

**Report on Copyright
and
Digital Distance Education**



U.S. Copyright Office

May 1999

A Report of the Register of Copyrights

REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION

U.S. Copyright Office
May 1999



The Register of Copyrights
of the
United States of America

Library of Congress
Department 17
Washington, D.C. 20540

(202) 707-8350

May 25, 1999

Dear Mr. President:

I am pleased to present the Copyright Office's Report on Copyright and Digital Distance Education, prepared pursuant to section 403 of the Digital Millennium Copyright Act of 1998 ("DMCA").

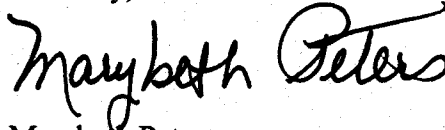
The DMCA directs the Register of Copyrights to consult with representatives of copyright owners, nonprofit educational institutions, and nonprofit libraries and archives, and thereafter to submit to Congress "recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works." The recommendations are to include any legislation the Register considers appropriate to achieve this objective.

Over the past six months, the Copyright Office has conducted an intensive study of the copyright issues involved in digital distance education. Through public hearings and comments, as well as consultations with experts in various fields, we have gathered a wide range of information and views. This Report summarizes much of that information, and the appendices and supplemental volumes reproduce the comments, reply comments and hearing transcripts in their entirety, as well as certain reference materials.

This Report gives an overview of the nature of distance education today; describes current licensing practices in digital distance education, including problems and future trends; describes the status of the technologies available or in development relating to the delivery of distance education courses and the protection of their content; and discusses prior initiatives to address the copyright issues through the negotiation of guidelines or the enactment of legislation. It also provides an analysis of the application of current copyright law to digital distance education and an assessment of whether the law should be changed, and if so, how. We conclude by recommending several amendments to sections 110(2) and 112 of the Copyright Act, as well as the clarification of aspects of the law in legislative history, and further discussion and review of certain specific issues.

We believe these recommendations would promote digital distance education, and also maintain an appropriate balance between users and owners of copyrighted works. We look forward to working with the Congress on this important subject.

Sincerely,

A handwritten signature in black ink that reads "Marybeth Peters". The signature is written in a cursive style with a large, prominent "M" and "P".

Marybeth Peters
Register of Copyrights

Enclosure

The Honorable
Albert Gore, Jr.
President of the Senate
S-212, U.S. Capitol
Washington, DC 20510



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United States of America

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Marybeth Peters
Register of Copyrights

Enclosure

The Honorable
J. Dennis Hastert
Speaker of the House
of Representatives
2263 Rayburn House Office Building
Washington, DC 20515-1314

ACKNOWLEDGMENTS

This report is the result of the expertise, skills and dedication of many people. Fortunately, I was able to draw upon the wisdom and abilities of my colleagues and staff as well as many others in the government and the private sector, all of whom gave generously of their time.

The study leading to this report was a major undertaking, involving hearings in three cities, demonstrations using the latest technologies and meetings around the country, all within a very tight time frame. It also involved some specialized topics requiring consultation with experts in other fields. The comments and reply comments were electronically filed -- this was a first for the Copyright Office. Also, it was the first time that we sought to keep the public informed about a study through a separate file on our website.

I especially would like to acknowledge the contributions of Shira Perlmutter, Associate Register for Policy and International Affairs, who guided the project from start to finish, who wrote much of the report and edited it in its entirety, and Sayuri Rajapakse and Rachel Goslins, Attorney-Advisors in the Office of Policy and International Affairs. Ms. Rajapakse and Ms. Goslins not only wrote substantial portions of the report, they served as the project directors, organizing and overseeing all aspects of the study. Without these talented individuals, there would be no report.

Other individuals shared their insights, gave advice and assisted us in numerous ways. I thank David Carson, General Counsel of the Copyright Office; Jane C. Ginsburg, Morton L. Janklow Professor of Literary & Artistic Property Law, Columbia University School of Law; Robert Dizard, Office of Congressional Relations, Library of Congress; Jesse Feder, Policy Planning Advisor, Office of Policy and International Affairs; Tanya Sandros, Attorney-Advisor, Office of the Copyright General Counsel; Gina Giuffreda, CARP Specialist, Office of the Copyright General Counsel; Carolina Saez, Attorney-Advisor, Office of Policy and International Affairs; and William Roberts, Senior Attorney-Advisor for Compulsory Licenses, Office of the Copyright General Counsel. I also thank Kristina Harms, our intern from the Columbus School of Law of The Catholic University of America, whose substantive and organizational help was invaluable.

Special thanks also to Linda Roberts, Director, Office of Educational Technology, U.S. Department of Education; Christine Dalziel, Executive Director, Instructional Telecommunications Council; Laura (Lolly) Gasaway, Director of the Law Library and Professor of Law, University of North Carolina at Chapel Hill; Lisa Livingston, Director, Instructional Media Department, City College, City University of New York; Diana Vogel song, Assistant University Librarian for Information Services, American University; Mary Levering, Associate Register for National Programs; and Peter Fowler, Executive Assistant to the Commissioner of Patents and Trademarks, U.S. Patent and Trademark Office, who provided much useful information for the parts of the report dealing with the nature of distance education today and with prior initiatives addressing copyright and digital distance education.

I greatly appreciate the assistance of Isabella Hinds, who in a short time wrote an extensive report on licensing practices, and our technology panel, I. Trotter Hardy, Professor of Law, William and Mary School of Law, Christopher Burns, independent consultant and Dr. Clifford Lynch,

Executive Director, Coalition for Networked Information, who met with us and provided guidance on the sometimes esoteric technology issues. I am also grateful to Michael Handy, Louis Pizzoli and Jason Yasner of the Library of Congress Information Technology staff, who assisted us by explaining the technology and setting up the Office's demonstration of distance education programs. The hearings in Los Angeles and Chicago would not have been possible without the logistical assistance of John C. Vaughn, Executive Vice President, American Association of Universities.

Numerous and important contributions were made by many others in the Copyright Office. I thank Ed Rogers, our webmaster, for his expert contributions; Denise Prince of the Copyright General Counsel's Office and Mary Gray, Executive Assistant to the Register, for their skills and patience in finalizing the report with its many chapters, footnotes, and appendices; and Xue Fei Li and Jerry Tuben of our Automation Group, who kept the computers working and significantly reduced the level of stress on various occasions. I thank Marilyn Kretsinger, Assistant General Counsel, for her support and William Jebram for his invaluable assistance in the printing of the final documents. Thanks also to Guy Echols and Sandra Jones.

Marybeth Peters
Register of Copyrights

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EXECUTIVE SUMMARY

INTRODUCTION

Over the past five years, the application of copyright law to distance education using digital technologies has become the subject of public debate and attention in the United States. In the Digital Millennium Copyright Act of 1998 (DMCA), Congress charged the Copyright Office with responsibility to study the issue and report back with recommendations within six months. After an intensive process of identifying stakeholders, holding public hearings, soliciting comments, conducting research, and consulting with experts in various fields, the Office has issued this Report.

Part I of the Report gives an overview of the nature of distance education today. Part II describes current licensing practices in digital distance education, including problems and future trends. Part III describes the status of technologies relating to the delivery and protection of distance education materials. Part IV analyzes the application of current copyright law to digital distance education activities. Part V discusses prior initiatives addressing copyright and digital distance education. Part VI examines the question of whether the law should be changed, first summarizing the views of interested parties and then providing the Copyright Office's analysis and recommendations.

