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Digital Millennium Copyright Act, P.L. 105-304: Summary and Analysis

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ABSTRACT

The Digital Millennium Copyright Act, P.L. 105-304, was enacted October 28,1998 by passage of H.R. 2281. The Act amends and updates the Copyright Act, title 17 U.S.C. with respect to use of copyrighted works on the Internet and in other digital, electronic contexts. Title I implements two new intellectual property treaties (the World Intellectual Property Organization Copyright Treaty and the World Intellectual Property Organization Performances and Phonograms Treaty), to which the Senate gave its advice and consent to ratification on October 21, 1998. Title II establishes certain exemptions from copyright liability for online service and access providers. Title III exempts computer maintenance and repair companies from copyright liability for the reproduction of a computer program that occurs by mere activation of the computer. Title IV contains miscellaneous provisions relating to ephemeral recordings of digital broadcasts; exemptions for preservation activities of libraries and archives; new compulsory licenses to make ephemeral recordings of, and to transmit, digital sound recordings; the assumption of contractual obligations relating to motion picture collective bargaining agreements; and the rank and authority of the Register of Copyrights and the rank of the Commissioner of Patents and Trademarks. Title V creates federal design protection for vessel hulls, which is sunset after 2 years. This report summarizes and analyzes the Digital Millennium Copyright Act.

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Digital Millennium Copyright Act, P.L. 105-304: Summary and Analysis

Summary

The Digital Millennium Copyright Act (DMCA), P. L. 105-304, amends the Copyright Act, title 17 U.S.C. to legislate new rights in copyrighted works, and limitations on those rights, when copyrighted works are used on the Internet or in other digital, electronic environments. The Act is the outcome of several years of congressional consideration of Internet copyright policy issues. Initially, these policy issues were considered in the context of development of a National Information Infrastructure. Within the last two years, with the development of two new intellectual property treaties by the World Intellectual Property Organization (WIPO), the focus shifted to implementation of the new treaties.

The DMCA, which generally took effect October 28, 1998, consists of five Titles. Title I implements the new treaties — the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The Senate gave its advice and consent to United States ratification of the Treaties on October 21, 1998. The Copyright Treaty covers copyright protection for computer programs, those databases that qualify as intellectual works, and digital communications over the Internet and other computer networks. The Performances-Phonograms Treaty extends protection to performers and producers of sound recordings that is essentially equivalent to the protection afforded copyright subject matter by the Copyright Treaty. Both Treaties were implemented by amendment of the Copyright Act to create new protection against circumvention of anti-copying technologies, and protection assuring the integrity of copyright management information (CMI) systems.

Title II of the DMCA establishes certain exemptions from copyright liability for online service and access providers when they act merely as "conduits" of information transferred over their networks, without having any control over the content of the transmission.

Title III exempts computer maintenance and repair companies from copyright liability for the reproduction of a computer program that occurs automatically by mere activation of the computer in order to repair or maintain the machine.

Title IV contains miscellaneous provisions relating to 1) an exemption for ephemeral recordings of digital broadcasts; 2) a broader exemption for use of digital technologies by libraries and archives when they engage in preservation; 3) new compulsory licenses for making ephemeral recordings, and for the transmission, of digital sound recordings; 4) the assumption of contractual obligations relating to motion picture collective bargaining agreements; and 5) the rank and functions of the Register of Copyright and the rank of the Commissioner of Patents and Trademarks.

Title V creates a new federal design right to protect vessel hulls against copying of their artistic and utilitarian features. The boat design right terminates 2 years after enactment.

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Digital Millennium Copyright Act, P. L. 105 - 304: Summary and Analysis

Background

The Internet, other computer networks, and advances in electronic and digital technologies provide unparalleled opportunities for worldwide communications and economic growth, in the judgment of most experts. In order to tap fully the potential of these new technologies, it is also generally agreed that legislatures will need to confront and resolve many difficult technical and legal policy issues. The scope of copyright protection, and any limitations on the rights of copyright owners, for the use of copyrighted works in digital, electronic environments was addressed by the 105th Congress in enacting the Digital Millennium Copyright Act (DMCA), P.L. 105-304.[1]

The Digital Millennium Copyright Act is the outcome of several years of congressional consideration of copyright policy issues relating to domestic development of the national information infrastructure (once called the "information superhighway"; now referred to as the "Internet"), and to international development of two new intellectual property treaties.

A Working Group on Intellectual Property of the White House National Information Infrastructure (NII) Task Force convened a series of conferences exploring the copyright policy issues relating to the NII. Their September 1995 report led to the introduction in the 104th Congress of S. 1284 and H.R. 2441, which would have implemented the Working Group's recommendations.[2] Hearings were held on the NII copyright policy issues, but the bills were not enacted.

At the international level, two new intellectual property treaties were created by a diplomatic conference of States in Geneva, Switzerland, on December 20, 1996, under the auspices of the World Intellectual Property Organization (WIPO). These are the WIPO Copyright Treaty and the WIPO Performances and Phonograms

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[1] The Act of October 28, 1998 consists of 5 Titles, which generally took effect on the date of enactment, except for the technical amendments made by Title I concerning treaty relationships and miscellaneous provisions in Title IV.

[2] DEPARTMENT OF COMMERCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE, REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS OF THE INFORMATION INFRASTRUCTURE TASK FORCE (1995)

Treaty.[3] The WIPO Copyright Treaty covers copyright protection for computer programs, for databases (to the extent they are "intellectual creations"), and for digital, electronic uses of copyrighted works in general. The WIPO Performances and Phonograms Treaty covers protection for performers and producers of sound recordings (called "phonograms" internationally), and generally applies the same or equivalent protection to sound recordings as that applied to other copyright subject matter by the WIPO Copyright Treaty.[4]

The President forwarded the two WIPO treaties to the Senate for its advice and consent to ratification by the United States and requested the introduction of legislation to implement the two substantive provisions of the treaties which the Administration deemed would require legislation to satisfy the obligations of the treaties. S. 1121 and H.R. 2281, as originally introduced, embodied the Administration's recommended "minimalist approach" to implementing legislation.

The bills were premised on the assumption that existing United States copyright law was largely consistent with the treaty obligations. S. 1121 and H.R. 2281 would have created new legal protection against devices and activities that are primarily designed to circumvent anti-copying technologies and against fraudulent removal, alteration, or provision of copyright management information ("CMI"). Technical amendments were also included in the bills to update the Copyright Act's references to treaty relationships.

After the introduction of the Administration's implementation bills, alternative implementation bills were introduced (S. 1146 and H.R. 3048)[5] that addressed Internet copyright policy issues as well as WIPO Treaties implementation. Two other bills (H.R. 2180 and H.R. 3209) proposed amendments solely concerning the copyright liability of online service providers (OSPs).

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[3] For an overview of these treaties, *see* D. Schrader, *World Intellectual Property Organization Copyright Treaty: An Overview,* CRS Report No. 97-444 A, and D. Schrader, *World Intellectual Property Organization Performances and Phonograms Treaty: An Overview,* CRS Report No. 97-523 A.

