BEFORE THE COPYRIGHT OFFICE
UNITED STATES LIBRARY OF CONGRESS

In Re:	)	
Promotion of Distance Education Through Digital Technologies	)	Docket No. 98-12A

COMMENTS OF NATIONAL MUSIC PUBLISHERS' ASSOCIATION

This provides the comments of the National Music Publishers' Association, Inc. ("NMPA") in response to the Request for Comments of the Copyright Office on the Promotion of Distance Education Through Digital Technologies (63 Fed. Reg. 71167 (Dec. 23, 1998)).

NMPA is an industry trade association representing more than 600 music publishers – businesses that own and administer copyrights in musical compositions. NMPA's wholly-owned subsidiary, The Harry Fox Agency, Inc. ("HFA"), serves as licensing agent for more than 20,000 music publisher principals in connection with licensing the use of music in the United States in records, tapes, CDs and online delivery. HFA also licenses music on a worldwide basis for use in multimedia productions, films, commercials, television programs and other types of audiovisual applications.

NMPA's music publisher members, the publisher-principals of HFA, and the tens of thousands of songwriters they represent stand to be directly affected by policy and practices in the area of "distance education." We understand fully the promising opportunities distance

education offers for students of every age, and in every discipline. Creators and owners of rights in protected works, as well as the entities that license uses on their behalf, can play a constructive role in promoting the availability of the broadest possible range of materials for use in distance education and other network contexts. NMPA believes strongly that the greatest possible benefit -- for educators and learners, creators and copyright owners -- will be achieved through policies that first and foremost encourage the creation and dissemination of works and preserve the incentives to create that are at the core of our copyright system.

I. Response to "Specific Questions"

1. Nature of Distance Education.

In the policy debate that led to enactment of the Digital Millennium Copyright Act ("DMCA"), much attention was paid to the needs of educators, students and copyright owners with respect to so-called "distance education" activities. From the beginning, however, dialogue was frustrated by the difficulty of defining what is meant by the term.

The past decade has seen staggering advances in computer network technology. Many schools and universities have only very recently acquired and begun to utilize such technology for reaching students off-site. And educators have only begun to experiment with teaching techniques and tools for this new environment. It should come as no surprise then, that groups seeking exemptions for the use of copyrighted materials in distance education have had trouble clearly defining the "problems" they currently confront and offering tailored solutions.

Rather, some have argued that distance education should be viewed in its broadest and most general sense because "everyone is a learner and every place is a classroom." Similarly, others have suggested that the term "distance education" itself isn't

quite right; we should really be talking about exemptions for "distance learning." Still others have focused on the needs of educators to be able to obtain immediate and free use of any and all material needed "to get the job [of teaching] done," without regard for the copyright status of the work or the type of work in question. Many claim a broad exemption is necessary because obtaining necessary permissions is too burdensome.

Copyright owners, including music publishers, are also attempting to understand what distance education means and what impact it might have on established as well as potential businesses. ***For this reason, NMPA believes that it is far too soon to determine whether a distance education exemption in the law is warranted, let alone to begin to draft one.*** As we will discuss below, we believe firmly that more must be learned about specific problems encountered by teachers and other faculty, about the potential for licensing to satisfy the needs of educators and educational institutions, and the role of technology both in facilitating licensing and in protecting works against unauthorized uses.

If discussion of the need for a distance education exemption in the law is to proceed at this time, however, some working definition of the term must be found. In this regard, we note, as have other publishers, that the copyright law has never treated "educational" uses of copyright works as categorically exempt from copyright protection, and has never conditioned qualification for a privilege or limitation on the rights of copyright holders solely upon the assertion that a use is "educational." Rather, in Sections 110(1) and 110(2) of the Copyright Act, Congress has tied the availability of any limitation to "teaching" or "instructional" activities associated with a "classroom or similar place devoted to instruction," and has avoided general references to "learning" experiences unrelated to "systematic instruction."

