



UNIVERSITY OF  
CALGARY

# CUSMA & Technical Protection Measures

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Library

# CUSMA or USMCA or MUSCA....

Back when I put together my proposal for ABC, it looked like CUSMA was going to be ratified and become the law of the land.

It now appears that Canada will ratify CUSMA in June, though we still don't know if or when the US & Mexico will ratify the deal.

Even if it isn't ratified it does illustrate some of the treaty and trade issues around TPMs.

## CUSMA & TPMs Sub Committee

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- Photocopier
- Cassette Recorder
- VCR
- Compact Disc
- DVD
- PVR

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.

Contracting Parties shall provide **adequate legal protection** and **effective legal remedies** against the **circumvention** of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

## Sections 1201 – 1205 of the US Copyright Act

- No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—...
- \$500,000.00 fine or five year jail sentence

## Before the DMCA:

- Canada-US FTA
- NAFTA

## After the DMCA:

- US-Australia FTA
- US-Korea FTA
- TransPacific Partnerships
- Seeming all trade agreements
- S. 41 of the Canadian Copyright Act



Canada was prepared to accept intellectual property obligations in the TPP, so similar concessions in USMCA were not a negotiating failure or pure giveaway. The strategic plan was to exploit the United States' withdrawal from TPP, and then utilize flexibilities to restore balance at home.

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Canada will not be able to significantly amend Section 41 of the Copyright Act without either:

- 1) Convincing the United States and Mexico to make changes to CUSMA
- 2) Or withdrawing from CUSMA (USMCA, MUSCA)

The traditional library approach to TPMs will no longer work.

(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 the purpose of an act that is an infringement of the copyright in it or the moral rights in respect of it or for the purpose of making a copy referred to in subsection 80(1).**

If we are in an environment where significant amendments to Section 41 would violate CUSMA, what options do we have?

# Definition of TPM in the Copyright Act

*Technological protection measure* means any effective technology, device or component that, in the ordinary course of its operation,

- (a) controls access to a work, to a performer's performance fixed in a sound recording or to a sound recording and **whose use is authorized by the copyright owner**; or
- (b) restricts the doing — with respect to a work, to a performer's performance fixed in a sound recording or to a sound recording — of any act referred to in [section 3](#), [15](#) or [18](#) and any act for which remuneration is payable under [section 19](#).

# Definition of Circumvent in the Copyright Act

*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, **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.

## Option 1 - Amend S41.1

Make the Copyright Act clear that it is not illegal to circumvent TPMs where the copyright has expired.

# Additional Exceptions for Circumvention

- Law Enforcement and National Security
- Interoperability of Computer Programs
- Encryption Research
- Personal Information (Privacy)
- Computer Security
- Creating alternate format copies for people with Perceptual Disabilities
- Broadcast Undertakings
- Radio Apparatus



## Article 20.67 Section 4 (h) of CUSMA

*provide additional exceptions or limitations for non-infringing uses of a particular class of works, performances, or phonograms, when an actual or likely adverse impact on those non-infringing uses is demonstrated by substantial evidence in a legislative, regulatory, or administrative proceeding in accordance with the Party's law.*

## Option 2 - 226D of NZ Copyright Act

Could we create an exception for libraries, archives and museums (and possibly educational institutions?) to circumvent TPMs on behalf of their clients for otherwise non-infringing purposes?

(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 the purpose of an act that is an infringement of the copyright in it or the moral rights in respect of it or for the purpose of making a copy referred to in subsection 80(1).**

# Regulatory Differences

- Section 41.21 of the Copyright Act allows the Government in Council to make regulations allowing circumvention.
  - Subsection (2) (iii) seems to specifically refer to TPMs adversely affecting fair dealing.
- US Copyright Act Section 1201 subsection (a) (C) allows for regulations on circumvention
  - There is a call for new regulations every three years in the Federal Register

## Option 3 – Every three years

Why can't Canada have a call for new regulations every three years?