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

REPLY COMMENTS for Consultation Paper on Digital Copyright Issues

(Not specific to any particular submission.)

This is my second response to the submissions posted in reply to the Consultation Paper on Digital Copyright Issues. In my first response I specifically discussed the submission by *America OnLine/Time Warner*, however in this response I would like to address the body of submissions as a whole.

Unfortunately I have not been able to read through them all, yet I have made an effort to read as many submissions as possible, from both individuals and organizations. The first result that is clear is that an overwhelming volume of submissions are opposed to the draconian US-style DMCA restrictions on legitimate uses of content, which of course include the restriction on tools ('circumvention devices') that allow exercising certain legal rights.

I found it very heartening and inspiring that individual Canadian citizens responded in large numbers, standing behind the positions put forward by significant organizations such as the *Canadian Library Association*, *Council of Ministers of Education*, *Electronic Frontier Canada*, *Canadian School Boards Association*, and so many more. Each of these submissions understood that access to content and 'fair dealing' rights are essential to a balanced Copyright Act. They each make note of the fact that the existing balances in Copyright legislation must be upheld and protected, and that measures such as anti-circumvention legislation will destroy this balance in favour of maximizing available profits to a small number of commercial content providers.

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It is also very interesting to read the contrary opinions, issued by a small minority of respondents, that such expanded and restrictive legislation is necessary. These responses seem to be filled with a large number of conflicting and unsupported assumptions and arguments, in many cases relying on conclusions that are clearly erroneous. In my earlier response I pointed out some of these mistakes in the *AOL/TW* response, but they appear in many of the responses that try to claim that DMCA-style restrictions will not break existing Copyright Act standards. A typical example comes from the IBM Canada submission, which states "*As mentioned works that are protected by copyright will eventually have their term of protection expire, and as such there is a need to "legally strip" these works of the use restrictions. As such, the legislation will need to require that copyright protection measures be "released" or reversed throughout the term of protection to allow for authorized uses and upon expiry of the term, to allow access to no longer protected works*." Since IBM proposes that circumvention technologies and products be made illegal, just how do they imagine that protection measures will be 'released' or reversed? The answer certainly cannot be that the Copyright holder will arrange for such reversal, since by the time of expiry most Copyrighted works will no longer be published, supported, or even stored by the original Copyright holder. This line of thought may work for the fraction of one percent of all Copyrighted content which has a wide (and profitable) audience, but I would instead point to the vast majority of content which has a limited audience, a limited timeliness, and is not owned by a major media conglomerate. More than anything this is true of Canadian-generated content, which does not usually find itself in the hands of major media companies such as *AOL/TW*. IBM's submission also states "*Copyright Act provisions for exemptions should still be applicable (broadly the "fair dealing" or excusable exploitation exemptions). As mentioned above, the limitations imposed by the term of protection, and any authorized use of such 'technology' should not be caught in the definition of an offence*." Again, their submission is contradictory. Here they indicate their support of Copyright Act exemptions and 'fair dealing' rights, yet with their insistence on anti-circumvention restrictions and criminalizing the creation and dissemination of circumvention technologies they make this statement indefensible.

A handful of submissions that support anti-circumvention restrictions also do not appear to fully understand the issues or the results that will be apparent should restrictive legislation be put in place. For example, the *Canadian Chamber of Commerce* submission supports criminal and civil anti-circumvention legislation, yet also states "*The Chamber also believes that existing Copyright Act exemptions, such as the fair dealing exemption, should still apply. Moreover, an amendment in this area should not constrain research and development in the fields of encryption and technological security, even if devices/methods designed to overcome the said protection are developed during the course of such research. The amendment must focus on preventing circumvention for the purposes of copyright infringement*." The Chamber's position clearly ignores the fact that the type of anti-circumvention legislation that they say they support would by its very nature exclude 'fair dealing' rights, making the exercise of such rights impossible. In addition, this is no longer an academic 'thought' experiment – the past two years of US DMCA litigation have proven, with concrete actions, that anti-circumvention legislation does specifically restrict fair use, research and academic endeavour, and legitimate actions permitted by traditional Copyright Act regulations. The Felton, Sklyarov, and DeCSS cases are just a few of the examples of such chilling and unsettling results.

Nearly every submission from Library and Academic groups points out that the position proposed by IBM and others on these points is not reasonable; to quote from the *Canadian School Boards Association* submission, "*If all devices are illegal, it will be impossible to access copyright material for purposes permitted under the Copyright Act. Therefore, outlawing circumvention devices is not an available option if some circumvention is to be permitted. It is submitted, in response to question 4 below, that circumvention should be permitted for specified purposes.* ***Outlawing devices is incompatible with this option***." (Emphasis added by myself.)

In conclusion, the Ministries of Industry and Heritage must not find themselves 'bullied' by the American model or the limited interests of large media conglomerate companies. Accessibility of Canadian content in the digital age is a complex issue, but as has been made clear by the cornerstone organizations of our information society – libraries and academic institutions – it is essential that balances of fair dealing, access, and personal use must be kept, and this precludes the enactment of strict anti-circumvention legislation. As I mentioned at the start of my letter, I am particularly proud that so many individual Canadians have also taken the time to educate themselves on these matters and respond to this Consultation. I would also point out that many groups and individuals raise some excellent points on other areas of your consultation documents that I have not touched on myself, and I would urge both Ministries to seriously consider the need to protect the rights of all Canadians to access information and content in a fair and equitable way.

I appreciate the opportunity to have been able to comment on these issues under your consideration. Thank you,

Yours Sincerely,

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