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The Digital Millennium Copyright Act: Key Issues for Serialists

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SUMMARY. The Digital Millennium Copyright Act (DMCA) is an extremely complex piece of legislation that makes major changes to U.S. Copyright Law, specifically in the digital networked environment. Many legal and practical issues are addressed in this legislation that have an enormous impact on the library community. This session will outline the key issues for libraries and alert serialists to the issues that directly or indirectly affect their work. Whether we are concerned with access, delivery, preservation, or archiving, the DMCA affects what we do on a daily basis. In the near future, as the law is being applied and tested in court, libraries must actively identify its impact on their mission and goals, and work to assure proper protection under the law. *[Article copies available for a fee from The Haworth Document Delivery Service: 1-800-342-9678. E-mail address: <getinfo@haworthpressinc.com> Website: <http://www.HaworthPress.com>]*

INTRODUCTION

I've been reading all year long and listening and going to workshops on copyright, and it has given me a totally new perspective that I hope to share with you today. Copyright law has truly evolved over the last 100 years, and what most people in the know about copyright law are thinking is that this evolution is much more traumatic than expected. So in the next hour, let me see how much of what I've learned I can share with you to help you make good choices and to give you the background to actually understand what's going on with copyright law.

MYTHS ABOUT COPYRIGHT

I want to start by describing some copyright myths. I call them myths because in talking with people over the past year, I have realized that part of the problem that serials librarians have is that they don't really understand the issue of copyright and how it applies in the electronic age.

Myth 1. The first myth, one I'm sure you've all run into, is that educational use is fair use. No, it's not. Educational use can be fair use if it meets the fair use test, but a faculty member can't just grab a journal article and throw it on his Website and claim that this is fair use and that it's okay. In the print age, we didn't have to think about wide, easily accomplished distribution and librarians didn't go around preaching copyright law. But in the digital age, we must consider the implications of electronic access via Websites, and we have to say ''no''; and when we start saying no, relationships with faculty can become difficult.

Myth 2. Another myth is that materials that are out of print must be out of copyright. But we know that copyright does not end after 40 years; it now lasts another 70 years after the death of the copyright holder. Just because something is no longer available, you cannot automatically assume rights to it.

Myth 3. Another myth is that if I own a copy of something, if I bought and paid for it, I can do what I like with it. This is not true. While you have paid for the paper and ink, you do not have

any rights to the content of the book.

Myth 4. Another common misconception is that fair use guidelines are the same for print and electronic materials. Fair use is written for the print world, not the electronic world. I think most librarians know this, but many library users don't. If there is no copyright notice on the work, then the work is not copyrighted.

Myth 5. Fair use guidelines protect libraries from copyright in fringement. This is not true. Libraries can be as guilty of copyright infringement as anyone else. That's why librarians must be knowledgeable, and make reasonable efforts to abide by the copyright laws. We have come a long way since the late 1970s when we all slapped those little notices on our photocopiers. Remember that? I remember: ''It's the person who does the photocopying that's going to get sued.'' Well, guess what, with the DMCA it's not just the problem of the copyright holder suing the library user who makes the photocopy. Under the DMCA, it is not just a civil problem: it is a federal crime.

WHAT DOES COPYRIGHT MEAN?

When I write something, if I retain a copyright, what I actually retain is the right to make copies. That means that I have that right -you don't. I have the right to prepare a derivative work based in the original. I can take part of the original and expand it or translate it or do all kinds of things to it. That's my right, not yours. I have the right to distribute the copies, to print them, and send them around this room. If we are talking about a work of art or a song, similar rules apply: only I hold the right to perform my song in public and only I have the right to display my work of art in public. These are my inherent basic rights that were defined over a hundred years ago. As these examples suggest, the original intent of copyright was to give the author or creator some sense of ownership and encourage him/her to share with the world. The original intent of copyright was also to aid education, to enhance the general knowledge of the public, and to enhance civilization. It was to identify me -not to restrict you - and tell me I had the right to do these things and that I should not be afraid to share my work with the citizens of the United States.

