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Distance Education, Intellectual Property and the DMCA

## **Introduction**

Although Distance Education (DE) represents a distinct method of teaching and learning, DE remains in the shadow of traditional face-to-face (f2f) educational environments. This constant companion is evidenced by the application of copyright law to teaching and learning with intellectual property (IP) in digital environments. In this paper, we will focus on the Digital Millennium Copyright Act or the DMCA and its impact on intellectual property and distance education. “Recognizing the impact of digital technology on all creative works and the growing importance of the Internet as a medium for sharing digital files, Congress concluded that legislation was needed to strengthen legal protections against the potential for massive digital piracy and enacted the DMCA” (Bonner, 2006, p. 87). The DMCA thus becomes an important consideration in DE because what has been accepted practice in f2f classrooms is not automatically acceptable (or legal) in a DE course environment. This difference emphasizes the importance of understanding the impact of the DMCA on the use of intellectual property in DE.

The accompanying presentation provides a high level overview of the impact of the DMCA on DE and IP. The audience for this presentation is primarily college faculty and corporate instructors; however, students may also benefit from the information as a starting point for further research. The tutorial opens with a high level overview of the concepts and terminology in the discussion, continues with a focus on DMCA and its impact on DE and concludes with ideas for next steps, a summary of information covered and final thoughts on the subject matter.

## **The DMCA’s Impact on DE**

Fair Use has long been the safeguard for using intellectual property in education environments. As long as material is being used for the purpose of educating, that material could reasonably be considered exempt with some additional guidelines for use, namely the purpose of the use, the nature of the work, the amount of material used and the potential impact on marketability (Bonner, 2006, p. 10). In contrast, the focus of the DMCA is not on ensuring that educators have options for fair use, but is instead focused on the rights of copyright owners, in many cases to the detriment of educators and instructors in the current digital environment.

Did the DMCA create more problems than the law resolved? No matter the side that is taken, in other words, whether you are the copyright owner or the intellectual property consumer, there remains a lack of balance in the application of the DMCA.

The training module accompanying this paper emphasizes the fact that the DMCA has a negative impact on DE. Educators who have a history of operating within the fair use bubble are used to making use of intellectual property “without limits and without required permission” (Strickland, 2004, p. 5). Using Digital Rights Management or DRM, the DMCA has a tool that doesn’t simply protect intellectual property, but that has the potential to severely limit its use even for educational purposes. Although, to be fair, new technologies have given intellectual property owners a valid concern. As Strickland (2004) makes clear in his Digital Dilemma series,

Between extreme overreaching of the music and video industry and equally extreme advocates of unrestricted sharing of copyright content, we are faced with a digital dilemma. Technology has provided unparalleled tools not only for creation and use but also for infringement (p. 7).

The potential for and the known abuse of technology to bypass copyright restrictions is a known factor in the race to corral intellectual property and “protect” that property from improper use. However, there has not been a corresponding push to create a doorway accessible to those who educate and instruct (Strickland, 2003).

Decherney’s (2007) article, *From Fair Use to Exemption*, focuses on media professors and their fight for an exemption to claim fair use in the use of media clips in their classrooms. Although Decherney’s focus is on academia, his observations are important for all educators including corporate trainers who buttress their materials and training events with the intellectual property of others as well. All educators need to be aware of two key positions that the DMCA reinforces, namely that (1) “the exchange of fair use for a series of carefully defined exemptions is a dramatic transformation of copyright policy” and (2) the recognition that “while the DMCA allows for exemptions to its provisions, it does not exempt fair use” (Decherney, 2007, p. 121). This is where DRM becomes important to understand. As Decherney explains, DRM has an unambiguous impact on educators due to the “anticircumvention provision.” Decherney further clarifies,

All but a handful of commercially available DVDs, for example, are encrypted with CSS (content-scrambling system). CSS is a layer of code that controls access to the content of a DVD. Because of CSS, to make a digital copy of a DVD one must circumvent encryption and thus break the law. Even if the use of the copy is a fair use – such as using a clip in a classroom – the making of the copy is illegal (2007, p. 122).

Decherney closes his article by reminding the reader that exemptions are not a substitute for fair use.

Rafal Kasproski (2010) continues with this theme and uses the title of his article to peak the readers' interest by re-branding DRM as Digital Restrictions Management. Kasproski's article is one on various perspectives on DRM with a focus on fair use and how the DMCA impacts educators. Interestingly, even more balanced articles remind the reader that the DMCA and DRM technologies limit how intellectual property can be used and repeat the fact current laws have changed how educators can make use of intellectual property. Kasproski concludes his article by reminding the reader that

The higher education community was very active in requesting that the exception that allows certain professors to circumvent DRM for the purpose of making compilations of film clips to use in the classroom be expanded to include more faculty members. The motion picture industry, on the other hand, argued that even the current exception was unnecessary and should be eliminated (2010, p. 54).

