control TPM ("Secret Handshake") and copy control TPM ("Copy Switch").

- Circumvention permitted users to access and download copies of RealMedia files that are streamed over the Internet.

- Without the security measures afforded by RealNetworks, electronic methods of distribution could not succeed. End-users could make and redistribute digital copies of any content available on the Internet, undermining the market for the copyright original.

- Bill C-60 does not contain anti-trafficking provisions. So there would be no remedy against Streambox.

- A consumer’s use of VCR to circumvent the “Secret Handshake” would not be caught, as it is an access control TPM.

- The circumvention of the “Copy Switch” copy control TPM would not be caught unless it could be proved that it was done for the purpose of infringement.

- Using Copy Switch to facilitate infringement by others would not be caught either.
Universal City Studios, Inc. v. Corley, 273 F.3d 429, (2nd Cir.2001)

- Motion picture studios brought motion to enjoin website owners from posting or linking to “DeCSS” (a program that decrypts digitally encrypted movies (DVDs) protected with CSS (content scrambling system)).

- The distribution of DeCSS enables the circumvention of CSS and the illegal copying and use of decrypted movies.

- Bill C-60 contains no provisions prohibiting trafficking in anti-circumvention tools.

- Bill C-60 does not protect against the circumvention of the access control technology of CSS.

- Claims against users under S.34.02(1) would fail unless it could be proved that the circumvention was for the purpose of infringement. The circumventing of the TPM by itself would not be a violation of S.34.02(1).

- 321 sells software and instructions for unencrypting and copying DVDs - DVD Copy Plus, and DVD-X COPY.

- If the DVD is encoded with CSS, DVD-X COPY uses a CSS "player key" to access the data.

- The software allows the user to copy the video contents on the DVD onto a recordable CD.

- Bill C-60 does not cover the trafficking of circumvention devices.

- Bill C-60 does cover the circumvention of access control measures.

- 321’s creation of its programs does not violate S 34.02(1).

- A consumer would not be liable for using the plaintiff’s programs to unprotect protected DVDs under S 34.02(1).

- Sony games contain an access code TPM on each CD Playstation game that is read by a chip in the Sony Console.
- This device prevents unauthorized (pirated) CDs from being made as they won’t play on Sony consoles.
- Stevens sold “mod chips” and installed them on Playstation consoles effectively overcoming Sony’s access control TPM.
- Bill C-60 does not cover the trafficking of circumvention tools such as “Mod Chips”.
- Individual consumers using “mod chip” game enhancers to circumvent the access control TPM in games would not violate S.34.02(1) even if done for the purpose of infringement or facilitating infringement as an access control TPM is not a “technological measure” as that term is defined in S.1(2).

- ElcomSoft was criminally prosecuted under the anti-trafficking provisions of the DMCA for selling an anti-circumvention tool called the Advanced eBook Processor ("AEBPR").

- It allowed a user to remove the copy control TPM from electronic books distributed using Adobe Acrobat eBook Reader.

- This enabled the book to be easily reproduced and electronically distributed as a naked PDF file.

- Bill C-60 does not have any criminal provisions.

- Bill C-60 also has no prohibitions against trafficking in anti-circumvention tools.

- The use of AEBPR by a consumer would not infringe S.34.02(1) unless it could be proved that the user did so for the purpose of infringement.

- The circumvention of the copy control TPM by itself would not be infringing, nor would using the circumvented ebook for purposes not paid for by the consumer.
Evaluation of Bill C-60’s TPM Provisions

- They will provide little comfort to Canadians that works and other subject matter will be protected in the digital environment.
- They do not provide any remedies to address many of the well-known circumstances of circumvention, let alone those that can be imagined and will be dreamed up by “hackers” and “crackers” in the future.
- Bill C-60 does not provide “adequate legal protection and effective legal remedies” against the circumvention of TPMs.
- The proposed amendments concerning TPMs are clearly out of step with – and fall far below – international trends and developments in the international community.
- Canada would not be in compliance with the WIPO Treaties unless amendments are made to the proposed provisions.
Canada will Provide the World’s Weakest TPM Protection to its Creators

• If amendments are not made to the TPM provisions Canada would provide one of the weakest - if not the weakest - TPM protection in the world to its creators and rightsholders.

• Countries with higher levels of protection will include: United States, Australia, EU member states such as Belgium Cyprus, Czech Republic, Denmark, Finland France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Portugal, Slovak Republic, Slovenia, The Netherlands, United Kingdom.

• Other countries Belarus, Bulgaria, CAFTA members- Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic- and Ecuador, Indonesia, Paraguay, Peru, Moldova, and Ukraine.
Will Providing Stronger Protection Result in “Digital Lock-up”?  

“The US experience with the DMCA to date indicates that legal protection for technological measures has helped foster new business models that make works available to the public at a variety of price points and enjoyment options, without engendering the “digital lockup” and other copyright owner abuses that many had feared.” Jane C. Ginsburg, “Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience”, Columbia Public Law & Legal Theory Working Papers, Paper 0593, 2005, (“Ginsburg Legal Protection of TPMs”)
Will Providing Stronger Protection Result in “Digital Lock-up”?

§ 1201. . . involves genuine tradeoffs: Congress made a judgment that technological protection would foster innovation in new content delivery mechanisms in order to provide consumers with a range of new options for experiencing copyrighted works, recognizing that technological controls might diminish the convenience of non-infringing uses. So far, the balance that Congress struck appears justified. Section 1201 has provided substantial benefits to consumers by encouraging the development of innovative new business models for delivering sound recordings, motion pictures, books and other copyrighted works to consumers. June Besek, “Anti-Circumvention Laws and Copyright: A Report From the Kernochan Center for Law, Media and the Arts”, 27 Colum. J. L. & the Arts 389, 446-66 (2004) at P. 512-513.
Is a Rebalancing of the Law a Bad thing?

“Section 1201 does represent a rebalancing of power between copyright owners and users. But we should not immediately assume that any change in the prior state of affairs is a bad thing. After all, which prior “balance” do we mean? The one in which technology did not offer much potential for consumptive copying and copyright owners controlled access by controlling communications to the public? Or the one in which technology enabled widespread copying, but did not afford adequate and reasonable means of preventing or charging for the copying? Or the one in which technology permits massive copying, but also enables copyright owners to be paid for it? Or one in which technology enables copyright owners to prevent or frustrate copying? Taking the last pre-DMCA balance as somehow normatively compelled ignores the reality that copyright “balances” are highly contingent and contextual. The more useful question is, regardless of past allocations of power, whether the new balance makes sense for authors, owners, and users.” Ginsburg Legal Protection of TPMs at P. 25
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