WHAT IS COPYRIGHTABLE?

Expressions may be copyrighted, but not pure ideas. The material I'm putting up for you today in overhead slides is copyrightable, but it is not like I invented it. I concocted this particular expression of it by doing lots of reading and picking up ideas and constructing it according to the way my mind works. But the ideas themselves can't be copyrighted. The idea that this stage is two feet higher than the floor is a fact -I can't copyright that. However, for me to make something copyrightable it does need to be stated in a fixed or tangible format; that is, a permanent format or, as I mentioned earlier, at least stable enough so that you can identify it and copy it and distribute it. And this is where we get into sticky situations in the digital age because sometimes things aren't fixed for a very long period of time. How do you identify an electronic article if it is not archived somewhere? It's very difficult.

HISTORY OF COPYRIGHT LAW

The origins of copyright law in the United States go back over 200 years, to 1790. The first American copyright act was based on British law. The Copyright Act of 1976 came about because we were getting into mass production and easy distribution. And all the amendments to the 1976 law have been made because we've gone into multimedia and other delivery or presentation methods. The Copyright Act of 1976 was fundamentally different from earlier copyright law. And some of the fundamental changes that happened did not help libraries. In fact, if you talk with copyright experts - attorneys who know copyright law -they will tell you that since 1976, rights for libraries, or fair use rights, have actually shrunk and shrunk and shrunk because the laws, over time, have given more rights to the copyright holder. Before 1976, copyright law worked as follows. First, you had to publish something; and by publishing it, you adopted the formality of copyright protection. Therefore, if you were the copyright holder and I wanted to claim that you had stolen my work, I would have had to publish the work before you and I would have had to state that the work was

copyrighted. Since the Copyright Act of 1976, however, unpublished material can be copyrighted. This presentation, for example, is copyrighted even though I haven't published it formally, even though I haven't put ''Copyright by Trisha L. Davis'' anywhere on my slides. Still my presentation is equally protected with published works under law.

The Copyright Act of 1976 introduced other changes, including the following:

- It expanded protection, following the same principles as for print material, to all types of material including motion pictures, films, and sound recordings.
- It extended the length of copyright from life plus 28 years to life plus 70 years.
- It provided performance rights the same status as publication rights.
- It separated the right to copy from the right to distribute with the First Sale Doctrine: ''Under existing law, the doctrine of first sale permits the legal purchaser of a copy of a work to dispose of it in any way the purchaser wishes, including reselling, lending, or giving it to others. The ability of libraries to lend is based on this doctrine.''[1]
- It created the Fair Use Exemptions, which were designed to compensate for enhanced copyright holder monopolies.

Of the changes introduced by the 1976 law, fair use is probably the concept that librarians consider most often. But what is fair use and how do we determine fair use in libraries?

FAIR USE

There are four factors to consider when assessing fair use:

- Purpose and character of the use.
- Nature of the copyrighted work.
- Amount and substantiality of the material used.
- The effect of the use on the potential market of the work.

Purpose and character of the use. To convey the meaning of fair use, you must first explain to people that the purpose and character of the use is important. I will describe and explain what this means because when you get into discussions with your own constituents you need to be clear as to what constitutes fair use and you must make reasonable efforts to comply with the guidelines of fair use so that no one can accuse you of deliberately trying to use material illegally.

To determine whether or not a work will be used for fair use, ask: ''How are you going to use this material?'' In order for the fair use guidelines to be in force, the material must be used for non-profit ends. If the material is being used in a for-profit context, fair use does not apply. As soon as a user plans to sell material or in any way profit from using it, s/he must have either an assigned license from the copyright holder or some form of formal commission from the copyright holder to use the material for that purpose. While it is fairly easy to determine what for-profit use is, establishing appropriate non-profit use of materials can be difficult. The intent and circumstances of the non-profit use must be considered in order for fair use to apply. A non-profit situation that looks like a for-profit situation may be seen in libraries that charge for printing. While the .10 per page printing charge is often instituted in efforts to curb wasteful printing, it may look, to the copyright holder, that the library is making money by allowing users to print copyrighted material.

