

October 1998 Membership Meeting Confronting the Challenges of the Digital Era

The Digital Millennium: What Does It All Mean?

Arnold P. Lutzker, Esq.
Lutzker and Lutzker

Thank you very much, Prue. Before I start, I really want to underscore the remarkable support and commitment which this Association, the other library associations and the library community have given, as well as the remarkable talent that is accessible, particularly when we start dealing with the complex and yet utterly important issues of copyright policies.

I want to dispel one rumor. There was no truth to the suggestion that Jessie Helms was going to read the entire Digital Millennium Copyright Act as a way of filibustering the remainder of this session.

(Laughter.)

I also want to suggest that one of the ways we can gain experience in negotiating with the content community, as they're affectionately known, is sitting across the table from the Russians and trying to negotiate to obtain jewels from the Czar.

(Laughter.)

I've titled this "The Digital Millennium: What Does It All Mean?" And to give you just a sense of what we've gone through over the past four or five years, I've composed a time line that identifies the range of issues which have come forth.

It begins with the National Information and Infrastructure concepts, and it goes through the green paper, this wonderful CONFU—which I always use as the word for confusion, but it really means Conference on Fair Use—to the white paper, to term extension, to diplomatic conferences, to actual legislation being introduced, negotiated, bargained for and ultimately, in the very last few days, passed. What I will try to do is go through the key issues which have effected the library community in this process.

First and foremost, the library community has been at the forefront of identifying fair use as a critical component in the digital millennium. And, incidentally, the Digital Millennium Copyright Act was a phrase that was coined by the chief counsel for Senator Hatch. Before that it had some other sort of jargon, a bureaucratic definitions like the WIPO

Implementation Treaty. When it got passed with this title—the Digital Millennium Copyright Act—first of all, the trademark side of my brain sort of picked up and said, that’s pretty catchy. And I think it is, and it does stand for something as we enter a new educational environment and a new legal environment.

Fair use is at the top of the list of things that we’re concerned with. We have had to deal with this in the context of reconciling fair use with new access rules, which I’ll discuss in a moment, and also with database protection. One of the things I was struck with is the hunger of people in the library community for works to fall out of copyright protection and be made available to do things with that proprietors would otherwise charge an arm and a leg.

I think it’s important as we move forward to recognize that this public domain concept has been shrinking over the years and comes up in copyright term extension. It also comes in significant ways in database legislation. Preservation of library materials was also an important issue which we were able to throw into the mix. It wasn’t on their agenda, but we were able to throw it into the mix and actually accomplish something.

Online service provider liability is another one of these jargon phrases that gets condensed as the acronym OSP, and it is a very significant area of new communication activity. The new OSP rules that are in place are quite complex and are going to be a critical focus in the coming years. The area of distance learning was also one that we were able to throw on the table as an additional bargaining element. Our posture was, if Congress is going to take many actions in revising copyright law, we want to make sure that distance learning is part of their focus.

Turning to what emerged as the legislative highlights of the Digital Millennium Copyright Act (DMCA), this Act incorporated lots and lots of stuff into it and became a little bit of a copyright Christmas tree in the middle of the Summer. It creates a new right to control access based upon technological protection measures. That’s jargon for encryption, pass codes and things that block you unless you’ve in a sense ‘paid your way.’

It also creates an alternative to copyright protection in that access to a work precedes the use of a work and it is use that is covered by copyright. It also establishes a prohibition on the manufacture and sale of devices which affect or which can defeat these technological protection measures, and that’s an important additional concept. Copyright management information is going to be a renewal of communicating data about who owns, and who is involved with, the copyrighted works in a digital format.

Online service provider liability limitation has been established. It sets ground rules under which service providers can, in fact, escape potential liability when they’re involved in transmitting perhaps innocently copyrighted information that the transmitter doesn’t have or that the site doesn’t have to post. There is going to be a study in connection with distance learning and expanding this in relation to the Internet.

There has been an update of the library preservation rules in Section 108. A database title was added by the House but stripped by the Senate. We want to stay watchful, however, because Congress is in session for still a few more days on budget matters. And there are people that are trying to maneuver and trying to attach database legislation to anything, so this remains an issue.

There are also additional amendments dealing with preparing U.S. copyright law for adoption for WIPO Treaties. At the same time they passed the Digital Millennium Copyright Act, Congress also finally adopted copyright term extension that extends for 20 years the term of protection beyond the current terms. So it will now be a period of 95 years or the life of the author plus 70 years.

In the term extension legislation we were able to secure a special exception for libraries which I will explain. I should mention that music licensing was really the pivotal issue that held up passage of this bill for many years. And when I first talked to the libraries, copyright term extension was a loaded freight train that already left the station, and it still took three or four years to get the thing passed. And music licensing was really at the center of that issue.

More specifically, what does all this mean for most of us? As I said, the Digital Millennium Copyright Act has several key elements. One, it establishes a prohibition on accessing works that are protected by these technological protection measures and prohibits the sale of products which defeat these in certain commercial contexts.

One of the things that we strove for during the course of this negotiation and debate was trying to introduce the concept of fair use to access, fair use as a copyright principle. We had what I considered to be a partial victory. In a regulatory process, which we didn't quite ask for in this fashion, the access rules are going to be postponed, in effect, for two years.

