

PRIMER ON THE DIGITAL MILLENNIUM

WHAT THE DIGITAL MILLENNIUM COPYRIGHT ACT AND THE COPYRIGHT TERM EXTENSION ACT MEAN FOR THE LIBRARY COMMUNITY

BY ARNOLD P. LUTZKER

Arnold P. Lutzker, Esq.

Lutzker & Lutzker LLP

Washington, D.C. 20005

arnie@lutzker.com

202-408-7603

TABLE OF CONTENTS

Part I. Digital Copyright Timeline, Key Library Issues and Legislative Overview

- I. Introduction: The Digital Copyright Timeline – Where We've Come From
- II. Key Issues for the Library Community in the Digital Millennium Copyright Act
- III. "DMCA: Digital Millennium Copyright Act: Overview
- IV. The Sonny Bono Copyright Term Extension Act: Overview

Part II. Detailed Review of DMCA and Term Extension

- V. Technological Protection Measures ("TPMs") and Copyright Management Information
- VI. Online Service Provider ("OSP") Limitation on Liability for Copyright Infringement
- VII. Study on Distance Education and Digital Technologies
- VIII. Section 108 Library Exemption Update
- IX. The Sonny Bono Copyright Term Extension Act
- X. Database Legislation: The Proposal That Almost Happened

Part III. What the DMCA and Term Extension Mean for Libraries

- XI. What the Digital Millennium Copyright Act and the Term Extension Act Mean For the Library Community

PART I

DIGITAL COPYRIGHT TIMELINE, KEY LIBRARY ISSUES

AND LEGISLATIVE OVERVIEW

I. Introduction: The Digital Copyright Timeline – Where We've Come From

The Digital Millennium Copyright Act ("DMCA"), which is the centerpiece of the legislative strategy for the Clinton Administration and Congressional leaders responsible for copyright bills, was passed in the closing days of the 105th Congress. It is a very complex Act, which generated controversy and left unfinished business in its wake. As a result, high on the list of "must-dos" for the 106th Congress will be issues leftover from the DMCA.

To appreciate what the DMCA means, let's first take a few steps back and remind ourselves how we arrived to our current situation. Placed in context, the DMCA is best understood as part of a larger picture dealing with copyright and digital technology.

DMCA TIMELINE

1993

When the Clinton Administration took office, one of the top priorities was to bring a new order to what was developing as the National Information Infrastructure ("NII"). It established a task force within governmental agencies and prepared an agenda for action. The goal was to define U.S. priorities and action points for domestic and international legal reform. The Internet in those days was clearly growing into an international communications medium, but its full potential remained open to speculation.

1994

In 1994, the NII Task Force, spearheaded by the Department of Commerce ("DOC"), published a *Green Paper*, calling for public input on the need for expanded regulation of the digital environment. In fulfilling its responsibilities, the DOC, led by the Commissioner of the U.S. Patent and Trademark Office, held public hearings and initiated a Conference on Fair Use ("CONFU"), designed ultimately to develop guidelines for use of copyright works in numerous educational settings.

1995

Following many hours of hearings and receipt of reams of comments, the NII Task Force released *The Report of the Working Group on Intellectual Property Rights*. The Report dubbed the *White Paper*, stressed that U.S. copyright law was substantially fit for handling most important issues in the digital context; however, like a well-worn suit, some tailoring was needed to keep it fitting just right. The core recommendations included –

- (a) expanding the exclusive rights of copyright owners to include the right of transmission;
- (b) updating the library exemption in section 108 to permit making three copies of a work and allowing digital as well as facsimile copies;
- (c) creating new prohibitions on devices or services designed to circumvent mechanisms which protect the rights of copyright owners and which affect newly recognized copyright management information; and
- (d) establishing a new limitation on reproduction to help the visually impaired

While the *White Paper* received mixed reviews, Congressional Committees held hearings on the legislative proposals. Concurrently, an international diplomatic copyright conference was planned by the World Intellectual Property Organization ("WIPO") 1996. Some Congressmen strenuously urged the DOC not to get ahead of Congress, that is, Congress wanted to set U.S. Copyright policy, not follow the DOC lead.

At the same time the digital agenda was being discussed, copyright owners pressed Congress for another legal reform – extension of the term of protection from life of the author plus 50 (75 years in the case of work for hire) to life plus 70 (95 years for work for hire). The impetus for this reform stemmed from the goal of the copyright owners to secure protection in the U.S. equal to that provided by European countries. Noting that U.S. authors could not benefit in Europe from the full protection of European law unless U.S. law protected works for the same duration, term extension advocates urged

expanding the term in U.S. law. The rationale of looking to European law enhanced the impetus toward copyright reform based on the notion of *harmonization*, i.e., bringing the copyright laws of all nations into general equilibrium. This notion supported the principle that the Berne Copyright Treaty, the leading international agreement covering copyrights, needed to be updated to meet the challenges that new technology posed to copyright.

Regarding term extension, the library community raised the specter of significant loss of rights to use works in the public domain. Once the term of copyright protection expires, users are free to take and republish or distribute works without prior approval of the author. The longer the term of protection, the longer clearance to use is required. The Register of Copyrights was delegated by the Congressional committees to supervise discussions aimed at allowing libraries a limited right to use works during the last twenty years of any extended term.

1996

There was much public discussion about the copyright issues raised in the *White Paper*. Continued hearings in Congress and by CONFU focused on how U.S. copyright law should be reformed. At the conclusion of the year, a Diplomatic Conference was held in Geneva under the auspices of the WIPO to consider three treaties:

- (a) one proposed amending Berne along the lines set forth in the NII Report in order to develop an international consensus on treatment of copyright in a digital world;
- (b) another urged adding additional protections for performers and producers of phonograms (sound recordings); and
- (c) a third, set forth standards for protection of databases as developed in U.S. and European legislative initiatives.

The Diplomatic Conference was heavily lobbied by commercial and public interest parties and resulted in the adoption of amendments to Berne (WIPO Treaty) and the Phonograms Treaty, but in the tabling of the Sui Generis Database Treaty.

