

Copyright Law and the Digital Millennium Copyright Act

Application to Bemidji State University

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Introduction

Music is everywhere, all around each of us all of the time. The clock radio plays to wake people in the morning, in the car, at work, in the stores, in video games and now even cell phone rings. For a small fee one can even download their favorite songs onto their computer, or palm pilot.

This was not always the case; there was a time when music could be downloaded for free. This led to conflicts between the consumers that wanted the product for free and the people who produced the product. With the product being free there was no longer an incentive for the producers to make the product.

As technology changes the world, the laws must also change in order to continue to protect all of the people; those that use the technology and those that create the technology. Copyright Law and the Digital Millennium Copyright Act are a good example of the laws changing to protect the people. As new technology became available to the general public, the Copyright Law was unable to provide the copyright owners the protection they needed. The Digital Millennium Copyright Act was enacted to help provide protection for the new technology.

This paper looks at both of these laws, how they work, and what they protect. It then looks at some of the problems with the Digital Millennium Copyright Act such as limiting fair use, limiting research, and possibly limiting security measures. Finally it looks at how this new law affects Bemidji State University and what Bemidji State University could do to comply with the Digital Millennium Copyright Act.

The Congress shall have the power... to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. – United States Constitution, Article 1, section 8 (Bowyer, 1996, pg. 247)

As can be seen from the above passage, the idea for copyright law has been apparent for many years. The interesting perspective of copyright law from this passage is that the copyright law would exist not to protect the authors and inventors but to protect and promote the social educational benefits achieved from the works and discoveries (Bowyer, 1996). Obviously, this passage from the Constitution is vague when determining the exclusive rights granted to authors and inventors; this is where the Copyright Act of 1976 provides further details on this matter (Montana, 1999).

Conflict in interpretation of copyright law has existed since its beginning. Copyright laws tend to be unclear, which leads to difficulty in attempting to comply with the laws. The dispute between Ohio University and Ohio State University regarding which entity is allowed to use the word “Ohio” on their cheerleading uniforms is a prime example of such interpretation difficulty (Guthrie, 1998). Historically, both have been using the word Ohio, although Ohio University was granted the trademark for all athletic and entertainment uses of the word (Guthrie, 1998). Interestingly, Georgetown University in Washington DC and Georgetown College in Kentucky have not had any conflicts or confusion between them (Guthrie, 1998).

The difficulties with Copyright law have only increased with the introduction of new technology. Electronic copies have been protected under the copyright laws in the past, but the duplication of a tape produced as a copy was inferior to the original. Now computers have the capability of producing copies that are identical to the original causing concerns from all involved. Some people believe that everything on the Internet

should be free, while others feel a system of micro payments would be easily accepted among the public. The Digital Millennium Copyright Act of 1998 (DMCA) was formed to help solve some of the above problems (Gasaway, 2002).

To help with the enforcement of the DMCA, compliance regulations have been created. Some colleges and universities discussed below have applied for protection under this act and more are applying everyday. A few of the institutions that have agents registered with the Copyright Office include: Harvard University, Yale University, Minnesota State Colleges and Universities, and the Universities of Minnesota (all campuses) (Directory of Service Provider Agents for Notification of Claims of Infringement, 2004). To see the complete listing of all registered agents please see the website as listed in the bibliography.

Literary Review

This section discusses the journey of knowledge regarding the Copyright Act. Discussed in this section is the Copyright Act of 1976. It defines the rights of copyright owners, defining commonly used terms dealing with copyright, and how copyright generally works. The journey then continues with the discussion of the Digital Millennium Copyright Act. Discussed below will be the five titles of the act and what agencies need to accomplish to comply with the new rules and regulations.

Copyright Act of 1976

The Copyright Act of 1976 grants five exclusive rights to copyright owners. With the understanding of these rights and some commonly used terms, copyright law becomes a little easier to understand – even if the law is still vague in areas. This knowledge of the rights and commonly used terms allows an understanding of what can be copyrighted.

An immediate clarification needed regarding copyright law is the distinction between a copyright right and a property right. The simple way to describe the difference is to look at the sale of a book as an example. When a person purchases a book they have received a property right in a copy of a copyrighted work. The book owner may sell or destroy the copy they specifically own but they may not copy the book, as that is the right of the copyright owner, in this case the author. The author holds all copyright rights until specifically transferred (Tysver, 2000).

The Five Rights of the Copyright Owner

Section 106 of the Copyright Act of 1976 gives the owner of the copyright right the exclusive right to perform, and to authorize to perform, the following: to reproduce, to prepare derivative works, to distribute copies or phonorecords, to display, and, in the case of sound recordings or plays, to perform the work (Library of Congress, 2000).

