COPYRIGHT ISSUES IN THE DIGITAL MILLENNIUM

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Stetson University College of Law:

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20th Annual National Conference on Law and Higher Education
Clearwater Beach, Florida
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MEMORANDUM

TO: Stetson Conference Colleagues, "Favorite Client," Et Al.

FROM: Kevin A. Cranman

DATE: January, 1999 for the February, 1999, 20th Annual National Conference on Law and Higher Education; Stetson University College of Law

SUBJECT: Copyright Issues in the New Millennium;
The Digital Millennium Copyright Act

In recent years, we have discussed the growing importance of copyright law in educational and research environments. The issues have included establishing internal policies regarding ownership of copyright (and other intellectual property) created at or at the instruction of the institution; educating institution personnel and establishing policies regarding the use of the copyrighted works of others; the "copy shop course packet" cases and the examination of the "fair use" doctrine (concluding that the practice of collecting and binding copyrighted works, even for academic and educational purposes, without permission from the copyright owners, is generally not a fair use); other "fair use" implications; and other issues at the crossroads of copyright law, advancing technology, and educational, research, and non-profit institutions.

In response to concerns regarding liability for copyright infringement for providers of various network and online services ("Service Providers"), the Digital Millennium Copyright Act ("DMCA") was passed in October, 1998. "Service Provider" is defined broadly to include providers of many online, Internet, and other similar services. The DMCA addresses what Service Providers must do to enjoy the copyright infringement liability limitations in Title II, the Online Copyright Infringement Liability Limitation Act ("OCILLA"). Also covered in the DMCA is a section on Copyright Protection and Management Systems ("CPMS"), which addresses liability limitations regarding technologies that protect access to copyrighted works, good faith computer and encryption research, and related issues. This memorandum provides an overview of the DMCA, and the attached summary provides additional information and references.

Online Copyright Infringement Liability Limitation Act (OCILLA). A Service Provider that (a) implements a policy of terminating accounts of repeat infringers, (b) informs account holders of the "no infringement" policy, and (c.) does not interfere with standard technical measures (e.g., those used by copyright owners to protect their works) may qualify for immunity from copyright infringement claims for (1) transmitting, routing, and providing connections to material ("transitory digital network communications"), (2) intermediate and temporary storage of
material ("system caching"), (3) information residing on the system at the direction of others, (4) referring or linking users to sites containing infringing material ("information location tools"), and (5) "good faith removal" of infringing material (i.e., obligations of the Service Provider to remove or disable access to infringing material).

The OCILLA requires a "notification" process by which a party claiming that infringement can notify the Service Provider. The process also requires a "counter notification" process by which the party thought to be the infringer can reply, stating his/her position as to why the claimed action is not infringing.

Liability limitation for nonprofit educational institutions. The DMCA/OCILLA provides specific protection for nonprofit educational institutions in stating that (1) faculty members or graduate student employees, who meet certain criteria, shall be considered persons "other than the institution" for certain infringement claims (i.e., the institution may escape liability for the ill deeds of employees), and (2) the knowledge or awareness of infringement by faculty members or graduate student employees, who meet certain criteria, "shall not be attributed to the institution" (i.e., the institution may escape liability for infringement even if the wrongdoing employees knew their behavior was infringement, providing the institution complies with provisions relating to responsiveness to claims of infringement).

The section on Copyright Protection and Management Systems ("CPMS") prohibits the circumvention of technology tools that exist to protect access to and use of copyrighted works and the manufacture and trafficking in devices used to circumvent protective technological measures. However, under certain circumstances and for certain uses, the CPMS provides a number of exemptions for nonprofit libraries and educational institutions including the right to access a copyrighted work to determine whether to acquire a copy; reverse engineering of computer programs for certain research; circumvention to develop interoperability of computer programs and technology; circumvention to perform certain encryption technology research and security testing; and others.

