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

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MARCH 31, 2000

MEMORANDUM

INTRODUCTION

This memorandum is in response to Industry Canada's request for comments on certain aspects of an eventual copyright policy which would be in accordance with the obligations of the World Intellectual Property Organisations (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) regarding the protection against the circumvention of technological measures used by authors, performers and producers of phonograms to protect their copyrights against acts unauthorised by law, while maintaining the rights of users of copyright protected material to have lawful access to works, performances and sound recordings.

Specifically, Industry Canada has asked the following question:

"Should Canada decide to implement article 11 of the WIPO Copyright Treaty and article 18 of the WIPO Performances and Phonograms Treaty, both of which relate to technological measures used to protect copyrighted works, how could this be done so as to essentially prohibit the creation and diffusion of devices designed to circumvent such measures, while still giving scope to the legitimate claims of access to such materials by users (which may arise through an exception, fair dealing, the material is in the public domain, etc.)?"

The following comments are for discussions purposes only. A more elaborate document could be prepared after additional discussions have been held with Government Officials and other outside counsels retained by Industry Canada to examine the same issues.

Observers have noted that the provisions against the circumvention of technological measures used by authors, performers and producers of phonograms to protect their copyrights against acts unauthorised by law may have only a small link with copyright.

> (…) A serious question exists as to whether the Berne Convention is the appropriate vehicle for any such anti-circumvention legislation. The Berne Convention is, of course, a convention on *copyright* and *author's right*, and the Convention has always focused on defining the contours of copyright and, in particular, defining the unlawful acts that constitute infringement. The Berne Convention does not, and never has, prohibited (sic) any *particular* devices by which infringement occurs, but instead has always defined and regulated the *acts* constituting infringement[1].

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[1] VINJE, Thomas C., *A Brave New World of Technical Protection Systems : Will There Still Be Room For Copyright?*, [1996] E.I.P.R. 431, 434.

Furthermore, while copyright must strive to effect a balance between copyright and the rights of users to have access to protected material, the first function of copyright law is to protect the rights of copyright owners. It is no surprise that, under the WIPO Treaties, the obligations concerning technological measures are only directed at the protection of rights owners. The preoccupation with "access" to protected material can only be a secondary preoccupation. Indeed, it is unclear whether "access to protected material" fits comfortably in the definition of a "copyright measure".

I. SCOPE OF THE OBLIGATIONS REGARDING TECHNOLOGICAL MEASURES CONTAINED IN THE WCT AND WPPT

In order to ensure that all the essential aspect of the mandate given by Industry Canada are properly addressed, this analysis is based on the working hypothesis that only the minimum provided for in the WCT and in the WPPT would be implemented in Canadian law. It is accordingly important to determine the scope of the obligations concerning technological measures contained in the two treaties.

The basic proposal submitted by WIPO to the international community in the first draft of the treaties was much wider in scope than that which is found in the final text. The original proposal was as follows:

> (1) Contracting Party 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 authorised by the right-holder or the law.
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> (2) Contracting Parties shall provide for appropriate and effective remedies against the unlawful acts referred to in paragraph (1).
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> (3) As used in this article, "protection-defeating device" means any device, product of component incorporated into a device or product, the primary purpose of effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty.

Some countries and interest groups expressed strong concerns about the wording of this proposal and sought to amend this section. At the end of the discussions, the following texts were adopted. Section 11 of the WCT now reads as follows:

> 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 of the Berne Convention and that restrict acts, in respect of their works, which are not authorised by the authors concerned or permitted by law.

A similar text (section 18) appears in the WPPT:

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

The French versions of the treaties use the word “neutralization” where the English versions use the word “circumvention”; to address a specific concern raised by Industry Canada it is our view that the French versions probably encompass “removal” as much as “circumvention” of the technological measures of protection.

In any event, the scope of the treaties is much more restricted than the scope of the original proposal. According to the WCT and to the WPPT as adopted, the contracting Parties shall provide:

a) *adequate* legal protection and *effective* legal remedies;

b) against the circumvention of *effective* technological measures used by authors, performers and producers; if

   1) these measures are used in connection with their rights; and

   2) these measures restrict acts:

      i) unauthorised by authors, performers or producers of phonograms; or

      ii) not permitted by law.

