



# Intellectual Property:

*Key Legal Issues in Managing Information  
in the Digital Age*



**A Presentation for the**  
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# Objectives

- I. The broad scope of the law of intellectual property
- II. The basics of copyright law in the digital age
- III. The hot copyright issues in the digital age
- IV. Key issues and resources for digitization projects
- V. News sources for up-to-the-minute developments



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# I. The World of Intellectual Property (IP)



# The World of “Intellectual Property”

- The law that protects all form of intellectual property (IP) and includes:
  - **copyright which is the law of authorship;**
  - **trademarks, service marks & trade dress,**
  - **patents,**
  - **trade secrets,**
  - **proprietary information, and**
  - **right of publicity**

## ... world of ip

### ➤ Copyright law

- *The law of authorship* ... from books, maps and charts in 1790 ... to computer programs and even architectural works today
- **History**
  - **Property:** Abbot Finnian v. Columba, Ireland, 561
  - **Censorship:** Queen Mary and the royal charter to the Company of Stationers, UK, 1556
  - **Monopoly:** the publishing contest late 1600s
  - **Authorial property:** Statute of Anne, 1710

## *... world of ip*

### ➤ Copyright (continued)

- **Today**

- **Immense growth:** “... *in an information or knowledge economy, intellectual property is the ultimate property right.*” (Waldron @C&B)
- **Civil and criminal aspects**
- **WIPO (normalization law)**
- **WTO, GATT and TRIPS (trade law)**



## ... *world of ip*

### ➤ Trademark law

- Relatively new -- 1881 and 1946 Lanham Act
- Includes *trademarks, servicemarks and trade dress* where issues are “distinctiveness” and “confusion”
- Also “genericide”
- Today
  - Federal Trademark Dilution Act that protects famous marks from “blurring” or “tarnishment”
  - Anticybersquatting Consumer Protection Act
  - ICANN and its UDRP

## *... world of ip*

### ➤ Patent law

- **The law of invention**
- **First “Letters Patent” issued in 1449 by Henry IV for new method of making stained glass**
- **First specification: Puckle’s 1718 patent for a machine gun**
- **First improvement and first idea: Watt’s 1796 patent for steam engines**



## ... *world of ip*

### ➤ Patent law (continued)

- Today in the United States:
  - utility, design or plant
  - *“any new and useful process, machine, manufacture, or composition of matter, or any new or useful improvement”*
  - = **novel, non-obvious, useful, concrete product**

## *... world of ip*

### ➤ Patent law (continued):

- Critical issues today:
  - **Expansive, obvious business process patents**
  - **Extension of drug patents with new use claims**
  - **Gene patents with generic use claims**



## *... world of ip*

### ➤ Patent law (continued):

- Critical issues today (continued):
  - **Revisiting old patents and making current business claims (*e.g.*, hyperlinking or JPEG)**
  - **Defensive publishing**
  - **Drugs, drug patents and third world countries**




## *... world of ip*

### ➤ Trade secrets:

- **Any formula, pattern, device or compilation of information used in a business to obtain an advantage over competitors who do not know it.**
- **Most famous trade secret?**
- **But growing risks:**
  - **Internet**
  - **Poorly secured corporate information systems**
  - **On-site contractor employees**
  - **Disgruntled current and former employees**
  - **Competitors**



## *... world of ip*

- 
- **Trade secrets (continued):**
    - **Until recently a patchwork of federal and state laws**
    - **Today, Economic Espionage Act of 1996; requires Trade Secret Protection Program w/three critical elements:**
      - **Identification of information**
      - **Appropriate policies**
      - **Effective physical, personnel and information systems security programs**

## ... *world of ip*

### ➤ Proprietary information:

- **Everything else, even public domain information, that has been compiled at some cost and is used for business purposes**
- **Protections:**
  - **Licenses (*i.e.*, contracts) including shrink-wrap**
  - **Browse-wrap licenses**
  - **Common law (*e.g.*, trespass to chattels or misappropriation)**
  - **Computer Fraud and Abuse Act (or state equivalents)**





## *... world of ip*

### ➤ Proprietary (continued):

- **Example ... could I impose these terms?**
- **Copyrighted;**
- **Also pay 1.00 each time you read this presentation**
- **No fair use**
- **Pay .05 for each word used in each copy**
- **Protect & respect technology protection measures**
- **Must purchase semi-annual update at price to be set at that time or lose access to prior copies.**

## *... world of ip*

### ➤ Right of publicity:

- **Right to commercially exploit one's identity**
- **From Fred Astaire to Elvis, from Vanna to Tiger Woods**
- **Interesting intersection with 1<sup>st</sup> Amendment**
- **Only array of conflicting state laws although Lanham Act claims may also be presented in given cases**





## II. Copyright Law Basics



# Copyright Basics

- Copyright today is the right to keep others from using one's original writing; it includes
  - **Right to reproduce**
  - **Right to display or perform**
  - **Right to sell, market and/or distribute copies**
  - **Right to prepare adaptations or derivative works**
  - **Right to obtain judicial relief**

## ... *basics*

- 
- Copyright protects the specific expression of ideas not ideas or facts *per se*
  - Applicable domestic copyright laws include
    - **Copyright Act of 1976**
    - **Audio Home Recording Act of 1992**
    - **Digital Millennium Copyright Act of 1998**
    - **Sonny Bono Copyright Term Extension Act**
    - **TEACH Act of 2002**

## ... *basics*

### ➤ Basic rules today

- **Original, fixed and some degree of creativity**
- **Automatic upon creation**
  - **1909 law required publication -- and caused great complexity (*e.g.*, MLK family lawsuit)**
- **© notice -- optional but important**
- **© registration – optional but essential to sue**
- **© deposit – required w/3months of publication.**





# Term of Copyright

- *A history of growing terms*, previously 28 years with renewal, now life of author + 70 years (date of publication irrelevant) or 95 years (works for hire);
- Public domain for *published?*
  - Any publication before 1923 with © notice; but no more until 2019;
  - Any publication before March 1989 without © notice (not 1978 since amendments via Berne Convention changed the notice requirement in the 1976 act); and
  - Vast majority of works published 1923 and 1963 even with © notice since not renewed ... but must research to verify

... *term*

➤ Public domain for *unpublished*?

