

THE DIGITAL MILLENNIUM COPYRIGHT ACT AND LIBRARY LIABILITY

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I. INTRODUCTION

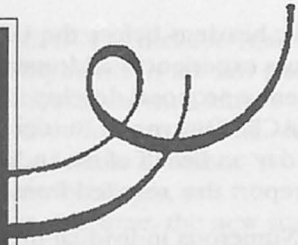
Copyright law affects libraries in many ways. It protects the core activities of most libraries - collecting information resources and making them available to the public. This is no small accomplishment. Other countries (for example, Great Britain) charge a royalty every time a library loans a book.¹ Copyright law protects the original expression of librarians and library staff, and helps clarify which rights belong to the library and which to the individual creators. Although copyright law is generally highly protective of the interests of libraries, it also provides for liability when libraries, or in some cases their employees or even their patrons, infringe the copyrights of others.

The proliferation of the Internet and other digital technologies has expanded the importance of copyright law not only to libraries, but to virtually every segment of U.S. society. As statutes, judicial opinions, and legal scholarship race to adapt to this technological change, the application of copyright law has become both more complex and more uncertain. Again, libraries may be especially vulnerable to this complexity and uncertainty because many libraries both use and make available to the public technologies - photocopiers, videotape and disc players and recorders, networked computers, tape recorders, online databases, CD-ROMs, facsimile machines - each one of which has among its primary uses the infringement of copyrighted works.

Congress took its first step towards addressing this situation in October 1998 when it passed the Digital Millennium Copyright Act (DMCA).² The Act creates significant new rights for copyright holders and new defenses for copyright users, both of which are potentially critical to the activities of most libraries. This article provides a brief overview of the current state of U.S. copyright law and a summary of the DMCA's recent changes to that law that are likely to affect libraries.

II. OVERVIEW OF COPYRIGHT LAW

Copyright law in the United States is based on the Copyright Clause in the U.S. Constitution, which empowers Congress to "secur[e] for limited Times to



Authors . . . the exclusive Right to their respective Writings" to "promote the Progress of Science and useful Arts."³ In 1976, Congress concluded more

than a decade of hearings and debate by passing a new Copyright Act that substantially rewrote U.S. copyright law.⁴ Under the prior law, which had been enacted in 1909,⁵ federal copyright protection applied only to limited categories of works and then only if the work was published;⁶ required strict compliance with a variety of formalities, including registration with the Copyright Office and publication with appropriate copyright notice;⁷ and lasted for only 28 years (56 years, if the copyright was renewed).⁸

The 1976 Act substantially broadened and extended federal copyright protection. Rather than protecting only specified categories of works, Congress applied copyright law to all works of authorship,⁹ provided that they were "fixed" and "original," regardless of whether they were published. A work is "fixed" when it is embodied, by or with the permission of its creator, in "any tangible medium of expression" from which the work can be "perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device . . . for a period of more than transitory duration."¹⁰ A work may be fixed on paper, videotape, disk, or on many other forms of media, but not on a television or computer screen because these images are of only "transitory duration." A work is "original" if it is "independently created by the author (as opposed to copied from other works), and . . . possesses at least some minimal degree of creativity."¹¹ These requirements are deliberately broad and easy to satisfy. As a result, copyright law now protects every letter, memo, note, home video, answering machine message, e-mail, and doodle.

Moreover, unlike other areas of intellectual property, the 1976 Act, as amended in 1988¹² and again in 1998,¹³ does not require compliance with statutory formalities or application to the government as a condition for protection.¹⁴ Protection begins as soon as the work is "fixed" - whether or not the author wishes the work to be protected - and lasts for 70 years past the life of the author.¹⁵ If the author is an organization, protection lasts for 120 years after creation or 95 years

after publication, whichever expires first.¹⁶ Under current copyright law, protection is easy to come by, long-lasting, and difficult to lose.