Nature of the copyrighted work. To determine whether fair use applies, we must also look at the nature of the work itself. Generally, if it is non-fiction, non-drama, non-music, and if it is basically scholarly in nature, the fair use guidelines apply. The material itself needs to be created specifically with non-commercial intent and purpose and scholarly works usually fall into this category. Use of scholarly works, however, must be limited to a non-profit, educational context.

The amount and substantiality of the material used. Another factor to consider when evaluating a fair use situation is substantiality. Substantiality is the importance of the piece being used, whether it is a small or large part of a copyrighted work. Some words or phrases are more important than others and a few words from a piece may be more important than others. One way to understand the concept of substantiality is to think of songs to which you know only a few lyrics, such

as those from the chorus. While there are many words in the song, the catchiest words, the ones that stay with you and that may be said to represent the whole song, are the few words that make up the chorus. The song may have 200 words; the chorus may have only 25 words, but the chorus embodies the value of that song.

When dealing with written works, it is generally easy to ascertain percentages or portions of materials in relation to the whole. It is easy to identify a chapter in a book, and it is easy to see the relationship of the chapter to the whole. In the case of photographs, however, it is not easy to use just a part of it. Generally, a photograph if needed, is needed in its entirety. What would be the point of having the corner of a picture? If, however, the photograph included images of four people, and you wanted the image of only one person, would it be possible to take the portion of the picture containing the face you are interested in? If one person is sitting in the foreground and others in the background, is the person in the foreground more important or worth more in terms of the concept of substantiality? These are questions we must ask ourselves, particularly as we look at digital materials where pagination is not helpful in determining proportion or substantiality.

The effect of the use on the potential market of the work. The effect of fair use on the potential market for a particular work must also be considered. How many of us have seen statements in journals instructing readers that they may make copies only for a particular purpose, or that copies are not permissible, but that articles are available for a fee? What messages like this mean is that the user has no right to copy and or distribute this material. In situations like this, ask yourself if the user could be reasonably expected to purchase the rights to use the work. When messages are liberally and clearly placed on journal articles, the user can be expected to understand that purchase is necessary. Another question you must ask yourself when copying material is whether or not the publisher or copyright holder could lose income due to users who copy rather than purchase the material in question.

LIBRARY-RELATED COPYRIGHT REVISIONS

Since the Copyright Act of 1976, a number of changes have happened in copyright law. The Bern Convention Implementation Act (1988) said that copyright notice was no longer required. The Copyright Term Extension Act of 1998, also referred to as the ‘‘Sonny Bono Copyright Term Extension Act,’’ extended the term of copyright to life plus 70 years. The Digital Millennium Copyright Act, about which I’ll talk in some detail, came about in the fall of 1998. I think some people were surprised by the DMCA, but actually it had been under discussion since the early 1990s. The purpose of the DMCA was to conform to the World Intellectual Property Organization (WIPO) Treaties of 1996, and to update copyright law in the digital age. The WIPO treaties, ratified in December of 1996 by over 150 countries at a conference in Geneva, defined digital authors’ rights and focused on the Internet and sound recordings.

THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998

Let’s take a look at the five factors of the Digital Millennium Copyright Act. It is divided into five titles. It’s a very, very thick volume of law. It is extraordinarily boring to read. Even the summary, which I believe is 56 pages if you print it off the Website, is tedious to read. Luckily for you, there are thousands of places to go and get information on the copyright law.

