

**Reply 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)**

March 3, 1999

AAP has reviewed the Written Comments submitted to the Copyright Office by other interested parties during the earlier phase of this proceeding (Docket No.98-12A). We now take this opportunity to respond and direct the attention of the Copyright Office to certain statements made therein that are relevant to the Written Comments which AAP previously submitted to the Copyright Office.

INSTRUCTIONAL MATERIALS ARE ABUNDANT WITHOUT A NEW EXEMPTION; EDUCATIONAL INSTITUTIONS VALUE COPYRIGHT FOR THEIR OWN WORKS; FOR-PROFIT & NON-PROFIT DISTINCTIONS AMONG PROVIDERS ARE FAST BLURRING.

In its earlier submission, AAP asserted that the proponents of a new copyright exemption to facilitate distance education through digital networks have failed to show any need for such an exemption. At that time, AAP pointed to the distance education demonstrations that were hosted by the Copyright Office on January 25 of this year as *prima facie* evidence that the educational community is able to obtain or create high-quality learning materials in digital and other formats for use in distance education programs produced by educational institutions and faculty.

Those demonstrations, which showcased the kinds of materials currently being produced by educational institutions, commercial publishers, and various collaborations among these and other entities, clearly showed that the existing legal landscape regarding the use of copyrighted works provides ample opportunities for distance education applications with new technologies. In addition, they proved that, with respect to the wide array of ongoing experimentation and development now occurring in the field of distance education, educational institutions themselves recognize the importance of claiming copyright protection to ensure the continuing integrity of their own works as they license them for use by others. Moreover, the demonstrations plainly showed that, given the trend toward collaborative ventures and an increasing flow of new entrants into the field, there is scant justification for attempting to distinguish among for-profit and non-profit distance education programs or providers regarding the law's treatment of their use of copyrighted works.

These lessons of the January 25th demonstrations are strongly reinforced by statements in a number of the Written Comments that were submitted to the Copyright Office by users and

producers of copyrighted works. This should not be surprising, however, since many (if not most) of the parties that are interested in the outcome of this proceeding are both users and producers of copyrighted works.

Among the examples, one can look most tellingly at the joint submission of the Corporation for Public Broadcasting (CPB), the Association of America s Public Television Stations (APTS), and the Public Broadcasting Service (PBS). These entities, each in its own way a direct beneficiary of the instructional broadcasting exemption in Section 110(2) of the Copyright Act, have had little trouble transcending the limitations of that statutory provision to legally produce a myriad of educational programming that is delivered to nationwide audiences at all levels of learning, through public television systems using all available electronic technologies (increasingly including digital technologies) to distribute their distance education services. (CPB/APTS/PBS, p. 4-7). Like all licensors and licensees of copyrighted works, public television has had successful and not-so-successful experiences with the licensing process (CPB/APTS/PBS, p. 9-11). But even a cursory examination of the examples provided of public television distance learning service offerings demonstrates that there is no paucity of diverse content in this arena, including the Internet where PBS alone provides over 60,000 pages of content for teachers (CPB/APTS/PBS, Exh.1, p. 2).

TYPICALLY, DISTANCE AND ON-CAMPUS EDUCATION PROGRAMS HAVE THE SAME COURSE CONTENT, OBTAINED THROUGH THE SAME PROCESSES AND SOURCES.

Similarly, universities and community colleges, for all of their excitement about distance education programs and their complaints about the difficulties of licensing pre-existing copyrighted works, are apparently offering a broad array of quality distance education programs featuring a mix of pre-existing and faculty-created copyrighted works that are basically the same as are used in traditional campus-based courses. See, e.g., *American Association of Community Colleges (AACC)*, p. 3-4 (faculty encouraged to provide instructional materials in format most convenient to students; in addition to creating courses exclusively for digital environments, instructors post same lecture notes, quizzes, assignments and syllabi online that they provide in the classroom; same textbook used in classroom setting generally is assigned to online students); *University of Michigan*, p. 2 (distance education courses use variety of content sources; most combine traditional texts, purchased by students, with course-specific supplements that might include individual articles, case studies, model data sets, and interactive simulations); *University of Texas Systems (UTS)*, p. 2, 4 (universities relying more heavily on digital information to enhance the traditional classroom environment; majority of distance education programs in the U.S. are created in-house, or by faculty within the university; however, many community colleges and small universities use content created by others; community colleges are leaders in U.S. for canned distance education courses and sell these to other colleges across the country).