Consistent with the policy underlying existing limitations in section 110(1) and 110(2), we urge that any further discussion of any exemption for distance education purposes be tied to: (i) instructional activities conducted by an accredited non-profit educational institution acting as such for an educational, non-commercial purpose; (ii) digital transmission of the material only in the course of a regularly scheduled course of instruction that is part of an established curriculum; and (iii) receipt of the material only by enrolled students in good standing at such an educational institution. Only by adopting a shared understanding of what is meant by a distance education program can the affected interests engage in a meaningful discussion of the specific needs, problems and opportunities such programs afford for students, educators and educational institutions, and creators and publishers of protected works.

There is a critical practical consequence of many distance education proposals that must be emphasized: they would ***eliminate*** existing segments of the publishing business. In the music industry, for example, there are publishing companies that exist specifically to develop and market materials for music instruction and music education. A broad distance education exemption would usurp educational publishers of copyright protection and would eliminate any economic incentive for these existing businesses to develop or market their materials. Not only would this be a bad result for the individual publishers, but it would be an unfortunate result for music students and educators as well -- because fewer music education products would be available. Nonprofit educational institutions are certainly free to create their own music education products and distribute them across digital networks to their students. If such institutions wish to use the work of others, however, then there is absolutely no justification for departing from traditional copyright principles.

2. Role of Licensing.

The growth of the Internet and other advanced computer networks has forced many established copyright-based businesses to confront and adopt new models for doing business. Despite their grounding in intellectual property, many business segments had come to view themselves principally as creators and distributors of tangible goods. On the Internet, however, these same creative "products" can be distributed electronically, without any tangible commodity changing hands. In this environment, companies derive income from licensing individual transactions, including the licensing of copies or "downloads" of protected works. Increasingly, such licensing transactions will form the backbone of "e-commerce."

The music publishing business has enjoyed a substantial advantage in coming to terms with the potential of new license-based Internet markets. Songwriters and music publishers, over the past century, have earned the most substantial portion of their income from licensing transactions. Major sources of income have come from "mechanical" licenses issued for the making and distribution of phonorecords and from public performance licenses covering a range of live performances, broadcasts and retransmissions.

In the United States, NMPA's licensing subsidiary, HFA, serves as agent for 20,000 publishers in the issuance of mechanical licenses, including "digital phonorecord delivery" ("DPD") licenses authorizing the digital distribution of music in downloadable formats. With the expected proliferation of legitimate sources of music in new formats such as MP3 (MPEG 1, Layer 3), DPD licenses are likely to account for a growing source of industry income. Music publishers also expect to explore new opportunities to offer other forms of music online, including lyrics, sheet music and innovative new products (such as

authorized versions of guitar tablatures). Some publishers may even wish to consider the development of music education products for online applications. Today, none of these opportunities could properly be called a "market" because the products and technologies are in their early stages. An essential fact about the Internet, however, is that markets develop almost instantly.

Individual music publishers are embracing new technologies and experimenting with new ways of doing business. At the same time, established licensing organizations, including HFA, are ready and able to assist users in clarifying the nature of the license or licenses required for a particular use. With regard to requests to distribute music online in a downloadable format, HFA is able either to issue the necessary license or to refer the user to the appropriate publisher. The performing rights organizations similarly are able to assist in providing information and licenses for the public performance of music.

Obtaining licenses through HFA is neither difficult nor burdensome. In fact, the same computer network technology that is making new uses of music possible is being employed by HFA to provide its publisher-principals and their customers with up-to-date copyright ownership, administration and licensing information. Information concerning the hundreds of thousands of works available for licensing through HFA will soon be available via the Internet to any interested user. NMPA and HFA hope that this important collection of information will serve not only to facilitate licensing, but also as an important reference tool and resource for music teachers and historians.

