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IT Policy: The 105th Congress and Information Technology

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Just before its fall adjournment, the 105th Congress took action on several difficult issues at the crossroads of federal policy and information technology and gave signs that there was much more to come. Headlining new laws included the Digital Copyright Act—a compromise that may or may not adversely affect academic fair use—and the Child Online Protection Act, which has "constitutional challenge" written all over it.

While the present 106th Congress has focused much of its attention on the lofty business of trying an American president for low behavior, it continues to discuss issues involving information technology that are controversial. Among the items included in legislation that survived the 105th Congress were:

- The Internet Tax Freedom Act, which ensures a three-year moratorium on any new state or local taxes on Internet commerce or access to the network. Attached to this legislation were provisions requiring agencies to use electronic forms and accept electronic signatures.
- The Digital Millennium Copyright Act, which made it a crime to break through the technologies that prevent digital software and music from being copied.
- An immigration bill that makes visas available to an extra 142,000 skilled technology workers over the next three years.
- An extension of an expiring research and development tax credit created 15 years ago.
- Limits on Year 2000 liability disclosures aimed at encouraging companies to share information about whether their computer systems are prepared to handle calendar dates beyond 1999 and about how any related problems can be fixed.
- The Child Online Protection Act, which its authors drafted to address court concerns that led to the striking down of the 1996 Communications Decency Act. The current act, aimed at better protection for minors from objectionable material, was immediately tagged as unconstitutional by critics who called it "CDA II."
- The Children's Online Privacy Protection Act, which requires Web sites aimed at children to obtain permission from parents before collecting personal information.

For the purposes of this discussion, we will focus briefly on the Child Online Protection Act and then take a closer look at the Digital Millennium Copyright Act.

Before the ink was dry on the Child Online Protection Act (COPA), the American Civil Liberties Union (http://www.aclu.org), the Electronic Privacy Information Center (http://www.epic.org), and the Electronic Frontier Foundation (http://www.eff.org) had

sought an injunction in federal court in Philadelphia, claiming that the new act had many of the same constitutional flaws as the Communications Decency Act (see the ACLU press release at http://www.aclu.org/features/f101698a.html). Critics see the new language as

- imposing burdens on constitutionally protected speech,
- failing to serve the government's interest in protecting children because it cannot be applied to foreign-based material or to such venues as chat rooms or e-mail, and
- representing something other than the least restrictive means of regulating speech (parents can use filtering software to accomplish this goal).

For Virginians, among the most interesting elements of COPA is its reliance on a standard phrased as "harmful to minors." This standard also has made its way into the language of various pieces of proposed legislation in Virginia's General Assembly (http://legis.state.va.us) and other governmental documents. Some constitutional law experts regard that standard, similar to the notion of "community standards," as unacceptably vague in the context of the global Internet. Many of us who would be on the front lines of daily interpretation of such a standard agree. As in the case of the CDA, the outcome of constitutional challenges will affect not only the federal law itself but also state and local derivatives that use similar language. [*Late-breaking news*: **Judge extends ban on enforcement of COPA** (see below)]

Regarding copyright, those representing the interest of copyright owners say they didn't get everything they wanted, but the Digital Millennium Copyright Act (DMCA) is a step strongly in the direction of new protections for copyright owners. At the same time, there are provisions helpful to the notion of "fair use," which is central to the educational use of protected materials. On balance, however, it seems that the advocates of fair use can only claim that they avoided a complete dismantling of the concept in a climate favorable to beefing up restrictions on the use of copyright-protected material.

The DMCA implements World Intellectual Property Organization (WIPO) treaties focused on the protection of Internet-accessible works of music, software, and the written word. It then goes further by making it illegal to break through the technologies used to protect such works—an expansion sought by the software and entertainment industries. Just "breaking" the protective technology—regardless of whether the person doing so intended to distribute the protected material—is punishable by a fine of up to $2,500.