The Right of Reproduction

The Right of Reproduction is usually thought of as the most important right granted by the Copyright Act of 1976. This right indicates that no one other than the copyright owner may make any reproductions or copies of the work. Examples of unauthorized acts prohibited under this right, include copying a book, copying a computer program, or incorporating part of one song into a new song. As can be seen by the examples, it is not necessary for the entire work to be copied for an infringement to occur. A "substantial and material" amount of the work copied is all that is needed for an infringement to occur (Tysver, 2000).

The Right to Make a Derivative Work

Slightly overlapping the reproduction right, the right to make a derivative work is the second privilege granted to the copyright owner. The Copyright Act of 1976 describes a derivative work as:

"A work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed or adapted."
(Copyright Law, Chapter 1, S101).

A transformation of some sort is usually involved with a derivative work. Examples of this transformation include; a novel transformed into a motion picture, or a second version of a software program (Tysver, 2000).

The Right of Distribution

The Right of Distribution allows the copyright holder to prevent the distribution of unauthorized copies of a work (Tysver, 2000). It also grants the exclusive right to make a work available to the public by sale, rental, lease or lending option. The last part of this right allows the copyright holder to control the first distribution of a particular authorized copy. However, this right is limited by the first sale doctrine, which states that after the first sale of a copy the copyright holder can no longer control what happens to that particular copy (Tysver, 2000). Congress, including a prohibition on the rental of software and phonorecords¹, has limited the first sale doctrine. An example of how the first sale doctrine works is easily seen by revisiting the book sale scenario. After a book has been purchased, the copyright holder no longer has a right in how that copy is further distributed. The book can now be rented or resold without the permission of the copyright holder (Tysver, 2000).

The Right of Public Performance

The right of public performance allows the copyright holder to control the public performance of certain copyrighted works (Tysver, 2000). This right is limited to literary works, musical works, dramatic works, choreographic works, pantomimes, motion

¹ Phonorecords are material objects embodying fixations of sounds such as cassette tapes, CDs, or LPs. (Copyright Basics)

pictures, and audiovisual works. The copyright holder is also allowed to control when a work is performed publicly. A performance is considered public when performed where a substantial number of persons, outside a normal circle of a family, and social acquaintances are gathered or in a place open to the public (Tysver, 2000). A performance transmitted to multiple locations via television or radio is also considered to be public and thus would be a violation of the public performance right. Another example of a violation of this right would be to rent a video and to show it in a public park or theater without permission from the copyright holder. However, renting a movie to watch on a home television with friends and family would not be a violation. The application of this right to software had not yet been fully developed, except in the case of publicly available video games (Tysver, 2000).

The Public Display Right

Quite similar to the public performance right is the public display right. The difference being that the public display right controls the public display of a work (Tysver, 2000). An example of this right at work is the warning shown at the beginning of a video stating that it is illegal to copy or show the video in public, that the video is for private viewing only. This right is limited to the following: literary works, musical works, dramatic works, choreographic works, pantomimes, pictorial works, graphical works, sculptural works, and stills, or individual images, from motion pictures and other audio visual works. The same definition of public applies to the public display right as was used in the public performance right (Tysver, 2000).

Common Copyright Terms Used

Understanding copyright terminology helps with understanding its concepts. The terms derivative work, first sale doctrine, and public have already been discussed. The other terms to be defined and discussed are fair use and public domain.

The term Fair Use comes up quite frequently when discussing copyright law. Fair Use is a provision in copyright law that allows for use of a work by reproduction in copies or phonorecords for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. To help determine if use of a copyrighted work is protected by Fair Use, Section 107 of the copyright laws lists four factors used in determining Fair Use.

1. The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. Amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or sale of the copyrighted work (Gardner, 1999)

The first factor when looking at the new work has three subparts to it.

1. Commercial nature or non-profit educational purposes
2. Preamble purposes
 - Criticism
 - Comment
 - News reporting
 - Teaching
 - Scholarship
 - Research
3. Degree of transformation (Fair Use, 2002)

This first sub factor looks at the new work to determine whether it was created for a profit venture or for a non-profit educational purpose. With this test, preference will be given to non-profit educational purposes. The second sub factor ensures if the new work is for one of the preamble purposes. The third sub factor determines if the new work

adds something original, giving the work further purpose or different character than the original (Copyright law, Chapter 1, S. 107).

