

The Case for Flexibility in Implementing the WIPO Internet Treaties:

An Examination of the Anti-Circumvention Requirements

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The introduction of Bill C-32,¹ the third attempt at Canadian copyright reform in five years,² was greeted with generally positive reviews, as many groups and individuals welcomed the good faith attempt to broker a compromise on many contentious copyright issues.³ While copyright watchers have long recognized that any bill is guaranteed to generate some dis-

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- 1 Bill C-32, *An Act to amend the Copyright Act*, 3d Sess., 40th Parl., 2010, www2.parl.gc.ca/content/hoc/Bills/403/Government/C-32/C-32_1/C-32_1.PDF (First Reading: 2 June 2010).
- 2 The other two copyright bills were Bill C-60 [Bill C-60, *An Act to amend the Copyright Act*, 1st Sess., 38th Parl., 2005, www2.parl.gc.ca/content/hoc/Bills/381/Government/C-60/C-60_1/C-60_1.PDF (First Reading: 20 June 2005)] introduced by the Liberal government in June 2005, and Bill C-61 [Bill C-61, *An Act to amend the Copyright Act*, 2d Sess., 39th Parl., 2008, www2.parl.gc.ca/content/hoc/Bills/392/Government/C-61/C-61_1/C-61_1.PDF (First Reading: 12 June 2008)], introduced by the Conservative government in June 2008. Both died on the order paper.
- 3 See, e.g., Canadian Association of Research Libraries, News Release/Communiqué, "CARL Commends Government on Copyright Bill" (7 June 2010), www.carl-abrc.ca/new/pdf/carl_c-32_media_release_june2010.pdf. See also Retail Council of Canada, News Release/Communiqué, "Retail Council of Canada welcomes introduction of Copyright Modernization Act" (3 June 2010), www.retailcouncil.org/mediacentre/newsreleases/current/pr20100603.asp.

agreement—the copyright reform balancing act invariably means that no stakeholder views the law as perfect—Bill C-32 does a better job than its predecessors of addressing difficult issues such as fair dealing, intermediary liability, and statutory damages.

Much of the support for Bill C-32 came with one major caveat, however. The dominant focus of discussion upon introduction of the bill and for weeks thereafter was on the anti-circumvention provisions, which provide legal protection for technological protection measures (TPMs) such as copy controls on CDs, region coding on DVDs, and access controls on electronic books. Commonly referred to as the “digital lock” provisions, these rules were one of the few issues that the government left largely unchanged from Bill C-61, the failed copyright reform bill that died on the order paper in 2008.

While there has been considerable discussion on the need for anti-circumvention legislation, most of the debate has been focused on either the policy or political issues raised by the provisions. From a policy perspective, critics argue that Canadians would be better served by protection from digital locks rather than legal protection for them.⁴ Supporters of the rules, including government ministers, have sought to assuage public concern by noting that some business sectors have abandoned the use of digital locks in consumer products.⁵

At a political level, all the Canadian opposition parties chose to focus their reaction to Bill C-32 by placing the spotlight on the potential harm caused by the anti-circumvention provisions. For example, Liberal MP and Industry critic Marc Garneau noted “the bill seems to be missing an exception that would allow people to break digital locks if it was for private, non-commercial use.”⁶ Meanwhile, NDP MP and Digital Affairs critic

⁴ See, e.g., Ian Kerr, “If Left to Their Own Devices . . . How DRM and Anti-Circumvention Laws Can Be Used to Hack Privacy” in Michael Geist, ed. *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 167.

⁵ For example the government’s Frequently Asked Questions (FAQ) list for Bill C-32, under the heading “Why does this bill favour strong protections for TPMs?” states: “There are some business models that rely on digital locks to protect their investments. These industries need to have the protection of the law. However, in other markets, in light of consumer demands, some businesses have chosen not to use TPMs. Creators may decide whether to use a TPM, and consumers can then decide whether to buy the product. . . . The success of TPMs depends on market forces.” See Canada, Industry Canada, “Questions and Answers” (22 June 2010) www.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rpo1153.html.

⁶ Peter Nowak, “Copyright bill would ban breaking digital locks” *CBC News* (3 June 2010), www.cbc.ca/technology/story/2010/06/02/copyright-bill-clement-montreal.html.

Charlie Angus, a former professional musician and perhaps the most active Member of Parliament on copyright issues, lamented “the only rights you will get under this bill are those that US-based entertainment concerns decide you get. If the technological protections override those rights, then you have no rights.”⁷

The politics behind C-32’s digital lock rules were not limited to domestic considerations. There was little doubt that the approach was designed with the United States in mind. As Blayne Haggart discusses in his chapter,⁸ the US has been a vocal critic of Canadian copyright law for over a decade, leading some within the government to effectively establish a litmus test for the bill based on the assurance of US approval.⁹ With that in mind, the anti-circumvention provisions in Bill C-32 are even more restrictive than the US approach found in the Digital Millennium Copyright Act and were therefore guaranteed of obtaining the desired support.¹⁰

Yet beyond the policy and politics, lies an important legal question that has been hotly debated within certain copyright law circles. That question is whether the Canadian anti-circumvention approach is necessitated not by policy or politics, but rather by international law. The anti-circumvention provisions represent Canada’s attempt to implement the World Intellectual Property Organization’s *Copyright Treaty* (WCT)¹¹ and *Performances*

⁷ See Blayne Haggart, “North American Digital Copyright, Regional Governance, and the Persistence of Variation” in this volume.

⁸ *Ibid.*

⁹ “The United States urges Canada to enact legislation in the near term to update its copyright laws and address the challenge of Internet piracy. Canada should fully implement the WIPO Internet Treaties, which Canada signed in 1997. Canada’s weak enforcement of intellectual property rights is also of concern, and the United States continues to encourage Canada to improve its IPR enforcement system to provide for deterrent sentences and stronger enforcement powers.” See U.S., Office of the United States Trade Representative, *2010 Special 301 Report* (30 April 2010), www.ustr.gov/webfm_send/1906 at 25. See also “Canada among top five on US piracy watch list” *Financial Post* (19 May 2010), www.financialpost.com/story.html?id=3047997; Paul Koring, “Canada placed on copyright blacklist” *The Globe and Mail* (30 April 2009), www.theglobeandmail.com/news/technology/download-decade/article1127052.ece.

¹⁰ *Digital Millennium Copyright Act*, Pub. L. No. 105-304, 112 Stat. 2860 (1998), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_public_laws&docid=f:publ304.105.pdf (codified at 17 U.S.C. (1998)) [DMCA cited to U.S.C.].

¹¹ *WIPO Copyright Treaty*, 20 December 1996, WIPO Publication No. 226, (1997) 36 I.L.M. 65, www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_woo33.pdf (entered into force 6 March 2002) [WCT].

and Phonograms Treaty (WPPT)¹²—collectively referred to as the WIPO Internet treaties—which codify new legal obligations to provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures.”¹³

As discussed below, these fourteen words have generated dozens of scholarly articles and other commentaries on the nature of the legal obligations they entail. For supporters of the US approach, the anti-circumvention provisions in Bill C-32 merely reflect the treaty requirements, which, in their view, provide only limited flexibility for implementation into domestic law. To critics, the WIPO Internet treaties are flexible instruments that offer countries far more latitude. While signatories may be free to exceed the treaty requirements, the legal question faced by Canadian policy makers and politicians is: What is the minimum required by the treaty to ensure full compliance?

This article makes the case for a flexible implementation that provides new legal protections for TPMs but preserves the viability of limitations and exceptions—affirmed in Canada by the Supreme Court as “user rights”—in the digital environment.¹⁴ It argues that such an approach, which is perhaps best achieved by providing that circumvention is permitted for lawful purposes, is fully compliant with a country’s obligations under the WIPO Internet treaties. Moreover, it argues that restrictions on the trafficking, distribution or marketing of circumvention tools or devices, while found in the DMCA (and now Bill C-32), is not a treaty requirement.

The case for WIPO Internet treaty implementation flexibility comes in four parts. The first part reviews the plain language of the anti-circumvention provisions and some of the efforts to interpret the resulting legal obligations.

The second part examines the legislative history behind the inclusion of anti-circumvention provisions in the WIPO Internet treaties. The record reveals considerable discomfort among many country delegations with the initial anti-circumvention proposals. This led to the rejection of the US DMCA-style approach that specifically included restrictions on traf-

¹² WIPO Performances and Phonograms Treaty, 20 December 1996, WIPO Publication No. 227, (1997) 36 I.L.M. 76, www.wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs_woo34.pdf (entered into force 20 May 2002) [WPPT].

¹³ WCT, above note 11, art. 11; WPPT, above note 12, art. 18.

¹⁴ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, <http://scc.lexum.umontreal.ca/en/2004/2004scc13/2004scc13.html>, [2004] 1 S.C.R. 339 [CCH cited to LexUM/S.C.R.].

ficking in circumvention tools in favour of a more flexible approach that did not prescribe any specific legal measures.

The third part surveys state practice in implementing the WIPO Internet treaties. This includes a review of countries that have ratified the treaties as well as several countries preparing to do so. The review confirms that most countries have recognized the flexibility in the treaties by including exceptions, mandatory unlocking provisions, and other mechanisms to retain the copyright balance.

The fourth part canvasses some of the scholarly and legal analysis of the treaty obligations. Although there have been a few outspoken skeptics that dismiss the possibility of flexible implementation, there is a large body of published, peer-reviewed scholarly analysis from around the world that confirms that the WIPO Internet treaties offer considerable flexibility in implementation.

A. PART 1—THE PLAIN LANGUAGE OBLIGATIONS

Canada has faced mounting pressure in recent years over the state of its copyright law, with lobby groups and the US government pointing to its failure to ratify the WIPO Internet treaties as demonstrative of a legal system badly in need of updating.¹⁵ Since their creation in 1996, the twin treaties have had a transformative impact on the scope of copyright law, creating what some experts have referred to as “super-copyright”¹⁶ or “para-copyright.”¹⁷ Both treaties feature a broad range of provisions targeting digital copyright issues; however, the most controversial provisions mandate the establishment within ratifying states’ national law of anti-circumvention provisions that provide “adequate legal protection and effective legal measures” against the circumvention of effective technological protection measures.¹⁸

The promise of TPMs have long been touted by movie, music, and software industry associations as providing important protections for their products, by using technology to prevent unauthorized access or use. Despite the support for TPMs, many advocates have acknowledged that all TPMs can be defeated. For example, in 2000, the Secure Digital Music In-

¹⁵ See 2010 *Special 301 Report*, above note 9 at 25.

¹⁶ Canada, Industry Canada, *Technological Measures Circumvention Provisions* by Mark S. Hayes (Ottawa: Davies, Ward & Beck, 2000), www.ic.gc.ca/eic/site/ippd-dppi.nsf/eng/ipo1145.html at 5 [Hayes].

¹⁷ Dan L. Burk, “Anti-circumvention Misuse” (2002–2003) 50 UCLA L. Rev. 1095 at 1096.

¹⁸ WCT, above note 11, art. 11; WPPT, above note 12, art. 18.

itiative launched a public challenge to encourage the public to test whether it could crack SDMI, then-viewed as unbreakable technological protection.¹⁹ A team of security researchers cracked SDMI with relative ease, confirming the technology community's view that no system is foolproof.²⁰

Given the flawed protection provided by TPMs, supporters of technological protections have lobbied for additional legal protections to support them. Although characterized as copyright protection, this layer of legal protection does not address the copying or use of copyrighted work. Instead, it focuses on the protection of the TPM itself, which in turn attempts to ensure that the content distributor, not necessarily the creator or copyright owner, controls how the underlying content is accessed and used.

