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# What's New in Intellectual Property Law

Marc Boots-Ebenfield  
Bryn Mawr College

Many of you have probably heard about the Digital Millennium Copyright Act (DMCA) or the Copyright Office's *Report on Copyright and Digital Distance Education*, prepared pursuant to the DMCA, but have not had time or not known where to go to discover how the new law will impact the operation of language labs and use of language learning technologies. This column will review those aspects of the DMCA and the *Report on Copyright and Digital Distance Education* most likely to effect the work of IALL members.<sup>1</sup> While this column focuses on the copyright code of the USA, the DMCA implements international copyright treaties and brings the USA into compliance with world standards. Many of the issues will therefore be relevant to IALL members throughout the world.

## Intellectual Property Law

Before we discuss new items in copyright law, however, we should mention a few internal changes to IALL's committee that deals with copyright. You may have noticed the change in the title of this column from 'copyright' to 'intellectual property.' The executive board of IALL voted to adopt the more inclusive name of Intellectual Property for its committee and the committee's work. Copyright is actually only one of four major intellectual property laws in the United States of America: Copyright Law, Patent Law, Trademark Law and Trade Secret Law. Copyright law protects an author's original, tangible form of expression. The form is protected, but the ideas are not. Patent law protects new, useful, and "nonobvious" inventions and processes. Trademark law protects the words, names and symbols used to identify goods and services, and trade secret law protects valuable information that has been kept secret by its owner. While copyright law is the one that most often impacts the work of IALL members, we do occasionally need to be concerned with the other areas of intellectual property law—hence the change in name.

## Committee Members

In addition to a change in name, the committee has also seen a change in membership. Marc Boots-Ebenfield (Chair), Bryn Mawr College, Maurizio Oliva, Denison University, and Judy Shoaf, University of Florida, constitute the new committee. We will do our best to keep the IALL membership abreast of new issues in Intellectual Property Law, suggest policies to keep IALL in conformance with the law and answer your questions regarding intellectual property. New committee members are always welcome. Please contact Marc Boots-Ebenfield ([mbootseb@brynmawr.edu](mailto:mbootseb@brynmawr.edu)) if you would like to help us continue the excellent work of our predecessors.

## DMCA

The Digital Millennium Copyright Act (DMCA) was signed into law by President Clinton on October 28, 1998. The legislation implements two World Intellectual Property Organization (WIPO) treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), and in so doing provides a more uniform copyright protection to domestic and foreign works. The DMCA also addresses a number of concerns related to copyright and digital technology. All acts of the DMCA became effective immediately except where noted below.

## Protection of Foreign Works

The WIPO treaties each require member countries<sup>2</sup> to provide protection to certain works created in other member countries or by nationals of other member countries. That protection must be *no less favorable than that accorded to domestic works*. 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 expiration of the term of protection. Section 104A of the Copyright Act restores protection to works 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. In other words, as a rule of thumb, if the work would be protected as a domestic work, it is protected as a foreign work, but in cases where foreign copyright codes are more restrictive than US code, the work could still be protected even when it would have been in the public domain in the USA. The DMCA exempts foreign works from having to be registered in the Copyright Office before filing a lawsuit. Domestic works must be registered before a lawsuit can be filed. This brings US code into compliance with existing treaty obligations under the Berne Convention.

## Technological Protection Measures

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The implementation of the WIPO treaties also creates two new prohibitions in Title 17 of the U.S. Code. One provision prohibits tampering with copyright management information (CMI), the other prohibits the circumvention of *technological measures* that control access to copyrighted material. Both provisions carry civil and criminal penalties for violations. The CMI provision simply states that you cannot remove or alter identifying information about a work (the author, copyright owner, etc.) or distribute works that you believe to have had their CMI altered. The prohibition against tampering is much more complex. Section 1201 of the DMCA 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. This distinction was made in order to protect the fair use doctrine. There is no prohibition on circumventing a technological measure in order to copy a work under appropriate fair use circumstances. There is, however, a prohibition on circumventing a measure that is meant to prevent access to a work. Fair use does not protect access, only use. Note that if one does circumvent a technological measure in order to copy a work and is found to be in violation of fair use, civil and criminal penalties may apply.

One should note that there is some recognition that these two somewhat contradictory prohibitions are problematic. Restriction of access could severely impinge upon fair use, thereby forcing educational institutions to pay large licensing fees for the use of materials that would otherwise be free. On the other hand, the prohibition on circumventing access controls clearly takes the burden of creating iron-clad access controls off of the educational institution. The hackers and advanced users who find ways to circumvent passwords and firewalls will be the ones in violation of the copyright code. The prohibitions on accessing and copying a technologically protected work do not go into effect until October 28, 2000. Once in effect, a review is required during the first two years of enactment and every three years thereafter by the Librarian of Congress in order to review the effect of the restrictions on the availability and use of copyrighted materials, especially by libraries and educational institutions. The Copyright Office also retains the right to determine exceptions to certain classes of work by particular persons if it is determined that the restrictions are adversely affecting the ability to make noninfringing uses of the works in question. Several exceptions already exist, including an exception to the prohibition on the act of circumvention of access for nonprofit libraries, archives and educational institutions.

