



DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

The Digital Millennium Copyright Act of 1998

U.S. Copyright Office Summary

December 1998

Introduction

The Digital Millennium Copyright Act (DMCA) 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 an overview of the law's provisions; for purposes of length and readability a significant amount of detail has been omitted. **A complete understanding of any provision of the DMCA requires reference to the text of the legislation itself.**

Title I: WIPO Treaty Implementation

Title I implements the WIPO treaties. First, it makes certain technical amendments to U.S. law, in order to provide appropriate references and links to the treaties. Second, it creates two new prohibitions in Title 17 of the U.S. Code—one on circumvention of technological measures used by copyright owners to protect their works and one on tampering with copyright management information—and adds civil remedies and criminal penalties for violating the prohibitions. In addition, Title I requires the U.S. Copyright Office to perform two joint studies with the National Telecommunications and Information Administration of the Department of Commerce (NTIA).

Technical Amendments

National Eligibility

The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) each require member countries to provide protection to certain works from other member countries or created by nationals of other member countries. That protection must be no less favorable than that accorded to domestic works.

Section 104 of the Copyright Act establishes the conditions of eligibility for protection under U.S. law for works from other countries. Section 102(b) of the DMCA amends section 104 of the Copyright Act and adds new definitions to section 101 of the Copyright Act in order to extend the protection of U.S. law to those works required to be protected under the WCT and the WPPT.

Restoration of Copyright Protection

Both treaties require parties to protect preexisting works from other member countries that have not fallen into the public domain in the country of origin through the expiry of the term of protection. A similar obligation is contained in both the Berne Convention and the

Both treaties require parties to protect preexisting works from other member countries that have not fallen into the public domain in the country of origin through the expiry of the term of protection. A similar obligation is contained in both the Berne Convention and the TRIPS Agreement. In 1995 this obligation was implemented in the Uruguay Round Agreements Act, creating a new section 104A in the Copyright Act to restore protection to works from Berne or WTO member countries that are still protected in the country of origin, but fell into the public domain in the United States in the past because of a failure to comply with formalities that then existed in U.S. law, or due to a lack of treaty relations. Section 102(c) of the DMCA amends section 104A to restore copyright protection in the same circumstances to works from WCT and WPPT member countries.

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 the DMCA amends section 411(a) by broadening the exemption to cover all foreign works.

Technological Protection and Copyright Management Systems

Each of the WIPO treaties contains virtually identical language obligating member states to prevent circumvention of technological measures used to protect copyrighted works, and to prevent tampering with the integrity of copyright management information. These obligations serve as technological adjuncts to the exclusive rights granted by copyright law. They provide legal protection that the international copyright community deemed critical to the safe and efficient exploitation of works on digital networks.

Circumvention of Technological Protection Measures

General approach

Article 11 of the WCT states:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Article 18 of the WPPT contains nearly identical language.

Section 103 of the DMCA adds a new chapter 12 to Title 17 of the U.S. Code. New section 1201 implements the obligation to provide adequate and effective protection against circumvention of technological measures used by copyright owners to protect their works.

Section 1201 divides technological measures into two categories: measures that prevent unauthorized *access* to a copyrighted work and measures that prevent unauthorized *copying* of a copyrighted work. Making or selling devices or services that are used to circumvent either category of technological measure is prohibited in certain circumstances, described below. As to the act of circumvention in itself, the provision prohibits circumventing the first category of technological measures, but not the second.

This distinction was employed to assure that the public will have the continued ability to make fair use of copyrighted works. Since copying of a work may be a fair use under appropriate circumstances, section 1201 does not prohibit the act of circumventing a technological measure that prevents copying. By contrast, since the fair use doctrine is not a defense to the act of gaining unauthorized access to a work, the act of circumventing a technological measure in order to gain access is prohibited.

Section 1201 proscribes devices or services that fall within any one of the following three categories:

- they are primarily designed or produced to circumvent;
- they have only limited commercially significant purpose or use other than to circumvent; or
- they are marketed for use in circumventing.