Title I: WIPO Treaties Implementation. Title I implements the WIPO Treaties of 1996 and prohibits circumvention of protection technologies, such as passwords and IP filtering. Basically, the WIPO Treaties wanted to make it an official crime, to circumvent any of the technological protection measures implemented by publishers of digital information. In other words, you can’t beat the code; you can’t cheat and use the password. They wanted to make circumventing protection technologies a federal crime, and they wanted governments to be held responsible for it. It used to be that the copyright holder had to prove that his/her copyright was violated. Under this new law, this is no longer the case. The burden of proof is on the user not on the copyright holder.

Title II: Online Copyright Infringement Liability Limitation Act. Title II is very important to librarians. This is the one that we've all heard about because it basically said, okay, if you're an information service provider, like so many universities are, you can be exposed to a legal claim of copyright infringement without even knowing it. This can happen if a user at a library infringes copyright using the library's network. Since the user is unknown and untraceable, the library, as the online service provider, is charged. This seems ridiculous because, after all, I can't sue the telephone company because I receive harassing phone calls. My only recourse is to sue the caller.

Title III: Computer Maintenance Competition Assurance Act. You probably don't have to worry about this one too much. Basically, what it says is that even though it is illegal to make copies of a computer program, you may do so for certain types of computer maintenance and repair. So, it's okay to copy a program when rebooting or rebuilding computers.

Title IV: Miscellaneous Provisions. There are six provisions, but the two most interesting to libraries and librarians are the exemption for digital preservation copies and the charge to the Copyright Office to make recommendations on distance education. Both of these provisions are in our (librarians) favor.

Title V: Protection of Certain Original Designs. I love this one! This section includes the Vessel Hall Design Protection Act which says: If your vessel is under 200 feet long, you don't have to build the vessel, you just have to have the design in tangible format and that whole design is protected for 10 years if you register properly within the first two years. This act is only in effect for 2 years and then they're going to see how it works out. It sounds to me like the U.S. lost one of those big international sailing races, you know: ''They stole our boat design again, so we're going to do something about this.''

Implications of Title I. Title I amends U.S. law to incorporate WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). Member countries provide reciprocal protection to certain works. Title I protects preexisting works from other member countries where the work has not yet fallen into the public domain. The most important part of Title I is that the U.S. must retroactively honor the copyright of another country, even if the other country did not have copyright on the material when it first came to the U.S. Also, if copyright protection in the U.S. runs out after 15 years, but in another country copyright is in effect for 45 years, the U.S. must honor the length of copyright of the other country. Similarly, the whole world has to honor our life-plus-70-years copyright period. In other words, we have to look at the country under which the work was copyrighted and honor those copyright restrictions now. Doesn't that make your life easier? That's why it's much better to look at ours and assume everything falls into ours, because you don't want to have to do research on some third world country and figure out if they have a copyright law and, if so, what it is. And the WIPO group was basically trying to get everybody to agree to respect each other's copyright laws and the works from the country in which they're involved. Because this is such a strange and bizarre issue, and we could probably talk about it for hours, I'm going to move on. If you're interested in this, there is lots of documentation on this issue.

Another important implication of Title I is the circumvention of the technological prevention measures (TPMs). The WIPO treaties require that each member is obliged to prevent the making or selling of devices or services designed primarily for the purpose of circumvention. Part of the problem with this requirement is that TPMs can be anything. Attorneys are currently fighting battles over how to define a TPM. Copyright specialists and technological gurus are asking the same thing: Since we can't imagine what the TPMs of the future will look like, how can we write a law today to monitor them? However, the WIPO Treaties required that each member is obliged to prevent the making or selling of devices or services designed primarily for the purpose of circumvention. There are, however, exceptions to circumvention measure. Non-profit libraries, for example, are allowed a very limited browsing right solely for the purpose of making a purchase or access determination. Also, if you're doing official encryption research, you're allowed to break some TPMs, but how you would define what is legitimate in encryption research, I don't know. You can also, believe it or not, do some level of running around the TPMs in order to prevent access to material on the Internet to protect minors. Again, I guess you could go in and jimmy around with the black box or fuss with

some technology in order to get the Playboy Channel off the cable system, if you prove you were doing it to prevent access to minors -and probably the reason this got through is that it means less use, not more use -access is being restricted not opened up.

