

The Digital Millennium Copyright Act: A Balanced Result

by

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On October 28, 1998, President Clinton signed into law the Digital Millennium Copyright Act (DMCA). The 153 page legislation, as its name suggests, aims at updating the U.S. Copyright Act for the Digital Age. Individual provisions of the bill, taken by themselves, are highly problematic and favor one sector of the Information Society over another. But the entire bill, taken as a whole, achieves a relatively balanced result. As is typical with American legislation, there is something in it for everyone.

This article does not attempt to provide a detailed section by section analysis of the DMCA; such analyses are already available on the World Wide Web.¹ Rather, this article seeks to assess the DMCA's likely overall impact on copyright law and the Internet in the coming years. The article also examines provisions which were omitted from the DMCA at literally the eleventh hour, as well as the term extension bill, which Congress adopted almost simultaneously with the DMCA.

Title I -- WIPO Treaties Implementation

Title I of the DMCA implements the World Intellectual Property Organization's Internet Treaties by adding provisions to the U.S. Copyright Act that address copyright management information (CMI) and technological protection measures. The provisions prohibit both the use of false CMI, and the alteration of CMI, with the intent of enabling infringement. The statute defines CMI as including the name of the work, the name of the author, the name of the copyright owner, and terms and conditions of use.

The CMI provisions were drafted narrowly, and clearly benefit both the copyright owner and the user.² A prohibition on tampering with copyright management information obviously benefits the copyright owner because it helps ensure that users receive accurate information about the terms and conditions governing the use of the work. At the same time, preserving the integrity of CMI also helps consumers by reducing counterfeiting and misrepresentations by middlemen concerning the contents of a digital envelope.

The technological protection provisions are far more controversial and one-sided in favor of the content community. Instead of adopting a narrow prohibition on circumvention of technological measures in order to facilitate infringement, Congress enacted in section 1201 a sweeping ban on circumvention devices, regardless of whether they actually are used for infringing purposes. The ban applies to devices which circumvent technologies which control access to copyrighted works (e.g., encryption) as well as technologies which control the exercise of an author's copyrights (e.g., reproduction).³ Moreover, Congress prohibited the act of circumventing an access control, even when no

¹ See, e.g., Jonathan Band, *Summary of the DMCA*, at www.arl.org.

² 17 USC § 1202.

infringement results.⁴ Violation of these prohibitions can result in fines of up to \$1,000,000 and prison terms of 10 years.⁵

When the bill was introduced in Congress with these provisions, librarians, educators, software developers and electronics manufacturers quickly pointed out that these provisions would in one fell swoop eliminate virtually all the exceptions and limitations to the Copyright Act; if a work was protected by a copy control technology, that copy control could not be circumvented for lawful purposes such as fair use or archival copying because the DMCA prohibited the manufacture of the devices that enabled such circumvention.

Congress responded by enacting a long list of exceptions. Perhaps the most notable was an exception permitting circumvention (and circumvention devices) for purposes of enabling the software reverse engineering necessary for interoperability.⁶ Significantly, much of the language for this exception comes directly from Article 6 of the European Union's Software Directive. Congress created exceptions for other important activities such as encryption research, computer system security testing, law enforcement, and protection of personal privacy.⁷ Additionally, the DMCA directs the Librarian of Congress to draft additional exceptions if needed to preserve user access to works.⁸

While these exceptions make the provision far more balanced than it was initially, section 1201 still tilts decidedly in favour of the content community. Section 1201 without question enhances the content community's ability to combat digital piracy, but at the expense of many lawful activities. Because its language is so broad, section 1201 makes impossible circumvention for any use for which there is no specific exemption, such as error correction, Year 2000 remediation, or the disabling of viruses. In sum, in section 1201 Congress was overly solicitous of the content community's darkest fears about the Internet, and responded to the threat of digital piracy by restricting access to information and threatening innovative technologies.

Title II -- Online Service Provider Liability

While Title I overreacts to the threat of digital piracy, Title II fashions common sense safe harbors from copyright liability for on-line service providers (OSPs). Although the language of Title II is extraordinarily complicated, its basic principles are quite straightforward. An OSP faces no copyright liability for functions relating to

³ 17 USC §§ 1201(a)(2) and (b).

⁴ 17 USC §§ 1201(a)(1)(A). This section does not take effect for two years, until the Librarian of Congress completes a rulemaking to determine whether additional exceptions are necessary.

⁵ 17 USC § 1204.

⁶ 17 USC § 1201(f).

⁷ 17 USC §§ 1201(d)-(j).

⁸ 17 USC § 1201(a)(1)(B).

transmission, routing, or providing connections for material through the OSP's system, *i.e.*, when the OSP acts as a mere conduit.⁹ Additionally, an OSP faces no liability for automated system caching.¹⁰

With respect to hosting or linking to infringing material, the OSP faces liability only if it has actual knowledge of infringement, or an awareness of facts and circumstances from which infringing activity is apparent, and does not respond appropriately.¹¹ Title II establishes a “notice and takedown” regime to define when the OSP obtains sufficient knowledge to which it must respond expeditiously in order to remain within the safe harbor.¹²

To qualify for these safe harbors, an OSP must have a termination policy for repeat offenders and must accommodate standard technical measures.¹³ The OSP has no obligation to monitor its service for infringing activity, however.¹⁴ Moreover, if an OSP's conduct does not qualify for a safe harbor, courts are to evaluate the conduct under general copyright principles.¹⁵

To protect users, Title II creates a “notice and putback” procedure. Under this procedure, the OSP has an incentive to restore allegedly infringing material to its service if the content provider does not secure a court order within a set period of time.¹⁶ This procedure insures that neither the content provider nor the OSP abuse the “notice and takedown” regime.