[4] Two treaties, rather than one treaty, were developed because a majority of countries do not protect sound recordings as copyright subject matter. The United States protects sound recordings as copyright subject matter, but other countries (and especially the members of the European Union) protect sound recordings under so-called "related" or "neighboring rights," unfair competition, or other non-copyright legal theories. Also, the fact of a separate treaty for phonograms allows for the extension of protection to performers (most of whom are not considered "authors" within the meaning of the copyright law in those countries that protect sound recordings as copyright subject matter).

[5] H.R. 3048 and S. 1146 contained the same proposals relating to fair use, library reproduction, distance learning, ephemeral recordings, operational copying by computers, and protection against removal or alteration of CMI. The provisions dealing with anti-circumvention of copying technologies were virtually identical except for a definition of "effective technological measure." H.R. 3048, moreover, contained other amendments relating to the first sale doctrine and "shrink-wrap" licenses not found in S. 1146 but did not contain any provisions on online service provider (OSP) liability, which were included in S. 1146.

The Senate Judiciary Committee held hearings on S. 1121 and S. 1146 on September 4, 1997. The House Subcommittee on Courts and Intellectual Property held hearings on H.R. 2281 and H.R. 2180 on September 16 and 17, 1997. The House Judiciary Committee on April 1, 1998 approved an amended version of H.R. 2281, which included the core elements of a private sector agreement on online service provider liability.[6] The Senate Judiciary Committee on May 11, 1998 approved a new bill, S. 2037, as a successor to S. 1121.[7]

S. 2037, which was entitled the "Digital Millennium Copyright Act of 1998," embodied the full private sector agreement on OSP copyright liability, made changes in the anti-circumvention and CMI provisions, and included amendments concerning several other Internet copyright policy issues.[8]

The Senate passed S. 2037 by unanimous voice vote on May 14, 1998.

H.R. 2281 (under the short title, the "WIPO Copyright Treaties Implementation Act") was subject to sequential referral to the House Commerce Committee. The Subcommittee on Telecommunications, Trade, and Consumer Protection held a hearing on H.R. 2281 on June 5, 1998. The full Commerce Committee made several amendments to H.R. 2281 and reported the bill on July 22, 1998 under the short title, the "Digital Millennium Copyright Act of 1998."[9] This version of H.R. 2281 generally included the amendments already embodied in S. 2037 as passed by the Senate. The Commerce Committee made additional amendments, especially concerning anti-circumvention, fair use, the first sale doctrine, and encryption research.

The House of Representatives passed H.R. 2281 on August 4, 1998 under the short title, the "Digital Millennium Copyright Act of 1998." The House-passed version combined the Senate amendments to S. 2037 with additional amendments by the House Judiciary and Commerce Committees. The Floor Manager's Amendment

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[6] H.Rept. 105-551 (Part I), 105th Cong., 2d Sess. (1998).

[7] S.Rept. 105-190, 105th Cong., 2d Sess. (1998).

[8] The amendments embodied in S. 2037: 1) declared that nothing in the anti-circumvention provisions enlarges or diminishes the existing doctrines of vicarious or contributory infringement, or affects existing defenses such as fair use; 2) clarified that electronics manufacturers have no obligation to design consumer products to achieve protection against circumvention; 3) expanded the exemption of 17 U.S.C. 112 for ephemeral copying by broadcasters to apply in digital contexts and to override the new anti-circumvention measures under certain conditions; 4) expanded the exemption of 17 U.S.C. 198 for libraries and archives to preserve copies for their collections in digital formats; 5) protected personal privacy interests on the Internet; 6) provided exceptions from the anti-circumvention provisions for computer interoperability, for libraries and nonprofit educational institutions in making purchasing decisions, and with respect to the right to control access by minors to the Internet; 7) excepted law enforcement and intelligence activities from the anti-circumvention and CMI provisions; and 8) directed the Copyright Office to report on distance learning and on the liability of nonprofit educational institutions and libraries when they act as OSPs for patrons.

[9] H.Rept. 105-551 (Part II), 105th Cong. 2d Sess. (1998).

to H.R. 2281 also added two new forms of intellectual property protection (in separate titles) that were not earlier considered part of the WIPO Treaties implementation process. Title V incorporated the "Collections of Information Antipiracy Act," which had passed the House earlier as H.R. 2652. This Title would have created 15 years of federal misappropriation-style protection for databases that are not sufficiently creative to be eligible for copyright protection. Title VI of the House version of H.R. 2281 would have enacted the Vessel Hull Design Protection Act, which also passed the House as separate legislation in the form of H.R. 2696. This Title would have created 10 years of design protection for boat hulls larger than a rowboat and smaller than 201 feet in length.

Senate and House conferees agreed on a common bill (H.R. 2281), which passed the Senate on October 8, 1998 and passed the House on October 12, 1998. The Senate consented to United States ratification of the two WIPO Treaties on October 21, 1998. The President signed H.R. 2281, the Digital Millennium Copyright Act, into law on October 28, 1998 (P.L. 105-304).

The Digital Millennium Copyright Act consists of five Titles. Title I implements the two WIPO treaties. Title II establishes certain exemptions from copyright liability for online service and access providers. Title III exempts computer maintenance and repair companies from copyright liability for the reproduction of a computer program that occurs by mere activation of the computer. Title IV contains miscellaneous provisions relating to ephemeral recordings of digital broadcasts; exemptions for preservation activities of libraries and archives; new compulsory licenses for making ephemeral recordings and transmissions of digital sound recordings; the assumption of contractual obligations in collective bargaining agreements between motion picture producers and artistic contributors; and the rank and authority of the Register of Copyrights and the rank of the Commissioner of Patents and Trademarks. Title V creates federal design protection for vessel hulls, which sunsets after 2 years.

WIPO Treaties Implementation — Title I

Title I of the Digital Millennium Copyright Act bears the short title the "WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998." This Act amends title 17 of the U.S. Code by adding a new Chapter 12, which creates civil and criminal liability for circumvention of copyright protection technologies and for the knowing provision of false copyright management information ("CMI") or the intentional removal or alteration of CMI. The technological protection measures typically include encryption, scrambling, passwords, and electronic envelopes. Devices to bypass these measures are usually described as "black boxes." The Act also makes technical amendments to 17 U.S.C. 101,[10] 104,[11] 104A(h),[12] 411(a),[13] and 507(a).[14]

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[10] Section 101 defines terms and phrases used in the Copyright Act.

[11] Section 104 specifies the "points of attachment," i.e., the conditions under which works by foreign nationals are eligible for copyright protection in the United States.

[12] Section 104A restored copyright in certain foreign works that fell into the public domain (continued...)

