

THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998

U.S. Copyright Office Summary



December 1998

INTRODUCTION

The Digital Millennium Copyright Act (DMCA)¹ was signed into law by President Clinton on October 28, 1998. The legislation implements two 1996 World Intellectual Property Organization (WIPO) treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The DMCA also addresses a number of other significant copyright-related issues.

The DMCA is divided into five titles:

- ! Title I, the “**WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998**,” implements the WIPO treaties.
- ! Title II, the “**Online Copyright Infringement Liability Limitation Act**,” creates limitations on the liability of online service providers for copyright infringement when engaging in certain types of activities.
- ! Title III, the “**Computer Maintenance Competition Assurance Act**,” creates an exemption for making a copy of a computer program by activating a computer for purposes of maintenance or repair.
- ! Title IV contains six **miscellaneous provisions**, relating to the functions of the Copyright Office, distance education, the exceptions in the Copyright Act for libraries and for making ephemeral recordings, “webcasting” of sound recordings on the Internet, and the applicability of collective bargaining agreement obligations in the case of transfers of rights in motion pictures.
- ! Title V, the “**Vessel Hull Design Protection Act**,” creates a new form of protection for the design of vessel hulls.

This memorandum summarizes briefly each title of the DMCA. It provides merely

¹Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

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Registration as a Prerequisite to Suit

The remaining technical amendment relates to the prohibition in both treaties against conditioning the exercise or enjoyment of rights on the fulfillment of formalities. Section 411(a) of the Copyright Act requires claims to copyright to be registered with the Copyright Office before a lawsuit can be initiated by the copyright owner, but exempts many foreign works in order to comply with existing treaty obligations under the Berne Convention. Section 102(d) of

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Savings clauses

Section 1201 contains two general savings clauses. First, section 1201(c)(11

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development of the technological means to do so, in order to identify flaws and vulnerabilities of encryption technologies.

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is set out in two separate paragraphs, the first dealing with false CMI and the second with removal or alteration of CMI. Subsection (a) prohibits the knowing provision or distribution of false CMI, if done with the intent to induce, enable, facilitate or conceal infringement. Subsection (b) bars the intentional removal or alteration of CMI without authority, as well as the dissemination of CMI or copies of works, knowing that the CMI has been removed or altered without authority. Liability under subsection (b) requires that the act be done with knowledge or, with respect to civil remedies, with reasonable grounds to know that it will induce, enable, facilitate or conceal an infringement.

Subsection (c) defines CMI as identifying information about the work, the author, the copyright owner, and in certain cases, the performer, writer or director of the work, as well as the terms and conditions for use of the work, and such other information as the Register of Copyrights may prescribe by regulation. Information concerning users of works is explicitly excluded.

Section 1202 is subject to a general exemption for law enforcement, intelligence and other governmental activities. (Section 1202(d)). It also contains limitations on the liability of broadcast stations and cable systems for removal or alteration of CMI in certain circumstances where there is no intent to induce, enable, facilitate or conceal an infringement. (Section 1202(e)).

Remedies

Any person injured by a violation of section 1201 or 1202 may bring a civil action in Federal court. Section 1203 gives courts the power to grant a range of equitable and monetary remedies similar to those available under the Copyright Act, including statutory damages. The court has discretion to reduce or remit damages in cases of innocent violations, where the violator proves that it was not aware and had no reason to believe its acts constituted a violation. (Section 1203(c)(5)(A)). Special protection is given to nonprofit libraries, archives and educational institutions, which are entitled to a complete remission of damages in these circumstances. (Section 1203(c)(5)(B)).

In addition, it is a criminal offense to violate section 1201 or 1202 wilfully and for purposes of commercial advantage or private financial gain. Under section 1204 penalties range up to a \$500,000 fine or up to five years imprisonment for a first offense, and up to a \$1,000,000 fine or up to 10 years imprisonment for subsequent offenses. Nonprofit libraries, archives and educational institutions are entirely exempted from criminal liability. (Section 1204(b)).

