

In the Curl of the Wave

What the Digital Millennium Copyright Act and Term Extension Act Mean for the Library and Education Community

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Editor's Note: If you know anyone who thinks that last fall's passage of two major pieces of copyright reform legislation in the U.S. Congress puts to rest the need to sustain a high level of personal and institutional engagement in this set of issues, suggest they read on. Arnie Lutzker's report takes a candid look at why proponents of a balanced copyright law – now more than ever – need to join forces to make the strongest possible case on behalf of library and other educational uses of copyrighted resources.

In the coming 18 months, the library and education community faces a series of fast-paced public policy forums where significant copyright and other intellectual property issues will be addressed. The passage last fall of the most comprehensive reform of copyright law in a generation, the Digital Millennium Copyright Act (DMCA), along with passage of the Copyright Term Extension Act take copyright principles into the digital information age and establish complicated rules that most users do not yet appreciate. The implications of the new statutes for library and educational use of copyrighted materials, however, were not fully resolved in the legislation. To address outstanding questions, the statutes put into motion three formal public policy processes, the outcomes of which will be profoundly significant for the future of the scholarly communication process and for how libraries may support that process.

This article provides a summary of key issues in the DMCA and Copyright Term Extension Act and proposes an action agenda for the library and education community. The article concludes with a reminder of the importance of also continuing to represent the views of academic users of public domain information in ongoing congressional consideration of pending database legislation.

Digital Millennium Copyright Act

The issues addressed in The Digital Millennium Copyright Act (DMCA), PL 105-304, that are of utmost importance for libraries and the education community are: access to and fair use of copyrighted works issued in encrypted form; the liability of online service providers for infringing behavior by a user of the service; the proper uses of copyrighted works in distance education programs; and the use of digital technology to preserve library and archival materials. In the case of all but the last of these issues, major questions remain about application of the new statutory provisions in educational settings.

Encrypted Works and the Anti-Circumvention Law

Many electronic works are distributed in encrypted form and the DMCA established stiff penalties for anyone accessing a copyrighted work protected by "technological protective measures" (TPMs) without the consent of the copyright owner. The law also bans equipment or services whose primary purpose is for use in defeating technology that limits access to a copyrighted work. Taking effect in two years, the new anti-circumvention and access rules will encourage publishers to distribute digital works online; by CD, CD-ROM, or DVD; or in other

formats in either encrypted or protected form by providing greater assurance to copyright owners that those who abuse access barriers will be subject to severe penalties. Legislators and content owners both hope that the severity of the penalties will discourage widespread piracy.

The new law does provide for certain exemptions to the anti-circumvention penalties. However, the one exemption included for nonprofit libraries, archives, and educational institutions is solely for the purpose of determining whether to acquire the work or not. A central question not answered in the new law is how a library, archive, or school may obtain the means to circumvent, since the selling of such equipment is prohibited in the law. It also remains unanswered in law whether any fair use can be made of a work protected by TPMs, absent a future rulemaking.

No later than October 28, 2000, the DMCA requires that the Library of Congress publish regulations controlling access to "particular classes" of copyrighted works. The new law established a formal rulemaking procedure designed to allow any person or institution to make the case that protection systems either had interfered, or were likely to do so, with legal uses or with lawful access to a particular class of copyrighted materials. If that case can be made, the DMCA empowers the Librarian of Congress – on the advice of the Register of Copyrights and the head of the National Telecommunications and Information Administration (NTIA) – to issue a waiver from the bill's basic prohibition on "circumvention" for all materials in the identified class. The waiver would cover all materials in the class, not just uses by the person or institution who sought the waiver. The first such rulemaking proceeding will be conducted during the next two years while the effect of the new prohibition is deferred, and then every three years thereafter.

