

[Docket No. 98-12]

Shira Perlmutter
Associate Register for Policy and International Affairs
Copyright GC/I&R
P.O. Box 70400
Southwest Station
Washington, DC 20024

March 3, 1999

Dear Ms. Perlmutter:

The undersigned representatives of elementary and secondary education submit the following comments in reply to testimony taken in Docket No. 98-12 and to set forth a set of general principles which K-12 educational organizations believe ought to inform the development of a distance learning exemption for the digital age. Digital distance learning offers exciting opportunities for elementary and secondary schools. Increasingly, distance learning will provide a critical tool to meet the curricular needs of students at all grade levels and to ensure equitable access to information for students who are isolated in rural areas or who are in economically disadvantaged areas. It will provide a means to reach homebound students and to provide enrichment, advanced placement, and access to college courses for students across the nation. It will link master teachers with educators eager to build their skills and give students access to information and coursework that otherwise would be unavailable. Ultimately, the full vision of distance learning will not be realized unless there is affordable access to copyrighted materials online. While copyright law is intended to encourage the creation of works, it is equally intended to encourage the dissemination of knowledge. As information moves to a networked environment, that balance must be maintained. A robust distance learning exemption is central to that balance.

I. At least in elementary and secondary schools, online distance learning is far from flourishing under the current copyright regime.

A number of commentators have suggested that no changes in the law are necessary because online distance learning is flourishing. Distilled to its essence, their message is simple: if it ain't broke don't fix it. But, in K-12 schools, the use of digital networks to deliver distance learning is far from flourishing. At best, it is in its infancy and the outcome of this proceeding may determine whether and how it matures. Most K-12

schools are only beginning to use digital networks to deliver distance learning and starting to grapple with issues raised by the copyright laws. While there are spots of great innovation and promise in digital distance learning around the country, these programs generally steer clear of copyrighted works because of the problems outlined below.

Right now, the most robust delivery of distance learning in K-12 is not through online networks; it is through video networks that provide courses or enrichment into the classroom. This is not an accident. It is, we believe, a direct result of the distance learning exemption granted to educational institutions in 1976 in 17 U.S. Code 110(2). That exemption recognized the important role of educational institutions in furthering society's interest in disseminating knowledge. It provided strong public policy guidance both to institutions seeking to engage in distance learning and to copyright holders seeking markets for their intellectual property. For a quarter of a century, that public policy guidance has served the public interest. Now it must be updated to meet changing technology and a new educational vision.

II. Fair use must continue to apply with full force in a distance learning environment in addition to, not as a substitute for, a distance learning exemption.

Some commentators suggest that fair use supported by voluntary guidelines should be sufficient to facilitate distance learning in a networked environment. While primary and secondary schools believe a strong fair use defense is vital to the success of distance learning, it must not be allowed to substitute for a broader distance learning exemption which expressly sets out the terms under which copyright owner's statutory rights must give way to society's interest in education. Fair use is not an exemption. It is a defense which in each instance must be decided on the facts. In contrast, the distance learning exemption was intended to permit "practices which may not qualify as fair use," Copyright law Revision, H.R. Rep. No. 1476, 94 Cong. 2d Sess. 61 (1976). If educational institutions serving the nation's children are to move forward in this arena, they must have the certainty that an express exemption provides. At the same time, the enactment of a specific distance learning exemption must not narrow or preempt in any manner a fair use defense to all uses of information in distance learning. Copyright holders must not be allowed to have it both ways, arguing that the fair use defense is all that is needed in distance learning, while at the same time, seeking to undermine that defense by imposing a "pay-per-view" regime on every bit and byte of copyrighted work.

III. Licensing is not a substitute for a distance learning exemption.

A number of copyright owners argue in their comments that licensing is the *only* appropriate means for obtaining and using copyrighted materials in a digital distance learning environment. The comments of the Copyright Clearinghouse moreover, suggest that licensing poses little or no special burden in a distance learning environment. We strongly disagree with both assertions.

First, whether or not licensing is available or affordable should not be the predicate for deciding whether to update the policies embodied in Section 110 (2). The public

policy rationale for section 110 (2) did not rest on the difficulties inherent in licensing, but rather on Congress's belief that such an exemption would enhance teaching and learning. Second, licensing as the hearing record amply demonstrates, is costly, administratively burdensome, and often unattainable. Many publishers do not offer their works for use on digital networks at all and to the extent that they do, obtaining permission often takes considerable time and effort. "[W]hile licensing protects the interests of copyright owners, ... obtaining a license often can be very difficult. There is little consistency among copyright owners in the manner in which they want to be approached about licenses or their willingness to negotiate a license... some materials are so obscure that it can be extremely difficult to even know where to ask to obtain a license." Testimony of the American Association of Community Colleges at 5. Moreover, copyright holders often charge exorbitant fees for online licenses that are far out of the reach of the K-12 community. See e.g. testimony of University of Maryland. "Licensing hurdles tend to be more complex as technology offers a constantly evolving service platform, and a program must be cleared for an increasing number of distribution methods." Testimony of Corporation for Public Broadcasting, et al. See, also testimony of Sharon Hogan, University Librarian, the University of Chicago, February 12.

