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# The Digital Millennium Copyright Act

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On October 28, 1998 President Clinton signed a bill providing new game rules for the treatment and respecting of online copyrighted material. The Digital Millennium Copyright Act, (hereinafter referred to as the *DMCA*), H.R. 2281 in the House of Representatives, and S. 2037 in the Senate (S. 1121, abandoned with the passage of this legislation), was a hot potato by many interested in copyright law. Both houses of the one hundred and fifth (105<sup>th</sup>) Congress gave it the green light earlier in the month, October 8<sup>th</sup> and 12<sup>th</sup>, respectively. The complete text can be found at <http://thomas.loc.gov/cgi-bin/query/z?c105:H.R.2281>; see, generally, <http://www.loc.gov/copyright>, <ftp://ftp.loc.gov/pub/thomas/cp105/hr796.txt>, and <ftp://ftp.aimnet.com/pub/users/carroll/law/copyright/h2881enr.txt>. For a comprehensive analysis, see *The Digital Millennium Copyright Act*, by Mark Radcliffe at [http://www.gcwf.com/articles/interest/interest\\_11.html](http://www.gcwf.com/articles/interest/interest_11.html).

The DMCA adds two (2) new chapters to Title 17 as it strengthens international law worldwide and protects domestic technology. President Clinton released the following statement after passage:

"I am pleased that the Congress has passed the Digital Millennium Copyright Act. This bill will implement the two new landmark World Intellectual Property Organization (WIPO) treaties that my Administration negotiated. These treaties will provide clear international standards for intellectual property protection in the digital environment and protect U.S. copyrighted works, musical performances and sound recordings from international piracy. American copyright-based industries that produce and promote creative and high-technology products contribute more than \$60 billion annually to the balance of U.S. trade. This bill will extend intellectual protection into the digital era while preserving fair use and limiting infringement liability for providers of basic communication services..." (Statement by the President, Office of the President's Press Secretary, The White House, October 12, 1998, at <ftp://ftp.aimnet.com/pub/users/carroll/law/copyright/h2281-res.txt>.)

The one hundred and fifty (150)-page document divides into five (5) titles in **Figure. 1** below:

## Figure.1

*Note:* Except for Title I (Treaty), each the following are effective upon enactment:

Title I	Implementation of two (2) treaties dealing with digital issues, copyright protection and management systems.
Title II	<p>Limitation of Online infringement liability for ISPs ( Internet Service Providers) (reducing legal uncertainties regarding such items as digital networks, strengthening anti-online piracy, outlining copyright owners' notification procedures, defining university liability, and creating a "safe harbor" for ISPs in four (4) situational activities.</p> <ol style="list-style-type: none"> <li>1. Conduits (provision of materials transmission, routing and connections)</li> <li>2. System Caching (temporary or intermediate materials storage)</li> <li>3. User Storage (materials)</li> <li>4. Information Locators (linkage provision)</li> </ol> <p><i>Note: #1 and # 2: transmission must be initiated by a third party. #3 and # 4: requires the ISP to be without knowledge or having reason to know of any infringement, to obtain no direct financial benefit and to not change the materials.</i></p>
Title III	"The Computer Maintenance Competition Assurance Act"(formerly H.R. 72) (creation of an exception for temporary computer program reproduction in maintenance/repair).
Title IV	"Miscellaneous Provisions" (distance education, exemption for libraries/archives, ephemeral (momentary) recordings).
Title IV	<p>"The Vessel Hull Design Protection Act"(formerly H.R. 2696) (creation of new protections for boat hull designs, effective for two (2) years only).</p> <p><i>See, e.g., <a href="http://thomas.loc.gov/cgi-bin/query/z?c105:H.R.2281.enr">http://thomas.loc.gov/cgi-bin/query/z?c105:H.R.2281.enr</a> and <a href="http://abanet.org/intelprop/hr2282.html">http://abanet.org/intelprop/hr2282.html</a>. For a better understanding, see The Software Publishers Association, <a href="http://www.spa.org/govmnt/iprt/dmcasumdraft.htm">http://www.spa.org/govmnt/iprt/dmcasumdraft.htm</a>.</i></p>

Oddly enough Congress handed down the measure around Columbus day. It would seem Americans were in store for more than celebrating the discovery of the country. It would also be a day of revelation in copyright law. The legislation has significant impact on our international status. Although technically the Senate still must ratify international pacts before governments of the world give credence to the measure, the law does prepare for the ratification and execution of two (2) treaties regarding *WIPO*, The World Intellectual Property Organization. In December 1996 over one hundred and fifty (150) countries agreed on WIPO at a conference on digital information and copyrights in Geneva. The first treaty clears up digital authors' rights. The second pact focuses upon the Internet and sound recordings. Thirty (30) nations must ratify the agreement for it to be effective globally. *See, e.g., New Global Treaties Protect Copyrights Online*, by Ralph Oman, Law Journal Extra, at <<http://lrx.com/copyright/p4global.htm>>.