The rights protected under current law are equally expansive. Copyright law gives a creator, or, in some circumstances, a creator's employer,¹⁷ five exclusive rights: the right to reproduce, adapt, distribute, publicly perform, and publicly display a copyrighted work.¹⁸ For the period covered by the copyright, the law permits only the copyright holder to engage in, or authorize someone else to engage in, any activity covered by the five exclusive rights. In addition, the 1976 Act grants to the copyright owner the right to control importation of copyrighted works into the United States.¹⁹

The exclusive rights may be transferred or licensed, individually or collectively, for use by others.²⁰ Transfers and exclusive licenses must be in writing; nonexclusive licenses may be granted orally or even implied.²¹ The transferee or exclusive licensee is entitled "to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title."²² The new copyright holder or exclusive licensee can enforce his or her rights against even the original creator or copyright holder.²³

Courts have interpreted copyright law's infringement provisions very broadly. Individuals and institutions are liable not only for their own conduct, but also for the conduct of employees (under the doctrine of *respondeat superior*²⁴); the conduct of anyone whom they supervise and in whose work they have a financial interest (vicarious infringement);²⁵ and the conduct of anybody whose infringing activity they knowingly induce, cause, or to which they materially contribute (contributory infringement).²⁶ Libraries run the risk of liability - if their conduct is not protected by a statutory defense, discussed below - under contributory infringement when they provide patrons with *both* copyrighted material (e.g., books) *and* access to the means for copying that material (e.g., a photocopier), with knowledge that patrons will likely use the latter to infringe the copyright in the former. The law does not require that the defendant intend to infringe, or, except in the case of contributory infringement, even have knowledge of the infringing conduct. Innocent intent or lack of knowledge may affect damages, but they do not affect liability.²⁷

The 1976 Act provides significant penalties for violating the exclusive rights, including injunctions,²⁸ impoundment and destruction of infringing copies,²⁹ actual damages and lost profits,³⁰ statutory damages,³¹ court costs,³² and attorneys' fees.³³ The Act also provides criminal penalties for "[a]ny person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain."³⁴

Although broad, copyright protection in the United States is not limitless. The most significant limit in copyright today is that the law protects expression only. No matter how original or creative, "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."³⁵ In Feist Publications, Inc. v. Rural Telephone Service Company, a unanimous Supreme Court stressed: "The most fundamental axiom of copyright law is that '[n]o author may copyright his ideas or the facts he narrates. . . .' [C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."³⁶

As a result, courts will not protect expression if it includes one of a limited number of ways of conveying an idea, concept, or fact, or if it is necessary to implementing an idea or concept. Under the doctrine of "merger," courts withhold copyright protection from original, fixed expression if that expression "must necessarily be used as incident to" the work's underlying ideas or data.³⁷ In that situation, courts find that the expression and the underlying idea or fact have "merged."³⁸ The doctrine of merger highlights the importance of preventing copyright law from ever protecting a fact or idea: it is preferable to exclude otherwise protectable expression from copyright law's monopoly rather than to allow that monopoly to extend to any fact or idea.

Copyright protection is also subject to four other significant limitations relevant to libraries. The "first sale" doctrine, codified in Section 109,³⁹ limits copyright owners' rights by subjecting only the initial distribution of a particular copy of a copyrighted work to their control. The first sale doctrine provides that once the copyright holder has distributed or authorized the distribution of copies of her copyrighted work, subsequent possessors of those copies may redistribute them without the copyright holder's permission.⁴⁰ Without the first sale doctrine, reselling, lending, or giving away a copy of a copyrighted work would violate the copyright holder's exclusive distribution right.⁴¹ The first sale doctrine is therefore particularly important to libraries.

Copyright law also includes specific exemptions from the exclusive rights to publicly display and perform copyrighted works. Section 109 exempts the public display of a lawful copy of a copyrighted work by its rightful owner.⁴² Without this exemption, it would be a violation of the copyright law to publicly display a photograph, painting, or other copyrighted work without the permission of the copyright owner.

This exemption applies whether the display is direct (e.g., hanging the painting) or by projection of no more than one image at a time (e.g., showing slides of one or more paintings in series). However, the viewers must be "present at the place where the copy is located."⁴³ Again, because this provision permits the public display of book jackets and other copyrighted material, it is important to libraries.