The DMCA also provides for penalties, civil and criminal, for violations.
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INTRODUCTION

As we hyperlink\(^2\) into the new millennium, many “intellectual property” issues which were once relegated to “intellectual property” attorneys are now equally likely to be management issues that regularly impact administrators, professors, students, lawyers, and others. Copyright law\(^3\) is one such issue. Not so long ago, many of us looked at the “©” symbol or the “Copyright” designation on books, magazines, movies, and other materials with little interest. Usually followed by a string of letters indicating a year in Roman numerals, such a reference meant little to us.

Now, with the enactment of the Digital Millennium Copyright Act (DMCA),\(^4\) educational professionals must remain aware of changing copyright law and policy and act to monitor and protect their institutions. Relevant to education and research institutions are DMCA\(^5\) provisions establishing limitations of liability for copyright infringement for online/Internet services providers (hereafter “SPs”; e.g., “online service provider” (“OSP”), “Internet service provider” (“ISP”), search engines, and others);\(^6\) providing “safe harbor” copyright liability limitations for system caching;\(^7\) establishing notice (and counter notice) provisions as part of liability limitation;\(^8\) establishing liability limitations for nonprofit educational institutions;\(^9\) prohibiting the circumvention of technological protection for copyrighted works;\(^10\) prohibiting tampering with copyright management information used to identify and protect rightful owners;\(^11\) and establishing liability limitations for copyright infringement for computer maintenance and repair needs.\(^12\) The first four items above are found in the Online Copyright Infringement Liability Limitation Act (“OCILLA”).\(^13\) The next two items are found in the new Chapter 12 of the Copyright Act addressing Copyright Protection and Management Systems.\(^14\) The DMCA’s definition of “service provider” (“SP”) is broad,\(^15\) providing ample room to seek coverage for our clients.

In recent years, general issues of copyright have become more important and prominent on university campuses, in classrooms, in courtrooms, and on our desks. The copyright cases that first attracted the attention of university administrators and lawyers were the “course pack” or “copy shop” cases,\(^16\) which focussed on the practice in which instructors created a package of
class materials, often physically prepared and bound by a photocopy business, so that students would have all necessary materials in one volume. Not insignificant to business interests was the fact that students would not need to buy all of the books, journals, or other works of authorship from which the instructor collected materials, which were otherwise protected by copyright. The “course pack” cases forced the “fair use” discussion to the forefront, where it has remained, generally with only limited guidance for compliance with copyright laws. The “fair use” analysis, famous and infamous on college campuses, provides some direction; however, concerns exist that educators may conclude that a work is fair game for fair use simply because it is being used for an “educational” purpose (i.e., simply because of its use at a college or university). Such a conclusion is not necessarily correct and can lead to troublesome - and expensive - results, including having to pay license fees for use and infringement with little room for negotiation; defending a lawsuit (generally expensive, regardless of outcome); and becoming a target for more frequent visits to your campus by those who monitor and enforce copyrights. As copyright law provides for statutory damages for infringement (i.e., a copyright owner does not need to prove harm by the infringer; only that infringement occurred), mistaken infringement can still result in court-ordered damages (i.e., money payments). Further, though the law says that States and state employees are subject to copyright law, a 1998 5th Circuit case, Chavez v. Arte Publico Press, addressed the issue of Eleventh Amendment sovereign immunity for claims of copyright infringement against a state entity. Citing Seminole Tribe v. Florida, a 1996 U.S. Supreme Court case, the 5th Circuit held that Eleventh Amendment immunity may protect states against copyright claims in federal courts. As the Eleventh Amendment Sovereign Immunity issues raised in Chavez are unsettled (i.e., Chavez is controlling law only in the 5th Cir.), one should be cautious in relying upon Chavez as a safe harbor for state entities.

Just as those of us charged with overseeing copyright compliance (and/or those who must ask for forgiveness from publishers when no permission had previously been sought) were beginning to understand copyright analyses for course pack and fair use situations, the exponential growth of technology that affects and implicates copyright, such as computers, digitization, and the Internet, has provided an electronic frontier fraught with issues in need of attention. Such other issues, by way of illustration, include trademark, domain name and related registration issues, personal jurisdiction, electronic commerce, privacy and security, online education, and others. Lest the electronic West become too wild (or lest copyright analyses/management become too mundane), Congress passed, and President Clinton signed, the Digital Millennium Copyright Act of 1998 (DMCA).