The DMCA, with the support of such leaders as Senator John Ashcroft of Missouri and Representatives Rick Boucher of Virginia, Scott Klug of Wisconsin and Tom Campbell of California, is heralded by internet service providers, software industry groups, music/movie companies and the like for its protection against the unscrupulous individual who could possibly

make use of the super information highway for stealing and illegally distributing goods. Software piracy concerns abounded as the House and Senate debated such thorny matters.

Still many applaud the efforts of Congress and the President in achieving this feat. Attorney Jonathan Band, a partner in the Washington, D.C. office of San Francisco's Morrison & Forester, L.L.P, practices copyright law. He states:

"The Digital Millennium Copyright Act accomplishes four things... First, it implements the World Intellectual Property Organization treaties, thus harmonizing U.S. copyright law with international law. Second, the DMCA establishes "safe harbors" for online service providers who unknowingly transmit copyrighted works. Third, the act permits the copying of software during computer maintenance. Finally, the DMCA facilitates Internet broadcasting." (Lawyers and Technology: The Sound of One Computer Copy, by Wendy Liebowitz, Law Journal Extra, (citing The National Law Journal), November 2, 1998, p. A16 (emphasis added), at <http://www.ljx.com/news/dime.htm>.)

However, members of the academic and research communities have mixed feelings about the measure. Some claim the DMCA would hinder concepts of fair use and other acceptable means of validly utilizing copyrighted materials. Concerns regarding educational use continue as a result. There are those who also site the measure stifles operation, free thought, expression, system corrections, etc. Most library organizations opposed the measure citing it does not contain many desired provisions. Specifically, according to Professor Bob Oakley, Library Director of the Georgetown University Law Center, H.R. 2281 will be a hindrance to reading, browsing, classroom teaching and applying of fair use standards:

"HR 2281, as drafted, would grant copyright owners a new and unrestricted exclusive right to control access to information in digital works which could negate one of the most basic principles...the ability to gain access information in published or publicly available works..."

*American Library Association News and Views, June 10, 1998 at*  
<http://www.ala.org/news/copyright.html>.

Among the groups that communicated concerns about the legislation to Congress were The American Association for the Advancement of Science, The American Association of Law Libraries, The American Association of Legal Publishers, The American Historical Association, The American Library Association, The Digital Future Coalition (DFC), The Medical Library Association, The Music Library Association, The National Education Association, The National Humanities Alliance and The Association of Research Libraries. Association of Research Libraries, Washington, DC at <http://arl.cni.org> (Press release, Sept. 29, 1998).

The Digital Future Coalition, a forty-two (42) member organization comprised of non-profit and for-profit entities interested in intellectual property law in the digital era, opines:

"In the final version of the DMCA, Congress recognized the importance of ensuring balance in the treaty implementing legislation. The DMCA safeguards such crucial activities as computer security testing, reverse engineering to achieve interoperability, the protection of personal privacy, parental supervision of minors on the Internet and the preservation of materials by libraries and archives. It also assures the availability of the next generation of consumer electronics and computer products. In addition, it provides a mechanism to assure the continued vitality of the fair use privilege enjoyed by teachers, students, library patrons and all other information users. These provisions represent a dramatic departure from earlier drafts of the legislation. While the DMCA

encourages the use of technological measures to combat copyright piracy, its ongoing rulemaking process to insure appropriate protection for fair use will be a strong disincentive to overreaching by content owners, according to Peter Jaszi of the Digital Future Coalition. "This legislation is a substantial victory for both the creators and consumers of intellectual property because it provides meaningful protection while recognizing the traditional balance between owners' rights and the privileges of legitimate users." Digital Future Coalition, October 16, 1998, at <http://ari.net/dfc/issues/wipo/pr101698/pr101698.html>.

Another bill, *The Digital Era Copyright Enhancement Act*, H.R. 3048, is still awaiting approval. It is located at <http://lcweb.loc.gov/copyright/penleg.html>;

<http://thomas.loc.gov/cgi-n/query/D?c105:1/temp/~c105OrOe2w:ell112> and [http://www.panix.com/~jesse/pending\\_legislation.html](http://www.panix.com/~jesse/pending_legislation.html). The measure's main proponents are Representatives Rick Boucher (D-VA.) and Tom Campbell (R-Calif.). Introduced some four months earlier by Representative Howard Coble (R-N.C.), the measure included an increase for the preservation of author's rights similar to the provisions in the Berne Convention for the Protection of Literary and Artistic Works. In March 1989 the United States joined the Convention that produced a multinational treaty. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified in 17 U.S.C.A. sec.101 (1996)).

