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Copyright Law - The DMCA Report

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The Copyright Act grants copyright owners broad power to control the reproduction and distribution of copyrighted materials. But that power is balanced by rights granted the owners of tangible items that embody copyrighted material.

For example, even over the objections of the copyright proprietor, owners of books or videotapes may sell or lend those items—under the first-sale doctrine—and archival copies may be made of computer programs. How this balance is affected by the growth of electronic commerce and the instantaneous communication of the Internet is the focus of a report issued by the Copyright Office on Aug. 29.

In 1998, Congress passed the Digital Millennium Copyright Act (DMCA) to bring U.S. copyright law into accord with World Intellectual Property Organization treaties and, in the words of the Copyright Office, "to move the nation's copyright law into the digital age." The centerpiece of the legislation is its "anti-circumvention" provisions, which prohibit, among other things, the manufacture or sale of devices, and the rendering of services, for the purpose of circumventing technology designed to prevent unauthorized access to, or use of, copyrighted works.

When it passed the DMCA, Congress was concerned that giving protection to anti-circumvention technology could restrict consumers' exercise of their rights. Accordingly, Congress directed the registrar of copyrights to study the effects of the act and "the development of electronic commerce and associated technology" on the first-sale doctrine, codified at 17 U.S.C. 109, and on the right to make archival copies of computer programs, granted by 17 U.S.C. 117. The result is the recent DMCA Report, which was issued after extensive public comment and hearings.

The DMCA Report takes a cautious approach, maintaining, for the most part, the status quo. It concludes that no change to § 109 is necessary to protect first-sale rights and that only minor changes to the act are necessary to allow the creation of archival copies of computerized information. The Copyright Office also ducked an emerging and contentious issue: whether license agreements enforced by state contract law that restrict the use of copyrighted material should be preempted by the act.

Not surprisingly, copyright owners on the whole are pleased, while groups that advocate the free use of copyrighted materials are critical. The Recording Industry Association of America said it was "gratified" with the report. The Electronic Frontiers Foundation, an opponent of copyright holders, saw things differently. Its spokesman, Fred von Lohmann, as quoted in Salon.com, said that "protesters [supporting Dmitry Sklyarov, a Russian who has written a program to allow unauthorized use of encoded e-books] have taken to the streets around the world, and the Copyright Office appears to think the real problem is that consumers may be giving videotapes of last week's 'Buffy the Vampire Slayer' to their friends."

First-sale Rights under the Copyright Act

Sec. 109(a) of the Copyright Act provides that the "owner" of a "copy or phonorecord" that is "lawfully made" "is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." The first-sale doctrine codified in § 109 reflects a traditional hostility to restraints on the "alienation" of tangible property embodying copyrighted material.

Groups opposed to broad exclusive rights for copyright holders argued passionately that the DMCA's anti-circumvention provisions are being used by rights holders—particularly distributors of motion pictures on DVD—to enforce limitations on use that, critics claimed, violate the first-sale doctrine. These groups pointed to the encryption scheme used on commercial DVDs, which allows distributors to produce DVDs that can be viewed only on licensed DVD players, and only in authorized regions: A DVD bought in the United States may not play on a European DVD player. As a consequence, it was argued, the resale rights of the owner of a DVD are improperly limited.

The Copyright Office rejected that argument. The DMCA Report concludes that "the first sale doctrine does not guarantee the existence of a secondary market or a certain price for copies of copyrighted works." Nor does it "give consumers a right to use a DVD on any electronic device." The report does conclude that, were it to become wide-spread, the practice of "tethering" a copyrighted work to a particular computer "could have serious consequences for the operation of the first sale doctrine." But it found that to regulate the practice now would be "premature."

The Copyright Office was no more receptive to attempts to argue that the first-sale doctrine should be expanded to permit digital transmission of lawfully made copies of copyrighted works. Under this view, the recipient of a digitally downloaded work—for example, the contents of a music CD or a movie—received from an Internet distributor could sell or transfer a copy of that work over the Internet without the copyright holder's authorization.

The report rejected the view that digitally transmitted materials are equivalent to physical copies: "Physical copies of works degrade with time and use, making used copies less desirable than new ones. Digital information does not degrade, and can be reproduced perfectly on a recipient's computer." Thus, rights holders would face a substantial risk of widespread infringement.

Some Internet distributors proposed that a consumer be allowed to transfer digital copies only so long as the copies remaining on the consumer's computer were deleted—the "forward and delete" option. But the report regarded that proposal as unworkable and practically unenforceable. Indeed, the Copyright Office found that the popularity of Napster "strongly suggests that some members of the public will infringe copyright when the likelihood of detection and punishment is low."

With regard to archival copies, § 117(a)(2) of the Copyright Act allows an owner of a copy of a computer program—but not other copyrighted works—to make an additional copy of the program for "archival purposes only," provided that "all archival copies are destroyed in the event that continued possession of the computer program should cease to be lawful." Several commenters argued that this "archival exemption" should be expanded to cover "routine backups" typically performed on computers, and to allow archival copies of copyrighted materials other than computer programs.

The DMCA Report noted evidence that current law prohibits "the prevailing practices and procedures most people and businesses follow for backing up data on a computer hard drive. There is a fundamental mismatch between accepted, prudent practices among most system administrators and other users, on the one hand, and section 117 on the other. As a consequence, few adhere to the law."

Yet the report also found no evidence of harm to users—no consumer has been sued, or even threatened with a suit, for making routine backup copies. In addition, nearly all software is now distributed on CD-ROM, which itself acts as a reliable backup copy.

A broad exemption for archival copies could also harm copyright owners and handicap "new business models," such as the delivery of "software on demand," whereby a temporary copy of software is licensed but not purchased, and the temporary copy is to be deleted when the use ends. A blanket exemption for temporary copies might allow consumers of on-demand software to retain the temporary copies they are otherwise obligated to destroy. For these reasons, the Copyright Office declined to recommend a broad exemption for "incidental" copies.

It did recommend clarifying changes to the Copyright Act to address a potential loophole. The fair-use doctrine will in many cases allow a consumer to make a backup copy of a copyrighted work. As currently drafted, § 109, which refers to "lawfully made" copies, might allow for distribution or sale of those backups. The report recommends amending the act to clarify that such distribution is not permitted, unless a sale (as opposed to the copying) of the work is itself fair use.

No Recommendation on 'click-wrap' Agreements

In line with its conservative approach, the Copyright Office refused to be drawn into a significant debate concerning license agreements that negate rights that a consumer would otherwise have under the copyright laws. The debate is particularly acute concerning non-negotiable "click-wrap" agreements that accompany the distribution of software.

For example, while installing new software, a user is often required to click on a box indicating "agreement" with terms of a license that may prohibit use of the software for certain purposes, or installation on more than a designated number of computers. If the transaction were considered a sale, consumers might have certain of those rights under the Copyright Act. Click-wrap agreements will generally be enforceable under the Uniform Computer Information Transactions Act, which was released last year and has been adopted in Maryland and Virginia.

Under § 301 of the Copyright Act, state law rights that are "equivalent" to any of the exclusive rights "within the general scope of copyright" are preempted. Although the issue is still unsettled, most courts have found that contract rights arising under a license agreement are not preempted. Concluding that the issue is outside the scope of the report, the Copyright Office refused to recommend that § 301 be broadened to preempt restrictive license agreements. It did, however, leave the door open for future action: "[Although market forces may well prevent right holders from unreasonably limiting consumer privileges, it is possible that at some point in the future a case could be made for statutory change."

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