

Fixing Bill C-32: Proposed Amendments to the Digital Lock Provisions

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Proposed amendments

1. Link the prohibition of circumvention to infringement

- EITHER -

I) Add infringing purpose requirement to prohibition of circumvention

Proposal:

Replace the definition of “circumvent” in section 41 as follows.

“circumvent” means,

(a) in respect of a technological protection measure within the meaning of paragraph (a) of the definition “technological protection measure”, to descramble a scrambled work or decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate or impair the technological protection measure, for any infringing purpose, unless it is done with the authority of the copyright owner; and

(b) in respect of a technological protection measure within the meaning of paragraph (b) of the definition “technological protection measure”, to avoid, bypass, remove, deactivate or impair the technological protection measure for any infringing purpose.

- OR -

II) Add exception for circumvention for lawful purposes

Proposal:

Add subsection 41.1(5) and (6) as follows.

Lawful purpose

(5) Paragraph (1)(a) does not apply if a technological protection measure is circumvented for any lawful purpose.

(6) Paragraphs (1)(b) and (c) do not apply to a person who supplies a service to a person referred to in paragraph (5) or who manufactures, imports or provides a technology, device or component, for the purposes of enabling anyone to circumvent a technological protection measure in accordance with this Act.

2. Drop the ban on devices or technologies

Proposal:

Drop paragraph 41.1(c) and any references to it. Drop any paragraphs that are rendered moot by this change, such as 41.11(3).

3. Add provision to allow “qualified circumventers” to facilitate legal circumventions

Proposal:

Add subsections 41.1(7)-(10) as follows.

Qualified person

(7) Paragraph (1)(a) does not apply to a qualified person who circumvents a technological protection measure on behalf of another person who is lawfully entitled to circumvent that technological protection measure.

(8) Paragraphs (1)(b) and (c) do not apply to a person who supplies a service to a qualified person or who manufactures, imports or provides a technology, device or component, for the purposes of enabling a qualified person to circumvent a technological protection measure in accordance with this Act.

Conditions

(9) A qualified person may only circumvent a technological protection measure under paragraph (7) if
(a) the work or other subject-matter to which the technological protection measure is applied is not an infringing copy; and

(b) the qualified person informs the person on whose behalf the technological protection measure is circumvented that the work or other subject-matter is to be used solely for non-infringing purposes

(10) the Governor in Council may make regulations

(a) defining a “qualified person”;

(b) prescribing the information to be recorded about any any action taken under subsection (7) or (8) and the manner and form in which the information is to be kept; and

(c) prescribing the manner and form in which the conditions set out in subsection (9) are to be met.

4. Remove explicit anti-circumvention provisions in new exceptions

Proposal:

A) Drop subsections 29.22(c), 29.23(b), 29.24(c).

B) Retain subsections 30.04(3) and 30.04(4), which excludes material subject to access controls from the exception for educational use of material available on the Internet. By contrast with the exception for fair dealing for educational use, this exception is aimed at allowing the educational use of *publicly*

available material.

5. Drop the destruction requirement for “lessons” and inter-library loans

Proposal:

A) Replace subsection 30.01(5) as follows.

Reproducing lessons

(5) It is not an infringement of copyright for a student who has received a lesson by means of communication by telecommunication under paragraph (3)(a) to reproduce the lesson for non-infringing purposes.

B) Drop subsection 30.01(6)(a).

C) Drop subsection 30.1(5.02)(c).

6. Drop the lock requirement for “lessons” and inter-library loans

Proposal:

A) Drop subsection 30.01(6)(c).

B) Drop subsection 30.1(5.02).

7. Add an impartial review process for establishing new circumvention rights

Proposal:

Add section 41.21(3) as follows.

Order of Board

(3) The Board may, on application, issue an order

(a) excluding the application of paragraph 41.1 from a technological protection measure, a work, a performer’s performance fixed in a sound recording or a sound recording, or classes of them, or any class of such technological protection measures, having regard to the factors set out in paragraph (2)(a);
or

(b) requiring the owner of the copyright in a work, a performer’s performance fixed in a sound recording or a sound recording that is protected by a technological protection measure to provide access to the work, performer’s performance fixed in a sound recording or sound recording to persons who are entitled to the benefit of any limitation on the application of paragraph 41.1(a).