Both the WCT and WPPT contain anti-circumvention provision requirements. Article 11 of the WCT provides 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.²¹

Similarly, Article 18 of the WPPT provides that:

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

¹⁹ Janelle Brown, "Crack SDMI? No thanks!" *Salon* (14 September 2000), www.salon.com/technology/log/2000/09/14/hack_sdmi/index.html.

²⁰ Scott A. Craver et al., "Reading Between the Lines: Lessons from the SDMI Challenge" (Paper presented to the 10th USENIX Security Symposium, Washington, D.C., 15 August 2001), www.usenix.org/events/sec01/craver.pdf. The "cracking" of the SDMI protection led soon thereafter to litigation with the Recording Industry Association of America, after the RIAA threatened the researchers with liability if they publicly disclosed their analysis. See Scarlet Pruitt, "Silenced Professor Sues SDMI, RIAA" *PCWorld* (6 June 2001), www.pcworld.com/article/52006/silenced_professor_sues_sdmi_riaa.html. The case was ultimately dismissed due to lack of standing, after the RIAA denied they had threatened any legal action. See Electronic Frontier Foundation, Media Release, "Security Researchers Drop Scientific Censorship Case" (6 February 2002), http://w2.eff.org/IP/DMCA/Felten_v_RIAA/20020206_eff_felten_pr.html.

²¹ WCT, above note 11, art. 11.

are not authorized by the performers or the producers of phonograms concerned or permitted by law.²²

Article 31 of the Vienna Convention on the Law of Treaties provides that treaties “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Interpretation shall take into account subsequent agreements and practices, as well as relevant rules of international law, along with the context of the treaty. Special meanings shall be given to terms “if it is established that the parties so intended.”²³

The interpretation of several key words and phrases within the WIPO Internet treaties’ anti-circumvention provisions play an important role in determining their scope and coverage once implemented into national law.

First, the treaties do not provide definitions for the words “adequate” and “effective” with respect to legal protections. Since all TPMs can be circumvented, the provision points to the fact that perfection is not required nor does a minimum global standard exist. Instead, any national legislation will be measured against an adequacy criterion such that the legal protections must provide some measure of protection that a reasonable person would perceive as evidencing effectiveness.

The meaning of “effective technological measures” has also generated some discussion among legal experts.²⁴ Given the imperfections of TPMs, it is clear that the provision does not afford protections merely for the most effective, technologically advanced TPMs. Conversely, a rights holder may not simply describe any technological control as a TPM and expect to benefit from legal protection. Protections that are plainly ineffective would be unlikely to merit legal protection.²⁵

“Circumvention” is also subject to interpretation. Activities such as a brute force decryption of a TPM or hacking a closed system would obviously be covered by such a provision, though criminal provisions in

²² WPPT, above note 12, art. 18.

²³ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (entered into force on 27 January 1980, accession by Canada 14 October 1970), art. 31.

²⁴ See, e.g., Ian R. Kerr, Alana Marushat & Christian S. Tacit, “Technological Protection Measures: Tilting at Copyright’s Windmills” (2002-2003) 34 Ottawa L. Rev. 7 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=793504 at 34-35 [Kerr]; see also Jacques de Werra, “The Legal System of Technological Protection Measures under the WIPO Treaties, the *Digital Millennium Copyright Act*, the European Union Directives and other National Laws (Japan, Australia)” (Paper presented to the ALAI Congress, June 2001) [unpublished], www.alai-usa.org/2001_conference/Reports/dewerra.doc at 10.

²⁵ Kerr, *ibid.* at 35.

many jurisdictions, including Canada, could similarly be applied to incidents that are otherwise described as computer crime.²⁶ Circumvention could be interpreted to extend to more mundane activities, however, including posting passwords or registration numbers on the Internet.²⁷

The latter half of the provision has also generated conflicting interpretations. As Professor Ian Kerr notes in his comprehensive study of TPMs:

A literal interpretation of the requirements that TPMs must be “used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention” and “restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law” suggests that TPMs must restrict acts that are protected by copyright law in order to qualify for legal protection pursuant to article 11 of the WCT. According to this interpretation, article 11 of the WCT does not require states to prohibit the circumvention of a TPM in order to benefit from one of the exceptions to copyright (such as, for example, fair dealing in Canada). This suggests that only circumventions resulting in copyright infringement will be subject to article 11.²⁸

Kerr acknowledges, however, that others have interpreted the clause differently, focusing instead on the latter phrase “restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law”. The alternate interpretation posits that this provision seeks to protect rights holders against the circumvention of TPMs which limit access, effectively creating a *sui generis* right of access control.²⁹

Taken together, the WIPO Internet treaty language is remarkable for its brevity, leaving commentators to debate over the meaning of words that all would acknowledge are open to interpretation. Given the brief, open-ended language employed in the treaties, an examination of the legislative history that led to the adoption of the WIPO Internet treaties is needed to shed light on the intentions of the countries that negotiated them.

B. PART 2—THE WIPO INTERNET TREATY LEGISLATIVE HISTORY

The initial work behind the WIPO Internet treaties began in 1989 with the first session of the Committee of Experts developing model provisions

²⁶ *Criminal Code*, R.S.C. 1985, c. C-46, ss. 342.1, 430(1).

²⁷ *Kerr*, above note 24 at 24.

²⁸ *Ibid.* at 24 [emphasis added].

²⁹ *Ibid.* at 47.

for legislation in the field of copyright.³⁰ The interplay between law and technology—which later would come in the form of anti-circumvention legislation—did not start in earnest until the Fourth Session of the Committee of Experts in December 1994.³¹ The issue did take hold, however, and over the next two years, several committee sessions followed by a WIPO Diplomatic Conference in December 1996 led to the agreement on the treaties.³² This twenty-four-month period features a rich legislative history that provides considerable insight into the intentions of the parties in reaching consensus.³³

1) Preparatory Meetings

The WIPO Internet treaties do not include any specific reference to access controls or to circumvention devices. Yet Dr. Mihály Ficsor, who served as the secretary to the Diplomatic Conference for the treaties and has emerged as the most vocal proponent of an inflexible implementation, has suggested that the preparatory negotiations reflected a complete consensus that the treaty must prohibit circumvention of access controls generally, and that the prohibition must extend to trafficking in devices.³⁴ However, the record of the meetings of the Committee of Experts cast doubt on these claims.

³⁰ WIPO, *Report of the First Session of the Committee of Experts on Model Provisions for Legislation in the Field of Copyright*, (Geneva, 20 February to 3 March 1989) WIPO doc. CE/MPC/1/3, www.wipo.int/mdocsarchives/CE_MPC_I_1989/CE_MPC_I_3_E.pdf.

³¹ WIPO, *Report of the Fourth Session of the Committee of Experts on a Possible Protocol to the Berne Convention*, (Geneva, 5 to 9 December 1994) WIPO doc. BCP/CE/IV/3 [BCP/CE/IV/3].

³² WIPO, *Final Act of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions*, (Geneva, 2 to 20 December 1996) WIPO doc. CRNR/DC/98, www.wipo.int/edocs/mdocs/diplconf/en/crnr_dc/crnr_dc_98.pdf.

³³ Article 32 of the Vienna Convention on the Law of Treaties [above, note 23] provides that supplemental information, “including the preparatory work of the treaty and the circumstances of its conclusion,” may be used to clarify the meaning if the application of Article 31 “leaves the meaning ambiguous or obscure” or “leads to a result which is manifestly absurd or unreasonable.”

³⁴ Mihály Ficsor, “Only once more—and then Marry Christmas and Happy New Year to everybody, including Professor Geist and his devoted followers: the 1996 WIPO Diplomatic Conference, the WIPO Treaties and the balance of interests” Barry Sookman (23 December 2009), www.barrysookman.com/2009/12/23/only-once-more-and-then-marry-christmas-and-happy-new-year-to-everybody-including-professor-geist-and-his-devoted-followers-the-1996-wipo-diplomatic-conference-the-wipo-treaties-and-the-balanc.

a) Fourth Session

Meaningful debate about the inclusion of provisions relating to TPMs began at the Fourth Session of the Committee of Experts in December 1994. The US delegation stated that, in view of the ease with which digital works could be copied, rights holders were increasingly seeking to protect their works through the use of encryption and copy protection systems. In their view, it would be necessary to establish some norms to protect against the circumvention of such schemes.³⁵ The subject of TPMs was not on the work program for the meeting, but the Chairman proposed to defer debate on other matters in order to consider the issue.

At that point, no specific language was tabled. The US delegation indicated that it was considering a provision that would target trafficking in goods or services with the primary purpose or effect of circumventing technical security measures related to copyright.³⁶ There was explicit discussion about the importance of ensuring that the protection of TPMs did not conflict with lawful uses of protected works. Some delegations and representatives of non-governmental organizations attending as observers insisted that it would be necessary to impose limits and exceptions on the application of any new protections to allow for such lawful use.³⁷

The Chairman's summary of the debate notes that there were unresolved issues in defining the appropriate scope of protection and linkages to other areas of law. However, the best approach seemed to be to tie the protection to the scope of copyright law. Foreshadowing the final outcome, he explicitly noted that one possibility would be simply to declare the act of circumvention itself unlawful, and to leave it to each Contracting Party to determine how best to implement that requirement.³⁸

b) Fifth Session

At the fifth session in September 1995, there were still no explicit proposals to cover the circumvention of TPMs on the table but the US delegation stressed that, in its view, it was becoming urgent to define an aggressive schedule that would culminate in a full Diplomatic Conference in the second half of 1996.³⁹

³⁵ BCP/CE/IV/3, above note 31 at para. 13

³⁶ *Ibid.* at para. 88.

³⁷ *Ibid.* at para. 92.

³⁸ *Ibid.* at para. 96.

³⁹ WIPO, *Report of the Fifth Session of the Committee of Experts on a Possible Protocol to the Berne Convention*, (Geneva, 4 to 8 and 12 September 1995) WIPO doc. BCP/CE/

Other delegations expressed some reservations about the issue. For example, the Korean delegation emphasized that it only supported the protection of TPMs “provided that such measures did not prevent normal exploitation of the protected subject-matter.”⁴⁰ The European Commission delegation pointed to Article 7(1)(c) of its computer programs directive as a model. This provision applied to distribution or possession for *commercial purposes*, and only where the device had the *sole intended purpose* of facilitating the unauthorized removal or circumvention of a TPM protecting a computer program.⁴¹ Moreover, non-governmental organizations had their own concerns, with the Japan Electronic Industry Development Association stressing the importance of protecting exceptions for fair use and “safeguards for innocent infringers.”⁴²

c) Sixth Session

The first concrete proposals were presented at the sixth session in February 1996 with draft language presented by the US, Argentina, and Brazil. The US proposal did not target the act of circumvention, but rather focused on trafficking in circumvention devices or the provision of services. The specific text provided:

Contracting Parties shall make it unlawful to import, manufacture or distribute any device, product or component incorporated into a device or product, or offer or perform any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent without authority, any process, treatment, mechanism or system which prevents or inhibits the unauthorized exercise of any of the rights under the Berne Convention or this Protocol.⁴³

The Argentine and Brazilian proposals were broader in scope, applying to both the act of circumvention and trafficking in circumvention devices. However, both proposals were limited to copy controls, with no reference

V/9-INR/CR/IV/8, www.wipo.int/mdocsarchives/INR_CE_IV_1995/BCP_CE_V_9_INR_CE_IV_8_E.pdf at para. 20.