The second factor, the nature of the copyrighted work, acknowledges that some works are more deserving of protection than others. This factor looks at the original work to determine if it deserves copyright protection (Copyright law, Chapter 1, S. 107),

The third factor looks at the quantity and substantiality of the copying in relation to the work as a whole. It is more than a pure ratio test; quantity as well as quality and importance of the copied material are taken into consideration. Some justices have looked to make sure that no more was taken than necessary to achieve the purpose for which the materials were copied (Copyright law, Chapter 1, S. 107).

The fourth factor looks at the harm to the market or potential market of the original work caused by the infringement. Not only is harm to the original work examined, but also the harm to any derivative work (Copyright law, Chapter 1, S. 107).

Public domain is another term that needs to be understood when examining copyright law. Public domain is the repository of all works that are not protected by copyright and as such, they are free for all to use without permission (Copyright Basics, Public Domain, 2002).

Ideas, facts, titles, names, short phrases and blank forms by their very nature are not eligible for copyright protection. Federal documents and publications are also not protected by copyright. Expired copyright works are also included in the public domain. Copyrightable material may enter into the public domain if the copyright owner grants the work to the public domain. All works published before January 1, 1978 that did not contain a valid copyright notice may be considered public domain (Public Domain, 2002).

Owners of works published between 1978 and March 1989 that did not contain a valid copyright notice were given a five year grace period in which to correct the problem of production without notice before the work was added into the public domain (Public Domain, 2002). Works that have not been fixed in a tangible form of expression also do not qualify for copyright protection. Examples of this would be choreographic works that have not been notated or recorded, improvisational speeches, or performances that have not been written or recorded (Lib. Of Congress, 2000).

What Can Be Copyrighted?

Current law defines copyrightable material as:

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, produced, or otherwise communicated, either directly or with the aid of a machine or device. In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work (Montana, 1999).

The above passage portrays that it is the tangible expression of an idea, such as a book or recording, rather than the idea itself, which may be copyrighted. This significantly limits the rights of the intellectual property creator. This is not the only limitation, even tangible objects have some limitations; fair use is an example of such a limitation (Montana, 1999).

When Is A Work Copyrighted?

Copyright protection begins from the time the work is created in fixed form and immediately becomes the property of the author who created the work (Copyright Basics,

2000). The use of a copyright notice is no longer required under US law, although it is often beneficial. Copyright registration is not a condition of copyright protection. The law does provide several advantages to encourage copyright owners to register. One advantage is that registration is required for works of US origin before an infringement suit can be filed (Copyright Basics, 2000). Registration may be made at any time during the life of the copyright.

Digital Millennium Copyright Act (DMCA)

As technology has progressed, protecting works has become increasingly difficult. The original copyright law was clearly not effective with new technology and the rise of the Internet. Copying of material became much easier and the quality of the copies increased dramatically. Sharing of copied material has also become much easier with the Internet through the use of peer-to-peer networks, such as Napster. In a peer-to-peer network the PC can exchange data with any mainframe or any other PC on a host-to-host level (Goldman, P.400). This site allowed visitors to download a copy of almost any song and some movies. The public found this to be a wonderful thing, free music downloads that were, for the most part, good quality. This was a problem for the music industry; with music being freely distributed the music industry was losing money and their incentive to produce new music.

To help combat Internet piracy and other copyright infringements, President Clinton signed into law the Digital Millennium Copyright Act on October 28th, 1998. The Act implements two treaties signed in December 1996 at the World Intellectual Property Organization (WIPO) Geneva conference. These acts include the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. In addition to these treaties, the DMCA also addressed other copyright-related issues. The DMCA is divided into five titles:

1. WIPO Treaty Implementation
2. Online Copyright Infringements Liability Limitation
3. Computer Maintenance or Repair
4. Miscellaneous provisions
5. Protection of Certain Original Designs

The Five Titles

Title 1: WIPO Treaty Implementation

Title 1 of the DMCA extends the protection of United States law to the works that are required to be protected under the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (COS, 1998). Next this title restores protection to works that had fallen into the public domain in the United States but are still protected in the country of origin according to the Berne Convention and to works still protected in the WCT and WPPT member countries (COS, 1998).

Title 1 also examines technological protection and copyright management systems. Technological protection measures are divided into two categories: measures that prevent unauthorized access to a copyrighted work and measures that prevent unauthorized copying of a copyrighted work (COS, 1998). Making or selling devices or services that are used to circumvent either category of technological measure are prohibited if:

1. They are primarily designed or produced to circumvent;
2. They have only limited commercially significant purpose or use other than to circumvent; or
3. They are marketed for use in circumventing (COS, 1998)

The act of circumvention itself is prohibited for the measures that prevent unauthorized access but not for the measure that prevents unauthorized copying. This lack of consistency is because copying of a work may be fair used under appropriate circumstances.