Duration and renewal

(4) Any order issued under paragraph (3) shall remain in effect for a period of five years unless, for a particular order,

- (a) the Governor in Council makes regulations varying its term; or
- (b) upon application, the Board orders its renewal for an additional five years.

8. Generalize the encryption research exceptions to all research; drop the notice requirement

Proposal:

A) Replace section 30.61 as follows:

Research

30.62 It is not an infringement of copyright for a person to reproduce a work or other subject-matter for the purposes of research if

- (a) it would not be practical to carry out the research without making the copy; and
- (b) the person has lawfully obtained the work or other subject-matter.

B) Replace section 41.13 as follows.

Research

41.13 (1) Paragraph 41.1(1)(a) does not apply to a person who circumvents a technological protection measure for the purposes of research if

- (a) it would not be practical to carry out the research without circumventing the technological protection measure; and
- (b) the person 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.

Non-application

(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.

Technology, device or component

(3) Paragraph 41.1(1)(c) does not apply to a person referred to in subsection (1) who manufactures a technology, device or component for the purposes of circumventing a technological protection measure that is subject to paragraph 41.1(1)(a) if the person does so for the purpose of research and

- (a) uses that technology, device or component only for that purpose; or
- (b) provides that technology, device or component only for that purpose to another person who is collaborating with the person.

9. Remove the requirement not to “unduly impair” the TPM from the Personal Information exception

Proposal:

Replace subsection 41.14(2) as follows.

Services, technology, device or component

(2) Paragraphs 41.1(1)(b) and (c) do not apply to a person who offers services to the public or provides services, or manufactures, imports or provides a technology, device or component, for the purposes of circumventing a technological protection measure in accordance with subsection (1).

Note: if the amendments proposed in section I) are adopted, subsection 41.14(2) would be redundant, and could be deleted entirely.

10. Remove the requirement not to “unduly impair” the TPM from the Persons with perceptual disabilities exception

Proposal:

Replace subsection 41.16(2) as follows.

Services, technology, device or component

(2) Paragraphs 41.1(1)(b) and (c) do not apply to a person who offers or provides services to persons or organizations referred to in subsection (1), or manufactures, imports or provides a technology, device or component, for the purposes of enabling those persons or organizations to circumvent a technological protection measure in accordance with that subsection.

Note: if the amendments proposed in section I) are adopted, subsection 41.16(2) would be redundant, and could be deleted entirely.

11. Expand the interoperability exceptions to cover interoperability of all works with devices or technologies

Proposal:

Replace section 30.61 as follows.

Interoperability

30.61 It is not an infringement of copyright in a work or other subject-matter for a person who owns a copy of the work or other subject-matter that is authorized by the owner of the copyright, or has a licence to use a copy of the work or other subject-matter, to reproduce the copy for the sole purpose of obtaining information that would allow the person to make the work or other subject-matter interoperable with any technology, device or component.

Replace section 41.12 as follows.

Interoperability of computer programs

41.12 (1) Paragraph 41.1(1)(a) does not apply to a person who owns — or has a licence to use — a work or subject-matter, and who circumvents a technological protection measure that protects that work or copy for the sole purpose of obtaining information that would allow the person to make the work or other subject-matter interoperable with any technology, device or component the person is lawfully entitled to use.

Services

(2) 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 making the work or other subject-matter interoperable with any technology, device or component the person is lawfully entitled to use.

Technology, device or component

(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 if the person does so for the purpose of making the work or other subject-matter interoperable with any technology, device or component and

(a) uses that technology, device or component only for that purpose; or

(b) provides that technology, device or component to another person only for that purpose.

Sharing of information

(4) A person referred to in subsection (1) may communicate the information obtained under that subsection to another person for the purposes of allowing that person to make the work or other subject-matter interoperable with any technology, device or component.

Limitation

(5) A person to whom the technology, device or component referred to in subsection (3) is provided or to whom the information referred to in subsection (4) is communicated may use it only for the purpose of making the work or other subject-matter interoperable with any technology, device or component the person is lawfully entitled to use.

Non-application

(6) However, a person is not entitled to benefit from the exceptions under subsections (1) to (3) or (5) if, for the purposes of making the work or other subject-matter and any technology, device or component interoperable, the person does an act that constitutes an infringement of copyright.

