

Copyright Law and Practice in Canada Now

The Arrival of Technical Protection Measures

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Background

The WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty as well as the Anti-Counterfeiting Trade Agreement provide that the contracting parties shall provide adequate legal protection and effective remedies against the circumvention of effective technological measures that are used by authors, performers or makers of phonograms in connection with the exercise of their rights under the treaties and that restrict acts in respect of their respective works, performances, and phonograms which were not authorized by the authors, the performers or the producers of phonograms concerned or permitted by law.¹

The contracting parties shall also provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by the Treaties, the Agreement or the Berne Convention:

- (i) to remove or alter any electronic rights management information without authority;

¹. WIPO Copyright Treaty, article 11, WIPO Performances and Phonograms Treaty, article 18 and Anti-Counterfeiting Trade Agreement, Article 27, paragraph 5.

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.²

As indicated in the recitals to the *Copyright Modernization Act*³ the Government is committed to enhancing the protection of copyright works or other subject-matter, including through the recognition of technological protection measures, in a manner that promotes culture and innovation, competition and investment in the Canadian economy. The Government has also said that it wishes to adhere to the two Treaties and the Agreement.

While critics of technological protection measures have raised concerns with respect to privacy and other issues Parliament has made the policy choices and any issues will have to be dealt with on a specific basis once the *Copyright Modernization Act* is brought into force.

Technological Protection Measures - What are They?

Under the *Copyright Act* as amended by the *Copyright Modernization Act*, (the “Act”) “technological protection measure” means any effective technology, device or component that, in the ordinary course of its operation controls access or restricts the exercise of a right included within the rights available to a copyright owner.

a) Access Control

In the access control context a “technological protection measure” means any effective technology, device or component that, in the ordinary course of its operation controls

² WIPO Copyright Treaty, article 12, WIPO Performances and Phonograms Treaty, article 19 and Anti-Counterfeiting Trade Agreement, Article 27, paragraph 7.

³ S. C. 2012, chapter 20, chapter 20 has not yet been proclaimed in force.

access to a work, to a performer's performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner. In this context "circumvent" means to descramble a scrambled work or decrypt an encrypted work⁴ or to otherwise avoid, bypass, remove, deactivate or impair the technological protection measure, unless it is done with the authority of the copyright owner.

The use of an access control technological protection measure must be authorized by the copyright owner. If a technological protection measure is used by a licensee or the like and the use is not authorized by the copyright owner it will not be protected under the Act.

Common access control technological protection measures include password control systems, encryption measures and digital signatures that control access. In some cases it can be difficult to determine whether a technological protection measure controls access or relates to copyright control.

b) Copyright Control

In the context of copyright control a "technological protection measure" means any effective technology, device or component that, in the ordinary course of its operation restricts the doing — with respect to a work, to a performer's performance fixed in a sound recording or to a sound recording — of any act referred to in section 3, 15 or 18 and any act for which remuneration is payable under section 19. In this context "circumvent" means to avoid, bypass, remove, deactivate or impair the technological protection measure.

⁴. It is unclear why descrambling and decrypting are limited to works but do not refer to a performer's performance fixed in a sound recording or to a sound recording.

Common copyright control technological protection measures include software locks, encryption measures that prevent copying and a technology that 'locks' documents to prevent them from being copied e.g. the function that 'locks' a PDF document to stop you from making a copy.

Circumvention

a) Direct Circumvention

Paragraph 41.1(1)(a) of the Act provides that no person shall circumvent an access control technological protection measure.⁵ This prohibition applies to descrambling a scrambled work or decrypting 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. The prohibition applies without expressly requiring that any consideration be given to the purpose for which the person circumvented the technological protection measure.

The owner of the copyright in a work, a performer's performance fixed in a sound recording or a sound recording in respect of which paragraph 41.1(1)(a) has been contravened is, subject to the Act and any regulations made under section 41.21, entitled to all remedies — by way of injunction, damages, accounts, delivery up and otherwise — that are or may be conferred by law for the infringement of copyright against the person who contravened that paragraph.⁶

^{5.} The section refers to “within the meaning of paragraph (a) of the definition “technological protection measure” in section 41, meaning any effective technology, device or component that, in the ordinary course of its operation controls access.