- 1976 Copyright Act changed common law of perpetual protection;
- Works for hire = 120 years
- Personal = life + 70 years
- But nothing before 2003 under explicit provisions of 1976 Act ... *thus 1 January 2003 was grand unveiling!*
  - Works for hire 1882 and earlier
  - Works by authors who died in 1932 or earlier.



... *term*

➤ Free rein thereafter?

- This June, the USSC overruled precedent in *Dastar* holding that unaccredited copying of a work after copyright has expired does not violate Lanham Act;
- As we know, that Act protects consumers from confusion about the “origin” of a product;
- Scalia, for the court said that “origin” in such cases means the source of tangible goods (*i.e.*, the re-packer) and not the creator of a work;
- Caveat: Still possible problems for plagiarism, explicit or implicit.



# Infringement Basics

- Interference with any of the author's five (5) rights;
- CIVIL remedies are available for any act of infringement without regard to:
  - intention or knowledge of the defendant,
  - or harm to the copyright owner;

## ... *infringement*

- Civil remedies can be pursued against a wide scope of entities:
  - the federal government
  - as well as local governmental units;
  - but not state governments since the *Chavez* decision re-established state sovereign immunity;
  - See *Chavez vs. Arte Publico Press, Inc.*, 204 F.3d 601 (5<sup>th</sup> Cir. 2000).



## ... *infringement*

- Civil remedies can also be pursued against *any governmental employee* in their individual capacity;
  - the mere fact that an individual's conduct was undertaken in course of official responsibilities does not affect individual liability;
  - See *Richard Anderson Photography v. Brown*, 852 F.2d 114 (4<sup>th</sup> Cir., 1988).



## ... *infringement*

➤ Civil penalties include:

- injunctions,
- impoundment & destruction of infringing material,
- costs and attorney's fees,
- *actual (i.e., compensatory) damages* to include profits of infringer if more than actual damages,

➤ *or*

## ... *infringement*

- ***statutory damages*** – an alternative form of recovery (since actual may be difficult to prove) -- specified in three categories for each single infringement of a single work:
  - **normal with damages from \$750 to \$30,000;**
  - **willful with damages increasing to \$150,000;**  
**and**
  - **innocent with court allowed to reduce damages to an amount not less than \$200.**



## ... *infringement*

- An important note on statutory damages for non-profit educational institution, library or archives:
  - if “innocent infringer” under 504(c)(2),
  - if acting under belief and with reasonable grounds that actions within scope of fair use,
  - then court shall remit statutory damages.
- But, it is a defense ... to be asserted ... although proof of lack of good faith is with plaintiff ... and actual damages still possible.

## *... infringement*

### ➤ Criminal remedy also available:

- **where copying is intentional,**
- **with full knowledge of the fact of infringement,**
- **and the amount of commercial advantage or personal financial gain is large.**

### ➤ Penalties:

- **up to 5 years in prison and a fine of \$250,000;**
- **repeat offenders can receive up to 10 years.**







# Proving Infringement

## ➤ DIRECT

- **Strict liability tort -- liable regardless of intent, even unconscious or innocent copying;**
- **Since direct evidence of copying may not be available, circumstantial evidence can be used – showing “access” and “substantial similarity”**
- **But must be proved against specific defendants and for specific acts;**
- **Thus theory not fully viable in uncontrolled settings (e.g., library or the Internet);**

... *proving*

➤ CONTRIBUTORY

- Liability of others, predicated on actions of the direct infringer, for acts that make them accountable in part for the infringement;
- Found generally *where a party induces or contributes to the direct infringement* knowing or having reason to know that the information was copyrighted and that the direct acts were in violation of copyright interests;
- Thus behavior and intent are determinative factors.

*... proving*

➤ **NOTE:**

- *Direct and contributory infringement are the heart of the Napster and MP3 litigation – nothing esoteric ... just basic copyright law (as we shall see in more detail).*



... *proving*

➤ VICARIOUS

- Like contributory in making others liable;
- But based on *supervisory responsibility for infringer or infringing activity* and a direct financial interest in such activities;
- Thus relationship with the direct infringer is determinative factor.



# §107 Fair Use

- The representative categories or purposes:
  - criticism,
  - comment,
  - news reporting,
  - teaching (including multiple copies for classroom use),
  - scholarship, or
  - research.



... *fair use*

➤ *The test:*

- The purpose and character of the use (*e.g.*, commercial or not-for-profit);
- The nature of the copyrighted work (*i.e.*, how factual vs. how creative);
- The amount and substantiality of the portion used in relation to the work as a whole; and
- The effect of use on the potential market or value of the copyrighted work.



## ... *fair use*

- Remember that fair use decisions (especially *Texaco*) stand for the proposition that routing of journals and other copyrighted materials to employees and subsequent copying of articles by individual employees is NOT fair use;
- And would be an equal problem if done by the library in light of Section 108



## ... *fair use guidelines*

- Circular 21 by USCO including 1976 House Report approval of negotiated “*Guidelines for Educational Fair Use*”
  - *Single copy for teachers*
    - A chapter, a article, a short story or short work,
    - A graph, drawing, cartoon or picture from book, periodical or newspaper.





## ... *fair use guidelines*

- “Guidelines for Educational Fair Use” (cont):
  - *Multiple copies for classroom (1 per student):*
    - **Brevity:** complete item if less than 2,500 words or extract of 1,000 words / 10%
    - **Spontaneity:** to close in time to require permission
    - **Cumulative impact:** not more than 9 requests per course (does not include current news) and not repeated terms;
    - **No consumables;**
    - **Notice of copyright.**



## ... *fair use guidelines*

### ➤ *ALA Model Policy for educational fair use:*

- Developed in 1982 to provide university-level input;
- First part addresses *classroom*
  - Generally follow standard guidelines but these are minimum standards and not realistic in university setting
  - Supports individualized fair use analysis
  - Examples include substantial portions or even entire works if other copies not available or for personal research.



## ... *fair use guidelines*

➤ ALA Model Policy (continued):

- Second part addresses *library reserve guidelines*
  - One copy of entire article, entire chapter or entire poem;
  - If multiple copies:
    - must be reasonable in terms of substantiality, difficulty and number of students;
    - must not have detrimental impact on market;
    - generally less than six but tempered by general classroom rights.