Section 1201(d) of the DMCA allows educational institutions to circumvent access control measures for the purpose of determining whether they wish to obtain authorized access to the work.

As one would expect, the making or selling of devices that are primarily designed to circumvent technological control measures and that have only limited commercial value other than for use in circumventing technological control measures is prohibited. This would bring into question the multistandard, multiregion DVD players except for the following clarification in section 1201 of the DMCA: "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)) (DMCA Summary, pg 4)." Macrovision is the one exception to the rule. Section 1201(k) of the DMCA states that within 18 months of enactment, April 2000, all analog videocassette recorders must be designed to conform to Macrovision, a technology used to prevent unauthorized copying of analog videocassettes and certain analog signals. It is unclear whether one could disable Macrovision in order to pursue fair use of a work.

## **Limitation of Liability for OSPs**

Given that all original thought, once fixed in form, is protected by copyright, the mere act of accessing a webpage, an original webpage, violates copyright law. In simplest terms, the web browser caches the page, thereby making a copy of the web page. In actuality the webpage is probably cached many times in route. The DMCA attempts to protect those who provide the conduit over which copyrighted material travels, online service providers (OSP), by providing limitations of liability for the following network processes:

1. Transitory communications- 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.
2. System caching- retaining copies, for a limited time, so that subsequent requests for the same material can be fulfilled by transmitting the retained copy.
3. Storage of information- on systems or networks at direction of users.
4. Information location tools- hyperlinks, online directories, search engines, etc. that may link to materials in violation of copyright.

Under FCC regulations many colleges and universities would not qualify as OSPs, but Copyright Law provides its own definitions of an OSP. For purposes of the first limitation an OSP is defined in section 512(k)(1)(A) of the DMCA 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 (DMCA Summary, pg 9)." For purposes of the other three limitations, an OSP is more broadly defined as "a provider of online services or network access, or the operator of facilities therefor (DMCA Summary, pg 9)."

*"In order to maintain a limitation on liability the college or university acting as an OSP would be required to remove material that could very well be covered through fair use. Removing materials from a server could disrupt teaching and research until the removal could be challenged through proper procedures."*

While it may seem that being included in such a limitation of liability is positive, there are multiple conditions pertaining to the manner in which each of the above mentioned network processes are to be carried out. There are also numerous procedural conditions which must be met before one can qualify for the limitations on liability. The interested reader is referred to the Copyright Office's summary of the DMCA (<http://lcweb.loc.gov/copyright/legislation/dmca.pdf>). In general, a service provider must have filed a designation of agent to receive notifications of claimed infringement. The Copyright 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/>). Second, the OSP must adopt a clear policy on copyright and inform clients of acts that would require the OSP to block access to or remove files. If the OSP is informed of a violation, through proper notification as detailed by the Copyright Office, the provider must expeditiously remove or block access to the materials in question. The Copyright Office provides provisions for counter notification by the owner of the materials in question. The OSP is protected from any liability to any person for claims based on its having taken down the material.

The procedures that the DMCA lists in explicit detail are troubling from the perspective of academic freedom. In order to maintain a limitation on liability the college or university acting as an OSP would be required to remove material that could very well be covered through fair use. Removing materials from a server could disrupt teaching and research until the removal could be challenged through proper procedures. There are, in addition, special rules for establishing the limit of liability of nonprofit educational institutions when the infringing party is a faculty member:

- the faculty member or graduate student's infringing activities cannot involve providing online access to course materials that were required or recommended during the past three years
- the institution cannot have received more than two notifications over the past three years that the faculty member or graduate student was infringing
- the institution must provide its users with informational materials describing and promoting compliance with copyright law

Educational institutions should approach limited liability status with caution.

## Report on Copyright

Section 403 of the DMCA directed the Copyright Office to make recommendations to Congress on how to amend copyright in order to promote distance education through digital technologies. *The Report on Copyright and Digital Distance Education* was submitted in May 1999 and focused on the use of digital technologies for mediated instruction. In other words, the copyright office focused on possible changes to the current copyright exemption given to nonprofit educational institutions for the "performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction (Section 110 (1))." The Copyright Office urged that the wording be changed to allow for the transmittal of materials to enrolled students. This change would emphasize the controlled teaching aspect, but eliminate the requirement of a location. While current copyright law permits the transmittal of only nondramatic literary and musical works, the Copyright Office has suggested that the distinction of permissible genres be removed, but that only limited portions of works be permitted under the educational exemption. Such works would remain subject to fair use and licensing arrangements in addition to the mediated instruction exemption. The Copyright office specifies that the reproduction of the transmitted work should have to be made from a legally acquired copy and that educational institutions should be required to apply measures to protect against unauthorized access and copying of the work.