The TPM and anti-circumvention provisions of the DMCA will most likely ensure that more works come with licenses and with an obligation to pay for each use or access. This change could hit libraries particularly hard because it challenges the way in which libraries function as archives of our published history. *Libraries must be prepared to review contracts for the acquisition of digital works more closely than ever before and bargain for full access rights.* Libraries must be alert to limitations on access and use of works that are licensed. In short, they must be prepared:

- to bargain for the right to a hard copy;
- to realize that digital access means limited access, unless you own a copy of the work;
- to pay for the cost of access; and
- to understand that equipment that decrypts works may be illegal to acquire or use.

The library and education community needs to organize itself and understand how it is using digital works today, how it is likely to use them in the near term, and what the economic and social impacts of the new regime will be. Then, it must be prepared to participate actively in the regulatory proceedings to be established by the Librarian of Congress. Careful data collection in 1999 will be necessary if a strong record in favor of fair use, library preservation, teaching, and scholarship is to be made.

As with many agency rulemaking proceedings, active participation in the initial case will be very important, because procedures will be established for managing the record and early

precedents will carry forward for years to come. All issues raised by the legislation will be novel for the Librarian in the first rulemaking case. The central focus of these proceedings will be to determine (1) the "adverse affects" of the rules upon library and educational users, (2) the significance of licensing alternatives ("pay per use"), and, ultimately, (3) the particular classes of works that should be exempted from the scheme.

The library community did not ask for this structure, but it was offered as the best compromise that Congress could fashion. Since the burdens of obtaining relief fall on the proponents, library and educational institutions will have to make a persuasive record that justifies appropriate relief. It will be a challenge, but one that will help shape the future role of libraries in the digital age.¹

Limitation of Liability for Online Service Providers

Creation of a new limitation on liability for online service providers (OSPs) was perhaps the most complex task of the DMCA legislators. The new rules establish certain procedures and conditions that grant OSPs, including libraries and educational institutions, an exclusion from monetary liability for copyright infringement by a user of the service. Balancing a myriad of interests and fashioning legislation for technology that is arcane and evolving are no simple tasks. Thus, the OSP limitation of liability represents a very important contribution of the DMCA to copyright law. Also, the process used to develop this statutory limitation – congressional committee supervised negotiations – may also serve as a model for preparing legislation on other issues that require discreet balancing of concerns of contentious but politically powerful interests.

For libraries, the initial issue is whether to assert status as a "service provider" and register with the Copyright Office. This is not an easy question to resolve. Certainly, the definition of "service provider" is broad enough to encompass many of the libraries' online activities. However, the legislation's complex rules will require very careful compliance practices, including the use of sophisticated software and systems and the development of notification and termination policies. Although monitoring of sites is not required, once a service provider receives notice of an infringement, actions such as "notice and take down" or "counter notice and put back" must also be taken.

In weighing the benefits of coming within the statutory limitation terms, libraries should appreciate the reduction of potential damages for innocent, but contributory, infringements. For libraries that are part of larger, educational institutions, exposure to money damages from cyberspace violations by patrons, students, and faculty – as well as third parties – must be deemed a real threat. It should be understood that online copyright infringements are a "hot button" issue for publishers. It should also be anticipated that a test case or two would be brought in the near future.

Further, it must be underscored that even though monetary damages may be avoided, all service providers are subject to all other copyright legal remedies, including injunctive relief. It is not known whether content owners will use the website list of service providers maintained by the Copyright Office as the "go-to group" that receives all the infringement notifications.

Since each OSP is an online ramp to the cyber-violations, whether more than a limited group will receive infringement notices is not yet known. If many owners adopt an approach that blankets the potential universe of OSPs, then those identified OSPs could be flooded with requests for take down. Such a situation could render operations at small- to medium-sized libraries into an immediate state of chaos. Then, too, how much technological support in terms of advanced software and personnel is required to satisfy the legal strictures is unknown. Perhaps the wiser course for most non-research libraries that do not host websites or sponsor chat rooms is to wait for the dust to settle and see how implementation of the new rules proceeds.