## ... *fair use guidelines*

- **Kastenmeier Guidelines for *Off-Air Taping for Educational Purposes***
  - **1979 and published in Congressional Record;**
  - **Non-profit educational institutions for use in classroom settings;**
  - **Must develop implementing procedures;**
  - **Only at specific request, not in anticipation;**
  - **Viewed only once by each class within 10 days of broadcast and destroyed within 45 days.**



## ... *fair use guidelines*

- 1996 CONFU guidelines for *electronic reserve systems (ERS)*:
  - **Commission on New Fair Uses of Copyrighted Works**
  - **May include:**
    - short items (e.g., journal article or book chapter);
    - excerpts from longer items deemed to constitute a substantial portion of work;
  - **Must lawfully possess original;**
  - **Total amount of material in ERS for specific course should be a small proportion of the total assigned reading for a particular course;**



## *... fair use guidelines*

- **Must have copyright notices and attribution;**
- **ERS must be structured to limit access to students registered in the course;**
- **ERS must not charge for access;**
- **Permission required if item is to be reused in a subsequent academic term for the same course offered by the same instructor;**
- **No retention beyond three calendar years, including the year in which the materials are last used;**



## ... *fair use guidelines*

- 1996 CCUMC guidelines for *educational multimedia use*
  - Consortium of College & University Media Centers
  - Never widely endorsed; some institutions follow
  - Applies to educators for curriculum-based instruction, conferences or portfolios
  - Applies to students also for courses and portfolios
  - Must include technological restraints on access and further copying (if copying not prevented, only 15 days online)
  - Only 2 years from first use



## *... fair use guidelines*

- **Specific limitations (all lesser):**
  - **10% or 3 minutes of motion video;**
  - **10% or 1000 words of textual material;**
  - **10% or 30 seconds of music and lyrics;**
  - **10% or 2500 fields of a database;**
  - **5 images by an artist or photographer**
  - **10% or 15 images from a collective work**
- **Copy details:**
  - **No more than 3 copies including 1 preservation**
  - **Must have attribution, acknowledgement and notice of copyright.**





## *... fair use in sum*


- The primary issue with fair use authority:
  - **It is subjective, case-by-case, and not ultimately decided until a lawsuit is brought and decided**
- Also note that there is often a hierarchy of analysis:
  - **Is it public domain by date?**
  - **Was the copyright transferred?**
  - **Do we have or can we secure permission?**
  - **Can we argue fair use?**



# §108 for Libraries

- The authority that allows limited copying by libraries for research, inter-library lending (ILL), or preservation;
  - **Co-exists with and is separate authority from 107;**
  - **Library must be open to public or specialized researchers (although ILL agreement will suffice).**
  - **Copies must be made without any purpose of “direct or indirect commercial advantage”**
    - **Despite language, legislative history suggests corporate library could qualify;**
    - **Thus only direct costs for copies.**

# §108


- 
- For direct patron request or ILL:
    - **Limited scope -- one article or small part of work under 108(d) ... whole work only if copy can not be obtained at fair price under 108(e);**
    - **Copies must become the property of the requestor (*i.e.*, library may not add it to the collection),**
    - **Library must include copyright notice on copy and *copyright rules on order forms*,**
    - **Requester should certify that order is compliant with copyright law and CONTU guidelines;**

# §108


## ➤ The legally required notices:

- A “**Display Warning of Copyright**” is the sign to be posted where orders for copies are accepted by libraries and archives;
- A “**Order Warning of Copyright**” is the same language required on order blanks;
- **Size and other details at p.20 of USCO Circular 21;**
- **Also must preserve copyright information on completed copies;**

## §108

- 
- **“WARNING CONCERNING COPYRIGHT RESTRICTIONS:** The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material. Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement. This institution reserves the right to refuse to accept a copying order, if, in its judgment, fulfillment of the order would involve violation of copyright law.”

# §108


- 
- NOTE that if the photocopy machine is self-service (unsupervised) there is no official language;
  - Suggested language by the ALA and others:
    - **“NOTICE: The copyright law of the United States (Title 17, United States Code) governs the making of photocopies of copyrighted material. The person using this equipment is liable for any infringement.”**

# §108

## ➤ Patron or ILL (continued):

- Receiving (and thus servicing) library should maintain records of request for three years;
- NOTE that law is silent as to whether it can be digital copy for such requests;
  - **Some institutions do so, others do not;**
  - **In any event, license agreements may well speak to this issue;**

# §108

- 
- But under Section 108(g):
    - **MUST NOT** engage in systematic reproduction of same material especially to extent it would be deemed a substitute for additional purchases or subscriptions;
    - The National Commission on New Technological Uses of Copyrighted Works ("CONTU") has negotiated guidelines for such copying on annual basis:
    - Periodicals less than 5 years old: no more than 5 copies of material from any given periodical (not given issue); older periodicals: no guidance;
    - Other than periodicals: no more than 5 copies of or from any given work.



# §108

## ➤ Patron or ILL (continued):

- **But in the electronic library age, these guidelines fail and national groups have been unable to resolve;**
- **The problem is that the owner expects royalties on each and every copy made;**
- **And Section 108(f) (4) states that nothing here affects any contractual obligations *"assumed at any time by the library or archives when it obtained a copy or phonorecord in its collection."***
- **Can we contract away our rights? Those of our patrons who are not a party? Hence the importance of understanding and negotiating contract terms.**

# §108

## ➤ Patron or ILL (continued):

- Also, under 108(f)(3), may make limited copies of television news programs;
  - Includes most forms of newscasts but not news-magazines and documentaries (*e.g.*, 60 minutes);
  - And unlike previous sections, law does not mandate that copy belongs to the patron, thus library can retain and lend;
- But under 108(i), no authority to copy any musical, pictorial, graphic, sculptural or audiovisual works; in such cases, perhaps, fair use authority?