Protection against Circumvention of Anti-Copying Technology

The WIPO Treaties contain "substantively identical provisions on technological measures of protection (also commonly referred to as the 'black box' or 'anticircumvention' provisions). These provisions require contracting parties to provide 'adequate legal protection and effective legal remedies against the circumvention of effective technological measures'"[15] used by authors and other copyright owners to restrict unlawful access to their copyrighted works.

Basic nature of violations. New Section 1201, 17 U.S.C., implements the "anticircumvention" obligations of the WIPO Treaties. Subparagraph (a)1(A) provides that "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title [17]."

This prohibition is, however, delayed for two years after the date of enactment, in order to allow time "for the development of a record as to how the implementation of these technologies is affecting availability of works in the market place for non-infringing uses,"[16] and for the conduct of a rulemaking proceeding by the Librarian of Congress. That proceeding can be repeated every 3 years. "It is anticipated that the main focus of the rulemaking proceeding will be on whether a substantial diminution of that availability is *actually occurring* in the market for particular classes of copyrighted works....[T]he rule-making may also, to the extent required, assess whether an adverse impact is *likely to occur* over the time period relevant to each rule-making proceeding. However, the determination should be based upon anticipated, rather than actual, adverse impacts only in extraordinary circumstances in which the evidence of likelihood of future adverse impact... is highly specific, strong and persuasive." [17]

Section 1201(a)(2) also prohibits the manufacture, importation, offering to the public or other trafficking in any technology, product, service, device, component or part thereof that is primarily designed or produced to circumvent an anti-copying system. The 2-year delay affecting subparagraph (1) does not apply to violations of this subparagraph (2). The prohibition against manufacture or sale of devices applies

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[12](...continued)
in the United States because of a failure to comply with copyright formalities.

[13] Section 411(a) makes registration with the United States Copyright Office a prerequisite to a suit for copyright infringement for works of United States origin but excepts certain works of foreign origin from mandatory registration.

[14] Section 507 is a statute of limitations provision.

[15] CONFERENCE REPORT ON THE DIGITAL MILLENNIUM COPYRIGHT ACT, 105-796, 105th Cong., 2d Sess. 63-64 (1998) (hereafter: "DMCA Conference Report").

[16] *Section-By-Section Analysis of H. R. 2281 As Passed By the United States House of Representatives on August 4, 1998,* Committee on the Judiciary, House of Representatives, 105th Cong., 2d Sess. 6 (Comm. Print, Serial No. 6, 1998) (hereafter: "Sectional Analysis of H.R. 2281, August 4, 1998").

[17] Sectional Analysis of H.R. 2281, August 4, 1998, at 6 (Emphasis in original).

if one of three conditions is met: (1) the device is primarily designed for circumvention; (2) the device has only a limited commercially significant purpose other than circumvention; or (3) the device is marketed by someone who is trafficking in circumvention devices.

Section 1201(b) creates another anticircumvention violation that parallels the violation fixed by subparagraph (a)(2) of Section 1201. The "1201(b)" type of violation occurs when a person who has obtained authorized access to the copyrighted work circumvents the limits of the controls that the copyright owner has placed on lawful access to the work. Again, the prohibition on manufacture and sale, etc., of "black boxes" applies if one of three conditions is met — the device or service was primarily designed for circumvention, has only a limited commercially significant purpose other than circumvention, or is marketed by someone who traffics in circumvention technologies.

Exemptions from violations. In the course of legislative debate on WIPO Treaties implementation, several new or clarifying exemptions were added. Section 1201(c) declares that the circumvention provisions do not: (1) affect fair use or any other existing limitations on copyright infringement or the existing rights and remedies of the Copyright Act; (2) enlarge or diminish the existing doctrines of vicarious or contributory copyright infringement; (3) obligate electronics-computer manufacturers to design consumer products to achieve protection against circumvention so long as the products or parts do not otherwise fall within the ban of Section 1201(a)(2) or (b)(1); or (4) enlarge or diminish free speech or press rights for activities using consumer electronics, telecommunications, or computer products.

Circumvention for purposes of achieving interoperability of computers and reverse engineering by persons with access to a lawful copy are generally permissible under Section 1201(f), unless the activities otherwise constitute copyright infringement.

Law enforcement and intelligence activities are generally exempt from violations of the circumvention provisions.[18] Nonprofit libraries, archives, and educational institutions are exempt for purposes of making decisions about acquiring a copy of the work.[19] Persons engaging in encryption research are generally exempt if they lawfully obtained the encrypted copy, made a good faith effort to obtain authorization before circumvention, and their acts are necessary to conduct encryption research and do not otherwise constitute copyright infringement or violate the Computer Fraud and Abuse Act of 1986.[20] Similarly, Section 1201(j) exempts circumvention for purposes of legitimate security testing of a computer or computer system or network provided the acts do not constitute copyright infringement or violate the Computer Fraud and Abuse Act of 1986.

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[18] Section 1201(e), 17 U.S.C.

[19] Section 1201(d), 17 U.S.C.

[20] Section 1201(g), 17 U.S.C.

In applying Section 1201(a) to a component or part, the court may take account of the fact that the part has the sole purpose of preventing access by minors to material on the Internet.[21] Also, it is not a violation of Section 1201 (a)(1)(A) to circumvent a technological measure that also has the purpose or capability of collecting or disseminating personally identifying information about the online activities of a natural person.[22]

Technological measures for analog VCR. As noted, the anticircumvention provisions generally do not require the design of consumer electronics or computer products to achieve protection against circumvention. In a departure from that general principle, Section 1201(k) requires that "analog video cassette recorders must conform to the two forms of copy control technology that are in wide use in the market today — the automatic gain control copy control technology and the colorstripe copy control technology."[23]

The House-Senate conferees explained that this provision was included "in order to deal with a very specific situation involving the protection of analog television programming and prerecorded movies and other audiovisual works in relation to recording capabilities of ordinary consumer analog video cassette recorders. ... Before agreeing to include this requirement in the final legislation, the conferees assured themselves in relation to two critical issues — that these analog copy control technologies do not create 'playability' problems on normal consumer electronics products and that the intellectual property necessary for the operation of these technologies will be available on reasonable and non-discriminatory terms." [24]

Protection for the Integrity of Copyright Management Information

The two WIPO Treaties contain substantively identical obligations to protect the integrity of copyright management information ("CMI"), i.e., information which identifies the work, the author, or the owner of rights or which specifies the terms and conditions of use. CMI also includes any identifying numbers or codes.

Basic rights. The Digital Millennium Copyright Act implements the treaty obligations to protect CMI in the new Chapter 12 to title 17 U.S.C. The Act generally prohibits the knowing provision, distribution, or importation of false CMI and the intentional removal or alteration of CMI or the distribution or importation of CMI knowing that information has been altered or removed.

The purpose of the CMI provisions is to facilitate widespread use of CMI by copyright owners in order to make licensing of works (or obtaining permission to use works) easier and more beneficial both to the public and copyright owners. Pursuant to the WIPO Treaties, the provisions cannot, and are not, legislated as a formality

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[21] Section 1201(h), 17 U.S.C.

