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Impact of the Digital Millennium Copyright Act on Libraries and Library Users

by Jane M. Larrington¹ (James E. Rogers College of Law Library, University of Arizona) <jane.larrington@law.arizona.edu>

This article presents a brief survey of the issues presented by digital rights management, the *Digital Millennium Copyright Act*, and other Copyright provisions for libraries, especially regarding digital copying, digital document delivery, inter-library loan, and collection development. Reitz (2007) defines digital rights management as being:

A system of information technology components (hardware and software) and services designed to distribute and control the rights to intellectual property created or reproduced in digital form for distribution online or via other digital media, in conjunction with corresponding law, policy, and business models. DRM systems typically use data encryption, digital watermarks, user plug-ins, and other methods to prevent content from being distributed in violation of copyright.²

Copying digital media can be as easy and quick as the click of a mouse. Unlike analog copies, digital copies are identical to the original; quality does not degrade with successive copies. Without a way to effectively manage rights in digital works, copyright owners' ability to exploit their works financially can be hampered by unauthorized downstream distribution. Without some measure of protection, owners might choose to not make their works available on the Internet, effectively rendering these works inaccessible to a significant portion of researchers. Absent massive changes to our current systems of distribution and copyright laws, some measure of digital rights management is in the interest of both copyright

owners and information consumers. So, the challenge we face is designing an efficient management system that meets the needs of both groups.

In 1998, Congress enacted the *Digital Millennium Copyright Act (DMCA)*,³ amending several portions of the *Copyright Act* in an attempt to better address copyright in the digital age. There are several provisions of the *Copyright Act* and the *DMCA* that are relevant to libraries and library users, but this article will focus on the anti-circumvention provisions of the *DMCA*.

DMCA Provisions Relating to Circumvention of Technological Protection Measures (TPMs)

Section 1201⁴ of the *DMCA* creates three new torts. Torts are civil wrongs, as opposed to criminal, but can carry severe penalties, typically monetary damages and fines. Section 1201(a)(1)(A), the most controversial of the three new torts, makes it illegal to circumvent a technological measure that effectively controls access to a protected work. Under Section 1201(a)(2), it is illegal to traffic in devices primarily designed for purpose of circumventing a TPM that effectively controls access to protected work. Section 1201(b) makes it illegal to traffic in devices that are primarily designed to overcome a protection afforded by a TPM that effectively protects a right of a copyright owner.

There are three important distinctions to keep in mind among the three torts. First, the first two are concerned with access to a copyrighted work, while the third is concerned with protecting rights of a copyright owner (typically,

the copyright's exclusive right to make copies). Traditionally, copyright law only addressed the exclusive rights of a copyright owner, not access to a work: there is no copyright law that would prevent one from browsing a book prior to purchasing it. Second, the second and third torts are concerned with trafficking in anti-circumvention devices (typically done by businesses), while the first is concerned with the actual act of circumventing (done by individuals or institutions). It is the first tort that is primarily of concern to libraries and library users. Third, Section 1201 imposes liability on third parties who provide anti-circumvention devices allowing either access or copying, while the actual circumventor is only liable under this section for gaining access because she/he would already be liable for copyright infringement under Section 106 of the *Copyright Act*.⁵

Exceptions for Certain Classes of Works

Section 1201(a)(C) sets forth a process by which, every three years, the Copyright Office publishes a list of classes of works for which the Section 1201 prohibition would adversely affect noninfringing uses. Users may circumvent TPMs to access these works. A list of the current classes is available at: <http://www.copyright.gov/1201/index.html>.

Under Section 1201(d)(1), "Libraries, Archives, and Educational Institutions" are allowed to circumvent a TPM to gain access to a work, for the sole purpose of making a "good faith determination of whether to acquire a copy." They must not retain access longer than necessary to make their determination nor use such access for any other purpose. Section 1201(d)(2) limits the exemption to situations where the work is not reasonably available in another form. Section 1201(d)(5) requires that an institution be open to the public or make itself available to researchers who are not affiliated with the institution. Sections 1201(e), (f), and (g) provide limited exemptions for law enforcement and other government agencies, reverse engineering, and encryption research.