"Fair use" constitutes a statutory defense to copyright infringement. According to the 1976 Act, certain uses of copyrighted works may be fair "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."⁴⁴ Fair use expressly permits certain uses of copyrighted works that serve important public purposes and that do not harm the market for the original work. The Act sets out four factors for courts to consider when determining whether an otherwise infringing use is fair.⁴⁵ Courts often focus on the fourth factor: "the effect of the use upon the potential for or value of the copyrighted work."⁴⁶ According to the Supreme Court, unauthorized uses of copyrighted works are unfair (1) if it is proved that the particular use is harmful to the market for the original work, or (2) if it is shown by a preponderance of the evidence that "should [the use] become widespread, it would adversely affect the potential market for the copyrighted work."⁴⁷ Fair use immunizes activities such as quoting portions of a book or song in a review; its value to libraries is clear.

Finally, Section 108 provides for defenses specifically applicable to libraries. Section 108 establishes certain "safe harbors" - situations in which libraries and archives and their patrons may reproduce and distribute copies of copyrighted works without infringing. This provision permits limited photocopying of books and periodicals for scholarly or archival purposes as long as the copying is neither systematic nor a substitute for purchase or subscription.⁴⁸ To qualify, a library or archives must make its collections available to the public or to unaffiliated persons doing research in appropriate fields.⁴⁹ Moreover, the reproduction or distribution must be made without direct or indirect commercial advantage.⁵⁰ Section 108 also permits interlibrary loan photocopying "of no more than one article or other contribution to a copyrighted collection or periodical issues" or "a small part of any other copyrighted work," subject to important limitations.⁵¹ Finally, Section 108 appears to absolve libraries and library employees for infringement resulting from "the unsupervised use of reproducing equipment located on its premises," provided that "such equipment displays a notice that the making of a copy may be subject to the copyright law."⁵²

III. DIGITAL MILLENNIUM COPYRIGHT ACT

The DMCA creates important new rights for both copyright holders and users. Although intended to resolve issues presented by digital technologies, the DMCA has considerably broader impact. It is a complex piece of legislation consisting of five titles, only three of which are relevant to the activities of libraries.

A. Title I - WIPO Treaties Implementation

Title I of the DMCA implements two World Intellectual Property Organization (WIPO) treaties: The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty, adopted at the WIPO Diplomatic Conference in December 1996. Those treaties require member nations to protect digitally transmitted works in two ways:

(1) to provide legal remedies against the circumvention of technological measures designed to block access to copyrighted works, and

(2) to prohibit the interference with copyright management information digitally encoded in copyrighted works, including information about copyright ownership and licensing terms.

1. Anti-Circumvention

The Act achieves the first purpose by adding Section 1201 to the copyright law. The new section prohibits the circumvention of technological measures taken by copyright owners to control access to their works or to prevent the unauthorized exercise of the copyright owner's exclusive rights. Section 1201(a) applies to circumvention for the purpose of obtaining access to a work, and prohibits both circumventing technological measures that impede access and "manufactur[ing], import[ing], offer[ing] to the public, provid[ing], or otherwise traffic[ing] in any technology, product, service, device, component, or part thereof" that is primarily designed to circumvent technological measures designed to control access to a work.⁵³

This provision takes effect two years after enactment of the DMCA, on October 28, 2000. During this two-year period, the Librarian of Congress is to conduct a rulemaking proceeding to evaluate the impact of the prohibition against the act of circumventing the access control measures set forth in the Act.⁵⁴

Congress recognized legitimate reasons for engaging in circumvention. Accordingly, Title I specifically provides for one broad and six specific exceptions to the prohibition on circumvention and circumvention devices.⁵⁵ One is specifically applicable to nonprofit libraries. Section 1201(d) provides an exemption for nonprofit libraries, archives, and educational institutions to gain access to commercially exploited copy-

righted works solely to make a good faith determination of whether to acquire the work. The exemption applies only if a qualifying institution cannot obtain a copy of the work by other means.⁵⁶