In the meantime, however, the same information may be obtained through HFA by written request, or often by phone.[1] Our industry is available to address the needs and concerns of music educators and is interested in responding to those needs through

appropriate licenses issued at reasonable rates. HFA is not aware, however, of a single request from an educational institution for a license to incorporate music in distance education materials or to reproduce and distribute music in the distance education context, or even for information concerning the possible need to obtain such a license. It is inappropriate to legislate, or to recommend enactment of legislation, before existing law and licensing mechanisms have been given an opportunity to function.

NMPA and HFA would welcome the opportunity to assist music and other educators in understanding the issues raised by identified uses of music and related licensing of musical works. We urge the Office to build on the efforts of the Conference on Fair Use, and to bring together educators and educational institutions and representatives of the copyright community to explore means of facilitating and accommodating the needs of educators, students and copyright owners through licensing. In this regard, we believe that industry-specific dialogues might prove useful and informative both for the affected interests and for the Office.

3. Use of Technology.

The existence of technology to protect works in digital form is the absolute predicate to a successful distance education program that will respect the rights of copyright owners. Given the substantial risks of infringement over digital networks, and given the documented, widespread incidence of student misuse of electronically transmitted copyrighted music and other materials, distance education programs must prevent the unauthorized reproduction, retention and further distribution of copyrighted works. Whether a particular use is authorized by license or deemed "fair use," technical measures can ensure that copyrighted material is delivered solely to recipients within the scope of the authorization

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[1] The Harry Fox Agency, 711 Third Avenue, 8th Floor, New York, New York, 10017, phone: (212) 370-5330.

(such as enrolled students in appropriate courses of instruction) and not misused by such recipients once received.

Requiring respect for protective technical measures as a component of any responsible digital distance education program is consistent with the general policy toward copyright in the digital environment, particularly as established by Congress in the DMCA. In the new section that establishes limitations on remedies for infringement in the case of certain digital transmissions, Congress made clear that:

> The limitations on liability established by this section shall apply to a service provider only if the service provider . . . accommodates and does not interfere with standard technical measures . . . . [These technical measures] are used by copyright owners to identify or protect copyrighted works . . ..

17 U.S.C. 512(i). In this provision, Congress recognized the great potential for infringement posed by the Internet and chose to withhold any benefits from users of copyright that do not accommodate technologies employed by copyright owners to protect their works. That reasonable policy of "benefits only in exchange for good behavior" should be applied as well to any special copyright treatment for distance education.

One critical category of protective measure that should be respected by distance education programs is copyright management information. Section 103 of the DMCA added new section 1202 to Title 17. That section establishes penalties against the provision or distribution of false copyright management information and against the removal or alteration of copyright management information. There is no exception to the prohibitions in section 1202 for libraries, educational institutions, or any similar users (although courts are given the discretion to remit damages in the case of innocent violations by an educational institution, library or archives).

If copyrighted material is distributed over a network by any educational institution in a distance education program (or otherwise), then any copyright management information associated with such material must be respected in the manner required by section 1202. To recommend otherwise would invite further downstream infringements and erode the ability of the copyright owner to distinguish between authorized and unauthorized uses.

4. Application of Copyright Law to Distance Education

(a) *Existing Law*. It is NMPA's view that existing law is adequate to address current and presently anticipated forms of distance education using digital technology. There are an extraordinary number of special provisions in the Copyright Act that already address the needs of the educational user community in this context, specifically:

- the "teaching" provisions of fair use under section 107 (including the "nonprofit educational purpose" factor of section 107(1));
- the "teaching activities" exception to the performance and display right in section 110(1);
- the "systematic instructional activities" exception for certain transmissions under section 110(2);
- the "remission of statutory damages" provision for nonprofit educational institutions that reasonably believed that a fair use exception applied to a particular act found to constitute infringement in section 504(c);
- the exemption for nonprofit educational institutions from certain aspects of the anti-circumvention prohibitions in section 1201(d);
- the "remission of damages" provision for nonprofit educational institutions establishing "innocent infringement" under the anti-circumvention or copyright management information provisions: section 1203(c)(5)(B);
- the exemption from criminal penalties for nonprofit educational institutions violating the anti-circumvention or copyright management information prohibitions: section 1204(b); and

- the limitation on liability for nonprofit educational institutions acting as service providers for certain infringing acts of their faculty member and graduate student employees under section 512(e).