Noninfringing Use is Not a Defense Under Section 1201

Section 1201 provisions have been under attack since before their enactment. One of the major complaints is that it prevents access without distinguishing noninfringing uses from infringing uses. There are many noninfringing uses under the *Copyright Act*. Two of the most notable ones are codified in Section 107 Fair Use⁶ (discussed below) and in Section 109(a) First Sale.⁷ The First Sale doctrine states that the copyright owner has the exclusive right to make the first sale of each copy of his/her work, but that those works may be subsequently sold

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larger the number of streams, the more quickly the minimum ATH number will be reached.

The second implication is that the \$500 minimum royalty is a per-channel payment; if a library transmits two simultaneous streams the library would pay two minimum royalties. As a practical matter this cost structure may hinder some libraries' ability to be creative with this technology in terms of streaming other creators' content.

Of course, none of the forgoing issues apply when a library streams self-created content. There may be copyright issues involved in, for example, a poetry reading sponsored and

recorded by the library and later distributed to its patrons in an audio stream. But in this example, the library need only acquire one permission — that of the author of the work — while to stream audio created by someone else the library would need permission or a license both from the creator of the work, and from the entity that recorded the work.

Streaming audio is a technology that can be utilized by libraries to provide a multitude of services to their patrons. Due to the complexity of the copyright law, the expense of the royalty structure, and the necessity for continual monitoring of outgoing audio streams, however, libraries should only implement such programming after significant forethought. 🌱

by their owners without any further notice to the copyright owner. When access to digital works is controlled by a TPM, the owner is typically unable to effectively sell the work.

Fair Use

Fair use was originally judicially-created law, not codified until 1976 when the *Copyright Act* essentially adopted the standards as established by judges. Section 107 of the *Copyright Act*⁸ contains a list of purposes for which copying may be considered fair. The list is not determinative, but includes criticism, comment, news reporting, teaching, scholarship, and research. In determining whether a certain use is "fair," Section 107 presents four factors to be considered: (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

As codified, fair use is a *defense* to copyright infringement, rather than an absolute right of the intellectual property consumer. Thus, whether a use is "fair use" can only be determined by a judge or jury after the fact. A library or library user cannot know ahead of time whether fair use will shield them from liability. Furthermore, as mentioned above, fair use is not an available defense to Section 1201 violations. This creates a situation where a user could make fair use of content if accessed in print or a digital copy without TPMs but could not make fair use of the exact same content if accessed in a digital copy with TPMs.

Library-Specific Copyright Provisions

Libraries are specifically addressed in Section 108 of the 1976 *Copyright Act*⁹ as modified by the 1998 *DMCA* and *Copyright Term Extension Act*¹⁰ (*CTEA*; also known as the *Sonny Bono Act*). Section 108(a) sets forth the basic rules for library copying and requires that the library or archive be open to the public or open to non-affiliated researchers, gain no commercial advantage by making the copy, and include a copyright notice on the copy. Section 108(b) & (c) allow a library or archive to make a limited number of copies for preserving and replacing works owned by the library or archive.

Sections 108(d) and (e) both provide exceptions to permit reproduction and distribution of copyrighted works at the request of patrons, so long as the copy becomes the property of the patron, and the library or archives has had no notice that the copy would be used for any purpose other than private study, scholarship, or research, and the library or archives prominently displays a copyright warning. Section 108(d) allows a library to make one copy of a single article from a collection or small part of a larger work upon request by patron/other library.

Section 108(e) allows a library to make single copies of entire works, or substantial parts thereof, upon request by patron/other library. Section 108(f) includes a hodgepodge of disclaimers: (1) libraries and archives and their employees are not liable for unsupervised use of their copiers so long as they display a copyright notice; (2) individuals who make or receive copies under 108(d) may still be liable for copyright infringement if they exceed fair use; (3) libraries and archives may make and lend a limited number of copies of audiovisual news programs; and (4) Section 108 does not affect the rights of fair use or contractual obligations.