Accordingly, the contracting Parties have no obligation to give protection to technological measures used by authors, performers or producers of phonograms if these measures are not used in connection with the exercise of the rights of these copyright holders, or are used to restrict acts authorised by these copyright holders, or if these measures restrict acts permitted by law.

An author has noted that there exist a few precedents of measures adopted to prohibit the circumvention of technical protection used to protect works.

> Those who support the adoption of legislation broadly prohibiting anti-circumvention devices suggest that such an approach is not unprecedented, and that existing legislation supports adoption of such a law. In particular, the U.S. White Paper points to (1) the U.S. Audio Home Recording Act (which regulates digital audiotape (DAT) Recorders); (2) section 6.05 of the U.S. Communications Act (which regulates devices that can be used to decrypt satellite transmissions of television programs); (3) a NAFTA Treaty provision regarding decryption of satellite transmissions; [article 17.07(a)] and (4) section 296 of the U.K. Copyright, Designs and Patents Act (1998).[2]

To this enumeration, one could add article 7(1)(c) of the European Software Directives which states that European States should provide appropriate remedies against persons committing acts of putting into circulation or possessing for commercial purposes any means intended to facilitate the unauthorized removal or circumvention of technical devices applied to protect a computer programme. The German Supreme Court interpreted these criteria liberally and decided that programmes capable of other features than circumvention of technological measures might still be prohibited if one application of the programme was aimed at circumventing.

At least another decision rendered in the United States also studied the question of the removal of anti-circumvention technical measures used to protect copyrighted works. In *Vault Corp.* v. *Quaid Software Limited*[3], the United States Court of Appeal for the Fifth Circuit had to decide whether or not the circumvention of technological measures used to protect the copyright on a computer programme constituted contributory infringement under the US Copyright Act. Vault Corp. commercialised a PROLOK diskette which prevented purchasers from making copies of the programme saved on this diskette. Quaid Software produced a diskette COPYWRITE, with a feature called “RAMKEY” which unlocked the PROLOK protective device and permitted the creation of a functional copy of the programmes saved on PROLOK diskettes. The Court of Appeal of the Fifth Circuit decided that the making of such a device did not constitute contributory infringement since portions of the COPYWRITE diskettes also served a substantial non-infringing use by allowing purchasers of programmes of PROLOK diskettes to make archival copies as permitted by the US Copyright Act. Accordingly, Vault Corp.’s claim in contributory

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[2] VINJE, Thomas C., *A Brave New World of Technical Protection Systems : Will There Still Be Room For Copyright?*, [1996] E.I.P.R. 431, 432.

[3] 847 F. (2d) 255

infringement was rejected. This result may illustrate the need for an adaptation of the Copyright Act to the new technological reality.[4]

[4] Since the introduction of the Digital Copyright Millenium Act, a few decisions were rendered showing the utility of the anti-circumvention provisions of that Act : *DVD Copy Control Association* v. *McLaughlin*, Case No. CV 786804, Superior Court of California, County of Santa Clara, Jan. 21, 2000; *Universal CD Studios* v. *Reimerdes et al.*, 2000 U.S. Dist. LEXIS 554, United States District Court for the Southern District of New York, Jan. 20, 2000.

II. APPROACHES TO IMPLEMENT WCT AND WPPT OBLIGATIONS IN CANADIAN LAW

The draft policy received from Industry Canada indicates two basic approaches to implement the WCT and WPPT obligations regarding the circumvention of effective technological measures used by authors, performers and producers of phonograms to protect their copyrights: prohibiting certain acts, and/or prohibiting certain devices. We will review these approaches in turn.

(i) the prohibition of certain acts

A) HYPOTHESIS: NEW COPYRIGHT RIGHT

In order to "provide adequate legal protection" against the circumvention of effective technological measures used by authors, performers and producers in the exercise of their rights, it may be possible to create a new copyright right: the right for authors, performers and producers of sound recordings to prevent the circumvention of technical measures, where such measures are designed to restrict acts not permitted by the *Copyright Act*.

By way of example, it may be possible to add the following clauses to sections 3(1), 15 and 18 of the *Copyright Act*: [**NOTA:** These examples are not suggested legal drafting but merely an attempt to "position" the new rights in the present structure of the *Copyright Act*.]