⁴⁰ *Ibid.* at para. 25.

⁴¹ *Ibid.* at para. 319.

⁴² *Ibid.* at para. 339.

⁴³ WIPO, *Proposals Submitted by the United States of America*, (Geneva, 1–9 February 1996) WIPO doc. BCP/CE/VI/8, www.wipo.int/mdocsarchives/BCP_CE_VI_1996/BCP_CE_VI_8_E.pdf, art. 7.

to access controls.⁴⁴ Notwithstanding claims that all proposals envisioned including access controls, no control that applied only after a work had been lawfully distributed to, or received by, a consumer would be covered under the Argentine or Brazilian proposals. For example, neither region coding nor the general Content Scrambling System (CSS) applied to DVDs would seem to fit the criteria for protection since neither inhibits copying⁴⁵ or communication to the public.

No delegation spoke in favour of a broader protection for access controls.⁴⁶ A number of delegations expressed concerns about the scope of the three proposals, however. For example, the Korean delegation supported mandatory exceptions with obligations imposed on rights-holders to serve the public interest.⁴⁷ The Danish delegation argued for a declaration of principle only, with more flexibility for Contracting Parties to implement measures as they saw fit.⁴⁸ Other countries were even less supportive: Thailand opposed including *any* protection for TPMs;⁴⁹ China thought the idea required further study, and was also not prepared to support inclusion of any measures at that time.⁵⁰

Given the differing views, the Chairman's summary of the debate reflects the lack of consensus:

There had been many suggestions concerning which technical measures should be covered, and it would be necessary to consider further the test of whether the devices should be designed for the given pur-

⁴⁴ The Argentine and Brazilian proposals refer to encryption schemes intended to limit communication of signals to the public, but not to general access controls. See WIPO, *Comparative Table of Proposals and Comments Received by the International Bureau*, (Geneva, 1 to 9 February 1996) WIPO doc. BCP/CE/VI/12, www.wipo.int/mdocsarchives/BCP_CE_VI_1996/BCP_CE_VI_12_E.pdf.

⁴⁵ CSS is not a copy-protection scheme. It is a pure access control, in that its sole function is to require an authorized key in order to decode the content for playback. A direct copy of the encoded bitstream on a DVD can easily be made without decoding the contents. No circumvention of the protection system occurs. The resulting copy will be entirely functional on authorized DVD players.

⁴⁶ The delegation of Norway refers to preventing "illegal access" without defining what that means. However it also states that further elaboration is required. See WIPO, *Report of the Sixth Session of the Committee of Experts on a Possible Protocol to the Berne Convention*, (Geneva, 1 to 9 February 1996) WIPO doc. BCP/CE/V/9-INR/CR/VI/17-INR/CE/V/14, www.wipo.int/mdocsarchives/BCP_CE_VI_1996/BCP_CE_VI_16_INR_CE_V_14_E.pdf at para. 207.

⁴⁷ *Ibid.* at para. 200.

⁴⁸ *Ibid.* at para. 202.

⁴⁹ *Ibid.* at para. 206.

⁵⁰ *Ibid.* at para. 208.

pose, or, have it as their sole or primary purpose. Also the acts covered by the relevant provisions, such as importation, manufacturing, distribution or even use for defeating purposes, should be elaborated further, as should links to other legislation.⁵¹

Despite the lack of consensus on this particular issue, the sixth session concluded with a recommendation that a Diplomatic Conference be held in December 1996 with the aim of concluding the treaties.⁵²

d) Seventh Session

The seventh and final preparatory session in May 1996 saw the introduction of yet another proposal (from the European Union) along with several explicit rejections from country delegations of any anti-circumvention provisions. The European Union proposal bore a striking resemblance to the US version, focusing solely on the trafficking of circumvention devices or provision of services, not on acts of circumvention.⁵³ The primary difference between the US and European proposals was that the E.U. version added a knowledge requirement.⁵⁴ Moreover, the European proposal required that the TPM be *designed* to prevent or inhibit infringement of a treaty right, rather than merely having that effect.

The debate that followed saw considerable disenchantment with all the proposals. The Canadian delegation explicitly stated that it was unable to support *any* of the proposals, due to on-going domestic studies, and noted serious concerns about the impact on lawful uses.⁵⁵ Other expressions of concern included:

- The delegation of Singapore felt the proposal went too far: it would interfere with legitimate uses; would harm industry; and would create

⁵¹ *Ibid.* at para. 236.

⁵² *Ibid.* at para. 275.

⁵³ WIPO, *Proposals of the European Community and its Member States*, (Geneva, 22 to 24 May 1996) WIPO doc. BCP/CE/VII/1-INR/CE/VI/1, www.wipo.int/mdocsarchives/BCP_CE_VII_1_INR_CE_VI/BCP_CE_VII_1-INR_CE_VI_1_E.PDF.

⁵⁴ Unlike the Basic Proposal, where the knowledge requirement was applied to the (intended) use of the device or service, the European proposal's knowledge requirement was aimed at the device's purpose. In practical terms, this would seem to frame the question in terms of the intent of the designer, rather than the intent of the user.

⁵⁵ WIPO, *Report of the Seventh Session of the Committee of Experts on a Possible Protocol to the Berne Convention*, (Geneva, 22 to 24 May 1996) WIPO doc. BCP/CE/VII/4-INR/CE/VI/4 at para. 26 [BCP/CE/VII/4]. Only the Spanish version of this document is available online: www.wipo.int/mdocsarchives/BCP_CE_VII_INR_CE_VI/BCP_CE_VII_4_INR_CE_VI_4_S.pdf.

a barrier to innovation.⁵⁶ Furthermore, the proposal was so broad that it would capture both licit and illicit uses.⁵⁷

- The delegation of Thailand thought the proposal was too vague, and would lead to confusion.⁵⁸ Further, the delegation stated that the proposals went too far, and compared them to past efforts to ban video recorders.⁵⁹
- The Korean delegation again stressed its concerns about the harms to the public interest that could result from the protection of TPMs.⁶⁰ The delegation also thought the proposal would inappropriately impose liability on manufacturers of lawful products for the illicit acts of others.⁶¹
- The Chinese delegation thought the whole issue might not fit within the sphere of copyright.⁶²
- The Ghanaian delegation felt that protection of TPMs could be oppressive to developing nations, and suggested the whole subject should be “reconsidered.”⁶³
- The Brazilian delegation stated that the grounds for protecting TPMs needed further clarification.⁶⁴
- The Moroccan delegation simply noted that it was not fully in agreement with the European proposal.⁶⁵
- The delegation from South Africa was concerned about the ambiguity of the language, and raised questions about the allocation of liability.⁶⁶
- The Nigerian delegation, on behalf of the African Group, also expressed concerns about the vagueness of the language. The delegation went on to stress that the subject needed to be considered in terms of its impact on access to knowledge and economic and social development. The delegation asked that the committee reassess the question from the perspective of developing nations, and suggested that while some nations might wish to impose such prohibitions in their domestic codes, this might not be practical for developing nations.⁶⁷

⁵⁶ *Ibid.* at para. 14.

⁵⁷ *Ibid.* at para. 42.

⁵⁸ *Ibid.* at para. 15.

⁵⁹ *Ibid.* at para. 41.

⁶⁰ *Ibid.* at para. 19.

⁶¹ *Ibid.* at para. 40.

⁶² *Ibid.* at para. 21.

⁶³ *Ibid.* at para. 22.

⁶⁴ *Ibid.* at para. 25.

⁶⁵ *Ibid.* at para. 30.

⁶⁶ *Ibid.* at para. 32.

⁶⁷ *Ibid.* at para. 34.

- The delegation from Guinea supported the Nigerian delegations' remarks.⁶⁸
- The Egyptian delegation joined with those delegations seeking additional clarification.⁶⁹

Given these comments, the final meeting of the Committee of Experts ended with no formal conclusions or recommendations about provisions for the protection of TPMs.⁷⁰

2) Diplomatic Conference

The Diplomatic Conference in December 1996, which ultimately resulted in the conclusion of the WIPO Internet treaties, featured debate in both the Main Committee and within the Plenary on the anti-circumvention provisions. The starting point for the Diplomatic Conference was the US-backed "Basic Proposal" that provided:

- (1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the rightholder or the law.
- (2) Contracting Parties shall provide for appropriate and effective remedies against the unlawful acts referred to in paragraph (1).

Dr. Ficsor's account of the Diplomatic Conference claims:

The reports of Main Committee I and the Plenary of the Diplomatic Conference did not contain any statement or reference to any intention of any delegation to narrow the scope of the protection of TPMs from what was proposed previously.⁷¹

Yet the WIPO record—as well as that chronicled by other observers⁷²—paint a much different picture. The very first statement about the

⁶⁸ *Ibid.* at para. 35.

⁶⁹ *Ibid.* at para. 36.

⁷⁰ *Ibid.* at para. 107.

⁷¹ Mihály Ficsor, "Legends and reality about the 1996 WIPO Treaties in the light of certain comments on Bill C-32" *Barry Sookman* (17 June 2010), www.barrysookman.com/2010/06/17/legends-and-reality-about-the-1996-wipo-treaties-in-the-light-of-certain-comments-on-bill-c-32/.

⁷² Pamela Samuelson, "The US Digital Agenda at WIPO" (1996–1997) 37 *Va. J. Int'l L.* 369 [*Samuelson*].

draft articles protection of Technological Measures in the Summary Minutes, Main Committee I, is the demand by the Ghanaian delegation for the article to be dropped entirely, or at least substantially reduced in scope (the substantive impact of the proposal to replace the “primary purpose” standard with a “sole purpose” standard would be to exclude all multi-purpose devices from the scope of the provision).⁷³

This was followed by a succession of critical comments from country delegations. The Canadian delegation insisted that draft wording was not acceptable, and that the provision should not “create problems for producers and sellers of equipment which might have a significant non-infringing use but which could also be used to defeat copyright protection.”⁷⁴ In order for devices with significant non-infringing uses to be protected, the scope of protection of the Basic Proposal would need to be reduced.

The Korean delegation proposed changes aimed at ensuring that circumvention for the purposes of exercising an exception to exclusive rights remained not just lawful, but practically possible.⁷⁵ The South African delegation stated that the language of the Basic Proposal created “a danger that no provision could be adopted relating to technological measures.”⁷⁶ It offered an alternate proposal, which ultimately became the basis for the language adopted unanimously that dropped any reference to devices and services, instead targeting only the *act* of circumvention. The delegations of Nigeria, Senegal and Côte d’Ivoire supported the positions of Ghana and South Africa, which clearly call for a reduction in scope of the provision, or in the alternative, its removal.⁷⁷

Singapore called for reducing the “primary purpose” standard to a “sole purpose” standard, stressing “the need to ensure that bona fide legitimate manufacturers and users of general-purpose equipment would not be exposed to liability for the possible use of such devices for illegitimate purposes.”⁷⁸

Several countries called for narrowing the scope of the provisions. For example, Jamaica noted that “in the view of her Delegation, the formulation ‘any of the rights covered by the rights under the Treaty’ was too

⁷³ WIPO, *Diplomatic Conference on Certain Copyright and Neighboring Rights Questions: Summary Minutes, Main Committee I*, (Geneva, 2 to 20 December 1996) WIPO doc. CRNR/DC/102, www.wipo.int/edocs/mdocs/diplconf/en/crnr_dc/crnr_dc_102.pdf at para. 517 [Main Committee I].