I. THE NATURE OF DISTANCE EDUCATION TODAY

Distance education in the United States today is a vibrant and burgeoning field. Although it is far from new, digital technologies have fostered a rapid expansion in recent years, as well as a change in profile. The technologies used in distance education, the populations served, the

institutions offering such programs, and the partnerships that have emerged differ in nature and scale from earlier models.

The most fundamental definition of distance education is a form of education in which students are separated from their instructors by time and/or space. Distance education is utilized in some form at every level of the educational spectrum, with the most extensive use in higher education. An individual course may contain both classroom and distance education components. Digital technology is used extensively for varied purposes and in varied ways, depending on the intended audience for the course, and the availability and cost of the technology. The capabilities of the new technologies have made possible a more interactive experience that more closely parallels face-to-face teaching--in effect creating a virtual classroom. They have also made distance education courses more convenient and better suited to the needs of different students, including by providing the benefits of both synchronous and asynchronous methods.

Distance education is reaching wider audiences, covering all segments of the population. The college audience is increasing particularly rapidly, in part due to responsiveness to the needs of an older, non-traditional student population, as well as students in other countries. Students also include professionals engaging in professional development or training, and retirees. The expansion of the field has led to changes among providers, with courses offered by both nonprofit and for-profit entities, on both a nonprofit and for-profit basis, and through varieties of partnerships among educational institutions and corporations. The federal government has been active in promoting the benefits of distance education, with recent legislation providing funding and recognition in various forms.

Educational institutions offering distance education draw on library resources in several ways, including to provide support for online courses and to provide access to supplemental

materials in digital form. Institutions are engaged in adopting copyright policies, training faculty and staff, and educating students about copyright law. They are increasingly seeking and obtaining formal accreditation.

II. LICENSING OF COPYRIGHTED WORKS

Although substantial licensing activities are taking place today in connection with the provision of materials to distance education students, so far relatively few licenses are requested or granted for digital uses. Most licensing relates to supplemental materials in analog form, or, increasingly, in digital form; the least common type of licensing is for digital uses of copyrighted works incorporated into the class itself. Most of the works licensed for digital use are textual materials; licenses for other types of content are much less frequent. As an alternative to seeking a license, an educational institution may avoid the use of preexisting copyrighted works in distance education courses, or may rely on exemptions in the copyright law. There is wide diversity in licensing procedures among educational institutions and copyright owners. In general, the more resources devoted to licensing, and the more centralized the responsibility, the more efficient and successful the process.

Many educational institutions describe having experienced recurrent problems with licensing for digital distance education, primarily involving difficulty locating the copyright owner, inability to obtain a timely response, or unreasonable prices or other terms. The problems are reported to be most serious with respect to journal articles and audiovisual works. They appear to be exacerbated in the digital context, which may be explained in part by the perception of copyright owners that the risks of unauthorized dissemination are greater, and in part by the elements of novelty and unfamiliarity.

A number of trends may facilitate the development of more effective digital licensing in the near future, including advances in technology used to protect works, the use of electronic copyright management information, and online licensing systems. New collective initiatives should also ease the licensing process for many types of uses. As digital uses become more common and familiar, copyright owners are becoming more flexible. It is difficult to predict the extent to which licensing problems will subside or how long the improvement will take, but given the current state of development of these trends, a more definitive evaluation will be possible in the next few years.

III. TECHNOLOGIES INVOLVED IN DIGITAL DISTANCE EDUCATION

Technology that facilitates licensing includes the ability to attach information to a work in digital format, and online rights and permissions services supporting a range of license and delivery functions. A number of different delivery technologies are used in distance education today, including traditional media used to carry digital information, such as digital television broadcasts or videoconferencing. These may be used in combination with digital network technology, such as computer connections between students and instructors.

The computer is the most versatile of distance education instruments, since it can perform the same function as a television or telephone, but also provide more interactivity, deliver more content, and support more comprehensive services. Computers can be used to transmit texts and graphics, connect users in a variety of real-time and asynchronous dialogues, deliver messages between users, and receive both audio and video transmissions.

There is no “typical” digital distance education course. Instructors sometimes build courses from scratch, and sometimes customize templates provided by commercial software.

They may combine any or all of the technological tools available today, including e-mail, threaded discussions, chat rooms, whiteboard programs, shared applications, streaming video or audio, video or audio files, course management infrastructure, links to websites, and interactive CD-ROMs and DVD-ROMs. In addition, programs for self-paced independent learning may be obtained from commercial vendors or through an educational institution.

The need to provide technological security for copyrighted works in the digital environment has been recognized in all sectors, not just for distance education. Technology companies and content providers are working to develop commercially viable protection technologies, and industries are collaborating to develop standards. Some technologies limit access to works; others prevent or detect uses of works after access. Each method varies in its cost and degree of security; although many are highly effective, none provides absolute certainty. The goal is to provide a high enough level of protection that the cost of circumvention outweighs the value of access to the material protected.

Educational organizations can, and commonly do, limit access to students enrolled in a particular class or institution through several different methods used separately or in combination: password protection, firewalls, screening for IP addresses or domain names, hardware connections, encryption, or using CD-ROMs as a delivery mechanism.

After access has been gained, however, material is available to students for further use, including downloading or electronic distribution. Technologies that address such downstream uses do exist today, with several on the market, others expected to be released very soon, and others projected for release in the next year. Most, but not all, are designed to handle a single type of content. The most effective are secure container/proprietary viewer technologies, which allow copyright owners to set rules for the use of their works, which are then attached to all

digital copies, and prevent anyone from making a use that is not in accordance with the rules. For example, students could be allowed to view the work or print a single copy, but not to save it to disk or distribute it to others electronically. Streaming formats, which do not facilitate the making of copies, and the use of low resolution digital copies, also offer some degree of protection against redistribution.

Technologies for embedding information in digital works to identify and track usage are also in development and use, with the practice of digital watermarking the most effective. Using commercially available software or services, these identifiers can be used as a search object to find unauthorized copies of some types of works on the World Wide Web.

Significant developments are occurring in all of these areas, and a few generalizations can be made. More efficient licensing mechanisms will become more widespread, and delivery systems will become more efficient, sophisticated and interoperable. Developments in protecting content are harder to predict. In the near future it will be technically possible to protect works against both unauthorized access and dissemination with a high degree of effectiveness. Because it remains to be seen whether technologies to prevent downstream uses will gain widespread market acceptance, the extent to which they will be available in practical form for use in digital distance education at any given point in time is unclear.

IV. APPLICATION OF COPYRIGHT LAW TO DISTANCE EDUCATION

Different copyright rights are implicated by different educational activities, depending in part on the technologies used. When a performance or display of a work is accomplished by means of a digital network transmission, temporary RAM copies are made in the computers through which the material passes, by virtue of the technological process. As a result, not only

the rights of public performance or display are implicated, but also the rights of reproduction and/or distribution. This does not mean that the use is necessarily an infringement. Permission to use the work could be granted by the copyright owner, either through an express license or implied from the circumstances. If not, the use may fall within one of the various exemptions in the Copyright Act.

