

February 23, 1999

Sayuri Rajapakse
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Dear S. Rajapakse:

On behalf of the National Federation of Abstracting and Information Services (NFAIS), I am writing in reply to the formal comments that were submitted as part of the Copyright Office hearings on the promotion of distance education through digital technologies. An NFAIS representative attended the hearings held in Washington, DC on January 26, 1999, and we have since reviewed the formal comments that have been posted on the Web. We applaud your efforts to develop recommendations for Congress that will maintain “an appropriate balance between the rights of copyright owners and the interests of users.”¹ However, having heard the discussions at the hearing and now having read the comments, we are concerned by your statement that “such recommendations may include legislative changes.”²

Our concern is rooted in the following: 1) Electronic databases have *very little protection* under the current copyright law; further usage exemptions will only dilute what little protection is afforded by copyright and contract law; 2) the Academic community itself has *widely diverse opinions* regarding the database usage exemptions that are being sought and how the community can prevent abuse of those exemptions; and 3) the requirement to submit recommendations to Congress by April 28, 1999 does *not allow sufficient time for discussion* of the many significant issues that have been identified as a result of the hearings - issues that *must* be resolved before any legislative changes can be put forth *if* the aforementioned goal of “balanced needs” is to be satisfactorily reached. Let me further clarify these concerns.

Lack of Database Protection

Database owners have been aggressively seeking electronic database protection since the Feist decision in 1991 - to no avail. Even the Digital Millennium Copyright Act (H. R. 2281) was passed without the inclusion of specific database protection measures, primarily as a result of protest from the user community. Two of the major reasons given by users for *not* moving forward with database protection legislation were: 1) the combination of legal, contractual and technological protections available today is adequate; and 2) it is critical to proceed with great caution in this area given the risk of unintended negative consequences.³ *Ironically, users are now attempting to be exempted from the very protection that they said made legislative changes unnecessary - license agreements, technology, and the right to refuse to license if certain needs are not met.*

¹ *Federal Register*, Vol. 63, No. 246, Wednesday, December 23, 1998, Notices, p. 71167.

² *Ibid.*

³ *U.S. Copyright Office Report on Legal Protection for Databases*, August 1997

Licenses

A repetitive theme in support of legislative exemptions for educational uses of digital information is that database license fees can be expensive and that data owners impose too many restrictions. Let me quote from some of the comments:

“...it has been demonstrated that licenses can undermine privileges available to libraries and educational institutions,....deny access based solely on cost.”⁴

“If licensing of educational materials were inexpensive enough to allow schools to be involved with interactive, digitally delivered distance educational materials then it might not be necessary to allow for exemptions.”⁵

“A compulsory license provision in the copyright law, which allows educational institutions to disseminate materials by digital technologies quickly and easily, may be a viable alternative to a distance education exemption”⁶

“Vendors require us to restrict access of their content to students, faculty and staff and we must demonstrate that we are capable of doing that to their satisfaction.”⁷

“Most of the difficulties in the licensing have nothing to do with the process - most involve the overarching concern that we live in a society of “information haves” and “information have-nots”, and the gap between the two is ever-increasing due to the rising cost of information.”⁸

The major complaint against licenses is *not* the negotiation process. Indeed, the process has improved significantly in the past few years *and* licenses are helping to balance the needs between users’ needs and owners’ rights as noted in the following quote from a noted librarian:

“What many have come to realize during the current licensing activities is that the license arrangements that libraries and publishers currently are making might, in fact, be achieving what we once expected from legislation and getting us there more quickly.”⁹

Licenses allow flexibility in meeting the needs of a wide spectrum of users, and facilitate the adoption of reasonable usage agreements based upon the unique and often diverse needs of each user population.

The major complaints against licenses are primarily related to money (*not* a copyright issue) and secondarily related to the fact that data owners want to be assured that their data can and will be protected.

⁴ James G. Neal in his Testimony (January 26, 1999) on behalf of the Association of Research Libraries, the American Association of Law Libraries, the American Library Association, the Association of College and Research Libraries, the Medical Library Association, the Special Libraries Association , see <http://www.arl.org/info/letters/neal.html>

⁵ *Online Distance Education Study and Recommendations to the Registrar of Copyright from the Utah Education Network*, <http://www.uen.org>

⁶ *Comments of Education Management Corporation Regarding the Promotion of Distance Education Through Digital Technologies*, <http://lcweb.loc.gov/copyright/disted/comments.html>

⁷ *Promotion of Distance Education Through Digital Technologies*, submitted by the University of Texas System, <http://lcweb.loc.gov/copyright/disted/comments.html>

⁸ *Ibid.*

⁹ Okerson, Ann, Copyright or Contract, *Library Journal*, Vol. 122, No. 14, September 1, 1997, p. 138.