The circumvention of technical protection measures clause also has exceptions. One exception is the operation of the entire section for law enforcement, intelligence, and

other governmental activities (COS, 1998). Other areas discussed below are exempt from the prohibition on the act of circumvention and development of technological means for such circumvention. These areas include:

1. Nonprofit library, archive and education institutions
2. Reverse engineering
3. Encryption research
4. Protection of minors
5. Personal privacy
6. Security testing (COS, 1998)

Each of these exemptions has its own set of conditions of applicability.

Title 1 of the DMCA also deals with the integrity of copyright management information (CMI). Section 1202 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 (COS, 1998)

Title 1 prohibits distribution of a work with false CMI and with the alteration or removal of CMI from works where there is intent to induce, enable, facilitate, or conceal infringement. A general exception for law enforcement, intelligence, and other governmental activities is in place as well as limitations on the liability of broadcast stations and cable systems (COS, 1998).

Section 1203 of Title 1 gives courts the power to grant a range of equitable and monetary remedies similarly available under the Copyright Act, including statutory damages. The courts are allowed discretion in cases where the violator can prove that it was not aware and had no reason to believe its actions constituted a violation (COS, 1998).

To willfully violate sections 1201 or 1202 for purposes of commercial advantage or private financial gain constitutes a criminal offense. The penalties for such offenses are discussed in section 1204. A first offense can range up to a \$500,000 fine or up to 5 years imprisonment. Subsequent offenses can range up to \$1,000,000 or up to 10 years imprisonment. Nonprofit libraries, archives and educational institutions are entirely exempted from criminal liability (COS, 1998).

The last part of Title 1 requires the copyright office to conduct two studies jointly with the National Telecommunications and Information Administration of the Department of Commerce (NTIA).

The first study deals with encryption. The report was to look at the effect that the exemption for encryption research has on encryption research, the development of encryption technology, the adequacy and effectiveness of technological measures designed to protect works, and the protection of copyright owners against unauthorized access to their encrypted copyrighted works (COS, 1998). This information was to be reported to congress no later than one year from enactment of the DMCA.

The second study was to evaluate two items. The first item was the effects of Title 1 and the development of electronic commerce and associated technology on the operation of the first sale doctrine and the exemption: allowing owners of copies of computer programs to reproduce and adapt them for use on a computer. The second item evaluated the relationship between existing and emergent technology and the operation of those sections. The second study was due to congress twenty-four months after the date of enactment of the DMCA (COS, 1998).

Title 2: Online Copyright Infringements Liability Limitation

Title 2 of the DMCA creates limitations on liability for copyright infringement by online service providers with the additions of a new section termed as 512. The limitations are based on 4 categories of conduct by a service provider:

1. Transitory Communications
2. System Caching
3. Storage of information on systems or networks at directions of users
4. Information location tools

To benefit from the limitations on liability under this title the party must qualify as a service provider. A service provider is defined as an entity offering the transmission, routing, or providing of connections for digital online communications between or among points specified by a user of material of the users choosing, without modifications to the content of the material as sent or received (COS, 1998). This definition of a service provider only applies for the first limitation, for the other three limitations of liability the definition of a service provider is: "a provider of online services or network access, or the operator of facilities therefore (COS, 1998)". Two other conditions must also be met to be eligible for any of the limitations:

1. It must adopt and reasonably implement a policy of terminating in appropriate circumstances the accounts of subscribers who are repeat infringers.
2. It must accommodate and not interfere with "Standard Technical measures" (COS 1998).

Standard technical measures are defined as the following measures; 1) that copyright owners use to identify or protect copyrighted works that have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, and voluntary multi-industry process, 2) are available to anyone on reasonable

nondiscriminatory terms, and 3) do not impose substantial costs or burdens on service providers (COS, 1998).

The limitation for transitory communications 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. A service provider's activity must meet certain conditions in order to qualify for this limitation. These conditions include:

1. The transmission must be initiated by a person other than the provider.
2. The transmission, routing, provision on connections, or copying must be carried out by an automatic technical process without selection of material by the service provider.
3. The service provider must not determine the recipients, and must not be retained for longer than reasonably necessary.
4. The material must be transmitted with no modification to its content (COS,1998).