Section 108(g) addresses the cumulative effect of series of single copies. Section 108(g)(1) states that the copying allowed by 108(d) & (e) cannot be done if the library knows, or has substantial reason to believe, that it involves the "related or concerted reproduction or distribution of multiple reproductions of the same material, whether on one occasion or repeatedly, and whether intended for aggregate use by one or more individuals or for separate use by the members of a group." A 1975 Senate Report accompanying the Act states, by way of example, that "if a college professor instructs his class to read an article from a copyrighted journal, the school library would not be permitted . . . to reproduce copies of the article for the members of the class."¹¹

There are a number of libraries that are doing just that today by providing digital course reserves whereby enrolled students can download a free copy of an assigned work.

Section 108(g)(2) states that the systematic reproduction of single articles or portions of larger works is forbidden, even if the library is unaware that reproductions are systematic. The text of 108(g)(2) makes clear that the provision is not intended to eliminate inter-library loan arrangements, but merely to prevent such arrangements from substituting for a subscription or purchase. In crafting this proviso, the House intended the meaning of "aggregate quantities" and "substitute for a subscription to or purchase of" to be clarified by guidelines developed by the **Commission on New Technological Uses of Copyrighted Works (CONTU)**, which is discussed below. According to the Copyright Office's 1983 Report, whether or not reproduction is "systematic" is an objective test (i.e., it is irrelevant whether the library or library staff knew that such reproduction was systematic); if the reproduction is done via a common plan, regular interaction, organized or established procedure, then it is infringing.¹²

Section 108(h) loosens restrictions on photocopying orphan works, which are works whose copyright owners cannot be located. Section 108(i) addresses copying of a musical work, pictorial, graphic or sculptural work, motion picture, or other audiovisual work.

In addition to the library exceptions found in Section 108, academic libraries may also make use of the provisions of Section 110(1)¹³ on face-to-face classroom performances. Section 110(2) (also known as the **TEACH Act**)¹⁴ on transmission of performances for

distance education is available for libraries at regionally-accredited nonprofit educational institutions. And, as discussed above, Section 1201(d)(1) contains an exemption that allows the circumvention of TPMs so that a library can access work to determine whether to purchase the item.

Copyright Law & Inter-Library Loan

CONTU was established in 1974 to study the reproduction and use of copyrighted works by computers and other types of machines. In 1976, the *CONTU Guidelines* were written to provide guidance to libraries on appropriate ILL procedures under the new 1976 *Copyright Act*.¹⁵ The *Guidelines* were endorsed in the Conference Report for the 1976 *Copyright Act* as "a reasonable interpretation of the proviso of Section 108(g)(2)."¹⁶ The *Guidelines* provide guidance only on ILL of materials that were published within five years prior to the ILL request, presumably because the vast majority of materials are purchased and used within five years of their publishing date; serials, especially, are quickly considered out-of-date. The guidelines state that in any one calendar year, a library may receive via ILL no more than five copies of an article or articles from a periodical and no more than five copies of or from any given non-periodical work.

Increasingly, with research, scholarship, and private study conducted in a digital environment, users expect digital access to information. An increasing amount of information is "born-digital" with no analog equivalent. Since the time and cost efficiency with digital copies can be substantial, many argue that it makes little sense in this day and age to require libraries and archives to print analog copies of requested materials and deliver them in person, by mail, or by fax. As a result, libraries are increasingly filling their ILL requests with digital copies. Academic libraries are also moving quickly towards implementation of electronic reserves, which brings up the same issues.