⁷⁴ *Ibid.* at para. 523.

⁷⁵ *Ibid.* at para. 518.

⁷⁶ *Ibid.* at para. 519.

⁷⁷ *Ibid.* at paras. 521, 522 and 533

⁷⁸ *Ibid.* at para. 526.

broad and unprecise and its proposed amendment would not contravene the basic intention of the Article.”⁷⁹ The Australian delegation sought to modify the provision to “confine its operations to clear cases of intended use for copyright breaches.”⁸⁰ The Norwegian delegation “agreed with those who had proposed narrowing the scope of those provisions, for the main reason that such provisions should not prevent legitimate use of works, for example, private and educational uses, and use of works which had fallen into the public domain.”⁸¹ The German delegation also “joined those Delegations which had considered that the scope of the provisions in question should be narrowed.”⁸²

Contrary to Dr. Ficsor’s contention,⁸³ of the nineteen delegations to speak in the debate in Main Committee I, thirteen of them spoke explicitly in favour of some amendment that would reduce the scope of the protection of technological measures, relative to the Basic Proposal. Three others contemplated some form of clarification to avoid over-application that would interfere with legitimate uses. Only three delegations—the US, Columbia, and Dr. Ficsor’s native Hungary—were substantially satisfied with the scope of the proposal.

Opposition to the proposal was not limited to the Main Committee. The records of the Plenary also include critical comments. The Israeli delegation stated “concerning the proposals regarding technological measures . . . the language in the Basic Proposals was overly broad . . .”⁸⁴ Indonesia thought the proposals needed more study,⁸⁵ Singapore thought that the Basic Proposal wording interfered with *bona fide* uses of technology,⁸⁶ and India warned that “fair use should not be allowed to be whittled away by the new treaties, diluting the applicability of all the limitations and exceptions contemplated by Article 9(2) of the Berne Convention.”⁸⁷ Korea again expressed concern with the provisions, stating:

⁷⁹ *Ibid.* at para. 531.

⁸⁰ *Ibid.* at para. 536.

⁸¹ *Ibid.* at para. 537.

⁸² *Ibid.* at para. 539.

⁸³ Above note 71.

⁸⁴ WIPO, *Diplomatic Conference on Certain Copyright and Neighboring Rights Questions: Provisional Summary Minutes, Plenary*, (Geneva, December 2 to 20, 1996) WIPO doc. CRNR/DC/101, www.wipo.int/edocs/mdocs/diplconf/en/crnr_dc/crnr_dc_101.pdf at para. 388.

⁸⁵ *Ibid.* at para. 390.

⁸⁶ *Ibid.* at para. 408.

⁸⁷ *Ibid.* at para. 437.

the new treaties should respect the following principles: . . . technological measures such as copy-protection devices could be useful, but should not be over-employed to prohibit manufacture, importation or distribution of protection-defeating devices used within the permitted range of limitations on rights or in respect of non-copyrightable or public-domain materials.⁸⁸

The record indicates that there were *no* unqualified endorsements of the Basic Proposal's provisions on Technological Measures in the Summary Minutes of the Plenary. Given the opposition at the Diplomatic Conference and in the months leading up to it at the Committee of Experts, it should come as no surprise that the Basic Proposal — the only document that required prohibitions against trafficking in circumvention devices — did not achieve consensus support.

US law professor Pam Samuelson chronicles what followed given the rising opposition to the Basic Proposal in her 1997 law review article, *The US Digital Agenda at the World Intellectual Property Organization*:

Facing the prospect of little support for the Chairman's watered-down version of the US White Paper proposal, the US delegation was in the uncomfortable position of trying to find a national delegation willing to introduce a compromise provision brokered by US industry groups that would simply require states to have adequate and effective legal protection against circumvention technologies and services.

In the end, such a delegation was found, and the final treaty embodied this sort of provision in article 11.⁸⁹

The compromise position was to adopt the far more ambiguous “to provide adequate legal protection and effective legal remedies” standard. Not only does this language not explicitly require a ban on the distribution or manufacture of circumvention devices, it does not specifically target both access and copy controls. In fact, the record makes it readily apparent that the intent of the negotiating parties was to provide flexibility to avoid such an outcome. Countries were free to implement stricter anti-circumvention provisions consistent with the Basic Proposal (as the US ultimately did), but consensus was reached on the basis of leaving the specific implementation to individual countries with far more flexible mandatory requirements.

88 *Ibid.* at para. 425.

89 Samuelson, above note 72 at 414.

C. PART 3—STATE PRACTICE OF WIPO INTERNET TREATY IMPLEMENTATION

As noted above, according to the Vienna Convention on the Law of Treaties, state implementation is a factor in considering how to interpret treaty provisions. In view of the broad range of interpretations open to the anti-circumvention provisions in the WIPO Internet treaties,⁹⁰ it should come as little surprise to find that there is wide divergence among ratifying countries in the way they have implemented their anti-circumvention obligations into national law. Although a comprehensive review of the implementing legislation of the countries that have ratified the WIPO Internet treaties is beyond the scope of this article, a spectrum of approaches is presented below.⁹¹

1) Canada

Canada has introduced legislation designed to implement the WIPO Internet treaties on three occasions. The latter two attempts—Bill C-61⁹² and Bill C-32⁹³—mirror the US DMCA approach discussed below. The anti-circumvention provisions in Bill C-60, which was introduced by the Liberal government in 2005, differs in important ways from the more recent bills.⁹⁴ The Bill C-60 approach, which presumably reflected an internal government view that a flexible implementation of the anti-circumvention provisions was consistent with the WIPO Internet treaties, established the general prohibition on circumventing a technological measure:

34.02 (1) An owner of copyright in a work, a performer's performance fixed in a sound recording or a sound recording and a holder

⁹⁰ See part four, below.

⁹¹ For a compendium of national implementing legislation, see WIPO, *Survey on Implementation Provisions of the WCT and WPPT*, (2003) WIPO doc. SCCR/9/6, www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_6.pdf.

⁹² C-61, above note 2.

⁹³ C-32, above note 1.

⁹⁴ While there are some differences between Bills C-61 and C-32 and the DMCA, the core anti-circumvention provisions are very similar, as both feature broad prohibitions on circumvention of copy and access controls, a limited series of exceptions, as well as provisions targeting circumvention devices. Differences between the proposed Canadian approach and the US statute include the identification of new exceptions, which includes a triennial review in the US, and the inclusion of exceptions in the US for “jailbreaking” cellphones and circumventing controls on DVDs for several purposes.

of moral rights in respect of a work or such a performer's performance are, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right against a person who, without the consent of the copyright owner or moral rights holder, circumvents, removes or in any way renders ineffective a technological measure protecting any material form of the work, the performer's performance or the sound recording 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 8o(1).⁹⁵

This provision accomplished several things. First, it established who is entitled to exercise the new right against anti-circumvention, namely all copyright holders including owners and performers. Second, it granted those copyright holders the full scope of potential remedies, including injunctions and damages, in the event of infringement. Third, and most important, it rendered it an infringement to break a technological measure for the purpose of an act that constitutes copyright infringement. This provision did not make circumvention of a technological measure an infringement per se; an infringement would only occur where the purpose of the circumvention is to infringe copyright.⁹⁶ This limitation suggests that circumvention for the purposes of fair dealing would have been lawful under Canadian law. Moreover, this provision only targeted the act of circumvention; Bill C-6o did not establish legal limitations on circumvention tools or devices.

2) United States

As one of the primary supporters of the WIPO Internet treaties, the US was one of the first to attempt to implement the obligations into national law. Several implementing bills were tabled before the US Congress. Then Senator (later Attorney General) John Ashcroft introduced the *Digital Copyright Clarification and Technology Education Act of 1997*.⁹⁷ Rick Boucher (D-VA9) and Tom Campbell (R-CA15) introduced parallel legislation in the

⁹⁵ C-6o, above note 2, cl. 27.

⁹⁶ A notable exception is that circumvention for the purposes of making a private copy, i.e., breaking anti-copying technology on music CD to make a private copy.

⁹⁷ U.S., Bill S. 1146, *Digital Copyright Clarification and Technology Education Act of 1997*, 105th Cong., 1997, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_bills&docid=f:s1146is.txt.pdf [Ashcroft].

House of Representatives as the *Digital Era Copyright Enhancement Act of 1997*.⁹⁸ Neither bill included provisions on anti-circumvention devices. For example, the Ashcroft bill's anti-circumvention provision stated:

CIRCUMVENTION CONDUCT—No person, for the purpose of facilitating or engaging in an act of infringement, shall engage in conduct so as knowingly to remove, deactivate or otherwise circumvent the application or operation of any effective technological measure used by a copyright owner to preclude or limit reproduction of a work or a portion thereof. *As used in this subsection, the term ‘conduct’ does not include manufacturing, importing or distributing a device or a computer program.*⁹⁹

The Ashcroft bill also specifically excluded the application of a TPM to a fair use analysis.¹⁰⁰

The Ashcroft and Boucher bills were abandoned, however, after legislation that ultimately led to the DMCA gained Congressional momentum. Representative Howard Coble introduced what would later become the DMCA with the *WIPO Treaties Implementation Act*.¹⁰¹ The Coble bill sparked immediate concern from experts throughout the US. For example, a public letter signed by over 50 law professors noted that the US approach went far beyond what was required by the WIPO Internet treaties, with the authors calling specific attention to the changes that had occurred at the Diplomatic Conference and the rejection of provisions targeting circumvention devices:

Had the December 1996 WIPO Diplomatic Conference adopted the original draft language on “Obligations concerning Technological Measures” in the final treaties, the analysis might well be different: That language would have called on treaty states to “make unlawful the importation, manufacture or distribution of protection defeating devices. . . .” In deleting this language and substituting the current formulation, however, the Diplomatic Conference conclusively rejected the proposition that the duty to provide protection and remedies

⁹⁸ U.S., Bill H.R. 3048, *Digital Era Copyright Enhancement Act*, 105th Cong., 1997, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_bills&docid=f:h3048ih.txt.pdf.

⁹⁹ *Ashcroft*, above note 97, s. 301 [emphasis added].

¹⁰⁰ *Ibid.*, s. 202.

¹⁰¹ U.S., Bill H.R. 2281, *WIPO Copyright Treaties Implementation Act*, 105th Cong., 1997, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_bills&docid=f:h2281ih.txt.pdf.

against “circumvention” must take the form of general prohibitions on devices. Nevertheless, the bills now pending take exactly this approach, and their broad prohibitory language poses a very real risk that good and useful technologies (such as encryption) will be outlawed.¹⁰²

During hearings on the bills, US government officials acknowledged that the implementing legislation went beyond WIPO Internet treaty requirements. The US’s chief policy spokesperson and proponent of the DMCA, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, Bruce A. Lehman, admitted during his congressional testimony that the provisions went beyond the requirements of the treaties.¹⁰³ Lehman stated that the administration’s aim was not confined to changing US law. Rather, it hoped that the US model would be used to convince others to implement the WIPO Internet treaties:

Approval of the legislation and ratification of the Treaties would go a long way to convincing other nations, particularly developing countries, to accede to the Treaties, which are of significant benefit to US copyright interests.¹⁰⁴

That approach remains in place today, with the US the lead proponent of the Anti-Counterfeiting Trade Agreement, which includes anti-circumvention

¹⁰² Letter from Digital Future Coalition to The Honorable Howard Coble, Chairman, Subcommittee on Courts and Intellectual Property (16 September 1997), www.dfc.org/dfc1/Archives/wipo/profltr.html.