1997

Following the return of diplomats, Congress began in earnest to consider core issues, including proposals to prohibit circumvention of technological protection measures, to protect a copyright management information system and to modify copyright law to comply with the adopted WIPO and Phonograms Treaties. Also, high on the list of key issues was creation of a limitation on liability for "online service providers," those entities that link users to the Internet. A serious legal question had developed as to their liability for infringements that occurred online. Although the OSPs did not place the content online, they greatly facilitated widespread public access. Their exposure to copyright liability had emerged as one of the pivotal brakes on developing the Internet to the next level as the communication medium of the 21st century. Under the direction of the House Judiciary Subcommittee on Copyrights, representatives of content owners, service providers, libraries and education met over a period of months to hammer out the

elements of a legal structure for OSPs. Also, the legislative agenda contained an update of the library exemptions and a focused database initiative.

1998

By 1998, it became apparent that passing the WIPO Treaty and addressing database issues were at the top of the legislative agenda for the Administration and the Congress. Sen. Hatch, chairman of the Senate Judiciary Committee, renamed the WIPO Treaty Implementing Legislation, the Digital Millennium Copyright Act, thereby stressing its importance for U.S. Copyright Policy. The bill became the focal point of all legislative debate on copyright issues, and most particularly, OSP limitation on liability, anti-circumvention, database, library exemptions and term extension. Throughout the session, negotiations were ongoing to resolve disputes involving each of these issues. Database protection emerged as a pivotal issue for key copyright interests after DMCA passed the House of Representatives. Even though the Senate Judiciary Committee had not held any hearings on database, publishers and the Chairmen of the House Copyright Subcommittee and House Judiciary Committee insisted that a database bill be included in final settlement of the DMCA.

Updating laws relating to distance education also developed as an important part of the educational agenda. Equally important, politics played a role in the final developments of the DMCA. Although copyright jurisdiction belongs to the House and Senate Judiciary Committees, the impact of the legislation on commerce resulted in joint referral of the DMCA to the House Commerce Committee. This second House deliberative body played a crucial role in formulating the final policy of the DMCA. In particular, the Commerce Committee's staff managed direct negotiations between content owners and libraries and educational interests over the relationship between fair use (as well as other statutory copyright limitations) and the anti-circumvention rules. This part of the DMCA's ultimate structure was laid out in these negotiations.

The other important development throughout most of the period of legislative consideration of the WIPO bills was the emergence of coalitions of disparate groups with joint purposes. For the library community, participation in the Digital Future Coalition brought it in regular planning with device manufacturers (who fought limits on equipment) and certain publishers (who depended on access to factual information to develop their own works). This coalition helped devise a compromise strategy on anti-circumvention and develop an alternative to the House-passed database bill. Following weeks of Senate-supervised negotiations, the Database Title was dropped from the final legislation.

Also in 1998, the CONFU process ended without the emergence of formal adoption of fair use guidelines. As the details implementing fair use were assessed, no consensus on final parameters was devised. Moreover, the parties in negotiations, content owners on the one hand, and libraries, educators and other users on the other, failed to reach agreement on the ultimate purpose of the

guidelines; that is, whether they were "safe harbor" standards or the limits of fair use.

In all it was a tumultuous legislative period. The DMCA and term extension passed in the closing days of the 105th Session. Database and Distance Education are high on the agenda for the 106th Session of Congress.

II. Key Issues for the Library Community in the Digital Millennium Copyright Act ("DMCA")

The DMCA raised numerous legal and practical issues for the library community. The legislative debate and negotiations focused on the following:

A. Fair Use in the Digital Millennium/Anti-circumvention and Database.

The core fair use issue was how to preserve the principle of fair use as Congress proposed to create new rights of owners of works. First, fair use became the central debating point with regard to achieving access to works protected by technological measures. If access could be technologically restricted by the copyright owner, how could the public exercise fair use with regard to those works?

Second, fair use was at the heart of the question of dealing with the bill on database protection. In order to escape the suggestion that database protection was a copyright right, because the U.S. Supreme Court had held that constitutional copyright principles prohibited ownership of facts or works of the federal government, the drafters moved away from copyright notions. They suggested that the new law should protect "investment," not reward "creativity." In this new regime, the copyright doctrine of fair use does not exist. Unless it was created legislatively, users of facts could be subject to fewer protections than users of copyrighted works.

B. Maintenance of the Public Domain

For libraries, the ability to use works in the public domain is a vitally important principle. The Copyright Term Extension Bill and the Database Bill both threatened to remove works that resided in the public domain for many years. In the case of term extension, an automatic twenty-year extension would mean that works freely available seventy-five years after original publication could be subject to royalty demands and use restrictions for two more decades. In the case of databases, collections of factual information that were freely available for copying, might be tied up for fifteen years, or more. These two proposals augured the most significant shrinkage of the public domain in recent years. The plan of the library community was to carve out from the twenty-year term those works not exploited by their owners and leave them available for library uses. In

the case of database, the key fix was to restrict protection to cases of commercial exploitation; any non-commercial use would be exempted.

C. Library Preservation Update.

With a boost from the *White Paper*, an update of Section 108 requirements had impetus. Under the 1976 Act, libraries were prohibited from employing digital technology to preserve works and were restricted to making only one copy of a work, even though practice required three copies – an archival copy, a master, a use copy from which working copies could be made. Achieving a modernization of this section became an important goal of the library community.

D. Online Service Provider Limitation on Liability.

Along with commercial service providers, libraries recognized the urgency of adopting statutory limitation on copyright infringement. With the Internet the most significant educational tool to develop in decades, if Internet providers (including libraries and educational institutions) were liable for copyright infringement merely because they facilitated the transmission of digital data ("zeroes and ones") that translated into another party's copyrighted work, all Internet communications could be stifled. Even though there is no practical way for OSPs to determine content on the Net, courts were finding OSPs liable for copyright infringement if their activities contributed to the violation. A balance had to be struck if the information was to pass safely between users and websites.

