

Rescuing the Intellectual Commons: "Fair Access" Right for Public Libraries

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Content owners, fearing the unregulated Internet as a fatal threat to their business interests, lobbied and Congress passed the Digital Millennium Copyright Act ("DMCA") in 1998. The digital encryption protection (known as "1201 provisions") enshrined in the DMCA represents a paradigm shift in copyright law. No longer does the copyright holder need to initiate action against an alleged infringer. They can proactively prevent any unauthorized copying or distribution of its work by the 'triple play' of the 1201 provisions, contract via licensing agreements, and the technology itself (referred to collectively, as the "1201 regime"). Unauthorized uses swallow up traditional copyright doctrines of fair use and first sale. The content industry and many legislators and judges have been persuaded that these doctrines are unnecessary (and burdensome) in the digital era. The magical solution is the price discrimination model which promises optimal production and allocation of copyrighted works by the market.

Dedicated to the mission of broad access to knowledge resources (or "intellectual commons"), public libraries serve the goals of the copyright system. As William Patry wrote in *Moral Panics and Copyright Wars*, "Copyright is not an end in itself, but instead an end to a social objective, furthering learning." Over a decade ago when the DMCA was being debated, librarians and educators warned of the chilling effect of the 1201 regime on the free flow of information to the public, especially the less economically advantaged. Their concerns went largely unheeded as Congress responded to the alarmist rhetoric voiced by certain content industries.

This article argues that the traditional critique of copyright expansion is insufficient to advance copyright in the digital era. It fails to account for the dynamic processes of access, creativity and cultural production, which sustain the intellectual commons. In their 2000 appeal to the Librarian of Congress for a broad exemption to the 1201 provisions, the public libraries understood well what was at stake for society. Diminished access to knowledge resources (i.e. intellectual commons) would undoubtedly over time threaten the vitality and health of America's cherished democratic values of social mobility, democratic discourse and an innovative, productive economy.

The public libraries invocation of Constitutional arguments and nostalgic references to the "existing legal regime" for support of their appeal echoed the abstract arguments of the conventional critique of copyright expansion. The public libraries' unsuccessful appeal parallels the weaknesses of this abstract

model which overlooks the need to examine empirically the concrete, tangible harms resulting from the 1201 regime. In so doing the conventional critique is vulnerable to the equally abstract (unproven) argument by the content industry that the price discrimination model will solve all problems of access through the market function.

This article proposes an alternative model drawing on the discourse of social and culture theory. It focuses on the dynamic processes at work in the creative process and the critical role of access, and draws attention to the related need to understand the tangible effects on those processes by the current copyright regime. This article suggests possible interventions to expand access to knowledge resources through a new 'fair access' doctrine exercisable by the public library system. It recognizes the valid argument of the publishing industry that a broad exemption for public libraries for fair use in digital works could subsume the private market as the lines between the two have blurred with remote access and electronic delivery of digital books. Several interventions are proposed to support the goal of 'fair access' for the public through the public library system.