

[sent to: disted@loc.gov]

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Dear Attorney Rajapakse:

I am writing in reply to the Federal Register notice of December 23, 1998 inviting comments concerning the Copyright Office study of distance education mandated by Congress in the Digital Millennium Copyright Act ("DMCA"). My copyright background includes a Canadian law degree with a particular focus in copyright and also direct experience in copyright administration as a publisher representative at the Copyright Clearance Center and currently as the copyright permissions officer at the John F. Kennedy School of Government. These comments are submitted solely in my personal capacity and do not necessarily reflect the views of Harvard University.

Section 403 of the DMCA instructed the Register of Copyrights to consult with educators, publishers, copyright owners, and libraries, and submit recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works. Such a study is a logical outgrowth of the so-called White Paper issued in 1995 by the Working Group on Intellectual Property Rights of the White House Information Infrastructure Task Force. In that report, the Intellectual Property Working Group concluded that the emergence of new information technologies did not require a massive overhaul of intellectual property law, and that "[e]xisting copyright law needs only the fine tuning that technological advances necessitate, in order to maintain the balance of the law in the face of onrushing technology."

The rapid growth of distance education presents a test of the Working Group's assertion that the current copyright framework can keep pace with technological change. I agree that the basic framework of the current system can continue to be workable, but only if it incorporates features necessary for the education system to realize the benefits of the diverse, fast-moving, and highly decentralized system of interactive digital communications that is rapidly becoming a technological reality.

Like the report on distance education produced by the Conference on Fair Use ("CONFU"), many of the comments thus far submitted for the DMCA study have been confined to an analysis of how the current exemption for face-to-face teaching activities contained in Section 110 of the Copyright Act can be adapted to the situation where teacher and student are in different locations. I fully agree that such amendments to Section 110 are necessary. However, given the relatively narrow boundaries of the current Section 110 -- essentially allowing only synchronous "performance and display" - I do not believe that merely extrapolating Section 110 to the distance learning environment will be sufficient to permit the range of teaching and research activities attendant to full development of distance learning programs. Nor does it provide a clear, administratively efficient, and predictable process for copyright clearance for the full range of materials to be distributed in a distance learning environment.

Accordingly, while I strongly urge the Copyright Office to recommend changes to Section 110 along the lines proposed by the Association of American Universities, the American Council on Education, and the National Association of State Universities and Land-Grant Colleges, I also propose for your consideration several other changes to law and policy. Principal among these is the suggestion, discussed further below, that a time-limited and carefully designed and controlled demonstration project be carried out to study the feasibility of compulsory licensing for non-profit distance education. It is my hope that the Copyright Office will take this opportunity to *test suggestions* that go beyond the narrow confines of Section 110.

**In advancing this idea, I emphasize that it is not my intention to suggest that compulsory licensing should in any way supplant the rights currently available to students and educators under the doctrine of fair use.** Whatever the merits of compulsory licensing in the distance education context, the rights of fair use established in Section 107 *must* continue to subsist. Compulsory licensing would merely be an alternative mechanism, available in situations that do not meet the four-factor test of Section 107, or in those situations where participants in distance education, believing that the existence of fair use is "too close to call" or too difficult to determine, opt for the safe harbor and timely determination that a compulsory license would provide.

*I. The Copyright Office Should Undertake a Study of Compulsory Licensing for Distance Learning by Non-Profit Educational Organizations.*

On the basis of my experience gained at several organizations the delay, unpredictability, and administrative cost associated with the traditional system of "clearing copyright" are greatly hindering the use of copyrighted materials in educational curricula. In the case of text works, for example, the time and expense of identifying the copyright holder, requesting permission, negotiating a license fee, and processing the permission and payment, are often disproportionate to the nature of the transaction, which may involve distributing a relatively brief passage of a work to a small audience for a limited purpose. In many instances, although the copyrighted material sought to be reproduced would make a valuable contribution to the educational program involved, and the license fee itself is not unreasonable, the time and administrative cost of securing the

permission are simply too great to justify going through the steps that would be necessary to obtain the material for the program.

To be sure, for certain materials there are reproduction rights organizations such as the Copyright Clearance Center which generally provide a faster, somewhat more efficient means for clearing permissions than the traditional “bilateral” system. However, the range of works for which such rights organizations are authorized to act as agent, and the number of works covered by automatic license fee schedules, remains relatively small. There is also a lack of predictability in the range of fees and permissions policies of the various publishers and other rights holders. Moreover, the proportion of works for which such organizations effectively serve as a clearinghouse is likely to become even smaller over time, as “publishing” becomes more fragmented, more decentralized, and less confined to printed works as a result of the Internet and other forms of electronic communication.