# §108

➤ With respect to preservation:

- The 1976 law required substantial updating that had allowed for only 1 facsimile copy for “brittle works”
- Now, with DMCA changes to 108(b) & 108(c):
  - **Three copies -- one archival, one master, and one use copy to make other allowable copies;**
  - **Definition of “brittle” expanded to “obsolete”**
  - **Copies may be digital**

# §108

## ➤ Preservation (continued):

- **Specific rules for UNPUBLISHED:**
  - **For preservation, security, loan/deposit elsewhere**
  - **Provided item in current collection.**
- **Specific rules for PUBLISHED:**
  - **For damaged, deteriorating, lost, stolen or obsolete**
  - **Provided item is or was in collection**
  - **Provided further unused replacement is not available at fair price after reasonable effort ... but critical to document.**

# §108

## ➤ Preservation (continued):

- **IF DIGITAL COPIES MADE, can not be made available to the public outside the premises of the library or archive**
- **Also note no limits as to types of material;**
- **Also note that these provisions do not allow the resulting digital copies to be posted to the Internet.**

## ➤ Other 108 provisions:

- **Last 20 year rule? Difficult to use.**







# Copyright and Video

- § 106 reserves to the copyright holder the right to publicly perform and display a video;
- While § 109 grants right to the legal owner of a copy to *distribute the physical copy* it does not authorize any *public display*
  - thus libraries may loan *but not show* videos in a public setting ... whether for a fee or for free ... and irrespective of nature of group
  - thus license terms control and “for home use only” means what it says

*... video*

- 
- § 110 provides a “classroom” exception
    - **Legal copy**
    - **Part of instructional program by non-profit**
    - **Face to face in classroom or equivalent**
    - **Shown to students**
    - **Part of educational effort and not mere entertainment or recreation**

... *video*

- 
- Could a library qualify for the classroom educational exception?
    - **Yes if part of “educational effort” that might be characterized by registration and legitimate, stated purpose**
  - Otherwise must secure public display rights
    - **[www.mplc.com](http://www.mplc.com)**
    - **[www.movlic.com](http://www.movlic.com)**





# Copyright & TEACH Act

- TEACH Act is major expansion to 110(2) that controls distance education
  - from prior very restrictive statute rooted in CCTV context
- Parallels the 110(1) classroom concept but with numerous conditions, limits and restrictions:

*... teach act*

➤ **TEACH Terms:**

- **Allows display of most types of works (primary exceptions are commercially-available educational materials and illegal copies)**
- **Allows reach to any location**
- **Allows reasonable storage of transmitted content**
- **Allows digitization of analog works if not available in digital form**



## *... teach act*

### ➤ But if and only if:

- **Utilized by Government body or accredited nonprofit educational institution**
- **For enrolled students**
- **In the context of mediated, instructional activities**
- **Must institute corporate copyright policy**
- **Must preserve and communicate copyright information ... and reasonably prevent copying ... especially vis-à-vis students**



## *... teach act*

### ➤ Relationship to libraries:

- **Developing copyright policy**
- **Preparing or assisting in production of distance education efforts**
- **Locating materials, converting format, negotiating licenses**
- **Providing alternative access to content that can not be included in distance education modules**





### **III.**


# **Hot Copyright Issues in the Digital Age**



# Overview

- In essence, the digital environment has not changed the law, it has simply made infringement ever so easy;
- The major change is the DMCA:
  - **Has given legal protection to TPMs – technological protection measures**
  - **Concomitantly changed “fair use” standards for electronic materials**
  - **Required OSPs to adopt policies to prevent and take prompt action upon notice of infringement**

## *... overview*

- 
- Although the intent of the DMCA was forward-looking:
    - **to promote electronic commerce in digital copyrighted works, and**
    - **to prevent technological attacks that would enable infringing commercial duplication and distribution**
  - We feared that the DMCA would re-write our established copyright privileges;
    - **And this is correct to a substantial degree as we have seen and shall see ...**


## ... overview

- But the truth is that business forces are using the DMCA and technology, independently and together, in unexpected ways –
  - not to prevent piracy of copyrighted works,
  - but instead to protect their market for copyrighted and non-copyrighted goods,
  - including both information and physical consumables;





## *... overview*

- 
- As members of the educational community – and citizens – this has profound legal and policy implications:
    - **Will fair use simply disappear as a result of technology?**
      - **or will consumers demand their rights?**
    - **Will the DMCA create vertical monopolies?**
      - **or will the courts find copyright misuse?**
    - **Or will we find legislative relief?**

## *... overview*

➤ We'll consider briefly:

- **Basic copyright cases in the digital age**
- **DMCA cases to date**
- **Developing DMCA law (e.g., Lexmark)**
- **Developing law outside DMCA (state super-DMCA)**
- **Developing technology that impacts fair use**
- **Other battlegrounds (e.g., licensing, jurisdiction, UCITA and pending legislation)**
- **Implications for library & educational community.**



# Basic Copyright in E-Age

- Electronic re-publication: the *Tasini vs. NY Times and Lexis* litigation
  - Greatly watched by the copyright community and decided in favor of authors by the Supreme Court
  - But ephemeral victory with new contacts but loss of some material

lexis.com®

## ... *basics in e-age*

- *Electronic copying is simply traditional infringement with a new tool;*
- The *Napster* litigation
  - **Cyberspace does not change traditional law**
- And now *Morpheus (et al)*, true P2P, no central index, Sony Betamax defense





## *... basics in e-age*

- **On 25 April 2003, a surprise ruling in favor of Grokster and StreamCast Networks (distributor of Morpheus);**
  - **Decision on Sharman Networks (Kazaa) pending;**
- **Finding no direct, contributory or vicarious liability based on lack of control and valid non-infringing uses;**
- **Relying on the 1984 U.S. Supreme Court decision involving Sony Betamax;**



## ... *basics in e-age*

- Although Court noted that it is not “*blind to the possibility that Defendants may have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefiting financially from the illicit draw of their wares.*”
- Rather, “*additional legislative guidance may be well-counseled.*”
- RIAA has promised appeal: “*Businesses that intentionally facilitate massive piracy should not be able to evade responsibility for their actions.*”
- Note this a final judgment not an injunction and doubtful that Court of Appeals will reverse.

