

DMCA

The Digital Millennium Copyright Act

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Executive Summary

The Digital Millennium Copyright Act (DMCA) was passed into law on October 28, 1998. This legislation implemented the United States' compliance to the 1996 WIPO treaties. These were the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The DMCA also addresses some other sections of United States Copyright Code. The main purposes of the DMCA were to comply with the WIPO treaties and to update Copyright Law with provisions specific to digital media.

The DMCA is split into 5 titles. These are as follows:

Title I deals with the WIPO Treaties and international compliance. This was the original reason that the DMCA was drafted, but many other updates to copyright law had been sitting on the bench waiting for a good act to be compiled into.

Title II deals with online copyright infringement. The particular area that needed updating was the limitation of liability of ISPs infringements committed by their subscribers.

Title III is called the Computer Maintenance Competition Assurance Act. This allows copies of copy-written works for the purpose of maintenance in certain situations.

Title IV covers miscellaneous provisions that cover updating the copyright offices duties, specific educational exceptions, webcasting, and transfer of contractual obligations in respect to motion pictures.

Title V is the Vessel Hull Design Protection Act. This is an unrelated tail act to strengthen current protections for ship designs.

Title I: WIPO (World Intellectual Property Organization) Copyright and Performances and Phonograms Treaties Implementation Act of 1998

This act essentially strengthens existing international copyright protections defined in existing WIPO treaties. It also adds new sections to US copyright law, including many of the ones for which the DMCA was criticized. These sections were considered necessary to ensure that the US complied with the new treaties.

The new WIPO treaties (including the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) require member nations to conform to a number of copyright protections and regulations involving protected works and related technologies. WIPO itself requires member countries to protect copyrighted material from other members, and defines conditions for foreign works to be protected under US copyright law. The new sections obligates members to prevent circumvention of protection technologies, and attempt to protect “Fair Use” while prohibiting unauthorized copying and the selling of devices which allow unauthorized access or copying. This prohibition on technological circumvention does not require manufacturers to conform to specific copy protection technology, except for analog devices such as VCRs. After a certain date, all new VHS, Beta, 8mm, and similar analog devices are required to conform to one of two standard copy protection schemes (color bar protection or automatic gain control). Beta is exempt until more than 1000 new units are produced in the US (since it is a little-used format). Professional video recorders and camcorders are also exempt from this requirement.

The prohibition against circumventing “Technological measures” used to protect copyrighted material is one of the most controversial parts of the DMCA, since it would prohibit reverse engineering of copy protection programs as well as certain modifications to audio/video equipment. Recent court cases have provided precedent to loosen these restrictions somewhat (such as modifications necessary to play legal content on non-mainstream computers or operating systems).

As part of the international treaties, as well as the changes to US copyright law, The DMCA allows exceptions to technological circumvention and copying for nonprofit libraries, authorized researchers and testers, and for situations involving personal privacy or protection of minors. A specific example includes the circumvention of access or copying technology by a university library when considering a work for possible purchase. These exceptions have fairly strict requirements, such as the stipulation that such copies be destroyed within a certain length of time, and that security testers or encryption researchers should not attempt to defeat or reverse engineer encryption technology unless they have not been able to get the necessary information from the technology’s creator.

The final subsection of this title requires the copyright office and the National Telecommunications and Information Administration to study the effects of the DMCA and WIPO, and report to Congress on the impacts on media piracy, encryption research, effectiveness of technological protection methods, and other areas.

Title II:

Online Copyright Infringement Liability Limitation Act

Title II of the DMCA is referred to as the Online Copyright Infringement Liability Limitation Act. This title adds section 512 to Chapter 5 of Title 17 of US Code. It serves to limit the liability of service providers who are somehow associated with an infringement involving copyrighted material. It protects those providers acting as a data conduit. The limitations cover transitory communications, system caching, storage of information on systems or networks at direction of users, and Information location tools. Title II of the DMCA also has special rules regarding liability of nonprofit educational institutions.

Section 512(a) or the limitation for transitory communication acts to limit the liability of a service provider acting as a data conduit. The limitations cover acts of transmission, routing, or providing connections for information, or copies made in operation of a network. In order to qualify for the limitation of liability the provider must meet certain qualifications. Someone other than the service provider must initiate the transmission. The service provider must not determine the name of the recipient, and the data must be transmitted without alteration.

