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OFFICE OF POLICY AND INTERNATIONAL AFFAIRS

PROMOTION OF DISTANCE EDUCATION) DOCKET No. 98-12A
THROUGH DIGITAL TECHNOLOGIES)

**REQUEST FOR COMMENTS AND
NOTICE OF PUBLIC HEARING**

By its Notice in the Federal Register, the Copyright Office requested public comments on a variety of issues to assist it in making a report and recommendations to Congress concerning implementation of Section 403 of the Digital Millennium Copyright Act (“DMCA”) (Pub.L. 105-3-4). 63 Fed. Reg. 71167 (December 23, 1998). That legislation requires the Copyright Office to consult with copyright owners and other interested parties about how to promote distance education through digital technologies, while maintaining an appropriate balance between the rights of copyright owners and users.

The Association of Test Publishers (“ATP”) responded to the Copyright Office’s original Notice of Request for Information, 63 Fed. Reg. 63749 (November 16, 1998). By letter dated December 7, 1998, the ATP identified several issues and its positions on them, while urging that the federal government should take care not to compromise the integrity and utility of both educational and diagnostic tests in the distance learning environment. In summary, we argued that uncontrolled dissemination of test materials would result in the inability to protect test security, which would destroy the confidentiality and psychometric standards of current assessment products. The ATP also urged the Copyright Office to reject further discussion of a

House provision dropped from the final version of the Digital Millennium Copyright Act — language that would have given parents an unrestricted right to circumvent technological copyright protection measures for any “test, examination, or other evaluation” of a child’s ability.

IDENTITY OF THE ATP AND ITS INTERESTS

The ATP is the national association of the testing industry, representing over 80 companies that develop, publish, market and distribute assessments and assessment-related services. The products and services of ATP members are used in a variety of settings, involving education, clinical psychology, employment/personnel, and certification/licensure. As a result, ATP members are committed to promoting the benefits of quality assessments for society and adherence to best practices in their use.

To that end, the ATP has testified before Congress and a number of state legislatures on assessment issues. It also has filed comments with various federal and state agencies to address important points of regulation that affect testing and/or the use of tests. As indicated above, the ATP has already filed comments in this Docket because most of its members are copyright owners who stand to be affected by the outcome of the proceeding. Thus, we request that these comments be added to the record of this proceeding. The ATP also intends to review the comments and testimony filed by other interested persons and to reply to them by February 24, 1999.

THE NATURE OF DISTANCE EDUCATION

Test publishers, as copyright owners, view the evolution of distance education as a great

opportunity and potential for both the traditional and novel use of assessment products delivered through a digital mechanism. Certainly, it is the best interests of all Americans to promote distance education, to upgrade the educational opportunities for our children, to increase the value of the American educational experience, and to make American students more competitive in the global economy. The members of the ATP also agree with the focus on life-long learning and the need for everyone (from pre-schoolers to at-risk students to adults with little or no basic skills) to receive the benefits of educational instruction. If there are advances to be made in the electronic delivery of strong educational programs that can achieve success for those students, then test publishers will support the growth and use of such a system.

Increasingly, many forms of assessment are being made available in digital format. This covers assessments for educational and certification uses, as well as training materials used in business/employment settings and diagnostic assessments related to educational and business purposes. These products are being purchased, or are capable of being purchased, by state and local educational agencies, state vocational education/employment training agencies and even federal and state prison systems. Thus, traditional schools, adult learning centers, community colleges, proprietary trade schools, and many others are beginning to use technology to enhance what instructional materials are available in the classroom. The newest area of assessment, the certification/licensure testing community, is also using digital technologies to deliver distance education programs and services. Many of these organizations and businesses provide on-demand, preparatory seminars, simulated examination sessions and a host of other educational programs in digital formats. Thus, the nature of distance education is expansive, with both traditional and new uses emerging over a short period of time.

COPYRIGHTS AND LICENSING

Publishers and the public both deserve to know that the legal safeguards and intellectual property protections that are traditionally associated with strong assessment programs will remain intact as test content and related materials are migrated to the digital environment. The security of copyrighted materials that are stored and delivered in digital formats is paramount to all test publishers. ATP members invest significant resources, and thus incur great expenses, to publish high quality materials and examinations. Understandably, such investments are driven by the expectation that publishers will realize a return on their investment through the controlled sale of these materials.

