COPYRIGHT ISSUES IN
THE DIGITAL MILLENNIUM

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Not only is circumvention prohibited,\textsuperscript{112} engaging in the industry supporting or assisting such prohibited actions is likewise prohibited. The CPMS specifically lists as separate prohibited actions the manufacture, import, and trafficking in any technology, product, service, device, or component that

- is primarily designed or produced to circumvent technological protection of a copyrighted work;
- has only limited use other than to circumvent technological protection afforded to a copyrighted work;
- or is marketed by someone who knows such is being used to circumvent copyright protection afforded by a technological measure.

Congress seems to have been serious in addressing circumvention of both technological measures of access control\textsuperscript{113} and technological measures of protection of rights of copyright owners.\textsuperscript{114}

**Other rights are not affected.**\textsuperscript{115} Other rights, remedies, limitations, or defenses to copyright infringement, including fair use, are not affected by this Act. Further, this section neither enlarges nor diminishes vicarious or contributory liability for copyright infringement regarding technology or otherwise. In other words, though immunity clauses exist to protect organizations against various infringement claims\textsuperscript{116} for certain acts, risks may still exist for organizations that are hosts for ongoing and continuing infringing activity.\textsuperscript{117} However, the CPMS neither enlarges nor diminishes the rights of free speech or press for activities using consumer electronics, telecommunications, or computing products.\textsuperscript{118}

**Exemption for nonprofit libraries, archives, and educational institutions.**\textsuperscript{119} Nonprofit libraries, archives, and educational institutions can, without being in violation of the circumvention prohibition, access a commercial copyrighted work to determine whether to acquire a copy for the sole purpose of permitted conduct. A copy of a work gained under this exemption may only be used for the determination and may be kept no longer than needed to make the determination. Though this exemption only applies to a work when an identical copy is not reasonably available in another form, Congress, nevertheless, provided a specific exception for many of our clients in assessing works that they may want to obtain. At the same time, a nonprofit library, archives, or educational institution that willfully, for commercial advantage or financial gain, violates the foregoing exemption shall be subject to penalties.\textsuperscript{120} This exemption may not be used as a defense to manufacturing or trafficking in products or devices to circumvent access protection of copyrighted works nor permit a nonprofit library, archives, or educational institution to manufacture, import, or take other actions which circumvent a technological measure. In other words, Congress provided protection for "proper" purposes - not a carte blanche to infringe the copyrighted works of others without recourse. Fair use may remain an important aspect in our practices involving libraries, archives, and museums.\textsuperscript{121}
Qualifications for exemptions. For a library or archives to qualify for this exemption, its collections must be open to the public or available not only to researchers affiliated with the institution, but also to other persons doing research in a specialized field.¹²²

Law enforcement, intelligence, and other government activities. The foregoing prohibitions do not prohibit any lawfully authorized investigative, protective, information security, or intelligence activity of an employee of the United States, a State, or a political subdivision of a State.¹²³

Reverse engineering and further exemptions for certain research.¹²⁴ Despite the foregoing circumvention prohibitions, a person who has lawfully obtained the right to use a computer program may circumvent a technological access control to a particular portion of that program for the sole purpose of identifying and analyzing portions of the program that are necessary to achieve inter-operability of an independently created computer program with other programs, which have not previously been readily available, to the extent any such acts of identification and analysis do not otherwise constitute infringement.

Circumvention to allow interoperability. Despite the manufacturing and distribution prohibitions, a person may develop and employ technological means to circumvent a technological measure or to circumvent protection afforded by a technological measure to enable the identification and analysis, or for the purpose of enabling inter-operability, to the extent that doing so does not otherwise constitute infringement.¹²⁵ These reverse engineering allowances are extremely important for science and technology research institutions for continued research and development in fields such as electrical engineering, computer science, electronic security technology, and others. The information acquired through the foregoing acts may be made available to others (i.e., even people other than the copyright owner) solely for the purpose of enabling inter-operability¹²⁶ of an independently created computer program with other programs, and to the extent that doing so does not otherwise constitute infringement.¹²⁷