(7) Furthermore, a person is not entitled to benefit from the exception under subsection (4) if, for the purposes of making the work or other subject-matter and any technology, device or component interoperable, 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.

12. Add a positive obligation to facilitate circumvention for legal purposes

Proposal:

Add section 41.101 as follows.

Obligations of rights holders

41.101 (1) Anyone who applies, or causes to be applied, a technological protection measure to a work or other subject-matter that is intended to be offered for use by members of the public by sale, rental or otherwise shall, upon request, provide reasonable means to circumvent that technological protection measure if required to make any non-infringing use provided for by this Act in relation to that work or subject-matter including, without limitation, those specified in sections 29, 29.1, 29.2, 29.21, 29.22, 29.23, 29.24, 29.4, 29.5, 29.6, 29.7, 30.02, 30.03, 30.1, 30.2, 30.61, 30.62, 30.63, 32.01, 32.1, or 32.2.

No remedy for circumvention without infringement

(2) No-one who fails to comply with the requirements of this section is entitled to any remedy for any act of circumvention referred to in paragraph (1), unless that act was for an infringing purpose.

Injunctive relief only

(3) No person making a request under paragraph (1) is entitled to any remedy other than injunction against anyone who is found to have contravened that paragraph.

Regulations

(4) The Governor in Council may make regulations in regard to

(a) the meaning of “reasonable means” under paragraph (1); and

(b) any fees that may be charged to provide the means to circumvent the technological protection measure under paragraph (1).

13. Exclude access controls that are unrelated to preventing infringement

Proposal:

Replace paragraph (a) of the definition of “technological protection measure” as follows.

(a) controls access to a work, to a performer’s performance fixed in a sound recording or to a sound recording for the purpose of preventing infringement of an exclusive right granted by this Act and whose use is authorized by the copyright owner; or

14. Add an exception for circumvention for personal use

Proposal:

Add section 41.102 as follows.

Private Purposes

41.102 (1) Paragraph 41.1(a) does not apply to an individual who circumvents a technological protection measure if

(a) the copy of the work or other subject-matter to which the technological protection measure is applied is not an infringing copy;

(b) the individual owns — or has a licence to use — the copy of the work or other subject-matter to which the technological protection measure is applied; and

(c) the individual uses the copy of the work or other subject-matter only for private purposes.

(2) Paragraphs 41.1(b) and (c) do not apply to a person who supplies a service to a person referred to in paragraph (1) or who manufactures, imports or provides a technology, device or component, for the purposes of enabling anyone to circumvent a technological protection measure in accordance paragraph (1).

15. Add an exception for circumvention for archival purposes

Proposal:

Add section 41.103 as follows.

Libraries, archives and museums

41.103 (1) Paragraph 41.1(a) does not apply if a library, archive or museum or a person acting under the authority of a library, archive or museum circumvents a technological protection measure for any purpose permitted under paragraph 30.1, 30.2 or 30.5 if

(a) it would not be practical to carry out the permitted purpose without circumventing the technological protection measure; and

(b) the library, archive or museum 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.

(2) Paragraphs 41.1(b) and (c) do not apply to a person who supplies a service to a person referred to in paragraph (1) or who manufactures, imports or provides a technology, device or component, for the purposes of enabling anyone to circumvent a technological protection measure in accordance paragraph (1).

16. Add an exception for circumvention for purposes of protection of minors

Proposal:

Add section 41.104 as follows.

Protection of minors

41.104 (1) Paragraph 41.1(a) does not apply if a person with lawful authority to care for or supervise a minor circumvents a technological protection measure for the purpose of protecting the minor if

(a) the copy of the work or other subject-matter with regard to which the technological protection measure is applied is not an infringing copy; and

(b) the person 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.

(2) Paragraphs 41.1(b) and (c) do not apply to a person who supplies a service to a person referred to in paragraph (1) or who manufactures, imports or provides a technology, device or component, for the purposes of enabling anyone to circumvent a technological protection measure in accordance paragraph (1).

Non-application

(3) 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.

17. Add an exception for filtering software

Proposal:

Add section 41.105 as follows.