Study of Distance Education in Networked Environments

Although DMCA did not include explicit expanded protection for educational activities involving the Internet, the creation of a congressionally-mandated study of the subject by the Copyright Office is important and deserves immediate and active attention by the library community. From its inception, copyright law has balanced owners' rights with users' rights. Despite copyright owners proclaiming the need for fair return on their creative works and the importance of securing economic rewards in a global economy, principles like fair use and exemptions for classroom teaching and library preservation survive. Distance education is the latest major battleground in the effort to balance educational interests in a federal law that increasingly emphasizes the commerce of copyright.

Extending the face-to-face and transmission exemptions to Internet education will not happen without aggressive and active participation by the library and educational communities. In the initial hearings held in January 1999 by the Copyright Office, owners have already asserted there is no need to change the law. They argue licensing and other permissive approaches to incorporating works into course content will suffice. Moreover, they claim to be the primary producers of course texts and thus any exemption hurts their markets and damages them competitively. Unless educators are energized by the opportunity to create a new and important expansion of principles embodied in the current classroom and closed circuit transmission limitations, no change will occur. The central points to be made include the following:

- Obtaining clearances for spontaneous use of copyrighted works in online courses is virtually impossible.
- Identifying copyright owners of certain works, like photographs, is so daunting as to make it a task not worth pursuing.
- Licensing is not an acceptable alternative because, when offered, the price is often far too high to justify the use.
- Unless the copyright law is modified, the playing field for parties negotiating licenses is out of balance. Libraries and educators will find they have less leverage to negotiate fair terms for digital use within their communities.
- The transaction costs associated with clearances and licensing requirements threatens to perpetuate or exacerbate the traditional disparities between "have" and "have-not" communities that distance education and the Internet could otherwise help to mitigate.

Even if the Copyright Office study proposes favorable changes in law – and that result is not

certain at all – it will be a very difficult road to achieving reform. It is always easier to defeat legislation than pass it. But if the library and educational communities are unified in their desire to update copyright law exemptions so that online education is treated on a par with classroom learning, then there is a chance that reform can be accomplished in the near future.² With congressional and presidential elections coming in the next year, education will be a very important electoral issue and distance education should be a central topic in all races.

Library Exemption Update for Preservation

The DMCA provides the most significant updating of library and archival preservation rules since procedures to cope with photocopy machines were established in 1976. The changes permit preservation and storage of a copyrighted work in a digitized format and describe a mechanism for handling preservation of works originating in outmoded formats.

The updating of Section 108 to enable libraries to work in digital preservation was surprisingly hard fought. Even with the endorsement of the authors of the White Paper³, it required extensive negotiations in the House and Senate. The content community is very nervous about allowing digital copies of works to exist anywhere without explicit authorization. In the end, this update is a modest, yet important, change for libraries that will make their task of maintaining collections easier in a technologically advanced environment.

Copyright Term Extension Act and the Library Limitation

Moving in tandem to the DMCA legislation was another copyright reform bill – term extension. For the past three years, there was a drumbeat by certain copyright proprietors, especially those owning movies and musical works, for extension of the copyright term. Since many European nations had added 20 years to their standard term of protection, U.S. author interests pressed for an equal amount of additional time to prevent loss of rights by American copyright interests in foreign markets. They also argued it would be a good incentive for future creativity and the balance of trade if more works qualified for more years of protection.

Although the legislation had strong support, it was held hostage to a debate over the demand of certain groups – notably restaurants, bars, and religious broadcasters – to be entitled to relief from the high charges for use of music on their premises and in their broadcasts. In the closing days of the session, agreement on these pesky issues was finally accomplished and the legislation was adopted and signed by the President (PL-105-298). The new law automatically extends the copyright term for all protected works to life of the author plus 70 years, and 95 years for works made for hire. The first works to be affected by term extension are those whose terms of protection would have expired on December 31, 1998.