[22] Section 1201(i), 17 U.S.C.

[23] DMCA Conference Report, 105-796 at 67.

[24] *Id.* at 68.

(i.e., as a condition of the exercise or enjoyment of the copyright), nor can the CMI requirements prohibit the free movement of goods.

The new rights to protect the integrity of CMI systems apply both to analog and digital formats. In this respect, the DMCA exceeds the minimum treaty obligations since the WIPO Treaties require protection only for electronic rights management information.

The prohibitions do not apply to "the ordinary and customary practices of broadcasters or the inadvertent omission of credits from broadcasts of audiovisual works, since such acts do not involve the provision of false CMI with the requisite knowledge and intent."[25]

Exemptions. The lawfully authorized activities of law enforcement and intelligence agencies are exempt from the CMI requirements.[26]

Broadcasters, cable systems, and those who provide programming to these entities are also generally exempt from liability under the CMI provisions, if they do not intend to induce, enable, facilitate or conceal a copyright infringement.[27] The conditions for applying the limitation on liability differ depending upon whether the transmission is an analog or a digital one.

In the case of an analog transmission, an eligible person will not be liable if it is not technically feasible to avoid the violation or if avoidance would create an undue financial hardship.

In the case of a digital transmission, the exemption is dependent upon the status of efforts to create voluntary standards for transmission of CMI. The Act contemplates that voluntary standards will be developed. Until a standard is set, an eligible person is not liable if the transmission would cause a perceptible visual or aural degradation of the digital signal, or if the transmission would conflict with an applicable government regulation or industry standard other than CMI standards. If a voluntary CMI standard has been set, the eligible person will not be liable if the CMI was not located in accordance with the industry standard.

Civil and Criminal Remedies

The Digital Millennium Copyright Act establishes nearly the same civil and criminal remedies for violations of either the anticircumvention provisions of 17 U.S.C. 1201 or the CMI provisions of 17 U.S.C. 1202.

Civil remedies. The civil remedies for violations of the anticircumvention and CMI provisions are found in Section 1203, 17 U.S.C. They include: injunctions, impoundment of infringing material or equipment, actual damages and any additional

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[25] Sectional Analysis of H.R. 2281, August 4, 1998, at 19.

[26] Section 1202(d), 17 U.S.C.

[27] Section 1202(e), 17 U.S.C.

profits of the violator not counted as part of damages or statutory damages, at the option of the plaintiff. The statutory damages for violation of Section 1201 range from $200-$2500 per act of circumvention. For violation of the Section 1202 CMI provisions, the plaintiff may be awarded between $2500-$25,000 for each violation.

If there are repeated violations within a 3-year period, the court may award triple damages. The court also has the discretion to reduce or remit damages if the violator proves, and the court finds, the offender was not aware and had no reason to believe that the law was violated. Under the same circumstances, in the case of a nonprofit library, archive, or educational institution, the court must reduce or remit damages for innocent violations.

Criminal penalties. Nonprofit libraries, archives, or educational institutions are exempt from any criminal liability for violation of Sections 1201 or 1202.

Other violators shall be fined no more than $500,000 or imprisoned up to 5 years, or both, for first offenses. For subsequent offenses, the maximum fines and prison time are doubled.

Title I Studies or Reports

Encryption research. New Section 1201(g) of Title 17 U.S.C., in addition to creating certain exemptions for encryption research from the anticircumvention provisions, also directs the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce (hereafter: the "Assistant Secretary for Comm.-Info") to report back to the Congress on the effect of the legislation on encryption research.[28] The report, which is due 1 year after enactment, will also assess the adequacy and effectiveness of the anti-copying measures used by copyright owners.

Impact on electronic commerce. Section 104 of Title I directs the Register of Copyrights and the Assistant Secretary for Comm.-Info to report back to the Congress on the effects of Title I on the development of electronic commerce and associated technologies. The report must also evaluate the DMCA's effect on the operations of the first sale doctrine of 17 U.S.C. 109 and the computer program exemptions of 17 U.S.C. 117. This report is due within 2 years after enactment.

Effective Date

The amendments to title 17 U.S.C. made by Title I of the DMCA are generally effective on the date of enactment, October 28, 1998. The technical amendments relating to international treaty relationships will take effect when the United States becomes bound by the two new WIPO Treaties. The Senate on October 21, 1998 gave its consent to United States ratification of the Treaties. The instruments of ratification will be deposited with the Director General of WIPO in due course. The

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[28] 17 U.S.C. 1201(g)(5).

WIPO Treaties will not enter into force, however, until 30 States have deposited instruments of accession or ratification.[29]

Online Copyright Infringement Liability Limitation — Title II

The potential liability of online service and access providers (OSPs) for infringing activities of their customers was originally one of the major controversies regarding WIPO Treaties implementation.[30] The original implementation bills recommended by the Administration did not address the issue, on the theory that, since the Treaties themselves do not address ***who is liable*** for any copyright infringements, the matter could be left to judicial interpretation.

That outcome was opposed by many groups including coalitions representing the OSPs, telecommunications entities, the electronics industry, and library and educational institutions. Without legislative guidance, these groups argued there would be unacceptable business uncertainty and protracted litigation to delineate who is liable for infringements by OSP customers. The issue of OSP liability was resolved by a negotiated agreement among the private sector interests most directly affected by use of copyrighted works on the Internet.[31] That agreement formed the basis for most of Title II of the DMCA.

Title II of the DMCA — the "Online Copyright Infringement Liability Limitation Act" — amends Chapter 5 of the Copyright Act by adding a new section 512 relating to limitations on OSP liability for online infringements by their customers. The limitations on liability benefit persons or entities who act as online service providers.[32]

The Act gives a two-part definition of the term "service provider." With respect to digital network communications [17 U.S.C. 512(a)], a "service provider" is "an entity offering the transmission, routing, or providing of connections for digital online

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[29] Three countries (Belarus, Indonesia, and The Republic of Moldova) have ratified the Copyright Treaty. Two countries (Belarus and The Republic of Moldova) have ratified the Performances and Phonograms Treaty.

[30] This Report uses "OSP" as short-hand for persons and entities who transmit, route, provide connections, or otherwise facilitate computer network service and access for customers without initiating or altering the content of the transmission. Although OSPs are the main beneficiaries of the liability provisions in Title II of the DMCA, entities other than OSPs can claim the exemption if they meet the statutory conditions.

[31] The negotiations that culminated in an agreement on OSP copyright liability on March 31, 1998 were conducted for several years under the auspices of the Senate Judiciary Committee and the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee. The private sector negotiators included representatives of copyright owners and authors; the telecommunications industry, electronics industry, and computer equipment industry; and online service providers.

[32] Title II of the DMCA took effect upon enactment, October 28, 1998.