- 3(1): Copyright includes the sole and exclusive right to prevent the circumvention or removal of effective technological measures used in connection with the exercise of a right granted under this Act and that restrict acts not authorised by the author or not permitted under this Act;

- 15(c) where the performance is fixed in a medium that contains an effective technological measure used by the performer in connection with the exercise of his rights under this Act and that restrict acts not authorised by the performer or not permitted under this Act, the right to prevent the circumvention or removal of such technological measure.

- 18(d) where the sound recording contains an effective technological measure used by the maker in connection with the exercise of his rights under this Act and that restrict acts not authorised

> by the maker or not permitted under this Act, the right to prevent the circumvention or removal of such a technological measure.

The addition of such a new right to the list of copyright rights of authors, performers and makers of sound recordings has, in our view, many advantages: the new right does not interfere with any legitimate use of protected material, as all existing copyright exceptions and exemptions are also automatically limitations on the new right. Furthermore, all the remedies provided in the *Copyright Act* will be available to the copyright holders, thereby ensuring that, in accordance with the WCT and WPPT, "effective remedies" are provided to copyright holders in relation to their right to prevent the circumvention or removal of effective technological measures used in connection with the exercise of one of their rights.

The introduction of the new right may, however, create a situation of "cumulative infringements" as the circumvention of technological measures will constitute infringement only when the circumvention is effected in connection with the infringement of another right of the copyright holder. But examples of such "cumulative infringement" already abound. For example, the unauthorised use of a musical work as a jingle in a television advertisement constitute an infringement of the reproduction right of the author, of the right of the author to communicate his work to the public by telecommunication, of the moral rights of the author, etc. It should also be pointed out that the infringing act may very well be committed by someone other than the person who circumvents the protective measure. In such a scenario, the new right would not be redundant.

- Would this protection be considered as "adequate protection" under the WCT and WPPT?

The proposed new "copyright right" is a right to prevent circumvention of technological measures used to protect a right of the copyright owner, and not to prevent circumvention of technological measures used to control access to a work (whether protected by copyright or not). It is important to note that, even if controlling access to a work is not what copyright generally intends to protect, many countries have adopted the "locked drawer" theory, where every type of access is limited, including access to a work for individual purposes. The adoption in Canada of a right to prevent the circumvention of effective technological measures used in connection with the exercise of a copyright rather than in connection with the controlling of access to a work would represent an important difference from the solution retained in the United States in the *Digital Millennium Copyright Act*, as well as from the solutions developed in the European Union and in Australia.

> Or, les États ou les organisations régionales, telles que l'Union européenne, ont généralement introduit ou adopté des textes dont l'objet n'était pas seulement les technologies protégeant strictement les droits d'auteur, mais également les technologies conditionnant et contrôlant l'accès aux œuvres. Cela est manifeste dans les textes américain et australien; cela ressort également de la définition des mesures techniques reprise dans la proposition communautaire.[5]

It is clear from the *Digital Millennium Copyright Act* that section 1201(a)(1) concerns the act of circumventing a technological measure that controls access to a work. Section 1201(a)(2) prohibits the manufacturing of technology designed to circumvent technological measures that control access to a work, while section 1201(b)(1) prohibits the manufacturing of technology designed to circumvent technological measures designed to protect a right of a copyright owner. There is no provision concerning the act of circumventing a technological measure that protects a right of a copyright owner.

There is no doubt that the solution adopted in the United States goes far beyond what is requested by the WCT and the WPPT.

> The protection of technical measures controlling access to works might lead to grant a new right to copyright holders, i.e. the right to control access to works. This new *de facto* right goes beyond the criteria of *exercise of their rights* which justified the protection of technical measures enacted by the WIPO Treaties. This extension should deserve more attention since it could entail that the utilisation of a work will be liable to the exclusive right of the author[6].

The extension of the scope of protection granted by copyright law to authors would certainly require more debate in Canada. US author Pr. Jane Ginsburg noted that "access" may become the most important right in a digital world. We quote here a long extract of one of Pr. Ginsburg paper on the subject.