For the library community, concern about extension of the copyright term was expressed early in the debate. It was posited that the overwhelming majority of works are neither commercially exploited nor readily accessible in the marketplace after several decades, much less 75 years (or 70 years after an author's death). Yet, for researchers and scholars, access to such works from the library's collection are important and no limitation should be made on such noncommercial uses. Moreover, with regard to already-existing works, no "extra incentive" is needed to spur creativity.

In an effort to resolve the concerns expressed by library interests, an understanding was reached regarding the ability of nonprofit libraries, archives, and educational institutions to exploit older works during what constitutes the extended copyright term. Suggesting that libraries should be able to exploit works that have lain fallow for decades should not strike one as an explosive proposal. Yet, the content community aggressively fought this notion to the very end, receding only as the legislation was poised to succeed or fail for another congressional session.

The Copyright Office, through the vehicle of regulations, will help determine the reach of the new exception that permits libraries to continue to freely use old works in the last 20 years of the extended term, just like public domain works. This is a vital concern for the library and education community, because maintenance of the public domain assures the role of libraries as archivists of history, not licensees of commerce.⁴

Participation in the regulatory process that will define the terms and establish rules is a relatively efficient way to get one's key points across. Just as was noted with regard to the anti-circumvention rulemaking and the distance education study, active participation in these administrative proceedings assures that the library and education community's voice will be heard at the opportune time and its views not ignored. Once the procedures are in place, libraries will be able to turn regularly to the Copyright Office website dedicated to enforcement of this new limitation and learn what works fit within the definition of "normal commercial exploitation."

Even as the ink was drying on the newly enacted law, a lawsuit was being initiated to challenge the constitutionality of the Copyright Term Extension Act. A publisher that re-circulates public domain works has filed suit in Boston to declare the Act in violation of the "limited term" provision of the Copyright Clause of the U.S. Constitution, Article 1, Section 8. Since test case litigation requires several years to complete, nothing will happen overnight, but this is a case to watch.

Database – The Other Shoe

When the House of Representatives passed its version of the DMCA, the bill included Title V, The Collections of Information Antipiracy Act. This provision was the number one legislative priority of some major online publishers of data and governmental works, because their databases have been vulnerable to copying without compensation. The key legal problem identified by proponents is that under U.S. copyright law, as interpreted by the U.S. Supreme Court, "facts" (such as names, addresses, phone numbers, weather conditions, stock quotes, and the like) and "works of the federal government" (including court opinions and government reports) cannot be copyrighted. With the increasing availability of this information online, the concern has developed that publishers will be unlikely to continue to invest in assembling and maintaining information if electronic copiers can snatch the data and republish it without compensation as soon as it is released.

Without trying to sound like Chicken Little, it is nevertheless necessary to point out that the dramatic proposal to establish database protection for collections of information unprotected

by copyright law could have a devastating impact on what librarians and researchers think of as "the public domain." A database bill such as the one proposed in 1998 would effectively create a new body of material comprised of facts, data, and government works that could not be reproduced without consent. Such legislation, coupled with a new licensing regime, would have broad implications for digital communications and scholarship.

Although the database bill was deleted from the final version of the DMCA, it is fair to say its progress was only impeded. A new version of the bill has already been introduced in the 106th Congress.⁵

Recognizing that the House of Representatives adopted the measure twice, there is an urgent necessity to maintain effective political alliances that speak to the value of free access to facts, data, and government works for the purpose of education, scholarship, research, or teaching. Although legislators heard and agreed with many of the library and research community's arguments, have no illusion: database is the number one priority of publishing magnates such as Reed Elsevier and West Publishing. They have made major strides in convincing Congress that protection of their investment in building and maintaining databases from theft is sound public policy.

This bill is at the very top of the agenda of the House Subcommittee on Courts and Intellectual Property in 1999. Maintaining a strong library and education community presence on this issue is vital lest databases of facts, information, and government works become the next body of material removed from the public domain.

