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In Defence of a Defence — A Demonstrable Legitimate and Non-Infringing Purpose as a Full Defence to Anti-Circumvention Legislation

Andrew Yolles*

INTRODUCTION

The Technological Protection Measure (“TPM”) provisions included in Bill C-32¹ have attracted a great deal of criticism. This bill, which represents the Canadian Government’s most recent attempt to modernize Canada’s copyright laws, proposes to make it an infringement of the copyright in a work to circumvent a TPM that controls access to that work.² It has been suggested by some commentators³ that these provisions may unduly interfere with the rights and legitimate interests of users in these works. Although the bill provides a number of specific exceptions to the prohibition on circumvention of TPMs, these exceptions do not account for every possible scenario in which a user might have a legitimate purpose in circumventing a TPM: for example, such a TPM may prevent a user from exercising his or her fair dealing rights with respect to the underlying work. TPMs also interfere with the new user exceptions contained in the bill at sections 29.22 to 29.24. These sections seek to allow users to make copies of works for the purposes of format-shifting, time-shifting, and creating back-up copies, provided these copies are for personal use. However, each of these new sections contains a provision that no TPM be circumvented in the exercise of the right granted by it. The TPM provisions of Bill C-32 may therefore give copyright holders the ability to dictate whether statutorily-mandated exceptions to copyright protection will apply to their works.

TPMs are devices or software that are embedded into the medium or computer code containing a digital version of a copyrighted work for the purpose of protecting that work from unauthorized use or access.⁴ A TPM may control access to a work, as is the case in a region-coded DVD, or it may prevent certain acts with

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¹ Bill C-32, *An Act to amend the Copyright Act*, 3rd Sess, 40th Parl, 2010.

² *Ibid*, s 41.1(a).

³ See e.g. Michael Geist, “The Case for Flexibility in Implementing the WIPO Internet Treaties: An Examination of the Anti-Circumvention Requirements” in Michael Geist, ed, *From “Radical Extremism” to “Balanced Copyright”: Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) [Geist, “Case for Flexibility”].

⁴ Ian Kerr, Alana Maurushat & Christian Tacit, “Technical Protection Measures: Tilting at Copyright’s Windmill” (2002-2003) 34 *Ottawa L Rev* 6 at 13.

respect to a work, such as in a PDF file that cannot be printed or copied from. In most cases, these devices simply promote legitimate use of the works they protect; however to the extent that they interfere with legitimate and lawful uses a user may wish to put a protected work to, extending legal protection to TPMs may give copyright holders too much influence over user rights.

A commonly proposed remedy for this excess of influence on the part of copyright holders is to directly link anti-circumvention legislation with copyright infringement, so that circumvention of a TPM will only be prohibited when it is done for the purposes of infringing copyright.⁵ This approach was taken in an earlier attempt by the government at copyright reform, Bill C-60,⁶ but it has also drawn substantial criticism. A major complaint about this model of anti-circumvention legislation is that it fails to provide sufficient protection to copyright holders in the digital age, in which TPMs have become essential for many new business models of the copyright industries;⁷ furthermore, the need to prove a circumventor's infringing purpose in order to make out a claim for copyright infringement would make enforcement of copyright too difficult and costly to be worth pursuing.⁸

Another concern raised over this model of anti-circumvention legislation is whether it would effectively implement the 1996 WIPO Internet Treaties, specifically Article 11 of the WIPO Copyright Treaty⁹ ("WCT") and Article 18 of the WIPO Performances and Phonograms Treaty¹⁰ ("WPPT"). Canada signed these treaties in 1997, and the government has expressed a clear intention to enable their ratification with the inclusion of the TPM provisions in Bill C-32.¹¹ It is therefore very important that any proposed anti-circumvention legislation successfully implement Article 11 and 18 of the WCT and WPPT, respectively. There has been an ongoing debate as to whether directly linking the prohibition on the circumvention of TPMs with an infringing purpose can successfully fulfill the requirements of the WIPO treaties. Some authors have argued that the treaties afford substantial flexibility in their implementation, and that the Bill C-60 model would successfully rat-

⁵ Michael Geist & Keith Rose, "Fixing Bill C-32: Proposed Amendments to the Digital Lock Provisions", online: Michael Geist's Blog at <http://www.michaelgeist.ca/component/option,com_docman/task,doc_download/gid_33/>[Geist, "Proposed Amendments"].

⁶ Bill C-60, *An Act to amend the Copyright Act*, 1st Sess, 38th Parl, 2005.

⁷ Barry Sookman, "TPMs: A Perfect Storm for Consumers: Replies to Professor Geist" (2005) 4 CJLT 1 at 20 [Sookman, "TPMs"].