The second category in the limitation of liability for online service providers is the limitation for system caching. Cache memory is defined as a type of high-speed memory that a processor can access more rapidly than main memory. It is used to store frequently used data in a more easily accessible memory location (Stair, p94). This 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. This limitation is subject to the following conditions:

1. The content of the retained material must not be modified.
2. The provider must comply with rules about refreshing material when specified in accordance with a generally accepted industry standard data communication protocol.
3. The provider must not interfere with technology that returns hit information to the person who posted the material, where such technology meets certain requirements.

4. The provider must limit users access to the material in accordance with conditions on access imposed by the person who posted the material.
5. 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 had been removed, blocked, or ordered to be removed or blocked, at the originating site (COS, 1998).

The next limitation of liability is for infringing material on websites hosted on service providers systems. It applies to storage at the direction of a user. The following conditions must be met for eligibility:

1. The provider must not have the requisite level of knowledge of the infringing activity.
2. 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.
3. Upon receiving proper notification of claimed infringement the provider must expeditiously take down or block access to the material (COS, 1998).

The service provider must have also filed an agent to receive modifications of claimed infringement with the copyright office. This statute establishes the procedures for proper notification of claimed infringement and rules to its effect.

The last category is the limitation for information location tools. Liability is limited for the acts of referring or linking users to a site that contains infringing material by using such information location tools. This only applies if the following conditions are met:

1. The provider must not have the requisite level of knowledge that the material is infringing
2. If the provider has the right and ability to control the infringing activity, the provider must not receive a financial benefit directly attributable to the activity
3. Upon notification of claimed infringement, the provider must expeditiously take down or block access to the material (COS, 1998).

Special rules for liability of nonprofit educational institutions are also listed in this title of the DMCA. For the limitations for transitory communications or system caching the faculty member or student shall be considered a person other than the provider to avoid disqualifying the institution from eligibility. For the other limitations the knowledge or awareness of the faculty member or student will not be attributed to the institution. The following conditions must be met:

1. The faculty member or graduate student's infringing activities do not involve providing online access to course materials that were required or recommended during the past three years
2. The institution has not received more than two notifications over the past three years that the faculty member or graduate student was infringing
3. The institution provides all of its users with informational material describing and promoting compliance with copyright law.(COS,1998)

Title 3: Computer Maintenance or Repair

Title 3 refers to Section 117 of the Copyright Act. Section 117 allows the owner of a copy of a program to make reproductions or adaptations when necessary to use the program in conjunction with a computer (COS, 1998). Title 3 expands this exemption by also allowing the making of a copy of a computer program in course of maintaining or repairing that computer, as long as that computer already contains an authorized copy of the program. The new copy must be made automatically when the computer is activated and must be destroyed immediately after the maintenance or repair is complete.

Title 4: Miscellaneous Provisions

Title 4 contains miscellaneous provisions. The first provision confirms the Copyright Office's authority to continue to perform the functions that it has carried out for decades under its existing general authority (COS, 1998)

The second provision deals with ephemeral recordings for broadcasters. Ephemeral recordings are recordings made in order to facilitate a transmission. Section 112 of the Copyright Act permitted a transmitting organization to make no more than one copy of a work if it was entitled to transmit a public performance or display of the work. Section 402 of the DMCA expands the exemption in section 112 to also include recordings that are made to facilitate digital transmission of a sound recording.

The third provision in this title is for distance education study. When creating the DMCA legislators expressed interest to promote distance education study, possibly by expanding the existing exemption for instructional broadcasting in Section 110(2) of the Copyright Act. The legislators came up with Section 403 of the DMCA, which directs the Copyright Office to consult with affected parties, and then make recommendations to Congress on how to promote distance education through digital technologies. This report must be made to Congress within six months of enactment (COS, 1998).

The fourth provision is the exemptions for nonprofit libraries and archives. The original exemption allowed for one facsimile copy for purposes of preservation or interlibrary loan. Section 404 allows up to three copies of a work. This copy may be digital as long as the digital copies are not made available to the public outside the library premises. This amendment also allows works to be copied into a new format if the original format should become obsolete.

The fifth provision pertains to amendments to the Digital Performance Right in Sound Recordings Act of 1995 (DPRA). The DPRA created a limited public performance right in sound recordings. It only covers public performances by means of digital transmission and is subject to an exemption for digital broadcasts and a statutory license for certain subscription transmissions that are not made on demand. Section 405 of the DMCA amends the DPRA to include Webcasting as another category eligible for the right of public performances (COS, 1998). It also revises the criteria any entity must meet to be eligible for the statutory license. The last part of this provision creates a new statutory license for creating ephemeral recordings. If an organization that is permitted to make ephemeral recordings wishes to make more than one copy of a sound recording they can apply for a statutory license to make such additional ephemeral recordings.

