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

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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), 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 1201 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 he/she would already be liable for copyright infringement under Section 106 of the Copyright Act.

**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 Use (discussed below) and in Section 109(a) First Sale. 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...
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." 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. 108(h) loosens restrictions on photocopying orphan works, which are works whose copyright owners cannot be located. Section 108(h) 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) on face-to-face classroom performances. Section 110(2) (also known as the TEACH Act) 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. 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)." 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. Technically, producing a digital copy generally requires the production of temporary and incidental copies, and transmitting the copied materials 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
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 provision.

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 that library staff is aware of the policy. Make sure that staff is educated in how to comply with copyright law. 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.

References


Endnotes

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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

by Bryan M. Carson, J.D., M.L.L.S.  (Associate Professor/Coordinator of Reference & Instructional Services, Western Kentucky University Libraries, Author, “The Law of Libraries and Archives” (Scarecrow Press), Ed.D Student, Higher Ed. Leadership & Policy, Vanderbilt University, 1906 College Heights Blvd. #11067, Bowling Green, Kentucky 42101-1067; Phone: 270-745-5007; Fax: 270-745-2275) <bryan.carson@wku.edu>

Intelectual 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. 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. 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 continued on page 32