^{6.} S. C. 2012, chapter 20, section 47 adding section 41.1(2). Section 41.23 sets out the rules concerning parties to actions relating to actions seeking such remedies and section 41.24 deals with the jurisdiction of the Federal Court in a same way as sections 36 and 37 dealt with infringement of copyright. S. C. 2012, chapter 20 has not yet been proclaimed in force.

No election may be made under section 38.1 to recover statutory damages from an individual who contravened paragraph 41.1(1)(a) only for his or her own private purposes.⁷

The prohibition allows rights holders to trump the exceptions contained in the Act apart from the exceptions in sections 41.11 to 41.18 and 41.21. This has been widely criticized but Parliament has made the policy choice.

b) Indirect Circumvention

Paragraphs 41.1(1)(b) or (c) relate to the indirect circumvention of a technological protection measure. These paragraphs apply to a technological protection measure that controls access or copyright control.

Paragraph 41.1(1)(b) is directed at persons who offer or provide services primarily for the purposes of circumventing a technological protection measure. The paragraph provides that no person shall offer services to the public or provide services if

- (i) the services are offered or provided primarily for the purposes of circumventing a technological protection measure,
- (ii) the uses or purposes of those services are not commercially significant other than when they are offered or provided for the purposes of circumventing a technological protection measure, or
- (iii) the person markets those services as being for the purposes of circumventing a technological protection measure or acts in concert with another person in order to market those services as being for those purposes.

⁷ S. C. 2012, chapter 20, section 47 adding subsection 41.1(3). S. C. 2012, chapter 20 has not yet been proclaimed in force.

Paragraph 41.1(1)(c) provides that no person shall manufacture, import, distribute, offer for sale or rental or provide — including by selling or renting — any technology, device or component if

(i) the technology, device or component is designed or produced primarily for the purposes of circumventing a technological protection measure,

(ii) the uses or purposes of the technology, device or component are not commercially significant other than when it is used for the purposes of circumventing a technological protection measure, or

(iii) the person markets the technology, device or component as being for the purposes of circumventing a technological protection measure or acts in concert with another person in order to market the technology, device or component as being for those purposes.

Every owner of the copyright in a work, a performer's performance fixed in a sound recording or a sound recording in respect of which a technological protection measure has been or could be circumvented as a result of the contravention of paragraph 41.1(1)(b) or (c) is, subject to the Act and any regulations made under section 41.21, entitled to all remedies — by way of injunction, damages, accounts, delivery up and otherwise — that are or may be conferred by law for the infringement of copyright against the person who contravened paragraph (1)(b) or (c).⁸

c) Statutory Directions Concerning Remedies

A court may reduce or remit the amount of damages it awards in cases involving direct or indirect circumvention if the defendant satisfies the court that the defendant was not

⁸. S. C. 2012, chapter 20, section 47 adding section 41.1(4). S. C. 2012, chapter 20 has not yet been proclaimed in force.

aware, and had no reasonable grounds to believe, that the defendant's acts constituted a contravention of the prohibitions.⁹

If a court finds that a defendant that is a library, archive or museum or an educational institution has contravened the prohibitions and the defendant satisfies the court that it was not aware, and had no reasonable grounds to believe, that its actions constituted a contravention, the plaintiff is not entitled to any remedy other than an injunction.¹⁰

d) Rules relating to Proceedings Seeking Remedies

The rules relating to the protection of the owner of any copyright, or any person or persons deriving any right, title or interest by assignment or grant in writing from the owner, are set out in section 41.23. In substance and subject to statutory exceptions they may individually for himself or herself, as a party to the proceedings in his or her own name, protect and enforce any right that he or she holds, and, to the extent of that right, title and interest, is entitled to the remedies provided by this Act. Section 41.23 is similar to section 36 relating to infringement, which it replaces.

Section 43.1 sets out the rules relating to the limitation or prescription period in a manner which is similar to the rules for infringement set out in section 41, which it replaces.