But first, before we review the DMCA and what it means for college and university administrators, professors, and students, we should start with some history of the copyright law.
COPYRIGHT BACKGROUND

Copyright law comes from Article 1, Section 8, Clause 8 of the U.S. Constitution. The constitutional framers, recognizing the value to society of scientific and useful developments, balanced Congress' power to promote such progress with certain limitations of exclusive rights for authors and inventors. The Copyright Clause, court cases, and subsequent legislation comprise our current body of copyright law.

The Copyright Act of 1976, as amended, establishes rights and remedies regarding copyrights. Copyright protection exists in original works of authorship that are fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The amount of creativity required for copyright is minimal; however, the arrangement of simple facts is not sufficient. The originality requirement comes from the "original works of authorship" language. The creativity requirement is fairly to establish; "a modicum of creativity" will suffice. In short, if a work is original, involves some, even if limited, element of creativity, and is fixed in a tangible medium, it is protected by copyright laws. In educational environments, copyright may appear as books, journals, magazines, newspapers, works created in courses, electronic versions of the foregoing, software programs, digitized images, and others. Copyright protection is also available for compilations and derivative works.

Notice (i.e., indication to readers/users, usually in the form of "(c)" or "Copyright") and registration (with the Copyright Office) are no longer necessary to invoke copyright protection. Copyright protection attaches as soon as a work of authorship, eligible for protection, is sufficiently fixed in a tangible medium of expression. The 1976 Copyright Act abolished the formalities associated with establishing copyright protection. Notifying the rest of the world of one's copyright claim and registering the work with the Copyright Office can provide for easier and more extensive recovery of damages against infringers (e.g., statutory damages), but such action is not required to trigger copyright protection.

Eight categories of protectable subject matter:

- literary works;
- musical works;
- dramatic works;
- pantomimes and choreographic works;
- pictorial, graphic and sculptural works;
- motion pictures and other audiovisual works; and
- sound recordings;
- and architectural works.

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Specifically excluded from protection are ideas which are inseparable from their expression. In other words, the way one expresses an idea or concept is protectable; the underlying idea or concept is not.\textsuperscript{50}

To protect one’s work, one should make notes and create records of one’s work, indicating dates of creation and publication. Again, one does not need to put notices on or register works created after January 1, 1978; however, doing so makes the recovery of statutory damages more probable.

**Exclusive rights** (*i.e.*, what the copyright owner can do and what the copyright owner can prohibit others from doing) include the rights:

- to reproduce the copyrighted work;
- to prepare derivative works based upon the copyrighted work;
- to distribute copies or phonorecords of the copyrighted work to the public by sale or otherwise;
- to perform the copyrighted work publicly;
- to display the copyrighted work publicly.\textsuperscript{51}

Without permission from the copyright owner, one cannot engage in any of the exclusive rights of another’s work.

Copyright protection is also available for **interactive works**, such as video games. Though such a work’s activity may seem to be evolving (*i.e.*, perhaps not “fixed”), at least two courts have held that such works are sufficiently fixed,\textsuperscript{52} and are, thus, eligible for copyright protection.\textsuperscript{53} The short time in which the work is fixed (“perceived... for more than transitory duration”)\textsuperscript{54} is sufficient for protection.\textsuperscript{55} **Live transmissions** also caused confusion regarding the fixation requirement. Addressing this issue with respect to the live broadcast of a baseball game, the court identified the (at least) modest contributions of creativity of camera people in following the action of a live sporting event, and, noting that such professional sporting events are often videotaped by authorized parties simultaneously with the broadcast, the court concluded that such telecasts are fixed in a tangible medium, provided that they are videotaped simultaneously with the broadcast.\textsuperscript{56}

