

Copyright Challenges in the Digital Age:
Effects of the Digital Millennium Copyright Act
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Abstract

Copyright law in the United States has been evolving for hundreds of years. Its foundations rest in the desire to encourage creativity and expression by protecting the rights of the creator and to serve the public good through the sharing of their works. In 1998 copyright law saw significant changes. The Digital Millennium Copyright Act created new guidelines specifically addressing digital technology. This act instituted new rules and exceptions to those rules that have wide reaching effects for libraries and information organizations. Both positive and negative aspects can be argued for the changes that came with the DMCA. Many feel it has been a hindrance to the public good that copyright law, in general, was intended to serve. There is a great deal of fear surrounding it. Only a greater knowledge of the DMCA and its many complexities will allow information organizations to continue to operate effectively in a digital age.

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Merriam-Webster defines copyright as “the exclusive legal right to reproduce, publish, sell or distribute the matter and form of something (as a literary, musical or artistic work)” (Merriam-Webster's online dictionary, n.d.). According to Hirsh (2015), the purpose of copyright is to serve the greater public good. It allows creators to profit from their works and encourages them to freely share these works without fear of loses. The hope is to enhance creativity and the quality of information available (p. 301). Copyright law has a long history and has seen significant changes over the past 100 years. Early copyright law in the United States was based on British copyright laws. These laws have changed as production and distribution methods have evolved (Davis & Fiander, 2001, p. 88).

The 1976 Copyright Act gave exclusive rights to owners but it also provided limitations and exceptions to these rights. Owners were granted the rights to reproduce, distribute, display or perform (publicly) their work. Exceptions such as the First Sale doctrine, Section 108 (preservation and replacement) and Fair Use allow libraries to provide access to these works without infringing on copyright. The First Sale doctrine is the exception that allows libraries to loan copyrighted works to patrons. Section 108 allows for information organizations to create up to three copies of a copyrighted work for the purpose of preservation and replacement and a single copy for patron use. There are strict guidelines around these copies that must be honored to remain in compliance with this exception. Finally, Fair Use allows a work protected by copyright to be used for the purposes of criticism, research or teaching without fear of

infringement (Hirsh, 2015). These rules and their exceptions helped maintain a balance between the protection of information and providing access to that information for many years.

In 1998, with the passing of the Digital Millennium Copyright Act (DMCA) the landscape of copyright law changed. The DMCA is a complex and controversial act that many believe lends itself too strongly to the benefit of the copyright holder. The goal of the DMCA was to update copyright law with the changes in digital technology and implement the requirements of the World Intellectual Property Organization (WIPO) (DMCA: The Digital Millennium Copyright Act, n.d.).

The Digital Millennium Copyright Act is divided to five titles. Title I is focused on the implementation of the WIPO treaties. It required the length of copyright period, life plus 70 years, must be honored in all countries per WIPO. The copyright periods of other countries must be considered as well. For example, if the U.S. copyright period is up in 5 years but the copyright for the same work in France is in effect for 20 more years then the French copyright period would need to be honored. This applies even if the other countries copyright was not in effect when the work was brought to the U.S. Title I also made it illegal to circumvent any of the technology methods used to protect copyrighted works. Davis (2001) sums it up nicely, “you can’t beat the code; you can’t cheat and use the password” (p. 92). It becomes a federal crime to do these things and the copyright holder is no longer responsible for proving a violation. The user must prove they are innocent of the violation. Title II limits the liability of online service providers (OSP) regarding copyright infringement. In short, an OSP can be unknowingly be responsible for copyright infringement. If an unknown user were to infringe on copyright the OSP would be held responsible and charged because that user is untraceable. This is a very important subject for libraries because they would be considered an OSP. Title III creates an

exemption for making a copy of a computer program for maintenance and repair purposes. Title IV is made up of six provisions relating to the Copyright Office, distance education, collective bargaining agreements and exceptions for libraries. Two of the six are especially important for the library community. They provide the exception to make digital copies for preservation and place an obligation on the Copyright Office to provide recommendations on distance education. Title V is a bit strange and seems a bit out of theme with the other sections. It implements a new protection for the design of vessel hulls. Davis (2001) provides a tongue-in-cheek theorization that “the U.S. lost one of those big international sailing races” (p. 93).

Very clearly Title V is not going to have a significant impact in the library environment. But a number of these changes do have ramifications within our libraries. Whether they are public or academic, the DMCA brings new issues for information organizations. Title I, Title II and Title IV hold specific interest.

The changes Title I brings to the length of the copyright period delay the entry of copyrighted works into the public domain. The issue of fair use also comes into question with the implementation of Title I. Recall that fair use is an exception put into place by the Copyright Act of 1976. It allowed for works under copyright to be used without infringement for purposes such as teaching and research. Lots of questions were raised about what would constitute an infringing use of a work. This was a concern to the point of delaying this title’s implementation for two years to help determine if users would be limited in their ability to utilize works without infringement. Classes of works were to be identified and exempted for a period of 3 years. A new review would then be conducted and new three year period would begin (Davis, 2001). But it should be noted that all the exemptions are not specifically pertaining to information organizations. These exempted classes are currently under review for the sixth time. A list of 27

proposed classes are being considered. These issues include the unlocking/jailbreaking of mobile devices, videogames, tablet computers, wireless handsets; space and format shifting of literary and audiovisual works; and the derivative or education use of audiovisual works (1201 Rulemaking, n.d.). Hopefully a few of the issues that make the final cut will elevate some of the gray area surrounding infringement for the information organization. But even as these exceptions are outlined Davis (2001) expresses concerns about this, “Librarians can’t justify poetry anymore than we can justify motion-pictures because the media is not the issue- it’s the content, not the media” (p. 95)

Libraries should be concerned with details of Title II because in the eyes of the law they fall into the category of an online service provider. A library “provides software to link users to sites; stores information on its server; and facilitates displays and recordings by users” (Davis, 2001). These are the primary functions of an OSP. As an OSP the library would be responsible for the copyright infringement committed by its users. This creates tremendous potential to hinder internet communication as OSP’s operate in constant fear of legal repercussions.