Section 512(b) limits the liability of service providers for the practice of retaining copies of material made available online by a person other than the provider. Why would a SP do this? A SP would retain copies of material so subsequent requests for the same material could be transmitted without going to the original source on the network. Again there are certain qualifications the service provider must meet. The content retained must not be modified. The provider must comply with rules about “refreshing” the info so users don’t get out of date material. The provider must not interfere with technology providing “hit” information. The provider must limit access with accordance of original access rights such as a password. Any material posted with authorization by the copyrights owner must be removed one the SP is informed of its misuse.

Section 512(c) limits the liability of a SP for infringing material on websites hosted on their systems. This means they aren’t responsible for sites they host with copyright violated material. To meet the qualifications for this limitation the provider must not have actual knowledge of the infringement. Or upon receiving knowledge of a violation reports the violation and takes down or blocks the material. If the SP can control the “bad” activity it must not have financially benefited directly from the infringing activity. Lastly the provider must act promptly.

Section 512(d) limits the liability of SP for hyperlinks, online directories, and search engines or the like. It limits the liability for referring users to sites with infringing material by using such “information tools.” Both this and Section 512(c) have the same qualifications. The provider must not have actual knowledge of the infringement. Or upon receiving knowledge of a violation reports the violation and takes down or blocks the material. If the SP can control the “bad” activity it must not have financially benefited directly from the infringing activity. Lastly the provider must act promptly.

Lastly section 512(e) acts to determine whether the actions of a graduate student or teacher of a nonprofit educational institute will affect the eligibility for liability limitation to the institution. As to the limitations for transitory communications or system caching, a graduate student or faculty member will be considered a person other

than the service provider so as not to disqualify the educational institute from eligibility. In order for the employee to be considered a person other than the service provider the activity must have involved material other than that related to class within the last three years. The institution must not have received more than two complaints about the faculty member, and lastly the institution must provide information about copyright violation.

Title III: Exemption for computer maintenance or repair

This part of the DMCA exempts the copying of software from being considered a copyright infringement in specific instances. It allows the owner of a software program to make or authorize a copy of that program when such copying is necessary to repair or maintain a computer. It only applies to copies which are made “automatically when a computer is activated”, and only if the computer already contains a legal copy. As written, this restriction is somewhat unclear, but was considered necessary because of court decisions that held that copying a program to RAM while starting up the computer constituted “copying” the program. This exemption allows someone who does not own the computer or software to make such a copy while turning on the machine to repair it, as long as the new copy is not used for other purposes, and is deleted once the repair is complete

Title IV: Miscellaneous Provisions

Clarification of the Authority of the Copyright Office

Section 401(b), adds language to section 701 of the Copyright Act confirming the Copyright Office’s authority to continue to perform the policy and international functions that it has carried out for decades under its existing general authority.

Ephemeral Recordings for Broadcasters

Section 112 of the Copyright Act grants an exemption for the making of “ephemeral recordings.” These are recordings made in order to assist a live transmission. For example, a radio station can record a set of songs and broadcast from that recording rather than from the original CDs because all of the CDs involved would have to be changed “on the fly” during the course of a broadcast.

Before the passage of the DMCA, section 112 of the copyright law permitted a transmitting organization to make and retain for up to six months (hence the term “ephemeral”) no more than one copy of a work if it was entitled to transmit a public performance or display of the work, either under a license or by virtue of the fact that there is no general public performance right in sound recordings (as distinguished from musical works). The Digital Performance Right in Sound Recordings Act of 1995 (DPRA) created, for the first time in U.S. copyright law, a limited public performance right in sound recordings. The right only covers public performances by means of digital transmission and is subject to an exemption for digital broadcasts (i.e., transmissions by FCC licensed terrestrial broadcast stations) and a statutory license for certain subscription transmissions that are not made on demand (i.e. in response to the specific request of a recipient).

Section 402 of the DMCA expands the section 112 exemption to include recordings that are made to facilitate the digital transmission of a sound recording where

the transmission is made under the DPRA's exemption for digital broadcasts or statutory license. As amended, section 112 also permits in some circumstances the circumvention of access control technologies in order to enable an organization to make an ephemeral recording.

