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### **Recent Changes to Copyright Law: The Digital Millennium Copyright Act**

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*NOTA BENE: The author is not a lawyer, and the information in this report should not be taken as legal advice. While the author has sought to ensure that the information in this report is accurate, copyright law is complicated, and a brief overview such as this cannot reflect the deep and technical details of the law.*

In the last issue of *Archival Outlook* I wrote about the changes to copyright law encompassed in the Sonny Bono Copyright Term Extension Act. In 1998 Congress enacted a second major piece of copyright legislation, the Digital Millennium Copyright Act (DMCA). The DMCA is an expansive addition to copyright law, covering everything from the technology to be used in analog VCRs to boat hull design. This report highlights a few of the elements of the DMCA most relevant to archivists.

#### **Changes to Section 108**

Section 108 of the copyright law (Title 17), the exemption for copying by libraries and archives, is of fundamental importance to archivists. Archival reproduction done in accordance with the terms of Section 108 minimizes the liability faced by archivists and their institutions. Therefore any changes to Section 108 should be of direct concern to every archivist.

The DMCA makes two important changes to Section 108. The first concerns preservation copies, and the second speaks to the notice that must appear on copies made under the auspices of Section 108. The usual web sources for the text of the copyright law (including Cornell Law School's easily navigable site at <<http://www.law.cornell.edu/uscode/>> and the Copyright Office's copy at <<http://lcweb.loc.gov/copyright/>>) have not yet been updated to reflect the new changes, but a marked-up and clean copy of Section 108 as amended by the DMCA can be found at <<http://www.iupui.edu/it/copyinfo/sec108.html>>.

#### **Preservation copying**

There are in the DMCA three important changes to how preservation copies are treated in Section 108. First, eligible libraries and archives can now make up to three copies for preservation purposes. Until the passage of the DMCA, only one copy for preservation purposes was allowed. The law now explicitly authorizes the common practice of making multiple generations in a preservation project, such as a camera negative, a printing master, and a service copy.

Secondly, the preservation copies may now be in either analog or digital form. Until the passage of the DMCA, preservation copies could only be facsimiles; digital copies were explicitly excluded in the House report accompanying the 1976 legislation. The change means that libraries and archives can now use Section 108 for authority to scan or otherwise convert to digital form unpublished material for preservation purposes. The digital files, however, can only be made available to the public in digital form within the premises of the library or archives. Hence an archives could not use the preservation

clause to justify making digital scans of copyrighted manuscript material and then publishing those scans on the World Wide Web or a campus network.

Thirdly, in addition to being able to make copies of damaged, deteriorating, lost, or stolen items, eligible libraries and archives may now make copies of digital material in obsolete formats. A format is considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial market-place. The law recognizes that hardware or software obsolescence is in itself a form of loss and has made it legally possible to transfer files to newer media or file formats.

### **Copyright notice requirements**

The 1976 Copyright Act stipulated that copies made by libraries and archives under the authority of Section 108 had to include a notice of copyright on the copy itself. There has always been uncertainty, however, over the exact wording of the notice. Was it enough to state that the copied material might be covered by copyright, or did the copies need to include an explicit statement of the copyright status of the work? The DMCA settles the issue. When a library or archives makes a copy of a copyrighted work for a patron under the provisions of Section 108 and the original work has a copyright statement on it, the copy must be marked with that copyright statement. For example, if one were copying for a patron a chapter from a book that has at the front the copyright notice "Copyright 1998 by the Society of American Archivists," that notice must now be included on all copies made.

Of course most archival material lacks an explicit statement of copyright. In those cases, the law requires that a warning that the work may be copyrighted be included on the copies, but the law does not specify the precise language to be used. The Copyright Management Center (CMC) at Indiana University has proposed that the following notice be included on copies when the original work does not include a copyright notice:

The work from which this copy was made did not include a formal copyright notice. This work may be protected by copyright law. Uses may be allowed with permission from the rightsholder, or if the copyright on the work has expired, or if the use is "fair use" or within another exemption. The user of this work is responsible for determining lawful uses. <http://www.iupui.edu/it/copyinfo/dmcanotice.html>

Archivists who find the CMC proposed language excessive may wish to consult with their own lawyers about wording that would both minimize risk and is practical.

### **Copyright protection systems**

Another provision of the DMCA concerns the circumvention of technological measures designed to prevent copying. The DMCA prohibits the manufacture, importation, or distribution of devices that circumvent copyright protection systems. For example, analog video cassette recorders will now need to incorporate the two most common forms of copy control technology used to prevent the duplication of prerecorded movies or some analog television programming. The DMCA also prohibits gaining unauthorized access to a work by circumventing a technological protection measure, even if the access is for a reason otherwise permitted under the Copyright Act (such as fair use).

During the congressional debate over the DMCA, the SAA opposed the provisions banning the manufacture and use of copyright circumvention systems. The SAA worried about the impact such a ban would have on the preservation and accessibility of the archival record. It is likely that archives will receive from their parent units copyrighted material that has been encrypted or otherwise protected against copyright infringement. The archives may need to make the material available during its copyright term (in response to an FOIA request, for example, or under the provisions for fair use), or at a minimum once the copyright in the work has expired (in most cases ninety-five years after it was published). Given what we know is required to maintain electronic records in proprietary or encrypted formats, no archives will be able to maintain, migrate, and access information protected by copyright protection systems.

While the provisions prohibiting the manufacture or distribution of circumvention devices went into effect upon passage of the Act, the prohibitions on unauthorized access to protected material go into effect in two years. During this period, the Library of Congress will be conducting a rulemaking proceeding to determine appropriate exceptions to the prohibition, and the SAA will be advocating long-term access. I would welcome examples of cases where an archives by law (such as under FOIA) or in the interest of public policy wants to make copyrighted material available, but would be unable to do so if the material were protected by a copyright protection system.

### **Online service provider liability**

Title II of the DMCA limits an online service provider's (OSP) liability for copyright infringement. The intent of the act was to protect service providers (such as America Online or a university) from being held liable for infringing acts by users of their networks. The act broadly defines an OSP as "a provider of online services or network access, or the operator of facilities therefor." Thus an archives with a direct connection to the Internet and serving as an OSP for its staff can seek protection against being held liable for copyright infringements by that staff by adhering to the strict requirements of the DMCA. More on the "safe harbor" afforded to OSPs by the DMCA can be found at the Association of Research Libraries' Intellectual Property page at <<http://www.arl.org/info/frn/copy/copytoc.html>> and at the Copyright Office's web site at <<http://lcweb.loc.gov/copyright/>>.

### **Distance learning**

Distance learning is an area of great interest but with uncertain copyright implications. How, for example, can an instructor assign course reserve reading when students are spread across the country (or the globe)? The DMCA authorizes the Registrar of Copyright to conduct an investigation into copyright issues associated with distance education, and to report to Congress within six months. The SAA has responded to a call for comments from archivists and has issued a statement on "Copyright Issues for Archives in Distance Education" (found at <[http://www.archivists.org/governance/resolutions/distance\\_education.html](http://www.archivists.org/governance/resolutions/distance_education.html)>). In its statement, the SAA has stressed the uncertain copyright status of much unpublished material. It asks that the regulations be written so that primary source material not subject to commercial exploitation can be included in distance learning programs.