The hurdles to licensing are particularly steep in K-12 institutions where resources are scarce, bargaining power is minimal and expertise on intellectual property is limited. Educators recently surveyed on distance learning programs were generally pessimistic about their ability to use copyrighted works in online learning. Many respondents noted that they are currently limiting the material used online to "our own copyrighted works" because of the costs associated with licensing and the fear of lawsuits. Their comments are instructive here. "Copyright licenses for online and monitoring the numbers makes it prohibitive...." "We would love to be able to use our.... networks to provide courses for students and their families. We cannot unless there is some relief around copyright law." "Not very much [copyrighted material is used] because the copyright laws are such a mess...." "Even the fair use provision is not invoked very often due to the fear of a suit."

Indeed, if licensing becomes a prerequisite for all use of copyrighted works in distance learning, it will make no economic sense for cash strapped K-12 institutions to use such works in distance learning at all. More to the point, the pay per view licensing scheme put forth by the copyright holders would upset the balance of interests between copyright owners and educators that the law was intended to protect. As the testimony of Laura Gasaway on behalf of the American Council on Education, Association of American Universities and the National Association of State Universities and Land-Grant Colleges aptly puts it, "the power to license is the power to determine the terms of use and ultimately the power to deny access to information, it is too great a shroud to place over distance learning." To be sure, licensing is and should remain one means for making material available for online learning. But without a robust distance learning exemption, K-12 institutions will have little bargaining power to negotiate such licenses even when they are appropriate, and will find themselves subject to terms and pricing that are well beyond their reach.

IV. Content owners concerns about piracy are overblown in an educational context.

Organizations representing copyright holders far overstate the risk of unlawful use and distribution stemming from a distance learning exemption. While some risk is inevitable, there is no evidence that works used in educational forums are being unlawfully acquired and copied by students. According to the Association of Research Libraries, over two billion dollars of copyrighted works are licensed by librarians annually, some portion of it for online use. Yet copyright holders have presented no evidence of widespread abuse by students and other authorized users. Whatever piracy problems exist arise almost entirely on online entertainment sites where lawfully and at times unlawfully acquired works are made available for downloading. But education is not entertainment and the line between the two is a rather distinct one. At least in elementary and secondary education, schools educate students on the proper way to use copyrighted works and generally encourage students to seek permission for use in appropriate cases. Moreover, elementary and secondary schools have significant control over the behavior of students; they can establish rules and sanction students who break them. While both copyright owners and educators should take reasonable measures to protect works from unlawful use, the Copyright Office ought not consider risks posed by unlawful use outside of the educational context in fashioning proposed changes to the law.

Principles Guiding a Distance Learning Exemption

K-12 educators and institutions represented by the signatories agree that the following broad principles ought to guide any new distance learning exemption for digital networks. We offer them now in the hope that they will inform the Copyright Office's thinking on this matter as well as guide further discussion and deliberation among the interested parties.

1. An exemption must be available for all legitimate, serious educational activity. Accreditation is one important measure of the seriousness of that "educational purpose," but there may be other acceptable indicia as well.
2. An exemption should apply to copyrighted works that are "directly related and of material assistance to the teaching content of the transmission."
3. The exemption must apply to asynchronous learning where students may access material at any time.
4. The exemption must permit students to access materials from any location, not just in a traditional classroom setting.
5. All categories of works must be included in the exemption, including multimedia.
6. Anything that is permissible to perform, display, or distribute in a classroom should be permitted in a distance learning environment.
7. Any exemption must include any and all §106 rights that are necessary to accomplish the exemption in a networked environment.

8. Educational institutions must provide reasonable assurances against unlawful uses, including in appropriate cases, the use of technological safeguards.
9. The exemption should apply to resources an institution has legally acquired, whether by license, purchase, gift or fair use.
10. Copyright owners must not be permitted in a digital environment to use licensing to limit privileges that otherwise apply such as fair use.

The signatories look forward to discussing these views more fully with the Copyright Office.

Respectfully submitted:

Leslie Harris, Esq.

For:

The Consortium for School Networking

The Consortium for School Networking is a non-profit organization, which promotes the use of telecommunications in K-12 education to improve learning. Members represent state and local education agencies, nonprofits, companies and individuals that share our vision.

The International Society for Technology in Education

The International Society for Technology in Education is the largest teacher based nonprofit organization in the field of educational technology. Its mission is to help K-12 teachers and administrators share effective methods for enhancing student learning through the use of new classroom technologies. Its members of over 30,000 classroom teachers as well as university faculty, state and local educational administrators, technology coordinators and corporate partners are committed to using new technologies including computer-based digital networks to improve teaching and learning for K-12 students and faculty.

The National Association of Independent Schools

The National Association of Independent Schools is a voluntary membership organization for over 1,100 member schools and associations in the United States and abroad, and is the national institutional advocate for independent precollegiate education. NAIS represents 456,500 students, 60,400 teachers and instruction support personnel, and 10,200 administrators in the U.S.

The National Education Association

The National Education Association is the nation's largest professional association, representing more than 2.4 million elementary and secondary teachers, higher education faculty, education support personnel, school administrators, retired educators, and students preparing to become teachers.

The National School Boards Association

The National School Boards Association is the nationwide advocacy and outreach organization for public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education in the United States through school board leadership.