H.R. 3048 amends the first sentence of section 107 of The Copyright Act by adding "analog or digital" in applying fair use to all transmissions. H.R. 3048 sec.2. In actual comparison, H.R. 3048 includes many safeguards lacking in H.R. 2281. Among them include legal protections with allowances for the creation of incidental copies, fostering of distance learning (sec. 5), protecting of consumers against so-called shrink wrap licenses, negating of ephemeral copyright liability (i.e. making copies incidentally in relation to computer operation), preserving of microfiche technologies, exempting library/archive uses (allowing for the making of temporary computer program copies and utilizing a "knowledge" test as the basis for civil liability; note that criminal liability is not available at this level) (sec. 3), and, most importantly for many, the preserving of fair use doctrinal principles (sec.4.).

For detailed, side-by-side comparisons of the two bills, *see* <http://www.ari.net/dfc/legislat/wipo.htm> and The Digital Future Coalition at <http://www.dfc.org/issues/wipo/head2hd/head2hd.html>; *see also* <http://weber.u.washington.edu/~daryn/copyright/legislation.html> as well as The American Library Association at <http://ala.org/washoff/boucher.html>.

H.R. 3048 indeed expands the fair use doctrine toward notions that library, teaching and research purposes fall into acceptable practices in relation to technological advances. Thus, as professors and librarians today take advantage of fair use in analog form, they could also do so in the future digital world. The focus is on conduct not computers. Penalties apply against infringers rather than those on the fringe who may wish to legally and ethically utilize materials. *See, e.g.*, the Home Recording Rights Coalition's views at <http://hrcc.org/111497pr.html>.

According to the Software Publishers Association, copyright piracy costs over eighteen (18) billion dollars worldwide. <http://www.spa.org/govmnt/iprt/wipotalk.htm>.

Regarding penalties and liabilities, in general, the DMCA's Sections 1203 and 1204 imposes updated standards and gives guidance for works on the Net especially regarding criminality. Article eleven (11) of WIPO, for example, requires countries to "provide adequate legal protection and

effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law." Plaintiffs recovering successfully for wrongdoing have the choice of illegally obtained profits, statutory damages or injunctive relief. In a year and a half, it will be unlawful to create or sell any technology used to break copyright protection devices. It also will be illegal to commit acts of circumvention as each will carry statutory damages of twenty-five hundred dollars (\$2500.00). *See, e.g., Digital copyright bill becomes law*, by Courtney Macavinta, October 28, 1998, at CNET NEWS.com, <<http://www.news.com/News/Item/0,4,28060,00.html?owv>> . And, in a limited manner, willful and purposeful defendants could face serious criminal penalties of several hundred thousand for each violation. *Id.*

The DMCA contains many criminal impositions for conduct unrelated to infringement. For example section 104 provides for violations regarding circumvention of copyright protection systems in section 1201 or integrity of copyright management in 1202. Anyone who violates either section for "purposes of commercial advantage or private financial gain" faces up to five hundred thousand (500,000) dollars or imprisonment of up to five (5) years, or both for the first (1<sup>st</sup>) offense. The penalty is up to one million (1,000,000) dollars and up to ten (10) years, or both, for subsequent offenses. DMCA sections 1204 a & b. Courts will have the power to award triple damages against repeat offenders. A five (5) year statute of limitations applies here. *Id* at section 1204 (c). *See, e.g.,* <<http://spa.org/govmnt/iprt/wipotalk.htm>>. H.R. 3048, on the other hand, applies civil relief rather than criminal punishment. It prohibits anyone from altering or deleting copyright management information included with copyrighted works, for purposes of infringement.

The DMCA does not include a generic statement regarding the outlawing of tampering or interfering with safeguards in technology. It focuses mainly upon copyright management information. H.R. 3048 provides that "no person, for the purpose of facilitating or engaging in an act of infringement, shall engage in conduct so as knowingly to remove, deactivate or otherwise circumvent the application or operation of any effective technological measure used by a copyright owner to preclude or limit reproduction of a work or a portion thereof." H.R. 3048 at <<http://thomas.loc.gov/cgi-bin/query/c?105:1:OrOe2w:e1128>>. The DMCA makes it illegal to "manufacture, import, offer to the public, provide or otherwise traffic in any technology, product, service, device, component or part thereof " that may be used to circumvent a technological protection measure. DMCA, section 1201(b). In other words, any device made, sold, imported, distributed or used to block illegal copying protections such as encryptions are illegal. Burglary tools like the infamous black boxes were especially of concern in this regard as they circumvent scrambling and encryption. The law affords protection toward encryption research, security testing and related matters. And devices as to safeguard against child pornography on the Internet were given exemption in this respect.

## **Conclusion**

There are several bills such as H.R. 3048 still on Congress's plate. The DMCA is a massive complexity of rules and regulations. It will probably serve as a challenge for copyright aficionados, service providers and all involved in the field for some time to come. If we are to advance in the digital age, we must have a compromise between right and rule, between free thinking and structured regulation. It will be a test of time as to whether or not the Clinton administration's efforts will be a cure or a curse for the new millenium in copyright. The only way to examine the DMCA's validity is by trial and error. Unfortunately we will be cursed with many of each.

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