⁸ Jane Ginsburg, "Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience" (2005) Columbia Public Law & Legal Theory Working Papers (Paper 0593 at 3), online: <http://lsr.nellco.org/columbia_pllt/0593>.

⁹ *WIPO Copyright Treaty*, 20 December 1996, WIPO Publication No 226, (1997) 36 ILM 65 [WCT].

¹⁰ *WIPO Performances and Phonograms Treaty*, 20 December 1996, WIPO Publication No. 227, (1997) 36 ILM 76.

¹¹ Dara Lithwick, Library of Parliament, Legislative Summary of Bill-32: An Act to Amend the *Copyright Act* (20 July 2010) at 15 <<http://www2.parl.gc.ca/Content/LOP/LegislativeSummaries/40/3/c32-e.pdf>> [Bill C-32 Legislative Summary].

ify them.¹² Others have argued that limiting legal protection for TPMs to situations where the circumventor has an infringing purpose would fail to provide adequate legal protection to TPMs and so would not properly implement the treaties.¹³

While it seems that neither a blanket prohibition on circumvention with discrete exceptions nor directly linking circumvention with infringement are entirely satisfactory as models for anti-circumvention legislation, there is a third option that strikes a compromise between these two. Bill C-32 could contain a blanket prohibition on circumvention of TPMs with discrete exceptions, as it does now, but make a demonstrable lawful and non-infringing purpose full defence to copyright infringement by circumvention. This option has not been considered as carefully as the other two, and is sometimes considered to be equivalent to the Bill C-60 model;¹⁴ however, whereas that model placed the onus on the copyright holder to prove an infringing purpose in order to successfully make out a claim for infringement, this one places the onus entirely on the circumventor. By shifting this onus, a more even balance between the interests of the copyright holders and the legitimate interests of users can be achieved, and many of the concerns raised by the Bill C-60 model cease to be problematic.

In this essay, I will argue that making a demonstrable lawful and non-infringing purpose a full defence to copyright infringement by circumvention of a TPM addresses many of the concerns raised by the currently proposed legislation, while avoiding the pitfalls of directly linking anti-circumvention laws with actual copyright infringement. As the ratification of the WIPO Internet treaties is the foremost concern for this legislation, I will begin with a discussion as to how this model can successfully implement the treaties' anti-circumvention provisions where the Bill C-60 model may have failed. I will then explain why this model strikes a better balance between the rights of copyright holders and the legitimate interests of users. To do this, I will discuss the implications for fair dealing, addressing how the currently proposed provisions interfere with the fair dealing exceptions found in the *Copyright Act*¹⁵ while this model does not, as well as the more general issue of whether TPMs are capable of interfering with fair dealing at all. I will also address this model's implications for the new user exceptions in Bill C-32: in particular how this model negates the need for the TPM exemptions to these exceptions currently found at s. 29.22(1)(c), s. 29.23(1)(b), and s. 29.24(1)(c), and why that is a preferable outcome.

I. IMPLEMENTATION OF THE WIPO INTERNET TREATIES

In its legislative summary of Bill C-32, the government stated that “[t]he intent of the TPM provisions is to enable ratification of the two 1996 WIPO Internet

¹² See e.g. Geist, “Case for Flexibility”, *supra* note 3.

¹³ Most notably Dr Mihaly Ficsor. See e.g. Mihaly Ficsor, “Legends and reality about the 1996 WIPO Treaties in the light of certain comments on Bill C-32” (17 June 2010), online: Barry Sookman at 16 <<http://www.barrysookman.com/2010/06/17/legends-and-reality-about-the-1996-wipo-treaties-in-the-light-of-certain-comments-on-bill-c-32/>> [Ficsor, “Legends and Reality”].

¹⁴ Geist, “Proposed Amendments”, *supra* note 5 at 2.

¹⁵ RS, 1985, c C-42.

Treaties: the WPPT and the WCT”.¹⁶ These treaties were signed by Canada in 1997, but have not yet been ratified. While it has been argued that there is perhaps no pressing need to ratify the WIPO treaties,¹⁷ the government has expressed a clear intention to ratify these treaties, and so I will proceed on the assumption that any proposed legislation must satisfy Canada’s treaty obligations. These obligations, with respect to legal protection for TPMs, are contained in Article 11 of the WCT and Article 18 of the WPPT; the provisions in each treaty are substantially the same. Article 11 of the WCT states that

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, which are not authorized by the authors concerned or permitted by law.¹⁸

There has been a lot of debate about exactly what level of protection for TPMs is required to implement this Article of the WCT. The wording itself is equivocal on a number of points: most importantly, for the purposes of this essay, is what exactly constitutes “adequate legal protection”.