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." [33] The term service provider as used in subsections (b)-(j) and (l)-(m) of section 512 means "a provider of online services or network access, or the operator of facilities therefor," as well as entities that meet the first part of the definition of a "service provider."[34] The second part of the definition includes universities that act as service providers, and entities that provide Internet access, e-mail, chat room, and web page hosting services.

The Digital Millennium Copyright Act basically absolves the OSPs from copyright liability when they merely act as "conduits" of information transferred over their networks, without having any control over the content of the transmission. The DMCA creates "safe harbors" from either direct, vicarious, or contributory copyright infringement when the conditions of the exemption are met.

Upon receiving a notice of infringement that complies with statutory requirements,[35] an OSP is expected expeditiously to remove, disable, or block access, to the extent blocking is technologically feasible and economically reasonable. Upon receipt of a counter-notice from a provider of the blocked site, the OSP shall retain the block for 10-14 days but no longer, unless the copyright owner files suit for copyright infringement.

The exemptions from liability apply both to network service transmissions and to private and real-time communications services.

The Senate-House conferees reached an agreement on further limits on the liability of nonprofit educational institutions that act as service providers.

Digital Network Communications

An OSP is not liable for monetary relief and injunctive relief is carefully circumscribed when an OSP acts as a "mere conduit" in transmitting the copyrighted work(s). Some of the specific restrictions to qualify for this exemption are:

- the transmission was initiated by someone other than the OSP;
- the transmission is provided through automatic, technical processes without selection of content by the OSP;
- the OSP does not select the recipients of the copyrighted material, except as an automatic response to provide service;

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[33] Section 512 (k)(1), title 17 U.S.C.

[34] *Ibid.*

[35] Among other requirements, the notice must be in writing, describe the infringing material, give information about location of infringing material on the network, identify the copyrighted work(s), contain a sworn statement that the notice of infringement is accurate, and be signed physically or electronically by an authorized person.

- the OSP does not maintain a copy of the copyrighted material that is accessible to recipients for a longer period than is necessary for the communications; and

- the material is transmitted without change.

System Caching

The OSP is not liable for monetary relief and injunctive relief is carefully circumscribed when the copyrighted material is temporarily stored on the system or network as part of an automatic process without change for use in refreshing, reloading, or other updating in accordance with accepted industry standards for data communications.

Information Storage

An OSP is not liable for monetary relief and injunctive relief is carefully circumscribed when an OSP stores infringing material on its network at the direction of a system user, if the OSP does not have actual knowledge of the infringement, is not aware of facts or circumstances that make the infringement apparent, or, upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to the infringing material.

Information Location Tools

The standards applicable to storage of information apply generally to OSP liability for referring or linking users to an online location that may contain infringing material. That is, the OSP is not liable without actual knowledge or an awareness of facts that make the infringement apparent, or if the OSP acts expeditiously to remove or disable access upon obtaining knowledge or awareness of an infringement.

Limitations on Liability of Nonprofit Educational Institutions

In general, a university or other nonprofit educational institution is eligible for the same limitations on OSP liability as those described above for commercial OSPs. In recognition, however, of the special nature of the university environment, additional limitations on liability were added in Section 512(e). Special rules were developed for determining whether universities are liable for the acts of faculty members or graduate students.

Teaching/research function. Online infringing activities of faculty members or graduate students, which occur when they are teaching or engaging in research, will not be attributed to the university, if certain conditions are met. These conditions are:

(l) the infringing activities must not involve online access to instructional materials that are required or recommended for a course taught by the infringing instructor within the last 3 years;

(2) the institution must not have received more than 2 claims of copyright infringement concerning the particular instructor within the last 3 years; and

(3) the institution must provide to the users of its system or network materials that accurately describe and promote compliance with copyright law.

When these conditions are met, the instructor's knowledge or awareness of infringing activities will not be attributed to the university.

Non-teaching/non-research function. The special rules on liability do not apply when a faculty member or graduate student is performing a non-teaching/non-research function (for example, when the person is exercising administrative responsibilities or is carrying out operational responsibilities that relate to the institution's role as a service provider). In those cases, the knowledge, awareness, and actions of the employee can be attributed to the university. However, in those cases, the limitations on liability available to commercial service providers would be available to the university.

Nothing in subsection 512(e) creates any new liability for universities under the doctrines of respondent superior, or contributory infringement, where liability did not exist before enactment of the DMCA. Also, "subsection (e) has no impact on the fair use (section 107) doctrine or the availability of fair use in a university setting; similarly, section 110 of the Copyright Act dealing with classroom performance and distance learning is not changed by subsection (e)."[36]

Injunctive Relief

Monetary relief is not available against a qualifying service provider and injunctive relief is circumscribed. Section 512 (j) limits the scope of injunctive relief that may be obtained against a qualifying service provider. Distinctions are drawn between service providers qualifying for the limitations under Section 512 (a) (digital communications networks) and those qualifying under Section 512 (b)-(d).

Section 512 (b)-(d) injunctive relief. Only three forms of injunctive relief may be granted if a qualified service provider has cached, temporarily stored, or unknowingly facilitated the location of infringing material.

1) The court may provide for the removal or blocking of infringing materialresiding at a specific location on the provider's network. This is essentially an order to comply with the "removal-blocking" provisions of Section 512 (c) (l)(C).

2) The court may order the provider to terminate service to the subscriber who is engaging in the infringing activity.

3) In unusual cases, if the court considers it necessary, the court may grant other injunctive relief than that specified in Clauses (l) and (2), but must determine that this relief is the least burdensome to the service provider among comparably effective forms of relief.

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[36] DMCA Conference Report, 105-796 at 75-76.

Section 512(a) injunctive relief. In the case of transmission of infringing material via transitory digital network communications, injunctive relief is further narrowed. If a court determines that any injunctive relief is appropriate, it may grant one or both of two forms of relief.

l) The court may order termination of service to the subscriber.

2) Where the infringement relates to a foreign online location, the court may enter an order to take reasonable steps to block access to a specific, identified foreign online location.

Blocking orders are not available against a service provider qualifying under Section 512(a) in the case of infringing activity on a site within the United States or its territories.

In granting even this circumscribed injunctive relief, the court must first consider new criteria relating to the digital online environment.[37] The DMCA prohibits most forms of ex parte injunctive relief (including temporary and preliminary relief) against a service provider who qualifies for the Section 512 limitation on liability. An exception is made only for "orders ensuring the preservation of evidence or other orders having no material adverse effect on the operation of the service provider's communications network."[38]

Other Limitations on Liability

The Digital Millennium Copyright Act also creates penalties for knowing, material misrepresentations about infringing online activity; absolves OSPs of noncopyright liability if the OSP in good faith acts to disable or remove allegedly infringing material, subject to certain requirements for notifying the subscriber of receipt of a statutory notice of infringement from the copyright owner; confirms that traditional copyright defenses (such as fair use) are unaffected by an OSPs blockage of, or failure to block, access to alleged infringing material; and provides that copyright owners who seek the identification of the direct infringer from the OSP must obtain a subpoena from a court.