Three exemptions together largely define the scope of permitted uses for digital distance education: two specific instructional exemptions in section 110, and the fair use doctrine of section 107. Sections 110(1) and (2) together were intended to cover all of the methods by which performances or displays in the course of systematic instruction take place. Section 110(1) exempts the performance or display of any work in the course of face-to-face teaching activities. Section 110(2) covers the forms of distance education existing when the statute was enacted in 1976, exempting certain performances or displays in the course of instructional broadcasting. Both subsections contain a number of limitations and restrictions. In particular, the section 110(2) exemption from the performance right applies only to nondramatic literary and musical works (although the display right exemption applies to all categories of works). Section 110(2) also contains limitations on the nature and content of the transmission, and the identity and location of the recipients. The performance or display must be made as a regular part of systematic instructional activity by a nonprofit educational institution or governmental body; it must be directly related and of material assistance to the teaching content; and it must be made primarily for reception in classrooms or places of instruction, or to persons whose disabilities or other special circumstances prevent their attendance in classrooms, or to government employees.

As written, section 110(2) has only limited application to courses offered over a digital network. Because it exempts only acts of performance or display, it would not authorize the acts

of reproduction or distribution involved in this type of digital transmission. In addition, students who choose to take a distance course without special circumstances that prevent their attendance in classrooms may not qualify as eligible recipients.

Fair use is the broadest and most general limitation on the exclusive rights of copyright owners, and can exempt distance education uses not covered by the specific instructional exemptions. It is flexible and technology-neutral, and continues to be a critical exemption for educational users in the digital world. It requires courts to examine all the facts and circumstances, weighing four nonexclusive statutory factors. While there are not yet any cases addressing the application of fair use to digital distance education, a court's analysis will depend on elements such as the subject matter of the course, the nature of the educational institution, the ways in which the instructor uses the material, and the kinds and amounts of materials used. Guidelines have in the past been negotiated among interested parties to provide greater certainty as to how fair use applies to education; such guidelines for certain analog uses were included in legislative history around the time of enactment of the Copyright Act.

Other exemptions in the Copyright Act may exempt some distance education uses in limited circumstances, but do not significantly expand the scope of permitted instructional uses in a digital environment. These include the ephemeral recordings exemption in section 112, the limitations on exclusive rights in sound recordings in section 114, and the exemption for certain secondary transmissions in section 111. Compulsory licenses could permit distance educators to use some works in limited ways, but are not likely to be much used.

Two titles of the DMCA are also relevant, one providing limitations on the liability of online service providers and the other establishing new technological adjuncts to copyright protection. While these provisions do not affect the scope of permitted digital distance education

uses, they add a degree of security for both educational institutions and copyright owners disseminating and licensing material in the digital environment. New section 512 of the Copyright Act provides greater certainty that educational institutions providing network access for faculty, staff, and students will not, merely by doing so, become liable for infringing material transmitted over the network. New Chapter 12 contains a prohibition against various forms of circumvention of technological measures used by copyright owners to protect their works, and a provision protecting the integrity of copyright management information.

The international context raises two separate issues: treaty obligations and the impact of any amendments abroad. The major treaties that impose obligations on the United States with respect to copyright are the Berne Convention and the TRIPs Agreement. Both contain rules governing the permissibility of exceptions to copyright owners' rights. Any new or amended exemption for distance education should be drafted to be compatible with these standards. In addition, the enactment of any new exemption will have an impact abroad, primarily due to doctrines of choice of law. When an educational institution in the United States transmits courses to students in other countries, it is unclear whether U.S. law will apply to such transmissions, or the law of the country where the transmission is received, making it difficult for educators to determine what uses of works are permissible. Other countries are also making or considering amendments to their copyright laws to address digital distance education.

V. PRIOR INITIATIVES ADDRESSING COPYRIGHT AND DIGITAL DISTANCE EDUCATION

Two different initiatives begun in 1994 sought to develop guidelines interpreting the application of fair use to educational uses through digital technology. One group, initiated by the

Consortium of College and University Media Centers (CCUMC) and the Agency for Instructional Technology, issued a set of guidelines in 1996 addressing the use of portions of copyrighted works in educational multimedia projects created by educators or students as part of systematic learning activity at nonprofit educational institutions. The other group, established by the Conference on Fair Use (CONFU) convened by the Administration's Information Infrastructure Task Force, prepared draft guidelines relating to the performance and display of copyrighted works in distance learning classes of nonprofit educational institutions, not including asynchronous delivery over computer networks. CONFU considered both sets of guidelines as proposals, but did not formally adopt either of them. A number of organizations and companies, however, have endorsed one or both sets of guidelines, or use them as a reference.

In 1997, the issue of copyright and digital distance education was raised in Congress by the introduction of bills in the House and Senate proposing an amendment to section 110(2). The amendment would have clarified that the exemption covered digital transmissions, and would have broadened its scope, removing the limitation on categories of works covered, adding the right of distribution, and removing the requirement that the transmission be made primarily for reception in classrooms and by people unable to attend classrooms. No floor action was taken on these bills, but they became the subject of discussion in the Senate during consideration of the WIPO Copyright and Performances and Phonograms Treaty Implementation Act. After intensive discussions among interested parties, it became clear that many complex and interrelated issues were involved that could not be given adequate consideration in the time available. Congress therefore provided for a longer-term study in section 403 of the DMCA.

VI. SHOULD CURRENT LAW BE CHANGED?

A. The Views of the Parties

The educational community (including both educators and academic libraries) believes that a change in the law is required to optimize the quality and availability of forms of distance education that take full advantage of today's technological capabilities. Members of this community argue that fair use is uncertain in its application to the digital environment, and that the exemptions in section 110 are outmoded and do not extend to the full range of activities involved in digital distance education. They report that licensing for such uses is not working well, and therefore does not offer a satisfactory alternative. Some educators also note that distance education is already an expensive proposition, involving substantial start-up and maintenance costs, and warn that adding the cost of licensing fees for copyrighted materials could make it prohibitive.

Copyright owners, on the other hand, do not believe statutory amendment is necessary or advisable, pointing out that digital distance education is flourishing under current law. They see the fair use doctrine as strong and healthy, and are concerned that expanding the section 110 exemptions would harm both their primary and secondary markets. They assert that more efficient licensing systems are developing, and that the reported difficulties in obtaining permissions will ease with time and experience. Finally, they argue that educators who wish to use preexisting copyrighted content in their courses should regard licensing fees as one of the costs of distance education, comparable to the purchase of the necessary hardware and software.

There is virtual unanimity that the doctrine of fair use is fully applicable to uses of copyrighted works in the digital environment, including in distance education. (This does not mean that all agree as to which digital distance education activities would qualify as fair.) As to

the role of guidelines, the messages were mixed. Many copyright owners recommend pursuing the development of guidelines regarding the fair use of copyrighted materials in digital distance education, and suggest that further discussion could be productive in achieving greater mutual understanding and certainty. Educational and library groups were less positive, expressing varying views. Some educators see guidelines as valuable guides to decisionmaking; other participants are critical of the concept or doubtful about the efficacy of any results.

As to the specific instructional exemptions, copyright owners argue that section 110(2) should not be changed. They are concerned that a broadening of the exemption would result in the loss of opportunities to license works for use in digital distance education -- a new, growing, and potentially lucrative market. They urge that Congress not foreclose the potential market by legislating prematurely or overbroadly.

The other major concern of copyright owners is the increased risk of unauthorized downstream uses of their works posed by digital technology. When works are distributed in digital form, once a student obtains access, it is easy to further distribute multiple copies to acquaintances around the world. Depending on the type of work involved and the amount used, the result could be a significant impact on the market for sales of copies.