Permissible acts of encryption research.¹²⁸ Much like the foregoing computer research exceptions to the circumvention prohibitions,¹²⁹ it is not a violation to circumvent a technological measure as applied to a copy phonorecord, in the course of good faith encryption research, if the researcher lawfully obtained the encrypted copy; such act is necessary for the research; the researcher first made a good faith effort to obtain authorization; and such act does not otherwise constitute infringement under applicable laws including the Computer Fraud and Abuse Act of 1986.¹³⁰

Factors in determining exemption.¹³¹ In determining whether an encryption exemption applies, consider the following factors:

- whether the information derived from the encryption research was disseminated, and, if so, whether it was disseminated to advance the state of knowledge or development of
encryption technology or whether it was disseminated in a manner that facilitates infringement, including a violation of privacy or breach of security;

- whether the researcher is engaged in a legitimate course of study or work regarding encryption technology;
- and whether the researcher provides the work’s copyright owner with his/her findings.

These factors appear to relate to legitimate research by those skilled in the field seeking to improve the field of technology - not just anyone with a passing interest in the field (or in using this exemption as cover for copyright infringement). Use of technological means for research activities. Notwithstanding the prohibitions on manufacturing or distributing circumvention technology, it is not a violation to develop and employ technology to circumvent a technological measure for the sole purpose of performing good faith encryption research.¹³²

Security testing¹³³ means accessing a computer, computer system, or computer network, solely for the purpose of good faith testing, investigating, or correcting a security flaw or vulnerability, with the authorization of the owner or operator of such computer system. Permissible acts of security testing.¹³⁴ It is not a violation to engage in security testing, if such act does not otherwise constitute infringement, including the Computer Fraud and Abuse Act of 1986.¹³⁵ In determining the applicability of this exemption, consider whether the information derived from the security testing was used solely to promote the security of the owner or operator of such computer system or shared directly with the developer of such computer or computer system and whether the information was used or maintained in a manner that does not facilitate infringement including a violation of privacy or breach of security. Further, it is not a violation for a person to develop, produce, distribute or employ technology for the sole purpose of performing the acts of security testing provided such technology do not otherwise violate manufacturing and distribution prohibitions.

Be aware of changes/updates¹³⁶ Be on the lookout for proposed and actual revisions, as the DMCA requires reports from the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce to be submitted to Congress on the effect this section has on encryption research and the development of encryption technology; the adequacy and effectiveness of technological measures designed to protect copyrighted works; and protection of copyright owners against the unauthorized access to their encrypted copyrighted works. It seems that through these exemptions, Congress has established “research projects” both to determine the effectiveness of the DMCA, including the need for future revisions, and a nationwide (global) analysis of encryption technology.

Protection of personally identifying information.¹³⁷ In addition to addressing legal and policy matters regarding protection of copyrighted works and development of new technologies, encryption and otherwise, Congress has taken steps to allow the public to seek privacy protection - or, at least, try to minimize privacy invasions. The DMCA permits circumvention of a technological measure if
the technological measure, or the work it protects, is capable of collecting or disseminating personally identifying information reflecting the online activities of the person who seeks access to the protected work;

• in the normal course of its operation, the technological measure collects or disseminates personally identifying information without providing conspicuous notice of such collection or dissemination to the user and without providing the user with the ability to prevent or restrict such collection or dissemination;

• the act of circumvention has the sole effect of identifying and disabling the collection capability;

• and the act of circumvention is carried out solely for the purpose of preventing the collection or dissemination of personally identifying information.

**Integrity of copyright management information.**\(^{138}\) **False copyright management information.**\(^{139}\) No person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement, provide, distribute, or import copyright management information that is false. This prohibition is important for the protection of an organization’s copyrighted works. It is also important to advise employees not to remove this identifying information.

**Removal or alteration of copyright management information.**\(^{140}\) No person shall, without the authority of the copyright owner or the law, intentionally remove or alter any copyright management information; distribute or import for distribution copyright management information knowing that it has been removed or altered; or distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered. This section does not prohibit any lawfully authorized investigative employee of the United States, a State, or a political subdivision of a State.