EDUCATIONAL LICENSING & PERMISSIONS CLEARANCE EXPERIENCES ARE A MIXED BAG, BUT NO DIFFERENT THAN WHAT AUTHORS AND PUBLISHERS DO.

Written Comments submitted by various educational institutions and their representative associations indicate that the educational community's experiences in licensing copyrighted works and clearing permissions for the use of such works in distance education programs, though frustrating at times, are overall no different than those of authors and publishers who use the works of others in creating their own works. See, e.g., *UTS*, p. 4-5 (obtains permissions for all proprietary content to which it provides access, including the UTS Digital Library); *University of Maryland University College (UMUC)*, p. ii, 3 (works closely with Copyright Clearance Center; uses both negotiated licenses and form contracts; seeks permissions for pre-existing content used in e-reserves); *CPB/APTS/PBS*, p. 9-10 (clearance may be responsibility of faculty member or department offering the course, rather than public broadcaster; either way, general method of licensing is direct negotiation with copyright owner or owner's agent).

Unfortunately, some Written Comments do not reflect an appreciation of the close similarity of these experiences. See *Virtual Resources Association (VRA)*, p. 2 (offers anecdotal evidence of licensing frustrations through description of faculty experience in attempting to clear images of art -- not for classroom use, however, but for publication of a book!).

Some educational entities even have extensive experience serving as licensing representatives for other educational entities. See *NILRC*, p. 2 (not-for-profit consortium of 60 Midwest community colleges, colleges and universities has served for two decades as telecourse licensing agent for members, with contracts serving hundreds of thousands of students; also collaborates with commercial production agencies as co-producer of telecourses).

Although universities and their faculty members may agree on their desire to avoid the need to negotiate licenses for the use of third-party copyrighted works, they are frequently in tension regarding the allocation of copyright and permissions authority with respect to copyrighted works developed by faculty while using university resources or teaching university courses. See, e.g., *University of Missouri-Columbia*, p. 2-3 (emphasis on need for formal contracts between the instructor as course developer and teacher and the university to determine whether the course may be offered and who will benefit if course materials are licensed to others).

Many of the Written Comments that detail the frustrations of educators with the licensing process nevertheless acknowledge the evident validity and practicality of licensing for both owners and users of copyrighted works. See, e.g., *Indiana Commission for Higher Education (ICHE) and Indiana Partnership for Statewide Education (IPSE)*, p. 2, 7-8 (licensing can provide an expedient, cost-effective, and relatively safe option for using

copyrighted works to support some educational activities, but can also prove time-consuming, costly, and can produce unpredictable results; examples of licensing difficulties, though not specifically in distance education context); *UTS*, p. 5-6 (obtains licenses for all proprietary content to which it provides access; prior to emergence of the Web, simply didn't have much trouble licensing information); *UMUC*, p. ii, 4-5 (conscientiously seeks necessary permissions from copyright owners for pre-existing content when creating course for delivery in digital form; works closely with Copyright Clearance Center; uses both negotiated licenses and form contracts; examples of numerous problems encountered); *Association of Research Libraries (ARL)*, *American Association of Law Libraries (AALL)*, *American Library Association (ALA)*, *Medical Library Association (MLA)* and *Special Libraries Association (SLA)*, p. 5 (library community purchases or licenses approx. \$2 billion of information resources each year; licensing has become a fact of life in our institutions).

Unfortunately, some Written Comments from the educational community tend to cast licensing in the worst possible light by characterizing it as the ability to restrict access, *University of North Carolina at Chapel Hill (UNC)*, p. 9, or the power to deny access, *Association of American Universities (AAU)*, *American Council on Education (ACE)* and *National Association of State Universities and Land-Grant Colleges (NASULGC)*, p. 4-5. See also *UMUC*, p. 5 (ironically citing Harvard Business School as an example of publishers who refuse to allow any of their works to be made available in digitally-delivered distance education courses).

Such characterizations, however, ignore the right of copyright owners to control the distribution of their copyrighted works, 17 U.S.C. Section 106(3) -- a right which, inevitably, must be acknowledged even by those who spout alarmist rhetoric in their attempts to undermine the validity of licensing in order to lay the public policy foundation for obtaining a new statutory exemption from copyright. See, e.g., *AAU/ACE/NASULGC*, p. 5 (we do not mean to suggest any *a priori* obligation on the part of a copyright owner to make material available...).