E. Distance Learning.

In various negotiations, the library and educational communities took the position that if Congress were to provide new protections for copyright owners in the digital world, then there could be no escaping the need to update policies on distance learning and the use of digital networks. With educational markets at the center of many copyright owners' businesses, the need to reconcile reasonable expansion of educational uses while preserving the business of selling works to the educational market was at the center of the discussion.

III. Digital Millennium Copyright Act: Overview

The DMCA contains many new statutory elements, including the following:

A. New Rules Prohibit Circumvention of Technological Protection Measures (TPMs). The scheme has the three key elements:

(1) On a periodic basis, a regulatory process supervised by the Librarian of Congress will determine whether access to particular classes of works protected by anti-circumvention technology should nevertheless be allowed to facilitate fair use and other copyright law limitations.

(2) A prohibition on the manufacture, importation, sale or offering for sale of any technology, product, service device, component or part that (a) is primarily designed to circumvent technology of a copyright owner that limits access to a work, (b) has only limited commercially significant purpose other than to circumvent, or (c) is marketed for use in circumvention.

(3) Several specific statutory limitations were created to enable certain practices by those involved in libraries, law enforcement, reverse engineering and encryption research.

B. Copyright Management Information: The DMCA prohibits alteration of information imbedded in digital works by copyright owners. The information may include details as to ownership, authorship and licensing.

C. Online Service Provider Limitation on Liability: One of the most complex and important aspects of DMCA is the limitation for OSPs. The new rules grant OSPs that transmit and store, as well as provide tools (hyperlinks and software) to facilitate online access, an exclusion from monetary liability for copyright infringement, provided that their online system complies with OSP procedures, they have no actual knowledge of copyright infringements and they cooperate with processes to disable access and limit the harm to the copyright owner.

D. Distance Education: The Copyright Office is commissioned to study the issues associated with distance education utilizing digital networks and report back to Congress by April 28, 1999. Views of copyright owners, educators and libraries will be solicited on seven key topics.

E. Section 108 Update: The DMCA provides the most significant updating of library and archival preservation rules since procedures to cope with the photocopy machines were established in 1976. The changes permit preservation and storage in a digital format and describe a mechanism for handling preservation of works originating in outmoded formats.

A special note about Database Protection is appropriate. The title of the DMCA that would have created a new type of protection for databases was deleted from the final version of the bill. The controversial section was removed on condition that it would receive high legislative priority in 1999. A database bill based on the 1999 House-passed version has already been introduced in the 106th Congress.

IV. The Sonny Bono Copyright Term Extension Act: Overview

In essence, the term extension act preserves copyright protection for all covered works for an additional twenty years. The libraries won a hard-fought, limited exception to use works in the last 20 years of protection. The proviso

permits use for purposes of preservation, scholarship or research if the work is not subject to normal commercial exploitation or is not available at a reasonable price. Passage of copyright term extension, which was a popular bill, should have occurred several years ago; however, passage was held up by disputes involving music licensing in connection with religious broadcasts and public performances in restaurants and bars. In order to achieve final action on the extended term, the conflicting parties agreed to House-passed amendments.

PART II

DETAILED REVIEW OF DMCA AND TERM EXTENSION

V. Technological Protection Measures ("TPMs") and Copyright Management Information

A. *TPMs and Anti-Circumvention Rules.*

1. Prohibition on Circumventing Controls on Access: Regulatory Scheme.

In the House-adopted WIPO Treaty Implementation Act, anyone accessing a copyrighted work protected by a technological protection measure without the consent of the copyright owner could be found civilly and criminally liable. Libraries and non-profit educational institutions were given a very limited "browsing right" to circumvent a TPM in order to review a work that they considered purchasing or licensing. However, once the review was completed, the work could not be re-accessed.

In response to this bill, the libraries argued that the Congress was creating a new right that circumvented the protections embodied in the limitations and defenses of the Copyright Act. Even though a section of the bill stated that nothing in the act would affect the copyright defenses, if it would be illegal to access works without permission, there would be no fair use with regard to those works. Even if a subscriber paid for an online or digital subscription, after a subscription expired, it would be prohibited from passing through TPMs to make fair use of content published in the period of the original subscription. The libraries lobbied for an exception that imported the limitations and defenses of Chapter One of the Copyright Act into the new anti-circumvention rules.

The lobbying was most successful in when the House Commerce Committee took jurisdiction over the commerce aspects of the legislation. A

regulatory scheme was drafted to replace the prohibition on access without consent. After further negotiations in conference, a compromise measure incorporated the House Commerce Committee's structure. The key aspects of the provision are these:

- The formal initiation of the prohibition on accessing works protected by TPMs is stayed for two years.
- During those two years, the Librarian of Congress, in consultation with the Register of Copyrights and the Assistant Secretary of Commerce for Communications and Information, will conduct an "on the record" rulemaking proceeding to determine whether users, including libraries and educational institutions, are, or are likely to be "adversely affected" in their ability to make non-infringing uses of a particular class of copyrighted works. Among the factors the Librarian will consider are these:
 - I. The availability for use of copyrighted works;
 - II. The availability for use of works for nonprofit archival, preservation and educational purposes;
 - III. The impact of the prohibition on circumvention has on criticism, comment, news reporting, teaching, scholarship or research;
 - IV. The effect of circumvention of TPMs on the market for or value of copyrighted works; and
 - V. Such other factors as the Librarian considers appropriate.

Based on the results of the rulemaking, particular classes of works will be identified and for a three-year period those works will be exempt from the prohibition on circumvention to access for non-infringing copyright purposes. Thereafter, the Librarian will conduct similar on the record proceedings every three years.

2. Prohibition on manufacture, importation, sale or trafficking in certain technology, product, service, device or component.

At the heart of the anti-circumvention proscriptions is a ban on equipment or services whose primary purpose is for use in defeating technology that limits access to copyrighted works. Thus, the new law prohibits any equipment or services that

- I. is primarily designed or produced for the purpose of circumventing a technological protection measure;
- II. has limited commercially significant purposes or uses other than circumvention; or
- III. is marketed for use in circumventing TPMs.