The last provision in this title is the assumptions of contractual obligations upon transfers of rights in motion pictures. This provision mainly pertains to the ability of writers, directors and screen actors to obtain residual payments should the producer be unable to pay, subject to a collective bargaining agreement if the distributor knew the agreement existed.

Title 5: Protection of Certain Original Designs

The Vessel Hull Design Protection Act (VHDPA) adds chapter 13 to Title 17. These additions do not provide copyright protection rather, they establish *sui generis* protection for original designs of vessel hulls (Overview). Before going further with this act a few terms need to be defined to aid one's understanding.

“Useful Article” – a vessel hull, including a plug or mold, which in normal use has an intrinsic utilitarian function that is not merely to portray the appearance of

the article or to convey information. An article which normally is part of a useful article shall be deemed to be a useful article (Overview, Chapter 13, section 1301 b 2).

“Vessel” – a craft

- a) That is designed and capable of independently steering a course on or through water through its own means of propulsions and;
- b) That is designed and capable of carrying and transporting one or more passengers. (Overview, Chapter 13, section 1301 b 3).

“Hull” – is the frame or body of a vessel, including the deck of a vessel, exclusive or masts, sails, yards, and rigging (Overview, Chapter 13, section 1301 b 4).

“Plug” – means a device or model used to make a mold for the purpose of exact duplication, regardless of whether the device or model has an intrinsic utilitarian function that is not only to portray the appearance of the product or to convey information (Overview, Chapter 13, section 1301 b 5).

“Mold” – means a matrix or form in which a substance for material is used, regardless of whether the matrix or form has an intrinsic utilitarian function that is not only to portray the appearance of the product or to convey information (Overview, Chapter 13, section 1301 b 6).

In general, the designer or owner of an original design of a useful article which makes the article attractive or distinctive in appearance to the purchasing or using public may secure the protection provided by this chapter upon complying with and subject to this chapter (Overview, Chapter 13 Section 1301 (a 1)). The protection provided for a design under Chapter 13 shall commence upon the earlier of the date of publication of the registration under section 1313(a) or the date the design is first made public as defined by section 1310 (b) (Overview, chapter 13 section 1304). Protection under this chapter shall be lost if application for registration of the design is not made within two years after the date on which the design is first made public. Design protection is for a period of ten years and is available only for original designs that are embodied in an actual vessel hull (Overview, Chapter 13 section 1310 (a)).

Effective Dates

Not all of the provisions of the DMCA went into effect upon the act being signed into law. The technical amendments in Title 1 relating to the eligibility of works for protection under US copyright law do not come into effect until the WIPO takes effect. The prohibition on the act of circumvention of access control measures does not take effect until two years from enactment of the DMCA itself (COS, 1998).

Compliance

What does an educational institution need to do in order to comply with the DMCA and qualify for the limitations on liability? First, the educational institution needs to register an agent with the Copyright Office to receive notification of claims of copyright infringement. Second, the institution needs to begin to develop or update policies and procedures for handling complaints of copyright infringement that occur on networks or servers that they control (Lide, 1999). These policies and procedures need to include the procedure for terminating the accounts of repeat infringers and to accommodate, not interfere, with standard measures used by copyright owners to identify and protect their works. Such policies must be posted on the institution's website. Colleges and universities will also need to undertake an educational program to ensure that their campus communities understand the copyright law and to promote compliance with it (Lide, 1999).

Martha Winnacker at the University of California Office of the President writes:

When notice of alleged infringement involves material made available by members of the faculty, the process for making takedown decisions will have to be transparent and legitimate enough to withstand controversy. Even a temporary takedown may cause serious disruption to teaching or research, or it may be seen as threatening the principles of academic freedom. Universities will require competent staff and legal resources to

help faculty, students, and staff understand what copyright all allows and to help administrators make appropriate choices when infringement is alleged. The same issues will apply in lesser degree to material made available by students particularly if it is related to research (Lide, 1999).

Problems with the DMCA

Although the DMCA was enacted to help alleviate some problems with Copyright Act and to provide clarification for copyright with the technological improvements, it has caused some problems. It seems that the language in the DMCA has been used by copyright owners in a way the writers of the DMCA did not expect; such has jeopardized fair use. Due to various violations and misinterpretations, the negative effects on research and impeding competition and innovation are present. The music industry, under protection of the DMCA has started using copy protected CDs to help prevent unauthorized copying of the CDs. In doing so they have also prevented consumers from making legitimate personal copies of music they have purchased. Technology is available to repair dysfunctional CDs, restoring consumers Fair Use privileges. This technology however does run the risk of lawsuits under section 1201's ban of circumvention tools and technologies (EEF, p7,2004).