During that period, the Librarian of Congress is going to do a study, together with some folks in the Commerce Department, in terms of the impact of these rules on library preservation, on access to works, and the ability of people to make fair use of these works in the marketplace. These studies will be undertaken initially in the first two years and then thereafter every three years there will be studies made with respect to these particular rules.

We consider this really a partial victory, because it does establish a principle. It does get fair use into the mix. It doesn't assure fair use in any context, and therefore, it's going to require some vigilance on the part of those in the community to enforce the opportunity and the rights that you've now been given by this statutory provision.

Another aspect of the technological protection measures, specifically the anti-circumvention rules, is a prohibition on selling devices that are primarily designed to defeat these TPM's, as I'll call them. This concept does some violence to the Supreme Court Decision in the Sony BetaMax case which essentially said that if the technology of a VCR has non-infringing uses—in other words, you make a fair use of it to record a program for later viewing—the fact that it does record programming shouldn't disqualify it.

There was an attempt to argue that same principle into this new law dealing with access. It was not successful, and therefore the standard is somewhat stronger than what came out of the Sony case. But, essentially, if technology has a primary purpose of defeating technology to breaking through barriers of encryption, it can be banned. And those that market it can be subject to severe penalties.

Here I have reference to those penalties. They include, in connection with access violations, minimum damages of \$200–\$2500. These penalties follow a copyright principle of minimum damages even if they can't prove actual damages. In the case of copyright management information, which consists of details of information that will be embedded into digital

works, violations of changing or altering that information can run as much as \$25,000 per violation.

There are also criminal penalties with respect to this, substantial criminal penalties, including fines of up to a million dollars and imprisonment for years and years. There's a sense of overkill with respect to this, but I'll leave you to judge the ultimate outcome with respect to that.

Online service provider liability was one of the most complicated, difficult, contentious principles that was negotiated. It took over two years. In some cases, there were sessions stretching over periods of months to try to hammer out both the concepts—getting people to understand what they were talking about took about three months to begin with—then figuring out what rules should apply took another three or four months.

But, essentially, the effect is to say that libraries and educational institutions, universities, high school and others are, in fact, service providers when you create opportunities for students or faculty or yourself to use the Internet.

And the rules are now set in place, very complicated rules. Let's say you were involved as a service provider in the process of getting a Disney movie that's on a site in Holland delivered to a student who's taking a film course in Connecticut and he downloads it, and then he can show it to all his friends.

That process implicates you as the middle man. However, the service provider is exempt from liability if certain very complicated rules are followed. Fortunately, from my point of view, you'll need a lawyer to figure all this stuff out.

(Laughter.)

Distance education is such a hot button issue that we couldn't get anywhere in terms of hammering it out. But we had Senator Hatch and Senator Leahy standing over us and saying, "Look, we'll study this. It's very complicated."

So we're going to study it. Congress is allowing six months from the date of enactment to the point at which a study has to be completed and presented to them. Then, they said, they'll take action. Now, I'll believe it when I see it. I believe the report will be done. I mean, the Copyright Office is pretty diligent about doing what Congress tells it to do. They may ask for more time at some point, but it's going to be done.

It's going to happen pretty fast, and you have to be thinking about this, about what distance education mean, particularly the relationship of the Internet to content. And again, you'll need a lawyer to figure out all the rules that they're suggesting in there.

Library exemption was an additional focus. Bob Oakley was a primary spokesman for the library community area and deserves kudos galore. He really helped identify and focus on the issues where we were successful. Believe it or not, we were successful in getting them to change 108. If you ever read the old 108, it would prohibit making digital copies. We can now make digital copies, welcome to the 1990's, the digital millennium. There are limitations on what you can do. You can make up to three copies. You can have the digital version.

You've got to keep control of digital versions, because digital versions are the bane of the

copyright content community. They feel that since you can make perfect copies, we're all sort of in a conspiracy to go out and copy things without ever accounting for it. And Prue has been one of the leaders in communicating how much money people in this room spend on content.

That's one of the points we make. In the library community, we're not out there to take stuff. We want to take what we're allowed to take and pay for what we have to pay for.

Copyright term extension, I'll just mention briefly that it's 20 extra years. We argued and were sort of successful in getting the principle that if stuff sits on the shelves for 75 years and no one's looked at in 74 of those last 75 years, there should be some way of making reasonable access use to that. And we have a limited exception that will allow for treating stuff in the last 20 years of the copyright term, for some material it will be sort of like public domain material.

However, if it's commercially available, then it may not be similar to public domain. What normal commercial exploitation means is going to be the pivotal issue as we try to interpret that particular provision. Our friends in the content community say, "oh, for sure, we're never going to sue any libraries. So don't worry about that. We'll work this out."

(Laughter.)

The bill that was not passed is probably one of the most significant pieces of legislation that almost slipped through in the last generation. Database protection legislation would essentially have overturned the Supreme Court Decision in the Feist Case, which says that facts are not owned by anybody.

Anybody can use facts, and the content community created a concept that is essentially not a copyright concept, but it's a non-copyright concept. Copyright protects creativity. The ingenuity that one uses and the system that we have is an economic system to encourage creativity by having people buy works or pay for works that are created. In database legislation, they're saying we're not creating anything. Of course, it's facts. It's government works in some cases. What we're doing is making an investment, and it's that investment that needs to be protected. And if you steal our investment by taking bits of data, you are violating our database rights. And that's what the essence of the fight is about, and along that line there are enormously important issues, including whether or not the investment ever stops if they maintain digital databases.