This provision was written carefully with an eye toward to the U.S. Supreme Court's *Sony Betamax* case, which held that devices (in that instance

video recorders), which have "substantial non-infringing uses" are not copyright infringing devices and are therefore not illegal. The computer equipment industry strenuously pressed for a Sony-standard, but the Congress opted for the "primarily designed" or "limited commercially significant purposes" rather than "substantial non-infringing uses." It may be anticipated that if this standard is challenged in court, the relationship of it to Sony will be at the heart of the case.

3. Exceptions to the Prohibitions

The statute provides a number of explicit exemptions from the new anti-circumvention rules. They include the following:

- i. *Nonprofit Libraries, Archives and Educational Institutions: Browsing Right.* Qualifying public institutions are permitted to circumvent to gain access to a copyrighted work *solely* in order to make a good faith determination whether to acquire a copy of the work or not. This accessed copy cannot be retained longer than necessary to make the acquisition determination and may not be used *for any other purpose*. Violations of the limitation will subject the nonprofit to civil damages and repetitive violations can result in loss of the exemption. The exemption is *not* a justification to traffic in prohibited equipment. A central question not answered by the new law is how can a library obtain the means to circumvent if the selling of equipment is prohibited under the ban on infringing devices.
- ii. *Law enforcement, intelligence and other government activities.* Federal and state governmental law enforcement authorities are not restricted by this statute.
- iii. *Reverse Engineering.* A lawful user of a computer program may circumvent TPMs to ensure that the program can work with other programs (interoperability); provided there is not a readily available commercial alternative for that purpose. The research may be shared with others, as long as it does not constitute a copyright infringement of the original or related work.
- iv. *Encryption Research.* Circumvention is permitted in the context of "good faith encryption research" with respect to copies lawfully acquired. Persons availing themselves of this exemption must have tried to get permission of the original owner and cannot engage in practices deemed a violation of computer fraud laws. The Register of Copyrights and Assistant Secretary for Communications and Information of the Department of Commerce are charged with preparing a report to Congress one year after

passage describing this provision's effect on encryption research.

- v. *Personally Identifying Information*. Circumvention is permitted to detect and disable technology which collects and disables information about an online subscriber that was not authorized by the subscriber.
- vi. *Security Testing* Circumvention is permitted for good faith efforts to access a computer system or network (with permission of the network owner) to investigate and correct a security flaw.
- vii. *Analog Devices*. The law requires compliance by analog recording device manufacturers with anti-copy technologies, which do not affect playability of the machines or restrict lawful activities.

4. Relationship to other laws.

The statute provides that nothing in the section dealing with access affects the rights, remedies and limitations, or defenses available in cases of copyright infringement, or any right of free speech or press for persons using consumer electronic, communications or consumer products. However, the clear intent is to recognize the obligation of the user to obtain authorized access to work. Once lawful access is obtained, the other limitations and defenses of copyright law come into play. It remains unanswered in law whether any fair use can be made of a work protected by TPMs, absent a rulemaking decision by the Librarian.

B. *Copyright Management Information ("CMI")*.

In an attempt to ensure the integrity of any information included with digital works that the owner intends to use for management purposes, the new law prohibits the removal or alteration of CMI, or the dissemination of false CMI. "Copyright Management Information" is defined in the law to include:

- I. The title and other information identifying the work.
- II. The name and other information about the author.
- III. The name and other information about the copyright owner.
- IV. The name and other information about performers, writers and directors of qualifying works.
- V. Terms and conditions for use of the work.
- VI. Identifying numbers or symbols.
- VII. Other information which the Register of Copyrights may appropriately prescribe.

Law enforcement, intelligence and other information security activities, as well as certain public performances by radio and television stations, are exempted from portions of these prohibitions.

C. *Penalty Provisions.*

Violations of the new anti-circumvention rules can result in stiff civil penalties, injunctions against certain practices, liability for attorneys fees and even exposure to criminal liability. Persons who violate the access prohibitions are subject to awards of actual damages and profits or statutory damages of not less than \$200 nor more than \$2,500 per act of circumvention, or per device sold or service offered. Violators of the CMI rules can recover statutory amounts ranging from \$2,500 to \$25,000 per violation. A nonprofit library, archive or educational institutions can have money damages remitted, if it can establish it was not aware and had no reason to believe that its acts constituted a violation. These institutions are also exempted from any criminal sanctions, which include fines up to \$500,000 and imprisonment for up to five years (doubled in the case of repeat offenses).

VI. Online Service Provider ("OSP") Limitation on Liability for Copyright Infringement

A. The Problem - Infringing Copyright

Many Online Service Providers ("OSPs"), including libraries and educational institutions, have been exposed to a legal claim of copyright infringement without even knowing it. Under copyright rules, if someone copies, distributes or displays a copyrighted work publicly without authority of the copyright owner or its agent, then a violation of law has occurred. Even innocent infringements are subject to penalties. In addition to injunctive relief, a copyright owner prevailing in an infringement action may be entitled to receive actual damages and profits of the infringer, or statutory damages (\$500-\$20,000 per work infringed; up to \$100,000 per work in cases of willful infringement), plus attorneys fees.

One of the developments associated with the Internet has been the fact that valuable copyrighted works, such as new musical CDs and movies, are posted at renegade sites for anyone to download without paying a fee. This practice has driven some copyright owners to the courts for relief. However, since the source of the infringements is often an untraceable site in cyberspace, an alternative defendant has been the Internet service provider that links customers to these sites.

Traditionally, common carriers have been exempt from liability for copyright infringement because they merely provide the facilities that link sender and receiver and have no control over the actual content of the transmissions. Many libraries and educational institutions feel this describes their functions for patrons, students and faculty in connection with the Internet. However, in their capacity as OSPs, libraries and educational institutions do more. Technically, they provide software to link users to sites, they store information on their server and

they facilitate recordings and displays by subscribers. Each of these activities is a function recognized in copyright law as an exclusive right of copyright owners. Copyright law also holds that helping someone else to violate copyright rights is an infringement, so-called "vicarious" or "contributory" infringement. Thus, when certain commercial OSPs were accused of violating copyright law, some courts held them liable for copyright infringement. The fact that an institution is "not for profit" does not eliminate exposure to the copyright infringement claim.

