NOVEMBER 28, 2024 • 6 MIN READ

Unlocked: circumvention of technological protection measures through repair exception

AUTHORS


Edward T. Fan


Teresa A. Reguly


Dany H. Assaf


William Wang

Bill C-244, *An Act to amend the Copyright Act (diagnosis, maintenance, and repair)* and Bill C-294, *An Act to amend the Copyright Act (interoperability)* received Royal Assent on November 7, 2024. As discussed in a previous bulletin, Bill C-244 and C-294 amend the *Copyright Act* (the Act) so that the circumvention of Technological Protection Measures (TPMs) for purposes of maintenance, repair, and interoperability is not considered an act of infringement.

What you need to know

- End-users or third-party service providers can circumvent TPMs for the limited purposes of maintenance or repair, or to enable interoperability of programs, devices, or components without the circumvention being deemed an infringement. These amendments do not include any special treatment for medical devices or any other product class.
- Related amendments to the *Competition Act* permit the Competition Tribunal to order a supplier to make the means of diagnosis or repair available in certain circumstances.
- Copyright holders should consider how to manage and address potential requests from users to access technologies and information that may be needed for TPM circumvention.

Permitted circumvention of TPMs under the *Copyright Act*

Maintaining or repairing a product

Bill C-244 amends the *Copyright Act* to create an exclusion under the general prohibition against circumventing TPMs. With this exclusion, a person can circumvent TPMs without the action being deemed an infringement provided it is for the sole purpose of maintaining or repairing a product, including any related diagnosing. This exclusion also applies to a third party who circumvents TPMs for another person.

As defined in the Act, to circumvent a technological protection measure means to descramble a scrambled work or computer program, decrypt an encrypted work or computer program, or otherwise avoid, bypass, remove, deactivate, or impair the TPM, unless it is done with the authority of the copyright owner.

It is important to note that the exclusion created by Bill C-244 is limited. Circumventing a TPM for any purpose other than diagnosis, maintenance, or repair remains copyright infringement under the *Copyright Act*.

Interoperability

A related bill, Bill C-294, amends the *Copyright Act* so that a user can circumvent TPMs without the action being deemed an infringement if it is for the purpose of obtaining information to make the program or device interoperable with any other computer program, device, or component. The amendment would enable a manufacturer to circumvent TPMs in a lawfully obtained third-party product to make the third-party product interoperable with the manufacturer's product. Similar to the limited scope of Bill C-244, circumventing TPMs for the purpose of interoperability is a limited exclusion of the general non-circumvention provisions of the *Copyright Act*.

Bill C-59: provisions under the *Competition Act* that impact repair rights

The *Competition Act* was also recently amended through Bill C-59, the *Fall Economic Statement Implementation Act, 2023*, which received Royal Assent on June 20, 2024. Through this bill, the Refusal to Deal provisions of the *Competition Act* were expanded to support product repairs.

The amendments grant the Competition Tribunal the authority to order a supplier to "make the means of diagnosis or repair available to a person, within a specified period and on the terms the Tribunal considers appropriate"[1]. The Tribunal may make such an order in certain instances, including where a person is precluded from carrying on business due to an inability to obtain adequate supplies of a product on usual trade terms, or where the refusal to deal is having or is likely to have an adverse effect on competition in a market. The Tribunal would consider such an order to open the market to independent firms that wish to provide repair services to consumers. The definition of a "means of diagnosis or repair" includes diagnostic, maintenance, repair and calibration information, technical updates, diagnostic software or tools and any related documentation and service parts.

While untested, it appears that this provision could be used by a person who is seeking to circumvent a TPM for maintenance, repair, or interoperability purposes to force a copyright owner to provide information necessary to allow for the circumvention in certain circumstances.

Implications

Before the introduction of Bills C-244 and C-294, a blanket prohibition on circumventing TPMs meant that end-users typically had to approach technicians who are licensed by original product manufacturers, and thus had been granted contractual authorization, to unlock TPMs in order to maintain and repair products. With the amendments in force, an end user or any third-party service provider can now circumvent TPMs to conduct maintenance and repair. A copyright holder attempting to withhold the means of diagnosis or repair from end-users or third-party service providers may be compelled by the Competition Tribunal to disclose such means.

While any acts beyond circumventing TPMs for repair and maintenance can remain a copyright infringement, the amendments have additionally raised concerns among copyright holders about the risks of modifications made by parties other than the original product manufacturer or its licensed service providers, including in respect of liability if a user or other person is harmed by a modified product. For example, an advocacy group representing medical technology companies has expressed safety concerns in view of the new provisions regarding products that are regulated as medical devices under the *Food and Drugs Act*[2]. Third-party service providers are not subject to the same obligations about ensuring safety and efficacy requirements for medical devices, which are only imposed on manufacturers under current legislation by Health Canada. There are concerns that this lack of oversight could lead to safety concerns for both patients and healthcare workers that use medical devices[3]. It is unclear at this stage whether Health Canada will consider regulatory action in this regard.

FOOTNOTES

To discuss these issues, please contact the author(s).