

February 4, 1999

Sayuri Rajapakse, Attorney-Advisor
Office of Policy and International Affairs
U.S. Copyright Office
Copyright GC/I&R
P.O. Box 70400, Southwest Station
Washington, D.C. 20024

Dear Attorney-Advisor Rajapakse:

Pursuant to the Notice of Request for Comments and Notice of Public Hearing issued by the U.S. Copyright Office in the Federal Register of December 23, 1998 (p.71167-71169), the American Society of Journalists and Authors (ASJA) submits these comments of behalf of itself and its members regarding the Copyright Office's study on the promotion of distance education through digital technologies, in accordance with Section 403 of the Digital Millennium Copyright Act. Our comments will specifically address issues regarding the "Application of Copyright Law to Distance Education.

ASJA is a national nonprofit association of independent nonfiction writers. Our 1,000-plus members are leading professionals in the publishing field; they own copyrights in magazine articles, trade books, textbooks, and other works. Their economic well-being depends on the protection of those copyrights and on the uniform application of copyright laws. While ASJA does not oppose distance education through digital technologies, we believe that the creative contributions that its members make to the society at large would be discouraged and damaged if an exemption from exclusive rights of copyright owners is created. An exemption of this nature would also threaten the integrity and authenticity of the copyrighted materials made available for distance learning through digital networks because without strong copyright protection, there is no way for users to be sure that the information received is truly what it is claimed to be.

Application of Copyright Law to Distance Education

a. Is existing law adequate in addressing current and anticipated forms of distance education using digital technology? If not, in what ways is it inadequate? Are there reasons why digital transmissions should be treated differently from education through broadcasting or closed circuit technologies, or in a traditional classroom?

The current exemption from infringement afforded to distance education through digital technologies does not adequately protect the interests of copyright owners in their works. Distance education currently enjoys limited exemption from exclusive rights of copyright owners under 17 U.S.C. 110(2). In order to qualify for this exemption, the performance or display of a nondramatic literary or musical work, "by or in the course of a transmission," must be "a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution," it must be directly related and material to the teaching content of the transmission, and the purpose of the transmission must meet certain criteria concerning where and to whom the

transmission is directed. In addition to section 110(2), some uses of copyrighted material for distance learning are protected by section 107, the fair use provision of the copyright law. The law's protection, however, does not now cover asynchronous delivery of distance learning materials over digital networks.

Current copyright law does not account for the dramatic advances that have been made in digital technology since the law went into effect in 1976. Distance learning originally took the form of closed circuit television and other formats that could be used to relay real time transmissions in special situations to reach limited numbers of people. Section 110(2) specifically includes transmissions used in classrooms or "similar places normally devoted to instruction." With the wide availability of the Internet, video conferencing, and the proliferation of CD-ROM and DVD-ROM, the academic world has embraced these new technologies as society rapidly transforms itself by telecommuting and shopping, playing and learning online. Distance learning, once the exception to traditional face-to-face classroom teaching, is becoming the norm. Instead of using closed-circuit television to reach homebound students, professors are posting course assignments and course materials on the Internet and even conducting class discussions in chat-room-like forums online.

Digital technologies allow educators and other distributors of copyrighted material to reach mass audiences at little or no cost. A file can be placed on the Internet for free, and an entire book can be scanned into a file for a few dollars. The simple and quick distribution of information is unfettered by traditional limitations of cost, time, and accessibility. The exemption in the copyright law afforded to distance education was specifically geared toward protecting closed-circuit broadcasts in order to reach small groups of people. Now, once a document is on the Internet or on a CD-ROM, there is no way to prevent the dissemination of that material to the general public. Once a document is made available in a digital format, the copyright owner loses all control over the electronic use of the work and, furthermore, the educator or distributor who placed the document online can no longer control access to or use of the work by others.

One major feature of digital technologies is that they are capable of producing copies of near-perfect quality -- copies that are often indistinguishable from the original work. The low cost involved in making these copies and the ease with which they can be produced threaten the economic interests copyright holders have in their property. With near perfect copies available online or in other digital formats, there is no need for the user to pay money for a hard copy of a book or article. The economic impact of this will be enormous since many authors and copyright holders rely on the academic community of professors, administrators, and students for their market base.

