Canadian Federation of Library Associations
Fédération canadienne des associations de bibliothèques

POSITION STATEMENT
TECHNOLOGICAL PROTECTION MEASURES

ISSUE:
Libraries operate in an increasingly digital environment and much of the content they purchase is digital and protected by technological protection measures (TPMs), also known as digital rights management. Unfortunately, the TPM provisions in the *Copyright Act* do not make any exceptions for libraries, archives and museums (LAMs) to be able to preserve digital items as intended if they are protected by TPMs.

Technological protection measures also prevent library users from exercising user rights such as fair dealing. For example, if a student wants to make a copy of a small portion of a TPM protected work for their research project under fair dealing, the TPM prevents them from doing that, even though the use would be legal under the legislation.

BACKGROUND:
Policy makers use copyright exceptions and limitations in an effort to balance the interests of rights holders and the public. Libraries buy digital products (especially ebooks and DVDs) that are protected by technological protection measures (TPMs). TPMs prevent library users from exercising their rights such as fair dealing and prevent libraries, archives and museums from fulfilling their cultural role of preserving and making historical content available to Canadians.

Under Section 30.1 of the Copyright Act, LAMs have the right to make preservation copies of original copyrighted works if the original is rare or unpublished and is deteriorating, damaged, or lost or at risk of deterioration, becoming damaged, or lost. LAMs also have the right to transfer an item to another format for use by our patrons if the format of the original is obsolete or becoming obsolete. The TPM provisions in the Copyright Act create an internal contradiction in the act that makes it impossible for LAMs fulfill their role in preserving copyrighted works or migrating works to useable current formats when that material is protected by a TPM.

While unlawfully circumventing a TPM is not technically a copyright infringement, unlawful circumvention of a TPM gives the copyright owner all the ordinary remedies available for infringement (injunction, damages etc.) except for Statutory Damages under section 38.1.

The prohibitions on the circumvention of digital locks in the Copyright Act go well beyond Canada's obligations under the WIPO copyright treaties. Because the current legislation does not allow for the circumvention of a TPM for permitted uses, the Copyright Modernization Act gave a new right to copyright owners which upsets the balance in the Copyright Act and which directly conflicts with fair dealing rights and other rights used by consumers of copyrighted works.

ANALYSIS:
The CFLA-FCAB has determined that Canada can balance its obligations under the WIPO copyright treaties to protect TPMs while simultaneously allowing for rights such as fair dealing and allowing LAMs to preserve for posterity copyrighted material protected by TPMs.

The CFLA-FCAB proposes a technical amendment to Section 41 of the Copyright Act:

> The following definitions apply in this section and in sections 41.1 to 41.21.
> *circumvent* means,
> …
> (b) in respect of a technological protection measure within the meaning of paragraph (b) of the definition *technological protection measure*, to avoid, bypass, remove, deactivate or impair the technological protection measure <u>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 80(1).</u>

This amendment uses the same wording used by the Paul Martin Government in 2005, when that government introduced Bill C-60 to amend the Copyright Act and to ratify the WIPO Copyright Treaty. This wording meets Canada's obligations under the WIPO copyright treaties, while preserving fair dealing rights for consumers and preservation rights for libraries, archives and museums.

RECOMMENDATION:
The Government of Canada should amend the Canadian Copyright Act to make it clear that circumvention of TPMs is only *illegal 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 80(1).*