And there is an argument that a database under copyright, which has a limited term, might exist in perpetuity. If you're constantly refreshing and maintaining a database, does that qualify you for continued protection? And the answer, I think in their view, would be yes.

What does all this mean? With the anti-circumvention rules in terms of these technological protection measures, clearly what's going to happen is that you're going to find more copyrighted works will come in encryption form.

The entitlement for libraries and others in the educational community to provide these works to people that don't have access codes, pass codes, or have abilities to crack through the encryption system is going to be compromised. And the flip side of that is the stuff is going to cost more. And that was the essence. When you get digital, you're going to find that prices and negotiations dealing with the pricing is going to increase.

Now, one of the things that was thrown out at the library communities and the university communities was that you now have these consortiums that are powerful buying mechanisms. And they may be. I don't personally deal with that, but I think it sounded to me like a good thing. Whatever you're doing, the consortiums seem to be a real point of concern, because you can obtain things in group buying that you can't otherwise obtain.

Now, there may be other considerations that come into play and other legal considerations that need to be addressed, but clearly, the consortium concept is important. Now, when you engage in contract negotiations, among the things that you may want to think about is—particularly when you're dealing with digital works—how can I get a hard copy of something? Because if you've got the hard copy, then you've, in a sense, by-passed these new access rules, and you're in the more "familiar terrain" of copyright.

Copyright may be confusing enough as it is, but when you throw access into the mix, it really gets confusing. Obtaining hard copies is going to be something you need to bargain for. You may find it on the table more frequently in the future. If you have the digital copy, you may find it's almost impossible to access it without the technology, and the technology is separately banned if its purpose is to defeat the measures that stop you from getting access.

It becomes a vicious circle. You're going to find that even if you have some theoretical right of access to it, you may not have the technology to actually access it. And as a result, the equipment and even software that breaks through these codes will become contraband under the concept that was articulated in this bill.

The Librarian of Congress is going to be studying the introduction of the new access rules. We were not successful in delaying the ban on the technology. In other words—the original proposal was that, as of today, it would have been illegal to access works that are protected by technological protection measures, in effect, without permission. It would have been illegal, and you would have been subject to fines.

There was a very limited exception for libraries in the bill that would allow you to browse to see whether you wanted to buy. But that would have been the only thing you could have done. We got that rule stayed for two years. During this period, the Librarian of Congress is going to study this area. I think it's going to be critical that the library community participates actively in this study. You have to make a record.

You have to voice your concerns about the impact of what these technology controls do to the ability to access and use works the way you feel you need to use them. And you need to share your concerns with the community and then make your voice heard. There are uncertain elements in the way this proposal was crafted. And, frankly, we didn't ask for this proposal. We asked for something simple, just drop the proposal, drop this access limitation entirely.

And we weren't successful in doing that, but this regulatory procedure will try to figure out if there are particular classes of works, types of works that deserve greater access by libraries and non-profit educational institutions. We would need to establish some concept of adverse affect, and we need to know what is the significance of the availability of works only on a paid basis. One of the arguments we were making is that we were heading into a pay per use information universe. And that struck a responsive chord with politicians, but now we've got to follow through and try to communicate exactly what our concern is.

Turning to the issue of OSP liability or the limitation on liability, I think this really was an important resolution, narrow as it is, for people in the library and educational communities. The rules, I assure you, are incredibly complex. And they will require careful monitoring if you want to take advantage of it. The compromises were brought about literally with staff and members of Congress sitting in the room with negotiators.

It was a long drawn out process, but it will serve as a model in some cases for resolving future concerns. I'll make a prediction based upon having sat in these negotiations for umpteen months. This remains a very hot button issue, and there will be a major test case in this area in the near term once the rules are in place. And if people have not complied 100 percent, there will be litigation.

The distance education study, which is different from the access study, is going to be, as I said, a six-month study. It's really going to be the battleground for the relationship between learning and the Internet. And throughout these discussions and negotiations, the content community has been urgent in trying to keep any exceptions—with respect to digital work—very narrowly drawn.

And the content community is going to be right on top of this, you can bet. They're probably already working on it. A report, as I said, is due in six months, and has received commitments from senior Senators that say they will act on this. So we may get something out of this, but only if we are truly active in it. The library exceptions were very hard for it, surprisingly so. It struck me "why are you fighting so hard about this stuff?" But when you deal with copyright, sometimes you deal with the metaphysics and religion of copyright.

(Laughter.)

I don't want to be a preacher about this, but there really is this sense that just because I have a copyright, I've got it, it's mine and I should exploit it. It's independent of the work. The notion they are fighting so hard for is the availability of the work for licensing—even if they don't have the work. I've told these people, you don't have it. It's in a library. Nobody has looked at it for 65 years. No one knows what it says. The people who wrote it are dead. The companies are out of business. They said, it's available for licensing.

(Laughter.)

That's the mentality that you're fighting with. So with copyright term extension and similarly with the library updates, we have this sort of religiousness that inculcates the dynamics.

I want to turn, yet again, to database protection legislation. It hasn't gone away. And assuming that we're successful in closing down this session with it not happening, there is a commitment, as there was a commitment with distance education, there is a commitment by Members of Congress to move this thing along.

This is the number one priority of Reed-Elsevier and Thompson & Thompson, actually of anybody that's got a major digital presence. They want it. They want it. They want it. And if they get what they want it will be the bill that they had passed by the House of Representatives twice. They sat down with us, and they said, hey, it passed the House twice. What do we have to talk about with you?