Moreover, the lack of adequate protection for copyrighted materials in digital media will threaten the quality of information available to users. Copies can be easily made and they can also be easily altered. Stronger copyright protection is needed to ensure the integrity and authenticity of a work, and to protect the author's intended expression. With broadcasts and closed circuit technology, as with face-to-face instruction, the material performed or displayed was closely monitored by the instructor and could not be easily altered without the knowledge of the user.

b. Is it preferable to deal with the copyright issues raised by digital distance education through specific exemptions like section 110(2) or through a flexible balancing approach like fair use? What role should be played by voluntary guidelines such as the Fair Use Guidelines for Educational Multimedia (sometimes referred to as the Consortium of College and University Media Centers (CCUMC) guidelines)?

The limited exemption from infringement for fair use of copyrighted material under 17 U.S.C. 107 has always been a source of discussion and debate. The specific exemptions offered by section 110(2), however, provide clear guidance to users and owners alike as to what exact protection is available under the law. While a penumbral provision such as the fair use exemption would allow the law to conform to the evolution of digital technology and give both individuals and the courts greater liberty of interpretation of the statute, it is important that strong and clear protection is provided for authors and copyright owners. ASJA supports clear statutory language such as that provided in section 110(2) which will secure the rights of authors and protect their economic interests now and in the future.

c. If a new or amended exemption or exemptions for distance education were to be adopted: Which section 106 rights should or should not be covered?

Any new or amended exemption or exemptions for distance education should continue to be limited to the performance and display of a work. The copyright owner alone should have the rights of reproduction of copies, preparation of derivative works, and the distribution of copies. If these rights, currently reserved for copyright owners under section 106, are weakened by an exemption for distance education, authors will be stripped of the economic benefit of their work and the integrity of their work will be diluted when they lose control of the dissemination of their work to the public.

What categories of works should or should not be covered?

For practical reasons, any new or amended exemption or exemptions for distance education must be limited to the categories listed in section 102 that can be transmitted through digital media. This is limited, at the moment, to nondramatic literary and musical works, sound recordings, and audiovisual works. All works, however, should receive equal protection under the law, regardless of the category they fall into. Digital technology has facilitated the development of multimedia projects which blend these established categories and now cause copyright owners and media users alike to question the availability of copyright protection under the law.

To what extent should there be quantitative limitations on the portions of a work that can be used?

Any new or amended exemption or exemptions for distance education should include a quantitative limitation on the portions of a work that can be used. It is imperative that only small portions of a work be exempted in order to preserve the economic interests and rights of copyright owners. With no such limitation, the very foundation of copyright law would be rendered meaningless. There would be no reason for individual users to pay for something they

could receive for free.

Who should be entitled to the benefits of such exemption? Accredited or nonprofit institutions only?

ASJA feels strongly that exemptions are inappropriate, even in a modified form. If any were to exist, however, we believe it should apply only to accredited nonprofit institutions. At this point, with copyright protection measures still being developed and tested, there is no way to clearly establish an exemption that would apply to some education providers and not to others. There is no way to enforce this sort of distinction, and once copyrighted material has been exposed to the general public in a digital format, there is no way to prevent the future unauthorized use of that work by others.

How should the class of eligible recipients be defined?

One of the primary reasons that ASJA opposes any new or amended exemption or exemptions for distance learning is that there is no way to define a class of eligible recipients. Until adequate copyright protection measures are widely available, there is no way to restrict access to digital media. Even if a password is necessary to sign onto a particular area of the Internet or to access a CD-ROM disk or other similar storage unit where copyrighted materials are available, there is no mechanism in place to prevent the dissemination of that material outside of the restricted area.

Should such an exemption be limited to nonprofit distance organization activities?

Please see above response.

Should the use of technological measures to protect against unauthorized access to and use or retention of, copyrighted materials be required? If so, what types of measures?

ASJA strongly supports the required use of technological measures to protect against unauthorized access to, and use or retention of, copyrighted materials. It is too early to tell what copyright protection measures will prove most effective. There are currently many such measures in development, and only time will tell which will become widely available and which will offer the strongest protection. Copyright protection measures to be considered include encryption, digital watermarking, and copyright management systems. Digital watermarking would provide an effective way to allow educators to display copyrighted material for the benefit of users, while prohibiting the printing or copying of the material. The digital watermark is simply an electronic code embedded in the text that, when activated, could take the form of a large infringement warning printed or displayed across the face of the document, or it could generate an image to conceal the document from view, thereby curtailing any further use.