¹⁰³ In response to the question “Could we meet those requirements by adopting a conduct oriented approach as opposed to a device oriented approach?” from Rep. Rick Boucher, Mr. Lehman’s response was “In my personal view . . . the answer is yes. But in my personal view also that [sic] the value of the treaties would be reduced enormously, and we would be opening ourselves up to universal piracy of American products all over this planet.” See U.S., *WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary U.S. House of Representatives*, 105th Cong. (16 September 1997) at 62 (Bruce Lehman), cited in Bill D. Herman & Oscar H. Gandy, Jr., “Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings” (2006) 24 Cardozo Arts & Ent. L.J. 121, www.cardozoaelj.net/issues/06/Herman.pdf at 134. Years later, Lehman admitted that the DMCA approach had been a policy failure. See Bruce Lehman, Address (Musical Myopia, Digital Dystopia: New Media and Copyright Reform, Centre for Intellectual Property Policy, McGill University, 23 March 2007) [unpublished], video at www.archive.org/details/bongboing.mcgill at 20:30.

¹⁰⁴ U.S., *Statement of Bruce A. Lehman Assistant Secretary of Commerce and Commissioner of Patents and Trademarks Before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary U.S. House of Representatives*, 105th Cong. (1998), <http://judiciary.house.gov/legacy/41167.htm>.

provisions designed to narrow the flexibility found in the WIPO Internet treaties and provide a model for other countries to follow.¹⁰⁵

Marybeth Peters, the US Registrar of Copyrights, also appeared before the Congressional committees and specifically addressed whether the US proposal went beyond the treaty requirements by including provisions targeting circumvention devices. While supportive of their inclusion, Peters admitted that the treaty was flexible, with the decision left to implementing countries:

Some have urged that the legislation not address the provision of products or services, but focus solely on acts of circumvention. They state that the treaties do not require such coverage, and argue that devices themselves are neutral, and can be used for either legitimate or illegitimate purposes.

It is true that the treaties do not specifically refer to the provision of products or services, but merely require adequate protection and effective remedies against circumvention. As discussed above, however, the treaty language gives leeway to member countries to determine what protection is appropriate, with the question being whether it is adequate and effective.¹⁰⁶

Peters similarly acknowledged that the treaties did not require anti-circumvention provisions targeting access to works:

In this area too, the treaties do not specifically require protection for access controls in themselves. Again, the determination to be made by Congress is how best to ensure adequate and effective protection for technological measures used by copyright owners to prevent infringement.¹⁰⁷

Notwithstanding the public concern and scope for greater flexibility in implementation, the US ratification of the WIPO Internet treaties was incorporated into the DMCA.¹⁰⁸ The US anti-circumvention provision includes the following:

¹⁰⁵ Michael Geist, "US Caves on Anti-Circumvention Rules in ACTA" *Michael Geist* (19 July 2010), www.michaelgeist.ca/content/view/5210/125.

¹⁰⁶ U.S., *Statement of Marybeth Peters Register of Copyrights Before the House Subcommittee on Courts and Intellectual Property on h.r. 2180 and h.r. 2281, 105th Cong.* (1997), <http://judiciary.house.gov/legacy/4012.htm>.

¹⁰⁷ *Ibid.*

¹⁰⁸ See, e.g., U.S., Copyright Office, *Summary: The Digital Millennium Copyright Act of 1998* (December 1998), www.copyright.gov/legislation/dmca.pdf.

§ 1201. Circumvention of copyright protection systems

(a) Violations Regarding Circumvention of Technological Measures.—

(A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title . . .

(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

(3) As used in this subsection—

(A) to "circumvent a technological measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and

(B) a technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

(b) Additional Violations

(1) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological meas-

- ure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or
- (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.¹⁰⁹

In addition to the above-noted provisions, the DMCA contains a series of exceptions designed to preserve certain copyright rights. These include limited exceptions for non-profit libraries,¹¹⁰ law enforcement,¹¹¹ reverse engineering,¹¹² encryption research,¹¹³ security testing,¹¹⁴ and privacy.¹¹⁵ Moreover, the statute features a provision mandating a regular consultation on whether the DMCA provisions are likely to impair non-infringing uses of works.¹¹⁶ The Librarian of Congress, together with the Registrar of Copyrights, are asked to consider a series of factors and to establish exceptions where needed.¹¹⁷ While the additional exceptions have been extended in recent years to include unlocking and "jailbreaking" cellphones as well as circumventing TPMs on DVDs for a series of limited purposes,¹¹⁸ none of the exceptions extend to the provisions on devices, including new technologies, products, services, devices, and components that are used for purposes related to circumvention.

3) Australia

Australia's implementation of the WIPO Internet treaties occurred in two phases—first within the *Digital Agenda Act* in 2000,¹¹⁹ which amended the *Copyright Act* of 1968,¹²⁰ and second as part of the US—Australia Free Trade

¹⁰⁹ DMCA, above note 10 §§1201(a)(1)-(2), (b)(1).

¹¹⁰ *Ibid.* §1201(d).

¹¹¹ *Ibid.* §1201(e).

¹¹² *Ibid.* §1201(f).

¹¹³ *Ibid.* §1201(g).

¹¹⁴ *Ibid.* §1201(j).

¹¹⁵ *Ibid.* §1201(i).

¹¹⁶ *Ibid.* §1201(a)(1)(C).

¹¹⁷ *Ibid.* §1201(a)(1)(C)(i)-(v).

¹¹⁸ U.S., *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 75 Fed. Reg. 43825 (2010) (to be codified at 37 C.F.R. Part 201), www.copyright.gov/fedreg/2010/75fr43825.pdf.

¹¹⁹ *Digital Agenda Act* 2000 (Cth.), www.austlii.edu.au/au/legis/cth/consol_act/caaa20000294.

¹²⁰ *Copyright Act* 1968 (Cth.), www.austlii.edu.au/au/legis/cth/consol_act/ca1968133.

Agreement (AUSFTA) which was concluded in 2004.¹²¹

The first set of reforms focused on the distribution of circumventing devices rather than the act of circumvention or the individuals who use circumvention technologies. It prohibited supplying circumvention devices and services whose purpose is to circumvent effective technological protection measures.¹²² It is noteworthy that the law did not prohibit use of a circumventing device, only its distribution. A circumventing device was defined as “a device (including a computer program) having only a limited commercially significant purpose or use, or no such purpose or use, other than the circumvention, or facilitating the circumvention, of an effective technological protection measure.”¹²³

The Act contained an exception that permitted circumvention devices and services to be supplied in several circumstances. These included:

- (a) to a person authorised in writing by a body administering an educational institution to make reproductions and communications under the statutory licence in Part VB of the Act;
- (b) for the purpose of making reproductions and communications under that statutory licence;
- (c) of material which is not readily available in a form which is not protected by a technological protection measure.¹²⁴

The High Court of Australia examined the first Australian implementation in *Sony v. Stevens*, a case that focused on circumvention devices.¹²⁵ Chief Justice Gleeson specifically discussed the requirements of the WIPO Internet treaties. After noting that the Australian reforms “were intended to ensure that Australia provided adequate legal protection and effective legal remedies to comply with ‘the technological measures obligations’ in two treaties negotiated in 1996 in the World Intellectual Property Organization,” he concluded “it will be apparent that the provision is expressed in broad terms, leaving considerable scope to individual States in deciding on the manner of implementation.”¹²⁶

¹²¹ *Australia-United States Free Trade Agreement*, Australia and United States, 18 May 2004, www.dfat.gov.au/trade/negotiations/us_fta/final-text/ [AUSFTA].

¹²² *Digital Agenda Act*, above note 119, sch. 1, ss. 98-100.

¹²³ *Ibid.*, sch. 1, ss. 4-5.

¹²⁴ *Ibid.*

¹²⁵ *Stevens v Kabushiki Kaisha Sony Computer Entertainment*, [2005] HCA 58; (2005) 221 ALR 448; (2005) 79 ALJR 1850 (6 October 2005), www.austlii.edu.au/au/cases/cth/HCA/2005/58.html.

¹²⁶ *Ibid.* at para 12-13.

While Australia believed its initial implementation was consistent with the WIPO Internet treaties,¹²⁷ it amended the rules under US pressure.¹²⁸ The AUSFTA, a comprehensive free trade agreement, specifically mandated that Australia incorporate additional anti-circumvention provisions into its national law.¹²⁹ Article 17.4.7(a) required Australia to change its law by providing for a ban on both the distribution and use of devices for circumventing TPMs.¹³⁰ In addition, Article 17.4.7(b) required Australia to adopt a definition of a TPM that controls access to a protected work, or protects any copyright.¹³¹

4) European Union

The European Union approach to WIPO Internet treaty implementation is found in Directive 2001/9/EC, better known as the European Copyright Directive (EUCD).¹³² The directive entered into force in June 2001 and granted member states 18 months to implement its provisions within their national law.¹³³ The European Union formally ratified the WIPO Internet treaties in December 2009.¹³⁴

¹²⁷ “Importantly, the reforms in the bill are consistent with new international standards to improve copyright protection in the online environment adopted in the 1996 World Intellectual Property Organisation (WIPO) Copyright Treaty and WIPO Performances and Phonograms Treaty. Australia was an active participant in the Diplomatic Conference in December 1996 that agreed to the WIPO treaties, and the enactment of this bill will be a major step towards aligning our copyright laws with the obligations imposed by the treaties.” Australia, Commonwealth, House of Representatives, *Parliamentary Debates* (2 September 1999), www.aph.gov.au/hansard/reps/dailys/dro20999.pdf at 9749 (Mr. Daryl Williams).

¹²⁸ For an account of the process, including the involvement of the US Trade Representative in directing the implementation of the agreement, see Robert Burrell and Kimberlee Weatherall, “Exporting Controversy? Reactions to the Copyright Provisions of the US-Australia Free Trade Agreement: Lessons for US Trade Policy” 2008 *Journal of Law Technology and Policy* 259, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010833.

¹²⁹ *Copyright Act*, above note 120.

¹³⁰ AUSTFA, above note 121, art. 23.4(1).

¹³¹ *Ibid.*, art. 17.4.7(a).

¹³² *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society* (EU), O.J.L. 167/10, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF> [EUCD]. For a critical analysis of the EUCD, see B. Hugenholtz, “Why the Copyright Directive is Unimportant and Possibly Invalid,” 11 *E.I.P.R.* 501.

¹³³ *Ibid.*, art 13.1.

¹³⁴ European Commission, Press Release, IP/09/1916, “European Commission welcomes ratification of the WIPO Copyright Treaties” (14 December 2009), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1916>.