This bill had no concept of fair use. We were successful in working with staff and getting things modified on a basis that, if it was going to pass, how do you reduce the damage? The reality is it was stopped.

I don't know where it's going to start again, but I promise you it's going to start. It's going to be a drum-beat, and there needs to be a constant attention to this. And again, I can't emphasize from my personal perspective the credit I would give to Prue Adler, Carol Henderson, Peter Jaszi, and Laurel Jamtgaard. These are people who have worked on a daily basis dealing with this. They are remarkable in their ability to communicate and in the intensity of communicating the concerns.

But it was also clear that lots of Members of Congress think this is a very good idea. And they're going to be pushing to have this thing adopted in some fashion. So you've got to look at it, understand it, and then fashion the next phase of the response.

MR. HEATH: Thank you, Arnie, for advancing our understanding of what has been enacted and what lies ahead for us. We understand now that the struggle continues, and we must be ever vigilant. Before we turn the remainder of our time over to Arnie for questions, I'd like to invoke the privileges of my chair and take a side trip here.

From our experiences of this legislative session and the success that I know we've enjoyed, a few words come to mind: Leadership, focus, vision, collaboration, partnership. Let me add the words of a prominent statesman from an earlier decade, and that is that "never have so many owed so much to so few."

And at the center of that dedicated cadre that Arnie described for us was Prue Adler. It was to her leadership, her focus, her vision and her collaborative skills that allowed us to attain the outcomes that benefit not only libraries but education generally and the country as a whole. And so, before we go to questions, I would like to ask Prue to come up here and receive a small token of our esteem.

(Applause.)

MS. ADLER: Thank you very, very much. It has been a long couple of years. But as I have always said to the folks in the government documents arena—which I say carry across the whole portfolio—I'm only as good as what you can give me in terms of your letters and your support. And that has truly been what made the difference. I also do want to say thank you to people like Peter Jaszi and Jim Neal who have been leading this throughout.

And Carol Henderson is here and all the other members of the library community who really, really pulled together in an extraordinary way. And I thank Duane Webster as well, because he kept allowing us to do what we did which I think made the difference. So thank you very much. I appreciate it.

(Applause.)

MR. HEATH: With that, I will turn the floor over to Arnie.

MR. LUTZKER: This is a wonderful community, and I've really felt blessed to work with you. I have really enjoyed it, and I think the comments about Prue, I echo

UNIDENTIFIED: Just a perception question. I'm dealing with a perception on my campus—and I think everywhere—that electronic must be free. I'm wondering if you've dealt with that perception in Congress and how you responded to it.

MR. LUTZKER: The content community is very adept at getting the message across that everybody in this room is a thief and a scoundrel because you're at places that espouse fair, free use of material. We've tried to suggest in a different form that roughly \$2 billion dollars has been spent by members of this community.

The price of subscriptions that were once \$1,000 a year is now \$7,000 a year. That's the type of data and information that if your advocates have at their command, they can dump on the desk. You start with the Congressional staff and then you get to the Members, and if you can reach the Members you just sort of hammer them over the head. They know you're buying stuff, but they don't appreciate that when they hear the other side say that there are people out there just stealing their stuff.

The content community, to its benefit, has grown a lot in the last number of years. I remember in the 1980's the Motion Picture Association was at the forefront of fighting the VCR. It was the devil incarnate because it was taking its movies and exploiting them. Today the sale of video (because of the VCR) accounts for three times the amount of money they make at the box office. They make \$5 billion at the box office and \$15 billion through video sales. And so, in other contexts, I appreciate how little forethought many in the content community have. Even though it's their stuff, they don't necessarily know how best to market it.

UNIDENTIFIED: It's been said that the database bill might be unconstitutional. You don't hear the anti-gun control people saying that gun control might be unconstitutional. They say it's unconstitutional. We might also add another piece of rhetoric here, it's un-North American.

(Laughter.)

UNIDENTIFIED: I'm wondering why we aren't saying more about the fundamental constitutional problems with database and enlarging the rhetoric on this bill?

MR. LUTZKER: Well, I think we have said it in context. There were so many bills and elements of bills that were dumped together in the Spring, database was thrown out as a concept, and I don't think many people gave a whole lot of thought that it was actually going to happen, zeroing in on database.

What happened was that certain people in the content community took the opportunity of the WIPO bill to attach it as their priority. Along with trying to develop fair use concepts on access, library exceptions, and this and that, then you're also dealing with database. I think you're right. I think database has enormous constitutional issues.

Even though some of those were addressed by alternatives that have been put forth, that can be one of the real spotlight elements hopefully in the next session. And we welcome input on that. Anybody that wants to do a constitutional analysis, send it our way.

UNIDENTIFIED: When you say that House members are so enthusiastic about database, what is it about this that appeals to them? What are the pressure points that we can address?

MR. LUTZKER: Well, some of this starts from the districts and Members who are in critical control. Members of the Copyright Judiciary Committee have people in their own community who really support this. Reed-Elsevier in the New England area is an example. We have learned of publishers in North Carolina that got to Howard Coble, and it's a matter of if they've got somebody in the district that really wants it, that helps.

So you guys are in everybody's district. It's a matter of using that sort of connection. I think the attractive element of database is essentially the notion that you're tying it to investment, rewarding that investment and stopping what's called misappropriations, stealing of stuff. As a practical matter, some of these concepts get to be a little difficult to distinguish.

