

**Written Comments
regarding
"Promotion of Distance Education Through Digital Technologies"
Submitted to the U.S. Copyright Office
on behalf of the
Association of American Publishers ("AAP")**

February 5, 1999

As the principal national trade association of the U.S. book publishing industry, AAP represents more than 200 member companies and organizations that include most of the major commercial book publishers in the United States, as well as many small and non-profit publishers, university presses, and scholarly societies.

AAP members publish hardcover and paperback books in every field, including general fiction and non-fiction, poetry, religion, children's books, and general and specialized reference works. In addition, AAP members publish scientific, medical, technical, professional and scholarly books, and journals, as well as textbooks and other instructional and testing materials covering the entire range of elementary, secondary, postsecondary, and professional educational needs. Apart from print publications, many AAP members publish computer programs, databases, and other electronic software for use in online, CD-ROM and other digital formats.

* All AAP members strongly support the promotion of digital distance education opportunities consistent with the basic principles of copyright law.

All AAP members, including trade book publishers and others not usually viewed as publishers of "educational" materials, are creators or owners of copyrighted works in all media that may be used by other digital distance education providers, while many AAP members (particularly our nation's educational publishers) are themselves well-established providers of digital distance education programs that often feature the copyrighted works of others as well as their own.

* AAP educational publishers continue to provide a unique service to the nation as the creators and producers of pedagogically sound, high-quality instructional media in multiple formats.

AAP members note that, in response to continuing advances in digital technologies and their application to educational uses, a dynamic and competitive global marketplace has developed around the creation, production, and acquisition of instructional materials in diverse digital formats suitable for use in a variety of distance education contexts. AAP members who are generally recognized as leaders in the highly-competitive field of educational publishing are also leaders in adapting existing content and developing new content for curricula at every level of instruction in which digital distance education opportunities present themselves, including remedial, developmental, professional, and life-long learning programs, as well as elementary, secondary and higher education.

Through substantial investments of time, labor, expertise, and capital resources, these publishers -- often working collaboratively with a variety of author teams, educational institutions and state or federal agencies -- are competitively marketing an array of high-quality instructional products that are characterized by their increasing diversity in type, design, use, delivery, and cost to meet the myriad differing needs and circumstances of educational programs across the United States and around the world. Publishers draw on extensive research and experience, as well as a vast assortment of skilled specialists in creating and producing these products. The products vary widely in terms of their complexity and the amount and nature of the content and interactivity they embody. Some of them are stand-alone works specifically designed for use in digital distance learning programs, while others are components or modules designed to integrate software with traditional instructional materials or to facilitate customized approaches to the presentation and use of content.

* Today's vibrant marketplace for materials used in distance education programs has developed in reliance upon and without the need for significant change in U.S. copyright law.

AAP members believe that today's vibrant marketplace for diverse and innovative materials used in distance education programs has developed in reliance upon, and without the need for significant change in, the basic principles of U.S. copyright law, including the protection of exclusive rights of copyright subject to limited exceptions under Section 107 (fair use) and Section 110 (instructional use) of the Copyright Act. The essential principle of "licensing" rights, which is critical to the practical exercise of copyright ownership as well as the satisfaction of user needs in a diverse and competitive marketplace, works well for producers and users in this marketplace and has been contemporaneously reaffirmed by the courts as a legitimate exercise of copyright.

* Nothing in the hearings or written comments supplied by proponents of an exemption demonstrates any need for that exemption. In fact, the demonstrations provided by the educational community showed that significant numbers of quality distance learning materials are being developed under existing law.

AAP members are troubled by conclusory assertions that it is necessary and appropriate for Congress to enact a new exemption from the exclusive rights of copyright owners to facilitate distance education through digital networks. They question the validity of many of the different justifications offered in support of such claims, and consider those justifications and their resulting exemption proposals to be wholly at odds with basic principles of copyright, the continued flourishing of digital distance education materials (both commercially produced and those created by educational institutions), and the legitimate use of federal law to promote education in the United States.

* Copyright law has never treated "educational" uses of copyrighted works as categorically exempt from copyright protection. Any exemptions have always been structured in a way to assure a balancing of the rights of copyright holders with the legitimate needs of users without removing the incentive to create quality educational materials.