Computer Maintenance or Repair Exemption — Title III

Title III of the DMCA enacts the "Computer Maintenance Competition Assurance Act," which amends Section 117 of title 17 U.S.C. Section 117 contains certain limitations on copyright liability relating to computer programs. Title III adds a new limitation relating to maintenance or repair of computers by independent service organizations. The Act overturns a decision of the Ninth Circuit holding that an independent computer service-repair company infringes the copyright in a

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[37] Section 512 (j)(2), Title 17 U.S.C.

[38] Section 512 (j)(3), Title 17 U.S.C.

computer program by causing reproduction of the program through activation of the computer, in the course of maintenance or repair work.[39]

Under the revised Section 117 limitation, neither the owner or lessee of a machine that makes a copy of a computer program upon activation of the machine does not infringe the computer program copyright nor does the person authorized to maintain or repair the machine. The copy of the computer program must be destroyed immediately after the maintenance or repair work is completed

This Act "has the narrow and specific intent of relieving independent service providers, persons unaffiliated with either the owner or lessee of the machine, from liability under the Copyright Act when, solely by virtue of activating the machine in which a computer program resides, they inadvertently cause an unauthorized copy of that program to be made."[40] This amendment does not affect the liability of persons who make unauthorized adaptations, modifications or other changes to the computer program. The amendment makes no change with respect to the scope of the term "reproduction" as it is used in the Copyright Act.[41]

Miscellaneous Provisions — Title IV

Title IV of the Digital Millennium Copyright Act contains miscellaneous provisions relating to ephemeral recordings of digital broadcasts; exemptions for the preservation activities of libraries and archives in the digital environment: new compulsory licenses for making ephemeral recordings and transmissions of digital sound recordings; the assumption of contractual obligations relating to motion picture collective bargaining agreements; and the rank and authority of the Register of Copyrights and the rank of the Commissioner of Patents and Trademarks. The amendment concerning motion picture contracts is made to title 28 rather than title 17. The miscellaneous provisions also mandate two studies of copyright issues — distance education (SEC. 403) and assumption of motion picture contracts (SEC. 406).

Ephemeral Recordings of Digital Broadcasts

"Ephemeral recordings" are copies of transmission programs made by a transmitting organization for delayed transmission and for archival purposes. Under 17 U.S.C. 112 of the copyright law in effect before enactment of the DMCA, commercial and noncommercial broadcasters were given the benefit of an exemption from the reproduction right to make at least one copy of a broadcast program for

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[39] *MAI Systems Corp. v. Advanced Computer Systems of Michigan, Inc.*, 991 F. 2d 511 (9th Cir. 1993).

[40] Sectional Analysis of H.R. 2281, August 4, 1998, at 41.

[41] DMCA Conference Report 105-796 at 76.

delayed transmission or archival purposes.[42] This exemption clearly applies to analog transmissions, but its application to digital transmissions (which are now occurring on an experimental basis) has been uncertain.

The DMCA amends 17 U.S.C. 112 and 114 to address two issues concerning the scope of the ephemeral recording exemption in digital contexts.[43] One amendment explicitly extends the Section 112 exemption to nonsubscription broadcasts of sound recordings in digital formats.

Subscription music services, webcasters, satellite digital audio radio services and similar entities who operate under statutory licenses for the performance of sound recordings pursuant to 17 U.S.C. 114(f) are also entitled to make ephemeral recordings of the sound recordings they transmit.[44]

The second amendment concerns the relationship between the ephemeral recording exemption and the anticircumvention provisions of new Section 1201 of the Copyright Act. "Concerns were expressed that if use of copy protection technologies became widespread, a transmitting organization might be prevented from engaging in its traditional activities of assembling transmission programs and making ephemeral recordings permitted by Section 112 for purposes of its own transmissions within its local service area and of archival preservation and security."[45]

The DMCA provides that if a broadcaster is prevented by the copyright owner's anti-copying measures from making the permitted ephemeral recordings, the copyright owner must make available the necessary means to make the recording, provided it is technologically feasible and economically reasonable to do so. If the copyright owner fails to provide the necessary means in a timely manner in accordance with reasonable business requirements, the broadcaster is not liable for violation of the anti-copying measures.

New Digital Audio Transmission License and New Ephemeral Recording Statutory License

Background. The Digital Performance Right in Sound Recordings Act of 1995 ("1995 Digital Audio Act")[46] created a limited public performance right in sound recordings. Under existing copyright law, public performances of analog sound recordings are not within the control of the copyright owner, i.e., analog sound recordings can be played over radio and television or performed in other public places without the need to obtain a license or permission from the sound recording copyright

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[42] Noncommercial broadcasters and governmental entities can make up to 30 copies of a broadcast program under certain conditions. 17 U.S.C. 112(b).

[43] SEC. 402 of Title IV of the DMCA.

[44] DMCA Conference Report 105-796 at 79.

[45] DMCA Conference Report 105-796 at 78.

[46] Pub L. 104-39, Act of November 1, 1995, which generally took effect on February 1, 1996.

owner. (Of course, performance of any musical work embodied in the recording must be licensed.) Effective February 1996, however, digital sound recordings were granted limited rights of public performance.

Under the 1995 Digital Audio Act, public performance rights were granted in subscription transmissions and interactive transmissions. The 1995 Act exempts nonsubscription digital broadcasts that are not interactive. Moreover, the 1995 Act distinguishes between interactive and noninteractive subscription performances.

Noninteractive subscription services may be eligible for a statutory license.

With respect to pay-per-listen, audio-on-demand, and similar interactive services, copyright owners are granted an exclusive right. Interactive services must negotiate with sound recording copyright owners to obtain the right to transmit the sound recordings. The 1995 Act does, however, place some strict conditions on the exclusive right relating to interactive services.

Since the enactment of the 1995 Digital Audio Act, " services commonly known as 'webcasters' have begun offering the public multiple highly-themed genre channels of sound recordings [on the Internet] on a nonsubscription basis."[47] The webcasters and sound recording copyright owners have disagreed about application of the 1995 Act.[48]

SEC. 405 of Title IV of the DMCA responds to this issue by adding two more statutory licenses for digital audio transmissions of sound recordings and for making multiple ephemeral recordings.[49] One new license applies to certain nonsubscription and new subscription services that perform digital sound recordings. A second new license applies to multiple "ephemeral" reproductions of sound recordings (stored in computer system "servers") in order to facilitate performances. The original statutory license of the 1995 Act, in slightly modified form continues to apply to "old" subscription services in operation on July 31, 1998, provided the pre-existing service continues to use the same method of transmission.

New digital audio transmission license. In essence, 17 U.S.C. 114 is revised to contain two separate statutory licenses relating to digital audio transmissions of sound recordings. The new digital audio transmission license applies to "webcasters" on the Internet and other new transmission services not in existence before July 31, 1998. Pre-existing subscription services are "grandfathered" under the original (but slightly modified) license of the 1995 Digital Audio Act.