Copyright owners are worried that tools and technologies that help to by pass digital locks will result in piracy. The original copyright laws answer has been to seek out and prosecute the infringers, not to ban the tools that enable fair use. All technology can be misused including photocopiers, VCRs, and CD-R burners. No one would suggest that the public give up these items simply because they might be used by others to break the law (EFF, p.8,2004).

This is not the only problem that has arisen with the DMCA. Another issue that must be corrected pertains to cyber-security. The provision that prohibits the

circumvention of technological measures that protect access to copyrighted works was intended to help stop hackers. As the DMCA was going through Congress technologists worried that the bill as drafted could outlaw the research and testing necessary to develop new cyber-security products. As a result Congress did include two exceptions for encryption research and security testing, (section 1201(G) and section 1201(J) of Title 1 of the DMCA). Unfortunately these exceptions are too narrow.

Computer science professors have found themselves entangled in litigation because of their academic activities, and universities and software companies have had to include attorneys in the research and development process to ensure compliance with the DMCA. This has hindered the development of technologies that can protect computer networks from cyber-attacks. Richard Clarke, the head of the White House office of cyberspace security, recently called for the amendment of the DMCA because of its “chilling effect on vulnerability research” (Band, 2002, p1).

Many foreign scientists have expressed concerns about even traveling in the United States after the arrest of Russian programmer Dmitry Sklyarov in July 2001 (EFF, p. 5, 2004). Sklyarov was jailed for several weeks and detained for five months in the US after speaking at the DEFCON conference in Las Vegas. Prosecutors alleged that Sklyarov had worked on a software program known as the Advanced e-Book Processor, which was distributed over the Internet by his Russian employer, ElcomSoft Co. Ltd. The software allowed owners of Adobe electronic books (“e-books”) to convert them from Adobe’s e-Book format into Adobe Portable Document Format (“pdf”) files, thereby removing restrictions embedded into the files by e-Book publishers. The Department of Justice ultimately permitted Sklyarov to return home, but elected to

proceed against his employer, ElcomSoft, under the criminal provisions of the DMCA. In December 2002, a jury acquitted ElcomSoft of all charges, completing an 18-month ordeal for the wrongly accused Russian software company (EFF, p. 4,2004).

A prominent Dutch cryptographer and security systems analyst Niels Ferguson discovered a major security flaw in an Intel video encryption system known as High Bandwidth Digital Content Protection (HDCP). He declined to publish his results on his website relation to flaws in HDCP, on the grounds that he travels frequently to the US and is fearful of “prosecution and/or liability under the US DMCA law” (EFF, p. 4,2004).

How it applies to Bemidji State University

Changing times, rules, and regulations bring about change on campus as well. The changes being brought on with technology and the DMCA are no exception. The newer technology has made file sharing and software pirating very easy to accomplish and more difficult to regulate. The DMCA has its own rules as to compliance and what needs to happen in order to qualify for the limitations on liability. Bemidji State University (BSU) now has to make some choices on how it will proceed.

In order to qualify for limitations on liability BSU needs to register an agent with the Copyright Office. BSU would also have to put in place various new rules and regulations on campus with regards to the DMCA. Most likely this would result in an expansion in the Computer Services department. It would also increase the amount of questions exported to the BSU legal council in regards to how to comply with the new regulations.

In the topic of educating the students on what they can and cannot do with regards to the DMCA, creating a program for all students to attend at the beginning of each year would not be difficult to arrange. BSU is already conducting the Responsible Men/Responsible Women program that all students must attend. A program explaining the DMCA could be similarly created. The Computer Science department would also require more legal council and resources to ensure they are complying with standards.

In a short email correspondence with Computer Services specialist Fred Hartman, BSU is proceeding carefully and consulting legal council for guidance on how they should proceed. Since MNSCU already has an agent registered with the Copyright Office, and BSU is a member of MNSCU, it is still unclear whether BSU needs to

register their own agent. This scenario is another example of how difficult it is to interpret the new copyright laws.

Conclusion

After discussing both the Copyright Act of 1976 and the DMCA of 1998, it is clear that these are confusing issues. Understanding the basic concepts of both documents is a lot of work. To comprehend all aspects of both documents would take years of reading, research, and schooling. As for this paper, lots of learning has taken place to understand how these two acts work together and compliment each other. One can also see the difficulty in complying with a sometimes-vague law.