# The DMCA (Act I)

- New law preventing the *circumvention of TPMs*
- The *Reimerdes* litigation (aka the deCSS case)
  - Preventing cyber crime or the demise of fair use and the 1<sup>st</sup> Amendment?
  - Affirmed on appeal by US Court of Appeals;
  - State litigation continues




# The DMCA (Act II)

- *Obligation of service providers under the DMCA to prevent infringement;*
  - Register, policy, proactive and reactive steps for immunity;
- By way of example, this fall the Naval Academy seized computers from nearly 100 midshipmen;
  - RIAA confirmed it was their demand, estimating more than 2.6 billion music files are downloaded illegally each month;





## ... *dmca (act II)*

- 
- But what is required before the MPAA or RIAA serves notice?
    - **Very little according to recent decision in *MPAA vs. InternetMovies.com* in Hawaii;**
    - **Holding that the DMCA requires no investigation before asserting a take-down notice;**
    - **And the DMCA immunities provisions will preclude a suit against ISP and company making claim – even if claim is unresearched and/or inaccurate.**



# The DMCA (Act III)

- The DMCA special *subpoena authority* under § 512(h) to move against *individual users*;
- The not-so-surprising case of *RIAA v. Verizon*;
  - non-litigation blank subpoenas to get subscriber information (allegedly violating copyright);
  - no showing, no judicial review, no contest;
  - constitutional violation of individual rights?

## ... *dmca (act III)*

- The first loss on 22 January 2003:
  - Court rejected Verizon's statutory challenges to the RIAA subpoena;
  - More specifically, Verizon claimed that because RIAA's subpoena related to material transmitted over Verizon's network -- rather than stored on it -- it fell outside the scope of the subpoena power authorized by § 512(h).
  - *In re: Verizon Internet Services, Inc., Subpoena Enforcement Matter*, 240 F.Supp. 2d 24 (D.D.C.).





... *dmca (act III)*

- The second loss on 24 April:
  - **In this substantially similar action, the court also rejected Verizon's constitutional claims;**
  - **More specifically, Verizon argued that the subpoena power violates:**
    - **Article III of the Constitution because it authorizes federal courts to issue binding process in the absence of a pending case or controversy,**
    - **as well as the First Amendment rights of Internet users.**



... *dmca (act III)*

- On 3 June, the D.C. Circuit refused a stay and Verizon will turn over names;
  - **However, the substantive appeal will be heard in September;**
  - **And there is expected legislation that may change the law to require the filing of actual cases;**
  - **In the meantime, expect to see a flurry of actions against individual users.**

# The DMCA (Act IV)

- The criminal aspects of the DMCA and the prosecution of the Russian programmers
  - **First the arrest of Dmitry Sklyarov,**
  - **Then the prosecution of Elcomsoft**
- Verdict of “not guilty” in December
  - **A case of jury nullification?**
  - **Or simply failure to prove “willful” given small sales and prompt retraction?**



# The Developing DMCA

➤ *Lexmark v. Static Control* (E.D. Ky.):

- Defendant sells chip that permits aftermarket cartridges to work in Lexmark printers
- DMCA lawsuit alleging circumvention of TPMs that control access to copyrighted Lexmark software
  - Note that pre-DMCA cases allowed the copying of code to permit interoperability (Sony v. Connectix)
- Initial TRO, extended 1 March until trial;



## *... developing DMCA*

### ➤ **Lexmark (continued):**

- **Asserted defenses:**
  - **Allowed reverse engineering**
  - **Copyright misuse (no valid underlying copyright)**
  - **Invalid shrink-wrap license**  
**(Jazz Photo v. U.S. ITC, 264 F.3d 1094)**
  - **Anti-trust and unfair trade practices counter-suit**  
**in M.D.N.C.**



## *... developing DMCA*

### ➤ Lexmark (continued):

- Also submission to Library of Congress for DMCA exemption under current rule-making proceeding;
- Also related state litigation in California charging unfair competition (Az. Cartridge Re-mfrg. Assoc. v. Lexmark)
- Immense commercial implications
- [www.eff.org](http://www.eff.org) best website to track this and related issues

## *... developing DMCA*

### ➤ Rep. Boucher:

- **This case illustrates the DMCA's shortcomings and potential for abuse that "thwarts competition"**

### ➤ European Union solution:

- **Directive prohibits sale of any electronic product that employs Lexmark-type "killer chips"**

### ➤ U.S. solutions?

- **Several critical bills pending in Congress would address this problem.**





# Outside the DMCA

- We must also be cognizant of state-level legislation outside of DMCA that will impose substantial limitations on our fair use rights as well as current Internet activities;
  - **The so-called super-DMCA laws;**
  - **Model legislation being pushed by MPAA to amend statutes aimed at cable theft to include any receipt and use of broadcasts except as expressly allowed by the provider;**



## *... outside dmca*

- The law declares it illegal to *"deliver, offer to deliver, or advertise an unlawful telecommunications access device" while "knowing or having reason to know that the devices are intended to . . . receive . . . decrypt, transmit, retransmit, acquire, intercept any telecommunications service without the express authority or actual consent of the telecommunications service provider."*
- **An additional problem: the sweeping language criminalizes a wide range of ordinary Internet activity including the concealment of the place of origin or destination of any communication.**



## *... outside dmca*

- **The MPAA is offering revisions (to require some specific intent for criminal liability) but still significant problems (e.g., no DMCA-like immunities and no limitations on civil actions);**
- **Versions have passed in some states (i.e., Delaware, Illinois, Maryland, Michigan, Oregon, Pennsylvania, Virginia and Wyoming);**
- **Pending in a number of other states (e.g., Florida, Mass., and Texas)**
- **Vetoed in May in Colorado;**
- **See [www.eff.org](http://www.eff.org) and [www.freedom-to-tinker.com](http://www.freedom-to-tinker.com).**



# Developing Technology

- Digital Rights Management (DRM) and the future of video and digital television;
- Multiple layers:
  - **content formats and software players (open or proprietary)**
  - **enabled hardware (to work with embedded controls in the content format or only with certain other equipment)**
  - **hardware connectors**

## *... developing tech*

### ➤ Some format developments:

- MPEG-4 :
  - **working toward final specs for encryption and authentication to combat piracy and permit digital distribution (both streaming and download);**
  - **to be called MPEG-4 IPMP (intellectual property management protections);**
- Competition is MS Windows Media 9 but with platform and version compatibility problems
- and of course Real Networks.