In addition to privileges and limitations that are specific to nonprofit educational institutions, the DMCA establishes certain limitations on remedies for any entity acting as a "service provider." This term is defined to mean "a provider of online services or network access, or the operator of facilities therefor . . .. "[2] Given that "distance education" includes "education through digital technologies, including interactive digital networks,"[3] it appears inevitable that some accredited, nonprofit educational institutions engaging in distance education will satisfy the definition of service provider. Indeed, the limitation on liability of nonprofit educational institutions for certain actions of their employees assumes that such institutions will satisfy this definition.[4]

Upon satisfaction of the service provider definition, a nonprofit educational institution would be eligible for limitations on liability for monetary relief and on certain forms of injunctive relief for: (1) "system caching"; (2) material stored at the direction of a user on the service provider's system or network without actual knowledge of infringement, or awareness of facts or circumstances from which infringing activity is apparent; and (3) use of information location tools without actual knowledge or awareness of apparent infringement at the referred location. The "information storage" provision could be particularly helpful in providing nonprofit educational institutions meeting the definition of service providers with arguments to protect themselves from liability for copyright

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[2] 17 U. S.C. § 512(k) (l).

[3] Section 403(a) of the Digital Millennium Copyright Act of 1998, Pub. L. 105-298 (Oct. 27, 1998).

[4] 17 U.S.C. § 512(e)(1) ("When a public or other nonprofit institution of higher education is a service provider . . . ").

infringement damages for actions taken by participants in distance education over whom such institution might have limited control.

In summary, the copyright law already contains a broad range of provisions that promote the ability of nonprofit educational institutions to develop and engage in distance education programs conducted over interactive digital networks. Taken as a whole, these provisions offer substantial safeguards and protection for educational users of copyrighted works who make good faith attempts to obtain permission to use works for digital distance education projects, or who reasonably and in good faith rely on the privilege to make fair use of such works. NMPA believes that no further general or specific distance education exemption is warranted at this time.

(b) *Possible Specific Exemptions.* Some have suggested that amendment or expansion of the exemptions in section 110(1) and 110(2) would facilitate distance education programs. We believe such action would represent a poor policy choice. First, there has been no litigation or other documented dispute over distance education practices to indicate that so drastic a move is necessary, appropriate, or responsive to established institutional needs. For example, deleting the term "face-to-face teaching activities" in section 110(1), or the references to "systematic instructional activities" and the requirement that the transmission be made primarily for "reception in classrooms or similar places normally devoted to instruction" in section 110(2), would not simply "extend" the existing limitations to distance education. Instead, it would greatly contribute to the number of unauthorized copies of works that travel the Internet, it would threaten existing educational publishers, and it would hamper copyright owners' efforts to respond to and effectively address piracy.

Second, Congress just completed a long, acrimonious fight over a proposal to expand the exemption in section 110(5) in the new term extension law. The result is extensive bitterness among the parties involved and a likely protest of this diminution of essential copyright protection by the European Union. Expansion of other aspects of section 110, particularly with regard to protected music, is both unnecessary and politically unwise.

Educational institutions – merely because they are educational institutions – should not be authorized by law to usurp the rights of copyright owners and to act as publishers and distributors of works. We strongly urge the Office to encourage proponents of change in this area to be more specific about their needs and concerns. While certain problems may in the end raise exemption issues, others may prove capable of resolution through responsive licensing practices, or voluntary guidelines evidencing a shared understanding of what constitutes "fair use" in defined circumstances.

For distance education today, the marketplace and the law should be allowed to evolve. In the meantime, fair use exists to the extent that parties agree a use is fair, or a court determines that a use is fair. Legislation is particularly unhelpful in this inherently fact-specific setting. Voluntary guidelines, however, are constructive and helpful, and NMPA stands ready to participate in any such negotiations -- as it always has.