The current exemption contained in Section 110(2) of the Copyright Act is too narrow to serve fully the anticipated needs of distance education because (1) it only permits participants in distance education to “perform” non-dramatic literary or musical works or “display” any work as part of a transmission; and (2) it requires that the transmission be received in a classroom or other place normally devoted to instruction or by persons whose disabilities or special circumstances prevent attendance in class.

For these reasons, I urge the Copyright Office, in its report on distance learning under the DMCA, to recommend for further consideration a carefully-controlled study on how compulsory licensing *in some form* might be utilized in connection with distance learning by non-profit educational organizations. Compulsory licensing, of course, is not a new concept under United States copyright law. It has been utilized successfully for many years in connection with such activities as secondary transmission of television programming by cable systems (Section 111 of the Copyright Act), recording of nondramatic musical works (Section 115), performance of musical works by jukeboxes (Section 116), and performance and display of published nondramatic musical works and published pictorial, graphic and sculptural works in connection with noncommercial broadcasting (Section 118). For a review of compulsory licensing models (etc.) see: Barbara Cohen, Note: A Proposed Regime for Copyright Protection on the Internet, 22 Brooklyn J. Int’l L. 401 (1996).

Under the auspices of the Copyright Office, a special commission appointed by the Register of Copyrights would design, carry out, and analyze the results of a brief experimental program of compulsory licensing for distance education. The special commission would include representation from the publishing industry, the academic community, and other affected interests. While the special commission would determine the ground rules for the experimental project, those rules should at a minimum include the following features, in my view:

- 1. Rights available under the experimental program would be supplemental to, and not a substitute for, the rights of fair use**

**provided by Section 107 of the Copyright Act, and the availability of a licensing mechanism under the experiment would not be construed so as to narrow users' rights under Section 107.**

2. The experimental program would establish a fixed fee, or series of fees, for the use of designated categories of copyrighted works in distance education programs operated by non-profit educational organizations. As determined by the special commission, the fixed fee could take the form of a formula incorporating such the type of material, amount of material used, and number of students receiving the material.
3. In determining fees, the commission should recognize that permissions costs may pose an even greater burden to distance learning students than to students in traditional campus-based education, because distance learning students may not have convenient access to libraries and materials on reserve.
4. Copyright owners and users could voluntarily negotiate licensing agreements at any time, and such agreements would be given effect in lieu of the terms and rates adopted under the compulsory licensing experiment.
5. A quasi-governmental organization or clearinghouse(s) (operated by the Copyright Office or perhaps outsourced to a private organization with Copyright Office oversight) would handle the dissemination of information on terms and royalty rates, and the collection and remittance of license fees.
6. To facilitate the operation of the clearinghouse, the special commission would adopt a standard form of copyright owner notice to appear on all works covered by the experimental program.

While the concept of applying compulsory licensing to the educational context will no doubt be controversial in some quarters, and the economic and technical issues involved in designing such an experiment are complex, I believe the idea is worthy of a brief and carefully-controlled demonstration. At the time of its consideration of the cable system compulsory licensing provisions, Congress determined that “it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system.”<sup>1</sup> Likewise here, distance education will never achieve its full potential unless there is a fast, standardized, and economical method of handling copyright permissions. I believe the application of compulsory licensing to non-profit distance education is, at a minimum, deserving of serious consideration. The study required of the Copyright Office under the DMCA provides the ideal opportunity to test such a program.

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<sup>1</sup>House Report No. 98-934, 98<sup>th</sup> Cong., 2d Sess., p.89

*II. The Copyright Office Should Oversee the Formulation of Clear Safe Harbor Guidelines for Fair Use of Copyrighted Material in Non-Profit Distance Education Programs.*

Whether compulsory licensing provides a feasible and equitable approach to the use of copyrighted material in distance education can only be evaluated after extensive study, including, in my view, the sort of experiment or demonstration proposed above. In the meantime, however, the Copyright Office should continue to work toward the development of clear “safe harbor” standards for fair use in non-profit distance education projects. Such standards should address the use of print works, online text, images, audio, and video materials.

Regardless of whether compulsory licensing ultimately proves appropriate, the establishment of clear fair use guidelines designed specifically for distance education will help to promote this form of education by reducing the uncertainty and cost involved in determining whether a work is in the public domain, and whether a license (compulsory or otherwise) is necessary for the sort of use intended. It will also serve to enhance compliance. Although CONFU was unable to achieve a sufficient consensus for all of the areas studied, it should be easier to achieve broad-based agreement in the more limited sphere of non-profit distance learning activities.