Internet Filtering Software

41.105 (1) Paragraph 41.1(a) does not apply if the work protected by the technological protection measure is commercially marketed filtering software intended to block access to domains, web sites, portions of web sites or specific content or the compilation of locations or descriptions of content to be blocked by such software, and

(a) the technological protection measure is circumvented for the purpose of determining what material is excluded by the filtering software and

(b) it would not be practical to determine what material is excluded by the filtering software without circumventing the technological protection measure.

(2) Paragraphs 41.1(b) and (c) do not apply to a person who supplies a service to a person referred to in paragraph (1) or who manufactures, imports or provides a technology, device or component, for the purposes of enabling anyone to circumvent a technological protection measure in accordance paragraph (1).

Non-application

(3) 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.

18. Add an exception for circumvention of obsolete or malfunctioning TPMs

Proposal:

Add section 41.106 as follows.

Malfunctioning or obsolete technological protection measures

41.106 (1) Paragraph 41.1(a) does not apply to an individual who circumvents a technological protection measure if

(a) the technological protection measure

(i) impairs the normal operation of a technology, device or component with which the work or other subject-matter that it protects would reasonably be expected to be used;

(ii) does not permit authorized access to, or use of, the work or other subject-matter that it protects; or

(iii) requires the use of a technology, device or component that is no longer reasonably commercially available; and

(b) the copy of the work or other subject-matter to which the technological protection measure is applied is not an infringing copy; and

(c) the individual owns — or has a licence to use — the copy of the work or other subject-matter to which the technological protection measure is applied.

(2) Paragraphs 41.1(b) and (c) do not apply to a person who supplies a service to a person referred to in paragraph (1) or who manufactures, imports or provides a technology, device or component, for the purposes of enabling anyone to circumvent a technological protection measure in accordance paragraph (1).

19. Add an exception for circumvention for access to government or court documents

Proposal:

Add section 41.107 as follows.

Government or court documents

41.107 (1) Paragraph 41.1(a) does not apply if the work or other subject-matter protected by the technological protection measure consists primarily of

(a) publications of any court or tribunal; or,

(b) any laws, treaties, statutes or regulations, including without limitation any Act of Parliament or any provincial or territorial legislature; or

(c) records under the control of a government institution, within the meaning of the *Access to Information Act*;

(2) Paragraphs 41.1(b) and (c) do not apply to a person who supplies a service to a person referred to in paragraph (1) or who manufactures, imports or provides a technology, device or component, for the purposes of enabling anyone to circumvent a technological protection measure in accordance paragraph (1).

20. Add an exception for circumvention for works that are substantially in the public domain

Proposal:

Add section 41.108 as follows.

Public Domain

41.108 (1) Paragraph 41.1(a) does not apply if the work or other subject-matter protected by the technological protection measure consists substantially of material in which copyright protection does not subsist in accordance with paragraph 5, or which has been placed in the public domain by the copyright owner.

(2) Paragraphs 41.1(b) and (c) do not apply to a person who supplies a service to a person referred to in paragraph (1) or who manufactures, imports or provides a technology, device or component, for the purposes of enabling anyone to circumvent a technological protection measure in accordance paragraph (1).

(1).

21. Add a labelling requirement to disclose the use of TPMs on consumer goods

Proposal:

Add section 41.109 as follows.

Labelling

41.109 (1) No one shall apply, or causes to be applied, a technological protection measure to a work or other subject-matter that is intended to be offered for use by members of the public by sale, rental or otherwise unless the work or other subject-matter is accompanied by a clearly visible notice indicating

(a) that a technological protection measure has been applied to the work; and

(b) the capabilities, compatibilities and limitations imposed by the technological protection measure, including where applicable, but without limitation

(i) any requirement that particular software must be installed, either automatically or with the user's consent in order to access or use the work or other subject-matter;

(ii) any requirement for authentication or authorization via a network service in order to access or use the work or other subject-matter;

(iii) any known incompatibility with ordinary consumer devices that would reasonably be expected to operate with the work or other subject-matter; and

(iv) any limits imposed by the technological protection measure on the ability to make use of the rights granted under sections 29, 29.1, 29.2, 29.21, 29.22, 29.23, or 29.24; and

(c) contact information for technical support or consumer inquiries in relation to the technological protection measure.

Regulations

(2) The Governor in Council may make regulations prescribing the form and content of a clearly visible notice.