It is clear that a blanket prohibition on circumvention, of the kind found in s. 41.1(1)(a) of Bill C-32, meets this requirement. However, many critics have expressed concern that this method of implementation may override the existing exceptions to copyright, such as fair dealing. Much of the debate around implementing the TPM provisions of the treaties has therefore focused on whether directly linking a legal prohibition on circumvention of TPMs with an actual infringing act or purpose, as was done in Bill C-60, satisfies their requirements. Section 34.02 of Bill C-60 contained the provision that a copyright owner would be entitled to full remedies for infringement of a work against “a person who [. . .] 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”.¹⁹ Many authors have argued that this model of implementation does provide adequate legal protection to TPMs while simultaneously preserving the existing exceptions to copyright, since these would not constitute infringing acts. Carys Craig, for example, has suggested that “[t]ying circumvention liability to copyright infringement would go a large way to achieving this goal [of preserving the existing exceptions to copyright] by implicitly permitting the circumvention of TPMs for the purposes of fair dealing and other lawful acts”.²⁰ Michael Geist argues unequivocally that “the record conclusively demonstrates that Canada has the right under the WIPO Internet treaties to enact rules that link circumvention to actual copyright infringement and to reject the inclusion of comprehensive restric-

¹⁶ Bill C-32 Legislative Summary, *supra* note 11 at 15.

¹⁷ See Kerr, *supra* note 4 at 45-46.

¹⁸ WCT, *supra* note 9 at Article 11.

¹⁹ Bill C-60, *supra* note 6 at s 34.02.

²⁰ Carys Craig, “Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32” in Michael Geist, ed, *From “Radical Extremism” to “Balanced Copyright”*: *Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 177 at 198.

tions on the trafficking of circumvention devices”.²¹

Other authors, however, have taken the view that a Bill C-60 style of anti-circumvention legislation would not satisfy Canada’s international obligations. One notable proponent of this position is Mihaly Ficsor, a former Assistant Director General of WIPO. In Dr. Ficsor’s opinion, “limiting the protection of TPMs to circumvention for an infringing purpose [. . .] would not provide adequate legal protection for TPMs and would not result in a Bill that would comply with the Internet Treaties”.²² He argues that the drafters of the treaty specifically did not link the prohibition on circumvention of TPMs with actual infringement because

the delegations recognized that requiring proof of a direct link to copyright infringement would cut the heart out of the anti-circumvention obligation. To apply legal prohibitions against circumvention only when they also involve actual or attempted copyright infringement would be to misapprehend the very purpose of the relevant provisions of WCT and WPPT.²³

The failure of such legislation to implement the treaty has been attributed to the reality that “acts of circumvention of technical protection measures will be carried out by individuals in private homes or offices, where enforcement will be very much more difficult”.²⁴ Requiring copyright holders to prove an infringing purpose in the circumvention of a TPM would make pursuing a claim under such legislation extremely difficult for copyright holders, particularly when that circumvention takes place in private and cannot be monitored: it would essentially amount to requiring the claimant to prove infringement of the underlying work before infringement by circumvention of a TPM could be properly made out, which is exactly what the TPM requirements of the WIPO treaties seek to avoid.²⁵ For this reason, Dr. Ficsor and other like-minded authors have argued that anti-circumvention legislation that directly links a prohibition on circumvention with infringement of the copyright in the protected work cannot be considered to adequately protect TPMs as required by the treaties.

It is unclear whether legislation that directly links a prohibition on circumventing TPMs with an infringing act or purpose, such that circumvention of TPMs is only prohibited when it is done for the purposes of infringing copyright, would successfully implement the TPM provisions of the WCT and WPPT. If it would not, however, this seems mainly to be because enforcement of such legislation requires copyright owners to prove an infringing act or intention on the part of any circumventor against whom they wish to pursue a claim: this is too great an evidentiary burden for practical enforcement of such legislation, and it undermines the

²¹ Geist, “Case for Flexibility”, *supra* note 3 at 246.

²² Ficsor, “Legends and Reality”, *supra* note 13 at 20.

²³ *Ibid* at 16.

²⁴ Mihaly Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretations and Implementation* (New York: Oxford University Press, 2002) at C11.12.

²⁵ Barry Sookman, “Facebook Fair Copyright of Canada: Replies to Professor Geist,” (2008) 1 Osgoode Hall Rev L Pol’y 198 at 208. See also Heather Sapp, “North American Anti-circumvention: Implementation of the WIPO Internet Treaties in the United States, Mexico and Canada,” (2005) 1 Computer L Rev & TJ 10 at 35.

purpose of prohibiting circumvention. Even putting aside the issue of proper implementation of the WIPO Internet Treaties, the existence of such serious and legitimate concerns with this proposed form of legislation suggests that a different method of implementation might be preferable.