Article 6 of the EUCD contains anti-circumvention provisions similar to those found in the DMCA. Article 6.1 requires that member states provide “adequate legal protection” against the deliberate circumvention of technological measures.¹³⁵ This applies regardless of whether such an act infringed any copyright, though a user must know or have reasonable grounds to know they are causing such circumvention. Article 6.2 focuses on circumvention devices, defining any device or service as one that is marketed or primarily designed to circumvent technical measures, or has only limited other commercial purpose.¹³⁶ The article bans the manufacture, importation, distribution, sale, rental or advertisement of circumvention devices or services. Moreover, possession of such devices for commercial purposes is also prohibited and recital 49 of the EUCD grants member states the right to further ban private possession of circumvention devices.¹³⁷

The EUCD does contain one crucial article that seeks to address the issue of copyright balance. Article 6.4 provides that:

Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law . . . the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.¹³⁸

The EUCD lists several exceptions that are mandatory. These include exceptions in relation to photocopying, copy and archiving activities by educational facilities, broadcaster ephemeral recordings, non-commercial broadcasts, teaching and research, use by disabled individuals, and public safety.¹³⁹ Moreover, member states are also permitted to take measures to preserve private copying rights.¹⁴⁰

¹³⁵ EUCD, above note 132, art. 6.1.

¹³⁶ *Ibid.*, art. 6.2.

¹³⁷ *Ibid.*, rct. 49.

¹³⁸ *Ibid.*, art. 6.4.

¹³⁹ Urs Gasser and Michael Girsberger, “Transposing the Copyright Directive: Legal Protection of Technological Measures in EU-Member States: A Genie Stuck in the Bottle?” (2004) Berkman Publication Series No. 2004-10, <http://cyber.law.harvard.edu/media/files/eucd.pdf> at 10.

¹⁴⁰ *Ibid.* at 11.

Implementation of the EUCD varies considerably between member states. For example, in Germany paragraph 95a(2) of the *Copyright Act* limits the coverage of anti-circumvention protection solely to works that are subject to copyright protection. Accordingly, where TPMs are applied to non-copyrightable works, including in non-copyright cases and works in the public domain, the anti-circumvention protection does not apply.¹⁴¹

Denmark's implementation includes an explanatory text that indicates that only TPMs used to prevent copying are protected. Accordingly, if a TPM seeks to expand protection beyond mere copyright protection it does not enjoy legal protection. For example, encoding DVDs with regional coding would presumably not enjoy protection, an interpretation confirmed by the Danish Ministry of Culture which has opined that it would not be unlawful to circumvent DVD regional encoding for lawfully acquired DVDs, nor to circumvent a TPM if the sole purpose is to use a lawfully acquired work.¹⁴²

Italy has moved the furthest toward applying the EUCD's Article 6.4 to private copying. Its legislation includes the right to make one copy for personal use notwithstanding a TPM, provided that the work is lawfully acquired and the single copy does not prejudice the interests of the rights holder.¹⁴³ Other member states have sought to provide users with a positive right of access. For example, Greece provides such a right with the condition that failure to obtain the right leads first to mediation, followed by a legal right of action.¹⁴⁴ Both Austria and the Netherlands have legislation that assumes access for non-infringing material—Austria has said it is “monitoring” the situation, while the Netherlands has included the ability for the Justice Minister to issue decrees on the matter.¹⁴⁵

The EU experience to date illustrates the significant flexibility in implementing the WIPO Internet treaties. Although on the surface the EUCD appears similar to the DMCA, at the member state level it is clear that many countries have sought to closely link anti-circumvention legislation with traditional copyright infringement. Moreover, the EUCD's openness to the establishment of TPM exceptions to protect user exceptions represents an important potential compromise designed to preserve the copyright balance.

¹⁴¹ *Ibid.* at 13.

¹⁴² *Ibid.* at 14.

¹⁴³ *Ibid.* at 23.

¹⁴⁴ *Ibid.* at 21.

¹⁴⁵ *Ibid.* at 22–23.

5) Japan

Japan's copyright law includes several different approaches from that found in the DMCA. First, circumvention only applies to copy controls, not access controls, since access is not traditionally a right under copyright law.¹⁴⁶ Second, the situations where the direct circumvention of copy control technologies is prohibited are very limited. Circumvention of copy controls is prohibited only when a business does so in response to a request from the public.¹⁴⁷ Circumvention of copy controls are permitted for all other statutory exceptions and for any access control.¹⁴⁸ Third, there are no criminal remedies in Japanese law for trafficking in tools to circumvent access controls.¹⁴⁹

6) Switzerland

Switzerland formally enacted legislation to ratify the WIPO Internet treaties in 2008. Much like Bill C-60 in Canada and the New Zealand implementation discussed below, the Swiss law links circumvention to actual copyright infringement. Article 39a(4) includes a full exception for circumvention of TPMs for legal purposes, providing “the prohibition of circumvention can not be applied to People who are primarily circumventing for the purpose of a legal use.”¹⁵⁰ This broad approach, which effectively preserves all exceptions in the digital environment, provides further evidence that linking circumvention to actual copyright infringement meets

¹⁴⁶ The definition of “technological protection measure” in Article 2(1)(xx) of Japan’s Copyright Law includes only those measures that restrict infringing acts. See generally “Copyright Law of Japan”, trans. by Yukifusa Oyama, (2009) Copyright Research and Information Center, www.cric.or.jp/cric_e/clj/clj.html [JCL]. See also Japan, Office of Multimedia Copyright, Copyright Division, Agency for Cultural Affairs, “On the Law to Partially Amend the Copyright Law (Part 1)” by Takao Koshida (1999), www.cric.or.jp/cric_e/cuj/cuj.html at sec. III(2).

¹⁴⁷ JCL, above note 146, art. 12obis.

¹⁴⁸ See e.g. June M. Besek, “Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts” (2003–2004) 27 Colum. J.L. & Arts 385 at 435.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Loi fédérale sur le droit d'auteur et les droits voisins*, R.S. 231.1 (1 July 2008), www.admin.ch/ch/f/rs/2/231.1.fr.pdf art. 39a(4) [LDA]. See also Rentch & Partner, “The Revision of the Swiss Copyright Act,” www.copyright.ch/?sub_id=83&leng=1 (“Article 39a paragraph 3 E-URG provides for a prohibition of all preparatory acts aiming at the avoidance of technical protective measures, and Article 39a paragraph 4 E-URG merely permits the avoidance of such protective appliances in cases where they serve utilization purposes permitted by law.”).

the adequacy standard required in the WIPO Internet treaties.¹⁵¹ Moreover, the Swiss law also established a monitoring agency charged with tracking the use of TPMs and the potential misuse of such technologies.¹⁵²

7) Developing Countries

The majority of countries that have ratified the WIPO Internet treaties are not developed countries such as the US, Australia, and EU, but rather developing countries from around the world.¹⁵³ Although the many smaller developing countries are not presently significant copyright importing or exporting countries, their ratifications were needed to obtain the minimum number of country ratifications in order for the treaties to take effect.

In 2003, WIPO released a comprehensive review of national implementing legislation.¹⁵⁴ Contrary to some expectations, WIPO's review demonstrated that many countries had ratified the WIPO Internet treaties without even including anti-circumvention provisions in their national laws. These countries include Argentina, Chile, Kazakhstan, Kyrgyzstan, the Philippines, Saint Lucia, and Senegal.¹⁵⁵ It may be possible that some of these countries have allowed for the WIPO Internet treaties to take direct effect within their countries and that they have therefore effectively incorporated the general WCT and WPPT's anti-circumvention provisions.

8) Non-parties

There are countries, such as New Zealand, which have not formally signed on to the WIPO Internet Treaties, yet are working towards compliance with them.¹⁵⁶ New Zealand's implementation of anti-circumvention meas-

¹⁵¹ Switzerland became a contracting party to the WIPO Internet treaties on July 1, 2008. See Swiss Federal Institute of Intellectual Property, News, "Ratification of two World Intellectual Property Organization (WIPO) treaties" (21 April 2008), <https://www.ige.ch/en/legal-info/news/news-details/news/ratifikation-von-zwei-abkommen-der-weltorganisation-fuer-geistiges-eigentum-wipo-1/161/next/14.html>.

¹⁵² LDA, above note 150, art. 39b.

¹⁵³ See *WIPO Copyright Treaty*, Contracting Parties, www.wipo.int/treaties/en/ip/wct.

¹⁵⁴ Above note 91.

¹⁵⁵ *Ibid.*

¹⁵⁶ See N.Z., Ministry of Commerce, "Digital Copyright Bill—Questions & Answers" (21 December 2006), www.beehive.govt.nz/node/28179, Q1 ("[The Copyright (New Technologies and Performers' Rights) Amendment Bill] incorporates many aspects of two treaties negotiated by the members of the World Intellectual Property Organisation (WIPO): the WIPO Copyright Treaty and the WIPO Performers and Phonograms Treaty."). See also Copyright Council of New Zealand, "International

ures came in the *Copyright (New Technologies) Amendment Act (2008)*.¹⁵⁷ The bill includes several unique characteristics. First, it expressly retains the right to circumvent a TPM for legal purposes identified in its copyright law. This provision is very similar to the Canadian Bill C-60 discussed earlier and supports the belief that there is sufficient flexibility in the WIPO Internet treaties to preserve existing national exceptions.

Second, the law recognizes that legalizing circumvention may mean little for many people who lack the technological savvy to do so. To remedy that inequity, the statute grants “qualified circumventers” the right to circumvent on behalf of users eligible to circumvent. The relevant provision states:

- (1) Nothing in this Act prevents any person from using a TPM circumvention device to exercise a permitted act under Part 3.
- (2) The user of a TPM work who wishes to exercise a permitted act under Part 3 but cannot practically do so because of a TPM may do either or both of the following:
 - (a) apply to the copyright owner or the exclusive licensee for assistance enabling the user to exercise the permitted act;
 - (b) engage a qualified person (see section 226D(3)) to exercise the permitted act on the user’s behalf using a TPM circumvention device, but only if the copyright owner or the exclusive licensee has refused the user’s request for assistance or has failed to respond to it within a reasonable time.

Other countries have also recently introduced anti-circumvention legislation into long-awaited copyright reform bills. For example, India’s bill, which the government says will allow it to implement the WIPO Internet treaties, includes anti-circumvention provisions that preserve the right to circumvent for any legal purpose.¹⁵⁸ The provision states:

Copyright,” www.copyright.org.nz/international.php (“New Zealand is not party to the WIPO Treaties, but is closer to compliance now that the Copyright (New Technologies) Amendment Act 2008 has come into force.”).

¹⁵⁷ *Copyright (New Technologies) Amendment Act 2008* (N.Z.) 2008/27, www.legislation.govt.nz/act/public/2008/0027/latest/096be8ed803869e1.pdf.

¹⁵⁸ Government of India, Press Information Bureau, Press Release, “Amendment to the Copyright Act, 1957” (24 December 2009), www.pib.nic.in/release/release.asp?relid=56443 (“Amendments are being made to bring the Act in conformity with the World Intellectual Property Organisation (WIPO) Internet Treaties, namely WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) which have set the international standards in these spheres.”).

65A. Protection of Technological Measures

(1) Any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by this Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) shall prevent any person from:

(a) doing anything referred to therein for a purpose not expressly prohibited by this Act:

Provided that any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated.¹⁵⁹

Brazil's recently introduced proposal goes even further, permitting circumvention for fair dealing and public domain purposes, and establishing equivalent penalties for hindering or preventing the users from exercising their fair dealing rights.¹⁶⁰

D. PART 4—SCHOLARLY ANALYSIS OF WIPO INTERNET TREATY IMPLEMENTATION

In the nearly fourteen years since agreement was reached on the WIPO Internet treaties, there have been dozens of scholarly articles and analyses about the implications of the anti-circumvention provisions. This part provides a partial review of the scholarly perspective of the issue, noting scholars from around the world have concluded that there is considerable flexibility in the implementation of the anti-circumvention provisions that do not necessitate the inclusion of provisions barring the distribution of circumvention tools nor unduly limit adding exceptions to the anti-circumvention rules.