Moreover, failure to protect examination content when placed in digital settings would be inconsistent with the protection afforded the same content in traditional printed formats. In non-digital settings, test content is adequately draped in security. Although individuals can review sample questions, the actual examination questions are kept secured and protected until the examination is given. Secured test content means standardized procedures are used which help to ensure the integrity of the content and the validity of the test scores. The procedures to secure copyrighted test materials in non-digital settings are amendable to and necessary for digital settings. Since enactment of the Digital Millennium Copyright Act, and subsequent U.S. Senate action authorizing the United States to sign the World Intellectual Property Organization's ("WIPO") treaties, ATP members feel confident that the value of digital products — and the concomitant recognition of the need to protect those products — is embraced within those legislative actions.

Related to the development of an appropriate definition and scope of digital copyright is a recognition by many in commercial publishing, including test publishers, that copyright protections alone do not any longer represent adequate means to protect products, whether in traditional or digital formats. Continued erosion of copyright protections, through “fair use” situations, cause major problems for publishers to know how their rights will be interpreted in a consistent and reliable fashion. This uncertainty has resulted in the growing application of licensing techniques to augment copyrighted products. No longer is the copyright holder forced to treat all users the same under an identical copyright — use of licenses, or licensing agreements, allows the copyright holder to adopt reasonable rules for the use of the product (such as the number of times a product may be used under the license), based upon the distinct, and often times disparate, needs of each user.

The ATP submits that this use of licensing best serves the needs of both copyright holders and potential users. The parties are now able to negotiate for only what is needed, not what the copyright holder felt was required in order to protect fully the product. For example, in a digital environment, a test publisher is now free to contract with a test user for a specific number of uses of an examination, which may be downloaded from the publisher’s site by the customer at any time the test is needed. This also allows the parties to expand the use after an initial agreement. In the past, rigid publication of products could have limited the user’s options to change the usage after initial ordering.

This approach also enables the publisher to update its product more frequently and to deliver that updated product to the customer even if it has not used all of the previously agreed

examinations.¹ Indeed, the ATP believes that under the evolving digital environment, many products that previously were routinely printed for distribution will only be available on-line and may never be available in a paper version.

Finally, licensing will allow each individual test publisher to decide on a specific basis what non-profit distance learning activities are legitimate and should be supported. The ATP expects that the level of licensing available will range broadly in order to encompass a wide variety of uses, creating cost structures that reflect the value of the distance education project and the need of the organization offering such activity for special consideration in establishing licensing fees.

USE OF TECHNOLOGY

The digital environment just described is contingent on one major ingredient being present — the ability to encrypt one’s product. Without the ability to protect fully each and every product, such as where different users are making different uses of the same product, publishers will be wary of making their products available in digital formats. The beauty of the digital environment is its freedom and flexibility — yet, the flip side of the same coin is the potentially

¹ The ATP contends that because of their unique need for security, assessments are not subject to the same typical uses associated with other products, namely to browse, quote, extract and reproduce certain amounts of product without any restrictions. For many of the tests under the control of ATP members, any access to items or to answers from which the question is discernible, will result in failed standardized test administration, rendering invalid the scores of many test takers (both those who had such access and those who were not privy to the answers beforehand). Nevertheless, test publishers expect to be able to allow potential customers to have access to their catalogues and background information discussing the purpose and use of individual tests, along with sample questions and other materials which will enable users to decide which instrument will best meet the customer’s needs. Thus, it will be critical for updated material to appear on the Internet, presumably at the publisher’s website, in order to enable customers to be well informed about the range of available products.

impossible time a publisher could have in ensuring that it can deliver the product one way to one customer and another way to a second, third, fourth or infinite number of customers.

Corresponding to the use of encryption technology is the need for useful digital signature legislation so that parties will have sufficient confidence in handling financial transactions over the Internet. The ATP does not understand that this proceeding is the proper place to address this complex issue; however, it is worth noting that the testing industry expects to utilize the digital marketplace to deliver many of its products. Therefore, a viable solution must be found to ensure that both buyers and sellers are adequately protected in their efforts to use the digital marketplace.² As indicated previously, test publishers envision a scenario where a customer will be able to download current tests for interactive administration directly from the publisher's website. Such transactions will be capable of occurring in a matter of seconds, delivering the most current product to the test user for its use and utilizing a "click wrap" licensing process. The expansion of business on the Internet is occurring at such a rate that the ATP is hesitant to predict how fast or at what cost these transactions will be available. Suffice it to say, the amount of Internet business is growing at an incredible pace, which is expected to continue for the next several years.

