

What is the Digital Millennium Copyright Act (DMCA)?

Answer:

The 1998 enactment of the Digital Millennium Copyright Act (DMCA) represents the most comprehensive reform of United States copyright law in a generation. The DMCA implements two World Intellectual Property Organization (WIPO) treaties and updates current copyright law for the digital environment.

Key topics included in the DMCA are provisions concerning the circumvention of copyright protection systems (e.g., encryption, passwords, or digital watermarks), fair use in a digital environment, and online Internet Service Provider (ISP) liability (including details on safe harbors, damages, and "notice and takedown" practices). Higher education institutions may qualify as ISPs. Section 404 promotes the maintenance and development of digital libraries "to accommodate digital technologies and evolving preservation practices."

The DMCA:

- Makes it a crime to circumvent anti-piracy measures. Defeating the access control measure, or ◻circumventing a technological measure,◻ means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure without the authority of the copyright owner. Access control measures are found in many digital items such as DVDs, video games, or computer games. The DCMA allows the above circumventions in limited educational and library related circumstances, as well as sometimes allowing reverse engineering of certain devices.
- Outlaws the manufacture, sale, or distribution of code-cracking devices used to illegally copy software or otherwise circumvent access control measures. In order for an individual to defeat an access control measure they create software that will allow unauthorized access to the copyrighted information.
- Permits the cracking of copyright protection devices, however, to conduct encryption research, assess product interoperability, and test computer security system.
- Provides exemptions from anti-circumvention provisions for nonprofit libraries, archives, and educational institutions under certain circumstances.
- Prohibits the alteration of copyright management information (i.e., false marking) or providing false copyright management information (i.e., false representation). Copyright management information is information conveyed in connection with a copyrighted work for the purposes of identifying its origin. Copyright management information could include the title, author, name of the copyright owner, terms and conditions for use of the work, and identifying numbers or

symbols referring to the above information. This provision prevents a user from altering this information prior to passing the copyrighted materials on to others.

- Limits ISP from copyright infringement liability for simply transmitting information over the Internet. ISPs, however, are expected to remove material from users' web sites that appears to constitute copyright infringement.
- Limits liability of ISPs for the actions of its users as long as the ISP did not know or have reason to know that their uses were violating a copyright holder's rights.
- Outlines "notice and takedown" procedures for material such as web site content that resides on ISP servers. Notice refers to the copyright holder notifying the ISP. Takedown refers to the ISP removing the alleged infringing material.
- Requires that "webcasters" pay licensing fees to record companies.
- Requires that the Register of Copyrights, after consultation with relevant parties, submit to Congress recommendations regarding how to promote distance education through digital technologies while "maintaining an appropriate balance between the rights of copyright owners and the needs of users."
- Requires registration of an agent with the Copyright Office.
- Requires copyright education for students and enforcement against violators of institutional copyright policies.

The DMCA limits liability in four separate contexts:

1. Transitory digital network communications - Provides protection where the Internet Service Provider "merely acts as a data conduit, transmitting digital information from one point on a network to another at someone else's request. This limitation covers transmission, routing, or providing connections for the information, as well as the intermediate and transient copies that are made automatically in the operation of the network." There are a number of conditions that apply here (e.g., the transmission must be initiated by a person other than the provider, the transmission must be carried out by automatic technical process, the ISP must not determine recipients, etc.). The key to limiting liability is for the University to take a passive role in digital information transmission.

2. System caching □ Provides protection for the storage of material from other networks on the ISP's system for the purpose of mitigating bandwidth requirements. There are conditions that apply here also.

3. Information location tools - Provides protection for linking or electronically referring to an infringing site.

4. Information on systems or networks at the direction of users. Provides protection for storage on the ISP's network at the direction of a user. To limit liability under this section, the ISP must register an agent with the Copyright Office. In addition, according to the *U.S. Copyright Office Summary*, the following conditions must be met:

- The ISP must not have the requisite level of knowledge of the infringing activity.
- If the ISP has the right and ability to control the infringing activity, it must not receive a financial benefit directly attributable to the infringing activity.
- Upon receiving proper notification of claimed infringement, as defined in the Act, the ISP must take down or block access to the material.

ISP knowledge of infringing material is a consideration in each of these four contexts. Additionally, in the context of liability limitations for transitory communications or system caching, "the faculty member or student shall be considered a person other than the provider, so as to avoid disqualifying the institution from eligibility."

Lastly, according to the U.S. Copyright Office Summary, liability limitations for material residing on networks at the direction of users and for information location tools, the knowledge or awareness of the faculty member or student will not be attributed to the institution, provided the following conditions are met:

- The faculty member or graduate student's infringing activities do not involve providing access to course materials that were required or recommended during the past three years.
- The institution has not received more than two notifications over the past three years that the faculty member or graduate student was infringing.
- The institution provides all of its users with informational materials describing and promoting compliance with copyright law

The civil (financial) penalties for violations of the DMCA can be severe. In some instances, criminal penalties such as fines or even imprisonment may apply. The DCMA notes any person who circumvents anti-piracy measures willfully and for purposes of commercial advantage or private financial gain:

- Shall be fined not more than \$500,000 or imprisoned for not more than 5 years, or both, for the first offense; and
- Shall be fined not more than \$1,000,000 or imprisoned for not more than 10 years, or both, for any subsequent offense.

Additionally, any person injured by a violation of section 1201 or 1202 may bring a civil action in an appropriate United States district court for such violation.

The penalties noted above do not apply to a nonprofit library, archives, or educational institution.

Some examples of exclusions from liability that are included in the DMCA are:

- Library or educational use
- Law enforcement or governmental use
- Reverse engineering
- Analog tape copying (pertaining to some VHS/Beta videotapes)

The DCMA also notes that the penalty for false marking is a civil fine of not more than \$500 for EACH such offense and the penalty for false representation is a fine of not less than \$500 and not more than \$1,000, and any rights or privileges that individual may have in the design under this chapter shall be forfeited.

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