Title II has three underlying principles; 1) a service provider should not be responsible for what is beyond its control; 2) content providers and service providers have shared responsibility for combatting piracy; and 3) the eradication of piracy should not come at the expense of the development of the Internet. Section 1201, in contrast, does not share these principles; in Section 1201, the eradication of piracy is seen as the ultimate good, and its cost is borne entirely by users and manufacturers of digital technology.

Titles III and IV -- Technical Provisions

Titles III and IV of the DMCA make additional minor adjustments to the copyright law to accommodate digital technology. Title III overturns the decision in *MAI v. Peak*, 991

⁹ 17 USC § 512(a).

¹⁰ 17 USC § 512(b).

¹¹ 17 USC §§ 512(c) and (d).

¹² 17 USC § 512(c).

¹³ 17 USC § 512(i)(1)(A).

¹⁴ 17 USC § 512(m).

¹⁵ 17 USC § 512(l).

¹⁶ 17 USC § 512(g)(2).

F.2d 511 (9th Cir. 1993), where a U.S. Court of Appeals found a computer hardware service company liable for infringement for making a temporary copy of an operating system in the computer's random access memory when it booted up the computer during the maintenance call. The Court ruled that the 17 USC § 117 exception for copies of programs made "as an essential step in the utilization of the computer program" applied only to owners of copies of programs, and not licensees. Title III expands Section 117 to permit the making of random access memory copies during the course of computer hardware maintenance.

Title IV grants to Internet broadcasters -- so called webcasters -- the same privilege to make ephemeral copies as traditional analog broadcasters. It also brings webcasters within the framework of the Digital Performance Rights Act, adopted in the previous Congress.

Although Congress could have drafted the exceptions in Titles III and IV more broadly without prejudicing the interests of the copyright holders, the fact remains that Congress did adopt additional exceptions to accommodate the reality of computer maintenance and webcasting. Thus Titles III and IV perpetuate the overall balance of interests struck in the DMCA.

Title V

Title V of the DMCA creates *sui generis* protection for boat hull design. Upon registering an original boat hull design with the Copyright Office, the designer can prevent others from copying the hull design by using a mold. This provision is of interest to those outside the boat construction industry because it may serve as a model for more general industrial design protection, which now does not exist in the U.S. beyond design and utility patents.

Omitted Provisions

When the House of Representatives passed the DMCA in early August, it included two provisions that proved extremely controversial. First, the House included the Collections of Information Antipiracy Act – H.P. 2652. Although described as a tort-based misappropriation law, the bill as a practical matter created *sui generis* protection for databases similar to that contained in the EU database directive. A person who collected, organised or maintained a "collection of information" would have been able to prevent the extraction or use of a qualitatively or quantitatively substantial part of the collection in a manner which harmed the actual or potential market for products or services incorporating the collection.

The database portion of the DMCA encountered strong opposition from libraries, universities, scientists, Internet and communications companies, financial institutions, and companies engaged in on-line trading of securities. The groups argued that the bill would have granted the collector of the information perpetual monopoly control over downstream use of the information. The Senate Judiciary Committee staff convened informal discussions between the proponents and opponents of the legislation throughout

August in an effort to reach consensus. When no agreement was reached, the Judiciary Committee staff tried to fashion a compromise bill. The Clinton Administration articulated concerns that the compromise bill was still too sweeping. Meanwhile, the proponents of the legislation rejected the compromise as not giving enough protection. In the face of this opposition from both directions, the database provision was stripped from the DMCA while the bill was in the House-Senate conference in late September and early October.

The decision to drop the database provision once again reflects Congress' basic desire to strike an overall balance in the DMCA. It became obvious to the conferees that the database title remained too controversial and was not yet ripe for enactment.

The other provision struck by the conference committee concerned parallel imports. The Supreme Court had ruled earlier this year that the first sale doctrine prevailed over the right to control imports, and thus a person could buy a work sold overseas and re-import it to the United States. The House-passed DMCA included a provision which would have amended the Copyright Act to allow the copyright owner to prevent the import of copies purchased abroad. Neither chamber held any hearings on this issue, and indeed most members of the House of Representatives had no idea that the DMCA included the provision when they voted on it. Discount retailers who rely on parallel imports objected to the provision, and the conferees took it out.

Term Extension

In the final weeks of the session, Congress also passed the Sonny Bono Copyright Term Extension Act, named after the famous singer turned Congressman who died in a skiing accident. The Term Extension Act, which is separate from the DMCA, extends the copyright term by twenty years to match the term of protection in the European Union. The bill applies retroactively – that is, to works that already exist and currently enjoy copyright protection. The bill does not, however, grant additional protection to works whose term has already expired.

To counter-balance this provision benefiting the content community, Congress expanded the exception for small restaurants to perform sound recordings. This exception was the price the recording industry had to pay to obtain term extension, which they desperately wanted.

Conclusion

The DMCA is far from perfect. Its provisions are extremely complicated, and contain many ambiguities. The Section 1201 created by Title I is particularly convoluted, with broad prohibitions followed by complex and inconsistent exceptions. Nonetheless, the bill as a whole achieves rough justice. In its report accompanying its recommendation that the Senate ratify the WIPO treaties, the Senate Foreign Relations Committee stated that it “urged the Executive to promote this compromise legislation as a model for domestic legislation by other parties to the WIPO treaties.” Other countries might look to the DMCA when they implement the treaties; they should try to avoid its complexities

and flaws, but emulate, and perhaps improve upon, its effort to balance the many competing interests.