Section 41.24 sets out the rules relating to the concurrent jurisdiction of the Federal Court in a manner which is similar to the rules for infringement set out in section 37, which it replaces.

Exceptions Relating to Circumventing a Technological Protection Measure

⁹. S. C. 2012, chapter 20, section 47 adding section 41.19. S. C. 2012, chapter 20 has not yet been proclaimed in force.

¹⁰. S. C. 2012, chapter 20, section 47 adding section 41.2. S. C. 2012, chapter 20 has not yet been proclaimed in force.

a) Law Enforcement and National Security

The prohibitions described above do not apply if a technological protection measure is circumvented for the purposes of an investigation related to the enforcement of any Act of Parliament or any Act of the legislature of a province, or for the purposes of activities related to the protection of national security.¹¹

b) Interoperability of Computer Programs

The prohibitions described above do not apply to a person who owns a computer program or a copy of one, or has a licence to use the program or copy, and who circumvents a technological protection measure that protects that program or copy for the sole purpose of obtaining information that would allow the person to make the program and any other computer program interoperable.¹²

The person may communicate the information obtained to another person for the purposes of allowing that person to make the computer program and any other computer program interoperable.¹³ The person to whom the information obtained is communicated may use it only for the purpose of making the computer program and any other computer program interoperable.¹⁴ This exception relating to sharing information does not apply if, for the purposes of making the computer program and any other computer program interoperable, the person does an act that constitutes an

^{11.} S. C. 2012, chapter 20, section 47 adding subsection 41.11(1). S. C. 2012, chapter 20 has not yet been proclaimed in force.

^{12.} S. C. 2012, chapter 20, section 47 adding section 41.12(1). S. C. 2012, chapter 20 has not yet been proclaimed in force.

^{13.} S. C. 2012, chapter 20, section 47 adding section 41.12(4). S. C. 2012, chapter 20 has not yet been proclaimed in force.

^{14.} S. C. 2012, chapter 20, section 47 adding section 41.12(5). S. C. 2012, chapter 20 has not yet been proclaimed in force.

infringement of copyright or an act that contravenes any Act of Parliament or any Act of the legislature of a province.¹⁵

The exception is not available if, for the purposes of making the computer program and any other computer program interoperable, the person does an act that constitutes an infringement of copyright.¹⁶

Similar exceptions are available for a person who offers services to the public or provides services for the purposes of circumventing a technological protection measure¹⁷ or who manufactures, imports or provides a technology, device or component,¹⁸ if the person does so for the purpose of making the computer program and any other computer program interoperable.

c) Encryption Research

The prohibitions described above do not apply to a person who, for the purposes of encryption research, circumvents a technological protection measure by means of decryption if

(a) it would not be practical to carry out the research without circumventing the technological protection measure;

^{15.} S. C. 2012, chapter 20, section 47 adding section 41.12(7). S. C. 2012, chapter 20 has not yet been proclaimed in force.

^{16.} S. C. 2012, chapter 20, section 47 adding section 41.12(6). S. C. 2012, chapter 20 has not yet been proclaimed in force.

^{17.} S. C. 2012, chapter 20, section 47 adding section 41.12(2). S. C. 2012, chapter 20 has not yet been proclaimed in force.

^{18.} S. C. 2012, chapter 20, section 47 adding section 41.12(3) and see 41.12(5) concerning limitations relating to the use of the technology, device or component. S. C. 2012, chapter 20 has not yet been proclaimed in force.

(b) the person has lawfully obtained the work, the performer's performance fixed in a sound recording or the sound recording that is protected by the technological protection measure; and

(c) the person has informed the owner of the copyright in the work, the performer's performance fixed in a sound recording or the sound recording who has applied the technological protection measure.¹⁹

In addition the prohibitions do not apply to the person doing the research who manufactures a technology, device or component for the such purposes and

(a) uses that technology, device or component only for that purpose; or

(b) provides that technology, device or component only for that purpose to another person who is collaborating with the person.²⁰

The exception is not available if the person doing the research does an act that constitutes an infringement of copyright or an act that contravenes any Act of Parliament or any Act of the legislature of a province.²¹

d) Personal Information

The prohibitions described above do not apply to a person who circumvents a technological protection measure if

a) the work, performer's performance fixed in a sound recording or sound recording that is protected by the technological protection measure is not

^{19.} S. C. 2012, chapter 20, section 47 adding section 41.13(1). S. C. 2012, chapter 20 has not yet been proclaimed in force.