Most educational and library groups, in contrast, support a broadening of section 110(2). They view fair use alone as either not clear enough or not extensive enough in its application. Their primary goals are to avoid discrimination against remote site students in their educational experience vis-a-vis on-site students; to avoid discrimination against new technologies vis-a-vis old ones; and to avoid the difficulties in licensing that many describe having experienced. In general, the educational community seeks the following changes: (1) elimination of the concept of the physical classroom as a limitation on the availability of the exemption; (2) coverage of

rights in addition to performance and display, at least to the extent necessary to permit digital transmissions; and (3) expansion of the categories of works covered, by broadening the performance right exemption to apply to works other than nondramatic literary and musical works. Some would go further, advocating an exemption that allows educators to do anything by means of digital transmission that they can do in the classroom under section 110(1). Libraries in particular also seek exemptions for additional activities, stressing the importance of being able to give access to electronic reserves and other resource materials in order to provide a high-quality educational experience for students at remote sites.

As to the risks involved, educational institutions are willing to take steps to safeguard the security of the materials they disseminate. In fact, they point out that they already make such efforts; the use of password protection and other access controls is widespread. Many also require compliance with copyright policies and inform students, faculty and staff about the law. Finally, educators believe that licensing should continue to play some role in distance education.

B. Analysis and Recommendations

The analysis of whether the law should be changed is complicated by the context: a time of rapid development in both technologies and markets. While such rapid development is a hallmark of the digital age, in the area of distance education we are at a particularly crucial point in time. Sophisticated technologies capable of protecting content against unauthorized post-access use are just now in development or coming to market, although it is not clear when they will be widely available in a convenient and affordable form that can protect all varieties of works. Meanwhile, licensing systems for digital distance education are evolving, including online and collective licensing mechanisms, and initial fears are beginning to ebb.

Many of the concerns on all sides stem from the inability to depend on the effective functioning of technological protections and licensing mechanisms. If technology were further along, broadened exemptions could be less dangerous to copyright owners; if licensing were further evolved, broadened exemptions could be less important for educators. The technical tools for both exist today; it will be clearer within the next few years how successfully they can be integrated into the real world of distance education. Given the timetable of the legislative process, the question is what steps Congress can and should take in the interim.

Over the course of this study, numerous issues have been raised and discussed. Given the limited time allotted, the specific mandate for the Register to consider primarily "the need for an exemption from exclusive rights of copyright owners for distance education through digital networks," and the origin of that mandate in proposed amendments to section 110(2), our analysis focuses on the appropriate treatment under copyright law of materials delivered to students through digital technology in the course of mediated instruction. We do not address other uses of copyrighted works in the course of digital distance education, including student use of supplemental or research materials in digital form; the creation of multimedia works by teachers or students; and the downloading and retention of materials by students. Such activities, although an important part of digital distance education, do not involve uses analogous to the performances and displays addressed in section 110(2).

As a fundamental premise, the Copyright Office believes that emerging markets should be permitted to develop with minimal government regulation. When changes in technology lead to the development of new markets for copyrighted works, copyright owners and users should have the opportunity to establish mutually satisfactory relationships. A certain degree of growing pains may have to be tolerated in order to give market mechanisms the chance to evolve in an

acceptable direction. At some point, however, existing but dysfunctional markets may require adjustments in the law. Timing is therefore key.

The desire to let markets evolve does not mean that the law must remain frozen. Where a statutory provision intended to implement a particular policy is written in such a way that it becomes obsolete due to changes in technology, the provision may require updating if that policy is to continue. Doing so may be seen not as preempting a new market, but as accommodating existing markets that are being tapped by new methods. In the view of the Copyright Office, section 110(2) represents an example of this phenomenon.

The exemptions in sections 110(1) and (2) embody a policy determination that performances or displays of copyrighted works in the course of systematic instruction should be permitted without the need to obtain a license or rely on fair use. The technological characteristics of digital transmissions have rendered the language of section 110(2) inapplicable to the most advanced delivery method for systematic instruction. Without an amendment to accommodate these new technologies, the policy behind the law will be increasingly diminished.

At the same time, it must be borne in mind that existing law was crafted to embody a balance of interests between copyright owners and users of works. In order to maintain a comparable balance, the coverage of an exemption cannot be expanded without considering the impact of the expansion on markets for copyrighted works. If the law is updated to address new technology, the risks posed by that technology must be adequately taken into account.

Updating section 110(2) to allow the same activities to take place using digital delivery mechanisms, while controlling the risks involved, would continue the basic policy balance struck in 1976. In our view, such action is advisable.

Other amendments have been suggested that would go further, and entail varying degrees of change in legislative policy. These include expanding the exemption to cover more categories of works or additional exclusive rights beyond those necessary for digital delivery, and otherwise resolving problems experienced in the licensing process. Here, the elements of timing and burden of proof are critical. From a pedagogical perspective, these suggested expansions are desirable. From a copyright owner's perspective, they endanger primary or secondary markets for valuable works. The question should not be whether users have established a need to expand the exemption, any more than whether copyright owners have established a need to retain its limits, but rather whether given current conditions, the policy balance struck in 1976 should be recalibrated in certain respects.

We conclude that some policy recalibration may be appropriate at this point, relating primarily to categories of works covered. In other areas, we believe that existing restrictions should be retained and markets permitted to evolve, subject to further review. Critical to this conclusion is the continued availability of the fair use doctrine as a safety valve.

1. Recommendations as to Statutory Language.

In order to accomplish the goal of updating the language and the policy balance of section 110(2), the Copyright Office offers the following recommendations:

(a) Clarify meaning of "transmission." It should be clarified through legislative history that the term "transmission" in section 110(2) covers transmissions by digital means as well as analog.

(b) Expand coverage of rights to extent technologically necessary. Because the exemption in its current form permits only acts of performance and display, digital transmissions over computer networks would not be excused. We therefore recommend expanding the scope of

the rights covered, in order to add those needed to accomplish this type of transmission. The rights of reproduction and/or distribution should not be added in their entirety, but only to the extent technologically required in order to transmit the performance or display authorized by the exemption.

(c) Emphasize concept of mediated instruction. An exemption that includes elements of the reproduction right so as to allow a student to access individual works asynchronously raises an unintended problem. If an entire work can be viewed on a computer screen, repeatedly, whenever a student chooses and for an indefinite duration, the performance or display could conceivably function as a substitute for the purchase of a copy. In updating section 110(2), it is therefore critical to ensure that the performance or display is analogous to the type of performance or display that would take place in a live classroom setting. This might be accomplished by amending paragraph (A) of section 110(2), which requires the performance or display to be "a regular part of . . . systematic instructional activities," to focus on the concept of mediated instruction. Additional language could specify that the performance or display must be made by or at the direction of an instructor to illustrate a point in, or as an integral part of, the equivalent of a class session in a particular course.

(d) Eliminate requirement of physical classroom. In its current form, section 110(2) requires transmissions to be sent to a classroom or similar place normally devoted to instruction, or to persons who cannot attend a classroom. The nature of digital distance education, where the goal is to permit instruction to take place anywhere, makes this limitation conceptually and practically obsolete. Eliminating the physical classroom limitation would better reflect today's realities.

At the same time, it is important to retain meaningful limitations on the eligible recipients; the performances or displays should not be made available to the general public. We recommend permitting transmissions to be made to students officially enrolled in the course, regardless of their physical location. Since today's digital and scrambling technologies allow transmissions to be targeted more precisely, the requirement should be added that the transmission must be made solely, to the extent technologically feasible, for reception by the defined class of eligible recipients.

