

Is it legal to circumvent digital locks
for works where the copyright has
expired?

Do TPMs create perpetual copyright?

Terminology

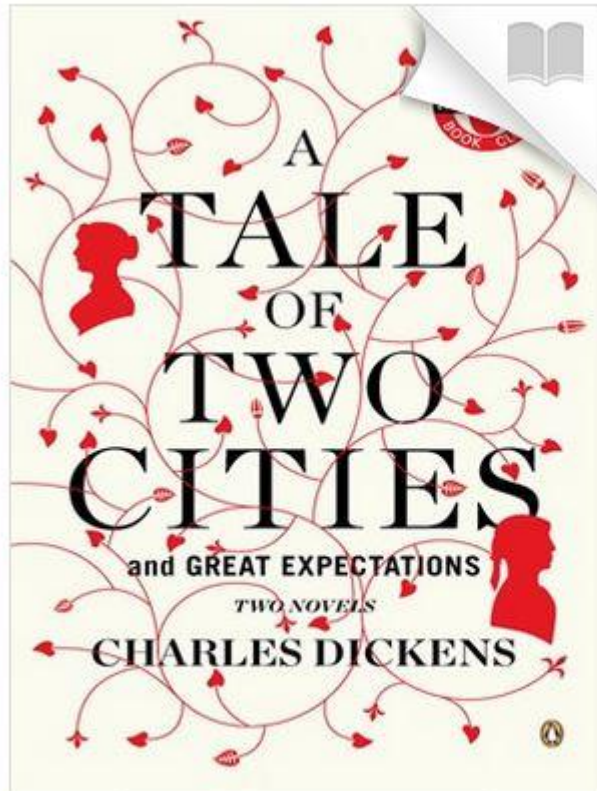
Will use the Term TPM as a synonym for these terms:

Digital Locks; Technological Protection Measures; DRM; or Digital Rights Management.

Introduction

- TPMs and Expired Copyright
- What Happened in the US?
- What Does our Copyright Act Say?
- What Next?

Overdrive



Sample

A Tale of Two Cities and Great Expectations (Oprah's Book Club)

Two Novels

by [Charles Dickens](#)

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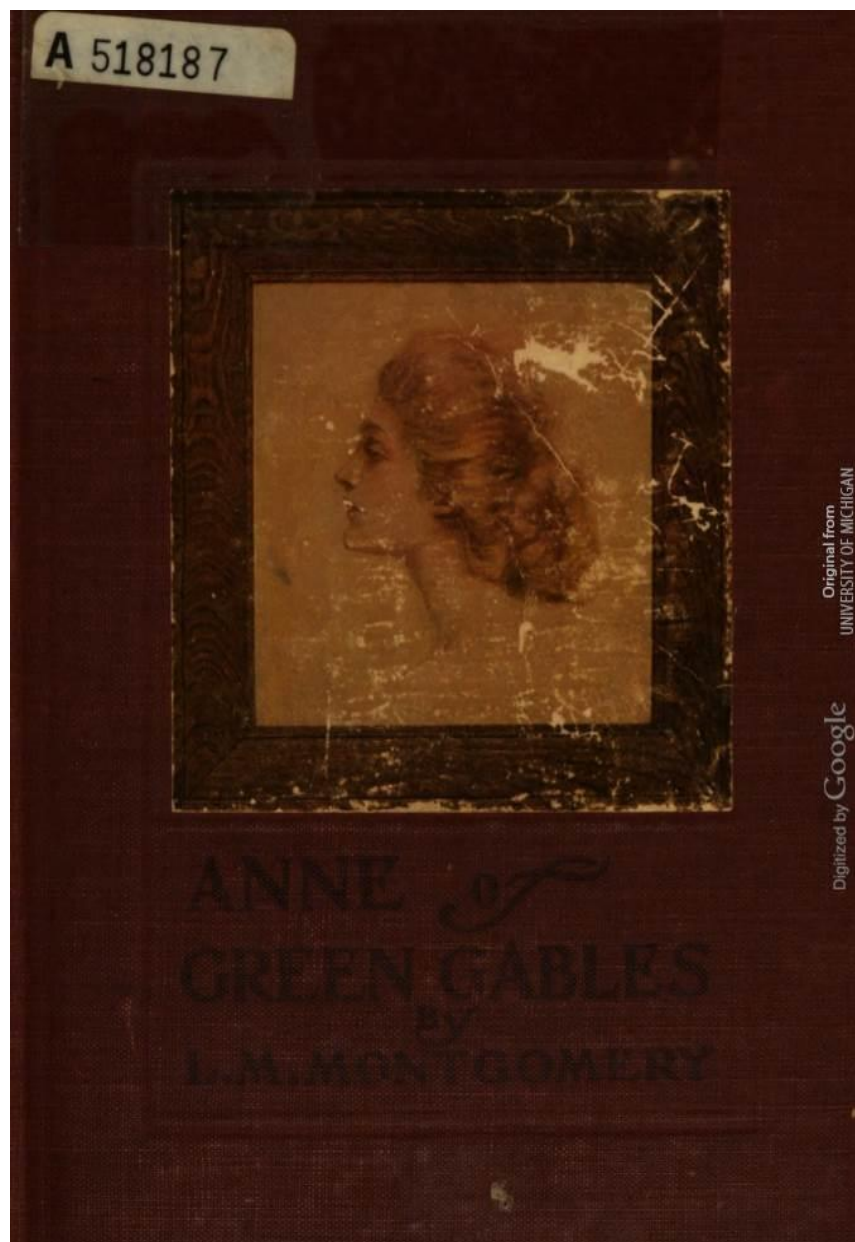
Available: 0