NFAIS Members believe that in the absence of database protection legislation, the security provided to data owners by licenses is essential. Any legislative exemptions that will negate licenses or the technological protection requirements contained therein, will leave data owners extremely vulnerable. Which leads me to the second source of concern - technology.

Technological Protection

As noted earlier, the use of technological protection (encryption, watermarking, time-outs, etc.) was cited by users as one of several measures that provide adequate substitution for database protection legislation. However, there now appears to be mixed opinions among users as to the *degree of security* that such devices actually provide and on the *amount of technological protection*, if any, that should be imposed upon educational users of digital information. Again, I will quote from the published comments:

“The inherent security of these diverse technologies varies greatly.”¹⁰

“...the contemplated prohibition (against circumvention of technological measures to protect copyrighted works) poses significant problems for distance educator providers.”¹¹

“States may wish to explore negotiating yearly payment for “blanket” educational licensing so long as the state and educational institutions keep control over use (for instance: materials can be used in courseware and course work but not broadcast or used for personal projects unrelated to teaching in an enrolled setting). However, this may be difficult to control and police.”¹²

“Currently NVCC has not developed specific programs to protect the security of digital education programs.”¹³

“Products that incorporate these technologies (cryptographic algorithms) are able to prevent unauthorized use of copyright materials, but do not serve to prevent unauthorized retention or re-use of copyright materials. Digital watermarking technologies provide some level of protection against unauthorized re-use of copyrighted materials, but this is still an active area of research, and the answers are not yet complete.”¹⁴

NFAIS Members realize that educational institutions acknowledge the need for data protection and are struggling with the implementation of technological devices that will provide security for digital information. Their distance education programs vary, but many are international in scope, providing fertile and widespread ground for potential information piracy. However, the requisite security for such programs is not yet in place.

¹⁰ *Copyright, Distance Education, and New Technologies: Meeting the Needs of Indiana Educators and Copyright Owners in A Digital Society*, Indiana Commission for Higher Education and the Indiana Partnership for Statewide Education, January 21, 1999, <http://lcweb.loc.gov/copyright/disted/comments.html>

¹¹ *The University of Montana Recommendations and Views on Promoting Distance Education Through Digital Technologies*, <http://lcweb.loc.gov/copyright/distd/comments.html>

¹² *Northern Virginia Community College Comments: Distance Education Questions*, February 10, 1999, <http://lcweb.loc.gov/copyright/distd/comments.html>

¹³ *Ibid.*

¹⁴ Griffiths, Jose-Marie, University of Michigan Comments, <http://lcweb.loc.gov/copyright/distd/comments.html>

NFAIS members believe that legislative exemptions should not be given for the use of digital information in distance learning due to the current absence of secure technological measures that will protect that information - a void that has been openly acknowledged by the user community.

The Right of Refusal

During the many debates on database protection legislation, the user community stated that legislation was not needed because data owners could refuse to sell or license their property if they were concerned with possible abuse. However, some proponents of legislative exemptions for the use of digital information in distance learning appear to believe that data owners should not have the right to say “no”:

“Regardless of the purpose of use...there are publishers...that refuse to allow any of their works to be made available in digitally delivered distance education courses. As a result, UMUC cannot arrange to deliver these materials because the publishers simply refuse to allow their works to be digitized and delivered online.”¹⁵

“There have been difficulties in receiving permission from copyright holders when the materials are delivered over an interactive video system. This has caused certain materials not to be used, and the quality of the lesson to be diminished”¹⁶

“If a work is not so available (via licensing at a fair price), educators need the right to digitize it and display and perform it to students...regardless of the student’s location...This would provide an appropriate incentive to content owners to make their works available efficiently and at a fair price, while giving Universities the right to use works whose owners do not step up to the plate, so to speak.”¹⁷

At the hearing on January 26, 1999 some of the presenters also expressed the opinion that as long as a reasonable fee were to be paid, a data owner should not have the right to refuse the use of their material in digital format for the use of distance education, and if the price isn’t “fair” the law should give them the right to use it without paying

NFAIS members believe that intellectual property should not be treated differently from any other legally-owned property, and that any owner should have the right to refuse the use of his property for good and sound reasons. If this is not the case, then there is no such thing as property and no such thing as theft.