**How long does copyright protection last for a protected work?** The length of copyright protection has changed under different Copyright Acts (*e.g.*, 1909, 1976, 1998), and the date(s) of creation and/or publication define the term under the applicable Act. In October, 1998, the Sony Bono Copyright Term Extension Act\textsuperscript{57} was enacted to extend the term of copyright protection. In short, works created on or after January 1, 1978 are protected from the time the work is fixed in a tangible medium of expression for the life of the author(s) plus 70 years. If the work is a corporate authorship, the term is the shorter of 95 years from publication or 120 years from creation. Works published between 1964 and 1977 are protected from the time they were published with copyright notice for 28 years plus an automatic extension term of 67
Infringement is the inappropriate use of another's copyright (e.g., violating a copyright owner’s exclusive rights). In copyright, different from other bodies of law, the aspect of intent is not relevant in establishing infringement. Intent may impact the extent or amount of damages awarded (i.e., the amount of damages may differ depending upon whether the infringer acted willfully or not); however, intent neither creates nor negates infringement.

Contributory infringement is a claim against those who induce or cause copyright infringement by another. Sega Enterprises, Ltd. v. MAPHIA, 857 F.Supp. 679 (N.D. Cal. 1994) is one of the earlier cases addressing contributory infringement in the online environment.

Vicarious liability for copyright infringement exists when one has the ability to supervise the infringing activity of another and a financial interest in the infringing activity.

Remedies. The remedies available to a wronged copyright owner include injunctions (court orders wrongdoer to stop), destruction of infringing goods, payment by wrongdoer to copyright owner of damages (actual loss and wrongdoer’s profits), statutory damages (i.e., damages outlined by the statute), and others.

Fair use. As mentioned above, fair use is a body of copyright law that confuses many, is sought often as protection, and is misunderstood by many. The factors to consider in determining whether a use is fair are:

- the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.

It is important to remember - and to remind educators, administrators, professors, and others regularly - that just because a proposed use is for and/or relates to education, research, or academics, does not necessarily mean that the use is fair.

Organizations should establish copyright use and management policies. Though copyright owners can seek/collect statutory damages, an organization’s behavior regarding copyrighted words may become important in assessing damages and addressing contributory infringement and various liability claims. In other words, the organization that establishes, disseminates, explains, and enforces policies that prohibit violations of copyright law may be able to avoid and/or limit its liability when employees violate copyright laws. Creating a culture of compliance, i.e., making employees and students aware of the law and the university’s policies and making it known that the university expects compliance, will help to minimize infringement.
and will allow the university to distance itself from individual employees' wrongful behavior (i.e., the university shows that it did what it could to require compliance with the law). Other organization policy issues relate to which works the employer owns, which are owned by the individual employee, and which are shared or disposed of in different manners. Some institutions retain ownership of copyright in all of its employees' works; others decide on a case-by-case basis; others yield copyright ownership to employees (except, for example, on sponsored research projects). Organizations should also inform employees and students of copyright restrictions and require compliance with the law. Notifying employees and students of risks of personal liability for non-compliance with institutional policies or the law may help encourage compliance.

THE DIGITAL MILLENNIUM COPYRIGHT ACT

As technology advanced with the development of communication tools such as the Internet, many looked to ways in which Copyright Law could meet the needs of the online world. To protect copyright owners from infringement, to protect service providers from expanding liability risks, and to provide additional guidance to the general public, the DMCA was enacted. Though general aspects of the DMCA were discussed above, the following information outlines the portions of the DMCA most applicable to university, research, non-profit, and similar institutions.

COPYRIGHT INFRINGEMENT LIABILITY LIMITATION

"Online Copyright Infringement Liability Limitation Act" ("OCILLA") (Chapter 5 of Title 17 is amended to add this liability limitation act.)

Concern over potential liability for SPs has grown as Internet use and access has increased and as copyright owners have become more diligent and vigilant in protecting their rights. Those developing Internet uses and applications want to minimize (avoid) liability for actions such as infringement intellectual property rights, defamation, and others. Owners of intellectual property wanted SPs to share some responsibility in addressing infringement matters. Congress attempted to address some of these issues in the somewhat ill-fated Communications Decency Act ("CDA") of 1996. The Fourth Circuit in Zeran v. AOL, 129 F.3d, 327, held that the CDA does immunize SPs under certain circumstances.