In other words, if you've got a collection of facts that are linked together, scientific information that's put together at great expense, and anyone can lift anything they want out of that, on the one hand, it's science and the copyright rules would say anybody can take that.

However, they're trying to say we've made that investment, and we should be supporting American business and American intellectual property which sputters throughout the world that makes money for American society. That's attractive as a political argument to members of Congress. And the response can't simply be, oh, it's fair use to use it. You have to develop a range of responses, which we have, and you have to develop alternatives.

But it is complicated, and you have to let Members know. And I think, as we've pointed out, letters are really important. And I want to mention two other quick things in this context as well. We found, number one, that even though these issues have traditionally originated with the Judiciary Committee in the House and Senate, the Commerce Committee played a pivotal role, and I think will continue to play a pivotal role in this area.

So knowing and expanding the legislative base is quite important. Also, and this is to the credit of Peter Jaszi and the work that he did in organizing the Digital Futures Coalition and then reaching out where the library communities became allies, if you will, with a group that was called the Commercial Skeptics, people in Commerce who were worried about database. Dun and Bradstreet, MCI, and others say: We use databases, too, to do things. Where's the balance here?

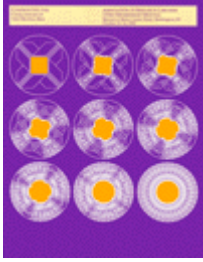
Creating new alliances, being open to them, and being creative about them bring you additional strengths that other people have. That was a pivotal lesson that was part of the database work.

(Applause.)

| [October '98 Table of Contents](#) | [ARL Proceedings](#) | [ARL Publications](#) |



[ARL Home](#)



October 1998 Membership Meeting
Confronting the Challenges
of the Digital Era

The Digital Millennium: What Does It All Mean?

Arnold P. Lutzker, Esq.
Lutzker & Lutzker LLP

DIGITAL TIMELINE: WHERE WE'VE COME FROM

- 1993 INFORMATION INFRASTRUCTURE TASK FORCE
- NATIONAL INFORMATION INFRASTRUCTURE (NII):
AGENDA FOR ACTION
- 1994 NII "GREEN PAPER"
- HEARINGS BEFORE COMMERCE DEPARTMENT
CONFU - CONFERENCE ON FAIR USE BEGINS
- 1995 NII "WHITE PAPER"
- CONGRESSIONAL HEARINGS BEGIN
COPYRIGHT TERM EXTENSION NEGOTIATIONS
- 1996 DIPLOMATIC CONFERENCE
- WIPO COPYRIGHT TREATY ADOPTED
SUI GENERIS DATABASE TREATY SCRAPPED
- 1997 LEGISLATIVE INITIATIVES INTRODUCED
-
• PROHIBITION ON CIRCUMVENTION OF TECHNOLOGICAL PROTECTION
MEASURES (TPMs)
• COPYRIGHT MANAGEMENT INFORMATION
• DATABASE PROTECTION
- ON-LINE SERVICE PROVIDER LIABILITY NEGOTIATIONS
SECTION 108 LIBRARY EXEMPTION AMENDMENTS
- 1998 NEGOTIATIONS RESPECTING
-
• LIBRARY EXEMPTION
• ANTI-CIRCUMVENTION OF TPMs
• DATABASE
• COPYRIGHT TERM

CONFU ENDS WITHOUT ADOPTION OF GUIDELINES
FINAL CONGRESSIONAL APPROVAL OF

- COPYRIGHT TERM EXTENSION
- DIGITAL MILLENNIUM COPYRIGHT ACT

WITHDRAWAL OF COLLECTIONS OF INFORMATION ANTIPIRACY ACT
(DATABASE BILL)

KEY ISSUES FOR THE LIBRARY COMMUNITY

- FAIR USE IN THE DIGITAL MILLENNIUM
 - RECONCILING FAIR USE WITH ACCESS PROHIBITIONS
 - DATABASE PROTECTION
 - MAINTENANCE OF PUBLIC DOMAIN
 - COPYRIGHT TERM EXTENSION
 - DATABASE PROTECTION
 - LIBRARY PRESERVATION UPDATE
 - ON-LINE SERVICE PROVIDER EXEMPTION
 - DISTANCE LEARNING
-

LEGISLATIVE HIGHLIGHTS

DIGITAL MILLENNIUM COPYRIGHT ACT

HIGHLIGHT OVERVIEW

- NEW RIGHT TO CONTROL ACCESS BASED TECHNOLOGICAL PROTECTION MEASURES (TPMs)
- PROHIBITION ON MANUFACTURE AND SALE OF DEVICES WHICH DEFEAT TPMs
- COPYRIGHT MANAGEMENT INFORMATION (CMI)
- ONLINE SERVICE PROVIDER LIMITATION ON LIABILITY
- STUDY ON UPDATING SECTION 110(2) DISTANCE EDUCATION FOR THE DIGITAL FUTURE

- UPDATE OF SECTION 108 LIBRARY REPRODUCTION RULES
 - DATABASE TITLE STRIPPED FROM FINAL VERSION
 - OTHER AMENDMENTS PREPARE U.S. COPYRIGHT LAW FOR ADOPTION OF WIPO TREATIES
-