> Since the WCT does not compel signatory countries to protect technological measures that control the breadth of "access" covered by Section 1201(a), Congress has independently determine that this scope of protection is necessary to afford meaningful protection to copyrighted works in a digital environment. What supports this determination? The changing

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[5] STROWEL, Alain and DUSOLLIER, Séverine, *Atelier sur la mise en œuvre du Traité de l'OMPI sur le droit d'auteur (WCT) et du Traité de l'OMPI sur les interprétations et exécutions et les phonogrammes (WPPT) – La protection légale des systèmes techniques*, WIPO, Geneva, December 6 and 7, 1999

[6] DUSOLLIER, Séverine, *Electrifying the Fence : The Legal Protection of Technological Measures for Protecting Copyright*, [1999] E.I.P.R. 285, 291.

economics of exploitation of copyrighted works may supply a justification. In the digital environment, exploitation of works of authorship will differ from exploitation in the analog world. Professor Jessica Litman has observed that in the analog world, a book could not "sprout wings and fly away" after a certain number of readings. As a result, the purchasing user pay the price commensurate with unlimited consultations of the book, or listenings of the sound recordings, or viewings of the motion picture (if the film was not available for rental). In the digital world, by contrast, the price can be set to correspond to the number of times the user wishes to enjoy the work. It may, for example, be more attractive to a user to purchase a $5 DiVX videodisk that permits three viewings of a film, than a $25 DVD videodisk that allows unlimited viewings. But if the copyright owner is to make this marketing option available, it is necessary to ensure that the user who purchases the $5 videodisk cannot then circumvent the technological protection that limits the user to three viewings, in order to obtain unlimited viewings without paying the price.

Arguably, the Section 1201(b) prohibition on provision of devices to circumvent measures that protect "a right of the copyright owner" (see discussion *infra*) could suffice to assure copyright owners that users will not be able to pay $5 but through circumvention obtain $25 of value. Section 1201(b) however, does not prohibit direct acts of circumvention. The technologically adept user thus faces no liability under that section. As to the provisions of circumvention services or devices, it is not clear in this situation that a "right to the copyright owner" would be implicated. The user's viewing of the film would most likely be a private performance (…) to which the copyright owner's rights do not extend. In order to view the film, the user would be making a copy of the contents of the DiVX onto the user's RAM, but this copying might not be actionable either. As a result, the user would certainly be depriving the copyright owner of revenue but that deprivation might not contravene a "right of the copyright owner" and Section 1201(b) might therefore be ineffective. By contrast, if each viewing is an act of "access" to the work, then after the third viewing, the DiVX user would be circumventing an access control and would be in violation of Section 1201(a). That said, one should recognize that, in granting copyright owners a right to prevent circumvention of technological controls on "access", Congress may in effect have extended copyright to cover "use" of works of authorship. (…) In theory, copyright does not reach "use"; it prohibits unauthorized reproduction, adaptation, distribution, and public performance or display. Not all "uses" correspond to these acts. But because "access" is a prerequisite to "use", by controlling the former, the copyright owner may well end up preventing or conditioning the latter. (…) "Access" probably will become the most important right regarding digitally expressed works as its recognition, whether by the detour of prohibitions on circumvention of access controls, or by express addition to the list of exclusive rights under copyright, may be inevitable. But if "access" is a right (express or *de facto*), it is also

> necessary to consider whether that right should encounter limitations.[7]

It should be noted that the scope of the protection already granted by the Canadian *Copyright Act* in a digital world may be more important than the scope of the US *Copyright Act*. It seems from the recent decision of the Copyright Board[8], and from the report of the IHAC Sub-Committee on Copyright[9], that the downloading of works from the Internet would constitute a reproduction of said work, while the browsing of the work may constitute the communication to the public by telecommunication of the work. Accordingly, the removal of technological measures which serve to protect a work on the Internet could already be seen as the removal of technological measures used in connection with the exercise of a right granted to the copyright holder by the Canadian *Copyright Act*.

This memorandum does not propose to grant a right to prevent the circumvention of effective technological measures protecting access to a work, but simply a right to prevent the circumvention of effective technological measures protecting a right of the copyright holder.

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. As will be seen below, it is necessary first to examine the possible impact of the "right of an author to authorise" one of the acts enumerated at section 3(1). There follows a discussion on the possibility of prohibiting certain devices altogether.

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[7] GINSBURG, Jane, *News from US*, [1999] R.I.D.A. 143, 165 to 171.

[8] *Statement of royalties to be collected for the performance or the communication by telecommunication, in Canada, of musical or dramatico-musial work – Tariff 22 Transmission of musical works to subscribers via a telecommunication service not covered under tariff nos. 16 or 17 – Phase I: Legal issues*, Copyright Board, October 27, 1999.