B. The Solution - Limiting Liability

To remedy this exposure, OSPs sought a limitation under copyright law. After two years of negotiations, the **Online Copyright Infringement Liability Limitation** was approved by Congress as part of the omnibus Digital Millennium Copyright Act. The new limitation greatly reduces an OSP's exposure to monetary damages. However, it does not exempt an OSP from legal action or injunctive relief. Nevertheless, it will serve as a first line of defense against a claim of copyright infringement and is in addition to other copyright defenses and limitations, like fair use. Be forewarned: the rules are complex and require strict adherence to rigorous deadlines. Unless fully complied with, an OSP, even a non-profit institution, faces loss of the exemption and exposure to potentially large copyright damage claims.

It is incumbent upon libraries and educational institutions that choose to operate as service providers to understand the rules, establish internal mechanisms for compliance and monitor these activities. It may be anticipated that this hard-fought limitation will be subject to test cases to ensure full compliance. Again, since non-profit status does not immunize an institution from liability, do not presume that a test case involving a library or educational institution will not occur. In fact, because so many computer skilled people work or study at libraries and schools, an educational test case may be desired by copyright owners to narrow this limitation.

C. Details of the OSP Limitation

1. Service Provider Defined. The statute provides a definition of "service provider" for purposes of the limitation as follows:

- (a) An entity offering the transmission, routing, or providing of connections for digital online communications between or among points specified by a user, or material of the user's choosing, without modification as to the content of the material as sent or received; and

(b) A provider of online services or network access, or the operator of facilities therefor.

All entities whose services fit these descriptions, and the definition in (b) is intended to be broad, may qualify with regard to those activities. However, to the extent the functions of the OSP involve creation and posting of content, choosing recipients of messages or controlling users, the limitation does not apply and regular copyright rules respecting proper clearance, as well as fair use and other defenses, are applicable.

2. **Covered Activities.** The new provision covers most transitory digital network communications. Specifically, these are:

- I. Intermediate and transient storage of materials (such as Web pages or chat room discussions) in the course of transmitting, routing or providing connections;
- II. System Caching;
- III. Placing information on a system or network at the direction of users; and
- IV. Use of information location tools, such as directories, indexes and hypertext links.

3. **Conditions for Qualifying for the Limitation.** To qualify fully for the limitation with regard to all covered OSP activities, a set of conditions for each specific function must be met. If an institution performs all the OSP functions, as most do, then all requirements must be met. The following summary breaks down the requirements into three pertinent categories.

a. *Material.*

- I. The material must be made available online by someone other than the OSP.
- II. The OSP cannot modify the material.
- III. No copy of the material during intermediate storage shall be maintained longer than "reasonably necessary."
- IV. The OSP does not have "actual knowledge" that the material or the activity is infringing; more specifically,
- V. it is not aware of facts or circumstances from which infringing activity is apparent; or

- VI. upon receiving such awareness, the OSP acts expeditiously to remove or disable access to the site.

b. Parties to the Transmissions.

- I. The transmissions must be initiated by or at the direction of another person and sent to another.
- II. No copy of the material during intermediate storage shall be made accessible to another person.
- III. The OSP must not select recipients.
- IV. The OSP does not receive a financial benefit directly attributable to the infringing activity, in a case in which the OSP has the right and ability to control the activity.

c. Procedures.

- I. The transmission, routing, provision of connections or storage must be carried out through an automatic, technical process.
- II. The OSP must follow rules relating to refreshing, reloading or other updating of the material.
- III. The OSP cannot interfere with technology associated with the material, such as access requirements or preconditions for use, such as passcodes or fees.
- IV. The OSP must comply with
- V. "notice and takedown" procedures, *i.e.*, upon "proper notification," expeditiously remove or disable access to the offending material, and
- VI. "counter-notice and put back" procedures, *i.e.*, upon "proper *counter* notice," promptly notify copyright owner of dispute and replace material within two weeks, unless the matter is referred to court.

4. **Obligations of Copyright Owners.** The limitation has countervailing obligations of copyright owners. Among the most relevant are the following:

- I. When refreshing, reloading or updating material, the owner must adhere to generally accepted industry standard data communications protocols.
- II. As to the OSP's obligation not to interfere with technology controlling access to the material (e.g. passcodes and fees), the owner's technology must
 - I. not *significantly* interfere with the OSP's system or network performance with intermediate storage of material,
 - II. be consistent with generally accepted industry communications protocols, and
 - III. not extract information from the OSP's system or network about the person initiating the transmission that it could not have acquired through direct access to that person.
- III. Comply with notification requirements in connection with "notice and take down" procedures.

5. **Notice and Take Down.** "Notice and take down" is an essential part of the protections sought by the content community and forms a new regulatory regime for both OSPs and copyright owners. If a content owner reasonably believes that a site misuses copyrighted matter and it notifies the OSP according to statutory procedures, or if the OSP independently becomes aware of the facts and circumstances of infringement, then the OSP must expeditiously remove the material or disable public access to the site, or face loss of the limitation.

Among the elements of the notice and takedown process are the following:

- I. The OSP must have a designated agent to receive notices and it must use a public portion of its website for receipt of notices.
- II. The OSP must notify the U.S. Copyright Office of the agent's identity and the Copyright Office will also maintain electronic and hard copy registries of website agents. In November, 1998, the Copyright Office published interim rules and procedures for registering website agents as service providers.
- III. Proper written notification from a copyright owner to an OSP must include
- IV. the name, address and electronic signature of the complaining party,

- V. sufficient information to identify the copyrighted work or works,
- VI. the infringing matter and its Internet location,
- VII. a statement by the owner that it has a good faith belief that there is no legal basis for the use of the materials complained of, and
- VIII. a statement of the accuracy of the notice and, under penalty of perjury, that the complaining party is authorized to act on behalf of the owner.
- IX. Any misrepresentation of material facts will subject the offending party to claims for damages and attorneys fees.