(c) *Conditions on New Exemptions.* As described above, NMPA believes there is no justification for any new exemptions in the copyright law for distance education. This is particularly true given the many recent changes to the law in the DMCA -- many of which directly benefit nonprofit educational institutions -- and the lack of any experience with the practical effects of this new law. If , however, the Copyright Office does consider a new exemption, NMPA encourages it follow these established principles:

- Outright exemptions from a right established in section 106 are to be avoided at all costs. Copyright law has traditionally approached complex infringement situations through limitations on remedies (i.e., the remission of damages in section 504(c)(2)) rather than through exemptions from liability.

- No benefit should be given to a copyright user merely because of that user's status. Rather, the user must earn the benefit by following a prescribed code of conduct that discourages infringement. This principle is reflected, for example, in the section 512 requirements of "good copyright conduct" -- including compliance with "notice and takedown" rules and accommodation of technological protection measures -- before limitations on remedies are made available. If a nonprofit educational institution does not take affirmative actions to avoid infringement, then any benefit under the copyright law should be denied to that institution.

- Any exemption must take fully into account international treaty obligations to ensure that global copyright protection for U.S. works is not improperly diluted to satisfy an asserted domestic interest.

- As established in the new term extension law, if a work sought to be used in a distance education program is subject to commercial exploitation (i.e., is readily licensable) and is available at a reasonable price, then such work should not be subject to any general use exemption that might otherwise apply (17 U.S.C. § 108(h)(2)).

(d) *Economic Impact of Exemption.* It is inherently difficult to quantify the economic impact of an exemption that does not now exist (indeed, Congress established statutory damages in the Copyright Act for similar reasons: actual damages are theoretical and can be difficult to prove). The burden is not, however, on copyright owners to show that a distance-education exemption will have a significant adverse economic impact; rather, the burden is on nonprofit educational institutions to describe with sufficient specificity the problems that distance education currently faces under existing law.

It should be remembered that an exemption from copyright would give nonprofit educational institutions no incentive to obtain permission or licenses, or to otherwise respect copyrights, and it would encourage other entities with marginal claims to the exemption to try to shoe-horn themselves into a distance education definition. In short,

an exemption from copyright law would remove an important incentive to respect copyrighted material and observe the copyright laws.

(e) *What would be the international implications of such an exemption? Would it be consistent with U.S. treaty obligations?*

The Office seeks comment as to whether a distance education exemption would be compatible with U.S. obligations under intellectual property and other related treaties. Whether a particular exemption is likely to be deemed compatible with U.S. treaty obligations would depend largely upon an assessment of its nature and scope, the exclusive rights to which it would apply, and its potential impact on the interests of creators and rights holders in the works affected. A general review of relevant U.S. obligations and recent international developments instructs that even a narrowly drawn exception could be subject to scrutiny and possible challenge by our trading partners.

Current U.S. treaty obligations in the copyright area derive principally from the Berne Convention for the Protection of Literary and Artistic Works (Paris 1971) ("Berne Convention") and the World Trade Organization ("WTO") Agreement on the Trade Related Aspects of Intellectual Property Rights ("TRIPs"). Although the U.S. has yet to ratify the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty ("WIPO Treaties"), it has expressed its clear intention to do so, and therefore the Office will wish to consider related provisions as well.[5]

Both TRIPs and the WIPO Treaties build in significant part on the substantive provisions of the Berne Convention. The Berne Convention binds signatory countries to grant to authors certain exclusive rights, including, *inter alia*, the right of reproduction (Article 9), the

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[5] Each of the WIPO Treaties will, separately, come into force 30 days after it has been ratified by a total of 30 nations.

closely related rights of public performance, broadcasting and communication to the public by wire or wireless means (Articles 11 and 11*bis*) and the right of adaptation (Article 12). Distance education activities – however they are defined -- stand to implicate every right of authors and their successors in interest guaranteed by the Berne Convention. Because HFA serves as agent in licensing the reproduction and distribution of musical works, our analysis will focus principally on international obligations with implications for those rights.