AAP members note that copyright law has never treated "educational" uses of copyrighted works as categorically exempt from copyright protection, and has never permitted the mere assertion that a particular use is "educational" to determine whether the use legally qualifies for the special limitations on copyright protection that may be accorded to certain educational uses under the "fair use" doctrine or specific statutory exemptions in the Copyright Act. Moreover, insofar as Congress has deemed it appropriate to establish limited specific statutory exemptions for educational uses of copyrighted materials, *i.e.*, 17 U.S.C. Section 110(1) and (2), it has sought to ensure the legitimate "educational" nature of exempted uses by requiring their close linkage to "teaching" or "instructional" activities associated with a "classroom or similar place devoted to instruction," rather than opening the exemption for potentially unlimited application to more vaguely-characterized "learning" activities that do not involve "teaching" or "systematic instruction." In addition, the 1976 exemption had inherent limitations on the use of the copyrighted works that protected the copyright owner and assured the balance of interests.

* The exemptions in current US law are consistent with treaty obligations reflected in Article 9 (2) of the Berne Convention that reproduction "does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." The proposals for a blanket exemption would clearly interfere with the legitimate market and would cause undue harm to authors and other producers of copyrighted works.

AAP members strongly oppose "blanket" exemption proposals which, like those offered in the last Congress as parts of S.1146 and H.R.3048, would simplistically permit the performance, display, and distribution of all kinds of copyrighted works, in their entirety, through Internet-based or other remote-access digital transmissions for distance education purposes. Such an exemption would create substantial risks that the integrity of the works would be compromised. Moreover, it would deprive copyright owners of the right to exploit their intellectual property interests through licensing in a competitive marketplace, and would thus constitute an unconstitutional taking of property by the Federal Government. By eliminating the incentive for publishers to continue to invest in the development of high-quality content for digital distance education uses, such an exemption would also result in a significant reduction in the amount of materials that are produced and readily available for such uses and would thereby defeat the aim of those who seek to promote distance education through enactment of such an exemption.

Given the global reach of the Internet and the world-wide use of the English language in educational publishing, these issues cannot be considered solely in a domestic context. Exemption proposals raise important issues regarding the ability of the United States to fulfill its obligations under the Berne Convention, the WIPO treaties and other international agreements.

* "Distance education through digital technologies" and "education using digital technologies" are indistinguishable because campus-based education augments the classroom experience with e-mail, chat rooms, online content and home page syllabi, making it impossible to craft an exemption for one and not the other.

Publishers are developing digital materials for *all* aspects of education, not merely for the subset of activities that may be characterized as "distance education." For this reason, it would be virtually impossible to craft a policy that would apply only to "distance education" and would not have substantial implications for all education using digital technologies. AAP members believe that the Copyright Office study should not focus on the asserted need for a copyright "exemption" for digital distance education, but rather should concentrate on distinguishing the copyright issues that arise from different uses of different types of copyrighted materials by different persons in digital education programs, whether "distance" or not. While certain uses may arguably raise exemption issues, others may be more suited to the application of non-statutory guidelines (like those applicable to multimedia projects developed by teachers and students) or to efforts to devise more efficient and responsive "permissions" processes.

During the demonstrations, several educational presenters noted that their distance education programs were used by audiences and groups other than those for whom the materials were developed.

* The development of distance education programs using digital technology is increasingly collaborative and involves partnerships bridging the for-profit and non-profit sectors.

During the demonstrations, Johns Hopkins University Business of Medicine Executive Graduate Certificate Program noted that they had chosen to work with Caliber Learning Network, a subsidiary of the for-profit Sylvan Learning Systems Corporation; and Houghton Mifflin pointed out that its HMChem general chemistry course was developed in collaboration with State University of New York at Binghamton. Additionally, many of the schools developing Distance Education programs have announced plans to market these programs broadly to earn income for their institutions. All of these institutions were careful to include a copyright notice on their programs and to recognize the value of protecting that copyright. The uses of previously created copyrighted materials in these programs are more often than not simply incidental uses but are key components of valuable multi-faceted programs. These third party copyrighted materials deserve the same copyright protection as the resulting collective work.

If any exemption can be justified at all, it should be based upon the nature of the limited use of the copyrighted materials and the demonstrated need for the specific exemption, rather than the "non profit" or "for profit" status of the user.

* AAP believes that calls by nonprofit educational institutions and libraries for enactment of a new exemption through amendment of Section 110(2) of the Copyright Act cannot be justified simply by their desire to exploit technological capabilities for educational purposes, or their acknowledged roles as providers of access to information and ideas in our society.

According to their statements, educational institutions and libraries seem to believe that a substantial statutory cutback in the intellectual property rights of copyright owners would be justified merely because it would give these entities freedom to exploit the enhanced capabilities of interactive digital networks to make copyrighted works available for educational purposes. At the same time, these entities appear to believe that, by virtue of their roles as providers of public access to information and ideas, they have a unique and special role in "promoting progress of science and useful arts" which is acknowledged in current provisions of the copyright law as entitling them to exercise the rights that otherwise exclusively belong to copyright owners. They are wrong on both counts.