6. **Good Samaritan Immunity and "Notice and Put Back."** If the OSP complies in good faith with the statutory requirements, the new law immunizes it from liability to subscribers and third parties; however, this immunity is conditioned upon affording the affected subscriber notice of the action. If a subscriber files a proper "counter notice," attesting to its lawful use of the material, then the OSP must "promptly" notify the copyright owner and within 14 business days restore the material, unless the matter has been referred to a court. The counter notice must contain these elements:

- I. The subscriber's name, address, phone number and physical or electronic signature.
- II. Identification of the material and its location before removal.
- III. A statement under penalty of perjury that the material was removed by mistake or misidentification.
- IV. Subscriber consent to local federal court jurisdiction, or if overseas, to an appropriate judicial body.

7. **Special Rule Regarding Teaching and Research Employees of Public and Nonprofit Higher Educational Institutions.** The OSP regime also makes one special exception to the general rule that an institution is responsible for the acts of its employees. In recognition of the principles of academic freedom and scholarly research and the practice of administrators of higher educational institutions of not interfering with classroom work, the statute provides that faculty and graduate students employed to teach or research shall not be considered "the institution" for OSP purposes. Thus, if, for example, a member of the faculty posts infringing content, selects recipient of infringing matter or knows of an

infringement, the institution would not automatically lose its right to the limitation.

The exception has three important qualifications:

- I. The faculty or graduate student's activities do not involve online access (including e-mail) to materials that were "required or recommended" within the preceding three years for a course taught by the employee at the institution.
- II. The institution has not received more than *two* notices of actionable infringement by the faculty or graduate student.
- III. The institution provides all users of its system or network informational materials on compliance with U.S. copyright laws.

If properly followed, the higher educational institution is not tainted by the actions of its teaching and research employees. As an institution, it would qualify for protection against money damage claims and could not be required to block access or terminate a subscriber. It could still be subject to other injunctive remedies, such as those involving preserving evidence.

8. **Privacy Rules.** The statute also recognizes the importance of protecting the privacy of a user's identity on the Internet. Procedures are established by which a complaining copyright owner may obtain the identity of individual subscribers from the OSP. The principal safeguard involves the content owner's compliance with a formal court request that will be issued by federal court clerks. If followed, this process will protect the OSP from liability under federal or state prohibitions respecting release of information regarding individual subscribers.

9. **Other Key Requirements.** In addition to all these rules, the OSP must

- I. Develop and post a policy for termination of repeat offenders;
- II. Accommodate and not interfere with "standard" technical measures used by copyright owners to identify and protect their works, such as digital watermarking and access codes.

The Act makes clear that the OSP is *not required* to monitor its services for potential infringements. It does not have to seek out information about copyright misuse; however, it cannot ignore obvious facts.

D. Implementation. The new rules take effect immediately; therefore, a review of current practices is urgent for all service providers and their staffs. Implementation of system should occur as soon as practicable.

For libraries, the initial issue is simple: does the institution qualify as a service provider? The statutory definition is very expansive, encompassing any provider of Internet access or online network services. Broadly interpreted, most library institutions *could* qualify. However, with qualification comes potential burdens, including creating a website agent, registering that individual with the Copyright Office, satisfying the other conditions of the OSP rules, and responding rapidly to notifications of infringement. Because the Copyright Office registry may make notification by concerned copyright owners fast and effective, registered OSPs may find themselves embroiled in many online copyright disputes over everything from motion pictures to individual pictures and poems. Although these works may be accessible from any computer connected to the Internet, in reality those works may have little direct bearing to works actually accessed by a particular library's patrons. Nevertheless, if notified, the library-OSP may feel compelled to comply with the rigors of the statutory scheme. In short, for many, the burden of compliance will not be worth the benefits of limited liability.

VII. Study on Distance Education and Digital Technologies

A. DMCA Requires Copyright Office Study on Distance Education.

Although not originally part of the WIPO Implementation Act debate, distance education became a topic of the negotiations because libraries and educational interests raised it. The point was that it would be inappropriate to expand legal protection for commercial owners of digital works without remedying some of the legitimate legal concerns of librarians and educators who use copyrighted works and technologies in education. With a commitment from the Chairman and Ranking Minority Members of the Senate Judiciary Committee, Senators Orin Hatch (R-Ut.) and Patrick Leahy (D-Vt.), the Senate included a Copyright Office study of distance education in the bill. The study remained part of the DMCA as finally enacted.

The provision requires the Register of Copyrights not later than six (6) months of passage of DMCA (April 28, 1999) to provide Congress with its recommendations on

...how to promote distance education through digital technologies, including interactive digital networks, while maintaining an

appropriate balance between the rights of copyright owners and the needs of users of copyrighted works.

B. Topics of the Study. The study requires the Register to consult with representatives of copyright owners, nonprofit educational institutions, libraries and archives and to focus on the following factors:

- I. The need for an exemption from exclusive rights of copyright owners for distance education through digital networks.
- II. The categories of works to be included in any exemption.
- III. The extent of appropriate quantitative limitations on the portions of works that may be used under any distance education exemption.
- IV. The parties who should be entitled to the benefits of any exemption.
- V. The parties who should be eligible to receive distance education materials under the exemption.
- VI. Whether and what types of technological measures can or should be employed to safeguard against unauthorized access to, and use or retention of copyright materials as a condition of eligibility.
- VII. The extent to which the availability of licenses should be considered.
- VIII. Other factors that the Register deems appropriate.

C. Copyright Office Plans. On November 16, 1998, the Copyright Office released a preliminary notice, soliciting identification of interested parties and a statement of their concerns in early December, 1998. In January, 1999, the Copyright Office initiated a series of public hearings, which will conclude in February, 1999. Sometime in March, the Office will probably encourage interested parties to sit down and may mediate proposals to change the Copyright Act. It will conclude its work before the end of April, 1999. At that time, the debate is to return to the Congress.