“Information security” means activities carried out in order to identify and address the vulnerabilities of a government computer, computer system, or computer network.\(^{141}\)

**Analog and digital transmissions.** Limitations on liability for analog transmissions and digital transmissions are addressed in 17 U.S.C. 1202(e)(1) and (2), but are not discussed herein.

**Civil remedies.**\(^{142}\) Any person injured by a violation of this DMCA provision may bring a civil action in U.S. district court. The court may grant injunctions\(^{143}\) to prevent or restrain a violation, but can not impose a prior restraint on free speech or the press. The court may order the impounding of any device or product in the alleged violator’s custody or control that the court believes was involved in a violation; may award damages;\(^{144}\) may allow the recovery of costs by or against any party other than the United States or a U.S. officer; may award attorney’s fees to the prevailing party; and order the modification or the destruction of any device or product involved in the violation that is in the custody or control of the violator or has been impounded. These remedies can provide warnings to individual employees, who may not otherwise understand and appreciate (or want to understand) the ramifications, including personal liability, for copyright infringement. Establishing disciplinary personnel actions for violations of copyright law, just like for violations of any other law, may be worth considering.
Criminal penalties. Any person who violates the above restrictions willfully and for purposes of commercial advantage or private financial gain is subject to fines of not more than $500,000 or imprisonment for not more than 5 years, or both, for the first offense; and fines of not more than $1,000,000 or imprisonment for not more than 10 years, or both, for any subsequent offense. Limitation for nonprofit library, archives, or educational institution. The foregoing criminal penalties shall not apply to a nonprofit library, archives, or educational institution.

Innocent violations. The court may reduce or return the award of damages in any case in which the violator convinces the court that the violator was not aware and had no reason to believe that its acts were violations. When nonprofit libraries, archives, or educational institutions appear to be culprits, the court shall remit damages in any case in which the library, archives or educational institution convinces the court that it was not aware and had no reason to believe that its acts constituted violations.

Other DMCA provisions worth considering include Title I, “Implementation of WIPO Treaties,” addressing changes to various sections of the Copyright Act and Title III, Computer Maintenance or Repair Copyright Exemption.
1. Thanks to Gary Wolovich, Senior Attorney, Office of Legal Affairs, Georgia Institute of Technology, and Steven J. McDonald, Associate Legal Counsel, The Ohio State University for comments on an earlier draft and to Paul J. Ward, General Counsel, Arizona State University, for suggesting the “example/summary” memorandum.


4. Pub. Law 105-304. For online access to the DMCA, go to <http://thomas.loc.gov/home/c105query.html>, insert “H.R. 2281” in section 3 (“bill/amendment”); select “text of legislation.” The “Thomas” site is an excellent resource for legislative information <http://thomas.loc.gov/>. Upon enacting the DMCA, President Clinton said “[t]his Act implements two landmark treaties ... and also limits the liability of online service providers for copyright infringement under certain conditions. ... Through enactment of the [DMCA], we have done our best to protect from digital piracy the copyright industries that comprise the leading export of the United States.” (Oct. 28, 1998) <http://www.pub.whitehouse.gov/WH/Publication/html/Publication/html> (citations verified Jan. 5, 1999).

5. The purposes of the DMCA include the implementation of the 1996 World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty, to establish copyright infringement liability limitations for online/Internet services providers, to provide for limitations on exclusive rights of copyright owners to allow for computer maintenance and repair, and others.


14. 17 U.S.C. §1201, et seq.; §103 of Title I of the DMCA.

15. 17 U.S.C. §512(k)(1)(A): For “transitory digital network communications” situations, a “service provider [SP] means 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.” 17 U.S.C. §512(k)(1)(B): For all other situations, “service provider means a provider of online services or network access, or the operator of facilities therefor, and includes entities in the preceding section, §512(k)(1)(A).