The reader is able to construct their own verdict from the evenhanded statements above.

The issue remains that working inside the constraints in place by the DMCA severely limits distance educators and those limitations are further highlighted by the reminder that face-to-face instructors are able to legally employ fair use where distance educators cannot. In an example presented in Kasproski's article on perspectives,

Music legally purchased and loaded on a DRM-enabled device may not play on classroom equipment. A professor, for example, may download [and pay for] music to be taught in a course, but then may not be able to play that music back in class even though it would be legal to do so (2010, p. 51).

In the world of DE, these same actions, circumventing DRM for teaching purposes, becomes an illegal activity as soon as that material is made available electronically and educators potentially at risk of being identified as intellectual property infringers with legal ramifications a very real possibility.

For those educational institutions and educators using the provisions of the Technology, Education, and Copyright Harmonization or TEACH Act, there are some options available for the use of electronic media in distance course environments. Nevertheless, the limitations on types of work, the limitations on who can use the provisions, the

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emphasis on “mediated (i.e., teacher-conducted) use, and the potentially expensive institutional requirements continue to ignore fair use and, in a way, penalize educators who instruct from a distance (Strickland, 2004, p. 5).

### **Other DMCA Tutorials**

A Google search for DMCA tutorials, lists many websites with advice for copyright owners on how to eliminate copyright infringement and unauthorized use of intellectual as well as tutorials on how to fight back when take-down notices and copyright infringement is alleged property (see

[http://www.google.com/search?hl=en&source=hp&q=DMCA+tutorials&aq=f&aql=&oq=&gs\\_rfai](http://www.google.com/search?hl=en&source=hp&q=DMCA+tutorials&aq=f&aql=&oq=&gs_rfai)). For

this project, there are three positions reviewed, a tutorial on using the provisions of the DMCA for intellectual property owners, a tutorial on what to do if you’re identified as a copyright infringer and a tutorial on how the DMCA impacts a university. Links to each of the tutorials follows:

- <http://www.musicphotographers.net/guides-and-tutorials/dmca-letter>
- <http://www.crucialp.com/resources/tutorials/web-hosting/how-to-file-dmca-counter-claim.php>
- <https://student.support.tufts.edu/dmca-portal.php>

### **Music Photographers Network Guides and Tutorials: DMCA Tutorial**

The DMCA tutorial from the Music Photographers Network provides minimal definitions of the DMCA and its uses, while focusing on the actual steps required to initiate a takedown of sites using their intellectual property without permission. There is a detailed description of what is required in a DMCA notice and a template is provided to assist the reader. Contacting the site owner is discussed with an area devoted to steps to take if the site owner is difficult to identify. The site does provide a list of links to additional information on the DMCA and the link to the actual DMCA law itself, which partially mitigates the minimal definitions provided earlier. This tutorial clearly states its goal and fulfills that goal with the information provided.

### **How to File a Counter-Claim**

Crucial Paradigm Web Solutions offers another short tutorial with a singular goal in mind. The purpose of this tutorial is how to file a counter claim against a DMCA takedown notice. This tutorial has even fewer definitions of terms, but does refer the reader to a link of a summary of the DMCA. The steps to respond to a DMCA request are detailed with a reference made to supporting a counter claim with the four elements of Fair Use if appropriate.

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The authors of this tutorial do not provide enough information to ground their information within the context of scenarios or examples that would further explain and support their directions. Thus, this tutorial is most likely geared toward those who have recently received a takedown notice referencing the DMCA and the readers are interested in quickly responding and not necessarily learning about what counter claims are, but needing to rapidly initiate one.

### **Tufts Student Support: DMCA**

Tufts Online DMCA tutorial has three main sections, is succinct, and provides links to additional information that include the University's own Responsible Use Policy. The tutorial concretely relates the tenets of the DMCA and its application to the students with scenarios and expectations. There is a focus on sharing or peer-to-peer networks and another section that provides examples of legal Internet sites where students can download information. The audience for this tutorial is clearly students and they are provided warnings, additional places to go for assistance and reality-based current examples, i.e. examples that most students would be able to relate to and examples of actions that many students have probably engaged in. Tufts provides a "what does this mean for you" section with sample student questions and answers that clearly explain the student's options and define the consequences. Although this tutorial is a text tutorial, it is interesting and educational.

### **Conclusion**

The DMCA has a very real impact on education in general and distance education in particular. The tenets of the DMCA, anti-circumvention technologies and the TEACH Act amendment all do little more than remind distance educators that they are not afforded the same rights as face-to-face instructors. The information provided in this paper and the accompanying tutorial take the position that the impact on distance educators is a negative one. However, knowledge and awareness are the first steps to re-defining not only how the law is applied, but also how it is perceived. Currently, the DMCA favors intellectual property owners and that in itself is not a bad thing, but balancing the DMCA with the rights of educators to criticism, research, scholarship and teaching in particular is an important next step in the response to new technologies and new ways of sharing.

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