THE COPYRIGHT SPECTRUM

No policy area affects libraries and technology so much as copyright, and few policy areas are as complex as copyright.

Within the United States, copyright grows out of Article I, Section 8, Part 8, of the Constitution. Combined with the necessary preface, the clause is quite brief:

> The Congress shall have power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries.

That's also the basis for patent law, and patents do affect library technology—but mostly indirectly. You may find fewer competitive choices than you'd like for a new technology because of patent protections, but that's a relatively minor issue.

The words seem straightforward. The purpose of copyright is "to promote the progress of science and useful arts." To achieve that purpose, Congress may provide authors and inventors exclusive rights to their writings and discoveries for limited times.

Libraries rely on copyright. Without copyright to encourage creation and dissemination, you would have fewer available resources. Academic librarians work to ensure that faculty members understand copyright restrictions—that they don't feel free to copy and distribute anything, anytime, if it suits their needs. Public librarians post appropriate warnings on copying machines. When public libraries find (or project) that demand for an item exceeds current holdings, libraries buy or lease additional copies—they don't expect to be able to replicate the books or sound recordings with no compensation to the author and publisher.

In return, first sale and fair use rights enable libraries to do their jobs. Once a library purchases a book, sound recording, or DVD, it is free to circulate that item without further payment to the publisher or creator. It may sell the item when it's no longer needed, give it away, or lend it to another library, entirely within the bounds of copyright law. In most cases, libraries may also lease items for temporary use.

Copyright in its constitutional form balances the rights and needs of those who create original works, those who use those creations—readers, listeners, viewers—and those who create new works based in part on what came before; since most works draw from previous creations, most creators are also borrowers. Along the way, copyright makes it possible for intermediaries—publishers, distributors, and so on—to function by establishing known and reasonably equitable rules.

In the analog world, this was straightforward. Buy a book, lend it as often as you want. If it wears out, buy another copy. Some authors and most publishers understood the benefits of library circulation. Others lived with it as a workable compromise between control and flexibility.

With the advent of digital technologies and nearly universal Internet accessibility, issues have become more complex. Rather than repeat material covered in *LTR*'s Jan./Feb. 2002 issue (38, no. 1, "Librarian's Guide to Copyright for Shared and Networked Resources," by Tomas A. Lipinski), this

chapter will offer a fourfold view of copyright and technology interactions and some examples of problems caused by current policy. Examples will also note substantial problems that could be caused by proposed policies, some of which have been defeated but keep coming back in new guises.

Rewording Section 8, Part 8

First, consider how extreme the changes could be. These two hypothetical rewordings of the Constitution's Article 1, Section 8, Part 8, first appeared in *EContent Magazine* in 2002.

Copyright Everlasting and Unlimited

> The Disney Corporation and other members of the MPAA, RIAA, and AAP shall have exclusive and perpetual rights to creations that they pay for and creations derived in any fashion from those creations, and Congress shall protect those perpetual rights by any means necessary, regardless of other provisions of the Constitution.[1]

Copyright Controlling Technology

> Members of the MPAA, RIAA, and AAP shall have the right to control technological change in order to enforce perpetual rights to creative works. Congress shall ensure that the corporate right to control over and payment for every use of those creations takes precedence over outmoded notions such as freedom of speech, fair use, and the first purchase doctrine.[2]

Ludicrous Overstatement?

Do both of those seem ludicrous? Perhaps—but the first may be a reasonably accurate reading of copyright's actual status today. The second reflects ongoing efforts and, to some extent, current reality.

Current copyright complexities also illustrate how technology influences policy. Some aspects of copyright discussed in this chapter arise because of technological realities, even though they may seem concerned primarily with media rather than technology itself.