D. Overhaul of Distance Education Rules Now Timely. For the past twenty years, the copyright aspects of distance education have been expressly regulated by Section 110(1) and (2) and Section 112. These provisions grant an exemption from copyright liability for in-class performance and displays of certain copyrighted works and the transmissions of those performances to outside locations. However, these sections were written for an era when educational communications were dominated by face-to-face teaching and one-way, closed-circuit television technology. The emergence and use of digital interactive networks has raised the issue of how to adjust copyright law to two-way, open circuitry. This study will form the factual and legal basis for Congress to organize its review of the law.

Since copyright law has not kept pace with technological changes, only the fair use provision, Section 107, has provided legal flexibility for educators

uncertain of their copyright rights. This study and the Congressional reaction to it will determine the interest of lawmakers in updating distance education user rights in the digital age. Thus, there is an urgency to obtaining information about current practices. It is expected that publishers will participate actively in this proceeding.

E. View of Certain Publishers. Some commercial publishers argued in negotiations that they see little if any reason to update the rules. They will attempt to persuade the Copyright Office and Congress not only that works are and will be readily available to potential users based on reasonable licenses, but also that a broadened exemption would pose risk to creation of new works and the principles of copyright ownership. Moreover, they have on-going concerns about the potential for widespread copyright infringement of works in an educational marketplace, dominated by interactive digital networks. Then, too, many faculty and educational institutions are copyright owners and publishers. They bring a very special perspective on the issue and will have a crucial interest in the outcome of the study and any legal reform.

F. Burden of Reform on Educational, Library and Archival Institutions. More generally, libraries and educational institutions must be prepared to respond. As the advocate of reform, they will need to document their current and reasonably anticipated practices. This means they must know the extent to which licensed and unlicensed works are needed for educational purposes on digital networks. Information will also be needed regarding who posts and who accesses the digital networked material and technological protections against misuse. The economics of licensing and technological protections should also be considered.

The DMCA asks the Copyright Office to advise Congress on *how to promote distance education, but to do so in the context of balancing interests of owners and users*. Thus, the Copyright Office study provides a forum for telling policymakers what is needed to expand responsible distance education practices into the next millennium. Educational institutions and libraries should take full advantage of this opportunity.

VIII. Section 108 Library Exemption Update

Since the passage of the Copyright Act of 1976, the library community has benefited from a limited exception from the exclusive rights of owners dealing with reproduction and distribution of copyrighted works. The limitations are in addition to other uses which libraries and other educational organizations may make under fair use and other copyright rules, and provide explicit guidance for preservation, the use of photocopy equipment on the library's premises and for inter-library lending.

The law has been outdated for some time and in need of reform. DMCA accomplished the necessary changes. Specifically, DMCA provides the following:

- I. Up to three (3) copies of a covered work can be made. Prior to this change, a library which desired to preserve a work which was in brittle condition, could only make one facsimile copy. Now, a library can make three copies – one strictly for archival purposes, one as a master and a third as a use copy, from which other allowable copies may be made.
- II. The requirement that limited permissible copyright to *facsimile only* copies has been eliminated. Now, libraries may employ current technology, including digital technology, in the making of copies. However, in the case of unpublished works, digital copies cannot be distributed in that format and the digital copy must not be made available to the public in digital form outside the premises of the library. In the case of published works, the digital version cannot be made available outside the premises of the library or archives in lawful possession of such copy. In other words, for *published* works, a library which made a digital version for preservation purposes, may loan the digital copy to another library which has lawful possession of the original. However, neither library may allow a member of the public to take the digital copy away from the library. The patron is, however, allowed to retain a facsimile or printed copy of those portions of the work allowed to be copied under section 108 or section 107 (fair use).
- III. Although section 108 requires a library to place a copyright notice on any copies made pursuant to the statutory scheme, this requirement became outdated when the Copyright Act was amended to eliminate the requirement that works contain formal notice. Now, a library may simply state that the work may be protected by copyright if no notice is available.
- IV. In addition, the DMCA provides that preservation copying, which had been limited to instances where a copy of work has is damaged, deteriorating, lost or stolen and a replacement copy is not available at a fair price, may also be preserved *if the copy's format has become obsolete* "Obsolesence" occurs if the machine necessary to read the work is no longer being manufactured or cannot be acquired reasonably in the marketplace.

IX. The Sonny Bono Copyright Term Extension Act

Moving in tandem to DMCA was another copyright reform bill – term extension. Since the 1976 Act took effect, the general term for copyright was changed from two terms of twenty-eight (28) years (an original and a renewal term) to life of the author plus 50 years or 75 years, in the case of works made for hire. Since the previous Copyright Act of 1909 also allowed that "unpublished"

works could have a perpetual copyright, the 1976 reform provided for an end to unlimited protection and a gradual phase in of a term of years.

For the past three years, there has been 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 twenty 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 and 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. The bill, which was renamed for the late-Republican Congressman, Sonny Bono, who died earlier in 1998, 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.

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. It provides that during the last twenty years of the copyright term, these institutions may--

copy, distribute, display or perform a work in digital or facsimile form for purposes of preservation, scholarship, or research; **provided that** the institution has determined on the basis of reasonable investigation that (1) the work is not subject to normal commercial exploitation *and* (2) a copy or phonorecord cannot be obtained at a reasonable price, *or* the copyright owner or agent provides notice through the Copyright Office that (1) and (2) apply.

The exemption applies only to uses within or by the qualifying institutions, not to subsequent uses by users outside of the library or archives.

Exactly what is meant by "normal commercial exploitation" was not resolved in the final legislation. Some publisher representatives claimed that if a work is merely identified as "available for a license," that should qualify as normal commercial exploitation, even if the work has not been sold or licensed for decades and even if the publisher does not have a copy of the work. Needless to say, library interests opposed this strained interpretation.

The Copyright Office, which must create the notification system required by the law, has developed interim regulations to establish a registry of qualified works and owners. Initially, it is obligating owners to identify works and the certify their availability at a fair price or their being subject to normal commercial exploitation. The agency has set a filing fee of \$50 per work covered by the notification; however, works within groups may be noticed at \$20 each. The Office is asking the public for comments by February 12, 1999, on such questions as the definition of normal commercial exploitation and the frequency by which owners should renew their certifications of exploitation (e.g. every five years). Participation in this proceeding is in the interests of library, archival and educational institutions.

