Canadian Federation of Library Associations
Fédération canadienne des associations de bibliothèques

Approved by the CFLA board November 8, 2022

CFLA Statement: Right to Repair, Interoperability and Technical Protection Measures

Issue

Canadian libraries, archives, and museums (LAMs) support the right to repair and to ensure the interoperability of software-enabled products and applications. Libraries and archives play an essential role providing access to many objects and devices that control access to collections (printers, scanners, digitization equipment) and enable innovators (makerspaces, tool lending libraries). Library collections and archival holdings increasingly include software-enabled products, devices, and applications, such as video games and consoles, computers, tablets, wifi-hotspots, and more.[1] Archives need the right to repair software-enabled products for example, as part of their preservation activities, and indeed sometimes in order to correctly identify holdings.

The ability to repair and modify objects and devices is under threat for both LAMs and users, as computer technology is increasingly required to operate products that are only made available to end-users via licenses that limit the use and modification of their internal software. However, the preservation of the right to repair is not solely a library and archives issue; it also concerns all of society.

Background

Owners of technological devices should have the ability to repair, maintain, and preserve the items that they own. The ability to repair should also be autonomous: end-users should not be restricted by single vendors or companies' willingness or capability to authorize or provide repairs to the software-enabled products or to make changes that enable multiple products to be used together. In addition, LAMs have the socially beneficial mandate to preserve and maintain access over time to our collections. When companies and vendors that LAMs depend upon either stop updating or stop providing service for a specific product and the product breaks or becomes obsolete, libraries and archives must be able to circumvent these control measures in order to maintain access. Information professionals are concerned that once devices and software are rendered obsolete, are no longer supported, or are deemed unprofitable by a

[1] INDU (2018), Evidence, 1635 (Petricone, CTA).

vendor, valuable information will be lost and or made inaccessible if modifications cannot be legally made to preserve access to content.

Manuals, code, and tools to maintain hardware and software for library and archive services should be transparent and readily available. The ability to repair the technology that is increasingly necessary for access to information or to use it in conjunction with other equipment to meet user needs should not be prohibitive and should not cost more than the replacement of the device or software. For example, some Canadian academic libraries have purchased Espresso Book Machines (print-on-demand technology) for over $100,000. As a result of licensing terms restricting repair of the physical equipment, these machines have been rendered useless and sold for parts because of prohibitive software licensing costs and the inability to fix/adapt software for continued use.[2] Products must be repairable and must come with a statement of level of repairability and access to repair related information. This information should be openly available, as reflected in legislation in France[3] where much of the concern for the durability of devices was tied to environmental concerns about e-waste.

LAMs believe that all Canadians should be able to circumvent technological protection measures for all legal purposes, including the ability to repair products. The right to repair should be a user right in Canada as it is essential for preserving balance in the law. Technological protection measures (TPMs) should not prevent anyone from exercising their legal rights.

Analysis

The *Copyright Act* includes exceptions that allow users to circumvent TPMs for certain interoperability purposes, but these exceptions are too restrictive and do not provide library and archives users with sufficient certainty regarding their legal rights.

Specifically, these exceptions are limited to measures protecting computer programs. This is problematic insofar as: i) “where the computer program ends and the hardware begins is also difficult to delineate in today’s world of embedded systems”[4]; and ii) this does not address the

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[2] Such language includes: “Upon termination of the License, customer shall promptly cease using the EBM software and ExpressNet on the Purchased EBM and shall cease all use of SelfExpress.” Earlier in the same contract: “customer agrees that it shall not […] use or attempt to use the Purchased EBM in connection with any other software or service similar to any or all the functions of EspressNet or the EBM Software…”

[3] For example, France introduced legislation https://www.ecologie.gouv.fr/indice-reparabilite). Incentives should be introduced in Canada to stimulate the production of repairable technology and discourage the rising cost of e-waste (https://repair.eu/news/germany-and-austria-implement-repair-bonuses/).

[4] Rosborough, Anthony Douglas, *If a machine could talk, we would not understand it : Canadian innovation and the Copyright Act’s TPM interoperability framework*, Canadian journal of law and technology, 2021, Vol. 19, pp. 141-171. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3848830

issue of data interoperability (i.e. it may be necessary to access data produced by the program and/or device in order to achieve interoperability). Some of these shortcomings may be addressed by adopting a broad definition of interoperability and incorporating it into the *Act*:

> "the ability of a system, software or product to exchange and make use of information and services with other systems."

The current exception is too specific and limited. Its application is restricted to individuals who own or have a license to use the computer program in question. This creates some uncertainty in a library or archives setting where users have access to software-enabled products outside of these parameters.

In their discussion of TPM circumvention in the recent Statutory Review of *Copyright Act* Report, the Standing Committee on Industry, Science and Technology agree "that the circumvention of TPMs should be allowed for non-infringing purposes."[5] The corresponding recommendation emphasized that the Government of Canada should modernize Canadian copyright policy with digital technologies in mind, and that all Canadians should have the right to repair their lawfully-acquired devices for non-infringing purposes.[6] There have been recent attempts to amend *The Copyright Act* to include the right to repair including the recent Private Members Bill C-244.[7]

Recommendations

In this context , CFLA recommends that the Government of Canada:

1. Amend section 41.1 (1) of the *Copyright Act* to allow the circumvention of a technological protection measure in order to diagnose, maintain, repair and make interoperable, software-enabled products and applications,
2. Amend section 41.1 of the *Copyright Act* to allow the circumvention of a technological protection measure for any non-infringing purpose,
3. Amend the *Copyright Act* to protect any non-infringing purposes, including the right to repair, from contract override,

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[5] Statutory Review of the Copyright Act: Report of the Standing Committee on Industry, Science and Technology. (June 2019). Retrieved Oct 17th, 2022, from https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/report-16/

[6] Ibid. Recommendation 19.

[7] See: C-244, *An Act to amend the Copyright Act (diagnosis, maintenance and repair*). 1st Sess, 44th Parl, 2022. Private Member's Bill, First Reading. Retrieved Oct 17th, 2022, from https://www.parl.ca/DocumentViewer/en/44-1/bill/C-244/first-read. A previous Private Member's Bill introduced in 2020, *C-272, An Act to Amend the Copyright Act (diagnosis, maintenance or repair)* was terminated when Parliament was dissolved for the Federal election of 2021.

4. Incorporate a broad definition of interoperability into the *Copyright Act:* "the ability of a system, software or product to exchange and make use of information and services with other systems,"[8] and
5. Remove 41.12 (1) of the *Copyright Act*, to reflect the above recommendations (1-4).
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Recommendations 2 and 3 listed in this section mirror CFLA's recommendations for AI Text and Data Mining and would have broad benefits for the entire LAM sector and thus, society at large.

[8] Innovation, Science and Economic Development Canada. (2021)."A Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things." Footnote 89. Retrieved Oct 17th, 2022, from https://www.ic.gc.ca/eic/site/693.nsf/eng/00316.html#s223