Copyright: A Four-Part Review

The framework of current and proposed copyright policies could be described in many ways. Here's one four-part model:

1. *Copyright universal and everlasting*: issues of unlimited protection. The "limited times" of Constitutional copyright have become nearly unlimited, with no clear indication that works currently under copyright will ever enter the public domain. Copyright is also more clearly universal than ever in the past, since no registration or visible copyright notice is required. Any "fixed expression" is copyrighted (with certain governmental exceptions) automatically. With the support of libraries and other interested parties, this is a case in which technology may aid in reducing the negative impact of technology.
2. *The shrinking public domain and derivative works*: Creative Commons and beyond. "Everlasting copyright on the installment plan" shrinks the public domain as a part of the whole of creative work. Copyright policy

also restricts derivative works far more than in the past. Technology provides new ways to build derivative works and make something new of them. Restrictive policies limit those capabilities. Technology and policy may also combine to improve the public domain.

3. *Losing fair use and first sale*: When technology trumps tradition, and when contract overrides copyright. Technology-based information delivery and resources that depend on advanced technology tend to limit fair use without explicitly changing the law. Contractual agreements that go beyond copyright policy can turn purchases into leases, eliminating first sale rights as well as most fair use rights.
4. *Locking down technology.* Policy changes already in place and being urged by copyright holders limit the use of desirable new technologies. The most extreme policy changes would lock down new technology effectively, requiring advance approval before most computer-related technologies could be implemented. Real-world proposals, some still under consideration, could have the effect of essentially outlawing general-purpose personal computers.

The sections that follow discuss each of these areas in more detail, offering examples of existing and proposed policies and real-world effects. First, though, it's worth discussing plausible reasons that copyright holders seem intent on such draconian policy changes, in addition to the consistent hostility some copyright-holding groups have shown toward any new technology.

Utopian Dreams, Real-World Nightmares

Essentially, computers are universal copying machines for digital data. That cuts two ways:

- It is in the nature of digital technology that every use of a digital object produces at least one copy and frequently more than one. When you call up a Word document that you previously wrote (which is now protected by copyright), you're making one copy in the computer's memory—and, arguably, another copy on the screen itself.
- Digital resources can be copied an unlimited number of times and (generally) for an unlimited number of generations, at little real cost and with no diminution of quality. Theoretically, one original version of a song or a story could be copied by every Internet user in the world.

One utopian dream—utopian from some perspectives at least—is that this means a library can own one copy of an ebook and circulate it to as many people as want to read it, simultaneously at no cost. Once digitized, the resource is available to everyone, everywhere, simultaneously.

But if one library can do this with its purchased copy of an ebook, so can a statewide consortium with its single purchased copy—or, for that matter, the whole world from a copy purchased by One Great Library on the Internet.

That may sound great for readers, but what it means for writers and publishers seems fairly clear: one sale. Period. That's untenable if you believe writers, songwriters, musicians, and others should be able to earn money for their creativity. It's untenable if you believe that publishers and distributors add value.

Given that possibility, it's not hard to understand the fears of copyright holders. Utopia for one group is dystopia for others. "Information wants to be free" may be an amusing rallying cry, but two side effects are to rally

those who want total control over copyright material and to provide a convenient club with which to pound those working for balanced copyright: Lump them in with the tiny but vocal anti-copyright fringe.

That's not the only factor by any means. At least one group of intermediaries, the Motion Picture Association of America (MPAA), consistently has opposed new technologies that it sees as reducing its total control over movies. Thus the Betamax case, in which the MPAA tried to prevent the sale of general-purpose videocassette recorders on the basis they could be used to copy movies and infringe copyright in the process.

The Supreme Court decided in Sony's favor, finding that Betamax VCRs could be used for legitimate purposes and could not be outlawed because they could *also* be used to infringe. Even though studios have made enormous sums thanks to prerecorded videocassettes, some of them still believe the Betamax case was decided wrongly. They have approached each new technological advance in the same manner: Shut it down or place it under total control.

That's getting ahead of the story. First, here are some additional details on the four faces of copyright policy and how they affect technology and libraries.

Copyright Universal and Everlasting

From the founding of the United States through 1908, copyright lasted fourteen years and could be renewed once by a living author, for a total span of twenty-eight years. To be protected, a published work also needed to have an explicit copyright mark, be registered, and be deposited with the Library of Congress.