No mandate

Section 1201 contains language clarifying that the prohibition on circumvention devices does not require manufacturers of consumer electronics, telecommunications or computing equipment to design their products affirmatively to respond to any particular technological measure. (Section 1201(c)(3)). Despite this general 'no mandate' rule, section 1201(k) does mandate an affirmative response for one particular type of technology: within 18 months of enactment, all analog videocassette recorders must be designed to conform to certain defined technologies, commonly known as Macrovision, currently in use for preventing unauthorized copying of analog videocassettes and certain analog signals. The provision prohibits rightholders from applying these specified technologies to free television and basic and extended basic tier cable broadcasts.

Savings clauses

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Section 1201 contains two general savings clauses. First, section 1201(c)(1) states that nothing in section 1201 affects rights, remedies, limitations or defenses to copyright infringement, including fair use. Second, section 1201(c)(2) states that nothing in section 1201 enlarges or diminishes vicarious or contributory copyright infringement.

Exceptions

Finally, the prohibitions contained in section 1201 are subject to a number of exceptions. One is an exception to the operation of the entire section, for law enforcement, intelligence and other governmental activities. (Section 1201(e)). The others relate to section 1201(a), the provision dealing with the category of technological measures that control access to works.

The broadest of these exceptions, section 1201(a)(1)(B)-(E), establishes an ongoing administrative rule-making proceeding to evaluate the impact of the prohibition against the act of circumventing such access-control measures. This conduct prohibition does not take effect for two years. Once it does, it is subject to an exception for users of a work which is in a particular class of works if they are or are likely to be adversely affected by virtue of the prohibition in making noninfringing uses. The applicability of the exemption is determined through a periodic rulemaking by the Librarian of Congress, on the recommendation of the Register of Copyrights, who is to consult with the Assistant Secretary of Commerce for Communications and Information.

The six additional exceptions are as follows:

1. Nonprofit library, archive and educational institution exception (section 1201(d)). The prohibition on the act of circumvention of access control measures is subject to an exception that permits nonprofit libraries, archives and educational institutions to circumvent solely for the purpose of making a good faith determination as to whether they wish to obtain authorized access to the work.

2. Reverse engineering (section 1201(f)). This exception permits circumvention, and the development of technological means for such circumvention, by a person who has lawfully obtained a right to use a copy of a computer program for the sole purpose of identifying and analyzing elements of the program necessary to achieve interoperability with other programs, to the extent that such acts are permitted under copyright law.

1. Encryption research (section 1201(g)). An exception for encryption research permits circumvention of access control measures, and the development of the technological means to do so, in order to identify flaws and vulnerabilities of encryption technologies.

4. Protection of minors (section 1201(h)). This exception allows a court applying the prohibition to a component or part to consider the necessity for its incorporation in technology that prevents access of minors to material on the Internet.

5. Personal privacy (section 1201(i)). This exception permits circumvention when the technological measure, or the work it protects, is capable of collecting or disseminating personally identifying information about the online activities of a natural person.

6. Security testing (section 1201(j)). This exception permits circumvention of access control measures, and the development of technological means for such circumvention, for the purpose of testing the security of a computer, computer system or computer network, with the authorization of its owner or operator.

Each of the exceptions has its own set of conditions on its applicability, which are beyond the scope of this summary.

Integrity of Copyright Management Information

Article 12 of the WCT provides in relevant part:

Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

Article 19 of the WPPT contains nearly identical language.

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New section 1202 is the provision implementing this obligation to protect the integrity of copyright management information (CMI). The scope of the protection 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 research, the development of encryption technology, the adequacy and effectiveness of technological measures designed to protect copyrighted works, and the protection of copyright owners against unauthorized access to their encrypted copyrighted works.

Section 104 of the DMCA requires the Register of Copyrights and the Assistant Secretary of Commerce for Communications and Information to jointly evaluate (1) the effects of Title I of the DMCA and the development of electronic commerce and associated technology on the operation of sections 109 (first sale doctrine) and 117 (exemption allowing owners of copies of computer programs to reproduce and adapt them for use on a computer), and (2) the relationship between existing and emergent technology and the operation of those sections. This study is due 24 months after the date of enactment of the DMCA.

Title II: Online Copyright Infringement Liability Limitation

Title II of the DMCA adds a new section 512 to the Copyright Act to create four new limitations on liability for copyright infringement by online service providers. The limitations are based on the following four categories of conduct by a service provider:

1. Transitory communications;
2. System caching;
3. Storage of information on systems or networks at direction of users; and
4. Information location tools.