^{20.} S. C. 2012, chapter 20, section 47 adding section 41.13(3). S. C. 2012, chapter 20 has not yet been proclaimed in force.

^{21.} S. C. 2012, chapter 20, section 47 adding section 41.13(2). S. C. 2012, chapter 20 has not yet been proclaimed in force.

accompanied by a notice indicating that its use will permit a third party to collect and communicate personal information relating to the user or, in the case where it is accompanied by such a notice, the user is not provided with the option to prevent the collection and communication of personal information without the user's use of it being restricted; and

(b) the only purpose of circumventing the technological protection measure is to verify whether it permits the collection or communication of personal information and, if it does, to prevent it.²²

Similar exceptions are available for a person who offers services to the public or provides services or who manufactures, imports or provides a technology, device or component, for the purposes of circumventing a technological protection measure as described above, to the extent that the services, technology, device or component do not unduly impair the technological protection measure.²³

It has been suggested that the exception is intended to deal with situations like that involved in U.S litigation relating to MediaMax and XCP software (which used a "rootkit" designed to conceal the running of the software from the operating system of the computer) that was installed on the computer of a user of compact disc that, among other things, was alleged to collect personal information without the user's consent.

e) Assessing Security

The prohibitions described above do not apply to a person who circumvents a technological protection measure for the sole purpose of, with the consent of the owner

²². S. C. 2012, chapter 20, section 47 adding section 41.14(1). S. C. 2012, chapter 20 has not yet been proclaimed in force.

²³. S. C. 2012, chapter 20, section 47 adding section 41.14(2). S. C. 2012, chapter 20 has not yet been proclaimed in force.

or administrator of a computer, computer system or computer network, assessing the vulnerability of the computer, system or network or correcting any security flaws.²⁴

The person who circumvents is not entitled to benefit from the exception if they do an act that constitutes an infringement of copyright or an act that contravenes any Act of Parliament or any Act of the legislature of a province.²⁵

Similar exceptions are available to a person who offer services or provide services to the person who circumvents²⁶ or the technology, device or component is manufactured or imported by the person who circumvents or is manufactured, imported, provided — including by selling or renting — offered for sale or rental or distributed as a service provided to that person.²⁷

f) Persons with Perceptual Disabilities

The prohibitions described above do not apply to a person with a perceptual disability, another person acting at their request or a non-profit organization acting for their benefit if that person or organization circumvents a technological protection measure for the sole purpose of making a work, a performer's performance fixed in a sound recording or a sound recording perceptible to the person with a perceptual disability.²⁸

A similar exception is available to a person who offers or provides services to persons or organizations described above, or who manufactures, imports or provides a

^{24.} S. C. 2012, chapter 20, section 47 adding section 41.15(1). S. C. 2012, chapter 20 has not yet been proclaimed in force.

^{25.} S. C. 2012, chapter 20, section 47 adding section 41.15(4). S. C. 2012, chapter 20 has not yet been proclaimed in force.

^{26.} S. C. 2012, chapter 20, section 47 adding section 41.15(2). S. C. 2012, chapter 20 has not yet been proclaimed in force.

^{27.} S. C. 2012, chapter 20, section 47 adding section 41.15(3). S. C. 2012, chapter 20 has not yet been proclaimed in force.

^{28.} S. C. 2012, chapter 20, section 47 adding section 41.16(1). S. C. 2012, chapter 20 has not yet been proclaimed in force.

technology, device or component, for the purposes of enabling those persons or organizations to circumvent a technological protection measure as described above, to the extent that the services, technology, device or component do not unduly impair the technological protection measure.²⁹

g) Broadcasting Undertaking

The prohibitions described above do not apply to a broadcasting undertaking that circumvents a technological protection measure for the sole purpose of making an ephemeral reproduction of a work, a performer's performance fixed in a sound recording or a sound recording in accordance with section 30.9, unless the owner of the work or other subject matter that is protected by the technological protection measure makes available the necessary means to enable the making of such a reproduction in a timely manner in light of the broadcasting undertaking's business requirements.³⁰

h) Radio Apparatus

The prohibitions described above do not apply to a person who circumvents a technological protection measure on a radio apparatus for the sole purpose of gaining access to a telecommunications service by means of the radio apparatus. The exception appears to be directed at unlocking a wireless device such as a cell phone.