With respect to the exclusive right of reproduction, the Berne Convention allows signatory nations to adopt narrowly cast derogations only in "special cases" subject to two stringent conditions: (1) the permitted reproduction must not conflict with a normal exploitation of the work and (2) it must not unreasonably prejudice the legitimate interests of the author (Article 9(2)). The TRIPs agreement, in Article 13, extended the conditions in Article 9(2) to permissible limitations or exceptions in respect of all exclusive rights of the copyright holder, including all rights guaranteed by the Berne Convention, as well as those rights recognized by TRIPs itself.

The TRIPs agreement's extension of the conditions on derogations of rights evidenced a shared commitment among nations to ensure that the grant of exclusive rights to authors and their successors in interest operates as more than a hollow promise. TRIPs contemplates that narrowly drawn exceptions to or limitations on rights might be acceptable in special circumstances. But in no event are nations free to impose limitations that conflict with the rights holder's ability to exploit his or her work through licensing or other normal modes of doing business, or to establish regimes that prejudice the rights holder's legitimate economic interests. Like other provisions of the TRIPs agreement, disputes between WTO Members over compliance with Article 13 and associated obligations are subject to WTO

dispute settlement procedures. In other words, if one nation believes another limits the exclusive rights of authors in a manner that exceeds the scope of permissible limitations under Berne in contravention of the conditions prescribed in Article 13, it can challenge the allegedly offending practice before the WTO.

Because reaching a strong TRIPs agreement was a high priority for the United States, our trading partners are likely to scrutinize with great care any new exemption or limitation on rights adopted in U.S. law. As the Office is well aware, the European Commission is expected within days to file with the WTO a formal complaint challenging a recently enacted expansion of the limitation on the exclusive right of public performance in section 110(5) of the Copyright Act. Following receipt in April 1997 of a complaint from the Irish Music Rights Organization ("IMRO"), the Commission conducted a legal and factual analysis of section 110(5) as it existed on the date the IMRO complaint was filed (the "homestyle" exemption), and as it was amended by the so-called "Fairness in Music Licensing Act."[6] In a decision dated December 11, 1998, the Commission concluded that "section 110(5) of the Copyright Act of the United States appears to be inconsistent with the obligations of that country under the Marrakesh Agreement establishing the WTO and constitutes an 'obstacle to trade' . . ." subject to challenge under WTO dispute settlement procedures.

In the view of the Commission, the original "homestyle" exemption[7] conflicts with Article 11*bis*(2) of the Berne Convention. That paragraph provides that, while countries

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[6] Pub. Law 105-298 (Oct. 27, 1998), Title II.

[7] The original homestyle exemption is now codified as section 110(5)(A)and provides:

> Notwithstanding the provisions of section 106, the following are not infringements of copyright:
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> (5)(A) except as provided in subparagraph (B) [the greatly expanded exemption applicable to nondramatic musical works], communication of a transmission embodying a

may place conditions on the exercise of exclusive rights of broadcasting in Article 11*bis*(1), such conditions may not be prejudicial to the rights holders' right to obtain equitable remuneration for the use of their works. "Section 110(5) of the U.S. Copyright Act is prejudicial to the right holders' right to obtain such remuneration," according to the Commission, "as it deprives them of all remuneration in respect of the use of their works in situations covered by the homestyle exemption."

The Commission's position on the proper application of Article 13 of TRIPS is also worth noting, as it is likely to influence the interpretation of the provision by other trading partners. The Commission's December 11 decision states:

> The Commission holds the opinion that Article 13 of TRIPs cannot be invoked by the United States to justify the homestyle exemptions, as this provision limits the scope of ***existing exemptions*** under the Berne Convention to special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder. It does not allow additional exemptions to the rights protected under the Berne Convention (emphasis added).

