

Comments - Government of Canada Copyright Reform  
c/o Intellectual Property Policy Directorate  
Industry Canada  
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BY FAX and EMAIL

I am pleased to have this opportunity to comment on the Canadian Government's initiatives to modernize copyright legislation. As a programmer and a partner in a software development and consulting firm, I have the opportunity to experience the effects of Copyright issues from both a producer and a user standpoint.

As the *Framework for Copyright Reform* and your consultation paper both note, there are significant issues to be considered regarding access and copyright in a digital environment. I am personally very concerned that traditional balances between copyright holders and users of works is being skewed, and existing user rights such as 'fair use' for libraries/academia/archives, 'first sale' rights, and personal use allowances are being diminished and eliminated.

One of the most seriously damaging proposals is with regard to preventing the circumvention of technical measures that limit reproduction of works. Such anti-circumvention laws have been enacted in the United States with the DMCA (1998), and I believe them to be a failure. As well as being questionable from the perspective of the Canadian Charter of Rights and Freedoms' guarantee of freedom of speech (and similar guarantees in the UN Universal Declaration of Human Rights), such anti-circumvention restrictions will also eliminate a number of legitimate, legal uses of copyrighted works. These include the inability of users to backup or load works on upgraded (or crashed) hardware, the inability to use alternate formats such as reading software for the blind, and the very real concern that content creators that do not survive in business (bankruptcies, buyouts) will cause locked products to be 'abandoned' and inaccessible to legal owners.

The computer software industry is filled with software titles that are no longer supported or produced, and the companies that manufactured them are no longer in business. Many of these products were originally 'copy protected'. Anti-circumvention legislation would make accessing such products for recovery or backup illegal, and this is just a foreshadow of similar issues that would occur should such regulations come into effect. Standard academic fair-use rights would also be restricted, as would the ability of purchasers of works to resell the products legally.

The most chilling properties of DMCA-style legislation are that it makes illegal activities such as the creation – or for that matter, even the discussion – of software that may be used for possible circumvention measures. Suddenly the onus is no longer on whether a specific act of copying is legal or not, but simply that a tool can be (possibly) used for an illegal use. This makes no accounting for legal and possibly unrelated uses of such tools.

Examples of the possible abuse of such legislation has also been provided recently by the United States' enforcement of the DMCA. The Dmitry Sklyarov case, a Russian programmer visiting the US to present at a technical conference, is an example where an individual writing software algorithms in another jurisdiction, software which was entirely legal in their home country, is arrested (and, in fact, jailed) even though he had never personally violated traditional copyright laws, and never made what would be considered an 'illegal copy'. In another example, action launched against Prof. Edward Felton of Princeton University tried to use the DMCA to prevent an academic team from presenting a paper discussing the weaknesses in a recording industry protection scheme. To quote Dr. Felton, such a restriction "would effectively prevent analysis of critical systems, and so would have a disastrous effect on education, research, and practice in computer security."

It should also be noted that most attempts at 'circumvention' are actually relatively easy, often successfully attempted by students. Due to the client-side nature of PC software and data, analysis and reverse-engineering are often not very difficult projects. Anti-circumvention laws could make criminals out of hundreds of computer enthusiasts that had possibly never made an 'illegal copy' of copyrighted work.

The Copyright Act already sufficiently covers restrictions and penalties for illegal duplication of copyrighted works, both in old and new media. Those that use circumvention tools to make such illegal copies can therefore be suitably charged. There is a strong view put forward by many groups, such as the Electric Frontier Foundation, that the WIPO 1996 treaties do not require draconian national legislation such as the DMCA. The risks to access, personal freedoms, and 'fair use' are serious and significant, and for these reasons I urge the Government of Canada to avoid any form of 'anti-circumvention' legislation in any future Copyright Act modifications.

Yours Sincerely,

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