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[47] Sectional Analysis of H.R. 2281, August 4, 1998, at 50.

[48] DMCA Conference Report 105-796 at 80.

[49] The details of this second 17 U.S.C. 114 statutory license are beyond the scope of this summary of the Digital Millennium Copyright Act. Most of the amendments to section 114 take effect upon enactment, but an obligation in Clause (ix) of section 114(d)(2)(C) relating to identification of the sound recording during transmission does not take effect until 1 year after enactment.

A major distinction between the "old" and the "new" digital audio license is that the rates under the new license must be fixed at marketplace value. "In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the copyright arbitration royalty panel shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."[50] Rates for pre-existing subscription services and preexisting satellite digital radio services are fixed under different criteria that basically permit comparison of rates for comparable services but do not require marketplace fees.[51]

The amendments to 17 U.S.C. 114, and the statutory licenses created by the amendments, "are all fully subject to the safeguards for copyright owners of sound recordings and musical works contained in sections 114(c), 114(d)(4) and 114(i), ...[and] the conferees do not intend to affect any of the rights in section 115 that were clarified and confirmed" in the 1995 Digital Audio Act.[52]

Ephemeral recording license. Section 112, 17 U.S.C. is amended by adding a new paragraph (e), which creates a new statutory license for making multiple reproductions of sound recordings embodied in an "ephemeral recording." This new license is intended primarily for entities that transmit "sound recordings to business establishments pursuant to the limitation on exclusive rights set forth in section 114(d)(1)(C)(iv)." [53] The new "112(e)" license is also available to Section 114(f) licensees who want to make more than the one recording permitted by the 112(a) exemption. Webcasters might wish to reproduce multiple recordings for use on different computer servers "or to make transmissions at different transmission rates or using different transmission software." [54]

As was true under the law before enactment of the DMCA, to avail itself of the ephemeral recording provisions, the transmitting organization must have voluntary licenses to perform any music embodied in the transmission.

Contractual Obligations Related to Transfers of Motion Picture Rights

SEC. 406 of Title IV of the DMCA amends Part VI of title 28 U.S.C., by adding a new Chapter 180 regulating the assumption of contractual obligations in collective bargaining agreements between motion picture producers and the craft guilds and unions representing contributors to motion pictures, when rights in the motion picture are transferred.

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[50] Section 114(f)(2)(B), 17 U.S.C.

[51] Section 114(f)(1)(B), 17 U.S.C.

[52] DMCA Conference Report 105-796 at 89.

[53] DMCA Conference Report 105-796 at 89.

[54] *Id.* at 90.

The guilds expressed concern "about their inability to obtain residual payments that are due to their members in situations where the producer of the motion picture fails to make these payments, for example, where the producer/company no longer exists or is bankrupt.... Although the collective bargaining agreements generally require the production company to obtain assumption agreements from distributors that would effectively create ...privity, some production companies apparently do not always do so."[55]

SEC. 406 of the DMCA requires that transfers of motion picture rights negotiated after enactment, shall be deemed to incorporate the collective bargaining agreements, if the transferee knew or had reason to know about the collective bargaining agreements, or, if there is an existing court order against the transferor and the transferor does not have the financial ability to satisfy the obligation within 90 days after the order is issued.

Transfers relating to the public performance right alone are, however, excluded from the assumption of contractual obligations. Also excluded are transfers related to security interests. Banks and other financial institutions are not subject to the statutory assumption of obligations in collective bargaining agreements merely because they obtain a security interest in the motion picture.[56]

Report by Comptroller General. SEC. 406(h) directs the Comptroller General, in consultation with the Register of Copyrights, to study and report to the Congress within 2 years of enactment on the conditions in the motion picture industry that gave rise to the amendment concerning assumption of contractual obligations, and on the impact of the amendment on the industry.

Exemption for Libraries and Archives

SEC. 404 of the DMCA amends the library reproduction exemption of 17 U.S.C. 108 to allow libraries and archives to take advantage of digital technologies when engaging in certain permitted activities.

Under the law in effect before enactment of the DMCA, Section 108(b) permitted the reproduction and distribution of one copy or phonorecord of an unpublished work solely for preservation, security, or deposit for research use in another library or archives. With respect to published works, Section 108(c) permitted reproduction of an entire copy or phonorecord for the purpose of replacing a damaged, deteriorating, lost, or stolen copy if an unused replacement could not be obtained at a fair price.

The amendments in the DMCA permit the reproduction of 3 copies or phonorecords rather than the one copy of the former law and delete the limiting reference to reproduction only in "facsimile" form. Any reproduction in a digital format of an unpublished work must not be distributed in that format to the public

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[55] Sectional Analysis of H.R. 2281, August 4, 1998, at 62.

[56] DMCA Conference Report 105-796 at 92.

outside the premises of the library or archive. Also, in the case of published works, storage in an obsolete format is added as another justification for reproduction, if a replacement copy is unavailable at a fair price. Any digital reproduction of a published work cannot be made available to the public in the digital format outside the premises of the library or archives in lawful possession of the copy from which the reproduction is made. References to the "premises" of the library or archive mean only physical premises, and do not include online websites, bulletin boards, or homepages.[57]

Another amendment eases the burden of reproducing a copyright notice as a condition of the Section 108 exemptions. A notice already appearing on the copy that is being reproduced should be maintained and not deleted. If the copy being reproduced lacks a copyright notice, the library or archive simply places a legend or notation on the copy that "this work may be protected by copyright."

Distance Education Report

Section 110(2) of title 17 U.S.C. exempts qualifying instructional broadcasts from copyright liability for the public performance of copyrighted works embodied in the broadcast transmissions. Nonprofit libraries and educational institutions urged the Congress to adapt the instructional broadcasting exemption to the Internet environment when enacting the Digital Millennium Copyright Act. Congress deferred this issue for further consideration after receiving a report from the Register of Copyrights.

SEC. 403 of the DMCA directs the Register of Copyrights, after consultation with representatives of copyright owners and nonprofit libraries and educational institutions, to submit a report to Congress on distance education, no later than 6 months after enactment.

The report shall include recommendations "on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works."[58] Paragraph (b) of SEC. 403 lists 8 factors that the Register shall consider in formulating recommendations.

Rank and Authority of Register of Copyrights; Rank of the Commissioner of Patents and Trademarks

SEC. 401(a) of the DMCA amends Section 3(d) of title 35, Section 701(e) of title 17, and Section 5314 of title 5, to create parity in the compensation paid to the Commissioner of Patents and Trademarks and the Register of Copyrights. Both officials will be paid at the pay fixed for level III of the Executive Schedule under Section 5314 of title 5 of the U.S. Code.

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[57] Sectional Analysis of H.R. 2281, August 4, 1998, at 49.

[58] SEC. 403(a) of the DMCA.