Moreover, even critics of licensing within the educational and library communities surely understand that the best case to be made for licensing of information is that there is no better practical way -- especially in the digital environment -- to facilitate the publishing business models that are evolving in response to an extraordinary range of perceived user needs in an increasingly diverse and competitive information marketplace.

Through licensing, publishers are able to provide information or information access to specific classes of users, in ways that are carefully-tailored to the specific nature of the product and needs of the users. This flexibility, in many instances, can make information more widely available, or available to certain users at significantly lower cost. Examples are myriad. Publishers can adjust prices and other terms of availability to distinguish among commercial and non-profit users. Different packages of value-added features and minimum

needs can be created and separately priced to accommodate larger and smaller users, corporations, educational institutions, and libraries. Since users pay for the type and amount of access and use they need, high-quality information products and services can be made available to users who could not otherwise afford them. Thus, for example, as a single user paying a modest cost and agreeing to the terms of a standard form license agreement, an individual teacher can be given access to the same information that is provided to a commercial investment firm under the terms of a negotiated but much more costly and complex license agreement.

In addition, licensing agreements can recognize and adapt to variety in types of licenses, as well as variety in types of products, users, and markets. Licenses that relate to the physical transfer of information to a licensee, whether directly to the end user or through a chain of distribution between the licensor and the end user, can be accommodated as well as licenses that enable a licensee to access a location in which the information resides, and provide for sublicenses between the licensee and one or more categories of end users.

As a further matter, licensing also helps to deal with the international, multi-jurisdictional nature of the Internet, giving parties to transactions in the global marketplace the means to ensure clarity and consensus in their understanding of licensed rights that may be negotiated in the context of different and often conflicting laws.

Traditionally, publishers have used licensing agreements to manage the international availability of their works, both in English and in foreign languages. With the advent of electronic publishing and the surge of activity over the Internet, licensing agreements take on an even greater role to help publishers and users sort out their options and decisions regarding not only the terms and conditions for the use of information, but also the law(s) which are to govern any disputes they may later have relating to such use.

All of these benefits, including the enhanced potential for ensuring the integrity of information and attribution to sources, promote high-quality and easy availability of information in ways that should give flexibility and choice to both publishers and users -- two extremely desirable qualities during a period of change and experimentation wrought by the digital revolution.

As Ann Okerson, Associate University Librarian, Yale University Library, noted less than two years ago in a thoughtful piece on electronic licensing issues involving libraries, the progress that is being made by publishers and users in developing functional licensing terms through negotiation has led many in the library community to realize that the license arrangements that libraries and publishers currently are making might, in fact, be achieving what we once expected from legislation and getting us there more quickly. *Library Journal*, September 1, 1997, p. 136-139. See also LIBLICENSE <<http://www.library.yale.edu/~llicense>> (Yale University Library Website that maintains a collection of common terms usually found in licensing agreements, providing assistance to

librarians -- and publishers -- in understanding and addressing issues that typically arise in licensing digital information).

TECHNOLOGY, EXPERIENCE & INNOVATION CAN SOLVE LICENSING PROBLEMS.

This, of course, is not to suggest that licensing, particularly in the educational context, cannot be improved. If, as some Written Comments state, there are problems with processes and practices for licensing materials in digital formats for distance education, it may be due in substantial part to the newness of the interactive digital environment and the consequent inability of copyright owners to adapt their business models at the rapid pace of current technological advances.

Moreover, the educational community itself must bear some of the responsibility for this situation. Despite anecdotal complaints about their frustrations in unsuccessfully requesting licensing for the use of materials in digital distance education formats, it appears that the educational community has not yet addressed its issues to the copyright community in the manner and volume necessary to move copyright owners to more responsive action. See, e.g., *National Music Publishers Association (NMPA)*, p. 7 (noting that the industry's primary licensing agency is not aware of a single request from educational institutions for licenses to incorporate music in distance education materials or to reproduce and distribute music in distance education contexts, or even for information concerning the possible need for such a license). Instead of assisting copyright owners to improve existing licensing mechanisms or develop new ones, the educational community -- along with the library community -- has concentrated its efforts on getting the licensing process declared substantially unsuitable for educational needs in the hope that this will push Congress to enact a new statutory copyright exemption for distance education.