Dr. Ficsor is the unquestioned leader of those arguing for an inflexible implementation, complete with limited exceptions and strong anti-device provisions. He has written a text on the treaties as well as the WIPO Guide

¹⁵⁹ Bill No. XXIV of 2010, *The Copyright (Amendment) Bill 2010*, <http://copyright.gov.in/Documents/CopyrightAmendmentBill2010.pdf>, cl. 36.

¹⁶⁰ Brazil, *Consulta Pública Para Modernização da Lei de Direito Autoral: Lei Consolidada* [Public Consultation For Modernization of Copyright Law: Consolidated Law] (2010), www.cultura.gov.br/consultadireitoautorral/lei-961098-consolidada, art 107.

to its implementation.¹⁶¹ Ficsor is unequivocal in claiming that “adequate” legal protections necessitate broad protections that bear a striking similarity to the Basic Proposal that failed to find consensus support at the 1996 Diplomatic Conference. He argues:

Contracting Parties may only fulfil their obligations under Article 11 if they provide protection and remedies:

- against preparatory acts (manufacture, importation and distribution of tools and offering of services);
- against circumvention of access controls and copy controls (and any other control of exercise of rights);
- against dual- or multi-use devices which are “primarily designed” for circumvention, have only limited commercial use other than circumvention, or are marketed for use for circumvention; and
- against individual components of such a device.¹⁶²

Professor Silke von Lewinski and Dr. Jörg Reinbothe, co-authors of another text on international copyright law and members of the European Union delegation at the 1996 Diplomatic Conference, are the most notable supporters of the Ficsor position. They argue:

By its nature, Article 11 WCT provides for minimum protection, which Contracting Parties are free to go beyond in their domestic law. The question arises, whether this minimum protection only covers acts of circumvention. It seems that limiting the protection to such acts would not correspond to the objective of the provision. . . . Accordingly, the obligation to provide for “adequate protection” under Article 11 WCT would seem to require that rightsholders enjoy protection also against preparatory acts on top of protection against the acts of circumvention themselves.¹⁶³

While the commentary from Ficsor and von Lewinski are frequently cited as evidence for the requirement to implement the WIPO Internet

¹⁶¹ He also serves as a consultant to the International Intellectual Property Alliance (IIPA), a private sector coalition of seven US trade associations that include the Motion Picture Association of America, the Recording Industry Association of America, and the Business Software Alliance. See International Intellectual Property Alliance, Biography, “Dr. Mihály Ficsor”, www.iipa.com/html/Bio_Mihaly_Ficsor.html.

¹⁶² Mihály Ficsor, *The Law of Copyright and the Internet* (Oxford: Oxford University Press, 2002) at 562.

¹⁶³ Jörg Reinbothe and Silke von Lewinski. *The WIPO Treaties 1996: The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty: Commentary and Legal Analysis* (London: Butterworths, 2002) at 142.

treaties with devices and limited exceptions, a broader examination of the global scholarly analysis indicate many experts disagree.¹⁶⁴

In fact, WIPO has acknowledged the flexibility in the language. In a 2002 survey on intellectual property issues and the Internet, it noted “[t]he treaty language is general enough to allow significant flexibility to national governments in determining the details of appropriate implementation.”¹⁶⁵ Consistent with both the legislative history and state practice, commentary from around the world has coalesced around the notion that the WIPO Internet treaties feature considerable flexibility in their implementation.

1) Canada

Mark Hayes, a prominent copyright lawyer in Toronto, was one of the first to opine on the WIPO requirements from a Canadian perspective. Retained by Industry Canada, Hayes delivered an 18-page memorandum on the implementation issues in 2000. Hayes concluded that access controls were beyond the requirement of treaties, noting:

In order to constitute “adequate legal protection” under the WCT and WPPT, one does not have to go so far as to provide a right to prevent the circumvention of effective technological measures protecting access to a work. Nevertheless, in order for the right granted to be truly adequate, some measure of prohibition or limitation of certain devices may be necessary.¹⁶⁶

The Hayes memorandum recommended implementing a new right to prevent circumvention, but argued against extending the right to access controls.

¹⁶⁴ Note that this review should not be regarded as an exhaustive review of all WIPO Internet treaty implementation analysis, since such a review is beyond the scope of this paper. It is presented as evidence that independent expert analysis is at best split on the issue of the formal implementation requirements in the treaty and that there are many scholars who have concluded that domestic rules that preserve rights of access and omit provisions on circumvention devices can still be regarded as compliant with the obligations found in the treaties.

¹⁶⁵ WIPO, *Intellectual Property on the Internet: A Survey of Issues*, (2002) WIPO doc. WIPO/INT/02, www.wipo.int/export/sites/www/copyright/en/e-commerce/pdf/survey.pdf at 35.

¹⁶⁶ Canada, Industry Canada, *Memorandum Concerning the Implementation in Canada of Articles 11 and 18 of the WIPO Treaties Regarding the Unauthorized Circumvention of Technological Measures Used in Connection with the Exercise of a Copyright Right* by Mark S. Hayes (Ottawa: Ogilvy Renault, 2000), [http://strategis.ic.gc.ca/epic/internet/inippd-dppi.nsf/vwapj/ogilvyrenault_e.pdf/\\$FILE/ogilvyrenault_e.pdf](http://strategis.ic.gc.ca/epic/internet/inippd-dppi.nsf/vwapj/ogilvyrenault_e.pdf/$FILE/ogilvyrenault_e.pdf) [Hayes].

Two years later, Professor Ian Kerr of the University of Ottawa was retained by the Department of Canadian Heritage to conduct a detailed study into the TPM issue. The Kerr study featured an exhaustive review of anti-circumvention legislation, warning against the potential effects of such rules. After recommending against implementation, Kerr offered several alternatives should the government proceed with WIPO Internet treaty ratification. Much like Hayes, Kerr focused on concerns associated with access:

... any newly introduced access-control right must be counter-balanced by a newly introduced access-to-a-work right. Under this approach, copyright owners would have a positive obligation to provide access-to-a-work when persons or institutions fall within an exception or limitation set out in the *Copyright Act*. Such an obligation might entail the positive obligation to allow access-to-works in the public domain, or to provide unfettered access-to works to educational institutions and other organizations that are currently exempted from a number of the provisions in the *Copyright Act*.¹⁶⁷

Selena Kim provided another Canadian perspective on WIPO Internet treaty implementation in an article published in the *Intellectual Property Journal*. Kim also concluded that there was considerable flexibility in treaty implementation, arguing that “prohibiting either the act of circumvention or the manufacture, import and distribution of circumvention devices would suffice to satisfy the terms of Article 11.”¹⁶⁸

2) United States

Given the controversy associated with the DMCA from its inception, there has been a great deal of scholarly discussion on the relationship between the US statute and the WIPO Internet treaties. Columbia law professor Jane Ginsburg, a strong supporter of the treaties, has acknowledged their limits with respect to including circumventions for non-infringing acts:

Not all acts of circumvention are violations of article 11; member States incur no obligation to prohibit circumventions that allow the user to exploit a public domain work or to engage in an act authorized by the right holder, or, more importantly, that allow the user

¹⁶⁷ Kerr, above note 24 at 78.

¹⁶⁸ Selena Kim, “The Reinforcement of International Copyright for the Digital Age” (2002) 16 I.P.J. 93 at 118.

to engage in a non-infringing act, such as accessing a work in the public domain, or copying for the purposes endorsed by articles 10 and 10bis.¹⁶⁹

In a 2004 report prepared for WIPO, US intellectual property expert Jeffrey Cunard emphasized the “substantial leeway” found in the treaties for implementation. The Cunard report on digital rights management stated:

The two Articles give substantial leeway to the Contracting Parties in determining how to implement these obligations. So long as the legal protection is “adequate” and the legal remedies “effective,” the obligations will be met. They do not have to be air-tight and prevent every single type of act of circumvention. In particular, the texts do not bar Contracting Parties from crafting appropriate exceptions and limitations to the legal protections and remedies, so long as those carve-outs do not undermine the protections envisioned by the Contracting Parties for “effective technological measures.”¹⁷⁰

Other scholars have reached similar conclusion on the flexibility of the treaties. Professor Timothy K. Armstrong, writing in the *Harvard Journal of Law and Technology*, noted “[a] statutory prohibition on circumventing DRM that hinders fair use goes well beyond the requirements of the WCT.”¹⁷¹

Following an assessment of the treaty legislative history, lawyer and former law professor Brian Esler emphasized the flexibility within the treaties and the requirements for balance in concluding that the DMCA went beyond the requirements (and the spirit) of the WIPO Internet treaties:

The word “adequate” here is important. Especially in the context of the defeated US and EU proposals, the WIPO treaties must be read to eschew strict liability for TPM circumvention and instead to contemplate a flexible, cautious and balanced approach. Such a reading is further bedrocked by the Agreed Statement to Article 10 in the 1996

¹⁶⁹ Jane Ginsburg, “Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and US Experience” (2005) 29 Colum. J.L. & Arts 13 at 19.

¹⁷⁰ WIPO, *Current Developments in the Field of Digital Rights Management*, prepared by Jeffrey P. Cunard, Debevoise and Plimpton, Washington, D.C., for World Intellectual Property Organization Standing Committee on Copyright and Related Rights Tenth Session, 2003, WIPO doc. SCCR/10/2, www.wipo.int/documents/en/meetings/2003/sccr/doc/sccr_10_2_rev.doc.

¹⁷¹ Timothy K. Armstrong, “Digital Rights Management and the Process of Fair Use” (2006) 20:1 Harv. J.L. & Tech. 49 at 67.

WIPO Copyright Treaty, which recognized that technology and TPM may require “new exceptions and limitations” to copyright and its related rights. The US response not only goes well beyond the words or spirit of the WIPO Treaties, but indeed seems to have been largely unnecessary in light of existing law.¹⁷²

Bentley Olive reached the same conclusion in a 2000 analysis of the DMCA, concluding that the US treaty went beyond the treaty requirements:

The prohibition on certain circumvention devices is not required by the WIPO Treaties. . . . Because of the general requirements of the treaties, new section 1201’s prohibition on the act of circumvention would seem to provide sufficient legal protection and remedies to satisfy the treaties. However, Congress went beyond the requirements of the treaties, and included prohibitions on certain circumvention devices.¹⁷³

3) Europe

The European scholarly analysis exhibits a similar divergence from the Ficsor and von Lewinski position. Thomas Vinje, a leading intellectual property expert in Brussels, was among the first to assess the implications of the WIPO Internet treaties, providing a positive assessment in *European Intellectual Property Review* on the flexible language on the basis that it did not cover circumvention devices:

This provision has the great advantage of applying to the act of circumvention, rather than to the manufacture or distribution of the device used to engage in the circumvention. This focus on acts facilitating infringement follows the tradition of copyright law, and avoids the problems inherent in any provision focusing instead on devices. In particular, it avoids threatening legitimate dual-use technology, diminution of the public domain and evisceration of copyright exceptions. By assuring that the sphere of application of the circumvention provision corresponds to that of copyright infringement, the Copyright Treaty preserves the delicate copyright balance.¹⁷⁴

¹⁷² Brian W. Esler, “Protecting the Protection: A Trans-Atlantic Analysis of the Emerging Right to Technological Self-help” (2003) 43 IDEA 553 at 570.