[9] *Comité Consultatif sur l'Autoroute de l'Information; Le droit d'auteur et l'autoroute de l'information – Rapport final du sous-comité sur le droit d'auteur*; Secrétariat du comité consultatif sur l'autoroute de l'information; Ottawa, mars 1995

B) THE IMPACT OF THE "RIGHT TO AUTHORISE"

Given that the proposition is to add to the list of copyright rights at section 3 of the *Copyright Act* (for the authors of works), consideration must be given to the "right to authorise" provided for at section 3(1) *in fine.* More particularly, we reviewed the jurisprudence on the notion of "authorisation" to determine if the simple fact of selling or distributing devices used solely of mainly to circumvent technological measures used by an author in connection with the exercise of one of his rights could constitute infringement of the right to authorise. If this should be the case, there would be no need to add new provisions regarding the prohibition of selling or distributing particular devices.

The jurisprudence considers that "to authorise" means to "sanction, approve and countenance"[10], or "to grant or purport to grant to a third person the right to do the act complained of, whether the intention is that the grantee shall do the act on his own account, or only on account of the grantor"[11]. This right, for more than fifty years now, has been interpreted restrictively[12] in Canada. After the decision of the Supreme Court of Canada in *Muzak*[13], it is generally admitted that in order "to authorise" in the meaning of the Canadian *Copyright Act*, someone must sanction, approve or countenance something more than the mere use of equipment that may possibly be used to infringe the copyright of another person, and that one may presume that whoever "authorises" an activity, will authorise this activity only so far as the activity is legal[14]. Furthermore a recent decision[15] states that the Australian decisions[16] whereby the courts decided that a person "knowing or having reasons to suspect that [a particular equipment] is likely to be used for the purpose of committing an infringement" or that a person "responsible for placing in the other's hand materials which by their nature are almost inevitably to be used for the purpose of an infringement" was "authorising" an infringement, are not applicable in Canadian law.

According to present Canadian jurisprudence, the concept of "authorisation" alone would not be sufficient to prohibit the selling or distribution of certain devices that may be used for infringing purposes. In order to achieve this result, specific provisions are necessary.

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[10] *Falcon* v. *Famous Players Film Co.*, [1926] 2 K.B. 474, 491 (C.A.).
[11] *Id.*, 499.
[12] *Vigneux* v. *Canadian Performing Right Society Ltd.* (1945), 4 C.P.R. 65
[13] *Muzak* v. *Composers, Authors and Publishers Association of Canada Ltd*, [1953] 2 S.C.R. 182.
[14] HITCHCOCK, P.D., *Home Copying and Authorization* (1983), 67 C.P.R. (2d) 17, 29-33.
[15] *De Tervagne* v. *Town of Beloeil*, [1993] 3 F.C. 227, 239.
[16] *Moorhouse* v. *University of New South Wales*, [1976] R.P.C. 151 (Aust. H.C.) and *RCA Corporation* v. *John Fairfax & Sons Ltd.*, [1982] R.P.C. 91 (N.S.W.S.C.).

(ii) the prohibition of certain devices

If specific measures have to be introduced relating to the prohibition of devices, it is necessary first to define the type of devices or the type of technology which will be prohibited, and then to determine what type of actions will be prohibited.

As noted above, in the US, both the technological measures used to have access to a work and the technological measures used to infringe a copyright right are controlled. The WCT and WPPT do not require such a control. It would therefore be permissible, in Canada, not to go beyond the control of mechanisms used to circumvent or remove technological measures used by copyright holders in connection with the exercise of one of their rights. The introduction in Canadian law, of a right to control "access" to a work would certainly require a more extensive debate as to whether or not this change is desirable.

There are important difficulties in limiting the prohibition against devices solely to the use of such devices for infringing purposes. Indeed, in such a scheme, it becomes important to determine what particular uses should be forbidden that give rise to a prohibition of the device.