## *... developing tech*

- 
- Some comprehensive solutions for digital video that are poised to re-shape traditional uses and rights:
    - **Digital Transmission Content Protection (DTCP)**
    - **High Definition Multimedia Interface (HDMI)**
    - **Note the early days of digital television with analog connectors are largely gone!**





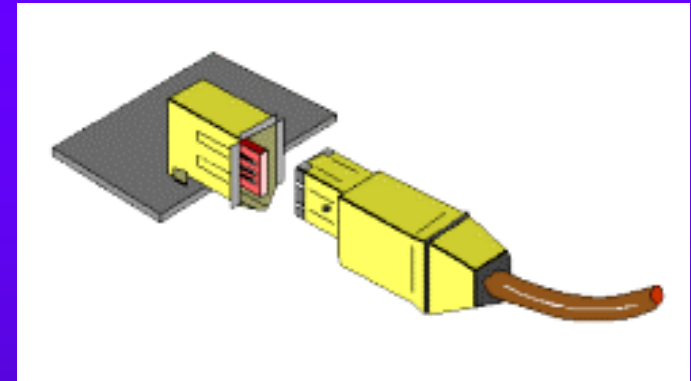
## *... developing tech*

- **Digital Transmission Content Protection (DTCP)**
  - **Based on MPEG-2, would use broadcast flags, encryption, enabled hardware and IEEE 1394 (firewire) connections**
  - **Program-specific flags would define rights:**
    - **Authority to copy (*e.g.*, freely, once or never)**
    - **allowed media and equipment (*e.g.*, no to DVD-R but yes to certain PVRs);**
    - **and allowed resolution;**

## *... developing tech*

### ➤ DTCP (continued):

- **Some implications:**
  - **current analog outputs would disappear;**
  - **current DTVs would work (simply not see flag);**
  - **but new recorded content would not play on current DVD players;**
  - **and new DVD units would not work with current DTVs.**



## *... developing tech*

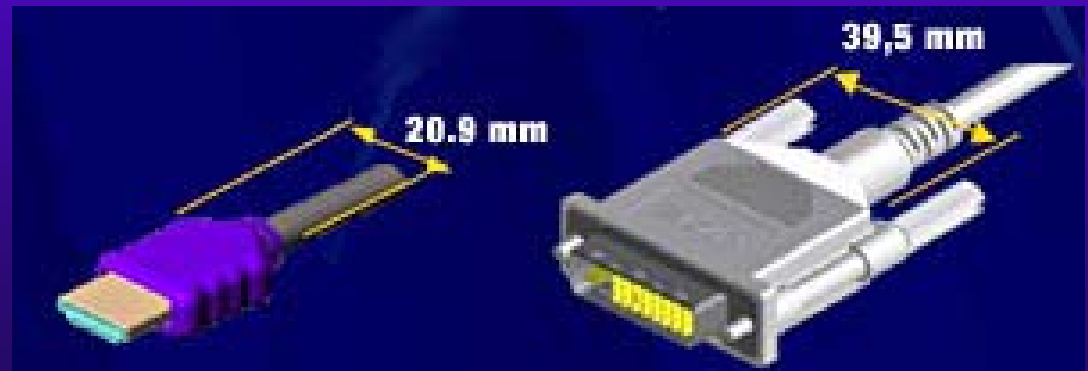
- High Definition Multimedia Interface (HDMI)
  - Builds on the current Digital Video Interface (DVI) connectors (18 pin “D” ⇒ USB-like);
  - Like current DVI and unlike firewire solution, would move uncompressed signals;
  - And incorporates High Bandwidth Digital Content Protection (HBDC) by JVC/Intel to prevent copying via encryption and hardware authentication protocol on all equipment;



## *... developing tech*

### ➤ HDMI (continued):

- Could also eliminate analog connections
- Implications:
  - No copying thus no PVRs, for example;
  - Absolute ability to control allowed equipment.





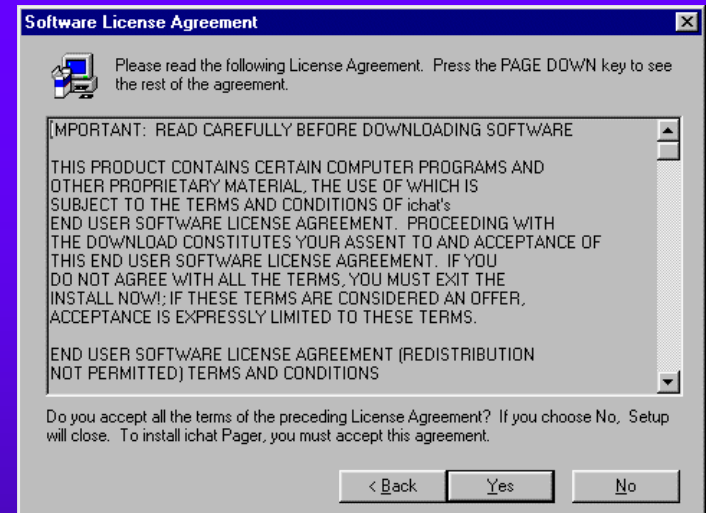
## *... developing tech*

- But note digital satellite TV employs different, settled scheme:
  - **Encryption**
  - **Analog-only output**
  - **Macrovision copy protection to prevent DVD or VCR reproduction as desired;**
- And cable remains a mess:
  - **no rush to digital HD and uses encrypted signal requiring proprietary converter box (despite 1996 federal law requiring open standard)**

# Licensing

## ➤ Licensing

- Practice and case law are developing that license terms can over-ride copyright law;
- *Jurisline v. Reed Elsevier* (2000) where David Boies lost in his argument that there was an “invalid copyright by contract scheme”



## ... *licensing*

- The more recent “sweeping language” in the Federal Circuit that statutorily-allowed reverse engineering can violate shrink-wrap license
  - **See, *Bowers v. Baystate Technologies, Inc.*, which was re-heard by the panel and re-decided, 2003 U.S.App.LEXIS 1423 (29 January 2003);**
  - **Holding that Copyright Act does not preempt contractual shrink-wrap license terms prohibiting reverse engineering and thus the contract claim survives;**