SEC. 401(b) clarifies the duties and functions of the Register of Copyrights by adding a new paragraph to Section 701 of title 17 U.S.C. "The new subsection... sets forth in express statutory language the functions presently performed by the Register of Copyrights .... Existing subsection 701(a) addresses some of the [legislative and executive or administrative] ... functions. New subsection 701(b) is intended to codify the other traditional roles of the Copyright Office and to confirm the Register's existing areas of jurisdiction."[59]

The amendment confirms the following areas of authority and jurisdiction of the Register of Copyrights and the Copyright Office of the Library of Congress: 1) the longstanding role as advisor to Congress on copyright matters and all matters within the scope of title 17; 2) the longstanding role in advising other federal agencies (such as the State Department and U.S. Trade Representative) on the adequacy of foreign copyright laws and as a technical consultant in bilateral, regional, and multilateral negotiations with other countries on copyright-related issues; 3) the longstanding role as a key participant in international meetings of various kinds, including as part of U.S. delegations as authorized by the executive branch; and 4) the preparation and submission to the Congress of studies and reports on various copyright policy issues. These statutory functions and duties are illustrative and not exhaustive.[60]

Vessel Hull Design Protection — Title V

Title V of the Digital Millennium Copyright Act creates a new form of intellectual property protection for the design of boat hulls. The "Vessel Hull Design Protection Act" adds a new Chapter 13 to title 17 U.S.C. that protects the design of the hull of boats larger than a rowboat and smaller than 201 feet in length against copying. Protection extends both to the artistic and the utilitarian features. The Vessel Hull Design Act is, however, subject to sunset 2 years after enactment.

Background. The boat design title enacts a design protection proposal that had been considered and rejected in the form of broad design legislation for at least 20 years. The boat hull design proposal responds to a decision of the Supreme Court in *Bonito Boats v. Thunder Craft Boats,*[61] in which the Court held that state law protection of boat hulls was an unconstitutional interference with the federal patent and copyright laws.

The boat hull design proposal first passed the House of Representatives as a separate bill, H.R. 2696, and was added as a separate title to H.R. 2281 as passed by the House on August 4, 1998. The House-Senate conferees compromised by allowing the boat design Act to remain in H.R. 2281 as enacted, but subjected the Act to termination after 2 years.

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[59] DMCA Conference Report 105-796 at 77.

[60] DMCA Conference Report 105-796 at 77-78.

[61] 489 U.S. 141 (1989).

The Register of Copyrights and the Commissioner of Patents and Trademarks shall submit a joint report to the Congress not later than 1 year after enactment, evaluating the effect of the Vessel Hull Design Act.

Boat design protection is intended to fill a gap that some perceive exists between the current design patent and copyright laws. The same argument has been made for legislation to enact a design right for useful articles in general. When general design legislation was considered by earlier Congresses, objections from the insurance industry, consumers, retailers, and others concerned about possible anti-competitive effects, were sufficient to prevent enactment.

Basic boat design right. New Chapter 13 of title 17 U.S.C. is headed "Protection of Original Designs," although the definition of "useful article" is intended to make clear the protection is limited to designs of boat hulls. Section 1301 creates new legal protection for the original design of a useful article, which makes the design "attractive or distinctive in appearance." A design is "original" if it is the result of the designer's own creative endeavor, and represents a "distinguishable variation" compared to other designs. The distinguishable variation must be more than trivial and not copied from another person.

The overall shape of a boat larger than a rowboat and smaller than 201 feet in length can be protected against copying of its artistic or utilitarian features. The fact that protection can extend to solely utilitarian design features is a departure from gearlier design proposals, which would have excluded designs dictated solely by utilitarian function.

In order to obtain boat hull design protection, an application for design registration must be made to the Administrator (the Register of Copyrights) within 2 years after the design is made public.

The boat design right is enforced through civil remedies only. These remedies include an injunction; actual damages or up to $50,000 or $1 a copy, as the court considers just;[62] the infringer's profits; destruction of infringing articles; and attorney's fees to the prevailing party.

Exclusions from protection. The biggest "exclusion" from protection is achieved by defining a useful article to mean only a "vessel hull, including a plug or mold...." Also excluded from protection by Section 1302 are designs that are: 1) not original; 2) staple or commonplace; 3) different from staple designs only in insignificant details or elements that are common variants; or 4) embodied in a useful article made public by the designer/owner more than 1 year before an application for registration is made to the Copyright Office.[63]

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[62] Damages of $1 a copy would seem to have significance primarily for designs of useful articles other than vessel hulls. This damages provision is another example of the way Title V of the DMCA may lay the foundation for protection of the design of useful articles in general.

[63] Section 1302 actually lists a fifth exclusion — for designs "dictated solely by utilitarian (continued...)

Conclusion

The Digital Millennium Copyright Act, P.L. 105-304, amends the Copyright Act, title 17 of the U.S. Code, to legislate new rights in copyrighted works — and limitations on those rights — when those works are used on the Internet and in other digital, electronic environments. The Act is the outcome of at least 5 years of intensive congressional consideration of Internet copyright policy issues. Initially, these policy issues were considered in the context of the development of a national "information superhighway" or a national information infrastructure.

The focus shifted somewhat to international copyright policy issues and the worldwide Internet with the creation of two new intellectual property treaties in December 1996 under the auspices of the World Intellectual Property Organization (WIPO). The WIPO Copyright Treaty covers copyright protection for computer programs, those databases that qualify as intellectual works, digital communications over the Internet, and use of copyrighted works in digital, electronic environments. The WIPO Performances and Phonograms Treaty extends protection to performers and producers of sound recordings that essentially is equivalent to the protection afforded copyright subject matter by the WIPO Copyright Treaty.

Initially, the Clinton Administration and copyright owners proposed implementation of the WIPO Treaties through a "minimalist" approach. They advocated copyright law amendments to protect against circumvention of anti-copying technologies and protection assuring the integrity of copyright management information (CMI) systems. Other Internet copyright policy issues, under this approach, would have been addressed in separate legislation at some future time or left for resolution by the courts in copyright infringement cases.

Based on the arguments of online service providers, other telecommunications entities, the electronics industry, libraries, and educational institutions, Congress confronted most of the Internet copyright policy issues, and made policy choices, in enacting the Digital Millennium Copyright Act. The Act, which generally took effect October 28, 1998, in addition to implementing anticircumvention and CMI protection, generally exempts online service providers from copyright liability; exempts computer repair service companies; broadens the ephemeral recording exemption to apply in digital contexts; creates new statutory licenses for multiple ephemeral recordings, and transmissions, of digital sound recordings; and broadens the application of the library reproduction exemption in digital contexts. The Act also creates new federal design protection for vessel hulls, which sunsets after 2 years.

The Senate gave its advice and consent to the ratification by the United States of the two WIPO Treaties on October 21, 1998. The Treaties will not come into force, however, until 30 States deposit their instruments of ratification or accession with the Director General of WIPO.

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[63](...continued)
function." Another clause of the Vessel Hull Design Act, however, specifies that this exclusion does not apply in the case of vessel hull designs.