16. E.g., Princeton Univ. Press v. Michigan Document Svcs., 99 F.3d 1381, 1385 (6th Cir. 1996) (en banc) (“The defendant... a commercial copyshop that [bound and sold] substantial segments of copyrighted works of scholarship... to students for use in fulfilling reading assignments given by professors at the University of Michigan... [The defendant] acted without permission from the copyright holders, and the main question presented is whether the "fair use"... obviated the need to obtain such permission.” The Dist. Ct. found copyright infringement, i.e. the “fair use” doctrine did not protect the defendant’s actions. The appellate court agreed “with the district court that the defendant’s commercial exploitation of the copyrighted materials did not constitute fair use.”). See also Basic Books, Inc. v. Kinko’s Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991) (holding that a Kinko's copyshop had violated the rights of copyright owners by creating and selling course packs of readings without permission from the copyright owners.).

17. 17 U.S.C. § 107 (“Limitations on exclusive rights; Fair use”) addresses situations in which copying a copyrighted work is allowed (i.e., is a “fair use”).


§106, <http://lcweb.loc.gov/copyright/title17/1-106.html>. (Fair use originated in *Folsom v. Marsh*, U. S. Cir. Ct., Dist. of Mass., 13 Copy. Dec. 991 (1841)). §107 affirmatively states that a fair use, as defined in the section, “is not an infringement.” In other words, despite the exclusive rights granted to copyright owners by §106, if a work falls within the §107 fair use definition, one’s use of the copyrighted work is, by definition, not infringing.


20. Sometimes referred to as “copyright police,” there are a number of organizations that own, manage, and monitor copyrights of and for others, including The Association of American Publishers, Inc. (AAP), <http://www.publishers.org/home/index.htm>; The American Society of Composers, Authors, and Publishers (ASCAP), <http://www.ascap.com/ascap.html>; Broadcast Music, Inc. (BMI), <http://www.bmi.com>; Copyright Clearance Center <http://www.copyright.com/> (online citations verified Jan. 6, 1999).

21. 17 U.S.C. § 501, *et seg.*, addresses “Copyright Infringement and Remedies,” which include injunctions, §502; impoundment, destruction of infringing goods, § 503; payment of damages and profits by the infringer, §504; statutory damages (i.e., damages awarded by the court, based upon the statute’s guidelines, §504(c); costs and attorney’s fees, § 505; and others. Regarding statutory damages, L. Ray Patterson, Professor, Univ. of Ga. Law School, is fond of saying that “Copyright Law is the only area of law in which a plaintiff who has suffered no harm can collect damages from a defendant who has done no wrong.” (The author of this paper took Prof. Patterson’s Copyright Law course in 1993).

22. *Id.*

23. 17 U.S.C. §501(a) states that “[a]nyone who violates the exclusive rights of the copyright owner . . . is an infringer. . . . The term “anyone” includes any State . . . and any officer or employee of a State . . . [and] shall be subject to the provisions [herein] to the same extent as any nongovernmental entity.” Moreover, §511(a) states explicitly: “Any State . . . and any officer or employee of a State . . . *shall not be immune*, under the Eleventh Amendment of the” U.S. Constitution “or under any other doctrine of sovereign immunity.” (emphasis added). *But see Chavez v. Arte Publico Press, ___* No. 93-2881 ___ (5th Cir. 1998) <http://www.ca5.uscourts.gov/opinions/pub/93/93-02881-CV1.HTM> (on remand in light of

24. Chavez. In other words, States and State actors may enjoy Eleventh Amendment immunity (at least in the 5th Cir.) under Chavez and in light of Seminole.