In 1909, the term was doubled—twenty-eight years, renewable once. You'd think fifty-six years was enough for almost anyone—but that's not true. If fifty-six years is good, longer is better—at least if you control long-lived properties (rare as those are), and particularly if you use copyright as a weapon to prevent others from using your characters.

In 1976, Congress changed copyright to a remarkably long and unpredictable term: Life of the author plus *fifty years*—and, for works made for hire, a generous seventy-five years. Additionally, the requirements to assert copyright and to register copyright materials both disappeared. Except for materials prepared by government entities (including court decisions), *all* new writings and other creations now are covered automatically by copyright as soon as they're put in fixed form.

Mickey Mouse and Sonny Bono

In 2004, the earliest Mickey Mouse cartoon would have entered the public domain seventy-five years after the cartoon's release, but Disney didn't want that to happen. Thanks to Disney and other lobbyists, and with the help of a singer-turned-congressman, Congress passed the Sonny Bono Copyright Term Extension Act (CTEA) in 1998. CTEA extended copyright for another twenty years.

As of now, the "limited term" of copyright is life plus seventy years when the author is known, or ninety-five years for works made for hire and anonymous or pseudonymous works. As soon as this paragraph was saved

to disk, it was protected by copyright until *at least* 2074, even if the author dropped dead the same evening.

Most observers assume that the so-called copyright industries (the Recording Industry Association of America [RIAA], MPAA, the Association of American Publishers [AAP], and others) will press for another twenty-year extension somewhere around 2018. In *Eldred v. Ashcroft,* a recent case challenging CTEA, the Supreme Court concluded that Congress could extend "limited term" as long as it wanted—as long as it isn't truly unlimited. If the current pattern continues, we will have perpetual copyright on the installment plan.

So What?

Dover Publications dare not republish *The Prophet* or *The Harp-Weaver.* I can write a short story using Lewis Carroll's Alice as a character without fear of litigation—but not one based on a character in *The Magnificent Ambersons,* even though the author died in 1946.

Edwin F. Kalmus had planned to issue new, inexpensive sheet music (with automatic performance rights) for the work of Bela Bartok and Maurice Ravel, dead for fifty years now. But now that Congress has encouraged these long-dead composers to create more by giving them *another* twenty years of protection, those plans are defunct.

Moviecraft and other companies want to restore decaying nitrate-based films from the early days of motion pictures and reissue them. They may or may not be able to do so, at least for films after 1923, because they can't identify the copyright holders and thus the movies may never pass into the public domain.

Preservation activities in general, and particularly digital preservation activities, are made more difficult when material never enters the public domain: What's the point, when the preserved materials can't be used legally by anyone?

Blocking the Many to Protect the Few

The petitioners in *Eldred v. Ashcroft* included these facts in their brief. Between 1923 and 1942, some 3.35 million items were registered for copyright. Only 425,000 of those (13 percent) were renewed for a second twenty-eight-year term. Roughly 77,000 of those continue to earn a royalty. Books, music, and films from that period (49,000 of the 77,000) earned roughly $317 million in 1977.

Because of CTEA, more than 345,000 works that don't earn money for anyone are in limbo, blocked from reuse. But it gets worse: CTEA blocks all 3.3 million items in order to protect 77,000 items.

The Shrinking Public Domain and Problematic Derivative Works

The net effect of CTEA and automatic copyright is the public domain becomes static. In the past, material under copyright regularly entered the public domain in a predictable pattern. That pattern has been interrupted and may never be restored.

In this case, technology may *help* the policy problem. The problem, in short: The public domain serves as a wellspring for new creation and as a resource for those who wish to reissue and enhance unavailable publications. As the

public domain becomes smaller and older, those resources for creativity effectively shrink.

Several policy initiatives may help to grow the public domain and a new category of works, where the copyright holder deliberately retains only *some* rights. These initiatives use technology to carry out policy. They are worth tracking by librarians and, in some cases, worth supporting. Two of them are listed below.