Such a method could come from shifting the burden of proof of a non-infringing purpose in the circumvention of a TPM from the copyright holder to the circumventor. Anti-circumvention legislation that places the onus on the circumventor to prove a non-infringing purpose rather than the copyright owner to prove an infringing one would avoid many of the criticisms levelled at legislation proposing to directly link a prohibition on circumvention with an infringing purpose by making this link indirect instead. Under such a regime, no burden would be placed upon the copyright holder to prove an infringing act or purpose in order to pursue a claim for circumvention of a TPM; there would be a presumption that acts of circumvention were done for the purposes of infringement. However, the opportunity would be available to the circumventor to demonstrate that she had a lawful and non-infringing purpose in circumventing a TPM. If she is able to do so, then the claim against her will fail.

The implementation of this kind of legislation would take the form of a blanket prohibition on the circumvention of TPMs with discrete exceptions, as is currently found under s. 41 of Bill C-32; with the addition of a provision to the effect that a demonstrable lawful and non-infringing purpose will be full defence to infringement by contravention of the prohibition on circumvention (in Bill C-32, for example, s. 41.1(1)(a)), provided that access to the work in question was lawfully acquired. By making a lawful and non-infringing purpose a defence to circumvention rather than a right to circumvent, the burden of proof would be entirely on the circumventor, and the copyright owner need not concern himself with proving underlying infringement. It is also important to note that any lawful and non-infringing purpose that is claimed in defence for circumvention would need to be *demonstrable*. It would not be sufficient to claim a non-infringing intention; this defence would require tangible proof of a lawful purpose in circumvention, such as an actual fair dealing use made of the circumvented work (e.g. a literary criticism or a research essay), or at the very least proof that one's occupation or history demonstrates a clear proclivity towards legitimate uses of the sort intended for the circumvented work.

This is a high standard of proof: it would be difficult for mass infringers to meet, and would likely create enough uncertainty for even causal infringers to doubt their safety from enforcement. Those with a true non-infringing purpose, however, would likely not have great difficulty meeting it, however: students and professors benefiting from an educational exception under fair dealing would not have a great deal of trouble presenting their latest research papers to counter claims for circumventing TPMs protecting academic articles. Those same students and professors, however, would have no protection for a claim for circumvention of a TPM protecting a song, as demonstration of legitimate use of other kinds of protected works would have no bearing on such a charge. Copyright owners would therefore have little difficulty enforcing this anti-circumvention legislation against true infringers, and even borderline cases where it is unclear whether there was a legitimate purpose in circumvention would weigh in their favour. Those with truly non-infringing purposes in the circumvention of a TPM, however, would not need

to fear penalty for exercising their rights under a statutory exception to copyright.

Another important aspect of this defence to note is that it should only apply when access to the work protected by the circumvented TPM was lawfully acquired. As I will explain, there may be circumstances in which someone needs to circumvent a TPM that has access-control attributes in order to make a non-infringing use of a protected work. The fact that the use to which a work will be put is non-infringing does not, however, grant a user the right to appropriate access to that work by any means: for example, one is not allowed to take a book from a store without paying for it in order to use it for private study.²⁶ As access-control TPMs are sometimes used to ensure that access to the underlying work is granted only to those who have legitimately obtained the right to it (i.e. have paid for it), it would be problematic if this defence allowed people to circumvent such TPMs and thereby gain access to works to which they have not legitimately acquired access rights simply because they wished to make a non-infringing use of those works. By including this language in the wording of this defence, legislators can ensure that this defence is not so interpreted.

By removing the onus on copyright owners to prove infringing acts or purposes on the part of a circumventors in order to bring claims against them for circumvention, and by ensuring that only those who have legitimately obtained access to a work can legally access it, the above proposed model of implementation of anti-circumvention legislation would allow legislators to “provide adequate legal protection”²⁷ to TPMs, as required to ratify the WCT and WPPT, while still ensuring that the statutory exceptions to copyright law remain available for all works. Although a blanket prohibition on circumvention with a discrete set of specific exceptions would also effectively implement the treaties, the model proposed above would have significant advantages in achieving the Government’s stated goal of “a common-sense balance between the interests of consumers and the rights of the creative community”.²⁸ Chief among these advantages are the implications for the availability of the fair dealing exceptions for digital works, as well as for the new consumer exceptions contained in Bill C-32. I will discuss each of these groups of exceptions in turn, explaining their importance, the concerns for each raised by the current wording of the TPM provisions in Bill C-32, and the advantages for each the model proposed above holds.

II. TPMS AND FAIR DEALING

The fair dealing exceptions of the *Copyright Act* are important: this was made abundantly clear by the Supreme Court of Canada in the case of *CCH Canadian*

²⁶ Mihaly Ficsor, “TPMs and Flexibility (‘The Ability Of Bending *Without Breaking*’) — Why Should The TPM Provisions of Bill C-32 Protect Access Controls And Prohibit ‘Preparatory Acts’”, online: IPOsgoode at 15 <<http://www.iposgoode.ca/Ficsor-TPMs-and-Flexibility.pdf>>.