Nothing in the history of copyright, including the numerous statutory revisions which have been made over time in response to various technological developments, suggests that the basic rights of copyright owners are or should be diminished *as a matter of law* whenever technological advancements make it easier for those rights to be exploited by unauthorized persons, whatever their purpose. On the contrary, as most recently demonstrated by the

enactment of the "circumvention" prohibitions in the Digital Millennium Copyright Act, Congress has consistently adapted copyright law to preserve, rather than abandon, the basic rights of copyright holders in accommodating new technological developments and applications. Regardless of the general public interest in promoting education, it would be bad public policy and a breach of faith with our system of laws and values to statutorily indulge the desire of these entities to exploit digital technological capabilities for enhanced performance, display, distribution or reproduction of copyrighted works at the expense of the persons who lawfully hold intellectual property rights in those works.

Moreover, the sense of entitlement that these entities assert, based on the contributions they make to the diffusion of knowledge through their roles as providers of public access to information and ideas, is also wholly inappropriate. Clearly, there are many other entities in today's "information society" that could make similar claims based on their "for-profit" or "non-profit" roles in disseminating or providing access to information and ideas. Whatever their particular roles may be, it is certain that their contributions -- like those of nonprofit educational institutions and libraries -- depend significantly on the incentives that copyright protection provides to the authors and publishers of the books, journals, magazines, newspapers, and all other types of copyrighted works that actually embody such information and ideas.

* Enactment of such a new statutory exemption cannot be accurately characterized as simply an "updating" of the existing statutory exemption for instructional broadcasting, or a "balancing of interests" between owners and users of copyrighted works in the networked digital environment.

Although the libraries and educational institutions frequently state that their proposals for a new statutory exemption would simply "update" Section 110(2) to accommodate expanded educational opportunities supported by new technologies, it is clear that their proposals would significantly depart from the underlying premises of the U.S. copyright law and the current exemption and would enormously expand its scope.

Despite some differences, the library and educational communities generally take a similar approach in advocating a new statutory exemption that would discard the critical restrictions in Section 110(2) regarding the types of copyrighted works it covers, the exclusive rights that it permits to be exercised without permission of the copyright owner, the eligible recipients of its covered materials and uses, and the place and circumstances where such uses may occur. Instead of the limited-exemption approach of the 1976 legislation, which Congress could reasonably believe would have little impact on the marketplace for the uses of copyrighted works it was exempting, these entities advocate a sweeping exemption covering the *distribution* (as well as performance and display) of all types of copyrighted works, in their entirety, to facilitate on-demand "anywhere, anytime" use by "distance education" students.

Unlike the 1976 amendment, it would be hard to imagine how such an exemption would *not* have a significant adverse impact on the market for any copyrighted works that are designed or may otherwise be used for educational purposes.

Similarly, the claim that the proposed new statutory exemption is necessary to "balance the interests" of owners and users of copyrighted works, so that libraries and educational institutions may fully realize the benefits of digital information technologies in the networked environment, cannot withstand close scrutiny.

By any reasonable measure, the new exemption advocated by these communities would give the benefits of the new technological environment to these entities *at the expense of the interests of copyright owners* who do not now possess any inherent marketplace advantages in that environment which would warrant heavy-handed statutory intervention on behalf of the users of copyrighted works.

In fact, the demand by these communities that there should be no distinction between what is permitted in a traditional classroom and what may be done in various kinds of "distance education" scenarios evinces a distinct lack of balance in that it ignores the heightened risk to copyright owners from the enhanced capabilities that distinguish digital technologies from analog technologies, while exhorting the statutory provision of the benefits to users that arise from these same distinctive capabilities (i.e., instantaneous, flawless and world-wide display, reproduction and distribution).

Library representatives, for example, point out that the services provided by libraries in the distance education context include such "balanced" activities as permissions clearance, authenticating access to licensed resources, and training; however, their plans for providing so-called "e-reserves" and document delivery -- especially through remote online access -- demonstrate little regard for copyright interests and will surely cause severe damage to the market for copyrighted works through displacement of sales and licensing opportunities and, if done without appropriate safeguards, unauthorized reproduction and distribution.

Although university representatives have been somewhat more forthright in statements acknowledging the need for adequate safeguards against the misuse of copyrighted works that would harm the market for such works, they fail to acknowledge that displacement of sales and licensing opportunities are as harmful to that market as unauthorized uses through leakage. Surely universities must understand this, having their own copyright interests to protect. Yet, even in averring their commitment to providing "reasonable protection" against downstream reproduction and redistribution, university representatives warn that the extent of such protection may be no more than making copyrighted works "not easily reproducible or redistributable."