Creative Commons (CC)

http://creativecommons.org

This initiative began in early 2002. The idea was and is to develop flexible, customizable licenses that artists, writers, programmers, and others can use to define *legally* what constitutes acceptable uses of their work. The group released its first set of machine-readable licenses on December 16, 2002.

The key is "Some Rights Reserved"—a flag you will see on many weblogs and other Web sites. "Some" depends on the creator's preferences and needs. In addition to two special forms—"No rights reserved," which places work in the public domain and allows creators to use a special CC graphic, and "Founder's Copyright," an explicit agreement that work will enter the public domain after fourteen years—eleven CC licenses are based on combinations of four specific conditions:

Attribution, noted by a circled "BY:"— this means others can copy, distribute, display, and perform your work, and derivative works based on it, but only if they give you credit.

Noncommercial, noted by a circled-and-slashed "$"— permits copying, distribution, display, performance, and derivation, but *only* for noncommercial purposes.

No derivative works, a circled "=" — allows verbatim copies but not derivative works (although some derivative works are protected by fair use).

Share alike, a circled backwards "c" — allows others to distribute derivative works if the derivative carries the same license as your works.

When a creator clicks on the "choose license" tab at CC's site, they answer three questions ("allow modifications" has three choices), with help available for each one. Once that's done, they review the results and "tell the world"—by adding HTML to their Web page (or text to a non-Web work) and, optionally, filling out a questionnaire to add more detail to the HTML, "to greatly increase other people's ability to search for your work."

The basic HTML—which CC e-mails to the creator—displays the CC "Some Rights Reserved" image and the text: "This work is licensed under a Creative Commons License."—with the last three words hotlinked to the specific license you chose (at the CC site). That license includes the appropriate icons and legal code.

Creative Commons licenses do *not* affect the creator's ability to sell or license other uses (for example, commercial redistribution for a noncommercial license)—but they *do* permit others to expand use of valuable material without tracking down the copyright holders.

The FAQ clarifies what CC does *not* plan to do. For example:

CC won't be a licensing or royalty-collection agency. It recommends the Copyright Clearance Center for such functions.

CC isn't building its own database of licensed content. "We believe in the Net, not a centralized, Soviet-style information bank controlled by a single organization." There's a registry of featured works, but it's not a catalog.

CC won't help enforce licenses. Since then, Creative Commons has added other licensing forms, started to work in other nations, and has other projects in the works. Those projects will be worth following. My own feelings about the CC licenses should be clear from the *Cites & Insights* home page and wording in the masthead in each issue:

> This work is licensed under the Creative Commons Attribution-Noncommercial License. To view a copy of this license, visit http://creativecommons.org/licenses/by-nc/1.0 or send a letter to Creative Commons, 559 Nathan Abbott Way, Stanford, California 94305, USA.

http://cities.boisestate.edu

What that means for readers is they are free to copy all *or part* of any issue or use it as the basis for derivative works, without contacting me or asking permission—but only with attribution and for noncommercial use. What it means for society as a whole is a substantial increase in the number of original works that can be shared and used as the basis for new work. Hundreds of thousands of creations already use CC licenses. More will in the future.

Public Domain Enhancement Act (PDEA)

After *Eldred v. Ashcroft* failed, Lawrence Lessig and others proposed the Eldred Act—a way of enlarging the public domain without burdening copyright holders with currently valuable works. That was refined into the Public Domain Enhancement Act, introduced to Congress by Silicon Valley's Zoë Lofgren on June 25, 2003.

PDEA would "amend Title 17, United States Code, to allow abandoned copyrighted works to enter the public domain after 50 years." The heart of the act is these two clauses:

> The Register of Copyrights shall charge a fee of $1 for maintaining in force the copyright in any published United States work. The fee shall be due 50 years after the date of first publication or on December 31, 2004, whichever occurs later, and every 10 years thereafter until the end of the copyright term. [If the fee isn't paid within a six-month grace period, copyright expires. Payment of the fee for a work also maintains copyright in ancillary and promotional work.]