²⁷ *WCT*, *supra* note 9 at Article 11.

²⁸ Balanced Copyright, News Release, “Government of Canada Introduces Proposals to Modernize the *Copyright Act*” (2 June 2010), online: Balanced Copyright <http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01149.html>.

*Ltd. v. Law Society of Upper Canada*²⁹ [“CCH”], wherein Chief Justice McLachlin described fair dealing as “an integral part of the scheme of copyright law”.³⁰ These exceptions, contained in the *Copyright Act* at ss. 29 to 29.2, allow users to legally copy portions of a copyrighted work for the purposes of research or private study, as well as for criticism, review, and news reporting provided certain other criteria are met; Bill C-32 proposes to add education, parody, and satire to this list.³¹ These exceptions are not a free license for unlimited copying, as any such copying must be “fair” as defined by the Supreme Court in CCH in order to qualify for these exceptions, but they do provide an important non-infringing purpose for which copying of a copyrighted work, potentially one protected by a TPM, might take place. Given the importance of fair dealing in maintaining the balance copyright seeks to achieve between the interests of copyright owners and users,³² it would be preferable to preserve this exception for digital works as well as analog ones.

As currently formulated, however, the TPM provisions of Bill C-32 may very well interfere with users’ abilities to benefit from this exception when to do so they must circumvent a TPM. A user who, for a fair dealing purpose, wishes to copy a portion of a work that is protected by a TPM that prevents her from doing so must circumvent that TPM in order to copy the work; however, under Bill C-32, this act of circumvention may constitute an infringement of copyright, even though the subsequent copying wouldn’t. This essentially allows copyright owners to prevent the operation of the fair dealing exception for their works simply by including a TPM that would need to be circumvented in order for a fair dealing use of the work to be made.

Some have argued, however, that the Bill C-32 TPM provisions can’t actually interfere with the availability of the fair dealing exceptions at all. There are two major arguments for this point. The first is that because Bill C-32 only prohibits the circumvention of TPMs that control access to a work, and not those that control copying, users are free to circumvent TPMs that prevent copying of a work in order to copy from it for a fair dealing purpose without fear of liability. The second argument is more general: TPMs cannot interfere with fair dealing because fair dealing does not confer a right to a perfect digital copy of a work, and users will always be able to make a lower quality or less convenient copy of even works protected by TPMs in order to fulfill their fair dealing purposes. I will address each of these arguments in turn, and explain why neither argument guarantees that Bill C-32 will maintain the availability of the fair dealing exceptions for digital works.

(a) Prohibiting Circumvention of Access TPMs Can Impact on Fair Dealing

Section 41.1(1)(a) of Bill C-32 states that “No person shall circumvent a technological protection measure within the meaning of paragraph (a) of the definition

²⁹ [2004] 1 S.C.R. 339 [CCH].

³⁰ *Ibid* at para 49.

³¹ Bill C-32, *supra* note 1 at s 29.

³² CCH, *supra* note 29 at para 48; see also Abraham Drassinower, “Taking User Rights Seriously” in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 462.

‘technological protection measure’ in section 41”; section 41 states that “‘technological protection measure means any effective technology, device or component that, in the ordinary course of its operation, (a) controls access to a work [. . .] and whose use is authorized by the copyright owner”. Taken together, these sections have the effect of prohibiting the circumvention of any TPM that controls access to a work in the ordinary course of its operation. The prohibition in s. 41.1 is followed by a list of specific exceptions in which this prohibition will not apply, however fair dealing is not amongst them. Insofar as it is necessary to circumvent a TPM that controls access to a work in order to make a fair dealing use of the work, then, fair dealing clearly is impaired by the anti-circumvention provision in s. 41.1(1)(a) of Bill C-32.

Some authors have commented that because s. 41.1(1)(a) makes reference only to access-control TPMs, and not to copy-control TPMs, fair dealing is not impacted at all by this prohibition.³³ They argue that “[t]here has never been a right to gain access to copyrighted material in order to make fair use of it. There is no right to break into a locked room to use a reference book kept there [. . .] whether or not protected by copyright”:³⁴ since the ability to access a work by circumventing a TPM protecting it is all that is impaired by this provision, fair dealing is not compromised by it. By this way of thinking, once a user has legally gained access to a work, she is free to circumvent any TPM that may be restricting copying in order to make a use of the work that falls within the fair dealing exceptions.

