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copyright in the library

Is your library an Internet service provider?

Title II of the Digital Millennium Copyright Act (the "DMCA") limits the liability of Internet service providers ("ISP") for certain infringements. Congress clearly intended this new law to protect large ISPs like America Online. It also clearly protects universities that provide Internet services to their students, faculty and staff. The definition of a "service provider" is so broad, however, that it includes public libraries that do no more than make available to the public a computer connected to the Internet. Here's part of the definition of "service provider" from the statute:

(k)(1)(B) As used in the section, other than subsection (a), the term "service provider" means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

The important words are "a provider of online services or network access." That's pretty broad. This is not necessarily bad news, though -- it means libraries have a choice.

The DMCA gives ISPs some protection from the usual remedies that a copyright owner is entitled to when his or her rights have been infringed. For example, a copyright owner whose rights have been infringed can ask the court to award it a lot of money - either the amount by which the owner was actually harmed, such as the value of lost sales or lost licensing revenues (the "actual damages"), or any amount within the range that the statute says an owner is entitled to ("statutory damages") depending on whether the infringer knew good and well that what he or she was doing was wrong, or was truly unaware and had good reason to think the infringing actions were authorized as a fair use. Copyright owners are also entitled to certain kinds of injunctions: court orders that bar the infringer from carrying out actions in the future that would create similar problems for the copyright owner or others. The DMCA takes away from copyright owners most of these remedies on the condition that ISPs agree to help the copyright owner get infringing works off the Web as quickly as possible. In effect, it creates a different way other than through lawsuits for copyright owners and ISPs to handle alleged infringements involving materials passing through or residing on ISP's network servers.

There is no requirement that an entity entitled to take advantage of these liability limitations must take advantage of them, either in general, or even after the entity has registered an agent. Compliance with the statute's provisions is completely voluntary. Even AOL could ignore this statute if it wanted to. The steps for taking advantage of the limitations are somewhat cumbersome. It may not be worth all the trouble if the benefit is very small. So, let's explore the benefits and the process of complying with the statute, so that it's possible to weigh the two and decide whether to register as an ISP, and whether to follow the statute's procedures to take advantage of the liability limitations in a particular case.

The DMCA provides liability limitations for the following kinds of activities:

- "Conduit activities" that are largely automatic activities of computers connected to the Internet and for which there is no explicit requirement to register an agent to obtain the law's protections:
 - transmitting or routing material through a system or network controlled by or for the service provider;
 - providing connections for material through such a system or network;
 - intermediate and transient storage of that material in the course of transmitting, routing or providing connections
 - intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider ("system caching")
- Long-term storage of information on the service provider's system or network, for which you must register an agent to obtain the law's protections:
 - storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider
 - referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link
- Taking material down when a copyright owner alleges infringement or when you learn facts or circumstances from which infringement is apparent, and putting it back up if the page owner says there's been a misidentification or mistake by the copyright owner

So, are these benefits going to benefit you? That will vary depending on the extent of the services an ISP provides and the type and numbers of users of those services. For example, a small library that provides the public with access to the Internet at one or more computer terminals probably does not provide server space to its patrons. That's one of the most important categories of protection, so if you don't need it, it's probably a waste of time to comply with the statute's requirements.

If the library has its own server with a homepage on which it provides links to external resources, it is beginning to do things for which it could benefit under section (d) of the new law that addresses information location tools. If the library permits the public to post pages or other digital materials on its servers, it is definitely providing services for which it could benefit under section (c) of the new law related to user information on a system. Both of those sections require ISPs to register an agent in order to qualify for protection. The more exposure a library has to allegations of infringement that stem from the covered activities, the more benefit the library will get from claiming to be an ISP, registering an agent and adopting procedures to respond to allegations of infringement as the statute directs.

But now for the downside: It is not easy to comply with the law. It requires a certain level of technical ability, careful adherence to the detailed procedures and in some cases, a modest amount of legal analytical ability. Please read, "[Complying with the Digital Millennium Copyright Act: Responding to notices of alleged infringement](#)" for the law's requirements. Keep in mind that the rules are the same whether the ISP is AOL, UT System or the public library in Akron, New York with its single Mac connected to the Internet.

As you can see, it takes considerable time and energy to comply with this law. For starters, someone has to read the law and figure out what it says to do. Then, someone has to do it all. Will it be worth it? Will your library receive 1 notice each year or 100 or 1000? It is fairly painless to simply register an agent. It's what the agent has to do that is detailed and cumbersome. It might be advisable if your library performs at least one or more activities for which it would benefit under the DMCA to register an agent and bookmark some helpful URLs detailing what the agent is supposed to do. Maybe your agent will never get a notice! There does not seem to be any downside to merely registering an agent. For state libraries, it probably is advisable to include a statement that by registering, the library does not waive its state sovereign immunity under the 11th Amendment to the U.S. Constitution.

Who should be involved in the decision whether to register an agent and in training the agent to respond to infringement notices? This involves reducing the risk of legal liability, so good candidates to make the decision would be your library's risk managers or legal department and your administrators who oversee fiscal responsibilities. You may also need technical support, someone who understands and can identify the activities covered by the DMCA that the library is undertaking.

Questions to guide decisionmaking

Does your library:

1. have computers connected to the Internet?
2. make computers connected to the Internet available to the general public?
3. operate servers on the Internet?
4. place its own materials on its own servers on the Internet?
5. permit its patrons to place materials on servers operated by the library?
6. have pages on its servers that contain information locations tools such as (i) directories, indices, references, pointers, or hypertext links to materials that are not on the library's servers ("external materials") or (ii) a user interface with search capabilities that would return results to the user that include external materials?

If you can answer yes to questions 5 or 6, your activities are covered by the parts of the DMCA that require you to register an agent, so you may benefit from registering an agent and training the agent to respond appropriately to notices alleging infringement. If you can only answer yes to questions 1 through 4, your activities are not among those that the DMCA explicitly requires registering an agent in order to obtain the law's protections and you are unlikely to derive any benefit from registering an agent.

The subjects in this series include:

Fair Use (Section 107)

- Reserving works for limited use, generally
- Print copies in the reserve room
- Reserve rooms for images, audio and audiovisual works
- Providing access to electronic copies
- Library copying for patrons and for the library's collection

Library reproduction and distribution (Section 108)

- Archiving
- Patron requests
- Unsupervised copying, news programs and contractual limitations on acquisitions
- Interlibrary loan

Other

- Scholarly communication
- The digital library
- Licensing access
- Is your library an Internet service provider under the DMCA?