> The maintenance fee . . . shall be accompanied by a form. . . . The form may be used to satisfy the registration provisions . . .

What would PDEA mean in practice? Copyright holders would still get fifty years of protection at no cost and with no registration required. After that, they would have to do two things to retain copyright: Register—which means that others wishing to pay to use copyrighted works would know who to contact—and pay a truly nominal sum, once each decade: $1.

With the Internet, both clauses are possible: A registration form can be online and take no more than a minute or two to prepare, going directly into a master database, and the government can process a $1 fee without losing money in the process.

PDEA would probably mean that, even if Congress continues to extend copyright by twenty years in a twenty-year rolling cycle, the bulk of copyrighted works would fall into the public domain because they aren't worth the trouble of registering and paying the $1—or because nobody's available to register them. Right now, "nobody's available" is a trap for

would-be users: Hidden copyright holders can emerge at any time, and ignorance of the copyright holder is not a good defense.

The cost to anyone with valuable properties would be nominal. The benefit to society would be substantial. PDEA seems like a reasonably noncontroversial proposal, and it is gaining some support—but the track record of pro-user copyright bills has not been good.

Technology Trumping Tradition: Losing Fair Use and First Sale

Problems in this area fall into two general categories: Digital rights management (DRM), which might better be called digital *restrictions* management, and the use of licenses to override balanced copyright. In the first case, DRM combines with extreme copyright law to make things worse. When the Digital Millennium Copyright Act (DMCA) became law in the late 1990s, the basis was that copyright holders needed better tools to fight digital piracy. DMCA provided those tools—and also created a whole new class of crime that causes unfortunate side effects.

Unintended Consequences: Three Years under the DMCA appeared May 3, 2002, from the Electronic Frontier Foundation (www.eff.org). The executive summary argues that DMCA's anticircumvention provisions (Section 1201) "have not been used as Congress envisioned." Congress was after pirates and wanted to ban black boxes—but the provision has been used to stifle legitimate activities.

www.eff.org

According to EFF's report, Section 1201 chills free expression and scientific research, jeopardizes fair use, and impedes competition and innovation. The summary provides examples of otherwise-legitimate activities made impossible by Section 1201 (for example, fast-forwarding through commercials before a DVD movie), real-world examples of the harm done by DMCA, including self-censorship for fear of violating the act, scientists unwilling to come to the United States, the assault on fair use represented by copy-protected pseudo-CDs, and more.

For more information on deCSS, see David S. Touretzky's site, www-2.cs.cmu.edu/~lst/DeCSS.

Consider deCSS, a program created so that Linux users could view legally purchased DVDs on their DVD-ROM drives. Under DMCA, deCSS is illegal—and so is any publication of the algorithm in any form. First Amendment? Sorry, DMCA takes precedence.

Does DMCA chill free expression and scientific research? The Secure Digital Music Initiative devised methods to watermark digital music in order to protect against copying and invited people to crack the codes. Edward Felten and his Princeton team did so and planned to present a paper on their work. The RIAA sent Felten a letter demanding that he destroy the research and threatening that publication of academic research "would subject your research team to enforcement activities under the DMCA."

Felten pulled his paper from one conference and raised a public stink—at which point the RIAA said they weren't really threatening legal action, just sending an innocent letter. By disavowing the threat, the RIAA mooted a potential anti-DMCA court case, while showing how effectively DMCA could be used to stomp on academic freedom as well as fair use, free speech, and other "pre-digital" rights.

DMCA's warping of copyright balance is bad enough that *Business Week* has run more than one story denouncing its provisions. Its proponents

have become surprisingly public with their assumptions that all consumers are thieves at heart, that fair use does not exist, and that reasonable expectations of purchasers and users should be overridden in the name of copyright.

Want to use a five-second excerpt from a movie on DVD to illustrate a point in a multimedia paper or classroom setting? Fair use says you can—but the Content Scrambling System (CSS) as enforced by DMCA says you can't, and fair use is not a defense against DMCA.