## *... licensing*

- **The court noted explicitly that their decision did not conflict with Atari, 975 F.2d 832 (Fed. Cir., 1992), a copyright case that recognized a fair use right to reverse engineer – in that case there was no added contract claim.**

- **Also note the trend toward browse-wrap licenses;**
  - **See, e.g., the web site of the Central Pacific Railroad Photographic History Museum requiring all waiver of fair use rights;**
  - **<http://cpr.org/Museum/legal.html>**




## ... *licensing*

- **And the January 2003 decision of the 1<sup>st</sup> Circuit in *EF Cultural Travel v. Zefar and Explorica*:**
  - **holding in context of CFAA that lack of authorization could be either explicit or implicit as expressed on a website;**
  - **aka “browse-wrap licenses”**
- **Both of these cases have immense implications for all information users since they are independent of traditional copyright and DMCA.**

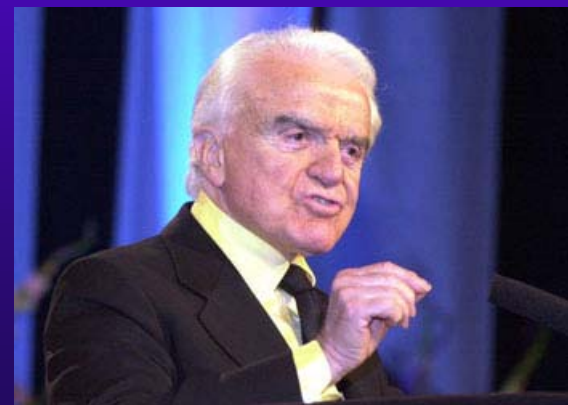


## ... *licensing*

- 
- Licensing issues also have great relevance to libraries today in the context of digital reference:
    - **Pushing web pages**
    - **Scanning and forwarding print content**
    - **Sending licensed database content including articles;**
  - Many licenses silent on digital reference but usually define scope of authorized users by physical location or group membership;
    - **Thus authentication of users typically important element.**

# Jurisdiction Battles in General

- *Jurisdiction* – the newest battleground
- The case of *MPAA v. Pavlovich*;
  - On 25 November 2002, California Supreme Court held Indiana student who republished deCSS could not be sued there simply given "general effects" in that state;
  - Extremely significant issue given Internet is a global entity with often competing laws and policies



## ... *jurisdiction*

- And also *Young v. New Haven Advocate* – the latest in libel and jurisdiction;
  - On 3 January 2003, the 4<sup>th</sup> Circuit held for a CT newspaper and against a Virginia prison warden;
  - Something more than posting and accessibility is needed;
  - The newspapers must, through their postings, manifest an intent to target and focus on Virginia readers.



# UCITA

➤ Basically, an enforcement mechanism for draconian licensing terms:

- **Passed in Maryland and Virginia;**
- **Generally feared to be unstoppable elsewhere but despite recent proposed amendments there is lost momentum everywhere (except D.C.);**
- **And “bomb shelter” legislation has passed in 4 states (Iowa, North Carolina, West Virginia and Vermont) and is pending in Massachusetts:**
- **Would invalidate “choice of law” provisions in contracts that would apply UCITA.**





# Database Legislation

- Although deleted from final version of DMCA, database legislation re-emerged in two bills in 106<sup>th</sup> Congress:
  - **HR 354 – Collections of Information Antipiracy Act**
    - **Assumed most uses of databases are illegal (without pay per view) with vague exceptions unlikely to be met;**
    - **Provided perpetual term of protection for dynamic databases;**



## *... database legislation*

- **H.R. 354 (continued):**
  - **Radical departure from 200 years of law and policy which protects expression not basic facts;**
  - **Education and research would be hampered because publishers could and would control the use of basic factual information;**
  - **Moreover, consolidations in publishing industry would effectively create monopoly control over broad amounts of information.**



## *... database legislation*

- **HR 1858 – Consumer and Investor Access to Information Act**
  - **An alternative, introduced by Rep. Bliley (R-VA) and supported by most library and educational organizations;**
  - **the bill balances the interest of database producers and the community of users of basic factual information necessary for political and economic growth -- the focus of the bill is “direct competition” not mere use of facts;**





## *... database legislation*

➤ Most recently:

- **Rep. Billy Tauzin (R-LA), House Energy and Commerce Chairman, and Rep. Jim Sensenbrenner (R-WI), House Judiciary Committee Chairman, announced continued work to bring a new database bill to the floor;**
- **Deadline of 15 April 2003 has passed;**
- **But potential for legislation remains real.**

# Implications for Public and Library Community

- Will the DMCA become a tool for business monopoly – “susceptible to widespread abuse across a plethora of industries”?
  - **For example, one doesn't need the complexity of the chip in Lexmark – cheap and ubiquitous RFIDs could accomplish same goal;**



## *... implications*

- And even if the innovative use of DMCA is halted, will licensing agreements and technology achieve the same end?
  - **Today, reverse engineering achieves interoperability and healthy competition;**
  - **Tomorrow that may be problematical as we have considered.**





## ... *implications*

- Importance of pending legislation:
- New 108<sup>th</sup> Congress digital fair-use bills
  - ***H.R. 107 - Digital Media Consumers Rights Act (Boucher (D., VA))***: would require consumer notice of TPMs and permit circumvention for consumer fair use;
  - **Section by section analysis at [www.house.gov/boucher/docs/dmcrasec.htm](http://www.house.gov/boucher/docs/dmcrasec.htm)**

## ... *implications*

- ***H.R. 1066 – The BALANCE Act (Zofgren (D., Ca.):*** would permit consumers to make legal backup copies of digital materials, restrict shrink-wrap license terms, explicitly allow format shifting, and permit circumvention of TPMs for fair use.

### ➤ 107<sup>th</sup> Holdovers:

- ***S. 2048 - Consumer Broadband and Digital Television Act (Hollings (D., SC):*** would require computer and consumer-electronics companies to build copyright-protection technology into their products.