Library copies: 1



Save as (displaying dialog)

HathiTrust



HathiTrust Copyright

- users accessing the volume from US IP addresses will have access to the works published outside the US between 1873 and 1923;
- however, users with non-US IP addresses will not. In-copyright - Texts that do not meet the criteria for Public Domain (e.g., US post-1923 and not a government document) are treated as in-copyright.

Casablanca



Born Digital Works

How will libraries, archives, museums and other memory institutions preserve works that were born digitally?

Or just available in digital form.

Section 41.1 of the Copyright Act

It is an infringement of copyright to:

- a) to circumvent a technological protection measure;
- b) to provide circumvention services to the public;
- c) to manufacture, import, distribute, offer for sale or rental or provide technology or devices that can circumvent a TPM.

Do TPMs Create Perpetual Copyright?

- Is it illegal to circumvent a TPM after the copyright expires?
- Is it legal to obtain technology to circumvent TPMs on works where the copyright has expired?
- Can a library legally migrate an ebook in an obsolete format protected by a TPM to a format currently in use?

Legal Exceptions for Circumvention

- Law Enforcement and National Security
- Interoperability of Computer Programs
- Encryption Research
- Personal Information (Privacy)
- Computer Security
- Creating alternate format copies for people with Perceptual Disabilities
- Broadcast Undertakings
- Radio Apparatus

Regulations for Circumvention Exceptions

Both Canada and the US have a process for establishing regulations for circumvention exceptions:

- US Copyright Act – S. 1201 (a) (C)
- Canadian Copyright Act – S. 41.21

What can the US process
teach us about our own
laws?

Request for Circumvention Exception

In 2012, the *Open Book Alliance* applied for a regulation that would allow circumvention of TPMs for books in the public domain. The US Copyright Office rejected the request with the following statement:

...the prohibition on circumvention of technological protection measures does not apply to public domain materials because such materials are not protected under Title 17 (ie the Copyright Act).

Does Canadian Law Protect
TPMs where copyright has
expired?

Section 41.1

41.1 (1) No person shall
(a) circumvent a technological protection measure within the meaning of paragraph (a) of the definition “*technological protection measure*” in section 41;

TPM Definition

“technological protection measure”
means any effective technology, device
or component that, in the ordinary
course of its operation,

(a) controls access to a work, ... **and**
whose use is authorized by the
copyright owner;

Definition of Circumvent

“circumvent” means,
(a) in respect of a technological protection measure within the meaning of paragraph (a) of the definition *“technological protection measure”*, to descramble a scrambled work or decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate or impair the technological protection measure, **unless it is done with the authority of the copyright owner;**

But the Technology is still Illegal...

41.1 (c) manufacture, import, distribute, offer for sale or rental or provide — including by selling or renting — any technology, device or component

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What about Contract Law?

Did your institution sign a contract agreeing that it wouldn't circumvent the TPM?

In a 2008 study of Ebook licences signed by Canadian Libraries, only one contract (out of 9) allowed circumvention of TPMs (for the perceptually disabled).

The Safe Harbour: LAMs and Education

41.2 If a court finds that a defendant that is a library, archive or museum or an educational institution has contravened subsection 41.1(1) and the defendant satisfies the court that it was not aware, and had no reasonable grounds to believe, that its actions constituted a contravention of that subsection, the plaintiff is not entitled to any remedy other than an injunction.

No One Else Gets a Safe Harbour

42 (3.1) Every person, except a person who is acting on behalf of a library, archive or museum or an educational institution, is guilty of an offence who knowingly and for commercial purposes contravenes section 41.1 and is liable

- (a) on conviction on indictment, to a fine not exceeding \$1,000,000 or to imprisonment for a term not exceeding five years or to both; or
- (b) on summary conviction, to a fine not exceeding \$25,000 or to imprisonment for a term not exceeding six months or to both.

What Next?

Regulation from the Treasury Board

Organizations such as the Canadian Library Association should apply for a regulation from the Treasury Board to allow for the circumvention of TPMs in items with expired copyright.

Let's Use our Safe Harbour

Libraries, archives, museums, and educational institutions should use our safe harbour.

- Parliament gave us the safe harbour for a reason (even if it was only to copy the provisions in S 1204 (b) of the US Copyright Act).
- Use the safe harbour cautiously and prudently, but we should be using it.