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# NEW COPYRIGHT LEGISLATION

**MAY 26, 1998**

The Senate has passed S2037, the Digital Millennium Copyright Act, by a 99-to-0 vote. The House version, HR3048, is in committee. If the House version is passed, there will be a conference to resolve differences in the two bill before a final version is passed by both houses of Congress and becomes law.

The most important change for photographers in the Senate bill is that it would be a crime to remove or alter copyright management information, such as a watermark, on an image.

The bill allows for actual and statutory damages for such removal. A complaining party may elect to recover an award of statutory damages for each violation in the sum of not less than $2,500, or more than $25,000. In addition any person who makes a willful violation for the purpose of commercial advantage or private financial gain is subject to a fine of $500,000 and/or imprisonment of not more than 5 years.

One of the major purposes of this legislation is to ratify and implement the decisions of the World Intellectual Property Organization (WIPO) made in December 1996. The treaties will be meaningless unless ratified by a large number of the 100 countries participating in WIPO. The U.S. is trying to take the lead in demonstrating its commitment to protecting American creativity. The government estimates that U.S. creators are losing $18-20 billion every year to international piracy. This volume has increased tremendously with the onset of the digital age and the expansion of the Internet.

The organizations leading the fight for these copyright changes are the Association of American Publishers www.publishers.org and the Creative Incentive Coalition www.cic.org. CIC is primarily a representative of music creators. Photography associations seem to have been notably absent in the lobbying for these bills. CIC is asking supporters to send letters to the House Judiciary Committee. You can get more specifics at their web site.

Critics of the bill are those who want everything on the Internet to be free. Adam Eisgrau of the American Library Association said, he sees a "legal infrastructure being created out of whole cloth for the beginnings of a pay-per-use information universe."

In this rare instance, the interests of photographers and publishers coincide. Both need legislation that will strengthen the traditional "pay-for-use" system. Later, we can continue to agrue about how much should be paid for various uses, but at least photo users won't be able to grab the fruits of our labor, for free. Once "pay-for-use" in the digital environment is more clearly codified in law, we will still have to fight with the publishers over the issue of whether photographers should receive part of that pay, or whether the publishers get to keep it all.

**Fair Use**

One issue not dealt with in S2037 is the matter of "fair use." In the current law "fair use" is an ill-defined catch-all phrase. It not only allows school children to make photocopies of magazine articles for their private educational purposes, but major publishers often claim "fair use" and refuse to pay for photographs produced by professional photographers.

In fact, some law professors teaching copyright law tell their students that when a client gets caught in an infringement the first strategy is to claim "fair use."

I know of at least two recent situations where portraits taken by professional photographers were supplied to their customers for personal use, only. Later, these images were given to the press and distributed worldwide.

When the pictures were originally shot the individuals photographed were of no public interest. Later, each became involved in a major news story and the press obtained the photos from their families or lawyers. The news organizations claim that their use of the images is "fair use" and that they have no responsibility to compensate the photographers in any way for the creation of these images.

The copyright law needs additional clarification as to what is, and is not, a "fair use". To my way of thinking, if the use of a copyrighted work accrues commercial benefit to the user, in any way, then the user should not be allowed to claim "fair use" as a way of avoiding reasonable payment to the copyright owner.

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