Licenses tend to restrict rights even further, but they fall into a cloudy area of policy. If another library asks for a copy of a journal article that you hold in electronic form, can you supply it? For a print journal, the answer typically is yes—at least if you haven't provided five other articles in the same journal, or if you pay the copyright clearance fee. For electronic journals, the answer depends on the license you negotiate, and your powers of negotiation may be limited. Licensing issues deserve a whole separate treatment; it's enough to note here that licenses can undermine library policies and the consumer side of copyright.

Locking Down Technology: The Threat of Extreme Copyright

If DMCA warps copyright balance, a number of other initiatives threaten to break it completely, in ways that could restrict new technology severely. Some initiatives are legislative; some arrive via regulation. Others work through treaty processes.

One problem with tracking extreme copyright initiatives is their contents frequently don't match the titles, either due to legislative ignorance or deliberate obscurantism. Take, for example, two previous efforts by Senator Fritz Hollings, neither of which made much progress.

First there was the Security Systems Standards and Certification Act (SSSCA). It would have made it a civil offense to create or sell "any interactive digital device that does not include and utilize certified security technologies" approved by the U.S. Commerce Department. That includes any hardware or software capable of "storing, retrieving, processing, performing, transmitting, receiving, or copying information in digital form."

In other words, *every* digital technology would be covered, from portable CD player to mainframe computer. SSSCA would put the government in the position of mandating the circuitry of electronic devices. The Walt Disney Company called it "an exceedingly moderate and reasonable approach." Anyone who knew anything about technology was appalled.

In March 2002, SSSCA died after a contentious Senate hearing, but Hollings came back with the Consumer Broadband and Digital Television Promotion Act (CBDTPA). Digital television is a big deal with Congress, and who could possibly be against something that would promote it?

How would CBDTPA promote broadband and digital television? By requiring every digital device to include undefeatable copy-protection circuitry defined by the government: "Any hardware or software that reproduces, displays, or 'retrieves or accesses' any kind of copyrighted work." In essence, same story, different title.

CBDTPA didn't go anywhere. Instead, portions of it surfaced in the Broadcast Flag, a rulemaking by the FCC, while other portions pop up in new

legislation. One recent effort was Orrin Hatch's INDUCE or IICA act, which started out as a way to avoid "child exploitation" and since has been cast as an anti-peer-to-peer effort.

INDUCE/IICA and related acts have been rewritten so often that they're hard to explain in any manner, but the core is to increase vastly the scope of secondary copyright liability. In essence, if someone creates (or promotes, or even advises on in some drafts) technology that *can* infringe copyrights, the creator may be liable for infringement regardless of the legal uses for that technology. It was a direct swipe at the Betamax doctrine and had remarkably little to do with its intended target.

I offer these as examples. INDUCE/IICA appears to be dead as of this writing. In 2004, as in 2003, Congress adopted no copyright legislation, either to redress existing imbalances or to tilt the field even more toward restrictive copyright. The good news is that public interest groups such as Public Knowledge and the Electronic Frontier Foundation have had some success in stalling or defeating bad law.[3] The bad news is that MPAA, RIAA, and their friends don't give up—and that they can and do work through other means to achieve their ends.

The Worst-Case Scenario

If copy protection means outlawing all copying, that overturns fair use and would not survive judicial review. RIAA, MPAA, AAP, and others disclaim any such intention—although the track records of MPAA and RIAA could raise doubts as to their sincerity. In any case, all current proposals assume some legal copying—but some of them give publishers full, undefeatable, control over copying.

Copy control for digital resources requires digital watermarks: Additions to copyright materials that spell out attached rights but (supposedly) don't interfere with the music, video, picture, or text itself.

Any digital watermark that can be detected can be defeated or removed (digitally) by true (commercial) pirates—and a digital watermark that isn't detectable won't work.