New section 512 also includes special rules concerning the application of these limitations to nonprofit educational institutions.

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

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 Electronic Communications Privacy Act) in order to be eligible for any of the liability limitations.

Eligibility for Limitations Generally

A party seeking the benefit of the limitations on liability in Title II must qualify as a "service provider." For purposes of the first limitation, relating to transitory communications, "service provider" is defined in section 512(k)(1)(A) 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 user's choosing, without modification to the content of the material as sent or received." For purposes of the other three limitations, "service provider" is more broadly defined in section 512(k)(1)(B) as "a provider of online services or network access, or the operator of facilities therefor."

In addition, to be eligible for any of the limitations, a service provider must meet two overall conditions: (1) it must adopt and reasonably implement a policy of terminating in appropriate circumstances the accounts of subscribers who are repeat infringers; and (2) it must accommodate and not interfere with "standard technical measures." (Section 512(i)). "Standard technical measures" are defined as measures 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, are available to anyone on 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."

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 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/>).

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 knowledge or awareness, responds expeditiously to take the material down or block access to it.

The statute also establishes procedures for proper notification, and rules as to its effect. (Section 512(c)(3)). Under the notice and takedown procedure, a copyright owner submits a notification under penalty of perjury, including a list of specified elements, to the service provider's designated agent. Failure to comply substantially with the statutory requirements means that the notification will not be considered in determining the requisite level of knowledge by the service provider. If, upon receiving a proper notification, the service provider promptly removes or blocks access to the material identified in the notification, the provider is exempt from monetary liability. In addition, the provider is protected from any liability to any person for claims based on its having taken down the material. (Section 512(g)(1)).

In order to protect against the possibility of erroneous or fraudulent notifications, certain safeguards are built into section 512. Subsection (g)(1) gives the subscriber the opportunity to respond to the notice and takedown by filing a counter notification. In order to qualify for the protection against liability for taking down material, the service provider must promptly notify the subscriber that it has removed or disabled access to the material. If the subscriber serves a counter notification complying with statutory requirements, including a statement under penalty of perjury that the material was removed or disabled through mistake or misidentification, then unless the copyright owner files an action seeking a court order against the subscriber, the service provider must put the material back up within 10-14 business days after receiving the counter notification.

Penalties are provided for knowing material misrepresentations in either a notice or a counter notice. Any person who knowingly materially misrepresents that material is infringing, or that it was removed or blocked through mistake or misidentification, is liable for any resulting damages (including costs and attorneys' fees) incurred by the alleged infringer, the copyright owner or its licensee, or the service provider. (Section 512(f)).

Limitation for Information Location Tools

Section 512(d) relates to hyperlinks, online directories, search engines and the like. It limits liability for the acts of referring or linking users to a site that contains infringing material by using such information location tools, if the following conditions are met:

- The provider must not have the requisite level of knowledge that the material is infringing. The knowledge standard is the same as under the limitation for information residing on systems or networks.

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- 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.
- Upon receiving a notification of claimed infringement, the provider must expeditiously take down or block access to the material.

These are essentially the same conditions that apply under the previous limitation, with some differences in the notification requirements. The provisions establishing safeguards against the possibility of erroneous or fraudulent notifications, as discussed above, as well as those protecting the provider against claims based on having taken down the material apply to this limitation. (Sections 512(f)-(g)).

Special Rules Regarding Liability of Nonprofit Educational Institutions

Section 512(e) determines when the actions or knowledge of a faculty member or graduate student employee who is performing a teaching or research function may affect the eligibility of a nonprofit educational institution for one of the four limitations on liability. As to the limitations for transitory communications or system caching, the faculty member or student shall be considered a "person other than the provider," so as to avoid disqualifying the institution from eligibility. As to 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:

- 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;
- the institution has not received more than two notifications over the past three years that the faculty member or graduate student was infringing; and
- the institution provides all of its users with informational materials describing and promoting compliance with copyright law.

Title III: Computer Maintenance or Repair

Title III expands the existing exemption relating to computer programs in section 117 of the Copyright Act, which 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. The amendment permits the owner or lessee of a computer to make or authorize the making of a copy of a computer program in the course of maintaining or repairing that computer. The exemption only permits a copy that is made automatically when a computer is activated, and only if the computer already lawfully 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 (DPR) 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 DPR'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

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

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