25. U.S. CONST. AMEND. XI: “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.”


28. According to Bruce Lehman, then the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks: “Copyright law... responds to technological challenges ... from Gutenberg's moveable type printing press to digital audio recorders, and everything in between—photocopiers, radio, television, videocassette recorders, cable television and satellites. The use of computer technology—such as digitization—and communications technology—such as fiber optic cable—has had an enormous impact on the creation, reproduction and dissemination of copyrighted works...Advances in digital technology and the rapid development of electronic networks ... raise the stakes. Any two-dimensional work can readily be "digitized... then [] stored and used in that digital format, [which] dramatically increases the ease and speed with which a work can be reproduced;" reproduced with excellent copy quality; and "delivered" quickly. The establishment of high-speed, high-capacity electronic information systems makes it possible ... to deliver perfect copies of digitized works to scores of other individuals—or to upload a copy to a bulletin board or other service where thousands of individuals can download it or print unlimited "hard" copies on paper or disks. Intellectual Property and the National Information Infrastructure, “Background” section, <http://palimpsest.stanford.edu/bytopic/intprop/ipwg/bg.html> (July, 1994) (verified Jan. 5, 1999).


32. See Network Solutions, Inc. (NSI) for domain name registration information <http://www.internic.net/> and NSI’s Domain Name Dispute Policy <http://www.internic.net/domain-info/internic-domain-6.html>; M. Stabbe, “When Trademarks and Internet Domain Names Clash,” (1998) <http://www.dla.com/noteworthy/index.html>; “Trademarks in Cyberspace: Domain Names and Beyond,” J. Jordan III <http://www.alston.com/docs/articles/199709/TMCYBER.htm>. Problem areas include wanting to register as a domain name a name that is another’s trademark; trademark dilution (e.g., see Hasbro, Inc. v. Internet Enter. Grp., Ltd. (W.D. Wash. Feb., 1996), in which the court enjoined the defendant, an adult entertainment website operator, from using the name “Candyland” or any similar name likely to dilute the value of plaintiff’s trademark in “Candyland,” a children’s game); and the registration by someone of a domain name that is (or probably is) a trademark of another for the purpose of selling the right to the domain name to the rightful trademark owner. “Entrepreneurs” have registered domain names of well-known people or businesses that had already trademarked the name at issue, in the hopes of selling the domain for profit. Courts and commentators have deemed such people “cyber-squatters” or “cyber pirates.” See Panavision Intl. L. P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998) (“Toeppen made commercial use of Panavision’s trademarks and his conduct diluted those marks . . . . Toeppen has registered domain names for various other companies [and] has attempted to "sell" domain names. <http://www.vcilp.org/Fed-Ct/Circuit/9th/opinions/9755467.htm>, aff’g 945 F. Supp. 1296 (C.D. Cal. 1996); Intermatic, Inc. v. Toeppen, 1996 U.S. Dist. LEXIS 14878 (N.D. Ill., Oct. 1996), <http://www.jmls.edu/cyber/cases/intermat.html>.

33. Personal jurisdiction, whether or not one is subject to legal action in a particular place, is a matter still evolving in Internet law. For a good summary, see Slutsky, “Jurisdiction Over Commerce On The Internet” <http://www.kslaw.com/menu/jurisdic.htm>. As many of the issues (e.g., what actions must one have taken to have availed oneself of a particular jurisdiction, thus making one subject to legal process) make their ways through the legislative and judicial systems, one must be thoughtful of one’s actions in cyberspace. See also Aiken, *The Jurisdiction of Trademark and Copyright Infringement on the Internet*, 48 MERCER L. REV. 1331 (1997); and cases, Bensusen Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996) aff’d 126 F.3d 25 (2d Cir. 1997) <http://www.jmls.edu/cyber/cases/blue2.html>; CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir.) <http://www.jmls.edu/cyber/cases/patter.html>; Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997) <http://www.vcilp.org/Fed-Ct/Circuit/9th/opinions/9617087.htm>; United States v. Thomas, 74 F.3d 701 (6th Cir. 1996), cert. denied, 117 S. Ct. 74 (1996) <http://www.jmls.edu/cyber/cases/thomas.html> (online citations verified Jan. 5, 1999).