Finally, you can circumvent some of the TPMs if your purpose is to protect someone's personal privacy. In other words, if something is tracking who I am and how I use it, it is not illegal for me to go around the TPM. Remember, we don't have a definition of what the TPMs are, do we? None of this is clear. None of this has been defined in case law, and none of this has been tested in the courts. This is just the way the law is written at the moment. Also, for security testing with a computer, computer system or network, if you have the authorization of the owner or the operator of the network, you can implement some go-arounds. This area of the law is fuzzy, as you'll discover if you talk with legal experts, including the attorneys that lobby for the ALA. Part of what ALA has been lobbying for, and part of the statements ALA lawyers have made, is that this whole title, Title I, doesn't make sense because it tries to define something that is indefinable. As such, the situations it sets up are bizarre, and it doesn't address other situations that will become common, which is why the discussion continues.

The last part of Title I refers to the integrity of copyright management information. As librarians, I don't think this concept presents a problem for us. The final part of Title I basically says you can't get rid of the copyright statement and you can't get rid of words, names or symbols that indicate who the author is, the producer is, who it belongs to, and how it is broadcast. For librarians, respecting this concept is pretty easy.

EFFECTS OF DMCA TITLE I ON LIBRARIES

Now, here's where it all runs amuck. Because everybody had such a problem with Title I, it was decided not to implement it for two years. This two-year waiting period was to give time to determine whether users are or are likely to be adversely affected in their ability to make non-infringing uses of a particular class of copyrighted works; particular classes of works were also to be identified and exempted for a three-year period; and an analysis of these classes of works was to be conducted every three years. But the two-year waiting period is up, and very little has been done. Defining what infringement means has been a struggle, and the recent testimony of May 2000, which is available on the LC Website, illustrates this. Most of the testimony confirms that nobody can define many of the things mentioned in Title I. Nobody can figure out what an infringing work is; yet they are passing federal law referring to it. They are passing a federal law that nobody understands. It's very, very sad and a little bit scary. They wanted us to identify classes of work, they said we know that libraries and non-profits are going to need access to certain classes of works, that they will need to circumvent the TPMs, but these classes of works haven't been defined yet. For a library's purposes, the class of the work doesn't matter; it's the works themselves that are important to libraries and library users. Librarians can't justify poetry anymore than we can justify motion pictures because the media is not the issue -it's the content, not the media. Once the classes of works are defined, they will be exempted under the law, and these classes will be reviewed every three years.

TITLE II

As discussed earlier, Title II describes the liability for the online service providers (OSP). Under Title II, an OSP can be exposed to legal claims of copyright infringement and not even know it. All kinds of people can be sending stuff all over the world and we don't know what they're doing. Since the source of the infringement is not known, the online service provider is charged. Is a library like an online service provider? According to the law, the library is exactly like an OSP, which is defined as follows: The online service provider provides software to link users to sites; stores information on its server; and facilitates displays and recordings by users. Libraries do these things all the time. Our online catalogs and Webpages link users to sites. Libraries store information on their servers; they store information all the time; and libraries facilitate display and recordings

(e.g., copies) by users. Oh my, we fit these qualifications just beautifully! Under the existing copyright law, each of those functions is exclusively the right of the copyright holder, so what are libraries doing? Libraries are engaged in totally illegal actions. Kind of scary, isn't it?