This kind of argument fails to take into account the fact that, as Prof. Geist puts it, “the distinction between access controls (access to the work itself) and copy controls (copying the work) is a distinction without a difference for many of today’s TPMs”.³⁵ Many works with both access and copy protection contain a single TPM that regulates both access and copying. A user may circumvent such a TPM only in order to bypass its copy controls for a fair dealing purpose, however because the access and copy control TPM are one and the same this user would be guilty of bypassing an access-control TPM, even if only incidentally. Alternatively, a TPM intended to protect access may incidentally prevent copying by rendering the tools necessary for effective copying unusable. Finally, a TPM that originally only protected access may come to prevent copying as well, if the decrypting software or device it is keyed to becomes obsolete: for example, a TPM protecting a work that requires a particular software program in order to be unlocked and read may need to be circumvented in order to be accessed for the purposes of copying once that software becomes obsolete and ceases to be available. Clearly, then, it cannot be said that fair dealing is safe because only circumvention of access-control TPMs is prohibited by Bill C-32.

³³ See e.g. Sookman, “TPMs”, *supra* note 7 at 31 (this comment was in regards to s 1201 of the US *DMCA*, which contains a similar prohibition against circumvention of access control TPMs, but it is just as applicable to Bill C-32)

³⁴ June Besek, “Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts” (2003-2004) 27 *Colum JL & Arts* 385 at 478.

³⁵ Michael Geist, “Setting the Record Straight: 32 Questions and Answers on C-32’s Digital Lock Provisions”, online: Michael Geist’s Blog at 7 <http://www.michaelgeist.ca/component/option,com_docman/task,doc_download/gid,32/>.

(b) TPMs In General May Prevent Fair Dealing

Another common objection to the concern that anti-circumvention legislation may impact upon the availability of fair dealing is that fair dealing does not convey a right to a perfect digital copy, nor does it convey the right to a copy in the most convenient or technologically advanced form. This point was articulated by the U.S. Court of Appeal in the case of *Universal City Studios, Inc. v. Corley*,³⁶ in which Justice Newman stated that the anti-circumvention provision of the U.S. *Digital Millennium Copyright Act*³⁷ [“DMCA”]

does not impose even an arguable limitation on the opportunity to make a variety of traditional fair uses of DVD movies, such as commenting on their content, quoting excerpts from their screenplays, and even recording portions of the video images and sounds on film or tape by pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie. The fact that the resulting copy will not be as perfect or as manipulable as a digital copy obtained by having direct access to the DVD movie in its digital form, provides no basis for a claim of unconstitutional limitation of fair use. A film critic making fair use of a movie by quoting selected lines of dialogue has no constitutionally valid claim that the review (in print or on television) would be technologically superior if the reviewer had not been prevented from using a movie camera in the theater, nor has an art student a valid constitutional claim to fair use of a painting by photographing it in a museum. Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user’s preferred technique or in the format of the original.³⁸

In other words, it is always possible to make a copy of a work, even one protected by a TPM, by copying it using analog means: one can always copy the relevant portions of a protected e-book out by hand, or videotape a screen playing a DVD with a video camera. These copies may be of lower quality than the original digital version (e.g. the re-typed book excerpt may contain typos, and the re-filmed film will certainly be a lower quality recording than the original digital version), and will certainly be more time-consuming to create and less convenient to work with; but there is simply no right to an instantaneous (or rapid) identical digital copy of a work under the fair dealing exception to copyright.

Before discussing the validity of this claim, I should point out that even if true this argument raises a serious policy concern over the relegation of those wishing to make a fair dealing use of a work to inferior copying technology or techniques. Stefan Bechtold has argued that “[f]or an emerging information society, the goal should not be a DRM environment which protects the legitimate interests of rights holders only, but a symmetric DRM environment which protects the legitimate interests of both rights holders and users”.³⁹ This point is particularly true in the Canadian context, where, at least since *CCH*, there is recognition that “user rights

³⁶ 273 F.3d 429 (2d Cir. 2001) [*Corley*].

³⁷ *Digital Millennium Copyright Act*, 17 USC.

³⁸ *Corley*, *supra* note 36 at 459.

³⁹ Stefan Bechtold, “Digital Rights Management in the United States and Europe” (2004) 52 Am J Comp L 323 at 363.

are as central to copyright law as author rights”.⁴⁰ As more and more work is done digitally, forcing would-be fair dealers to use such inefficient and inconvenient means of copying as making an analog copy of a digital work from which to make a new digital copy may have the effect of discouraging commentary, criticism, and even innovation based on fair dealing uses of digital works. It also tips the balance our copyright law aims to achieve in favour of copyright owners, as it allows them to make use of digital copying technologies while prohibiting users from doing the same. Most importantly, however, this argument relies upon an inherently artificial distinction: using analog means to bypass the operation of a TPM is just as much a “circumvention” of that TPM as hacking its computer code would be, in that in both cases the operation of the TPM has been rendered ineffective by the intervention of the would-be user. The only practical difference is that it’s slower and more inconvenient, which just has the effect of impeding the work of the user using the work for a fair dealing purpose. Therefore, even if fair dealing does not technically require the circumvention of TPMs, considering the harm to fair dealing that this kind of indifference can cause, it might be preferable from a policy standpoint to opt for legislation that leaves room for fair dealers to circumvent TPMs.