37. See note 4 above.

38. U.S. CONST. Art. I, Sec. 8, Cl. 8: “The Congress shall have 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.” <http://www.house.gov/constitution/constitution.html> (verified Jan. 4, 1999)

39. Though Copyright Law had its genesis in the U. S. Constitution, history was shaping it long before there was anybody considering declaring independence. According to COPYRIGHT LAW, 2nd Ed., by Joyce, et al, Matthew Bender & Co. (1991), pp. 6-10, the printing press technology, introduced to England in 1476, “. . . enriched printers and booksellers (although not authors) and threatened the Crown,” which was concerned about “widespread dissemination of works advocating religious heresy and political upheaval.” By royal decree, the Crown prohibited unlicensed publishing, required approval by official censors, and “conferred a publishing monopoly on the Stationers’ Company,” a group loyal to the Crown. Parliament, responding to concerns raised by the Stationers’ Company, later passed the Statute of Anne; 8 Anne, c.19 (1710), extending the Stationers’ monopoly, even though Parliament stated that the Statute’s purpose was the “Encouragement of Learned Men to Compose and Write Useful Books.” Having inherited “a set of mixed and even contradictory messages about the purpose of copyright,” Jasi, Towards a Theory of Copyright: The Metamorphoses of Authorship, 1991 Duke L.J. 455, the new States set out to forge their own copyright laws to address this matter. For more, see L. Ray Patterson, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968).

41. For definitions, such as “fixed,” “tangible medium of expression,” and others, see 17 U.S.C. § 101 ("Definitions"), <http://lcweb.loc.gov/copyright/title17/1-101.html> (verified Jan. 5, 1999).

42. 17 U.S.C. § 102(a).

43. 17 U.S.C. § 102(b), <http://lcweb.loc.gov/copyright/title17/1-102.html> (verified Jan. 5, 1999). This concept, known as the “idea-expression” dichotomy, recognizes that the idea is not protectable under copyright; however, the expression of the idea is (or, at least, can be). Important “idea-expression” cases are Baker v. Seldin, 101 U.S. 99 (1879) (the limited ways in which one can express the idea of ledgers for bookkeeping) and Kern River Gas. Trans. Co. v. Coastal Corp., 899 F.2d 1458, reh’g denied, cert. denied, 111 S. Ct. 374 (1990) (the limited ways in which one can express a specific geographic area in a map. Citing Baker, the Kern court said that “[w]hen the "idea" and its "expression" are . . . inseparable [as in the case of mapping a specific area], copying the "expression" will not be barred, since protecting the "expression" in such circumstances would confer a monopoly of the "idea" upon the copyright owner.”)

44. 17 U.S.C. § 102(a).

45. Feist Publications, Inc. v. Rural Tel. Svc. Co., 499 U.S. 340 (1991). Overruling the “sweat of the brow” doctrine (previously applied concept that work and effort could confer copyright protection), the Court held that facts, themselves, are not copyrightable: “ . . . facts do not owe their origin to an act of authorship . . . the first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.” 499 U.S. 340 at 347.


50. See note 43 above.


53. Midway Mfg. Co. v. Arctic Innt’l, Inc., U. S. Dist. Ct. (N. Dist. Ill.), 547 F. Supp. 999, aff’d, 704 F.2d 1009 (7th Cir. 1982), cert. denied, 464 U.S. 823 (1983) (In this dispute over “Pac-Man” and “Galaxian” video games, the court stated “[t]he fixation requirement ... does not require that the work be written down or recorded somewhere exactly as it is perceived by the human eye. Rather, all that is necessary... is that the work is capable of being “reproduced . . . with the aid of a machine or device.”). See also ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (computer files on CD are sufficiently fixed); Atari Games Corp. v. Oman, 888 F.2d 878 (D.C. Cir., 1989).


56. Baltimore Orioles, Inc. v. Major League Baseball Players Assoc., 805 F.2d 663 (7th Cir., 1986), cert. denied, 480 U.S. 941 (1987). See also “fixed,” 17 U.S.C. § 101: a “work consisting of sounds, images, or both, that are being transmitted, is “fixed” . . . if a fixation of the work is being made simultaneously with its transmission.”

57. Pub. L. 105-298; for online access, go to <http://thomas.loc.gov>, insert “S.505” or “H.R. 2589” in section 3 (“bill/amendment”), select viewing format. The law amends the Copyright Act to extend the duration of copyright protection. See also MILLER Copyright Term Extension: Boon for American Creators and the American Economy, 45 J. COPR. SOC’Y 319 (vol. 3) (1998) for Prof. Miller’s pre-act-passage analysis.