A new statutory exemption, as proposed by these communities, would neither maintain nor restore a "balance of interests" between owners and users of copyrighted works, but would clearly tip the balance of such interests against the owners and in favor of certain users without any clear public policy justification for doing so.

* AAP believes that the proponents of a new statutory exemption have described its scope and purpose in overly-simplistic terms that lack coherence and fail to acknowledge their adverse implications.

The demonstrations and hearings conducted by the Copyright Office have clearly shown the difficulties involved in attempting to reach a consensus regarding the meaning of "distance education" for purposes of assessing the need for a related copyright exemption. Moreover, statements characterizing the purpose of the exemption as "enabling remotely all instructional activities currently permitted in the classroom" do very little, in practical terms, to clarify whether a copyright exemption is necessary to achieve this purpose and, if so, what that exemption should look like.

For example, the universities' assertion that a new exemption should enable the display or copyrighted works "at remote locations at times selected by students" leaves unanswered important questions regarding the meaning of "display" in the digital networked environment. Would such an exemption cover only a static "display" of copyrighted material, or would it cover an interactive "display" that includes search capabilities? And for how long would use of such a "display" be permitted? In addition, insofar as the exemption would enable the display "at remote locations at times selected by students," wouldn't this in effect negate the "making available to the public" right under Article VI of the WIPO Copyright treaty, since that right is phrased in terms of on-demand delivery to individuals?

When library representatives use phrases such as "mediated information and instruction," "planned teaching experience," "remote classroom," networked learning," and "self-paced independent learning" to variously characterize "distance education," does this provide any basis for understanding whether and, if so, in what circumstances the concept requires the involvement of an affirmative pedagogical element, as does the current language of Section 110(2)?

Publishers recognize that the difficulty in definition results from the fact that "distance education" currently embraces a variety of programs and practices that are now evolving through experimentation in all interested communities. It is for this reason, however, that AAP is troubled by the rush-to-judgment claims regarding the need for a new related copyright exemption.

* AAP believes that enactment of a new statutory exemption would be premature and counterproductive, and that interested parties should help the U.S. Copyright Office to explore more sensible ways to promote distance education through digital technologies while maintaining an appropriate balance between the rights of copyright owners and the interests of users.

For all of the above reasons, AAP believes that it would be both premature and counterproductive for the Copyright Office study to recommend Congressional enactment of a new "distance education" copyright exemption.

Although such an exemption might indeed contribute to the ongoing experimentation by educational institutions and libraries in the provision of various "distance education" programs and services, it would bring to a dead halt the current experimentation by publishers and others in the marketplace in the development and licensing of materials in various formats for "distance education" and other digital education uses.

It is extremely ironic that proponents of a new statutory exemption, who urge that it must be crafted with sufficient flexibility to accommodate as-yet undeveloped technologies and their applications, fail to recognize that flexibility is also a requirement to enable the development of business models for publishing and arrangements for licensing materials to be used in digital formats and in the context of distance learning, and that this necessary flexibility will no longer be available once a broad statutory exemption is enacted.

No stakeholder in these matters has reached a stage of last resort or a point of no return on the matters at issue. There is ample time and reason to consider alternative approaches that offer more flexibility for the handling of these issues than would a statutory exemption.

Just two years ago, in commenting on proposed voluntary guidelines for fair use that were developed through the Conference on Fair Use ("CONFU"), the libraries and universities expressed their concerns regarding premature adoption of voluntary guidelines. The American Library Association stated:

"In a time of rapid technological and policy evolution, the American Library Association has concluded that it is premature to formalize guidelines for the fair use of copyrighted materials in a digital information environment... [B]ecause information and communication technologies are continuing rapidly to evolve, and because of the degree to which healthy experimentation is underway, ALA does not recommend formal guidelines for fair use in a digital information environment at this time."

Although the Association of American Universities and the American Council on Education agreed that CONFU's proposed distance education guidelines "generally provide straightforward guidance without prescriptive quantification, including guidance on the display and performance of copyrighted material in distance education environments not anticipated by the relevant statutory provisions," they similarly concluded that -- "particularly in this period of rapid change" -- adoption of specific guidelines governing fair use of digital information "is not useful at this time."

AAP respectfully submits that what the library and educational communities believed was true for the adoption of voluntary guidelines in 1997 is equally true with respect to the enactment of a new statutory exemption in 1999.