It should also be noted that even if at present analog copies of digital works can be made in order to allow copying for a fair dealing purpose without circumventing a TPM, this may not always be the case. As TPMs become more advanced and analog methods of copying become more obsolete, these methods may not be as readily available. Jane Ginsburg has observed that “at some point, particularly if analog or unprotected versions cease to be readily available, ‘inconvenient’ may look more like ‘impossible’”.⁴¹ Although she points out that this eventuality is still a long way off, the Canadian Government has noted that, with respect to amendments to the *Copyright Act*, “[i]t is important that any new legislation that is tabled not only reflect the current technological reality, but is also forward-looking and can withstand the test of time”.⁴² With this policy goal in mind, it is important that the possibility that TPMs might one day present a serious barrier to fair dealing (if they don’t already) be taken into account when *Copyright Act* is amended. Furthermore, this eventuality may not be as far off as Prof. Ginsburg suggests: at a hearing before the United States Senate in 2002, Richard Parsons, then the CEO of AOL Time Warner, described a method of preventing analog copying of video using digital watermarking techniques that could be recognized by analog recording products.⁴³

With all of that said, it is questionable whether analog copying is even cur-

⁴⁰ Drassinower, *supra* note 32 at 463.

⁴¹ Ginsburg, *supra* note 8 at 25.

⁴² Government of Canada, Copyright Consultations, “Frequently Asked Questions” online: Copyright Consultations <http://www.ic.gc.ca/eic/site/008.nsf/eng/h_04025.html>.

⁴³ “Competition, Innovation, and Public Policy in the Digital Age: Is the Marketplace Working to Protect Digital Creative Works?” *Hearing Before The Committee On The Judiciary United States Senate* (Serial No. J-107-67) 117 Cong. 2 (2002) at 47, online: <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_senate_hearings&docid=f:85758.pdf>.

rently always available to the fair dealing user. Consider the practice of digital watermarking digital photographs and artworks, which is already frequently employed to protect copies of such works placed online. Such a mark could potentially obscure an important detail of a photograph, that itself might only exist in a digital form. While someone may wish to include a copy of the work in a commentary on this detail, and have the right to do so under fair dealing, he would have no means of creating an analog copy of the work in which this detail is preserved. Such a person's only recourse for obtaining a useable copy of the work would be to circumvent the TPM embedded in the digital version.

As the preceding discussion demonstrates, a legislative model that leaves room for a non-infringing purpose as a defence to circumvention of a TPM is more advantageous in preserving the fair dealing exception in Canada than is a blanket prohibition on circumvention with discrete exceptions. Such a model would also be beneficial to the new consumer exceptions proposed in Bill C-32, as it would avoid the need for anti-circumvention provisions to be built into these exceptions.

III. TPMS AND THE NEW CONSUMER EXCEPTIONS

Sections 29.22, 29.23, and 29.24 of Bill C-32 introduce new consumer exceptions to copyright for the purposes of format-shifting, time-shifting or archiving works, respectively. As an example, if I purchase an e-book on my computer, s. 29.22 allows me to copy that book to an e-book reader such as a Kindle without that copy infringing copyright in the book. These new exceptions seek to formally legalize acts consumers already regularly undertake seemingly legitimately, and are generally laudable. One problem with these exceptions, however, is that each contains a provision preventing the operation of the exception if a TPM must be circumvented in order to exercise it.

As with the fair dealing exceptions, but to an even greater degree, these anti-circumvention provisions allow copyright owners to effectively control whether these new consumer exceptions will be available with respect to their works. And, as already discussed, this is an undesirable outcome for copyright laws that seek to achieve a balance between the interests of copyright owners and users; however, here too the problem is magnified, as these exceptions give expression to the legitimate and reasonable expectations consumers have for the continued use of purchased works. These provisions are also redundant: as discussed, Bill C-32 already contains a general prohibition on circumvention in s. 41.1. Circumvention for the purposes of exercising one of these consumer exceptions would therefore already violate the statute. However, if these extra anti-circumvention provisions were removed, and the general prohibition supplemented with the defence suggested by this essay, a better balance between users' and copyright owners' interests might be achieved.