(e) Add new safeguards to counteract new risks. Because the transmission of works to students in digital form poses greater risks of uncontrolled copying and distribution, a broadened exemption could cause harm to markets beyond the primary educational market. It is therefore critical, if section 110(2) is expanded to cover digital transmissions, that safeguards be incorporated into the statute to minimize these risks. We recommend including a number of safeguards as conditions on the applicability of the exemption: First, any transient copies permitted under the exemption should be retained for no longer than reasonably necessary to complete the transmission. Second, those seeking to invoke the exemption should be required to institute policies regarding copyright; to provide informational materials to faculty, students, and relevant staff members that accurately describe and promote compliance with copyright law; and to provide notice to students that materials may be subject to copyright protection.

Third, when works are transmitted in digital form, technological measures should be in place to control unauthorized uses. In order to effectively limit the risks to copyright owners' markets, these measures should protect against both unauthorized access and unauthorized dissemination after access has been obtained. The exemption should require the transmitting institution to apply such measures, described in simple and technology-neutral language. Because

no technology is one hundred percent effective, only measures that "reasonably" prevent these acts should be required. In addition, the law should impose an obligation not to intentionally interfere with protections applied by the copyright owners themselves. If copyrighted works are to be placed on networks, and exposed to the resulting risks, it is appropriate to condition the availability of the exemption on the application of adequate technological protections.

(f) Maintain existing standards of eligibility. An educational institution must be "nonprofit" to be eligible for the exemption in section 110(2). There was extensive debate over the appropriateness of retaining the "nonprofit" requirement, and/or adding a requirement of accreditation. In the area of digital distance education, the lines between for-profit and nonprofit have blurred, and the issue has arisen as to how to guarantee the bona fides of an entity that is entitled to the exemption at a time when anyone can transmit educational material over the Internet. The Copyright Office is not convinced at this point that a change in the law is desirable, given the policy implications of permitting commercial entities to profit from activities using copyrighted works without compensating the owners of those works; the potential inconsistency with other provisions of the Act, including section 110(1), that refer to "nonprofit educational institutions"; and the DMCA mandate to consult specifically with nonprofit educational institutions and nonprofit libraries and archives. This is nevertheless an important and evolving issue that deserves further attention.

(g) Expand categories of works covered. One of the most difficult issues to resolve is whether to expand the categories of works exempted from the performance right beyond the current coverage of nondramatic literary and musical works. On the one hand, pedagogical considerations militate against continuing to limit the types of works covered. On the other hand, the existing distinctions have been embedded in the law for more than twenty years,

based on the potentially greater market harm to works such as dramatic works or audiovisual works. The question is why this policy judgment should be altered now.

The main categories of works that could be affected by an expansion are audiovisual works, sound recordings, and dramatic literary and musical works. In terms of primary markets, educational licensing may represent a major source of revenue only for educational videos. The potential effect on secondary markets, however, remains a serious concern for all such works. This concern has been exacerbated beyond the threats perceived in 1976 by the capacities of digital technology. For entertainment products like motion pictures, transmission could well substitute for students paying to view them elsewhere, and if digital copies can be made or disseminated, could affect the broader public market.

The considerations are different for sound recordings than for other categories. Because there was no public performance right for sound recordings when section 110(2) was enacted in 1976, educators were free to transmit performances of sound recordings to students (assuming the use of any other work embodied in the sound recording was authorized by statute or license). When owners of sound recordings were granted a limited public performance right in 1996, there was no discussion of whether sound recordings should be added to the coverage of section 110(2). This issue thus represents a new policy question that has not yet been considered, rather than a potential change in a judgment already made.

It is the exclusion of audiovisual works, however, about which educators express the strongest concern, in part due to difficulties in obtaining licenses for digital uses from motion picture producers. Moreover, as digital distance education uses more multimedia works, which incorporate audiovisual works and may be considered audiovisual works themselves, the failure to cover this category may have an increasing impact.

On balance we suggest a compromise. If audiovisual and other works are added, it should be done in a limited way, with greater restrictions than section 110(2) currently imposes. Thus, section 110(2) could be amended to allow performances of categories in addition to nondramatic literary and musical works, but not of entire works. An expanded exemption should cover only the performance of reasonable and limited portions of these additional works.

It is important to note that under the current language of section 110(2), the portion performed would have to be the subject of study in the course, rather than mere entertainment for the students, or unrelated background or transitional material. This requirement, combined with the limitation on the amount of the work that could be used, should further serve to limit any impact on primary or secondary markets.

It nevertheless may be advisable to exclude those works that are produced primarily for instructional use. For such works, unlike entertainment products or materials of a general educational nature, the exemption could significantly cut into primary markets, impairing incentives to create.

(h) Require use of lawful copies. If the categories of works covered by section 110(2) are expanded, we recommend an additional safeguard: requiring the performance or display to be made from a lawful copy. Such a requirement is already contained in section 110(1) for the performance or display of an audiovisual work in the classroom.

(i) Add new ephemeral recording exemption. Finally, in order to allow the digital distance education that would be permitted under section 110(2) to take place asynchronously, we recommend adding a new subsection to section 112, the ephemeral recordings exemption. The new subsection would permit an educator to upload a copyrighted work onto a server, to be subsequently transmitted under the conditions set out in section 110(2) to students enrolled in her

course. The benefit of the new subsection should be limited to an entity entitled to transmit a performance or display of a work in digital form under section 110(2). Various limits should be imposed similar to those set out in other subsections of section 112, including the requirements that any such copy be retained and used solely by the entity that made it; that no further copies be reproduced from it (except the transient technologically necessary copies that would be permitted by section 110(2)); that the copy be used solely for transmissions authorized under section 110(2); and that retention of the copy be limited in time, remaining on the server in a form accessible to students only for the duration of the course. In addition, the reproduction should have to be made from a lawful copy. Finally, the entity making the reproduction should not be permitted to remove technological protections applied by the copyright owner to prevent subsequent unlawful copying.

2. Clarification of Fair Use.

Because there is confusion and misunderstanding about the fair use doctrine, including the function of guidelines, we believe it is important for Congress to provide some clarification. The statutory language of section 107 is technology-neutral, and does not require amendment. But if any legislative action is taken with regard to distance education, we recommend that report language explicitly address certain fair use principles.

First, the legislative history should confirm that the fair use doctrine is technology-neutral and applies to activities in the digital environment. It might be useful to provide some examples of digital uses that are likely to qualify as fair. It should be explained that the lack of established guidelines for any particular type of use does not mean that fair use is inapplicable. Finally, the relationship of guidelines to fair use and other statutory defenses should be clarified. The public should understand that guidelines are intended as a safe harbor, rather than a ceiling on what is permitted.

Although flexibility is a major benefit of the fair use doctrine, the corollary is a degree of uncertainty. This drawback is exacerbated by the context of new technologies, where little case law is available. In the analog world, efforts such as the photocopying and off-air taping guidelines have proved helpful in giving practical guidance for day-to-day decisionmaking by educators. The Copyright Office believes that additional discussion among the interested parties of fair use as applied to digital distance education could be productive in achieving a greater degree of consensus. In the past, efforts to develop guidelines have been successful where a consistent group of participants worked within a structure established under the auspices of a government agency, with some direction provided by Congress.