*III. Other Recommendations.*

A number of other, specific changes to existing law and practice would go far to adapt copyright law to the modern technology utilized in distance education without altering significantly the existing balance of rights between owners and users:

*A. Eliminate the “Classroom” Requirement of Section 110* -- Currently, Section 110(1) of the Copyright Act permits “performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction.” Since distance learning, by definition, involves learning that takes place at a different location from teaching, Section 110(1) needs to be brought up to date. Accordingly, I believe the “face-to-face” requirement should be eliminated for programs conducted by non-profit educational organizations. Similarly, the current Section 110(2) exemption for transmission of certain types of works requires that the transmission be primarily for reception in “classrooms or similar places normally devoted to instruction.” Since students in distance education programs may be participating from home, the “classroom” requirement should be eliminated for any program conducted by a non-profit educational institution.

The amendments suggested above raise the issue of whether the exemption contained in Section 110 should apply to asynchronous (delayed) as well as synchronous (real time) communication. I believe that applying the exemption to both types of communications would best fulfill the underlying intent of Section 110 and would not

unduly burden the rights of copyright owners so long as the communication involved is part of a non-profit educational program.

*B. Eliminate the Section 110(2) Restriction on Types of Works* -- For the reasons stated in the comments of AAU/ACE/NASULGC, I agree that the current provision of Section 110(2), limiting the performance right to non-dramatic literary or musical works, is outdated and should be eliminated. Rather the performance right should apply to all types of copyrighted works.

*C. Personal Use Exemption Modeled on Section 108* -- Section 108 of the Copyright Act has for many years provided a limited right for library users to copy library materials for purposes of private study, scholarship, or research. This provision, however, is based on the traditional paradigm of a student visiting the library in person to conduct research. It is therefore inapposite to a distance learning student who may not have easy access to a library and may have to resort to Internet-based resources to satisfy his or her research needs. To fulfill the intent of Section 108 in the distance learning context, I believe that students in non-profit distance education programs should be permitted to download and print a single copy of curriculum or research materials for private study, scholarship, or research that is directly related to participation in such a program.

*D. Assure the Permissibility of Hyperlinks as Methods to Make Available Web-Based Materials in Distance Education* -- In general, absent some type of unlawful activity or unfair competition, "linking" -- allowing a visitor to one website to quickly connect to another website by clicking on an icon or highlighted text displayed on the first website -- is generally thought to be lawful (e.g. DMCA sec.512 (d)). However, some organizations have taken the position that they do not want persons "linking" to anything other than their home page, i.e., they prohibit "deep links".

Whether a website operator may lawfully link directly to a *subsidiary* page of another proprietor's website is a question that has not yet been resolved by the courts. Whatever the correct answer to that question may be as a general matter of "cyberlaw," non-profit distance education programs should have a fair use right to link directly to internal or sub-pages for purposes of study, scholarship, or research, if such a link best suits their pedagogical needs. Educators should have the freedom to make links to those pages and subsidiary page that best suit their scholarly needs. At the same time, given the non-commercial interest of the distance education audience, and its small size relative to the general market, allowing distance learning students to bypass website home pages does not impose a significant burden on web proprietors.

*E. Encourage The Development of International Copyright Standards for Distance Education* -- Like the technology on which it is based, distance education will soon be a global phenomenon. However, unless participating nations agree on a common set of operating rules, transborder distance education programs will be stifled. The same factors which led to the adoption of the multilateral copyright conventions favor the consideration of international standards address the types of licensing, fair use and other

issues that the Copyright Office is addressing in the DMCA study, and that are likely to arise in the context of international distance education.

*F. Provision of Limited Use Digital Libraries* -- My final two recommendations are of policy -- not law -- and are addressed primarily, though by no means exclusively, to the producer community. I believe that copyright holders of content that is likely to be useful in distance education programs could do much to promote the success of distance education by making such content available from their own servers on a royalty-free or flat-rate reduced royalty basis to non-profit educational institutions. (An example would be a digitized version of an educational television program.) Such a procedure would eliminate the need for educational institutions to create and maintain their own digital archives and negotiate a license for each course use. In contrast with the present system, in which individual educational institutions must scan and store video or text based material, it would be more efficient and effective for the copyright owner to do so from its own site.

*G. Facilitate Provision of No Fee and Public Domain Materials* -- As a related recommendation I would suggest that the Copyright Office encourage the identification, digital creation, and access to the widest possible range of online public domain materials. In addition, the Copyright Office should also facilitate (indeed this is a project I am also pursuing individually and independently) the creation of an online list of those copyright holders who do not assess a permissions fee or of those specific works for which the copyright holder would waive a fee, where the work is properly credited and used exclusively for distance learning in non-profit educational institutions.

Please do not hesitate to contact me if you have any questions.

Sincerely,

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