X. Database Legislation: The Proposal That Almost Happened

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 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 republished it without compensation as soon as it is released.

Even though earlier drafts of the proposal had cleared the House of Representatives twice, the title became the centerpiece of controversy. Critics, including commercial publishers who need access to published data in order to create their own databases and libraries and educational interests expressed concern that information would be unreasonably locked away. Despite efforts by Senate staff to amend the House bill, no satisfactory resolution was accomplished. In light of the fact that the Senate did not hold public hearings on the legislation,

the conclusion was that database protection should be removed from the DMCA and made a high priority in the 106th Congress.

The key elements of the House-passed version were the following:

- Protection afforded for the *investment* in organizing, assembling and maintaining information.
- "Information" includes facts, bits of data and governmental works.
- Anyone who assembles a database could sue if its actual or potential market could be harmed by third party appropriation. "Harm" would be defined as taking even a few bits of data.
- Although the term of protection for a specific database would be fifteen years, if the owner of the database invested significantly to maintain it, the protection could be extended virtually indefinitely.

As the parties negotiated in the closing days of the session, these issues emerged as open and debatable:

- What would be the effect of this legislation on fair use of copyrighted works, library preservation and other educational scientific or research uses?
- What is a database owner's "potential market" and how is that determined?
- What is the appropriate definition of "harm" and what should be the legal impact if one reproduces a limited part of a database?
- What does a third party have to do to "transform" the use of data to create a new, legal work?
- What is proper relationship between copyright law and the database proposal?

PART III

WHAT THE DMCA AND TERM EXTENSION MEAN FOR LIBRARIES

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

The Digital Millennium Copyright Act is the most comprehensive reform of copyright law in a generation. It takes copyright principles into the digital information age and establishes complicated rules that most users do not yet appreciate. The implications of the statute, however, will be great. This

memorandum has detailed the history of the digital discussions and highlighted the key issues and the most important statutory provisions.

Now, from overview to action, here in a nutshell is what the DMCA means for the library community:

A. TPMs and Anti-Circumvention

Many electronic works are distributed in encrypted form. The new anti-circumvention and access rules will encourage publishers to distribute digital works online, by CD, CD-ROM, DVD or in other formats, in encrypted or protected form by providing greater assurance 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.

Most likely, the DMCA will 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 will challenge the way in which libraries functions as the archive 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.* They must be alert to limitations on access and use of works that are licensed. In short, libraries must be prepared --

- I. To bargain for the right to a hard copy.
- II. To realize that digital access means limited access, unless you own a copy of the work.
- III. To prepared to pay for the cost of access.
- IV. To understand that equipment which decrypts works may be illegal to acquire or use.

No later than October 28, 2000, the Library of Congress must publish regulations controlling access to particular classes of works. *The library 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 are the economic and social impacts of the new regime.* Then, it must be prepared to participate actively in regulatory proceedings to be established by the Librarian that will focus on the particular classes of works that need exemption from the new rules. 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 procedure 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.

B. OSP Limitation of Liability

Creation of a new limitation on liability for service providers was perhaps the most complex task of the DMCA legislators. Balancing a myriad of interests and fashioning legislation for technology that is arcane and evolving are no simple tasks. Thus, the OSP limitation represents a very important contribution of the DMCA to copyright law. Also, its process – Congressional committee supervised negotiations - may also serve as a model for preparing legislation on 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 online activities of libraries. However, the legislation's complex rules will require very careful compliance practices, including use of sophisticated software and systems and development of notification and termination policies. Even though 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 be taken.

In weighing the benefits of coming within the terms of the statutory limitation, 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 "hot button" issue for publishers. It should be anticipated that a test case or two will 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," receiving all notifications of infringements. 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 service providers 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 libraries that do not host web sites or sponsor chat rooms is to wait for the dust to settle and see how implementation of the new rules proceeds.

C. Study of Distance Education in Networked Environments

Although DMCA did not include explicit expansion of protection for educational activities involving the Internet, the creation of a Congressional-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 the rights of owners and the rights of users. 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 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:

- I. Obtaining clearances for spontaneous use of copyrighted works in online courses is virtually impossible.
- II. Identifying copyright owners of certain works, like photographs, is so daunting as to make it a task not worth pursuing.
- III. Licensing is not an acceptable alternative, because when offered, the price is often far too high to justify the use.
- IV. Unless the 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.
- V. 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 achieve 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. 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.

D. Library Exemption Update

Updating Section 108 so that it enabled libraries to work in digital preservation was surprisingly hard fought. Even with the endorsement of the authors of the *White Paper*, 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 maintain collections easier in a technologically advanced environment.

E. Copyright Term Extension and the Library Limitation

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. However, the unfinished business of the Term Extension Act remains the definition of "normal commercial exploitation." What does that mean? 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 twenty years of the extended year just like public domain works. For the library community, this is a vital concern, because maintenance of the public domain assures the role of libraries as archivists of history, not licensees of commerce.

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 the library 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 are claimed to 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.

F. Database - The Other Shoe

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 think of as "the public domain." A database bill would effectively create a new body of material comprised of facts, data and government works that could not be reproduced without consent. A new licensing regime would be created with 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. Recognizing that the House of Representatives adopted the measure twice, librarians cannot rest on their laurels. 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 purpose of education, scholarship, research and teaching. Although legislators heard and agreed with many of the arguments of the library community, have no illusion: database is the number one priority of publishing magnates like 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 will be at the very top of the House Copyright Committee's agenda in 1999. Maintaining a strong library 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.

American Library Association • Washington Office • 1301 Pennsylvania Avenue, N.W. • Suite 403 • Washington, D.C. 20004-1701 • 202.628.8410 • 800.941.8478 toll free • 202.628.8419 fax • webmaster@alawash.org

[ALA Home](#) | [ALA Washington Office](#) | [Office for Information Technology Policy](#)