The Internet's expanding importance and influence - and continued calls for some type of regulation in these areas - sent Congress to the drafting table again, culminating in the protection of SPs under certain circumstances under the OCILLA. Envisioning the many types of organizations, including communications companies, various other businesses, non-profits, and educational institutions, Congress defined "SP" broadly. Considering the breadth of this definition, it is worth considering the liability limitation benefits the OCILLA may provide to our clients in many circumstances.
Transitory digital network communications. An online service provider ("SP") shall not be liable for money damages or for injunctive relief for infringement of copyright because of the SP’s transmitting, routing, or providing connections for material through a system or network controlled or operated by or for the SP, or because of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if:

- the transmission was initiated by or at the direction of a person other than the SP;
- the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the SP;
- the SP does not select the recipients of the material except as an automatic response to the request of someone else;
- no copy of the material made by the SP in the course of such storage is maintained on the system in a manner ordinarily accessible to anyone other than anticipated recipients;
- no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections;
- and the material is transmitted through the system or network without modification of its content by the SP.

System caching. An SP shall not be liable for money damages or for injunctive relief for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the SP when:

- the material is made available online by a person other than the SP;
- the material is transmitted from the non-SP through the system or network to a person other than the non-SP person at the direction of that other person;
- and the storage is carried out through an automatic technical process to make the material available to users of the system or network who, after the material is transmitted as described above, request access to the material from the person described above (i.e., the original submitting party), if the following conditions are met.

Conditions:

- the material is transmitted to subsequent users without modification to its content;
- the SP complies with the submitter’s rules concerning the refreshing, reloading, or other updating of the material in accordance with a generally accepted industry standard data communications protocol for the system or network through which the submitter makes the material available (however this provision applies only if those rules are not used by the original submitting party to prevent or unreasonably impair the intermediate storage to which this section applies - i.e., the goal is to preserve the distribution of current information - not to allow submitting parties a way to trouble or frustrate SPs);
- the SP does not interfere with the ability of technology to return to the original submitter the information that would have been available to that person if the material had been obtained by the subsequent users directly from the original submitter.
The preceding clause seems to require that SPs allow unfettered return to the submitting party of recipient information, including responses and personally identifying information, if such is normally available. However, the preceding statement only applies if

- such technology does not significantly interfere with the performance of the SP’s system or network;
- is consistent with generally accepted industry standard communications protocols;
- and does not wrongfully extract information from the SP’s network.

The preceding requirement appears to guard against an original submitter becoming a drain on an SP’s resources.

Other conditions include: if the original submitter imposes a condition that a person must meet prior to having access to the material, e.g., fee payment, password, or age verification\(^4\), the SP permits access to the stored material only to users who have met those conditions; and if the original submitter makes that material available online without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement.\(^5\)

However, this obligation applies only if the material has previously been removed from the originating site, access to it has been disabled, or a court has ordered that the material be removed from the originating site, and if the party giving the notification includes a statement confirming that the material has been removed from the originating site, access to it has been disabled, or that a court has ordered such action.

Information residing on systems or networks at the direction of users.\(^6\) An SP shall not be liable for money damages for infringement of copyright because of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the SP, if the SP

- does not have actual knowledge that the material is infringing;
- is not aware from facts or circumstances that infringing activity is apparent;
- is not aware from such knowledge, acts expeditiously to remove, or disable access to, the infringing material;
- does not receive a financial benefit directly attributable to the infringing activity, in a case in which the SP can control such activity;
- and upon notification of claimed infringement,\(^7\) responds expeditiously to remove, or disable access to, the alleged infringing material.

SPs must establish a designated agent to receive notices of copyright infringement.\(^8\) The above limitations on liability apply only if the SP has designated an agent to receive notifications of claimed infringement by making agent contact information available through its service, including on its website in a location accessible to the public, and by providing to the
Copyright Office, substantially the following information:

- the name, address, phone number, and electronic mail address of the agent;
- other contact information which the Register of Copyrights deems appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including electronic and hard copy formats, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

**Elements of notification.** A notification of claimed infringement must be written, provided to the SP’s designated agent, and must include:

- a physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed;
- identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single site are covered by a single notification, a representative list of such works at that site;
- identification of the material that is claimed to be infringing and that is to be removed or access to which is to be disabled and information reasonably sufficient to permit the SP to locate the material;
- information reasonably sufficient to permit the SP to contact the complaining party (e.g., address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted);
- a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law;
- a statement that the information in the notification is accurate, and, under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

A notification from a copyright owner, or designee, that fails to comply substantially with the foregoing provisions shall not be considered in determining whether an SP has actual knowledge of infringing activity. **Substantial compliance with notification.** However, if the notification fails to comply substantially with the above provisions, but substantially complies with the second, third, and fourth provisions, then the SP enjoys limitations of liability only if it promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the identification provisions. In other words, unlike situations in which failure to perfect service on a receiving party may unburden the recipient’s obligations to respond, the OCILLA requires on SP in receipt of a semi-conforming notice to do some follow-up work to identify the party and relevant information.
**Information location tools.** An SP shall not be liable for money damages for infringement of copyright by reason of the SP referring or linking users to an online location containing infringing material or infringing activity, by using information location tools (including a directory, index, reference, pointer, or hypertext link) if the SP

- (1) does not have actual knowledge that the material or activity is infringing; is not otherwise aware of facts or circumstances from which infringing activity is apparent; or upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to the material;
- (2) receives no financial benefit directly attributable to the infringing activity, when the SP can control such activity; and
- (3) upon notification of claimed infringement, responds expeditiously to remove or disable access to the infringing material.

**Limitation on liability of nonprofit educational institutions.**

“Transitory digital network” and “system caching.” When a public or other nonprofit institution of higher education is an SP, and when a faculty member or graduate student who is an employee of such institution is performing a teaching or research function, for purposes of the “transitory digital network communications” or “system caching” issues, such faculty member or graduate student shall be considered to be a person other than the institution (i.e., less chance of liability for SP; more chance for personal liability for individual infringer).

“Information residing on systems” and “information location tools.” For the purposes of “information residing on systems/nets of systems at direction of users” or “information location tools” analysis, such faculty member's or graduate student's knowledge or awareness of his/her infringing activities shall not be attributed to the institution if

- such individual’s infringing activities do not involve the provision of online access to instructional materials that are or were required or recommended, within the preceding 3-year period, for a course taught at the institution by such faculty member or graduate student;
- the institution has not, within the preceding 3-year period, received more than 2 individual notifications of claimed infringement regarding such faculty member or graduate student, and such notifications of claimed infringement were not actionable under the below section on “misrepresentation” (i.e., such claims were not flawed as defined in 17 U.S.C. 512(f)); and
- the institution provides users of its system with information that describes and promotes compliance with the U.S. Copyright laws.

Presumably, making copyright policies and related materials available online will address this “education” function requirement - and will, hopefully, serve to inform those who need to know the rules.
Misrepresentations. Any person who knowingly, materially misrepresents that material or activity is infringing or that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorneys’ fees, incurred by the alleged infringer, by any copyright owner or copyright owner’s authorized licensee, or by an SP, who is injured by reliance upon such misrepresentation (e.g., who must allocate time and resources to investigate the claim, remove/disable access, and return situation to normal once the truth is established - seemingly, a “no crying wolf” or “no jumping to conclusions” provision).

Replacement of removed or disabled material and limitation on other liability. In general, SPs will not be liable for good faith removal of material. An SP shall not be liable for any claim based on the SP’s good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing. The foregoing liability limitations shall not apply to material residing at the direction of a subscriber of the SP on a system controlled or operated by or for the SP that is removed, or to which access is disabled by the SP, unless the SP

- takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;
- upon receipt of a counter notification, promptly provides the person who provided the original notification with a copy of the counter notification and informs that person (i.e., the original notice submitter) that it will replace the previously removed material or cease disabling access to it in 10 business days;
- and replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the original notice submitter that he/she has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the SP’s system.

Identifying infringers. The OCILLA provides that a copyright owner or designee can seek a subpoena to require an SP provide the identity of an alleged infringer.