2. Copyright Management Information

Section 1202 of the DMCA prohibits altering "copyright management information" (CMI) and creates liability for any person who provides or distributes false CMI.⁵⁷ In addition, the Act prohibits the intentional removal or alteration of CMI, and its knowing distribution in altered form.⁵⁸ "CMI" includes all identifying information involving the author or performer, the terms and conditions for the use of the work, and other information such as embedded pointers and hypertext links.⁵⁹ These provisions respond to the use of digital technologies' ability to encode significant amounts of data, which can be used to identify the copyright owner and to facilitate the licensing of copyrighted works. Pertinent information, such as name and address, telephone number, fax number, e-mail address, and licensing rates, can be encoded into the work and displayed to a potential customer. For works available over digital networks, embedded links to the copyright owner can make electronic licensing even more convenient. As more and more works become available in electronic form, this information could significantly reduce the transaction costs associated with copyright licensing and greatly enhance enforcement of copyright laws.

The DMCA creates civil remedies and criminal penalties for violations of Sections 1201 and 1202.⁶⁰ The Act provides for statutory damages of as great as \$2,500 per act of circumvention, and up to \$25,000 for each violation of the CMI provisions.⁶¹ The Act gives courts wide discretion to grant injunctions and award damages, costs, and attorney's fees, and also to reduce damage awards against innocent violators.⁶² For non-profit libraries, archives, or educational institutions, however, courts *must* remit damages if they find that the violator had no reason to know of the violation.⁶³ In addition, criminal penalties do not apply to non-profit libraries, archives, and educational institutions.⁶⁴

The new CMI provisions raise many concerns that have yet to be resolved by courts. Although targeted at copyright-related information imbedded in digital files, the provisions are not limited to electronic works. To be covered by the Act, the CMI must be conveyed with a copyrighted work.⁶⁵ As a result, these new provisions would prohibit removing or altering information about the creator, copyright, license terms, and the like concerning *any* copyrighted work. Arguably, this extends not only to reproducing a copyrighted work, but to any use made of such a work, for example, a quote in a review. Including all of the original work's CMI in such a situation will likely prove cumbersome

or even impossible. Moreover, there is no indication in the DMCA that the CMI provisions are subject to fair use or other defenses. Finally, the damages for violating CMI provisions - \$25,000 for each violation - are considerable. Taken together, these factors lead to the fear that copyright holders will sue possible infringers in the future not for their alleged infringement (which is often difficult and time-consuming to prove), but rather for violating the CMI provisions. Although libraries are exempt from criminal penalties and face reduced civil damages if they had no reason to know that they were removing CMI, the potential threat of significant and easy-to-obtain damages under the CMI provisions is nevertheless significant.

B. Title II - Online Copyright Infringement Liability Limitation

The DMCA includes important new provisions applicable to "online service providers" (OSPs). Although few libraries might think of themselves as OSPs, the law defines the term very broadly as "a provider of online services or network access, or the operator of facilities therefor."⁶⁶ Because some libraries do provide Internet access, e-mail, chat room, web page hosting, and other transmission, routing, and connection services, and more are likely to do so in the future, a brief summary of the OSP provisions is warranted. However, the OSP provisions are detailed and technical, so it is only possible to provide a broad overview below.

Prior to enactment of the DMCA, some courts had found that OSPs were liable - both directly and contributorily - for the infringing conduct of the users of their services.⁶⁷ Title II of the DMCA limits OSP liability in three important situations, discussed below. Beginning on October 28, 1998, these exemptions from liability add to any defense that an OSP might have under copyright law. These exemptions do not constitute complete defenses to copyright infringement suits. Rather, they eliminate the availability of monetary damages, and reduce the situations in which injunctions may be granted.

1. Transmission and Routing - Section 512(a)

Title II of the DMCA insulates an OSP from liability when it is merely acting as a passive conduit for materials passing between other parties.⁶⁸ This provision applies only if the following conditions are met:

- (1) the transmission of the material was initiated by or at the direction of a person other than the service provider;
- (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content.⁶⁹

Collectively, these conditions require that the role of the OSP is entirely passive towards the allegedly infringed material.

