

# AACC

## AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

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### REPLY COMMENTS

of the

### AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

Before the

### U.S. COPYRIGHT OFFICE

in

### PROMOTION OF DISTANCE EDUCATION THROUGH DIGITAL

### TECHNOLOGIES

### Docket Number 98-12A

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On behalf of the Nation's more than 1,000 community colleges, the American Association of Community Colleges ("AACC") submits these reply comments in the U.S. Copyright Office's proceeding under Section 403 of the Digital Millennium Copyright Act of 1998.

#### The Role of Education at the End of the Twentieth Century

Prior to addressing several of the arguments raised in comments of other parties in this proceeding, AACC wants to again emphasize the importance of the recommendations that the Copyright Office will develop under Section 403 to both the future of education in the United States and on the economy. AACC continues to "believe that the strength and vitality of the Nation's economy and its ability to compete in the global marketplace in the 21st Century hinges on an ever better educated and continually trained workforce".<sup>1</sup> AACC's view was echoed earlier this month by Federal Reserve Board Chairman Alan Greenspan who noted that "our institutions of higher learning now bear the overwhelming responsibility for ensuring that our society is prepared for the demands of rapid economic change". Chairman Greenspan said U.S. workers fear of "job obsolescence" and the rapid pace of economic change is manifested by the fact that 37% of Americans are insecure about their jobs even though the country enjoys the tightest labor market in more than two decades. This insecurity has fostered "a massive increase in the demand for educational

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<sup>1</sup> Comments of the American Association of Community Colleges in Docket Number 98-12A (February 5, 1999) 1.

services--the rise of on-the-job training, the proliferation of community colleges enhancing work skills, so-called corporate universities that combine job-oriented curricula with some broader excursions into the liberal arts, and, of course, the traditional university curricula".<sup>2</sup> The "press for lifelong learning and the availability of technology have spawned a variety of education initiatives outside the traditional classroom" in an "attempt to move learning closer to workers on the job and to make it more relevant to changing business needs".<sup>3</sup>

### A Distance Education Exemption is Needed

Some commentators in this proceeding have argued that there is no need for either an update and broadening of Section 110 of the Copyright Act of 1976 or for the creation of a new specific distance education exemption to the Section 106 rights of copyright owners. They argue that all distance education needs can and are being met through licensing. AACC strongly disagrees that licensing should be the exclusive means for sanctioning the use of copyrighted works for distance education. Rather, it is AACC's position that the promotion of distance education requires the continued applicability of fair use as well as either modification of Section 110 or a new stand alone distance education exemption *in addition* to the licensing option. In support, AACC notes that in 1976 Congress did not in any way condition or limit fair use or Section 110 rights on licensing. The Copyright Office should not break new ground now by recommending such a regime in this proceeding. Licensing in lieu of fair use and Section 110 would undo the time honored tradition of equitable balance between the legitimate rights of copyright owners and copyright users (including students and instructors), thereby frustrating the Constitution's mandate to promote science and the useful arts for the benefit of society as a whole.

In illustration of why licensing cannot be the sole mechanism for the use of copyrighted works in the distance education context, AACC notes that over a recent six month period, one of the schools of Miami-Dade Community College on 50 separate occasions requested permissions from copyright proprietors to use their works in distance education courses. Only 11 responses were received from copyright proprietors and only four of those agreed to license their material. AACC believes that Miami-Dade's experience is typical of the experiences of other educational institutions, a conclusion buttressed by the statement of Utah State University in this proceeding. AACC also notes that licensing, even when available, is often a very slow process that can be extremely expensive. As a result of such delays, as well as the high percentage of lack of response to requests and denials, much educationally valuable and significant material is not available to distant learners even though it may be available to their on-campus counterparts. Accordingly, distance learning is not flourishing under the current copyright regime. To

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<sup>2</sup> Remarks of Alan Greenspan, Chairman of the Federal Reserve Board, before the Annual Meeting of the American Council on Education (February 16, 1999) (<http://www.bog.frb.fed.us/boarddocs/speeches/current/19990216.htm>) at 2. ("Greenspan").

<sup>3</sup> Greenspan at 3-4.

meet the challenges described by Chairman Greenspan, Congress needs to reform copyright law to promote this increasingly important means of educational delivery.

AACC also rejects the claim of some copyright proprietors that the delivery of lawfully acquired instructional materials via distance education systems has contributed to piracy of copyrighted works. While copyright proprietors may have legitimate concerns about the piracy of works used and distributed in the entertainment context, AACC believes that the facts simply do not support a conclusion of piracy in the distance education environment.

#### Principles of a Distance Education Exemption

AACC urges the Copyright Office to propose either a modification of Section 110 or a separate distance education exemption. Such legislative action should embody the following principles.

- An exemption would only be available for legitimate, serious educational purpose or activity. One of several possible measures of seriousness or legitimacy could be whether or not the provider is accredited. Another condition of access to the exemption could be a requirement that use of copyrighted works would be permissible only if the instructional material incorporating the work is part of a course of instruction.
- An exemption must be keyed to the location of the distance education students rather than being limited to a traditional classroom or classroom-like setting.
- An exemption must cover both synchronous and asynchronous delivery.
- An exemption must be in addition to fair use and the availability of licenses.
- An exemption must apply to all Section 106 rights and all types of works, rather than just the performance or display of nondramatic literary and musical works. The function and purpose of the exemption must be to give distance education instructors and students the same rights and access to works enjoyed under current law by instructors and students in traditional classroom settings, provided that protections against unauthorized downstream copying and redistribution are employed that are reasonable and appropriate in light of the nature of the work utilized.
- An exemption should be premised on the use of lawfully acquired works.
- While licensing may be part of an overall distance education regime, it should not be utilized in the digital environment to limit the rights and privileges that copyright users have historically enjoyed, such as fair use. AACC stresses that licensing has always been viewed as an alternative but not a substitute for either fair use or the Section 110 exemption. It must not become a substitute in the digital distance education environment.

Respectfully submitted,

American Association of Community Colleges  
Dr. David R. Pierce, President

March 3, 1999