A similar exception is available to a person who offers the services to the public or provides the services, or manufactures, imports or provides the technology, device or component, for the sole purpose of facilitating access to a telecommunications service by means of a radio apparatus.

^{29.} S. C. 2012, chapter 20, section 47 adding section 41.16(2).

^{30.} S. C. 2012, chapter 20, section 47 adding section 41.17. S. C. 2012, chapter 20 has not yet been proclaimed in force

The following definitions apply to the exception:

“radio apparatus” means a device or combination of devices intended for, or capable of being used for, radiocommunication.³¹

“telecommunications service” means a service provided by means of telecommunications facilities and includes the provision in whole or in part of telecommunications facilities and any related equipment, whether by sale, lease or otherwise.³²

i) Additional Exceptions by Regulation

The Governor in Council may make regulations prescribing additional circumstances in which paragraph 41.1(1)(a) does not apply. This adds important flexibility since circumstances may change and a regulation can be implemented more quickly than an amendment to the Act. The following factors must be considered:

(i) whether not being permitted to circumvent a technological protection measure that is subject to that paragraph could adversely affect the use a person may make of a work, a performer’s performance fixed in a sound recording or a sound recording when that use is authorized,

(ii) whether the work, the performer’s performance fixed in a sound recording or the sound recording is commercially available,

³¹. S. C. 2012, chapter 20, section 47 adding section 41.18 and section 2 of *Radio Communication Act*, R.S.C., 1985, c. R-2, s. 1, 1989, c. 17, s. 2.

³². S. C. 2012, chapter 20, section 47 adding section 41.18 and section 2 of the *Telecommunications Act* S.C. 1993, c. 38.

(iii) whether not being permitted to circumvent a technological protection measure that is subject to that paragraph could adversely affect criticism, review, news reporting, commentary, parody, satire, teaching, scholarship or research that could be made or done in respect of the work, the performer's performance fixed in a sound recording or the sound recording,

(iv) whether being permitted to circumvent a technological protection measure that is subject to that paragraph could adversely affect the market for the work, the performer's performance fixed in a sound recording or the sound recording or its market value,

(v) whether the work, the performer's performance fixed in a sound recording or the sound recording is commercially available in a medium and in a quality that is appropriate for non-profit archival, preservation or educational uses, and

(vi) any other relevant factor.³³

Regulations may also be made requiring the owner of the copyright in a work, a performer's performance fixed in a sound recording or a sound recording that is protected by a technological protection measure to provide access to the work, performer's performance fixed in a sound recording or sound recording to persons who are entitled to the benefit of any of the limitations on the application of paragraph 41.1(1)(a) prescribed by regulation. The regulations may prescribe the manner in which, and the time within which, access is to be provided, as well as any conditions that the owner of the copyright is to comply with.³⁴

³³. S. C. 2012, chapter 20, section 47 adding section 41.21(2)(a). S. C. 2012, chapter 20 has not yet been proclaimed in force

³⁴. S. C. 2012, chapter 20, section 47 adding section 41.21(2)(b). S. C. 2012, chapter 20 has not yet been proclaimed in force

Finally, regulations may be made excluding from the application of section 41.1 any technological protection measure that protects a work, a performer's performance fixed in a sound recording or a sound recording, or classes of them, or any class of such technological protection measures, if the Governor in Council considers that the application of that section to the technological protection measure or class of technological protection measures would unduly restrict competition in the aftermarket sector in which the technological protection measure is used.³⁵

Criminal Remedies

Section 42(3.1) of the Act provides that 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.³⁶

Rights Management Information

Under the Act "rights management information" means information that

³⁵. S. C. 2012, chapter 20, section 47 adding section 41.21(1). S. C. 2012, chapter 20 has not yet been proclaimed in force

³⁶. S. C. 2012, chapter 20, section 48 amending section 42 by adding subsection (3.1). S. C. 2012, chapter 20 has not yet been proclaimed in force.