The problem with preventing the exercise of these consumer exceptions where doing so requires circumvention of a TPM is that TPMS, in addition to protecting copyright, are also often used to preserve the proprietary formats containing the copyrighted work. Continuing the e-book example above, suppose one purchases, at full price, an e-book from Amazon that is encoded in their proprietary file format. The computer files containing such books are encoded with TPMS that, in addition to preventing copying and unauthorized access, also prevents the file from being accessed other than by Amazon's proprietary Kindle software. For now,

this consumer will probably not even notice the TPM, since his purchase indicates that he owns a Kindle device and has access to such software. But suppose further that a few years later Amazon goes out of business, and Kindle devices cease to be available. At this point, in order to read his legitimately obtained copy of the book, our consumer would have no choice but to circumvent the TPM protecting it to create a copy that is not so protected. This circumvention would not result in illegitimate access to the book, and is exactly the kind of copy one would expect to be able to make under an exception to copyright allowing “reproduction for private purposes”; and yet, the presence of the TPM on this work makes this copy infringing under Bill C-32.

A common argument for the need for anti-circumvention provisions is that they are necessary in order to protect modern, TPM-enabled business models for digital media. James Gannon makes this point using Blockbuster’s online business model as an example:

Blockbuster makes digital movies available for download in two formats — either “Rent” for around \$3-4 or “Buy”, usually around \$15–20 [. . .] if consumers can circumvent these TPMs in order to make time-shifted, format-shifted or backup copies of the “Rented” movie files, the market for the “Buy” option is effectively undermined.⁴⁴

This concern has also been expressed with respect to free ad-supported streaming media services, such as YouTube: if users can circumvent the TPMs that keep streamed copies temporary, they can obtain permanent versions of them for free.⁴⁵

It should be noted, however, that these business models would already be protected from Bill C-32’s consumer exceptions even without the anti-circumvention provisions they contain. Each exception requires that the work was originally accessed legitimately; furthermore, each contains limitations in that they won’t operate in the case of rentals for the format-shifting exception, on-demand services (such as streaming) for the time-shifting exception, and works not owned or licensed in the backup copy exception. Finally, as noted above, the general anti-circumvention provision in s. 41.1 would apply to these works, so that a TPM could not be circumvented for the purposes of exercising these exceptions any more than it could be for a fair dealing purpose, as Bill C-32 is currently written.

TPM-enabled business models would therefore not be endangered by the removal of the specific anti-circumvention provisions included in these new consumer exceptions. However, by removing these and allowing the default anti-circumvention provision to apply to these new exceptions, consumers could benefit from a defence of a demonstrable legitimate and non-infringing purpose that could attach to this default provision. The availability of this defence to consumers exercising these new exceptions would allow them to avoid the format lock-in described above without fear of liability for circumventing a derelict TPM.

⁴⁴ James Gannon, “Bill C-32 — User Exceptions and Digital Locks” (17 June 2010), online: James Gannon’s IP Blog <<http://jamesgannon.ca/2010/06/17/bill-c-32-user-exceptions-and-digital-locks/>>.

⁴⁵ *Ibid.*

CONCLUSION

Bill C-32, as currently written, is generally a fair and balanced attempt to reform Canada's copyright laws and bring them up to date with the realities of the twenty-first century. The desire to achieve a balance between the rights and interests of copyright owners and the public can be seen throughout the bill, from its expansion of fair dealing and its inclusion of new consumer exceptions to the many exceptions to its otherwise strict prohibition on circumventing TPMs. As I have mentioned above, some would argue that Bill C-32 is heavily slanted in one direction or another; but upon closer inspection, it is clear that the government is at least cognizant of the balance that is needed, and has tried to capture that recognition in the bill. In this essay, I have argued that there is another way to achieve that balance with respect to the bill's TPM provisions: one that does not seem to have been adequately considered, but which has the potential to remedy many of the difficulties presented by the current form of the legislation.

The model that is advocated for here is not perfect in its ability to resolve the concerns raised by critics of the Bill C-32 model and those of the Bill C-60 model of anti-circumvention legislation, and it will likely give rise to new objections; however, as I have argued above, it does possess the capacity to strike a more even balance between the legitimate interests of copyright owners and the public, especially with respect to the fair dealing and consumer exceptions, which are both central aspects of the users' rights in copyrighted works. It should also be noted that the wording of my description of this model is not intended as a direct legislative proposal: I have simply highlighted the elements of this model that are important in ensuring that it functions as intended. For greater certainty, additional provisions could be added to the defence as proposed above, such as explicating its non-operation with respect to on-demand and streaming media services. However worded, the essential element that I have tried to elucidate with this essay is the need for a general defence for circumventing TPMs for legitimate and non-infringing purposes, one that comes with a very high burden of proof that will be difficult for all but the most legitimate users to overcome, and that is entirely the circumventor's to bear. This is necessary because as long as the circumvention of technological protection measures remains illegal, legitimate users are at risk of being locked out of content they have the right to use.