COPYRIGHT TERM EXTENSION ACT

HIGHLIGHT OVERVIEW

- TWENTY YEAR EXTENSION
 - LIBRARY EXCEPTION
 - MUSIC LICENSING - RESOLUTION OF BITTER DEBATE BETWEEN PERFORMING RIGHTS SOCIETIES AND RESTAURANTS AND SMALL BUSINESSES WHICH TIED UP LEGISLATION FOR YEARS
-

DIGITAL MILLENNIUM COPYRIGHT ACT

KEY ELEMENTS

- I. PROHIBITIONS ON ACCESSING WORKS PROTECTED BY TPMs AND ON SELLING DEVICES WHICH CIRCUMVENT PROTECTION MEASURES
 - A. ACCESS PROHIBITION VS. FAIR USE: FAIR USE WINS LIMITED VICTORY!
 - PROHIBITION STAYED FOR TWO YEARS
 - SUBJECT TO ON THE RECORD RULEMAKING BY LIBRARIAN OF CONGRESS REGARDING "ADVERSE AFFECTS" ON ABILITY TO MAKE NON-INFRINGEMENT USES OF WORKS
 - FOLLOW-UP RULEMAKING PROCEEDINGS EVERY THREE YEARS
 - B. PROHIBITION ON MANUFACTURE, IMPORT, SALE OF TECHNOLOGY, PRODUCT, SERVICE, COMPONENT OR DEVICE THAT
 - IS PRIMARILY DESIGNED OR PRODUCED FOR PURPOSE OF CIRCUMVENTING TPM
 - HAS LIMITED COMMERCIAL SIGNIFICANT PURPOSE OR USE OTHER THAN CIRCUMVENTION
 - IS MARKETED FOR CIRCUMVENTION USE

THIS IS A SLAP AT U.S. SUPREME COURT *SONY BETAMAX* CASE WHICH

HELD DEVICES (VCRs) WHICH HAVE "SUBSTANTIAL NON-INFRINGEMENT USES" ARE NOT ILLEGAL

C. LIMITED LIBRARY "BROWSING" EXCEPTION

- NONPROFIT LIBRARY, ARCHIVE OR EDUCATIONAL INSTITUTION CAN CIRCUMVENT TO GAIN ACCESS SOLELY TO MAKE GOOD FAITH DETERMINATION TO ACQUIRE THE WORK
- CANNOT RETAIN WORK LONGER THAN NEED TO MAKE THIS DETERMINATION
- CANNOT ACCESS FOR ANY OTHER PURPOSE
- PENALTIES FOR VIOLATION

II. COPYRIGHT MANAGEMENT INFORMATION (CMI)

A. PROHIBITION ON

- PROVIDING FALSE CMI
- ALTERING OR REMOVING CMI

B. PENALTIES CIVIL AND CRIMINAL INCLUDING ATTORNEY FEES AND STATUTORY DAMAGES

- ACCESS VIOLATIONS - \$200 - \$2,500 PER VIOLATION
- CMI VIOLATIONS - \$2,500 - \$25,000 PER VIOLATION
 - NONPROFIT LIBRARY, ARCHIVES OR EDUCATIONAL INSTITUTION: COURT MAY REMIT IF VIOLATOR WAS NOT AWARE AND HAD NO REASON TO BELIEVE THAT ITS ACTS CONSTITUTED AN INFRINGEMENT
- FINES - UP TO \$500,000 AND IMPRISONED FOR 5 YEARS FOR FIRST VIOLATION AND \$1 MILLION AND 10 YEARS (REPEAT OFFENSES)
 - NONPROFIT LIBRARY, ARCHIVES AND EDUCATIONAL INSTITUTION - NO CRIMINAL EXPOSURE

ONLINE SERVICE PROVIDER LIMITATION ON LIABILITY

RULES PERMIT -

- INTERMEDIATE AND TRANSIENT STORAGE
- SYSTEM CACHING
- INFORMATION RESIDING ON SYSTEM SERVERS

PROVIDED THAT COMPLEX CONDITIONS MET, INCLUDING

- THIRD PARTY IS SOURCE
- NO ADVANCE KNOWLEDGE OF INFRINGING ACTIVITY
- COMPLIANCE WITH "NOTICE AND TAKE DOWN SYSTEM"
- COMPLIANCE WITH "NOTICE AND PUT BACK"

SPECIAL RULES COVERING EDUCATIONAL INSTITUTIONS BEING ABLE TO "DISOWN"
ACTS OF FACULTY AND STUDENTS

DISTANCE EDUCATION

COPYRIGHT OFFICE TO STUDY DIGITAL UPDATING OF SECTION 110 OF COPYRIGHT
ACT

PARTICIPANTS: COPYRIGHT OWNERS, NONPROFIT EDUCATIONAL INSTITUTIONS
AND NONPROFIT LIBRARIES AND ARCHIVES

REPORT: HOW TO PROMOTE DISTANCE EDUCATION THROUGH DIGITAL
TECHNOLOGIES, INCLUDING INTERACTIVE DIGITAL NETWORKS

ASSESS BALANCE - RIGHTS OF OWNERS AND NEEDS OF USERS

FACTORS TO BE CONSIDERED INCLUDE:

1. NEED FOR AN EXEMPTION FOR DISTANCE EDUCATION THROUGH DISTANCE
NETWORKS
2. APPROPRIATE QUANTITATIVE LIMITATIONS ON PORTIONS OF WORKS THAT
MAY BE USED UNDER DISTANCE EDUCATION EXEMPTION
3. WHO IS ELIGIBLE TO ACCESS MATERIAL ONLINE
4. WHETHER AND WHAT TYPES OF TECHNOLOGICAL MEASURES CAN OR
SHOULD BE EMPLOYED TO STOP UNAUTHORIZED ACCESS
5. EXTENT TO WHICH AVAILABILITY OF LICENSES FOR USE OF COPYRIGHTED
WORKS SHOULD BE CONSIDERED

SECTION 108 LIBRARY EXEMPTION UPDATE

LIMITATION IN SECTIONS 108(b) AND (c) MODIFIED

- UP TO THREE COPIES CAN BE MADE
- "FACSIMILE ONLY" LIMITATION ELIMINATED
- REQUIREMENT OF COPYRIGHT NOTICE APPLIES ONLY IF ON ORIGINAL

- FOR UNPUBLISHED WORKS, MAINTAIN DIGITAL COPY ON PREMISES
 - FOR PUBLISHED WORKS
 - COPYING ADDITIONALLY PERMITTED IF "FORMAT" BECOMES OBSOLETE
 - DIGITAL COPY NOT AVAILABLE IN DIGITAL FORMAT TO PUBLIC OUTSIDE PREMISES OF LIBRARY OR ARCHIVE IN LAWFUL POSSESSION OF THE COPY
-

HIGHLIGHTS OF COPYRIGHT TERM EXTENSION ACT

WORKS MOVING INTO PUBLIC DOMAIN WILL HAVE TWENTY MORE YEARS OF PROTECTION

EXCEPTION FOR LIBRARY OR ARCHIVES, INCLUDING A NONPROFIT EDUCATIONAL INSTITUTION:

DURING LAST TWENTY YEARS OF TERM, INSTITUTIONS MAY

- COPY, DISTRIBUTE, DISPLAY OR PERFORM WORK
- IN DIGITAL OR FACSIMILE FORM
- FOR PURPOSES OF
 - PRESERVATION
 - SCHOLARSHIP OR
 - RESEARCH

PROVIDED THAT INSTITUTION HAS DETERMINED ON BASIS OF REASONABLE INVESTIGATION THAT NONE OF FOLLOWING APPLY

- THE WORK IS NOT SUBJECT TO NORMAL COMMERCIAL EXPLOITATION AND
- A COPY OR PHONORECORD CANNOT BE OBTAINED AT A REASONABLE PRICE, OR
- THE COPYRIGHT OWNER OR AGENT PROVIDES NOTICE THROUGH COPYRIGHT OFFICE THAT THOSE CONDITIONS APPLY

THE EXEMPTION DOES NOT APPLY TO SUBSEQUENT USES BY USERS OF THE LIBRARY OR ARCHIVES

THE BILL THAT DIDN'T HAPPEN: COLLECTIONS OF INFORMATION ANTIPIRACY ACT (DATABASE PROTECTION)

AFTER PASSING THE HOUSE TWICE AND AFTER ALMOST TWO MONTHS OF NEGOTIATIONS, THIS BILL WAS PULLED IN THE FINAL DAYS OF THE SESSION

- ALTHOUGH ACTIVELY ADVANCED BY THE HOUSE JUDICIARY COMMITTEE, THE SENATE CONFEREES PREVAILED IN DROPPING TITLE, SUBJECT TO A

PROMISE TO TAKE THE MATTER UP EARLY IN NEXT SESSION OF CONGRESS

- THIS BILL WAS THE #1 LEGISLATIVE PRIORITY OF ONLINE PUBLISHERS (REED-ELSEVIER AND THOMSON & THOMSON)

KEY ELEMENTS OF DATABASE PROPOSAL

1. INVESTMENT IN ORGANIZING, ASSEMBLING AND MAINTAINING INFORMATION PROTECTED
2. INFORMATION INCLUDES - FACTS, BITS OF DATA, GOVERNMENT WORKS
3. HARM TEST BASED ON ACTUAL OR POTENTIAL MARKET - MEASURED BY TAKING EVEN A FEW BITS OF DATA
4. TERM OF PROTECTION - POTENTIALLY PERPETUAL

OPEN ISSUES IN DATABASE BILL INCLUDE

- AFFECT ON FAIR USE, LIBRARY PRESERVATION AND OTHER EDUCATIONAL, SCIENTIFIC OR RESEARCH USES
- WHAT IS "POTENTIAL MARKET" AND HOW IS IT DETERMINED?
- DEFINITION OF HARM AND THE USE OF A FEW BITS OF DATA
- WHAT ARE ALLOWABLE "TRANSFORMATIVE" USES
- PROPER RELATIONSHIP TO COPYRIGHT LAW
 - U.S. SUPREME COURT *FEIST* CASE

WHAT'S IT ALL MEAN

1. ANTI-CIRCUMVENTION OF TECHNOLOGICAL PROTECTION MEASURES
 - MORE COPYRIGHTED WORKS WILL COME IN ENCRYPTED FORM
 - ENTITLEMENT TO PROVIDE EVEN LIMITED THIRD PARTY ACCESS IS COMPROMISED - THIS COULD HIT LIBRARIES HARD
 - PAY CAREFUL ATTENTION TO CONTRACT NEGOTIATIONS
 - IF YOU WANT A HARD COPY, WHICH COMES WITH FAMILIAR COPYRIGHT USE RIGHTS, BARGAIN FOR IT
 - IF YOU ONLY HAVE DIGITAL COPY, YOU MAY FIND FUTURE ACCESS LIMITED AND PERHAPS IMPOSSIBLE WITHOUT ADDITIONAL PAYMENTS
 - EQUIPMENT OR SOFTWARE WHICH DECODES ENCRYPTED WORKS