2. System Caching - Section 512(b)

Virtually all networked computers “cache” documents - that is, they store a copy of the document on the hard drive for faster reference in the future. This allows computers to manage large files and also to provide for speedier access to commonly used or recently used documents. Since caching necessarily involves making a copy of a file, it would likely constitute copyright infringement. The DMCA provides that caching is not copyright infringement, provided that the OSP is not itself downloading material for storage or altering the content of cached material, and that the OSP complies with industry standards related to caching.⁷⁰

3. Storing and Linking - Section 512(c)-(d)

Finally, Title II of the DMCA limits OSP liability under the copyright law for two common OSP activities: (1) storing material, such as a web page, on a server;⁷¹ and (2) referring users to material at other online sites through hypertext links.⁷² The former would clearly constitute copyright infringement, absent the defense provided by the DMCA, because it involves reproducing (as well as, perhaps, publicly displaying) copyrighted material. It is unsettled whether merely linking to a site could constitute copyright infringement, or whether the operator of a web page could be contributorily liable for linking to another page that contained infringing material. Fortunately, this provision of the DMCA makes the resolution of those issues unnecessary. The Act limits liability based on the material being stored or referred to if the OSP meets the following conditions:

(1) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(2) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent;

(3) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(4) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(5) upon notification of claimed infringement . . . responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.⁷³

4. Threshold Conditions

To qualify for any of the exemptions in Title II, an OSP must meet three general conditions. First, it must adopt, implement, and inform its subscribers and account holders of its policy providing for termination of users who are repeat infringers.⁷⁴ Second, the OSP must accommodate and not interfere with “standard technical measures” used by copyright owners to identify and protect copyrighted works.⁷⁵ Third, an OSP must comply with the DMCA’s “notice and takedown provisions.” These provisions are covered in minute detail in the DMCA, but they basically require that the OSP (1) designate an agent to receive notifications of claimed copyright infringement, and (2) provide publicly (including on the OSP’s web site) the name, address, phone number, and electronic mail address of the agent.⁷⁶ Significantly, as Professor Marshall Leaffer has written, “an OSP does not need to monitor its service or affirmatively seek out information about copyright infringement on its service, except to accommodate technical measures described above.”⁷⁷

The importance of these provisions can hardly be overstated. They effectively codified the result of *Religious Technology Center v. Netcom On-Line Communications Services*,⁷⁸ which held that Netcom, operator of a Usenet bulletin board, should not be held strictly liable for user infringement of which it had no knowledge. Moreover, under these provisions, compliance with fairly straightforward requirements can eliminate much of the uncertainty surrounding Internet-related copyright complaints; libraries no longer need to guess what the law has to say about how they handle such complaints. On the other hand, should a library fail to take the simple step of designating and registering an agent with the Library of Congress, it loses all of the protection provided by Title II of the DMCA.

5. Additional Provisions

Finally, Title II provides for liability for knowingly, falsely claiming that material or activity is infringing,⁷⁹ and protects OSPs from liability for “good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.”⁸⁰

C. Title IV - Sec. 404 - Exemption for libraries and archives

With only one exception, the balance of the DMCA contains no provisions relevant to libraries. That exception is a small but important amendment to Section 108 of the copyright law, which, as noted above, provides special protections for libraries. As amended by the DMCA, qualifying libraries may now make three copies - instead of only one - of an unpublished work for preservation or for deposit for research use by another library or archives.⁸¹ Libraries may make three copies of a published work that is “damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete,” provided that the library has not been able to locate an unused replacement at “a fair price,” and that if the new copies are in digital format, that they are not made available to the public in that format outside of the library.⁸² In this case, the DMCA not only increased the number of copies, but also added the language about obsolete formats, which the Act defines as being the case if “the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.”⁸³ Finally, prior to passage of the DMCA, Section 108 provided that libraries could reproduce and distribute a single copy of a copyrighted work, provided that they met certain conditions, including placing appropriate copyright notice on the copy. This had led to the question of what libraries should do when the original work being copied had no copyright notice. The DMCA resolved that question by providing that in such a situation libraries should simply affix a statement that the work may be protected by copyright.⁸⁴