Title II also talks about how to become exempt from these limitations and liability. But trying to protect yourself, and declaring yourself exempt, doesn't mean that no one can sue you. Even if you can adhere to the complex rules and strict deadlines required to achieve exemption, you are not necessarily protected from legal action against you, it just means that you may not get sued as much. Given the work involved in qualifying for exemptions, and given that it doesn't matter if your organization is for profit or not-for-profit, many people say they're not sure it is worth the effort.
In order to comply you have to set up compliance-specific mechanisms and constantly monitor (not actively, but passively) transitory communications. Transitory communications include Webpages, e-mail, bulletin boards, and listservs. Second of all, you have to be totally in control of all system caching. Now you know there is no way you can track everyone who is saving and deleting information on your network. Third, if material is not just cached temporarily, if it is actually saved permanently, the OSP again has to be innocent of all this. Whether or not you know what is saved, how are you going to control it? It is truly a Catch 22. So if you want to qualify for exemptions, you must not engage in specific activities. Now think back to what I just said. You cannot know about material that is illegally used on a Webpage, is cached in your system, or is stored permanently on your system. You have to be totally innocent of these things. Nor can you be a party to the transmission. You can't maintain records of transactions. So you would either have to know everything or know nothing to be totally innocent. And you also have to follow these incredible compliance procedures. You basically must not have any actual knowledge that the material or the activity is infringing -that's the bottom line.

Finally, there are special rules for non-profit educational institutions. And you can only be protected for actions or knowledge of your faculty and your graduate students who are employed by you and who are actually teaching or doing research. So even after you have complied with all this stuff, and set up all these mechanisms, and done all this paperwork, and examined your system, if someone comes to your agent and claims somebody has done something unlawful, you are only protected if it happens to be the activity of one of your faculty or graduate students in the act of teaching or doing research. Nothing else is covered. The faculty or grad students' activities must not have involved online access to materials that were required or recommended within the preceding three years for a course taught by the employee at the institution. Now, how are you going to meet that condition? The institution has not received more than two notices of actionable infringement by the faculty or grad student. Of course, if you did get a notice and you could prove that they did something wrong, you could smack them down right away. And then you have to prove you have provided all your users with information material in compliance with the law. How you're going to do that, I don't know.

Effect of Title II on libraries. So, what's the effect on libraries? Well first of all, you had better think twice if you want to qualify as a service provider. And whether you want to be involved with registering, and, even if you do all this, will any of the copyright disputes that come to your institution actually have any direct bearing on the activity of the library or the library's patrons? And finally, the big question asked by most of the attorneys is, why on earth would the burden of all this compliance be of benefit to the limited amount of protection that you would get? Because what they have said is, by registering yourself and putting out this Website and all this other stuff, you're just inviting people to come and see you. I'm sure this isn't what you wanted to hear, but I think if you go back to your institutions and they're talking about this, you need to go back and ask these questions -you need to say why and who and how, and what are we doing this for and why do you think this applies to the library? Because we can do an awful lot of good just protecting ourselves, and we can even state, in many cases, that certain use falls under license agreements anyway. We've got this information provided to us, and we've got it licensed and used correctly.

TITLE IV

Of all the titles, the most disappointing is Title IV, which is the distance education study. And I was one of the folks that testified before the copyright office, and I was really pleased with that report, and it has sat in Congress for over a year now and absolutely nothing has happened, and I suppose they will pull it up and read it sometime this fall because a lot of this stuff was supposed to have been addressed within two years. But, it's like all this good work has gone into this stuff and nothing has ever happened to it. I guess they're much more concerned with politics -campaign contributions, interns, etc. However, the copyright office of the Library of Congress was told that they had to get input about distance education from copyright owners, librarians, and others, and this was done through a series of open forums. As it turned out, many participants in the distance education discussion agreed that we need a specific exemption under the law. The copyright holders, especially the entertainment industry, said we'll make the exceptions and handle it by license; and we said no, we want it exempt under law. We want a basis we can all turn to.

Distance education issues. Need for a new exemption; categories of works to be exempted; quantitative limitations on the portions of works that may be used under the exemption; parties that should be entitled to benefits of exemption; the extent to which TPMs can or should be mandated as a condition of eligibility for any exemptions; the extent to which availability of licenses should be considered.