Fortunately, exemptions were created for the OSP provided they met certain very specific criteria. The first set of criteria surround the material being transmitted. The material must be available online through someone other than the OSP in question. The material cannot be modified by the OSP. The OSP cannot retain a copy of the item in storage for any longer than necessary. The OSP cannot have knowledge of the material or infringement. They must be ignorant of the circumstances of the infringement. And finally upon learning of the infringement they must remove or disable access to the site. The second set of criteria relate to the parties to transmission. The transmission must be initiated or directed by another person and sent to another. No other person should have access to the copy made during intermediate storage. The

OSP should not select recipients. There should be no financial benefits from the infringement for the OSP. Procedures are also outlined in order to maintain compliance. It should be an automatic process that is responsible for the transmission and storage. Rules must be followed regarding the refreshing or reloading of the material. Access requirements such as codes or fees must not be interfered with by the OSP. All notice and takedown procedures as well as counter-notice and put back procedures must be followed (Lutzker, 1999). The strict adherence to these guidelines allow for some level of protection for a library. But clearly this is a significant responsibility and these guidelines are just a brief overview of Title II.

As previously noted Title IV is made of six provisions but only two of these are of particular interest to information organizations. The Distance Education Study is designed to help promote distance education through copyright law. The Copyright Office was instructed to consult with the parties involved and make recommendations to Congress on ways digital technologies can encourage distance education. They were directed to consider a number of factors in consideration of a new exemption. These considerations included the categories to be considered, quantitative limitations, parties eligible for the exemption and the parties to receive exempted materials (The Digital Millennium Copyright Act of 1998 U.S. Copyright Office Study, 1998). This resulted in the Technology, Education, and Copyright Harmonization Act (TEACH) in 2002 which allowed for a broader scope of digital materials to be utilized in a distance or hybrid learning environment. But like all things in copyright, the balance must be maintained. It also instituted new requirements to protect the copyright holder (Wolfson Latourette, 2006). The other notable provision of Title IV is the Exemption for Nonprofit Libraries and Archives. This expands the previously granted exception to make a copy of a work for preservation or interlibrary loan to include the digital format. It allows up to 3 copies to be

made, including the digital format, with the understanding that the digital copies cannot be made available to the public. This exception also includes wording to allow for preservation if the format of the work has become obsolete. For example the machine needed to access the work is no longer being made. (The Digital Millennium Copyright Act of 1998 U.S. Copyright Office Study, 1998).

Popular opinion in the library community seems to trend toward the negative regarding the DMCA. Concerns run rampant regarding fair use, the public domain, and most frightening of all, liability. Henderson (n.d.) believes that copyright law is crucial in maintaining the balance of the three interested parties: creators, publishers, and the public. No one party should be too strong. Many fear that the DMCA has tipped this balance in the favor of the copyright holder and the publisher. Glynn S. Lunney (2001), in an article for the Virginia Law Review, states “Copyright is dead. The Digital Millennium Copyright Act has killed it” (p. 814). Lunney goes on to explain that copyright does not cease to be relevant. It continues to protect the rights of the creator. But it no longer serves the public good. He compares copyright under the DMCA to a guild monopoly, tightly controlling access to digital materials. Lunney feels that the DMCA is a reflection of concern in Congress that the ease of copying digital materials would lead consumers to copy the item themselves rather than paying for a legitimate copy. Eventually this could lead to a reduction in creation of new works (p. 814-818). Larrington (2007) expresses her concerns regarding Title I of DMCA. She notes that previously copyright law did not address access to a work, “there is no copyright law that would prevent one from browsing a book prior to purchasing it” (p. 26). She goes on to suggest under the DMCA guidelines it hinders the First Sale doctrine. The copyright holder has the right to the first sale of the protected item but future sales of that specific item (a specific copy of a book) are not protected. In the case of digital

items controlled by technology prevention measures, the ability of the owner to sell that item becomes limited (p. 28). In an article for the Electronic Frontier Foundation, Fred Von Lohmann (2010) reviews several examples of the negative impacts of the DMCA. He states “it is being used to stifle free speech and scientific research” (p. 1). He goes on to note multiple instances of journalists, scientists and researchers threatened with or directly facing legal action for committing infractions against the DMCA.

At first glance could be said that the DMCA provides new guidelines for the digital age with a positive impact for the information organization. It limits liability for OSPs, allows for digital copies to be made for preservation purposes, encouraged distance education and made no changes to fair use. All this seems positive. However, more than anything it seems to have created a culture of fear surrounding copyright law and potential infringement. The best response to fear is understanding. In order to operate effectively in the digital age, the best course of action for any library or information organization is to become educated. With the proper understand of the expectations of the DMCA, local policies can be set in an effort to comply with its rules. The more that is known and understood about the DMCA, and copyright law in general, the better the organization can protect themselves appropriately and serve their users effectively.

The Digital Millennium Copyright Act is lengthy, complex and sometimes difficult to interpret. It remains controversial in the library community and beyond. Effects of the DMCA are felt by everyone: scientist, journalist, student, library patron and general consumer. It impacts the way receive information and the way we share it. As technology continues to change the laws surrounding copyright will continue to evolve. It is the hope of many in the library community that these future copyright changes will restore some of the balance lost

between the copyright holder and the public. The protections provided by copyright law should be in the name of the public good, encouraging the creation and sharing knowledge. The new challenges created by the DMCA should not be allowed to hinder these processes.

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