The 1976 *Copyright Act* and CONTU *Guidelines* were designed to address analog copies. Nothing in the provisions expressly precludes their application to digital technologies, but if read literally, digital copying is effectively barred by subsection 108(a)'s single-copy limit.¹⁷ Technically, producing a digital copy generally requires the production of temporary and incidental copies, and transmitting the copy via digital delivery systems such as email requires additional incidental copies. The *Copyright Act* does not provide any express exception for such copies, although fair use and implied licenses might apply. Many libraries and archives engage in digital copying for ILL and library reserves, gambling that the incidental digital copies they make in doing so will not be found in violation of the *Copyright Act*, or that they will be protected by the fair use doctrine or other equitable arguments.

The chief concern of copyright owners is that copies provided to users electronically are susceptible to subsequent "downstream" distribution via the Internet, potentially multiplying

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many times over and displacing sales. Allowing libraries and archives to deliver copies to users electronically, unless reasonably limited, could potentially cause significant harm to owners by undermining their market.

Online technologies allow libraries and archives to serve anyone regardless of geographic distances or membership in a community. Many of the Section 108 exceptions were based on the assumption that certain natural geographical limitations would prevent unreasonable interference with the market for the work. If users can electronically request copies from any library, that natural friction would break down, destroying the balance originally struck by the provisions.

Conclusion

Aside from the limited exceptions discussed herein, libraries are subject to the provisions of 1201. Libraries may be subject to vicarious liability for the actions of their staff and even library patrons. Therefore, it is necessary to have a copyright compliance policy and ensure sure that library staff is aware of the policy. Make sure that staff is educated in how to comply with copyright law.¹⁸ Post appropriate copyright notices in conspicuous places for library patrons. Keep licensing agreements current and make sure they include the rights necessary to lawfully gain access and whatever copying is necessary for effective use by library patrons.

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Endnotes

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2. **Reitz, J.** Digital rights management (DRM). *Online Dictionary for Library and Information Science*. Retrieved July 8, 2007.

3. **Digital Millennium Copyright Act**, Pub. L. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

4. 17 U.S.C. § 1201.

5. 17 U.S.C. § 106.

6. 17 U.S.C. § 107.

7. 17 U.S.C. § 109(a).

8. 17 U.S.C. § 107.

9. 17 U.S.C. § 108.

10. **Sonny Bono Copyright Term Extension Act**, Pub. L. 105-298, 112 Stat. 2827 (October 27, 1998).

11. S. Rep. No. 94-473, at 70 (1975).

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13. 17 U.S.C. § 110(1).

14. **Technology, Education and Copyright Harmonization Act of 2001**, Pub. Law 107-273, 116 Stat. 1758, (November 2, 2002); codified at 17 U.S.C. § 110(2).

15. **National Commission on New Technological Uses of Copyrighted Works (CONTU)**. Final Report. Available at <http://digital-law-online.info/CONTU/contu1.html>.

16. Conf. Rep. No. 94-1733 (1976).

17. 17 U.S.C. § 108.

18. For a list of useful resources for keeping current on issues related to technology, law, and libraries, see **Balas** (2007). **Dames** (2006) discusses how "Big Content" (large corporation that control vast copyright portfolios) has successfully framed the debate over copyright in digital media. **Crawford** (2005) provides a clear, concise overview of the issues at stake in crafting policy around digital rights management.

Electronic Reserves and the Failed CONFU Guidelines: A Place to Start Negotiations

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Intellectual property is seldom a matter of hard-and-fast rules. In most library-related copyright disputes, both sides rely upon real legal principles but with different interpretations. One example of these differences involves the legality of electronic reserves in libraries.

Academic and school libraries base the legality of their reserves on the Fair Use provisions of section 107 and the library exceptions in section 108 of the **1976 Copyright Act**.¹ Fair Use by necessity involves a balancing act between the property rights of the author/publisher and the First Amendment rights of the

individual to comment, criticize, and use the material for scholarship.² Yet a use that is fair is in the eye of the beholder, and what a reader sees as Fair Use may be copyright infringement to the publisher. Section 108(b) of the **Copyright Act** allows libraries to create a copy

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