(a) is attached to or embodied in a copy of a work, a performer's performance fixed in a sound recording or a sound recording, or appears in connection with its communication to the public by telecommunication; and

(b) identifies or permits the identification of the work or its author, the performance or its performer, the sound recording or its maker or the holder of any rights in the work, the performance or the sound recording, or concerns the terms or conditions of the work's, performance's or sound recording's use.³⁷

The definition is broad and includes both electronic and physical devices, such as a radio frequency identity device used for tracking purposes.

Rights management information often takes the form of an electronic watermark placed in protected content. Watermarks identify the rights owner and may also interact with devices that receive or play content and determine the conditions of use of such content. They may also be used to track purchase details about a particular work or sound recording.

Removal or Alteration

Subsection 41.22(1) provides no person shall knowingly remove or alter any rights management information in electronic form without the consent of the owner of the copyright in the work, the performer's performance or the sound recording, if the person knows or should have known that the removal or alteration will facilitate or conceal any infringement of the owner's copyright or adversely affect the owner's right to remuneration under section 19.³⁸

^{37.} S. C. 2012, chapter 20, section 47 adding section 41.22(4). S. C. 2012, chapter 20 has not yet been proclaimed in force

^{38.} S. C. 2012, chapter 20, section 47 adding section 41.22(1). S. C. 2012, chapter 20 has not yet been proclaimed in force

Unlike the paragraph 41.1(1)(a) dealing with the circumvention of a technological protection measure, subsection 41.22(1) has a double intentional element as the result the use of the words “knowingly remove or alter ” and the subsection only applies if the person “knows or should have known that the removal or alteration will facilitate or conceal any infringement of the owner’s copyright or adversely affect the owner’s right to remuneration under section 19”. In addition it is directly linked to infringement or economic harm as it only applies if the removal or alteration will facilitate or conceal any infringement of the owner’s copyright or adversely affect the owner’s right to remuneration under section 19.

The owner of the copyright in a work, a performer’s performance fixed in a sound recording or a sound recording is, subject to this Act, entitled to all remedies — by way of injunction, damages, accounts, delivery up and otherwise — that are or may be conferred by law for the infringement of copyright against a person who contravenes subsection 41.22(1).³⁹

Subsequent Dealings

The copyright owner referred to above has the same remedies against a person who, without the owner’s consent, knowingly does any of the following acts with respect to any material form of the work, the performer’s performance fixed in a sound recording or the sound recording and knows or should have known that the rights management information has been removed or altered in a way that would give rise to a remedy:

(a) sells it or rents it out;

(b) distributes it to an extent that the copyright owner is prejudicially affected;

³⁹. S. C. 2012, chapter 20, section 47 adding section 41.22(2). S. C. 2012, chapter 20 has not yet been proclaimed in force

(c) by way of trade, distributes it, exposes or offers it for sale or rental or exhibits it in public;

(d) imports it into Canada for the purpose of doing anything referred to in any of paragraphs (a) to (c); or

(e) communicates it to the public by telecommunication.⁴⁰

This ability to claim for subsequent dealings is also subject to a double intentional element since it only applies if the person against whom the claim is made, has knowingly done any of the listed acts and “knows or should have known that the rights management information has been removed or altered in a way that would give rise to a remedy ...”

Conclusion

The new protection of technical protection measures represents a significant change in copyright practice. Whether the implementation goes too far and will negatively affect the balance between rights holders and users remains to be seen. There is some flexibility since regulations may be made excluding a technical protection measure from the application of section 41.1.

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⁴⁰. S. C. 2012, chapter 20, section 47 adding section 41.22(3). S. C. 2012, chapter 20 has not yet been proclaimed in force

These comments are of a general nature and not intended to provide legal advice as individual situations will differ and should be discussed with a lawyer. They are current as of October, 2012.