Fortunately, however, many of the Written Comments acknowledge that licensing processes and practices are likely to be significantly innovated by the same technology that has so vigorously challenged them. See, e.g., *CPB/APTS/PBS*, p. 11 (online technology may eventually facilitate the process of licensing, identifying rights holders, and negotiating conditions of use); *Copyright Clearance Center (CCC)*, p. 7-8 (barriers to electronic licensing seem to be falling relatively quickly); *American Society of Media Photographers (ASMP)*, p. 7 (CCC and Media Photographers Copyright Agency jointly-developed Media Image Resource Alliance is now providing online licensing and delivery of images; can develop pricing and licensing protocols for educational uses); *University of Michigan*, p. 3 (technology for secure licensing is available and more products are anticipated); *InterTrust Technologies Corp.*, p.1, 3 (commercial rights management technologies now being deployed in several markets can protect and manage copyright information in the context of the broad needs of many segments of the education community, including distance education programs; current and coming technologies can go a long way toward addressing a broad range of licensing difficulties, including price differentiation based on such attributes as the user's purpose, need, institutional affiliation,

and ability to pay).

A number of innovative projects involving the use of digital technology to advance the licensing and delivery of copyrighted works through labeling and a variety of collaborative management efforts are well-underway. One of them, the Instructional Management Systems (IMS) project, initiated by EDUCAUSE, was referenced hopefully in at least two Written Comments submitted to the Copyright Office. See *CPB/APTS/PBS*, p. 7; *AACC*, p. 4. See also *Art Museum Image Consortium (AMICO)*, <<http://www.amico.net>> (nonprofit consortium of institutions with art collections formed to enable educational use of museum multimedia documentation) and *Digital Object Identifier (DOI)*, <<http://www.doi.org>> (system developed by AAP, in cooperation with the Corporation for National Research Initiatives, for tagging digital content online to facilitate its finding and retrieval.)

IS MONEY THE REAL ISSUE AT STAKE IN THE DRIVE FOR A NEW EXEMPTION?

Of course, innovations that simplify licensing processes, making them more efficient and responsive to time-sensitive faculty needs and educational uses, can only go so far to address the complaints of the educational and library communities regarding price and other specific terms and conditions for the licensed use of copyrighted works. The advocacy of a broad new statutory copyright exemption for the use of materials in distance education programs is motivated in substantial part by claims of limited budgets and other rationales offered by these communities to explain the simple fact that they would prefer to avoid having to pay for their use of copyrighted works.

It may be a bit of an overstatement to claim, as one member of the copyright community so eloquently put it, that [t]he matter of copyright in a digital distance education environment consists of one issue and one issue only: money. *ASMP*, p. 3. But there is substantial evidence to support this viewpoint.

Many of the Written Comments from the educational community contain statements to the effect that, apart from the geographic or temporal divide between teacher and student, distance education provides (or should provide) the same education that occurs in the classroom. See, e.g., *AACC*, p. 2 (majority of distance education students are the same students who receive their instruction in an institution's traditional classrooms, and must meet the same prerequisites and admission criteria); *American Association of University Professors (AAUP)*, p.4, 7 (distance education may apply to both on-campus and off-campus courses and programs; policies for the distance education classroom should be comparable to those for the traditional classroom); *UTS*, p. 11 (no difference between remote and local students when each comes into the classroom virtually). .

Insofar as fees and payments are concerned, the Written Comments indicate that distance education students generally are treated like on-campus students and do not receive any

special discounts or financial considerations. *See, e.g., UTS*, p.2 (fees for distance education vary from institution to institution; some have fees for students, others opt to cover costs themselves in an effort to attract more students to their programs and thereby collect more tuition monies); *UNC*, p. 3 (by state law, students pay same tuition for on-campus or distance education course). In fact, some Written Comments note additional costs for distance education courses and suggest that federal financial aid should be available to cover them. *University of Missouri-Columbia*, p. 4 (most nonprofit universities charge standard tuition but add special delivery costs fee for distance education; cites example of School of Nursing adding \$50 per credit hour for distance education course delivery); *University of Montana*, p. 17 (urges ensuring sufficient federal financial aid resources for distance education student to acquire computer hardware and software needed for accessing distance education courses).

Thus, it is not unreasonable to ask: If there is no special exemption from tuition costs, or the costs involved in accessing the Internet or using any other mode of delivery for distance education courses, why should the costs of course materials -- and, therefore, the copyright owners who create and produce them -- stand alone as exempt from payment?

It is one thing to permit limited uses of copyrighted works, without payment or permission, pursuant to fair use and the limited exemption provided in Section 110 of the Copyright Act; it is quite another, however, to statutorily mandate that copyright owners have no right to control or be compensated for uses of their works so that educational institutions, including libraries, may fully realize the benefits of information technologies and the networked environment. *ARL/AAL/ALA/MLA/SLA*, p. 1.