It is interesting to note how the European Software Directive[17], one of the first pieces of legislation which provided legal protection to anti-copying systems, defined the acts which should be forbidden in the European states. Section 7(1)c) of this Directive reads as follows:

> Member States shall provide … appropriate remedies … against a person committing … (c) any act of <u>putting into circulation</u> or the <u>possession for commercial purpose</u> of any means the sole intended purpose of which is to facilitate the authorised removal of circumvention of any technical device which may have been applied to protect a computer program.[18] [emphasis added]

In the Directive, the prohibited acts are the "putting into circulation" and the "possession for commercial purpose". These acts are less restrictive than the acts mentioned in the US *Digital Millennium Copyright Act*, which forbids the manufacture, import, offer to the public and traffic in any technology or means to circumvent technologies used by authors to control the access to their works and the infringement of their rights. The Australian Bill proposes to control the manufacturing of circumvention devices, as well as the selling, letting for hire, offering or exposing for sale or hire, distributing for the purpose of trade, the exhibition in public by way of trade, and the importation in Australia. The European proposed Directive is more vague and states that

[17] Directive 91/250, May 19, 1991, [1991] O.J. L 122/42.

[18] Cited in DUSOLLIER, Séverine, *Electrifying the Fence : The Legal Protection of Technological Measures for Protecting Copyright*, [1999] E.I.P.R. 285, 286.

Members of the Union shall provide adequate legal protection against *any activities, including the manufacture or distribution of devices, products or components, or the provision of services...* Although each State will have to implement the Directive in its national law, the methods chosen to effect such implementation are left to the Member States.

Under the working hypothesis of this paper, which does not propose to completely prohibit all devices intended to circumvent technological measures used by authors in connection with their rights, it would be illogical to prohibit the <u>manufacture</u> of such devices. For example, we are not aware of any anti-copying system which would be useful only to copy works in the public domain. Accordingly, we propose instead to limit the <u>distribution</u> of certain types of devices, and not the making or the manufacturing of such devices.

Once the type of activities to be controlled is defined, there is a need to determine which technologies will be covered by the prohibition. The European Union is using the following criteria:

> L'illicéité des dispositifs et services est quant à elle conditionnée par trois critères alternatifs. Soit le système ou service fait l'objet d'une promotion, d'une publicité ou d'une commercialisation, dans le but de neutraliser la protection technique; soit la raison commerciale ou l'utilisation de tels dispositifs est principalement la neutralisation; ou enfin, le système ou service est principalement conçu, produit, adapté ou réalisé en vue de permettre ou de faciliter la neutralisation[19]

The *Digital Millennium Copyright Act*, on its part, uses three different criteria to determine if a particular device should be prohibited. Sections 1201(a)(2) and 1201(b)(1) prohibit the devices:

- primarily designed or produced for the purpose of circumventing protection;
- which has only limited commercially significant purpose or use other than to circumvent protection; or
- is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection.

Finally, the Australian Bill defines "circumvention device" the following way:

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[19] STROWEL, Alain and DUSOLLIER, Séverine, *Atelier sur la mise en œuvre du Traité de l'OMPI sur le droit d'auteur (WCT) et du Traité de l'OMPI sur les interprétations et exécutions et les phonogrammes (WPPT) – La protection légale des systèmes techniques*, WIPO, Geneva, December 6 and 7, 1999, p. 13.

> ***Circumvention device*** means a device (including a computer program) having only 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[20]

All these foreign experiences lead us to propose the introduction in Canada of the following provision regarding the devices: it would be forbidden to sell, let for hire, offering or exposing for sale or hire, distribute, import or offer on-line a device having only a limited commercially significant purpose or use, or no such purpose or use, other than circumvention or facilitating the circumvention of an effective technological measure used by an author, a performer or a maker of sound recordings, in connection with a copyright, unless the distributor (importer, seller…) can establish that such a device would have been used:

a) by users who may benefit from an exception to the rights of the author, the performer or the maker of sound recordings under the *Copyright Act*; or

b) on works not protected by the *Copyright Act*.

A presumption would be created that certain users (libraries, archives, museums) would be “allowed users” according to sub-paragraph (a) above.

(iii) Private copying

The exception with regard to copying for private use, provided by section 80 of the *Copyright Act* may be problematic in relation to the new right we propose to include in the *Copyright Act*. According to section 80 of the Act, “the act of reproducing all or any substantial part of a musical work embodied in a sound recording or a performer’s performance of a musical work embodied in a sound recording, or a sound recording in which a musical work or a performer’s performance of a musical work is embodied, onto an audio recording medium for the private use of the person who makes the copy does not constitute an infringement of the copyright in the musical work, the performer’s performance or the sound recording”.