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Note: This article is excerpted from *Primer on the Digital Millennium*, a report prepared by Arnold P. Lutzker, an attorney and specialist in intellectual property and new technology who is a consultant to ARL and other library groups. The *Primer* includes the history of the digital discussions and describes more of the details of the key issues and important statutory provisions only touched upon in this article. The *Primer on the Digital Millennium* is available in its complete form on the ARL website <http://www.arl.org/info/frn/copy/primer.html>. It is also included in ARL's new publication *Embracing Ambiguity: An ARL Copyright Briefing Notebook for 1999* (ISBN 0-918006-46-5. Price: \$40; \$30 for ARL Member Libraries). To order the notebook, email ARL at [pubs@arl.org](mailto:pubs@arl.org), or contact the new ARL Distribution Center: P.O. Box 531, Annapolis Junction, MD 20701-0531; Phone: (301) 362-8196; Fax: (301) 206-9789.

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## Endnotes

<sup>1</sup>Clearly, the collection of data regarding the experience of individual librarians and institutions with the use of protection technologies by copyright owners will be a critical building block of any successful waiver request. The American Library Association is working closely with ARL and other national library associations and many others in the public sector

to devise and publicize a system of collecting and analyzing such information on an ongoing basis.

<sup>2</sup>The Copyright Office has conducted hearings on how to promote distance education via digital technologies and whether a change in statute is needed to accomplish this goal. The hearings were in Washington, D.C.; Chicago, Ill.; and in Los Angeles, Calif. James Neal, Dean of University Libraries, Johns Hopkins University, testified on behalf of members of the Shared Legal Capability: ARL, AALL, ALA, MLA, and SLA. Laura Gasaway, Director, Law Library, University of North Carolina Chapel Hill, testified on behalf of AAU, NASULGC, and ACE. The statements are available on the ARL website <http://www.arl.org/info/frn/copy/dmca.html>.

The proprietary community was well represented at the Washington hearing and testified that changes to the current statute are not needed. In addition, these witnesses echoed the theme that licensing agreements are sufficient and are working very well. Many in the library and education communities testified that licensing agreements were problematic and thwarting many distance education initiatives. ARL reply comments to the Copyright Office will be posted to the ARL website noted above.

<sup>3</sup>White House Information Infrastructure Task Force (IITF) Working Group on Intellectual Property Rights. *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights*. Sept. 1995. <http://www.uspto.gov/web/offices/com/doc/ipnii/>.

<sup>4</sup>On December 21, 1998, the U.S. Copyright Office adopted interim regulations (effective January 1, 1999) to deal with the library and archive exception to the 20-year extension of the term of copyright. The exception provides for use of a work if: (a) it is not subject to "normal commercial exploitation," *and* (b) it cannot be obtained at a "reasonable price," *unless* the owner has filed a notice with the Copyright Office to the effect that the work is subject to "normal commercial exploitation" and can be had at a "reasonable price."

The Copyright Office-sought comments on the interim regulations and the response of the library community--especially addressing the meaning of the phrase "normal commercial exploitation"--are available on the ARL website <http://www.arl.org/info/frn/copy/comments.html>. The Copyright Office will issue final regulations after a review of all the comments.

<sup>5</sup>On January 19, Rep. Coble, (Chair, Subcommittee on Courts and Intellectual Property, and R-NC) introduced H.R. 354, the "Collections of Information Antipiracy Act," legislation that seeks to provide additional protections to collections of information and databases. There are few substantive changes from the extremely controversial bill considered last year. Also on January 19, Sen. Hatch (Chair, Senate Committee on the Judiciary, and R-UT) placed a statement in the Congressional Record which included H.R. 354 and two other proposals for database legislation. Calling for additional protections for databases, Sen. Hatch stressed the need to balance selected interests of the information industries seeking additional protections

and those of users of information and databases. The two other proposals include an alternative draft bill supported by the library, education, research, and scientific sectors and many in commercial database and telecommunication industries. The second proposal includes provisions discussed at the close of the legislative session during negotiations sponsored by Sen. Hatch. Sen. Hatch's full statement is available via the ARL website <http://www.arl.org/info/frn/copy/hatchdb.html>.

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