CANADIAN COPYRIGHT CONSULTATION ON THE INTERNET OF THINGS — RIGHTS TO REPAIR AND INTEROPERABILITY

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In July 2021, the Government of Canada launched a *Consultation on Modern Copyright Framework for Artificial Intelligence and the Internet of Things*. The goal of this public consultation is to gather additional information to help the Government re-evaluate Canadian copyright policy in light of new challenges posed by artificial intelligence (AI) and the Internet of Things (IoT). The consultation represents the latest phase in the Government's review of the *Copyright Act* (the "**Act**"), following a 2018-19 parliamentary review of the Act. The Government invites stakeholders to submit technical evidence and views on potential policy amendments that are described in detail in its consultation paper.

This bulletin will focus solely on the consultation paper as it deals with the topic of IoT. The consultation paper's examination of AI issues will be discussed in a separate bulletin.

We will take a close look at certain subjects that may benefit from the modernization of the *Act*, namely digital locks — otherwise known as technological protection measures — and statutory exceptions to allow for the right to repair and interoperability. For the sake of brevity, we will not discuss approaches taken by other jurisdictions; for such discussion, please refer to the consultation paper.

Technological Protection Measures

Technological Protection Measures ("**TPMs**") are used to control access to digital content (e.g., to prevent unauthorized access, copying, or distribution of digital music, films, books, and software). The legal prohibition against the circumvention of TPMs was introduced into the Act in 2012 as a form of incentive for rights holders to make their works available in digital format. The prohibition provides the rights holder with an enforceable right, separate from any copyright in the TPM-protected content, to pursue those that circumvent the TPM to access or perform certain acts regarding the underlying content without due authorization. The Act also sets out prohibitions against providing services to circumvent TPMs and dealing in TPM-circumventing technologies.

Perhaps an unintended consequence of TPM regulation is the level of control exerted over software-enabled devices by restricting access to the copyrighted software contained within the devices. This issue has grown in

importance due to the proliferation of software-enabled devices, particularly those connected to the Internet (e.g., IoT devices).

Some believe that TPM regulation is too restrictive, prohibiting what should be legitimate activities, such as the ability to maintain, repair, or adapt a lawfully acquired device for non-infringing purposes. Accordingly, the Government is considering creating new exceptions to allow for TPM circumvention for non-infringing purposes, either in specific use cases or in general.

The Government's ability to add new exceptions to TPM regulation is somewhat restricted by the Canada-United States-Mexico Agreement ("**CUSMA**"), but the Government is permitted to enact exceptions where TPM protection causes an actual or likely adverse impact on non-infringing uses of copyright content.

Repair

Before software-enabled devices, consumers were not prohibited by copyright law from repairing consumer devices (e.g., kitchen appliances), many of which were mechanical or electrical in nature. Any prohibitions against such repairs were generally only found in terms and conditions that would void the manufacturer's or retailer's warranty. Nowadays, a large proportion of consumer devices are embedded with software to operate the digital functions of the device. The inclusion of software, and potentially TPMs to protect the software, have brought such devices under the protection of copyright law.

Copyright law reduces the consumer's ability to repair the faulty device when it breaks or malfunctions. An attempt by the consumer to remedy the problem may result in a copyright violation should the repair involve producing a substantial part of a copyrighted work (e.g., software) or circumventing a TPM.

Consumers face other restrictions on their ability to repair, including contractual prohibitions against repairing the product themselves or failing to use an authorised repairer, and the inaccessibility of proprietary diagnostics, replacement components, or repair tools.

The Government is considering either creating a specific legislative or regulatory TPM exception for the purpose of repair. A bill (Bill C-272) has already been proposed to allow for diagnosing, maintaining, or repairing software-embedded devices. As part of any reform, the Government could require the copyright owner of a TPM-protected work to actively provide access to the work in a given manner and timeframe.

A principal concern is ensuring that any new exception for repair will not interfere with the ability of creators to leverage TPMs in order to protect investment in their copyrighted work. Accordingly, the Government welcomes input on the types of repair activities that require access to copyrighted works and circumvention of TPMs (e.g., for repair, maintenance, testing, diagnostics, or enhancement), whether the TPMs in question control access or prevent copying of the copyrighted work, whether the TPMs in question are in digital or

physical form, the extent to which TPMs are circumvented as part of a repair service, risks related to cybersecurity and disclosure of personal information, product categories for which TPM circumvention for the purpose of repair would introduce undue risks to health and safety or network functionality, other functions of TPMs as used by original equipment manufacturers (e.g., for quality assurance, brand protection, cybersecurity, privacy, or safety), and potential harms to the economic interests of manufacturers if a repair exception were implemented.

Interoperability

Manufacturers often employ TPMs and/or proprietary technologies to protect the software and compilations of data contained in their devices. These forms of protection can act as barriers to interoperability with third party products or services that customize, enhance, or build upon existing functionality or data. Such barriers can prevent SMEs from entering a market or inhibit their ability to innovate and create new markets, thus stifling competition and innovation.

The Act already contains two exceptions for the interoperability of computer programs, one with respect to copyright infringement and one with respect to TPMs. However, there is some uncertainty as to whether the scope of such exceptions is sufficiently broad to reflect modern interoperability requirements. For instance, while the TPM exception permits access to software for interoperability purposes, it does not expressly extend such access to related data. Further, the infringement exception permits interoperability between two computer programs, but does not contemplate the scenario where interoperability of products requires only a single computer program (e.g., for use in association with third party hardware or data).

The Government must balance the need for broadened statutory exceptions for interoperability against the objective of incentivising investment in copyrighted works. In this pursuit, the Government invites input on challenges faced by stakeholders in achieving interoperability under the existing copyright exceptions, the nature of information needed from copyrighted works to make software-enabled products interoperable, the extent of copying required for such purposes (e.g., all or part of the software), the steps involved in achieving interoperability and which parties perform each step (e.g., use of third party services or devices), instances where multiple TPMs must be circumvented to achieve interoperability, measures currently used to mitigate legal risks associated with TPM circumvention activities, and industry-led initiatives that support interoperability (e.g., open interfaces).

The deadline for submitting comments is rapidly approaching. All comments must be submitted by no later than September 17, 2021 and all organisations who wish to do so can forward their submissions (in Word document format) by e-mail to the following address: copyright-consultation-droitdauteur@canada.ca. Should you require any further clarifications or assistance in the preparation of your submission, we remain available

for consultation.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.