Distance Education Study

In the course of consideration of the DMCA, legislators expressed an interest in amending the Copyright Act to promote distance education, possibly through an expansion of the existing exception for instructional broadcasting in section 110(2). Section 403 of the DMCA directs the Copyright Office to consult with affected parties and make recommendations to Congress on how to promote distance education through digital technologies. The Office must report to Congress within six months of enactment.

The Copyright Office is directed to consider the following issues:

- The need for a new exemption;
- Categories of works to be included in any exemption;
- Appropriate quantitative limitations on the portions of works that may be used under any exemption;
- Which parties should be eligible for any exemption;
- Which parties should be eligible recipients of distance education material under any exemption;
- The extent to which use of technological protection measures should be mandated as a condition of eligibility for any exemption;
- The extent to which the availability of licenses should be considered in assessing eligibility for any exemption; and
- Other issues as appropriate.

Exemption for Nonprofit Libraries and Archives

Section 404 of the DMCA amends the exemption for nonprofit libraries and archives in section 108 of the Copyright Act to accommodate digital technologies and evolving preservation practices. Prior to enactment of the DMCA, section 108 permitted such libraries and archives to make a single facsimile (i.e., not digital) copy of a work for purposes of preservation or interlibrary loan. As amended, section 108 permits up to three copies, which may be digital, provided that digital copies are not made available to the public outside the library premises. In addition, the amended section permits such a library or archive to copy a work into a new format if the original format becomes obsolete—that is, the machine or device used to render the work perceptible is no longer manufactured or is no longer reasonably available in the commercial marketplace.

Webcasting Amendments to the Digital Performance Right in Sound Recordings

As discussed above, in 1995 Congress enacted the DPRA, creating a performance right in sound recordings that is limited to digital transmissions. Under that legislation, three categories of digital transmissions were addressed:

- Broadcast transmissions, which were exempted from the performance right
- Subscription transmissions, which were generally subject to a statutory license
- On-demand transmissions, which were subject to the full exclusive right

Broadcast transmissions under the DPRA are transmissions made by FCC-licensed terrestrial broadcast stations. In the past several years, a number of entities have begun making digital transmissions of sound recordings over the Internet using streaming audio technologies. This activity does not fall squarely within any of the three categories that were addressed in the DPRA. Section 405 of the DMCA amends the DPRA, expanding the statutory license for subscription transmissions to include webcasting as a new category of “eligible nonsubscription transmissions.”

Assumption of Contractual Obligations upon Transfers of Rights in Motion Pictures

Section 416 addresses concerns about the ability of writers, directors and screen actors to obtain residual payments for the exploitation of motion pictures in situations where the producer is no longer able to make these payments. The guilds’ collective bargaining agreements currently require producers to obtain agreements from distributors by which the distributor assumes the producer’s obligation to make these residual payments.

The DMCA adds a new part to U.S. Code that imposes on transferees the obligation to make residual payments. These payments are those that the producer would be required to have the transferee assume under the collective bargaining agreement. The obligations apply only if the distributor knew that the motion picture was produced subject to a collective bargaining agreement, or in the event of a court order confirming an award under that collective bargaining agreement that the producer cannot satisfy within ninety days. There are two classes of transfers that are excluded from the scope of this provision. The first is transfers limited to public performance rights, and the second is grants of security interests. The provision also directs the Comptroller General, in consultation with the Register of Copyrights, to conduct a study on the conditions in the motion picture industry that gave rise to this provision, and the impact of the provision on the industry. The study is due two years from enactment.

Title V: “Strengthening Protection of Vessel Hull Design”

This is unrelated to computer technology; it creates new methods for copyrighting original ship hull designs. We assume that the politicians added this as a tail act in order to get it passed through congress. This of course is not documented, but as this title has nothing to do with the subjects of the rest of the act, we think this is a safe assumption.

In conclusion, the DMCA is mostly an update and a strengthening of copyright law in the United States. It makes US copyright law WIPO compliant and adds some protections for digital formats and allows exceptions in digital format. These were issues that were not specifically addressed previously.

Sources:

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