Effect of these issues on libraries. Libraries need to document current practices and be prepared to respond to legislation; libraries must know the extent to which licensed and unlicensed works are needed for distance education; libraries must have information on who accesses the material and the TPMs in use. Libraries must also remember to argue the following points: Obtaining clearances for spontaneous use in online courses is virtually impossible; identifying copyright owners of certain works is often not worth pursuing; licensing is not an acceptable alternative; price is often far too high to justify use; and, until DMCA studies are complete, libraries have less leverage to negotiate.

What you can do at your institution. What can you do for your institution? Check and see if your institution has policies for distance education students. If you don't have them, then make sure they get done. You should know what your institutional liability is, and you should know what your institutional values are. For instance, when your patrons sign up for access to your site, there should be some kind of document saying they understand that, as patrons, they can't steal this information, etc. Your institution also needs to have some level of control over people to whom you give specific access on their own. When, for example, a patron walks into your library and uses a computer and the electronic materials available via the library network, this situation is analogous to a patron coming into the library and looking at a book. This is okay; the library is okay. If, however, you give someone password access to your network or a particular database, you should make sure that the user is aware of organizational copyright compliance issues associated with using the database.

If the current copyright law doesn't address the situation you are referring to, refer to the existing copyright law that you think addresses the situation you are trying to cover so that if you ever get into trouble, you can say -look, the current law doesn't address this; I didn't know what to do so I went back to the four fair use factors. Whatever your copyright compliance policy is, make sure you communicate it to library users. And make sure you have a list of all your policies and procedures that would prevail if the patron should infringe on copyright. Some possible ramifications of copyright infringement might be: losing access to the Web; being kicked out of school; barring the patron from the library. These consequences carry a lot of weight with copyright holders. Such consequences say: ''Look, once we know about it, if someone is infringing, we'll take action; we'll help you retain your copyrights.'' Again, policies with consequences show good faith effort on the part of the library.

So what else do you need to do? Well, in order to meet distance education requirements and to handle it right now until this law is passed, first of all go to the LC Website and get yourself a copy of that report and read it. It is a good report; it has a lot of good information in it. It gives you some real guidelines that you can use, and I would try to abide by those guidelines for now. For instance,

document your current practices and be prepared to respond to legislation come fall. And if you don't now know what you're doing for distance education, you should find out very soon. You should know what your whole institution is doing, and you should know how access is made, and you should know if any of the library materials (and we all have those electronic journals) are being accessed. Unfortunately, you cannot bury your head in the sand. You need to know how access is controlled, and you need to know how distance education users are defined, so that once the law passes, you can figure out if your users or institution will qualify for the exemption. Prepare yourself.

You need to find out the extent to which both licensed and unlicensed works are used in distance education, because it may be that if 80% of your stuff is licensed, and the law comes out and only addresses unlicensed materials, you will still have a mess to deal with, e.g., the 80% that is licensed. You also need to be prepared to identify what is licensed and what is not licensed, which may not make your faculty happy -after all, the end user doesn't care about licenses, but you're going to be in the position of having to say: ''You can use this, but not that.'' This situation is kind of like the current government documents situation, whereby you can access unlicensed government information, but not the licensed information.