For amateurs, a digital:analog:digital (DAD) round-trip will eliminate any watermark that doesn't audibly or visibly deface the file. Plug your CD player into your PC's sound card. MusicMatch Plus, Easy CD Creator Gold, and other extended-capability PC music programs will convert the analog audio output back into digital MP3 or .WAV files (which is also why "copy-protected" CDs aren't copy protected at all, they're just defective). Maybe it takes seventy minutes instead of three minutes to redigitize a seventy-minute CD, but that's no big deal.

Movies? A player, a TV, and a video camera; it may not be pretty, but it's all you need. For photos, there are scanners. Yes, there are quality losses in each case—but anyone who thinks 128K MP3 or network-downloaded MPEG4 movies offer adequate quality won't care about the losses.

That does not mean undefeatable copy protection is impossible. It will work just fine on this principle: *Anything not expressly allowed is forbidden.* A fully workable chip would necessarily refuse to play or copy any *possibly* copyrighted file, whether new or old, that does not carry an appropriate watermark.

If this seems like a doomsday scenario, think it through: How can you assure that illegal copying doesn't happen unless *all* copying requires watermarks?

If that's true, and even a modified version of this horror-show is ever adopted, "crippled PCs" is not hyperbole. Such provisions would outlaw new general-purpose PCs. Even less drastic implementations would destabilize and limit PCs as used by honest people. True (commercial) pirates and thieves will find and circulate ways to disable the protections, regardless of the possible consequences. Honest people will suffer; thieves, not so much.

Hopeful Signs: DMCRA and Others

Groups pushing for balanced copyright have become more effective over time. In the case of extreme acts, such as CBDTPA and IICA, these groups have considerable help. The consumer electronics and personal computing industries, which would be damaged most severely by such restrictions, are *much* larger than the "copyright industries."

But the copyright industries have decades of smooth, effective lobbying behind them: In his heyday, MPAA's Jack Valenti could tell legislators that it was their patriotic duty to jump, and the response would be "How high?"

Congressman Rick Boucher introduced the Digital Media Consumers' Rights Act (DMCRA), and there are signs it or something like it is gaining support. DMCRA would protect research explicitly, modify DMCA to allow circumvention of copy protection to exercise fair use rights, and require proper labeling for copy-protected pseudo-CDs.

DMCRA explicitly states it is not a DMCA violation to make, distribute, or use hardware or software with significant non-infringing uses, thus reaffirming the Betamax doctrine (which is currently case law) as law. DMCRA hasn't passed, but it's an example (along with PDEA) of pro-balance legislation.

Achieving a Balance

Copyright industry representatives portray positions on copyright as black and white: Either you're for total copyright control or you're out to eliminate copyright entirely. That polarization is useful in pushing legislation but stands in the way of restoring balances among the parties that create, disseminate, and use works.

Extreme-copyright advocates equate "intellectual property" with physical property, although copyright isn't a property right at all (it's a limited Constitutional monopoly). They ignore fair use, deny it exists, put "scare quotes" around it, or deride it as the last defense of scoundrels. They refer to citizens as consumers. Consumers have the right to buy or not buy—that's about it. We're told that digital restrictions (digital "rights" management) are there to *benefit* consumers, as restricting our use of stuff encourages publishers to bring out more stuff for us to buy.

A few digital dreamers and other utopians say copyright should not exist. These folks (there aren't many of them) say creativity should be its own reward or that musicians, writers, and other creators should make their money through performance and appearances. The more cynical among this splinter group add that in a digital world, they'll find some way to make your material freely available anyway: Live with it.

In the real world, most librarians and other citizens that think about copyright probably believe in what's now called "weak" copyright but should be called "balance" copyright. They believe creators and

intermediaries should benefit from their work but that those who buy and use creations also have rights.

Balanced copyright follows the Constitution: *limited* terms for the copyright monopoly—perhaps the fourteen or twenty-eight years that sufficed in the United States for most of our history, maybe a longer plausible limit. At some point, works should enter the public domain to encourage the progress of science and the useful arts.