Copyright Office and NTIA Studies Relating to Technological Development

Title I of the DMCA requires the Copyright Office to conduct two studies jointly with NTIA, one dealing with encryption and the other with the effect of technological developments on two existing exceptions in the Copyright Act. New section 1201(g)(5) of Title 17 of the U.S. Code requires the Register of Copyrights and the Assistant Secretary of Commerce for Communications and Information to report to the Congress no later than one year from enactment on the effect that the exemption for encryption research (new section 1201(g)) has had on encryption

³The Fairness in Musical Licensing Act, Title II of Pub. L. No. 105-298, 112 Stat. 2827, 2830-34 (Oct. 27, 1998) also adds a new section 512 to the Copyright Act. This duplication of section numbers will need to be corrected in a technical amendments bill.

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Each limitation entails a complete bar on monetary damages, and restricts the availability of injunctive relief in various respects. (Section 512(j)). Each limitation relates to a separate and distinct function, and a determination of whether a service provider qualifies for one of the limitations does not bear upon a determination of whether the provider qualifies for any of the other three. (Section 512(n)).

The failure of a service provider to qualify for any of the limitations in section 512 does not necessarily make it liable for copyright infringement. The copyright owner must still demonstrate that the provider has infringed, and the provider may still avail itself of any of the defenses, such as fair use, that are available to copyright defendants generally. (Section 512(l)).

In addition to limiting the liability of service providers, Title II establishes a procedure by which a copyright owner can obtain a subpoena from a federal court ordering a service provider to disclose the identity of a subscriber who is allegedly engaging in infringing activities. (Section 512(h)).

Section 512 also contains a provision to ensure that service providers are not placed in the position of choosing between limitations on liability on the one hand and preserving the privacy of their subscribers, on the other. Subsection (m) explicitly states that nothing in section 512 requires a service provider to monitor its service or access material in violation of law (such as the Electroni

reasonable nondiscriminatory terms, and do not impose substantial costs or burdens on service providers.

Limitation for Transitory Communications

In general terms, section 512(a) limits the liability of service providers in circumstances where the provider merely acts as a data conduit, transmitting digital information from one point on a network to another at someone else's request. This limitation covers acts of transmission, routing, or providing connections for the information, as well as the intermediate and transient copies that are made automatically in the operation of a network.

In order to qualify for this limitation, the service provider's activities must meet the following conditions:

- ! The transmission must be initiated by a person other than the provider.
- ! The transmission, routing, provision of connections, or copying must be carried out by an automatic technical process without selection of material by the service provider.
- ! The service provider must not determine the recipients of the material.
- ! Any intermediate copies must not ordinarily be accessible to anyone other than anticipated recipients, and must not be retained for longer than reasonably necessary.
- ! The material must be transmitted with no modification to its content.

Limitation for System Caching

Section 512(b) limits the liability of service providers for the practice of retaining copies, for a limited time, of material that has been made available online by a person other than the provider, and then transmitted to a subscriber at his or her direction. The service provider retains the material so that subsequent requests for the same material can be fulfilled by transmitting the retained copy, rather than retrieving the material from the original source on the network.

The benefit of this practice is that it reduces the service provider's bandwidth requirements and reduces the waiting time on subsequent requests for the same information. On the other hand, it can result in the delivery of outdated information to subscribers and can deprive website operators of accurate "hit" information — information about the number of requests for particular material on a website — from which advertising revenue is frequently calculated. For this reason, the person making the material available online may establish rules about updating it, and may utilize technological means to track the number of "hits."

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The limitation applies to acts of intermediate and temporary storage, when carried out through an automatic technical process for the purpose of making the material available to subscribers who subsequently request it. It is subject to the following conditions:

- ! The content of the retained material must not be modified.
- ! The provider must comply with rules about “refreshing” material—replacing retained copies of material with material from the original location— when specified in accordance with a generally accepted industry standard data communication protocol.
- ! The provider must not interfere with technology that returns “hit” information to the person who posted the material, where such technology meets certain requirements.
- ! The provider must limit users’ access to the material in accordance with conditions on access (e.g., password protection) imposed by the person who posted the material.
- ! Any material that was posted without the copyright owner’s authorization must be removed or blocked promptly once the service provider has been notified that it has been removed, blocked, or ordered to be removed or blocked, at the originating site.

Limitation for Information Residing on Systems or Networks at the Direction of Users

Section 512(c) limits the liability of service providers for infringing material on websites (or other information repositories) hosted on their systems. It applies to storage at the direction of a user. In order to be eligible for the limitation, the following conditions must be met:

- ! The provider must not have the requisite level of knowledge of the infringing activity, as described below.
- ! If the provider has the right and ability to control the infringing activity, it must not receive a financial benefit directly attributable to the infringing activity.
- ! Upon receiving proper notification of claimed infringement, the provider must expeditiously take down or block access to the material.