In other words, the Commission is of the view that Article 13 does ***not*** permit a nation to enact any limitation on rights so long as it can argue that the limitation does not exceed the conditions set forth in the Article. Rather, the conditions are available (the Commission seems to suggest by way of a legal defense) only to justify the scope of exemptions already contemplated by the Berne Convention. These are narrow and few and include Article 9(2), the possibility of "small exceptions" in respect of the rights of public performance and broadcasting, certain "fair use"-type of exceptions or limitations for purposes of permitting "quotation" from works, and "use ***by way of illustration*** for teaching"

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performance or display of a work by the public reception of the transmission on a single receiving apparatus of the kind commonly used in private homes, unless –

(i) a direct charge is made to see or hear the transmission; or

(ii) the transmission thus received is further transmitted to the public.

(Article 10) (emphasis added).

It is clear that, at least in the view of one of our nation's leading trading partners, an exemption or limitation that forecloses the ability to exercise rights across a potential market segment, even when narrowly drawn, is prejudicial to the legitimate interests of the rights holder, contrary to Berne Convention obligations, and stands as a barrier to fair trade. It is difficult to see how a general exemption for any segment of the education market, but especially for the evolving distance education market, would be viewed as less significant than the original homestyle exemption.

No existing provision of the Berne Convention provides a credible basis for claiming compatibility of a general exemption for distance education activities, as has been suggested by some. Nor would any appear to support elimination of the "face-to-face teaching" criterion in Section 110(1) or the wholesale expansion of the existing Section 110(2) to the Internet.

Having failed to explain how their proposals comport with ***existing*** U.S. treaty obligations, proponents of legislative change in this area point instead to language in an Agreed Statement concerning Article 10 of the WIPO Copyright Treaty. Article 10(1) of the WIPO Copyright Treaty carries forward the conditions in Article 9(2) of the Berne Convention and Article 13 of TRIPs to rights recognized under the WIPO Treaties; Article 10(2) in essence repeats the language of Article 13 of TRIPs with regard to Berne rights generally.[8] The Agreed Statement says

> It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in

[8] Similar language appears in Article 16 of the WIPO Performances and Phonograms Treaty.

> the digital network environment.
>
> It is also understood that Article 10(2) neither reduces nor extends the scope of the limitations and exceptions permitted by the Berne Convention.

Reliance upon the Agreed Statement as authority for an expansive distance education exemption is wildly misplaced. It simply ignores the plain language of the Treaty. As the second paragraph of the Agreed Statement makes clear, nothing in the WIPO Copyright Treaty reduces or extends the scope of limitations permitted by the Berne Convention itself. In this regard, the Agreed Statement is wholly consistent with Article 1(2) of the WIPO Copyright Treaty, which states "Nothing in this [WIPO] Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works."

As discussed above, NMPA strongly urges the Office to refrain from recommending a specific legislative proposal extending an exemption to certain distance education activities at this time. In addition to the reasons we have provided in response to other questions posed by the Office, such premature action could subject the U.S. to yet another challenge to the compatibility of its copyright law with significant international obligations.

II. Appropriateness of Legislative Recommendations.

It would be premature for the Copyright Office to recommend legislative changes in this new, rapidly changing area of law and technology. Many of the copyright limitations that nonprofit educational institutions could use to establish distance education programs were only enacted in October of 1998 -- including safe harbors for certain acts in their capacity as a service provider. In addition, the availability of online licensing to facilitate distance education projects is a growing but relatively recent phenomenon and

should be given a chance to work. Fair use and limitations on statutory damages against nonprofit educational institutions remain viable protections for such institutions. Given this situation, there is no present need -- and no solid basis -- for specific recommendations for further legislative changes.

Respectfully submitted,

National Music Publishers' Association
By:

By:_____

Edward P. Murphy
President and Chief Executive Officer
711 Third Avenue
New York, NY 10017
Telephone (212) 922-3260
Facsimile (212) 953-2471
E-mail: emurphy@nmpa.org