The DMCA begins to fill in the gaps that the Copyright Act of 1976 has in regards to the new up-and-coming technology. With both laws in place copyright owners can now have confidence that their works are still covered even though they are available in newer formats.

While the DMCA has alleviated some of the problems left by newer technology, it has certainly caused a few of its own. New legislation has been called for, and it will not be long until someone answers the call.

It is unclear exactly how the DMCA is affecting BSU, although it is evident that some major changes need to be made. Much file sharing continues on campus to this day. Peer-to-peer networks have become larger and harder to trace. It is obvious that huge problems may arise with enforcement when it comes to the new rules and regulations that will need to be in place with the DMCA.

Appendix

Pre – Quiz

Copyright law can be tricky. The following are some statements that will be discussed. How well do you know copyright law? (Answers below!) Good Luck ☺

True or False

1. If it doesn't have a copyright notice, it's not copyrighted.
2. If I don't charge for it, it's not a violation.
3. If it's posted to Usenet it's in the public domain.
4. "My posting was just fair use!"
5. "If I make up my own stories, but base them on another work, my new work belongs to me."

(Templeton) – 10 Big Myths about copyright explained

1. Used to be true, but I wouldn't risk it any more!
2. False, it is still a violation even if you give it away.
3. False. Nothing modern is in the public domain, unless specifically put there by the copyright owner (usually the author).
4. Depends on the situation! Don't rely on fair use as your only defense.
5. False, falls into the category of a derivative work.

Bibliography

- Band, Jonathan. "Congress Unknowingly Undermines Cyber-Security." Internet. Available: <http://www.siliconvalley.com/mld/siliconcalley/4750224.htm>. Posted December 16, 2002
- Bowyer, Kevin W. Ethics and Computing: Living Responsibly in a Computerized World. KNI, Incorporated, 1996.
- "Copyright Basics – Fair Use." Internet. Available: <http://www.benedict.com/info/fairUse/fairUse.asp>. Accessed October 30, 2002.
- "Copyright Basics – Public Domain." Internet. Available: <http://www.benedict.com/info/publicdomain/publicdomain.asp>. Accessed October 30, 2002.
- "Copyright Law of the United States. (Overview)" Internet. Available: <http://www.copyright.gov/title17>. Accessed December 8, 2002.
- Copyright Office Summary (COS). "The Digital Millennium Copyright Act of 1998: US Copyright Office Summary December 1998." Internet. Available: <http://www.Copyright.gov/legislation/dmca.pdf>. Accessed December 6, 2004.
- Directory of Service Provider Agents for Notification of Claims of Infringement. Internet. Available: <http://www.copyright.gov/onlinesp/list/index.html>. Accessed December 5, 2004.
- Electronic Frontier Foundation (EFF). "Unintended Consequences: Five Years under the DMCA." Internet. Available: http://www.eff.org/IP/DMCA/unintended_consequences.php. Access December 6, 2004.
- Gardner, Elizabeth. "Copyright Law Can Teach Costly Lessons." Computer News and Reviews. Internet World April 12, 1999, v5,i14, p31(1).
- Gasaway, Laura. "What's Happened To Copyright?" Information Outlook. May 2002,6,5,p16(5).
- Goldman, James E and Rawles, Phillip. Applied Data Communications. John Wiley & Sons, Inc, 2001.
- Guthrie, Lawrence. "The Territoriality of Copyright, Trademark." Information Outlook. March 1998, v2, n3, p41(1).
- Library of Congress. "Copyright Basics." Internet. Available: <http://www.copyright.gov/circs/circ1.html>. Accessed December 6, 2004.

Lide, Casey. "What Colleges and Universities Need to Know About the DMCA."
Cause/Effect. Nov 1, 1999, v22.

Montana, John. "Copyright Law and the Internet." Information Management Journal.
Jan 1999,v33,1,52. Accessed November 25, 2002.

Stair, Ralph M and Reynolds, George W. Principle of Information Systems, Fourth
Edition. Course Technology, 1999.

Templeton, Brad. "10 Big Myths About Copyright Explained." Internet. Available:
<http://www.templetons.com/brad/copymyths.html>. Accessed December 6, 2004

Tysver, Daniel. "Rights Granted Under Copyright Law." Internet. Available:
<http://www.bitlaw.com/copyright/scope.html#derivative>. Accessed December 6,
2004.