ENACTMENT OF A NEW DISTANCE EDUCATION EXEMPTION IS LIKELY TO HAVE SERIOUS REPERCUSSIONS REGARDING INTERNATIONAL TREATY OBLIGATIONS.

Although AAP's own Written Comments raised concerns about the potential implications a new distance education exemption could have with respect to our nation's obligations under international copyright agreements, our submission did not fully analyze the issues.

In the face of cursory assertions that enactment of such an exemption will not raise any treaty issues, *University of Montana*, p.20 and *UTS*, p. 12, AAP strongly urges the Copyright Office to carefully digest the excellent, detailed analysis of the matter in the Written Comments submitted by the National Music Publishers Association. *NMPA*, p.14-19. AAP believes that the NMPA has made an extremely persuasive case that enactment of a new distance education exemption, as championed by the educational and library communities, would violate our nation's Berne Convention obligations, as well as those under the TRIPs and WIPO treaties.

WRITTEN COMMENTS DO NOT COUNTER EVIDENCE THAT ENACTMENT OF A DISTANCE EDUCATION EXEMPTION WOULD BE PREMATURE AND PROBLEMATIC.

With support in many of the Written Comments for the reasons stated in AAP's previous submission, AAP again concludes that enactment of a new copyright exemption is not necessary to ensure the availability of rich and diverse content for use in distance education programs, and would, in fact, be premature and counterproductive with respect to that objective.

None of the Written Comments reviewed by AAP cast doubt on our assertion that publishers, particularly those who specialize in the creation and production of works for pedagogical use, are likely to suffer severe market harm if such an exemption is enacted. To the extent that any of the Written Comments spoke to the likely economic impact of such an exemption, they either viewed the impact as unknown, *UNC*, p. 10, or acknowledged that the impact could be very significant in light of the publishing community's current model for licensing uses of their copyrighted works. *UTS*, p. 12.

Despite the fulminations of the educational and library communities regarding the inadequacies of fair use as a primary basis for using copyrighted works for educational purposes, none of their Written Comments took issue with the fact that there has been no litigation or other documented dispute over distance education practices. *NMPA*, p. 13. Indeed, the only other Written Comment that mentioned the risk of litigation as a disabling disincentive to making fair use of copyrighted materials for distance education purposes also noted the general absence of such litigation and revealed its real concern to be a lack of faith in the interpretive abilities of the federal courts. *College Art Association*, p. 3-4 (In fact, lawsuits alleging infringement of images photographically copied or scanned under a claim of fair use are relatively uncommon. Nonetheless, leaving decisions to courts that may or may not correctly balance the fair use factors is unwise.)

One other issue worth noting in this context is the insistence of the education and library communities that enactment of a distance education exemption should facilitate the operation of e-reserves and full digital access to library collections. This argument is made despite the fact that library privileges regarding uses of copyrighted works are not really distance education issues. This is clear from the fact that, historically, Congress addressed library issues in Section 108 of the Copyright Act, separate and apart from the issues regarding instructional broadcasting under Section 110.

Indeed, in today's digital environment, a number of unexplored issues surrounding the nature and roles of various kinds of libraries cautions strongly against any broad new copyright exemptions that would uniformly grant special privileges to any entity that calls itself a library. See, e.g., *UMUC*, p. 7-8 (concern regarding Congressional intent that public access to digital copies of works must be restricted to a library's physical confines.)

With the library community clamoring for special privileges regarding the use of copyrighted works in digital environments, is it not appropriate to first examine exactly

what would constitute a library for purposes of obtaining such privileges? What would prevent anyone who can establish a Website from stocking it with copyrighted works, opening it to public access and use, and calling itself a library? The same question may be asked regarding what constitutes an archive. Surely Congress, in establishing special legal privileges for libraries, archives and educational institutions under copyright law, would not intend that anyone could entitle themselves to such privileges simply by hanging out a shingle in cyberspace.

Similarly, with respect to the library community's provision of so-called e-reserve services, if the desired exemption were to be enacted, what restrictions would apply to such services to ensure that they do not simply step into the shoes of publishers and republish their works, pointing to their special statutory license?

Among its many other considerations, AAP asks the Copyright Office to take these issues into account as it determines what recommendations it will make to Congress regarding the promotion of distance education through digital technologies.