You also need to have information on who accesses the materials and how, and if TPMs are in use on your campus. And again, the whole issue of what is a TPM outside of an IP address or a little black box on a cable TV must be addressed. There are all kinds of TPMs in the works. A good example was described last year at an ALA program. Some of you might have been there to hear this. A fellow got up at one of the programs and said: ''We have this wonderful new product and, basically, if you decide that you want a copy of a journal article, the publisher gives the data to us, and we sell it to the patron. For $5, the patron gets one download and no printing. After the download, we send the patron the paper and we not only put a cookie on her paper, but we can fingerprint her computer. Fingerprinting it means we can figure out the serial number, we can identify the user, what the user's files look like, what kind of network the user is on: we can identify that machine. And once we've done all this, that particular user cannot get access to that work other than at that particular machine. And we can even fix it so that Adobe Acrobat knows not to let the user print the information more than once.'' So if the user is ignorant of all this, and goes home and makes a copy on her machine, she'll never be able to get access to that article at another computer. And if she loses that one copy she has printed, she'll never be able to print it again. And the fellow who made the presentation describing this new product was bragging about this security method and he encouraged librarians and publishers to give his company data because his company could publish it and make sure nobody ever got hold of it illegally. This is scary because that company makes 10 cents a page. They make money doling out information in a controlled manner. And when there is money to be made, you know the industry making the money will advance. It is real scary -that's why it is so important that we get this done.

Problems associated with copyright clearance for online courses. You know these arguments -obtaining clearance for spontaneous use of on-line courses is virtually impossible. If anyone ever asks you, this is what we're arguing before Congress: that even identifying copyright owners of certain works is not worth pursuing. Even if you can identify the owner, half the time the information is wrong or you can't find the person. We argued that licensing is not an acceptable alternative, because the price and the cost of licensing are too high to justify use. Until the DMC studies are complete, we have even less leverage to negotiate because we can't define what fair use is. This is why the distance education report is so very important. One of the only good things to come out of Title IV is that you can now make up to 3 copies of a work in any format, including digital, for the purpose of preservation. You can now make one archival copy, one copy as your master, and one copy called a ''use copy'' or a ''circulating copy.'' The ''use copy'' can be loaned to an individual for use in a course, and that individual can make a copy. Of course, we don't have fair use exemptions in the digital age, but what you have to say to yourself is well, I'm making a reasonable effort to abide by fair use, so it's okay for now.

Copying material from one format to another. Another important concept we communicated

in discussions about distance education is the following: It used to be illegal to copy a work into a new format (remember, you couldn't take a film and put it on video), and this rule applied to digital material. Now, however, if the format becomes obsolete, you can make a copy. This does not mean that the copy itself is obsolete or unusable, it means that if you can prove that the machine is no longer produced or it's no longer repairable, or it is very difficult to get a machine to access the material, you may go out and have the information transferred from one format to another for library use. Ironically enough, this is very generous; the law is being generous regarding rules for preservation and archiving. I think it's because the entertainment industry doesn't necessarily care about preservation copies and archiving.

CONCLUSION

What I wanted to tell you is this. When I talk to all these copyright experts -Kenny Crews, the folks at ALA, Georgia Harper, the experts at Ohio State University, they all give me the same answer, which is that every single copyright situation that comes up is unique; they say, ''It depends.'' I finally asked somebody, why do you attorneys all say this? The response: ''That is how the law works.'' I then ask, ''What are libraries supposed to do?'' Their advice is twofold. First of all, be prepared. Know the law, know what's happening with any materials you're responsible for, know who your users are, and know what's happening on your campus. Once you know all that, make the second step, which is to make all reasonable efforts to comply under the law, as you understand it, so that you can show there was no intent on your part to infringe the copyright law. So that you can show that your intent was, in fact, to abide by the law. You need to show that you tried to follow the law. Showing good faith is important, because under this new law, the criminal liability is horrible; it's up in the hundreds of thousands of dollars, and it includes jail time. Now these penalties are going to have to be tested in court, but if you can show that you kind of knew what was going on in your institution and that you made a good faith effort to abide by the law, it's going to be settled out of court. It's probably not going to be seriously damaging to your institution, but, of course, it depends.

NOTE

1. See: *http://www-ninch.cni.org/ISSUES/COPYRIGHT/PRINCIPLES/NHA_Complete. html National Humanities Alliance Basic Principles For Managing Intellectual Property In The Digital Environment* from NINCH (National Initiative For A Networked Cultural Heritage) homepage.

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