IV. CONCLUSION

U.S. copyright law has traditionally been very protective of the activities of libraries and librarians. The DMCA is no exception to this laudable trend. The Act expands the protections afforded libraries in Section 108, provides significant new protections for online activities, and offers important clarification for how complaints of online infringement are to be handled. Many of the protections of the DMCA, however, turn on compliance with quite technical

(although seldom burdensome) requirements, such as the designation and registration of an agent to receive notices of alleged online infringement. In addition, the Act does create the potential of new liability for libraries, especially for removing or altering CMI. Even in the face of new liability, however, the Act reflects the law’s longstanding solicitude for libraries by providing for reduced damages.

At present, a number of the DMCA’s provisions are not applicable to many libraries, because few libraries today act as OSPs. But this is certain to change as more and more libraries expand their Internet services. As that happens, attention to the details of the DMCA will become increasingly important, if libraries are to realize the full protection of the law.

NOTES

1. See generally Paul Goldstein, *Copyright’s Highway* 163-64 (1994); John Cole, Public Lending Right, 42 *Library of Congress Info. Bull.* 427 (Dec. 12, 1983).
2. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C. at 101 et seq).
3. U.S. Const. art. I, art. 8, cl. 8.
4. Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. at 101 et seq).
5. Act of March 4, 1909, ch. 320, 35 Stat. 1075 (superceded by Pub. L. No. 94-553, 90 Stat. 2541 (1976)).
6. Id. at 2. The 1909 Act provided exceptions from the publication requirement for certain works “not reproduced for sale” and common law provided copyright-like protection for many unpublished works. Id. at 12.
7. Id. at 10.
8. Id. at 24.
9. 17 U.S.C. at 102(a). Works subject to copyright include, but are not limited to, literature, music, drama, pantomime, choreography, photography, graphic art, sculpture, film, computer software, sound recordings, or architecture. Id.
10. Id. at 102(a), 101.
11. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).
12. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified at 17 U.S.C. at 101 et seq).
13. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified at 17 U.S.C. at 101 et seq); Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298 (1998) (codified at 17 U.S.C. at 301 et seq).