In addition, a service provider must have filed with the Copyright Office a designation of an agent to receive notifications of claimed infringement. The Office provides a suggested form for the purpose of designating an agent (<http://www.loc.gov/copyright/onlinesp/>) and maintains a list of agents on the Copyright Office website (<http://www.loc.gov/copyright/onlinesp/list/>).

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Under the knowledge standard, a service provider is eligible for the limitation on liability only if it does not have actual knowledge of the infringement, is not aware of facts or circumstances from which infringing activity is apparent, or upon gaining such knowl

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contains an authorized copy of the program. The new copy cannot be used in any other manner and must be destroyed immediately after the maintenance or repair is completed.

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 facilitate a transmission. Under this exemption, for example, a radio station can record a set of songs and broadcast from the new recording rather than from the original CDs (which would have to be changed "on the fly" during the course of a broadcast).

As it existed prior to enactment of the DMCA, section 112 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.

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; and 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.”

In addition to expanding the scope of the statutory license, the DMCA revises the criteria that any entity must meet in order to be eligible for the license (other than those who are subject to a grandfather clause, leaving the existing criteria intact). It revises the considerations for setting rates as well (again, subject to a grandfather clause), directing arbitration panels convened under the law to set the royalty rates at fair market value.

This provision of the DMCA also creates a new statutory license for making ephemeral recordings. As indicated above, section 402 of the DMCA amends section 112 of the Copyright Act to permit the making of a single ephemeral recording to facilitate the digital transmission of sound recording that is permitted either under the DPRA’s broadcasting exemption or statutory license. Transmitting organizations that wish to make more than the single ephemeral recording of a sound recording that is permitted under the outright exemption in section 112 are now eligible for a statutory license to make such additional ephemeral recordings. In addition, the new statutory license applies to the making of ephemeral recordings by transmitting organizations other than broadcasters who are exempt from the digital performance right, who are not covered by the expanded exemption in section 402 of the DMCA.

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 assumption agreements from distributors in certain circumstances, by which the distributor assumes the producer’s obligation to make such residual payments. Some production companies apparently do not always do so, leaving the guilds without contractual privity enabling them to seek recourse from the distributor.

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The DMCA adds a new chapter to Title 28 of the U.S. Code that imposes on transferees those obligations to make residual payments that the producer would be required to have the transferee assume under the relevant collective bargaining agreement. The obligations attach only if the distributor knew or had reason to know that the motion picture was produced subject to a collective bargaining agreement, or in the event of a court order confirming an arbitration award under the 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, along with any subsequent transfers from the security interest holder.

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: PROTECTION OF CERTAIN ORIGINAL DESIGNS

Title V of the DMCA, entitled the Vessel Hull Design Protection Act (VHDPA), adds a new chapter 13 to Title 17 of the U.S. Code. It creates a new system for protecting original designs of certain useful articles that make the article attractive or distinctive in appearance. For purposes of the VHDPA, “useful articles” are limited to the hulls (including the decks) of vessels no longer than 200 feet.

A design is protected under the VHDPA as soon as a useful article embodying the design is made public or a registration for the design is published. Protection is lost if an application for registration is not made within two years after a design is first made public, but a design is not registrable if it has been made public more than one year before the date of the application for registration. Once registered, protection continues for ten years from the date protection begins.

The VHDPA is subject to a legislative sunset: the Act expires two years from enactment (October 28, 2000). The Copyright Office is directed to conduct two joint studies with the Patent and Trademark Office—the first by October 28, 1999 and the second by October 28, 2000—evaluating the impact of the VHDPA.

EFFECTIVE DATES

Most provisions of the DMCA are effective on the date of enactment. There are, however, several exceptions. The technical amendments in Title I that relate to eligibility of works for protection under U.S. copyright law by virtue of the new WIPO treaties do not take effect until the relevant treaty comes into force. Similarly, restoration of copyright protection for such works does not become effective until the relevant treaty comes into force. The prohibition on the act of circumvention of access

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control measures does not take effect until two years from enactment (October 28, 2000).

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