EXECUTIVE SUMMARY

Technological protection measures (TPMs) deter piracy, encourage rights owners to use new media like the internet, and provide consumers a sophisticated new range of ways of enjoying music.

The WIPO Treaties require effective legal protection of TPMs. Governments have recognised that this means protecting against ‘hacking’ and covering a range of circumvention devices and related illicit activities.

WHAT ARE TECHNOLOGICAL MEASURES?

With the introduction of legal protection for technological measures, the WIPO Treaties create a unique new way of protecting copyrighted products as new digital and internet-based uses emerge.

The treaties recognise that authors and other rights owners increasingly rely on technical means—commonly known as technological protection measures or TPMs—such as encryption and other mechanisms to control unauthorised copying, transmission and use of their products.

TPMs take various forms and their features are continually changing, but some major features remain constant. The most basic and most important kind of TPM is access control technology. One common way of controlling access is encrypting or scrambling the content. In such case the user gets the data but must follow an additional procedure to make it usable.

Another form of access control is a procedure that allows access to a source only with proof of authorisation, for example, password protection for a computer server.

The other major type of TPM, copy or use controls, enable the rights owner to allow certain permitted activities but to prevent illicit activities by a user who has access to the work.

The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) require adequate legal protection and effective legal remedies against the circumvention of TPMs applied to protected works and phonograms. (WCT Art. 11; WPPT Art. 18.)

These provisions are formulated in a broad and neutral way, oriented more to the desired result than on how to achieve it. In implementing these treaty provisions, however, governments have recognised that their laws need to cover the act of circumvention itself, as well as the manufacturing and distribution of a range of circumvention devices, in order to provide adequate and effective protection.

WHY IS IT IMPORTANT TO PROTECT TPMs?

Technological solutions themselves are not invulnerable. Technical systems can be hacked. Unauthorised passwords and access codes frustrate access-control software.

And the making and distribution of circumvention devices pose a serious danger to the integrity of any TPM.

As no technological measure can permanently resist deliberate attacks, a TPM is only as good as its legal protection.

Protecting TPMs is important both for rights owners and consumers. Of course, TPMs deter piracy, and encourage rights owners to use new media like the internet.

But by allowing a wide range of listening, copying and transmission options, TPMs also permit the development of new marketing, distribution and usage models, which open up a sophisticated new range of ways of enjoying music.

Consumers will benefit from these new ways of enjoying music and other copyrighted products, but only if TPMs are meaningfully protected.

TPM protection also benefits telecommunications and equipment providers. Internet services profit from increased traffic and legitimate electronic commerce in copyrighted material.

And consumer electronics and computer producers, which spend substantial sums developing new equipment and encryption technologies to play protected material, find their innovation frustrated and their investment rendered worthless if TPMs can be neutralised by hacking.
Most countries are finding that their copyright laws require some modernising to deal with TPM protection adequately. There are several elements that governments and rights owners have found crucial to effective legal protection for TPMs:

- **Protection of access and copy control technologies.** The treaties require protection of TPMs (1) that are used in connection with the exercise of rights, and (2) that restrict unauthorised acts. This only covers TPMs applied to works protected by copyright or related rights.

- **Protection against act of circumvention.** The treaties explicitly require legal protection and effective remedies against the act of circumvention of TPMs.

- **Prohibition of circumventing devices.** Adequate legal protection and effective legal remedies cannot stop at prohibiting circumvention itself. In order to control widespread hacking and other circumventing activities, protection against acts of circumvention of TPMs also will change over time—requiring a broad definition of the acts covered by legislation dealing with circumvention devices and services.

**Effective remedies.** The treaties also explicitly call for effective legal remedies. This is of great importance, because action against hacking and other circumvention of TPMs must be sufficiently speedy, efficient and deterrent to counteract the otherwise great incentive hackers and pirates have to break TPMs and steal content.