3. Licensing Issues.

The fact that digital technologies impose new costs on delivering distance education does not itself justify abandoning or regulating the long-standing licensing system. Digital distance education entails the use of computer hardware and software, and the employment of trained support staff, all of which cost money. Digital distance education may also entail the use of preexisting copyrighted works. This content is at least as valuable as the infrastructure to deliver it, and represents another cost to be calculated in the equation.

The critical question here is whether the markets in which distance educators participate are dysfunctional, and if so, to a degree that calls for a legislative remedy. While the problems experienced in licensing are not unique to digital distance education, they are heightened in the digital context due to factors such as fear about increased risks; lack of certainty as to the scope of pre-digital transfers of rights; and general unfamiliarity with new uses. Many of these factors should diminish with time and experience, and there are some indications that this is already happening. In addition, online and collective licensing for digital uses will increasingly facilitate

transactions. Nevertheless, problems will persist for the foreseeable future, as long as risks are perceived as high or benefits low.

One of the problems identified by educators has special characteristics that can block the functioning of the marketplace. Where the owner of the work simply cannot be located, there is no opportunity to negotiate. Particularly because the problem of such "orphan works" may become more acute due to longer copyright terms and the expanded audience for older works made possible by digital technology, we believe that the time may be ripe for Congressional attention to this issue generally.

We have not otherwise seen sufficient evidence of a need for a legislative solution moving away from the general free market approach of current law. Given the state of flux of online licensing systems and technological measures, and the waning influence of the elements of fear and unfamiliarity, problems of delay and cost may subside to an acceptable level. At this point in time we recommend giving the market for licensing of nonexempted uses leeway to evolve and mature. Because the field of digital distance education is growing so quickly, and effective licensing and technologies may be on the horizon, we suggest revisiting the issue in a relatively short period of time.

4. International Considerations.

In making these recommendations, the Copyright Office is mindful of the constraints of U.S. treaty obligations. In our view, the relevant criteria of the Berne Convention and the TRIPs Agreement are fundamentally in harmony with domestic policy considerations. We believe that our recommendations are fully consistent with these criteria, and would not alter the fundamental balance of either section 110(2) or 112, which have been part of U.S. law for more than twenty years.

The balance struck in U.S. law will have an importance beyond our borders, both through its potential application abroad and as a model for other countries examining the issue. Whether a distance education transmission initiated in one country and sent to a student in another country constitutes an infringement, falls within a collective or compulsory licensing scheme, or is exempted, will depend on which country's law a court applies. This means both that the scope of the exemptions in the U.S. Copyright Act may have an impact on foreign markets for U.S. works, and that U.S. copyright owners and users have an interest in the scope of exemptions or statutory licensing rules adopted in foreign laws.

INTRODUCTION

A. GENERAL

Distance education in the United States today is a vibrant and burgeoning field. While the concept dates back to the correspondence courses of the nineteenth century, the advent of new technological means to deliver instruction to students removed from the instructor in time and space has increased its appeal and its potential. The capabilities of digital technologies in particular have led to expanded audiences and exciting new pedagogical possibilities. With these developments, the field of distance education has become the focus of great creativity and investment, attracting national attention not only within the educational community but from the general public and in Congress.

In addition to raising numerous issues of educational policy, distance education implicates copyright policy as well. Today's digital distance education programs involve copyrighted works being used in new ways, providing new benefits for students and teachers but also posing new risks for copyright owners. Moreover, the expanded audiences for these programs represent a potentially lucrative market, which the varied participants in the process, including both corporations and educational institutions, are seeking to tap. The parameters established by the copyright law will affect the extent to which copyright owners will share in that market, and the calibration of benefit versus risk.

Many of the uses of copyrighted works in digital distance education will be licensed, with the educational institution and the copyright owner agreeing on appropriate terms. But copyright law also contains provisions delineating certain educational uses for which permission is not required. These provisions were written more than twenty years ago, before

current digital technologies were in widespread use. The question is whether they are still sufficient in today's world to strike the appropriate balance of interests.

This Report, the outcome of a six-month study, examines how copyright law does and should apply to distance education using digital technologies.

B. THE GENESIS OF THIS STUDY

Public discussion of the application of copyright law to digital distance education, with some form of government involvement, began five years ago. The initial efforts entailed attempts to resolve a number of issues without legislation, by establishing agreed-upon safe harbors for educators using copyrighted works in various ways. These efforts were partially successful, resulting in guidelines that have no formal or official status, but are relied on by some members of the educational community.¹

In 1997, the discussion moved to the legislative arena. Bills were introduced in the 105th Congress to amend the Copyright Act's exemption for instructional broadcasting, in connection with other pending legislation intended to update copyright law for the digital age.² After an intensive debate of the proposed amendment revealed the complexity of the subject, the bills were not passed as part of the Digital Millennium Copyright Act of 1998 ("DMCA").³ Instead, Congress charged the Copyright Office with responsibility to study the issues further

¹ See *infra* Part V(A).

² S. 1146, 105th Cong. (1997); H.R. 3048, 105th Cong. (1997). See *infra* Part V(B).

³ Pub. L. No. 105-304, 112 Stat. 2860 (1998) ("DMCA").

and report back with recommendations.⁴ A six-month time frame was set, reflecting Congress's recognition of the importance and timeliness of the subject.

C . THE CONGRESSIONAL MANDATE

Section 403 of the DMCA requires the Register of Copyrights, "after consultation with representatives of copyright owners, nonprofit educational institutions, and nonprofit libraries and archives," to submit to Congress "recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works." Her recommendations are to include any legislation she considers appropriate to achieve this objective.

In formulating these recommendations, the Register is to consider the following factors:

- (1) the need for an exemption from exclusive rights of copyright owners for distance education through digital networks;
- (2) the categories of works to be included under any distance education exemption;
- (3) the extent of appropriate quantitative limitations on the portions of works that may be used under any distance education exemption;
- (4) the parties who should be entitled to the benefits of any distance education exemption;
- (5) the parties who should be designated as eligible recipients of distance education materials under any distance education exemption;
- (6) whether and what types of technological measures can or should be employed to safeguard against unauthorized access to, and use or retention of, copyrighted materials as a condition of eligibility for any distance education

⁴ *Id.* at § 403.

exemption, including, in light of developing technological capabilities, the exemption set out in section 110(2) of Title 17, United States Code;

(7) the extent to which the availability of licenses for copyrighted works in distance education through interactive digital networks should be considered in assessing eligibility for any distance education exemption; and

(8) such other issues relating to distance education through interactive digital networks that the Register considers appropriate.

D. THE COPYRIGHT OFFICE PROCESS

In order to implement its obligations under the DMCA, the Copyright Office established a process designed to identify all stakeholders, gather sufficient factual information on which to base recommendations, and provide a mechanism for full and open consultation. The process was initiated on November 16, 1998, by a Notice of Request for Information published in the Federal Register, seeking to identify parties interested in the subject of the study and the issues with which they were concerned.⁵ More than 170 responses were received.⁶

The Copyright Office published a second Federal Register Notice on December 23, 1998.⁷ This notice requested comments on a lengthy and detailed list of questions, and notified the public of upcoming hearings as well as a planned demonstration of distance education programs using digital technologies. The questions were intended to elicit views and information on four broad topics: (1) the nature of distance education today; (2) the role of

⁵ 63 Fed. Reg. 63,749 (1998) (Appendix A).