This provision declaring such "digital wrappers" impenetrable (except in a few circumstances) effectively eliminates the possibility that faculty members can make copies of small portions of the works for personal or instructional use. It goes into effect in two years. Such entities as the American Library Association and the Association of Research Libraries fought the provision vigorously but only achieved a compromise. The Librarian of Congress (in consultation with the Department of Commerce and the Copyright Office) is authorized to grant an exemption if a person demonstrates that the wrappers eliminate the kind of access that would have been free if the work had been available on older media. The process for getting such an exemption clearly represents a barrier that will test the resolve of persons interested in such access.

Among other relevant provisions of the act, there is a clear outline of procedures that online service providers (OSPs) should follow in dealing with complaints regarding copyright violations in order to limit their financial liability. My university functions as such an OSP, often providing storage space and network access to persons who directly

place material there without review by the university. When such circumstances exist, OSPs (effective immediately) must:

- designate an agent to receive complaints from copyright owners about violations and to send notices to persons who have made the material accessible;
- develop and post a policy for termination of repeat offenders while providing all users with information about copyright laws;
- comply with both notices that demand copyrighted material be "taken down" and notices that demand that it be "put back" (lawyers have already coined the phrase "dueling notices" to describe this sequence); and,
- ensure that their systems accommodate industry standards for technical means of copyright protection.

The dueling-notice procedure removes a complication that has confused many of us who have received copyright-related complaints over the years. That complication involved figuring out whether or not the act in question really was a violation of copyright. Often we found ourselves in the awkward in-between space in such disputes. A person outside our environment would send a complaint to us threatening a lawsuit if we didn't remove the material from our systems. We notified the "user" involved, and he or she said to us that the use of the material was proper. If the case was not clearcut, then we'd have to act without a complete set of undisputed facts, sometimes removing the material to protect the university while allowing the allegation of copyright violation (and the threat of lawsuit) to trump our user's counter argument that he or she was using the material properly.

Under the new procedure, we will be required to "take down" the material when we receive proper notice that it is a copyright violation, but if our user wants to fight about the issue and tells us so, we will notify the copyright owner of the dispute and put the material back up within two weeks (unless the matter has already been referred to court). This takes us out of the role of fact-finder, limits our liability as "contributing infringers," and defines a specific procedure where in the past there was none.

Another provision helpful to higher education is that the act recognizes that most faculty and graduate students at colleges and universities are not standard employees, and the institutions are not responsible for them in the same way as other employing organizations are for their employees regarding copyright violations.

Also, privacy of users is protected by this process. An OSP need not release the identity of a user to the complaining party until the complaining copyright owner completes a federal court process that results in the issuance of a formal request by a federal court clerk. And, OSPs are not required to proactively monitor its services for possible copyright infringements. But to qualify for all of these provisions, the OSP must take a series of formal steps to be identified as operating in this capacity.

A final note: Discussion of the copyright protection of digital materials is far from over. One upcoming debate involves greater protection for databases of factual information—the kind maintained in such services as Lexis-Nexis. While this issue failed to make it into last year's legislation, members of Congress have promised to return to it this year.

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Footnote to this story:

Judge Extends Ban on Enforcement of COPA
Edupage, February 2, 1999

U.S. District Court Judge Lowell A. Reed has extended his temporary ban on enforcement of the Child Online Protection Act, and signaled in a lengthy memorandum that he considers the act an unconstitutional violation of First Amendment rights of free speech. To protect children from pornography transmitted through cyberspace, the federal Child Online Protection Act requires operators of commercial Web sites offering potentially objectionable material to establish a system to prevent minors from viewing that material. Judge Reed, a Reagan appointee, wrote: "Despite the Court's personal regret that this preliminary injunction will delay once again the careful protection of our children, I without hesitation acknowledge the duty imposed on the Court and the great good such duty serves. Indeed, perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection." (San Jose Mercury News 2 Feb 99)