MAY BE CONTRABAND

2. LIBRARIAN OF CONGRESS ACCESS STUDY AND REGULATORY ACTIONS

- EXACT NATURE OF STUDY AND IMPACT UNCERTAIN
- PARTICIPATION IN EARLY PHASES - FIRST TWO YEARS IS IMPORTANT
 - NECESSARY TO MAKE A RECORD
 - VOICE CONCERNS
- PARTICIPATION IN SUBSEQUENT STUDIES MAY NEED TO BE WEIGHED
- UNCERTAIN ELEMENTS OF RULES
 - WHAT WORKS ARE COVERED ("PARTICULAR CLASSES OF WORKS")
 - HOW DOES ONE ESTABLISH "ADVERSE AFFECT"
 - WHAT IS SIGNIFICANCE OF "PAY-PER-USE"

WE DID NOT ASK FOR THIS STRUCTURE BUT IT WAS BEST WE COULD GET UNDER ALL THE CIRCUMSTANCES. NEVERTHELESS, LIBRARY AND EDUCATIONAL COMMUNITIES NEED TO MAKE USE OF FAIR USE ACCESS PROCEEDINGS

3. OSP LIMITATION OF LIABILITY

- IMPORTANT RESOLUTION FOR SERVICE PROVIDERS, WHICH INCLUDES MANY IN LIBRARY AND EDUCATIONAL COMMUNITIES
- RULES COMPLEX AND WILL REQUIRE VERY CAREFUL MONITORING FOR COMPLIANCE
- EXAMPLE OF COMPROMISES BROUGHT ABOUT BY CONGRESSIONAL SCRUTINY
 - NEGOTIATIONS WERE LONG, DRAWN OUT, BUT MAY SERVE AS MODEL FOR BALANCING CONCERNS OF CONTENTIOUS AND POLITICALLY POWERFUL INTERESTS
- PREDICTION:
 - THIS WILL REMAIN A VERY IMPORTANT "HOT BUTTON" ISSUE FOR THE CONTENT COMMUNITY
 - THERE WILL BE MAJOR LITIGATION IN NEAR TERM OVER THIS EXEMPTION AND COMPLIANCE

4. DISTANCE EDUCATION STUDY

- MAJOR BATTLEGROUNDS - LEARNING AND THE INTERNET
 - AT STAKE IS RELATIONSHIP OF INTERNET TO EDUCATION AND THE USE OF DIGITAL MATERIAL ONLINE
- CONTENT COMMUNITY WILL TRY TO KEEP ANY EXCEPTION VERY NARROWLY DRAWN
- TECHNOLOGICAL PROTECTIONS WHICH DENY ACCESS TO UNAUTHORIZED USERS WILL BE IMPORTANT ELEMENT
- VERY QUICK TURNAROUND
 - REPORT DUE IN SIX MONTHS
- SENATORS HATCH AND LEAHY GAVE COMMITMENT TO ADDRESS THIS ISSUE EARLY IN NEXT SESSION OF CONGRESS
- LOOK FOR HOME SCHOOLERS TO PARTICIPATE

5. SECTION 108 LIBRARY EXEMPTION UPDATE

- THIS WAS SURPRISINGLY HARD FOUGHT
- CONTENT VERY NERVOUS ABOUT ANY DIGITAL COPIES NOT OTHERWISE AUTHORIZED OR CONTROLLED

6. COPYRIGHT TERM EXTENSION

- ALSO SURPRISINGLY HARD FOUGHT
- KEY ISSUE: DEFINITION OF NORMAL COMMERCIAL EXPLOITATION
- CONTENT PROPONENTS WILL SAY MERE AVAILABILITY FOR LICENSING IS ENOUGH TO CONSTITUTE NORMAL COMMERCIAL EXPLOITATION
- EVEN IF THEY DO NOT HAVE A COPY OF THE WORK BECAUSE IT IS SO OLD, THEY MAY REFERENCE IT ON A LIST OF WORKS AVAILABLE FOR LICENSING

7. DATABASE - THE 800 POUND GORILLA

- DRAMATIC PROPOSAL WITH POTENTIALLY DEVASTATING IMPACT ON PUBLIC DOMAIN
- IT WOULD CREATE A NEW LICENSING REGIME FOR FACTS, DATA AND GOVERNMENT WORKS
- VERY BROAD IMPLICATIONS IN DIGITAL WORLD
- URGENT NECESSITY FOR MAINTAINING EFFECTIVE POLITICAL ALLIANCES

- LIBRARY COMMUNITY JOINED WITH "COMMERCIAL SKEPTICS" TO FORM INFLUENTIAL ALLIANCE
 - NEED TO MAINTAIN VERY CAREFUL WATCH OVER THIS LEGISLATION
 - IMPORTANT ALLY IN COMMERCE COMMITTEE MEMBERS AND STAFF
- LIKELIHOOD IS STRONG THIS WILL BE TOP AGENDA ITEM FOR MANY IN CONTENT COMMUNITY IN 1999
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Last Modified: February 4, 2003