⁶ An index of those submissions is included in Appendix A.

⁷ 63 Fed. Reg. 71,167 (1998) (Appendix B).

licensing in distance education; (3) the use of technology to prepare, disseminate and protect the security of digital distance education programs; and (4) the application of copyright law to digital distance education.

The demonstration took place at the Library of Congress on January 25, 1999. Numerous distance education programs were presented, half by universities and half by educational publishers. The programs spanned a range of educational levels, from elementary and high school through undergraduate and continuing education. They also demonstrated a range of delivery methods, including web-based asynchronous courses, videoconferencing, streaming audio and CD-ROM/Internet hybrid products.

The Copyright Office held three public hearings in early 1999. The first hearing was held on January 26-27, in Washington, D.C.; the second on February 10, in Los Angeles, California; and the third on February 12, in Chicago, Illinois. All who requested the opportunity to testify were permitted to do so. Twenty-three organizations, institutions and companies were represented by witnesses at the hearing in Washington, D.C., fourteen in Los Angeles, and thirteen in Chicago.⁸

Comments were due on February 5, 1999. The Office received 59 comments, many of them written versions of testimony at the hearings. Reply comments, responding to statements made either in the comments or in oral testimony, were initially due on February 24, 1999, but the deadline was extended to March 3, 1999.⁹ Over 100 reply comments were submitted.¹⁰

⁸ Hearing schedules and transcripts are being published separately as Volume III of this Report.

⁹ 64 Fed. Reg. 9,178 (1999).

¹⁰ The comments and reply comments are available on the Copyright Office website at <http://lcweb.loc.gov/copyright/disted/> and are being published separately as Volume II of this Report.

Through this process, the Copyright Office heard testimony and received comments from a broad spectrum of interested parties, including colleges, universities, educational associations, professors, academic and research libraries, educational publishers, software and database publishers, motion picture and record producers, music publishers, authors, photographers, collective licensing organizations, and technology companies. Not surprisingly, differing positions were taken by the different stakeholders as to the need for legislative action. These positions are described in detail in Part VI(A), below.

In addition to the public hearings and comments, the Copyright Office held various informal meetings with interested parties and individuals with relevant knowledge and experience. The Office also sought guidance from outside experts on certain specialized issues. A consultant was retained to research practices and trends in licensing for digital distance education, and a panel of experts on digital technology assisted the Office in evaluating information about the status and capabilities of technological measures.

E. CONTENTS OF THE REPORT

This Report summarizes and evaluates the results of the Copyright Office's study. It is organized into six parts. Part I gives an overview of the nature of distance education today. Part II describes current licensing practices in the field of digital distance education, including problems and future trends. Part III describes the status of the technologies available or in development relating to the delivery of distance education materials and the protection of the content used in those materials. Part IV analyzes the application of current copyright law to digital distance education activities. Part V discusses prior attempts to address the copyright

issues through the negotiation of guidelines or the enactment of legislation. Part VI examines the question of whether current law should be changed, first summarizing the views of interested parties as presented during the study, and then providing the Copyright Office's analysis and recommendations.

We conclude that the Copyright Act should be amended in several respects in order to promote distance education through digital technologies. Specifically, we recommend updating section 110(2), the exemption for instructional broadcasting, to allow the same types of performances and displays it currently permits to be delivered by means of digital technologies, and received by students in remote locations, whether or not in a physical classroom. In addition, we suggest that the exemption be broadened to permit certain limited performances of categories of copyrighted works not covered by its current language. At the same time, in order to maintain an appropriate balance between the rights of copyright owners and the needs of the educational community, we recommend that the expansion of the exemption be accompanied by the incorporation of a number of safeguards to control the risks of unauthorized dissemination and ensure the continued effectiveness of the existing restrictions in the statute. In order to permit the section 110(2) exemption to be utilized in connection with asynchronous distance education, we recommend the addition of a new subsection to the ephemeral recordings exemption in section 112. As a critical component of this package of amendments, we recommend clarifying various aspects of the fair use doctrine in legislative history. Finally, we suggest a number of areas for further discussion or review.

I. THE NATURE OF DISTANCE EDUCATION TODAY

Although distance education is far from new, having roots extending to nineteenth-century correspondence courses, digital technologies have fostered a rapid expansion in recent years, as well as a change in profile. Many more distance education courses are being offered than ever before, and the number is growing exponentially. The technologies used in distance education, the populations served, the institutions offering distance education programs, and the partnerships that have emerged among providers differ in nature and scale from earlier models.

This part of the Report gives an overview of the state of distance education in the United States today. It describes the nature of the programs offered, the student bodies, the providers of the programs, and some federal government initiatives designed to promote distance education. It draws upon information obtained in the Copyright Office comment and hearing process, as well as publicly available materials.

A. WHAT IS DISTANCE EDUCATION?

1. Defining the Field.

Through its second Federal Register Notice, the Copyright Office sought comment on what constitutes “distance education” today. The Office began with the basic questions:

How may distance education be defined? In what sense does it differ from traditional face-to-face education? To what extent does it utilize digital technologies? In what sense does it differ from the general use of electronic communications in educational settings?¹¹

¹¹ See 63 Fed. Reg. 71,167 (1998) (Appendix B).

There is general consensus on the most fundamental definition: distance education is a form of education in which students are separated from their instructors by time and/or space.¹² This characteristic is central to all variants of the field.

Different terminology is often used in discussing distance education, most notably the additional terms “distance learning,” “distributed learning” and “distributed education.” Some use these terms interchangeably; others use different terms to refer to different activities.¹³ Despite the lack of standard definitions, the term “distance education” appears to focus most clearly on the delivery of instruction with a teacher active in determining pace and content, as opposed to unstructured learning from resource materials. Because such mediated instruction is the focus of this Report, we use the term “distance education” throughout.

It should be noted that distance education is not necessarily separate and distinct from on-campus education. An individual course may contain both classroom and distance education components. Some online courses require brief periods of on-campus instruction, for example, while many classroom courses use digital technology as a tool for directed research, delivery of resource materials, or communication between teachers and students. Some observers therefore conclude that the concept of “distance education” may become obsolete, as distance and classroom education merge.¹⁴ Others continue to differentiate

¹² See, e.g., Comment 1, Indiana Commission for Higher Education (“ICHE”), at 1; Comment 8, American Association of Community Colleges (“AACC”), at 2; Comment 20, University of Texas System (“U. of TX Syst.”), at 1.

¹³ See, e.g., Comment 10, University of Montana (“U. of Mont.”), at 5, n. 2 (citations omitted); Comment 24, Consortium of College and University Media Centers (“CCUMC”), at 2.

¹⁴ See, e.g., Comment 1, ICHE at 5; Comment 4, Association of American Publishers (“AAP”), at 4.

“between electronic components of face-to-face teaching . . . used as an adjunct to the classroom; and courses in which the learning is delivered entirely electronically.”¹⁵

The distance education courses available today are many and varied. They are geared towards all levels of students, from kindergartners through retirees. They take advantage of a wide range of technologies to enrich and expand the distance education experience. Such programs have also become increasingly integrated into educational institutions as a whole. In connection with their distance education activities, institutions are drawing upon their library resources, promulgating copyright policies, and participating in accreditation processes.

2. Levels of Courses.

Distance education is utilized at every level of the educational spectrum. It takes different forms, however, at different levels. The most extensive use as a substitute for the classroom experience is in higher education.