14. The 1976 Copyright Act offers several incentives to prompt registration, including making registration a prerequisite for filing a copyright infringement action or for obtaining statutory damages. 17 U.S.C. at 411(a), 412. Similarly, despite elimination of the notice requirement, affixing notice may affect the copyright owner's monetary recovery for infringement. As a general rule if notice appears on the published copy to which the infringer had access, a court will give no weight to a defense that innocent infringement mitigates actual or statutory damages. *Id.* at 401(d), 402(d).
15. *Id.* at 302(a).
16. *Id.* at 302(c).
17. The right belonged initially to the creator unless the work was "made for hire." The statute defines a "work made for hire" as
- (1) a work prepared by an employee within the scope of his or her employment; or
 - (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.
- Id.* at 101.
18. *Id.* at 106.
19. *Id.* at 602(a).
20. *Id.* at 201(d), 101.
21. *Id.* at 204(a), 101; *see Effects Associates, Inc. v. Cohen*, 908 F.2d 555 (9th Cir. 1990).
22. 17 U.S.C. at 201(d)(2).
23. *See, e.g., Gross v. Seligman*, 212 F. 930 (2d Cir. 1914).
24. *Whitol v. Crow*, 309 F.2d 777, 782-83 (8th Cir. 1962); *M. Whitmark & Sons v. Calloway*, 22 F.2d 412 (E.D. Tenn. 1927).
25. *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963).
26. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984); *Gershwin Publishing Corp. v. Columbia Artists Management*, 443 F.2d 1159 (2d Cir. 1971).
27. *See Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198 (1931) (stating "Intention to infringe is not essential under the act."); *Playboy Enter. v. Frena*, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993) (stating "Intent or knowledge is not an element of infringement, and thus even an innocent infringer is liable for infringement."). *See generally Paul Goldstein, Copyright* at 9.4 (1989).
28. 17 U.S.C. at 502.
29. *Id.* at 503.
30. *Id.* at 504(b).
31. *Id.* at 504(c). Statutory damages range from \$200 for innocent infringement to \$100,000 for willful infringement.
32. *Id.* at 505.
33. *Id.*
34. *Id.* at 506(a).
35. 17 U.S.C. §102(b).
36. 499 U.S. at 344-45, 349 (quoting *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 556 (1985)).
37. *Baker v. Selden*, 101 U.S. 99, 104 (1879).
38. *See Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971) (explaining that when an "'idea' and its 'expression' are thus inseparable, copying the 'expression' will not be barred, since protecting the 'expression' in such circumstances would confer a monopoly of the 'idea'"); *Merrit Forbes & Co. v. Newman Invest. Serv.*, 604 F.2 Supp. 943, 951 (S.D.N.Y. 1985) (stating that "where an underlying idea may only be conveyed in a more or less stereotyped manner, duplication of that form of expression does not constitute infringement, even if there is word for word copying"). *See generally Goldstein, supra* note 27, at ' 2.3.2 .
39. 17 U.S.C. § 109(a).
40. *Id. Columbia Pictures Indus. v. Avenco*, 800 F.2d 59, 64 (1986) (stating "When a copyright owner parts with title to a particular copy of his copyrighted work, he thereby divests himself of his exclusive right to vend that particular copy.").
41. The first sale doctrine does not apply with equal force to all types of copyrighted works. Under current law, the owner of a lawfully made copy of a computer program or a phonorecord of a sound recording may not rent, lease, or lend that copy or phonorecord for direct or indirect commercial advantage. 17 U.S.C. ' 109(b).
42. *Id.* ' 109(c).
43. *Id.*
44. *Id.* ' 107.

45. In determining whether the specific use made of a work in any particular case is fair, the factors to be considered shall include -

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.” Id.

46. Id.

47. Sony, 464 U.S. at 451; Harper & Row, 471 U.S. at 566 (stating “This last factor is undoubtedly the single most important element of fair use.”); *see also* Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994).

48. 17 U.S.C. ‘ 108(g).

49. Id. ‘ 108(a)(2).

50. Id. ‘ 108(a)(1).

5. Id. ‘ 108(d).

52. Id. ‘ 108(f)(1).

53. Id. ‘ 1201(a).

54. Id. ‘ 1201(a)(1)(B)-(E).

55. Id. ‘ 1201(a)(b)-(E), (d)-(j).

56. Id. ‘ 1201(d).

57. Id. ‘ 1202(a).

58. Id. ‘ 1202(b).

59. Id. ‘ 1202(c).

60. Id. ‘ 1203-1204.

61. Id. ‘ 1203(c)(3)(B).

62. Id. ‘ 1203(b).

63. Id. ‘ 1203(c)(5).

64. Id. ‘ 1204(b).

65. Id. ‘ 1202(c).

66. Id. ‘ 512(k)(1)(B).

67. *See*, e.g., Sega Enters. Ltd. v. MAPHIA, 948 F. Supp. 923 (N.D. Cal. 1996); Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993).

68. 17 U.S.C. ‘ 512(a).

69. Id. ‘ 512(a).

70. Id. ‘ 512(b).

71. Id. ‘ 512(c)

72. Id. ‘ 512(d)

73. Id. ‘ 512(c)(1).

74. Id. ‘ 512(i)(1)(A).

75. Id. ‘ 512(i)(1)(B).

76. Id. ‘ 512(c)(2).

77. Marshall Leaffer, *Understanding Copyright Law* 423 (3d ed 1999).

78. 907 F. Supp. 1361 (N.D. Cal. 1995).

79. 17 U.S.C. ‘ 512(f).

80. Id. ‘ 512(g).

81. Id. ‘ 108(b).

82. Id. ‘ 108(c).

83. Id.

84. Id. ‘ 108(a)(3).