If after reading this summary of the DMCA you still feel that Copyright Law is a hopeless morass, you are not alone. The Copyright Office has asked congress to clarify the relationship between fair use and the fair use guidelines, and notes that the public should understand that:

the guidelines do not have the force of law, and are intended as a safe harbor, rather than a ceiling on what is permitted. Guidelines therefore should not be deferred to as absolute codes of conduct, without leeway for reasonable activities that they may not adequately accommodate (RCDDE, pg 162).

The Copyright Office also proposes that Congress give attention to the problem of unlocatable copyright owners. They cite a Canadian law that allows for users to obtain a compulsory license for such 'orphaned' works. The study concludes with a barrage of questions, many of which we face every day:

"The international aspects of distance education raise a number of important questions. Which country's law determines ownership, the validity and interpretation of license terms, and the scope of the copyright owner's rights? Which country's courts would have jurisdiction, and where is venue proper? As discussed above, the answers are unclear. These are overarching questions with broad implications that go well beyond the scope of this study (RCDDE, pg 168)."

## Suggestions

First the warning: I am not a lawyer, just a faculty member and director of a language learning center with a perverse interest in copyright. I have attempted to summarize, rather than interpret, the DMCA for ease of consumption. The suggestions in this section should be taken cautiously.

EDUCAUSE advises its members to take advantage of the opportunity to limit their liability as OSPs. While this may be advisable, there would seem to be many unsettling consequences of following all of the requirements necessary to retain a limited liability status. Many of us who work closely with faculty members on their projects and then help to post the material on the web could not possibly limit our liability. One of the requirements of the DMCA is that the OSP is ignorant of the material being posted. At any rate, this is a decision that should be made by institutions as a whole in consultation with all constituent members. There are, however, many measures which can be taken within labs or at institutions as a whole to limit liability and maintain compliance with the new copyright code. First, develop a uniform copyright policy for all aspects of lab use and keep pertinent sections posted in prominent locations- especially your web site. Discuss copyright with staff and faculty during multimedia workshops- while they are asking you to digitize the film. Limit access to questionable material as much as possible, to students within a single course or students of your college, through firewalls, passwords, streaming technology, Acrobat files, etc. Remove

course materials, or make them inaccessible once the course in which they are being used has ended. Finally, send your questions, concerns and comments to members of the Intellectual Property Law Committee so that we may share our knowledge of this complex issue. ♦

## Notes

<sup>1</sup> For a comprehensive introduction to copyright law as it impacts the operation of language learning centers see, "Crandall, L. (1998) Copyright and the Learning Center: Issues & Resources. *IALLJournal*, 30, 1, pgs 39-70.

<sup>2</sup> Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, The, Bahrain, Bangladesh, Barbados, Belaru, Belau, Belgium, Belize, Benin (formerly Dahomey), Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso (formerly Upper Volta), Burma, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Chad, Chile, China, Colombia, Congo, Costa Rica, Cote d'Ivoire (Ivory Coast), Croatia, Cuba, Cyprus, Czech Republic, Czechoslovakia, Democratic Republic of Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, European Community, Fiji, Finland, France, Gabon, Gambia, The, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Holy See, Honduras, Hong Kong, Hungary, Iceland, Indi, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Kazakhstan, Kenya, Republic of Korea, Kuwait, Kyrgyz Republic, Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Macau, Macedonia (former Yugoslav Republic of), Madagascar (Malagasy Republic), Malawi, Malaysia, Maldives, Mali, Malt, Mauritani, Mauritius, Mexico, Moldova, Monaco, Mongolia, Morocco, Mozambique, Myanmar, Union of (formerly Burma), Namibia, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russian Federation, Rwanda, St. Christopher (St. Kitts) and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, Soviet Union, Spain, Sri Lanka (formerly Ceylon), Sudan, Suriname, Swaziland, Sweden, Switzerland, Tajikistan, Tanzania, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Tuvalu, Uganda, Ukraine, United Kingdom, Upper Volta, Uruguay, Vanuatu, Vatican City (Holy See), Venezuela, Vietnam, Yugoslavia, Zaire, Zambia, Zimbabwe (See Copyright Office Report 38a for exact status of these countries).



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*Marc Boots-Ebenfield has a Ph. D in Russian with a specialty in Second Language Acquisition from Bryn Mawr College. He is the Director of the Bryn Mawr College Language Learning Center and the Chair of the Intellectual Property Rights Committee of IALL.*