58. For a helpful analysis, see Prof. Gasaway’s site <http://www.unc.edu/~unclng/public-d.htm>


60. Id. See, e.g., Playboy Enters., Inc. v. Frena, 839 F.Supp. 1552 (M.D. Fla. 1993) (stating that intent is “not an element of infringement.”).


62. Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir.)


64. 17 U.S.C. §107; see notes 16-19 above.
65. For guidance, see Harper's “fair use” site discussed in note 18 above. For additional discussion, see WEINREB, Fair use and How It Got that Way, (The 1998 Donald C. Brace Memorial Lecture at Fordham Univ. Law School; Nov. 12, 1998), 45 J. COPR. SOC’Y 634 (1998).


69. 17 U.S.C. 101. A “word made for hire” is a work prepared by an employee within the scope of his/her employment or a work specifically commissioned or ordered. This subject can sometimes cause confusion. It is crucial to outline copyright ownership issues at the outset of any non-traditional contract relationship to make clear who will own what.


71. See notes 4-5 above.


73. 17 U.S.C. §512, et seq.

74. See notes 60-62 and 70 above and 75 and 77 below.

imposition of liability based upon representations made to users regarding editorial control, or lack thereof, by an SP.

76. Reno v. A.C.L.U. (see note 30 above) held much of the CDA relating to speech/expression restrictions unconstitutional.

77. 47 U.S.C. §230, et seq., of the CDA addressed immunity for SPs under certain circumstances, the Fourth Circuit held in Zeran v. AOL, 129 F.3d 327 (4th Cir. 1997).

78. Zeran v. AOL, 129 F.3d 327 (4th Cir. 1997).

79. See note 5 above, addressing broad definition of “service provider.”


83. Many service providers require users to establish some type of record or file to verify the age of the users to comply with, e.g., age limitations for access to “adult” material. See, e.g., the discussion in Loving v. Boren, 956 F.Supp. 953 (W.D. Okla. 1997), aff’d 133 F.3d. 771 (10th Cir. 1998).

84. 17 U.S.C. §512(c)(3)

85. 17 U.S.C. §512(c).

86. 17 U.S.C. §512(c)(3).


89. Agent notification directory (U.S. Copyright Office) <http://lcweb.loc.gov/copyright/onlinesp/list/>

90. 17 U.S.C. §512(c)(2).

91. 17 U.S.C. §512(c)(3); Proposed notice format from U.S. Copyright Office <http://lcweb.loc.gov/copyright/onlinesp/format.html>

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93. This reference to information that “is not authorized by ... the law” seems to provide for “fair use” claims.


95. 17 U.S.C. §512(e).


97. 17 U.S.C. §512(g).

98. 17 U.S.C. §512(h).


100. “Dueling notifications” is the term given to this scenario by Joseph Christensen, Asst.. Vice Pres. for Legal Affairs, Univ. of Georgia.


102. “Standard Technical Measures” means “technical measures that are used by copyright owners to identify or protect copyrighted works and ...have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process; ...are available to any person on reasonable and nondiscriminatory terms; ...do not impose substantial costs on service providers or substantial burdens on their systems or networks.” 17 U.S.C. 512(i)(2).

103. The Univ. of Oklahoma has already successfully defended a First Amendment access claim; see Loving v. Boren, 956 F.Supp. 953 (W.D. Okla. 1997), aff'd, 133 F.3d. 771 (10th Cir. 1998).


105. §103 of Title I of DMCA; 17 U.S.C. 1201, et seq.
106. 17 U.S.C. §1201(a). This prohibition takes effect two (2) years after enactment. No person shall circumvent a technological measure that controls access to a protected work. This prohibition does not apply to users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make non-infringing uses of that particular class of works. During this period, and during each succeeding 3-year period, the Librarian of Congress, with consultation of others, will determine whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the foregoing prohibition in their ability to make non-infringing uses under this title of a particular class of copyrighted works. The Librarian will examine a variety of factors to establish this information.