# IV. Digitizing Issues



# What about Digitizing?

- Few issues more misunderstood or drive more inertia
- Remember, objective is patron service and libraries and archives must adapt to new environment – styles and norms of usage;
- Issues include legal, technical and resource
- Consider risk willing to assume
- Consider volunteer services as means to address most significant issue -- resources

## *... digitizing*

➤ **Examples of good work:**

- **Maryland State Archives ... excellent image collection cataloguing and presentation of images**
- **Enoch Pratt Free Library, Baltimore ... digital exhibits including “Guidelines and Disclaimer”**
- **Central Pacific Railroad Photographic History Museum**





*... digitizing*

➤ Range of control over materials:

- **Government, thus no copyright,**
- **Copyright expired,**
- **Copyright but fair use**
- **Deed of gift restrictions irrespective of copyright**
- **Proprietary to institution as revenue or advertising source.**



## *... digitizing*

### ➤ Approaches include

- **Text indices**
- **Text indices with thumbnails**
- **Text indices, thumbnails, full size with download and print disabled**
- **Text, thumbnails, full size, with warnings against use in violation of copyright law or deed of gift.**





# Legal Issues for Published

- If not pre-1923 or pre-1978 with no © notice, must research to determine status of 1923-1963;
- Research tools
  - **USCO Circular 22**
  - **Digital version (image not database) of the USCO Catalog of Copyright Entries at <http://digital.library.upenn.edu/books/cce/>**
- How far to push the “fair use” envelope?
  - **See, e.g., *Kelly v. Arriba Soft*, 280 F.3d 934 (9<sup>th</sup> Cir., 2002), petition for rehearing pending.**



# Legal Issues for Unpublished

- Deed of gift (or sale) also explicitly transferred the copyright
- Or deed of gift prior to 1978 with implied transfer pursuant to the *Pushman* doctrine;
- Permission
- Section 108 authority for preservation; but does not extend to Web posting
- Fair use



# Further Ideas

➤ **Library Digitization Projects and Copyright by Mary Minnow**

- <http://www.llrx.com/features/digitization.htm>

➤ **Copyright Issues Relevant to the Creation of a Digital Archive, Council on Library & Information Resources (CLIR) and Library of Congress:**

- <http://www.clir.org/pubs/reports/pub112/pub112.pdf>



## *... further ideas*

- The New York Public Library's Digital History Projects: Planning Digital Projects for Historical Collections
  - <http://digital.nypl.org/brochure/>
  
- Building Digital Collections: Technical Information and Background Papers; Library of Congress
  - <http://memory.loc.gov/ammem/ftpfiles.html>

## *... further ideas*

- **Handbook for Digital Projects: A Management Tool for Preservation and Access (Andover, National Document Conversion Center, 2000)**
  - <http://www.nedcc.org/digital/dighome.htm>
  
- **Guides to Digitizing Image and Text Collections; Harvard University Library**
  - <http://preserve.harvard.edu/bibliographies/imagescanning.html>
  - <http://preserve.harvard.edu/bibliographies/textconversion.html>



# Case Study 1

- National Trust for Historic Preservation's building postcard collection transferred to University of Maryland;
  - From Arizona mining towns to Coney Island at night;
  - Little use now; Web environment would present dramatic change





## ... *study 1*

### ➤ Legal issues include:

- **Physical ownership of original media (e.g., deed of gift issues)**
- **Copyright of original media (1923 is key date);**
- **Copyright of Web environment (i.e., compilation)**
- **Conditions and Terms of Use – ranging from deed of gift restrictions to interests of current institution in preserving their rights and financial interests.**



## Study 2

- A genealogical Web site with wide variety of materials and legal issues:
  - **Digitization of copyright-expired books/articles acceptable; otherwise license/consent required;**
  - **Factual extraction from copyrighted materials acceptable (*e.g.*, distinguish death notice vs. obituary);**
  - **Republication of other privately posted information is problematical regardless of copyright notice; may turn on implied license arguments; framing may present same issues;**

## *... study 2*

- **Linking generally acceptable;**
- **“Your right to copyright may vary” – some originality required, “sweat of brow” irrelevant;**
- **Consider the following:**
  - **Pedigree Chart ... just facts arranged by commercial software?**
  - **Descriptive Narrative Pedigree ... copyright the specific expression but embedded facts enjoy no protection?**
  - **Manual or electronic digitization of copyright expired book ... sweat of brow earns something?**
  - **Interpreted Handwritten Public Record ... originality in decoding the obscure?**
  - **1920 Census Records ... a license problem if secured from commercial source?**



# V. News and Information Sources to Follow

# Key News Sources

➤ [www.LAW.com](http://www.LAW.com)

- daily e-mail



➤ [ecommercecenter.bna.com](http://ecommercecenter.bna.com)

- daily e-mail on Internet law and news

➤ [www.steptoec.com/WebDoc.nsf/LawNet-Main/Main](http://www.steptoec.com/WebDoc.nsf/LawNet-Main/Main)

- weekly E-Commerce News by noted law firm

## *... key news*

➤ [www.ALA.org](http://www.ALA.org)

- newsletter available Monday



➤ [www.NYTIMES.com](http://www.NYTIMES.com)

- Thursday “Circuits” and Friday “Cyberlaw” segments

➤ [www.librarylaw.com](http://www.librarylaw.com)

- No glitz, just imminently navigable and perhaps best single resource for legal information for librarians

## *... key news*

➤ **Other sources albeit with a political perspective:**

- **Federation of American Scientists**

- [www.fas.org](http://www.fas.org)

- **Also ACLU, EFF and CDT**

- [www.aclu.org](http://www.aclu.org)

- [www.eff.org](http://www.eff.org)

- [www.cdt.org](http://www.cdt.org)





# Information Sources

## ➤ PUBLIB

- [publib@sunsite.berkeley.edu](mailto:publib@sunsite.berkeley.edu)
- Public librarians

## ➤ PUBLIB-NET

- [Publib-net@sunsite.berkeley.edu](mailto:Publib-net@sunsite.berkeley.edu)
- Use of the Internet in public libraries.

## ➤ WEB4LIB

- [listserv@sunsite.berkeley.edu](mailto:listserv@sunsite.berkeley.edu)
- Librarians computer & WWW management



# For Additional Information



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