Lack of Agreement in the User Community

The answers to the questions posed to all those who submitted comments regarding the use of digital information in distance education clearly indicated a lack of agreement within the user community. Some believe that exemptions should be granted to those who use only a portion of a work, while others believe that a quality education requires the use of complete works, particularly in educational settings where poetry, advertising, films, photography, etc. are being discussed. Some believe that exemptions should be for degree programs, others want exemptions for all continuing education programs. Some believe that exemptions should be provided for programs that limit information access to registered students and faculty. Others define the user community much more broadly - students, faculty, consultants, employees, etc. Some expressed concern over the quality of distance education, the need for standards for accredited

¹⁵ *Promotion of Distance Education Through Digital Technologies*, University of Maryland University College, <http://lcweb.loc.gov/copyright/distd/comments.html>

¹⁶ Root, Jon R., Comments from Oregon Sate University, <http://lcweb.loc.gov/copyright/distd/comments.html>

¹⁷ *Promotion of Distance Education Through Digital Technologies*, submitted by the University of Texas System, <http://lcweb.loc.gov/copyright/disted/comments.html>

programs, etc. Most believe that exemptions should only apply to non-profit educational institutions, clearly stating that competitive programs from for-profit organizations such as the Learning Center should be excluded from any exemptions.

NFAIS Members believe that at present there is insufficient consensus within the user community and between users and data owners as to how exemptions for the use of digital information in distance learning should be applied, and that more discussion - between data owners and data users - is required in order to reach a satisfactory balance between the needs of both communities.

Additional Time Required for Discussions

In 1998 the user community stated that it was critical to proceed with great caution in changing copyright legislation in order to prevent any negative consequences as a result of database protection. We believe that this same caution needs to be applied to any legislative exemptions for the use of digital information in distance learning. This form of education is growing, has penetrated industrial settings, and is global in scope, as noted in the following quotes:

“The Business School’s Global MBA program uses telecommunication technology to deliver approximately 25% of its instruction.”¹⁸

“At present, more than 6,200 UMC students are enrolled in 150 online courses and are able to fulfill all of the requirements for seven different degrees online,...and for more than 50 years, UMUC has provided educational opportunities to United States armed services personnel in Europe and Asia under a contract with the Department of Defense.”¹⁹

“For the past nine years, NCSU has offered courses leading to a Bachelor’s degree in business management to working adults who are employees of the IBM facility at Research Triangle Park. Courses are taught on-site at the IBM facility.”²⁰

“With the sponsorship from the U.S. Environmental Protection Agency, the university is the home of the Air Pollution Distance Learning Network (APDLN), which is a satellite-based video training network. This program is exploring the use the World Wide Web for delivery of course materials, and several of the programs have been broadcast worldwide using the Mbone technology on the Internet”²¹

“Virtually every university in the United States is involved in some form of distance education, as is almost every community college district. In addition, universities are relying more heavily on digital information to enhance the traditional classroom environment. ...Therefore we are likely to see an increase in the use of digital and Internet-based material access for distance and traditional education.”²²

As was pointed out in the hearings, *distance education is not new*. It began with correspondence courses more than a century ago. What *is* new is the application of digital technology to distance education and the growing application of such technology to the traditional on-site campus education. However, this *technology is relatively new, the devices necessary for data protection are relatively undeveloped, and*

¹⁸ Griffiths, Jose-Marie, University of Michigan Comments, <http://lcweb.loc.gov/copyright/distd/comments.html>

¹⁹ *Promotion of Distance Education Through Digital Technologies*, University of Maryland University College, <http://lcweb.loc.gov/copyright/distd/comments.html>

²⁰ Hoon, Peggy E., Comments from North Carolina State University, Raleigh, N.C., <http://lcweb.loc.gov/copyright/distd/comments.html>

²¹ *Ibid.*

²² *Promotion of Distance Education Through Digital Technologies*, submitted by the University of Texas System, <http://lcweb.loc.gov/copyright/disted/comments.html>

the user population is generally unaware of copyright law and the issues surrounding intellectual property. We are in the early stages of developing a computer-literate information society. That society must be developed and protected by a legal framework that sets the stage for its successful development and growth. It is far too soon to be establishing legislative exemptions when the legal framework itself has not yet been fully established and tested.

NFAIS Members believe that in today's copyright environment database protection is limited. We rely on protection through license agreements, through technology, and through the right to request a certain level of assurance that security measures are being taken to prohibit data abuse. These methods were cited by users as being a reasonable substitute for legislative protection of data owners rights, and without legislative protection or some other form of protection we cannot support legislative exemptions from these practices.

Summary

However, *we do believe that quality education is essential*, not only for the future well-being of the United States, but for that of Society as a whole. We wish to work with the user community and the Copyright Office in seeking a satisfactory solution to the current dilemma, and we believe that we have the necessary expertise and experience to serve in such a role. NFAIS Members represent more than 50 of the world's leading producers of database and information services in the sciences, engineering, social sciences, business, and the arts and humanities. Some of our members have been creating databases and their forerunners for more than a century and all are experienced in handling issues related to the creation, dissemination, and usage of digital information. We offer our collective experience to you in all further activities related to developing your recommendations to Congress on this critical issue.

This reply is submitted on behalf of the Officers and Board of Directors of the National Federation of Abstracting and Information Services.

Sincerely,

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