107. “To circumvent a technological measure” means to de-scramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; 17 U.S.C. §1201(a)(3). “A technological measure effectively controls access to a work” if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work. 17 U.S.C. §1201(a)(3).


109. For additional information on distance learning, a/k/a online education, see materials by Michael Goldstein (Dow, Lohnes & Albertson Law Firm; <http://www.dllaw.com>) and David T. Drooz, Assistant University Counsel, North Carolina State University, in this (20th Annual) Stetson Conference and materials by Michael Goldstein and Steven D. Prevaux, Associate General Counsel, University of Florida, from the Annual Conference (June, 1998, Phil., PA) of the National Association of College and University Attorneys (NACUA). NACUA maintains a website with many helpful references <http://www.nacua.org>.

110. 17 U.S.C. §1201(b)

111. “To circumvent protection afforded by a technological measure” means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure; 17 U.S.C. §1201(a)(3).


116. See the discussion of Chapter 5 of Title 17 (OCILLA) above.
117. See Hayes, “The Coming Tidal Wave of Copyright Issues on the Internet,” (Part I), Jrnl. Of Internet Law, Vol. 1, No. 1 (July, 1997). Though this article predated the DMCA, it nevertheless provides a good analysis of important online issues.


119. 17 U.S.C. §1201(d)

120. 17 U.S.C. §1203. For the first offense, an institution is subject to the §1203 remedies, including injunctions, impounding (of infringing goods, etc.), money damages, recovery of costs for copyright owner, and others. Subsequent offenses may also lead to forfeiture of the exemption.

121. For an interesting discussion, see Steiner, “The Double Edged Sword: Museums and Fair Use,” Museum News, Sept./Oct., 1997, pp. 32-49. Ms. Steiner rightly selects the dichotomistic metaphor of the double edged sword, as organizations such as museums and libraries, especially those involved in research, “must” juxtapose strong copyright protection for their own works and some class of exceptions for access to the works of others.


123. 17 U.S.C. §1201(e). “Information security” means activities carried out to identify and address the vulnerabilities of a government computer, computer system, or computer network. Id.


125. 17 U.S.C. §1201(f)(2)

126. “Inter-operability” means the ability of computer programs to exchange information, and of such programs mutually to use the exchanged information. 17 U.S.C. § 1201(f)(4).


128. 17 U.S.C. §1201(g). “Encryption research” means activities necessary to identify and analyze flaws and vulnerabilities of encryption technologies applied to copyrighted works, if these activities are conducted to advance the state of knowledge in the field of encryption technology or to assist in the development of encryption products. “Encryption technology” means the scrambling and de-scrambling of information using mathematical formulas or algorithms. Id.


130. 18 U.S.C. §1030, et seq.
136. 17 U.S.C. §1201(g)(5)
140. 17 U.S.C. §1202(b). "Copyright management information ("CMI")" (17 U.S.C. § 1202(c)) means any of the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form, except that such term does not include any personally identifying information about a user of a work or of a copy, phonorecord, performance, or display of a work: title and other identifiable information; identifying information about the author; identifying information about the copyright owner, including copyright symbol/notice; with the exception of public performances via radio and television, the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work; with the exception of public performances via radio and television, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work identifying numbers or symbols referring to such information or links to such information.
143. 17 U.S.C. §1203(b).
144. 17 U.S.C. §1203(c.) addresses damages that can be awarded, including actual damages and any additional profits of the violator, and statutory damages. Statutory damages are between $200.00 and $2,500.00 per act of circumvention, device, product, component, etc., that the court considers just. Repeated violations may be punished with up to triple damages.
147. 17 U.S.C. §1204(b).


149. 17 U.S.C. §1203(c)(5).

150. DMCA Title I; Changes to 17 U.S.C. §§ 101, 104, 411, 507.

151. Addressing changes to 17 U.S.C. §117, this section is a/k/a the “Computer Maintenance Competition Assurance Act.”