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# Against the Grain

“Linking Publishers, Vendors and Librarians”

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## Fair Use or Foul Play

by **Norman Desmarais** (Acquisitions Librarian, Phillips Memorial Library, Providence College, Providence, RI 02918; Phone: 401-865-2241; Fax: 401-865-2823) <normd@postoffice.providence.edu>

The Copyright Act of 1909 introduced the concept of “fair use” while leaving it to the courts to define the doctrine. The courts eventually allowed exceptions to copyright for research, teaching, news reporting, and other productive purposes. The Copyright Act of 1976 formulated the doctrine by specifying the limitations on exclusive rights of copyright holders (17 USCA § 107) by identifying the four factors to consider (purpose and character of the use, nature of the work, amount and substantiality of the portion used, and the effect on the potential market.)

“Fair use” rights have been an important resource and support for librarians and their patrons, allowing them to make convenient and incidental copies of copyrighted works without obtaining the prior consent of copyright owners. But, as the interests of information consumers usually conflict with those of copyright holders, we must constantly deal with the legal tension.

### Digital Millennium Copyright Act

Content owners have never felt comfortable with fair use and have tried to erode it. In 1997, motion picture studios, record producers, book publishers, and other content owners proposed to Congress that if the copyright law would allow them to protect their works with technical protections and make it illegal to circumvent those measures, they would be more willing to release new content in digital formats. The Digital Millennium Copyright Act of 1998 (DMCA) [Section 1201(a)(1)] now allows the use of technical protections and prohibits the circumvention of technological measures used by copyright owners to control access to protected works; prohibits manufacturing or “otherwise trafficking in” a device designed to circumvent a technological measure that controls access or that protects rights of a copyright owner (copy controls); and prohibits providing false copyright management information and removing or altering copyright management information with the intent to conceal or facilitate copyright infringement.

### Sonny Bono Copyright Term Extension Act

Some people believe that the Sonny Bono Copyright Term Extension Act (PL 105-928) which was signed into law the day after the DMCA (October 28, 1998), came about largely from pressure by the Walt Disney Studios. They wanted to protect the rights to Steamboat Willy that would have gone into the public domain the following year.

The Sonny Bono Copyright Term Extension Act extends the duration of a copyright by twenty years for works published after January 1, 1978. The copyright for works by a single author now lasts for the life of the author plus seventy years (formerly life plus fifty). The copyright for works of joint authorship endure for the life of the last surviving author plus seventy years. Anonymous and pseudonymous works and works made for hire have a copyright period that extends for ninety-five years (formerly seventy-five years) from the date of first publication or 120 years from the date of first creation.

### Erosion of Rights

The extension of the term of copyright and the allowance of technological measures to prevent copying are gradually eroding the right of fair use. Libraries, universities, consumer electronics manufacturers, Internet portals, and others warned that the broad wording of the DMCA would stifle new technology, threaten access to information, and establish “pay per use” more broadly. It also makes violators subject to both civil and criminal penalties.

Technological “locks” could have a great impact on libraries over the long term. Librarians have

already experienced adverse effects from technological measures that limit their ability to provide access to, lend, and archive material. DMCA also adversely affects the ability of library patrons to make full legitimate use of library resources; so librarians need an exemption to ensure that they and their patrons can continue to exercise fair use and other activities permitted under copyright law.

### Crime Of Circumvention

While copyright should be technology neutral, the application of anti-circumvention measures threatens the viability of the fair-use doctrine in the digital age. But Congress often pays more attention to the loudest voices in the debate and is frequently influenced by the bigger campaign supporters and more affluent lobbyists. So now, instead of just having a crime of piracy, the DMCA has created the new crime of circumvention. In so doing, the DMCA refocuses the Copyright Act on complete protection and away from information availability.

As in political campaigns, the content owners have not lived up to their promise to produce new digital content. Instead, they have made it more difficult to use information resources already purchased. For example, we are now seeing compact discs produced that cannot be played in computers or even some CD players.

They cannot be used to create custom compilations of favorite songs. Music or video products purchased for personal use in one format can no longer be readily copied to another medium without breaking the law. In this

scenario, it is illegal to copy music from a vinyl recording or a cassette tape to a CD; so one must re-purchase albums to keep up with technology and remain a law-abiding citizen. The decision in the Napster case, for example, rejected fair use as a legitimate use of the Napster service.

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**Criminal Citizens**

We all depend on the ability to make limited copies of copyrighted material without having to pay a fee or obtain prior approval of the copyright owner. Yet the breadth of the **DMCA** threatens those fair-use rights we have come to enjoy. Will it now become illegal to photocopy a page from a library book or print an article from a newspaper's Website for use in a report? Are we breaking the law when we record a television program or movie for viewing at a later time?

Many aspects of our democracy depend upon the information availability and use facilitated by the fair-use doctrine. Yet, when the **DMCA** allows technological protection measures to prohibit unauthorized access to a work, it threatens the exercise of fair-use rights. The law does distinguish between permissible and illegal applications to circumvention; but it recognizes only two "classes of works" as exemptions:

1. Compilations consisting of lists of Web sites blocked by filtering software applications; and
2. Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsolescence.

Any other action of circumvention without the consent of the copyright owner becomes a criminal activity. This puts at risk all types of tradition-

ally accepted activities. Resources available for free in libraries may eventually be available only on a pay-per-use basis. A copyright owner could easily require the payment of a small fee each time a library patron accesses a digital book or video documentary. Copyright owners already use "click on" licenses to limit what purchasers of a copyrighted work may do with it. Some eBook licenses go so far as to make it a violation of the license to even criticize the contents of a work, let alone to make a copy of a paragraph or two. **The Uniform Computer Information Transactions Act (UCITA)** contains just such a stipulation that will become law in those states which pass UCITA.

**Corrective Actions**

**The Supreme Court** agreed on February 19, 2002, to hear Eldred v. Ashcroft which challenges the **Sonny Bono Copyright Term Extension Act**. **Rep. Rick Boucher**, who introduced the bill that eventually became the **DMCA**, wants **Congress** to revise section 1201, which can be used to keep library patrons from copying even a paragraph from a book without making a separate payment, to counter the emerging threat to fair-use values. He also wants to limit criminal circumvention to the purpose of infringing a copyright. This would provide adequate protection for copyright owners without infringing on the legitimate fair-use rights of consumers, libraries, educators, and other users. **The Copyright Law** should preserve the balance between the interests of copyright owners and the rights of information consumers. 🌳

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