To what extent should the availability of licenses for the use of copyrighted works be considered in assessing eligibility?

ASJA supports the use of licenses to protect the rights of copyright owners and to ensure fair

compensation for the material used. Licenses, however, may not be as effective as technological measures to protect copyrighted works from unauthorized use. While licenses would extend permission to the user to transmit the work in a digital format, licenses extract fees from each user and this concept simply shifts the economic burden associated with digital media from the copyright owner to the user instead of fully addressing and resolving the issue. The economic impact of digital technology on copyright cannot be overstated.

Should there be limitations on student copying or retention of the copyrighted materials?

Just as there are limitations on photocopying copyrighted print materials, there should be limitations on copying digital materials. Digital watermarking is a useful technological protection in this respect because it allows a document to be viewed in its digital format but it blocks the printing or copying of the document. The retention of copyrighted materials should also be limited. If the material is used for a course, any new or amended exemption or exemptions should require that the right to use the copyrighted material without penalty expires when the course ends.

Should the provision of electronic reserves be included?

We strongly object to including electronic reserves for the same reasons stated in the response to question e, that they are the gateway to widespread copying of material for which an academic audience may be a (if not the) primary market.

Should the provision of any information about copyright law be required as a condition for eligibility?

Information about copyright law should be required as a condition for eligibility. It is important that users of copyrighted material be informed and clearly understand what the legal parameters for use are and what penalties will be enforced for infringement. If information is indeed required for eligibility and a user willfully infringes, the penalties for infringement must be stiff in order to send a clear message that infringement will not be tolerated.

Are there other factors that should be taken into account?

It is important to recognize that digital technology is very fluid in nature and there is no easy way to contain information or restrict access to material in a digital format. Technological protection measures are still in their infancy and it is unclear what, if any, measures will be available to actually protect the interests of copyright owners. It is also important to note that any technological protection that is constructed is not fail-safe and will presumably be able to be deconstructed and circumvented in a relatively short time. For these reasons, it is important that the law provide the strongest copyright protection possible.

d. What would be the economic impact of such an exemption, including the impact on the actual or potential markets of copyright owners of different types of works?

A distance education exemption at this time would wreak havoc on the economic interests of copyright owners. With free information available in a variety of digital media and no enforceable means of controlling use of the work or preventing infringement, this sort of exemption would effectively render a copyright owner's property interest unmarketable and worthless. ASJA members, as authors of magazine articles, trade books, textbooks, and other works, rely heavily on the academic community of professors, administrators and students for their market base. This exemption would deflate their market and deprive these authors of a property right expressly recognized in Article I of the U.S. Constitution.

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

It is the international reach of digital communications that makes anything resembling "digital fair use" potentially enormously damaging to the copyright interests of authors. When an Umberto Eco essay was widely disseminated several years ago, and authors groups objected to this violation of the author's rights to income for the piece, the reaction of some was, "But look what exposure that gives Umberto Eco -- how much better-known he is now." We think this decision to allow a selection to be widely disseminated for free should rest with the copyright holder, not the world of the Internet. The rapid worldwide transmission of an essay or other short piece of writing is not only possible but happens regularly, and the short selections likely to be used in classrooms are far less likely to produce the subsidiary rights income that can support creative efforts, if those selections can easily be sent as e-mail and printed out in dormitory rooms. To a large extent, the Internet is a giant copying machine -- far more damaging to authors' copyright interests than even the photocopying machine has been. We see no reason for schools to be the gateway to widespread free reproduction at the expense of authors, even if the goal is to reduce the cost of education. This cost reduction should not be borne on the economic backs of authors and other artists or scholars. In the end, if authors have no control over dissemination of their own works, or have less ability to benefit financially from the creation of serious works, they will have less incentive to provide the very work upon which education depends -- and the quality of that work will decline.

ASJA appreciates this opportunity to comment on these issues and participate in this study. If you have any questions regarding these comments or any other matter concerning our organization or its members, please contact our office.

Respectfully submitted,

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