

April 24, 2003

TO: Directors of ARL Libraries

FROM: Prue Adler

RE: "Super" DMCA Legislation in the States

Summary:

The Motion Picture Industry Association of America (MPAA), cable operators, and others are aggressively promoting model legislation in quite a few states that would amend state telecommunications and cable security laws to address concerns over digital piracy. The legislation, already law in 7 states, is considered overly broad and raises a number of concerns for libraries, consumer electronics manufacturers and retailers, public interest and privacy advocates, and more.

Responding to the serious concerns raised by library associations, consumer electronics manufacturers, and others, the MPAA recently engaged in negotiations with representatives of these communities and proposed revisions to the model legislation. Although these negotiations resulted in significant improvements to the model legislation, some concerns remain. As a consequence, many communities still oppose the revised model legislation.

National library associations have neither signed off on the revised legislation nor are actively opposing it, in part because it appears that in the rush to move this legislation, a number of versions of the revised bill have been introduced in the states. As a result, if the bill is introduced in your state, please contact us so that we can help you evaluate the legislation. Following that, each institution or library organization can weigh the continuing concerns with the legislation with other priority issues before their state legislature. This memo provides background information and a summary of continuing concerns with the legislation to assist in the state debates.

Background:

Seven state legislatures have passed the model or revised legislation that focuses on digital piracy. These include: Arkansas, Colorado, Delaware, Illinois, Michigan, Oregon, and Pennsylvania. Bills are pending in Florida,

Texas, Tennessee, Massachusetts, and South Carolina. Most of the bills passed in the first seven states are the original, overly broad legislation and will require amending in the future to moderate the statutes. (The governors of Colorado and Arkansas have yet to sign the bills.) The legislation pending in the other states listed above is the revised bill (or variations thereof) that is based on negotiations amongst interested parties, including representatives of the library community. Overall, the legislation seeks to protect online content, movies for example, by expanding the scope of theft of communication services. It has the potential of converting an ordinary breach of contract into a criminal violation.

There has been a great deal of press recently concerning the impact of this legislation. Articles about this legislation in the *Chronicle of Higher Education* and in *Information Week* can be found at:

<<http://chronicle.com/daily/2003/04/2003040101t.htm>> ,

<<http://chronicle.com/free/2003/04/2003042301t.htm>> , and

<<http://www.informationweek.com/story/showArticle.jhtml?articleID=8800603>> .

The following summary of concerns with the revised legislation was drafted by Jonathan Band, attorney to the Shared Legal Capability.

The proposed amendments represent an improvement to the bill, but concerns remain.

The proponents have failed to articulate the gap in existing law this bill is intended to fill. In particular, the U.S. Congress in 1998 adopted the Digital Millennium Copyright Act (DMCA), which specifically addresses the circumvention of technological protection measures. The proponents of the state bills lobbied Congress to adopt the DMCA. They have presented no evidence that the DMCA is inadequate.

The underlying bill contains extremely broad prohibitions – so broad that the proponents quickly offered the proposed amendments when the over breadth was identified. The most significant amendment is that a wide range of activities become unlawful only when performed with "an intent to defraud" a provider of a communications service. To be sure, this "intent to defraud" standard is an improvement, but it is not as good as it sounds.

Specifically, the term "intent to defraud" is not defined. Thus, it could simply mean obtaining something without payment. For example, a cable television service could include in its service contract a term that a subscriber is not permitted to videotape a television show off of a premium channel without paying an additional fee. A similar statement flashes on the screen at the beginning of each episode of "The Sopranos." The subscriber nonetheless videotapes the show. This action clearly violates the underlying, original model bill. It might also violate the bill as amended because the subscriber intended to tape the show without paying the additional fee to the cable company. A court could easily interpret this as "intent to defraud."

In the library context, a library may subscribe to an online database. The license agreement provides that the library may not print out any part of the database without paying an additional fee. If the library prints out the page, it might violate the bill, even as amended. It arguably is "defrauding" the database provider.

In other words, this legislation has the potential of converting an ordinary breach of contract into a criminal violation. If the subscriber or the library knowingly breaches the license agreement, even in a trivial way, they expose themselves to severe civil and criminal penalties.

JB 4/22/03

PSA 4/24/03

Corrected 5/27/03