¹⁷³ Bentley J. Olive, “Anti-Circumvention and Copyright Management Information: Analysis of New Chapter 12 of the Copyright Act” (2000) 1 & 2 N.C. J.L. & Tech. 19 at 29.

¹⁷⁴ Thomas C. Vinje, “The New WIPO Copyright Treaty: A Happy Result in Geneva” (1997) 5 E.I.P.R. 230 at 235.

Several years later, Pierre Sirinelli, a well-known French law professor warned the 2001 ALAI conference about the potential for overprotection in the implementation of the WIPO Internet treaties:

. . . [t]aken together, a structure combining technological and legal protections in three strata—law, technology in aid of law, law in aid of technology—can lead to over protection. This can occur in two ways :

First, by creating a sort of new right : the right of « access » becomes the queen of copyright prerogatives. An example suffices to demonstrate the proposition. A legitimate user who first pays for access to a work may not keep a copy if the work's conditional availability was reinforced by an anti-copy control. The difference with a book buyer is striking. While the book buyer may engage in unlimited re-readings, the lawful online user will have to pay for each new use.

Second, the locking-up of the work combined with a prohibition on circumvention will prevent the doing of acts which lawmakers have nonetheless intended to be exempted from copyright's exclusive rights.¹⁷⁵

Sirinelli acknowledged the “vagueness of the WIPO treaties” in canvassing the broad range of approaches found in countries that had implemented the treaties.

Other scholars from across Europe have examined specific aspects of WIPO Internet treaty implementation. German professor Stephan Bechtold concluded in 2004 that “Article 11 WCT only prohibits the actual act of circumventing. It does not target preparatory activities such as the production of circumvention devices.”¹⁷⁶ Maja Bogataj wrote in the *Slovenian Law Review* that “[t]echnical measures that would prevent acts allowed to copyrighted works by copyright holders or the law would also not be protected.”¹⁷⁷ In Norway, Thomas Rieber-Mohn of the University of Oslo reasoned that “technological measures restricting acts that either are authorised by the rightholder or permitted by law need not be protected.”¹⁷⁸

¹⁷⁵ Pierre Sirinelli, “The Scope of the Prohibition on Circumvention of Technological Measures: Exceptions” trans. by Jane C. Ginsburg (General Report presented to the ALAI Congress, June 2001) [unpublished], www.alai-usa.org/2001_conference/Reports/GenRep_id2_en.doc at 5.

¹⁷⁶ Stephan Bechtold, “Digital Rights Management in the United States and Europe” (2004) 52 Am. J. Comp. L. 323 at 332 n. 38.

¹⁷⁷ Maja Bogataj, “Legal Protection of Technological Protection Measures Under the WIPO Treaties, European Directives and Slovenian Law” (2004) 1 Slovenian L. Rev. 27 at 32.

¹⁷⁸ Thomas Rieber-Mohn, “Harmonising Anti-Circumvention Protection with Copyright Law: The Evolution from WCT to the Norwegian Anti-Circumvention Provi-

Kamiel Koelman, formerly with the Institute for Information Law at the University of Amsterdam concluded:

Here the scope of the protection of the technological measure seems to coincide with the scope of copyright. Only against circumvention of a technological measure which restricts an act not permitted by law must protection be provided. Thus no legal remedies need be available when circumvention enables an act allowed on the basis of the limitations of copyright law.¹⁷⁹

Taken together, it is apparent that many European scholars differ from the Ficsor and von Lewinski conclusions with regard to how the WIPO Internet treaties should be implemented into national law.

4) Rest of the World

Scholars from other parts of the world have also contributed their analyses on the implications of the WIPO Internet treaties. Professor Stephen Coronoes of the Queensland University of Technology in Australia concluded “strictly construed, the Internet Treaties do not require restrictions on devices and technology which might be used to perform the circumvention.”¹⁸⁰ Mia Garlick, currently an advisor to the Australian government, argued in 2004 that a ban on the distribution of circumvention devices and access circumvention such as those found in the US DMCA go beyond the requirements of the WIPO Internet treaties:

what constitutes “adequate and effective legal remedies” as required by the Articles is open to different interpretations. Section 1201 has adopted a wholesale ban of trafficking in circumvention devices and services and on access circumvention. In addition, both civil and criminal prosecutions are available. These measures do not necessarily constitute adequate legal protection and effective legal remedies, but arguably go beyond what is necessary to satisfy the wordings of the Articles for two reasons.¹⁸¹

sions” (2006) 37 International Review of Intellectual Property and Competition Law 182 at 184.

¹⁷⁹ Kamiel J. Koelman, “A Hard Nut to Crack: The Protection of Technological Measures” (2000) 22 E.I.P.R. 272 at 272.

¹⁸⁰ Dale Clapperton and Stephen Coronoes. “Locking In Customers, Locking Out Competitors: Anti-Circumvention Laws in Australia and their Effect on Competition in High Technology Markets” (2006) 30 Melb. U. L. Rev. 657 at 663–64.

¹⁸¹ Mia K. Garlick, “Locking up the bridge on the digital divide—a consideration of the global impact of the US anti-circumvention measures for the participation of

Richard Li-dar Wang, a law professor at the National Chiao Tung University in Taiwan, canvassed the implementation approaches in five countries in 2006 and concluded that inclusion of provisions targeting trafficking in circumvention devices was not required:

Two more points about the scope of protection should be mentioned. First, article 11 is literally focused on circumvention acts; it does not refer to device-trafficking activities. In the negotiating process, the draft provision was abandoned because its main thrust—anti-trafficking—was not approved by most member states. As a result, the ratified article 11 does not require contracting parties to establish anti-trafficking regulations.¹⁸²

Meanwhile, Dr. Marlize Conroy, who completed her doctorate on TPMs at the University of South Africa, commented in the flexibility in the treaty in her analysis in the *South African Mercantile Law Journal*:

It is generally accepted that the technological protection measures referred to in art 11 include access and copy control. It also prohibits only the act of circumvention - it is silent about, for example, trafficking in devices used for circumventing purposes. Article 11 is flexible and leaves it to contracting parties to determine the scope of its implementation and to provide for exceptions to the prohibition.¹⁸³

Moreover, her doctorate concluded that it was in South Africa's "best interest to the [sic] implement the provisions of Article 11 in such a manner that it still allows users access to and legitimate use of works protected by copyright."¹⁸⁴

developing countries in the digital economy." (2004) 20:4 Santa Clara Computer & High Tech. L.J. 941 at s. III.D.

¹⁸² Richard Li-Dar Wang, "DMCA Anti-Circumvention Provisions in a Different Light: Perspectives from Transnational Observations of Five Jurisdictions" (2006) 34 A.I.P.L.A.Q.J. 217 at 228.

¹⁸³ Marlize Conroy, "Access to Works Protected by Copyright: Right or Privilege?" (2006) 18 South African Mercantile Law Journal 413 at 416.

¹⁸⁴ Marlize Conroy, *A Comparative Study of Technological Protection Measures in Copyright Law* (LL.D. Thesis, University of South Africa School of Law, 2006) [unpublished], <http://uir.unisa.ac.za/bitstream/10500/2217/1/thesis.pdf>, Summary.

E. CONCLUSION

When the Canadian government held a national consultation on copyright reform in 2009, the issue of anti-circumvention legislation figured prominently in thousands of responses. Many Canadians opposed any protection for TPMs,¹⁸⁵ others sought rules linking circumvention to actual copyright infringement,¹⁸⁶ and some supported DMCA-style rules.¹⁸⁷ My own submission supported anti-circumvention rules that prohibit circumvention for the purposes of copyright infringement.¹⁸⁸

While debate on the ideal approach to Canadian anti-circumvention rules is important, the goal of this article is more modest. Rather than identifying the specific form of implementation, it merely seeks to make the case that there is considerable flexibility in how countries may implement the anti-circumvention provisions found in the WIPO Internet treaties in order to be fully compliant with their treaty obligations. While some have argued that nothing short of full protection against preparatory acts, copy controls, and access controls is required, an analysis of the plain language of the treaty, its legislative history, state practice, and scholarly analysis conclusively demonstrates that the very intention of the treaty drafters was to provide flexibility in implementation.

The interpretation of several key words and phrases within the WIPO Internet treaties' anti-circumvention provisions play an important role in determining the scope and coverage of anti-circumvention legislation once implemented into national law. The WIPO Internet treaty language is intentionally vague, leaving countries with considerable flexibility in their interpretation.

The WIPO Internet treaty legislative history, which occurred over a 24-month period from December 1994 to December 1996, demonstrates

¹⁸⁵ David Allsebrook, "Copyright Consultations Submission" (2009) 2 Osgoode Hall Review of Law and Policy 108, <http://ohrlp.ca/images/articles/Volume3/david%20allsebrook%C2%0copyright%20consultations%20submission%20%282009%29%20%20osgoode%20hall%20rev.l.pol%5C%27y.%20108.pdf>.

¹⁸⁶ Michael Geist, "Copyright Consultations Submission" (2009) 2 Osgoode Hall Review of Law and Policy 59, <http://ohrlp.ca/images/articles/Volume3/michael%20geist%C2%0copyright%20consultations%20submission%20%282009%29%20%20osgoode%20hall%20rev.l.pol%5C%27y.%2059..pdf>.

¹⁸⁷ Barry Sookman, "Copyright Consultations Submission" (2009) 2 Osgoode Hall Review of Law and Policy 73, <http://ohrlp.ca/images/articles/Volume3/barry%20sookman%C2%0copyright%20consultations%20submission%20%282009%29%20%20osgoode%20hall%20rev.l.pol%5C%27y%2073..pdf>.

¹⁸⁸ Geist, above note 186, at 64.

genuine discomfort and even opposition to anti-circumvention provisions. The Committee of Experts discussed the provisions over four sessions and was unable to achieve consensus. The WIPO Diplomatic Conference experienced even greater opposition, with the Basic Proposal that would have specifically targeted trafficking in circumvention devices being shelved after failing to garner the requisite support.

Instead, the record makes it readily apparent that the intent of the negotiating parties was to provide flexibility as the basis for consensus. Countries were free to implement stricter anti-circumvention provisions consistent with the Basic Proposal, but consensus was reached by leaving the specific implementation to individual countries.

The support for flexibility in implementation has since been reflected in state practice. The DMCA may be the best-known implementation of the WIPO Internet treaties, but it can hardly be considered the only model. Countries such as New Zealand and Switzerland have linked circumvention to actual copyright infringement, European countries have introduced a wide range of exceptions, Japan has rejected provisions prohibiting circumvention of access controls, and Canada has previously proposed legislation without reference to circumvention devices. Moreover, countries are still grappling with finding the right balance: India recently introduced anti-circumvention legislation that links circumvention to copyright infringement and Brazil proposed penalties to rights holders who use TPMs to restrict lawful access to works.

The broad array of implementation strategies is consistent with scholarly analysis of WIPO Internet treaty obligations. There are well-known scholars who advocate for US-style implementation, however, the majority of scholars around the world have concluded that the treaties offer far more flexibility and that the US approach extends well beyond the treaty requirements.

As Bill C-32 winds its way through the legislative process, stakeholders from across the spectrum will provide their views on whether or how the anti-circumvention provisions should be amended. While there will be many claims about the efficacy of TPMs, the desirability of anti-circumvention rules, and the impact of the copyright balance, 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 restrictions on the trafficking of circumvention devices.