Counter notification. If an SP responds (e.g., removing information or disabling access) to a notice of claimed infringement, and another party believes that the first notice is incorrect or inapplicable, the second party can so notify the SP with a “counter notification.” A counter notification must be written, provided to the SP’s designated agent, and

- include a physical or electronic signature of the subscriber;
- identification of the material that has been removed or to which access has been disabled;
- the location at which the material appeared before it was removed;
- a statement, under penalty of perjury, that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification;
- the subscriber's name, address, and telephone number, and a statement that the subscriber
consents to the jurisdiction of Federal District Court for the judicial district in which the address is located (or if the subscriber's address is outside of the United States, any judicial district in which the SP may be found), and that the subscriber will accept service of process from the person who provided the original notification.

This provision seems to allow for an endless hall-of-mirrors series of back-and-forth allegations, termed “dueling notifications” by a colleague, for SPs to manage.

**Conditions for eligibility.** These limitations on SP liability shall apply to an SP only if it has adopted and reasonably implemented, and informs its subscribers and account holders of, a policy that provides for the termination in appropriate circumstances of accounts of the SP’s subscribers and account holders who are repeat infringers and accommodates and does not interfere with standard technical measures. In other words: establish, distribute, and enforce policies. Query: If the SP is a governmental actor (e.g., state college) or if the SP is a private college which has adopted broad free speech and/or access policies, will due process hearings become mainstays as educational and other institutions attempt to monitor and enforce the conditions for eligibility (e.g., by terminating “in appropriate circumstances” accounts of SP’s users) to enjoy the DMCA’s immunities?

**Scope of relief.** With respect to conduct other than that which qualifies for the limitation on remedies set forth above, the court may grant injunctive relief with respect to an SP only in one or more of the following forms:

- an order restraining the SP from providing access to infringing material or activity residing at a particular online site on the provider's system or network;
- an order restraining the SP from providing access to a subscriber or account holder of the SP’s system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order;
- such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular online location, if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose.

If the SP does qualify for the above limitation on remedies, the court may only grant injunctive relief in one or both of the following forms:

- an order restraining the SP from providing access to a subscriber or account holder of the SP’s system who is using the SP’s service to engage in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order;
• an order restraining the SP from providing access, by taking reasonable steps specified in the order to block access, to a specific, identified, online location outside the United States.

SECTION ON COPYRIGHT PROTECTION AND MANAGEMENT SYSTEMS ("CPMS")

The OCILLA outlines the steps which SPs can take to minimize their liability for copyright infringement. The CPMS addresses the different types of technology used to protect information, technology, copyrighted works, and use of and access to them. This new Chapter 12 provides protection for copyright owners, outlines penalties for wrongdoers, and establishes exceptions to the restrictions, especially important exceptions for research purposes.

The circumvention of copyright protection systems is prohibited. The CPMS prohibits the circumvention of technological measures that are in place to protect copyrighted works. As online access and distribution grow as avenues for copyright owners to license and distribute works, this prohibition will become more and more important as potential infringers create ways to beat the technological system to gain access without receiving permission or paying fees. This provision is good for organizations wanting to protect and commercially exploit their copyrighted works; however, the enforcement methods (e.g., trying to identify and locate wrongdoers) seem somewhat complicated, like tracking down e-mail spammers and other cyberspace outlaws, who are often unknown and difficult to find.

Also important is the provision of review periods for analysis of the law’s impact on various fields - including non-profits and educational institutions. According to the CPMS, the Librarian of Congress will publish a list of a class of copyrighted works which the Librarian has determined that non-infringing uses are, or are likely to be, adversely affected by the DMCA. Congress seems to want to periodically review the law’s impact on various fields to determine if amendments are needed. Though protection of copyright owners’ works is important, the areas which Congress wants to monitor (e.g., libraries, distance education, et al.) indicates the acknowledged importance of the convergence of the Internet, electronic communication, and (higher) education.

Also prohibited by the CPMS are the manufacture, import, and trafficking in any technology, product, service, device, or component that

• is primarily designed or produced to circumvent a technological measure that controls access to a protected work;
• has only limited use other than to circumvent a protective technological measure;
• or is marketed by someone who knows such is being used to circumvent protective technological measures.