According to this section, and since we propose to prohibit the distribution and the removal of technical measures used to protect a right of the copyright holder (for example, an anti-copying system) and not the distribution and removal of technical measures which control access to a work, it would not be unlawful for a person to remove an anti-copying system for the

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[20] PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, HOUSES OF REPRESENTATIVES, *A Bill for an Act to amend the Copyright Act 1968, and for related purposes*, defintion of « circumvention device ».

purpose of making a copy of the recorded musical work for his or her private use.

The proposed exception to the prohibition of circumventing devices would probably not cause any problems with works embodied in traditional medium. The removal of anti-copying systems from CDs would simply allow the user to make a copy for his private use, as is presently the case. Authors, performers and makers of sound recordings will obtain remuneration for this copy according to the system provided at sections 81 and following of the *Copyright Act.*

However, the exception may prove problematic in the "virtual world" of the Internet. The removal of technical measures to control access to a work would not be prohibited by the law. The removal of anti-copying measures or other technical measures used in connection with the exercise of a right would not be prohibited if the user removed the protective measure in order to reproduce a musical work onto an audio recording medium for his or her private use. It is already becoming quite easy for users to copy a musical work on their computer's hard disk for their private use. Such a copy would be lawful under the Canadian *Copyright Act*.

In order to avoid the wide scope of the exception in the virtual world, a possible solution would be to modify section 80 of the Copyright Act as follows:

> Subject to subsection (2), the act of reproducing all or any substantial part of
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> (a) a musical work embodied in a sound recording;
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> (b) a performer's performance of a musical work embodied in a sound recording; or
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> (c) a sound recording in which a musical work , or a performer's performance of a musical work, is embodied
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> onto an audio recording medium for the private use of the person who makes the copy does not constitute an infringement of the copyright in the musical work, the performer's performance or the sound recording, <u>to the extent that the musical work, the performer's performance or the sound recording have been otherwise legally obtained or accessed.</u>

Such a solution would have the advantage of not tampering with the definition of "audio recording medium" in the private copying system, thereby maintaining the broad coverage of the system with respect to digital supports.

<u>CONCLUSION</u>

Neither the WCT nor the WPPT impose on Member States that copyright owners be granted a right to control access to their works. The treaties merely require the implementation of adequate legal protection and effective legal remedies against the circumvention of effective technological measures used by authors, performers and producers, if these measures are used in connection with their rights and if these measures restrict acts unauthorised by authors, performers and producers or not permitted by law.

This memorandum therefore proposes that authors, performers and makers be granted a new right to prevent the circumvention or removal of effective technological measures used in connection with the exercise of a right granted under the *Copyright Act* and that restricts acts not authorised by the author, performer or maker, or not permitted under the *Copyright Act*. It is suggested that, in order for this new right to give rise to "*effective legal remedies*" (as required by the WCT and the WPPT) while being limited by all present copyright exceptions, it be made part of the basic bundle of rights recognised to authors, performers and makers.

The new right would protect technological measures used by rights holders to protect their rights, but would not grant rights holders the right to control access to their works. It must be stressed that Europe, the US and Australia have all chosen a different route and <u>do</u> grant rights holders a right to control access to their works. The right to control access to works constitutes a major shift in copyright policy and its implementation in Canada should probably require a wider public consultation.

In order for "*adequate legal protection*" and "*effective legal remedies*" to exist under Canadian law with respect to the protection of technological measures designed to protect rights holders rights, Canada could not rely on the concept of "*authorisation*" found in the *Copyright Act*. A degree of prohibition of certain circumvention devices appears to be needed.

Conversely, as it is intended for lawful access to works to continue, some circumvention devices will, in all probability, be needed. It therefore seems illogical to prohibit their manufacturing. This memorandum suggests that manufacturing such devices not be prohibited, but that their distribution be subject to the condition that they are not used for the purposes of infringing a copyright.

With respect to the specific issue of "private copying", the memorandum suggests maintaining a broad private copying system which allows for a remuneration from copies made on digital supports, so that users can fully benefit from the exception for private copying. On the other hand, with respect to this specific issue, the memorandum concludes that the private copying

exception should be applicable only where the private copier has obtained lawful access to the work.

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