APPLICATION OF COPYRIGHT LAW TO DISTANCE EDUCATION

² The ATP also believes that the proper foundation for a workable digital signature standard must take into account that many "buyers" are themselves large business organizations, educational institutions and the like, who are well able to represent themselves adequately in an arms'-length business transaction. Accordingly, the ATP does not agree with those who argue that a digital signature solution must be based on "consumer protection" principles.

The ATP firmly believes that, following enactment of the Digital Millennium Copyright Act, reasonable implementation of the law will spur effective solutions to many of the questions perceived by the education community. The new law is not a “silver bullet” but neither is it an unfair, one-sided approach, as some have claimed. Digital transmissions must be covered under the new law, as intended by Congress, and not by analogy to traditional copyright law or specific cases. Furthermore, as the ATP stated in its preliminary comments, there should not be exemptions carved out for dealing with what are essentially arms’-length relationships, which can be well handled by the use of copyright/licensing agreements. The Copyright Office should not be persuaded by claims based on anecdotal evidence that significant revisions to the law are required to address distance education issues.

Allowing copyrighted materials to become the equivalent of shareware by not providing adequate protection of their digital versions would undermine a publisher’s viability as a business entity and, as discussed above, opens up the likely prospect for some test takers to receive an unfair test advantage. Accordingly, the ATP cannot support, in any way, shape or form, creation of an exemption allowing circumvention of copyright protection mechanisms that might be used in a digital environment by publishers on their products for the purpose of advancing distance education or its goals, that are endorsed by the ATP. Test publishers must have the right to embed code or otherwise mark their products with a copyright and have that mark respected. Any alteration or attempt to remove that copyright management information must continue to be illegal; its protection will ensure that test publishers continue to market their products in dynamic novel ways through the digital environment. This approach will result in the balance Congress

intended to strike in the DMCA.

As for the use of voluntary guidelines in the distance education area, the Copyright Office should be aware that separate proposed guidelines for distance education have been adopted by the Conference on Fair Use (“CONFU”), published in November 1998, after years of discussion between the affected groups, including the ATP.³ Although there were some issues upon which the participants could not agree (areas where “technology is rapidly developing” and where “educational institutions are just beginning to experiment with these courses, and publishers and other creators of copyrighted works are in the early stages of developing materials and experimenting with marketing strategies for computer network delivery of distance learning materials[]”), these guidelines provide a meaningful reference point for interested groups to handle current usage and to begin to resolve related problems. What the Copyright Office should not do, certainly at this stage of the debate, is intrude on the process already undertaken and only recently completed by CONFU. Let the present guidelines have an opportunity to play themselves out and see what problems, if any, occur. Then, if there is a need for further guidelines, CONFU will undoubtedly attempt to undertake to address those needs.

CONCLUSION

³ Not only did the ATP participate on behalf of its members, but the Association was also a member of the Creative Incentive Coalition during part of the time CONFU discussions were ongoing. Additionally, several individual companies who have subsidiary companies that are members of the ATP represented themselves, and others were represented through the Association of American Publishers.

For all of the above reasons, the Association of Test Publishers (“ATP”) encourages the Copyright Office to perform the task assigned by the Congress in a careful and thoughtful manner. There are no glaring weaknesses in the Digital Millennium Copyright Act or the recently published CONFU guidelines on distance education that require the Copyright Office to recommend changes in the law to Congress — certainly, any that require the creation of exemptions affecting the use of assessments. If there are to be any changes, the questions asked by the Copyright Office must be answered in clear and unmistakable terms, showing chapter and verse where and how the new law will be unable to meet the needs of the education community while equally balancing the needs of test publishers as copyright owners and holders. The ATP submits that mere anecdotal stories and information is not sufficient basis upon which the Copyright Office should make findings and recommendations.

Furthermore, any approaches that may arise in the context of this proceeding could have serious international implications. Many test publishers are international in the scope of their operations and suggested changes to the law at this time could result in inconsistencies with the newly-enacted WIPO treaties. This would place U.S. publishers at a severe competitive disadvantage in contrast to their international counterparts.

In short, the inclusion of assessments in any recommendations by the Copyright Office are

unneded, without legal or regulatory justification and would work significant hardships on the members of the ATP.

Respectfully submitted,

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