Balanced copyright means people and institutions should be able to use their purchased copies of mass-produced works pretty much as they please: Copy for personal use or preservation, lend to others, excerpt for use within other works.

People should be able to make CD-R compilations from the CDs they own, for their own use, just as they made mix tapes from LPs. People should be able to make mix DVDs with scenes from purchased movies and recorded TV shows. People should be able to copy text and images from ejournals and books to use in reports and new creations.

Libraries should be able to preserve born-digital materials, which frequently means bypassing copy protection and digital rights management. Libraries should be able to lend digital works within reason, respecting limits similar to those for print journals.

Balanced copyright means people should be able to derive new works from existing works within reason, although "within reason" in this case is difficult to define. Fortunately, libraries aren't primary players in derivative-works issues.

Balanced copyright should never stand in the way of innovation. When innovation serves no purpose other than to violate existing laws, the innovators can be called to task; that should not require new policy. Most innovations serve legal purposes but can also be used for illegal purposes. Balanced policy, in copyright and elsewhere, does not preclude legal innovations in order to bar illegal uses.

http://digitalconsumer.org

DigitalConsumer.org suggests a "Consumer Technology Bill of Rights" that serves as one example of what a reasonable balance could mean. It's reproduced here in full (as permitted by its Creative Commons "by" license):

1. *Users have the right to "time-shift" content that they have legally acquired.* This gives you the right to record video or audio for later viewing or listening. For example, you can use a VCR to record a TV show and play it back later.

2. *Users have the right to "space-shift" content that they have legally acquired.* This gives you the right to use your content in different places (as long as each use is personal and non-commercial). For example, you can copy a CD to a portable music player so that you can listen to the songs while you're jogging.

3. *Users have the right to make backup copies of their content.* This gives you the right to make archival copies to be used in the event that your original copies are destroyed.

4. *Users have the right to use legally acquired content on the platform of their choice.* This gives you the right to listen to music on your Rio, to watch TV on your iMac, and to view DVDs on your Linux computer.

5. *Users have the right to translate legally acquired content into comparable formats.* This gives you the right to modify content in order to make it more usable. For example, a blind person can modify an electronic book so that the content can be read out loud.

6. *Users have the right to use technology in order to achieve the rights previously mentioned.* This last right guarantees your ability to exercise your other rights. Certain recent copyright laws have paradoxical loopholes that claim to grant certain rights but then criminalize all technologies that could allow you to exercise those rights. In contrast, this Bill of Rights states that no technological barriers can deprive you of your other fair use rights.[4]

Is this the right balance? Perhaps not for libraries and scholars, but it's a good start.

Restoring a Balance

DMCA, CTEA, and other laws and rulemakings, such as the Broadcast Flag, have unbalanced copyright toward rights holders, who, rarely, are the creators. There are efforts to restore some balance, including DMCRA (which would rectify the worst aspects of DMCA), PDEA (to help restore the public domain and make it easier to find rights holders for older material), and others. They represent uphill battles. Meanwhile, even more restrictive policies are on the horizon.

You need to be aware of ongoing copyright issues. ALA's Washington Office does excellent work in this area. So do others, such as Mary Minow, the Association of Research Libraries (ARL), CC, the Electronic Frontier Foundation (EFF), and Public Knowledge.

Libraries need copyright. Libraries need *balanced* copyright. Without it, your ability to preserve and even to lend is in danger.

Notes

[1] Walt Crawford, "Copyright Out of Whack, I: Perpetual Protection," *EContent* 25, no. 9 (Sept. 2002): 45.

[2] Walt Crawford, "Copyright Out of Whack, II: Control Run Amok," *EContent* 25, no. 10 (Oct. 2002): 42.

[3] ALA is an active participant in Public Knowledge. Lawsuits and briefs filed through Public Knowledge frequently appear with ALA as the primary name in the suit or brief.

[4] *Consumer Technology Bill of Rights*, DigitalConsumer.org, downloaded Dec. 28, 2004, http://digitalconsumer.org/bill.html.

http://digitalconsumer.org/bill.html