

February 24, 1999

BY HAND DELIVERY

The Register of Copyrights
Attention: Sayuri Rajapakse, Esq.
Attorney-Advisor
Office of Policy & Int'l Affairs
James Madison Memorial Building
Room LM403
101 Independence Avenue, S.E.
Washington, D.C.

**Re: Reply Comments of the Newsletter Publishers Association
Concerning Promotion of Distance Education Through
Digital Technologies;
Copyright Office Docket No. 98-12A**

To the Register:

The Newsletter Publishers Association ("NPA") is a trade association representing the interests of publishers of more than 2,300 newsletters and specialized information services. Most of NPA's members are small businesses publishing one or a handful of titles whose voices are not represented by other industry groups. Indeed, the majority of NPA members have fewer than ten employees and, thus, represent the archetypal "mom and pop" American enterprise.

At the same time, however, NPA members have a dramatic impact on the flow of news and information upon which government, academia and industry regularly depend. Collectively, members of the NPA publish on virtually every major subject of public concern, literally from A to Z: Titles run the gamut from *AIDS Clinical Care* to the *Indian Subcontinent Monitor* through *Personal Finance* and the *Zoning Bulletin*. One characteristic that distinguishes almost all newsletter publishers from other media enterprises is that, for the most part, newsletters eschew advertising in order to maintain their editorial integrity and are dependent solely upon subscription revenue for their income. Without wishing to overstate the metaphor, newsletter publishers are – in a very real sense – the modern-day equivalent of Thomas Paine's "lonely pamphleteers."

As a result of these characteristics, the publishers who make up the NPA are particularly vulnerable to unauthorized reproduction of their copyrighted works. Indeed, Congress expressly recognized this attribute of newsletters when it adopted the Copyright Act of 1976:

[A]s a general principle, it seems clear that the scope of the fair use doctrine should be considerably narrower in the case of newsletters than in that of either mass-circulation periodicals or scientific journals.

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., at 73 (1976). Because of its members' unique position, NPA has on several prior occasions offered testimony in connection with Congressional hearings, including the House Subcommittee on Courts and Intellectual Property's proceedings in connection with the Copyright Reform Act of 1993 and the NII Copyright Protection Act of 1995. In addition, as you may be aware, representatives of the NPA have participated in a number of the Copyright Office's informal working groups to address particular issues affecting copyright owners and the users of copyrighted works. It is against this backdrop that NPA respectfully submits the following comments in reply to statements made both at the hearings and in written comments on the promotion of distance education through digital technologies.

Based upon their testimony and written comments, NPA understands that proponents of enhanced distance education seek two key changes in existing copyright law:

- An expansion of the exemption currently available for the reproduction of copyrighted materials for use in the classroom. In essence, proponents seek to amend the Copyright Act to authorize the transmission of copyrighted materials to students via the Internet without the copyright owner's permission.
- Expansion of the exemption currently available to libraries that would permit them to make a digital copy of a work available not only to patrons physically present in the library, but also to users outside the library who would access the work only electronically.

These proposals, when applied in the unique circumstances of newsletter publishers, threaten the very survival of NPA's members. Permitting libraries to "circulate" electronic copies of the newsletters in their collections to "patrons" who merely log on over the Internet could, with a few keystrokes, eviscerate the market for many, if not most, newsletters. If current subscribers are able to "borrow" over the Internet from a library free of charge the same publication that they have heretofore purchased (often in the electronic format NPA members increasingly make available to their subscribers), how many are likely to

renew their subscriptions with the publisher?^{1/} By the same token, where, as in the case of newsletters, the publisher is compensated primarily by subscription revenue, authorizing educators to freely disseminate copies to students affords *no* compensation to the creator of the work and no weight to the rights of the copyright owner. The consequences of such a scheme would be dramatic: The majority of NPA members who do not have other sources of income likely would find it impossible to generate a profit through their publishing activities. We do not think it exaggerates the threat to say that a multitude of publishing voices could be silenced.

Thus, NPA strongly disagrees with those who have testified or have suggested in their written comments that any incentives for distance learning should apply to "all" classes of works. Not all classes of works are alike, and newsletters are, we submit, *sui generis* for the reasons set out above.

Notwithstanding the singular position of its members, NPA does share several concerns articulated by others during these proceedings:

- Technology currently does not provide adequate assurance that materials authorized for transmission to students will be limited to that audience.
- In the absence of quantitative limitations on the amount of any one work that could be transmitted, certain types of works, including individual articles, photographs and short publications such as newsletters would be particularly vulnerable to abuse because their market value could be completely displaced through transmission.
- At the very least, any exemption from existing law should be limited to non-profit educational institutions with a true pedagogical motive. There are any number of "non-profit research institutions" that in reality serve and are funded by well-heeled business and other interests.

The NPA and its members appreciate the Copyright Office's efforts to fulfill its obligation to advise Congress concerning these matters, and we respectfully request that the NPA's views be conveyed along with the Office's ultimate recommendations.

^{1/} Indeed, in the context of the NII Copyright Protection Act of 1995 and the comprehensive hearings in both the Executive Branch and Congress that preceded its introduction, virtually everyone concerned agreed that the "transmission" of a copy of a work should continue to be deemed among the bundle of exclusive rights that a copyright encompasses. To adopt a contrary principle now would be to reject the sound conclusion arrived at in those proceedings after exhaustive inquiry.

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Sincerely,

NEWSLETTER PUBLISHERS ASSOCIATION

By: _____

Andrew Jacobson
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Committee
(Mr. Jacobson also is the President of
Post-Newsweek Business Information,
Inc.)