Effective legal remedies should include both **criminal** law sanctions and **civil** law remedies. Criminal penalties should permit fines and prison terms in appropriate cases.

To serve as a deterrent, civil law should allow fast and efficient preliminary proceedings, injunctive relief, payment of damages including statutory damages, and the obligation to cooperate in neutralising harm already caused.

To get illicit devices out of circulation, remedies also should allow tracing, seizure, retention and destruction of physical devices and intangible software and information.

Criminal penalties and civil remedies should not be any lower than those available for copyright infringement.

### How should this be implemented?

**WCT Art. 11.**
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 or the Berne Convention and that restrict acts, in respect of their works, which are not authorised by the authors concerned or permitted by law.

**WPPT Art. 18.**
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 producers or the performers of phonograms concerned or permitted by law.
Frequently asked questions (FAQs)

How strong must a technology be in order to enjoy protection?

No. TPMs permit wider and more convenient access. Technology permits rights owners to cater to the demands and tastes of consumers in more refined ways, with more flexible pricing options.

Works will remain available in traditional formats as well as protected formats for a long, long time. And legal protections only cover TPMs applied to works protected by copyright or related rights.

What kind of exceptions are appropriate to protection of TPMs?

The problem with allowing exceptions to protection of TPMs is similar to allowing someone to break the lock on a safe. Anyone then can get in, for any purpose.

Allowing hacking or circumvention devices weakens the overall robustness of the TPM encryption or other technology. Carried too far, this can make use of TPMs pointless and investment in equipment and technologies worthless.

Governments therefore have recognised that any exceptions to TPM protection must be carefully limited. US law, for example, provides only a few exceptions, permitting circumvention only for such purposes as encryption testing under carefully limited conditions.

Allowing circumvention in any case where a traditional copyright exception applies is unworkable. Between private copying, educational use, ‘fair use’, and other typical exceptions, such a rule would effectively allow every citizen of a country to become a hacker.

Governments also have recognised that circumvention devices can do even greater harm than individual acts of circumvention. Exceptions to TPM protection generally have allowed only certain acts of circumvention, but not distribution of circumvention devices.

Sample implementing legislation

IFPI Model Legislation (Option 1): It shall be unlawful to circumvent any technological protection measure applied to a work or phonogram; or to manufacture, offer to the public, distribute or in any other way traffic in devices, components, services or other means designed, adapted or promoted to circumvent such a measure. The civil and criminal procedures, remedies and sanctions applicable to copyright infringement shall apply to any violation of this provision.

IFPI Model Legislation (Option 2):

(a) It shall be unlawful to circumvent any technological measure that is applied to a work, phonogram or other protected material and that is designed to prevent or restrict, in the normal course of its operation, access to the material or acts that are not authorised by the rights owner. ‘Circumvent’ shall mean avoid, bypass, remove, deactivate or otherwise impair.

(b) It shall be unlawful to manufacture, import, distribute, sell, rent, possess for commercial purposes, offer to the public, advertise, communicate or otherwise provide any device, part, component, technology, service or other means that—

(1) is primarily designed, produced, adapted or performed for the purpose of circumventing,

(2) has only a limited other commercially significant purpose or use other than to circumvent, or

(3) is marketed, promoted or advertised for the purpose of circumventing any such technological measure.

(c) The civil and criminal procedures, remedies and sanctions applicable to copyright infringement shall apply to any violation of this section.

Other example: Lithuania Copyright Law, Art. 64(1)(4): The following acts shall constitute infringements of copyright: (4) removal of technological protective measures used by subjects of copyright and related rights for the exercise and protection of the rights provided for in this Law, as well as the manufacture, importation, transportation, keeping for the purpose of distribution and distribution of any technical devices or equipment specifically designed or adapted to circumvent those technological protective measures.

IFPI has represented the international recording industry since 1933. Its membership comprises more than 1,400 record producers and distributors in over 70 countries. For more information, please contact IFPI

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