Elementary and secondary school students are using computers in increasing numbers. According to the Department of Education, 89% of public schools had access to the Internet as of the fall of 1998, as did 51% of individual classrooms.¹⁶ Computer use in elementary and secondary education, however, does not generally involve distance education in the sense described above, in which the course as a whole is delivered remotely. Rather, education in this area tends to focus on software packages designed to be used as an adjunct to classroom instruction. These could include computer programs in basic reading or math that the student

¹⁵ Comment 12, University of North Carolina at Chapel Hill (“UNC-CH”) at 3.

¹⁶ NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP’T OF EDUCATION, INTERNET ACCESS IN PUBLIC SCHOOLS AND CLASSROOMS: 1994-1998 (Issue Brief, Feb. 1999).

can use at home, or in-class projects that involve using computers as research or learning aids.¹⁷

At the higher levels of secondary education, distance education activities are more extensive. Distance education programs are providing high-school students with the opportunity to take classes not otherwise available to them, such as advanced placement or college equivalency courses, through remote means.¹⁸ In addition, there is at least one project underway to create a complete accredited high school diploma sequence available through the Internet.¹⁹

The field of post-secondary distance education is growing most rapidly. Courses are available in community colleges and universities, at the post-graduate level, for professional development and training, and for continuing education. Community colleges, with their history of serving local and continuing education communities, have been particularly active, as have many university systems.²⁰

¹⁷ See Program for Copyright Office Demonstrations of Distance Education Programs Using Digital Technologies, Jan. 25, 1999 (Appendix D).

¹⁸ See, e.g., Andrew Leonard, *Internet U.*, SALON (Sept. 4, 1998) (<http://www.salonmagazine.com/21st/reviews/1998/09/04review.html>); Center for Applied Research in Interactive Technologies at Buffalo State College, *Jump Start: Undergraduate Courses for High School Students* (www.snybuf.edu/~carit/jumps.htm); Transcript of Hearing, Washington, D.C. January 26-27, 1999 (“D.C. Testimony”) at 320-321 (Lynne Schrum, International Society for Technology in Education (“ISTE”).

¹⁹ See, e.g., Communications, Learning and Assessment in a Student-Centered System (“CLASS”) project, at the University of Nebraska (“U. of Neb.”) (http://class.unl.edu/final_web/index.html).

²⁰ See, e.g., Comment 8, AACC; Comment 33, Oregon State University (“Oregon SU”); Comment 28, University of Maryland University College (“UMUC”).

3. Technologies.

Today's distance education courses use digital technology extensively for varied purposes and in varied ways.²¹ The addition of digital technologies to the distance education palette has produced new models of learning, resulting in a richer and more interactive class environment.

(a) *Evolution of distance education technologies.* Radio was a favored medium for distance education in the first part of the twentieth century, with television supplanting it in the 1950s.²² Telecourses produced by educators and distributed by the Public Broadcasting Service ("PBS"), for example, have had a large audience since the 1950s. Such telecourses and video are still widely used, and are expanding their services in both the analog and digital environment.²³ The 1990s have seen the advent of computer networks and multimedia technologies as a powerful new addition to the tools of distance education.²⁴ These

²¹ Technologies used in distance education are discussed in greater detail *infra* Part III.

²² SHEILA CASSIDY, ET AL., LEARNING TECHNOLOGIES DIVISION, U.S. DEPT OF EDUCATION, DEVELOPING A VISION FOR DISTANCE EDUCATION IN THE 21ST CENTURY, 2-3; WESTERN COOPERATIVE FOR EDUCATIONAL TELECOMMUNICATIONS, THE DISTANCE LEARNER'S GUIDE 5 (George C. Connick, ed.) (1999).

²³ Many states have active distance education telecourse programs, often distributed through state educational networks. Examples of these networks include the Education Network in Maine, BadgerNet in Wisconsin and the Utah Education Network. See NATIONAL CENTER FOR EDUCATION STATISTICS, DISTANCE EDUCATION IN HIGHER EDUCATION INSTITUTIONS 1 (Oct. 1997); Comment 29, Utah Education Network ("UEN") at 1. The role of the Public Broadcasting Service ("PBS") in this area has grown in this area as well. See NATIONAL CENTER FOR EDUCATION STATISTICS, *supra* at 2 (in 1996 there were 400,000 students enrolled in PBS courses, as compared to 55,000 in 1981.) Some of these providers also operate programs via computer networks. Comment 29, UEN at 1 (describing UtahLink Internet site); Comment 5, Corporation for Public Broadcasting, Association of America's Public Television Stations, Public Broadcasting Service ("PBS") at 2 (describing PBS ONLINE Internet site).

²⁴ Students and educators have fueled the vigorous growth of distance education in the 1990s by capitalizing on these opportunities. Educational computer use has increased rapidly, in traditional classroom courses as well as in distance education. According to the 1998 Campus Computing Project, which surveyed 571 technology officials at two- and four-year colleges nationwide, 44% of on-campus courses use e-mail in some way, growing from 32.8% last year and only 8% four years ago. The Project further reports that 16% of

technologies have experienced by far the greatest rate of growth in distance education in the last several years. According to a study done by the U.S. Department of Education, in 1995, over 70% of higher education institutions were planning to start or increase offering courses using online or other computer-based technologies in the next three years.²⁵

Currently, distance education programs use combinations of available technologies in varied ways. These may involve one or more of the following: e-mail among teachers and students, class chat rooms, links to resources on the World Wide Web, incorporation of preexisting content in the course of instruction, and the delivery of supplementary materials in electronic form. The use of older technologies, like videoconferencing, is also prevalent, particularly by rural schools. Even in distance education courses delivered entirely through digital media, however, students continue to use textbooks.²⁶

The determination of which technologies are to be used in a distance education course is generally based on the intended audience for the course, and the availability and cost of the technology. Older working students, for example, may require fewer multimedia “bells and whistles” than the average college student, and programs prepared for them may focus more

courses use computers for simulations of exercises and 15% use computers to launch CD-ROMs. As of 1996, more than 7 million college students and faculty were routinely using the Internet and the World Wide Web as part of their daily and weekly activities. Pamela Mendels, *Survey Shows a Sharp Rise in Net-Savvy Academics*, N.Y. TIMES, (Nov. 4, 1998) (<http://www.nytimes.com/library/tech/98/11/cyber/education/04education.html>). See also Claremont Graduate University, “Use of Instructional Technology Jumps on College Campuses” (Jan. 17, 1996).

²⁵ See NATIONAL CENTER FOR EDUCATION STATISTICS, DISTANCE EDUCATION IN HIGHER EDUCATION INSTITUTIONS: INCIDENCE, AUDIENCES, AND PLANS TO EXPAND (Issue Brief, Feb. 1998).

²⁶ See, e.g., Isabella Hinds, *Market Place for Licensing in Digital Distance Education* (April 1998) (“Hinds Report”) at 8-9 (Appendix E); Comment 8, AACC at 4; D.C. Testimony at 311 (Virginia M.G. Hall, VRA).

on unvarnished text. Rural students or students in other countries may have less access to sophisticated equipment with advanced capabilities.

(b) *New characteristics.* One of the most significant ways in which distance education has evolved is its shift from one-way technologies to interactive technologies. Many educators try to incorporate interactive elements into their distance education classes, but in the past they were limited by the technologies available to them. The traditional model for distance education has been the one-way transmission of instruction from teacher to remote students, with interaction between the instructor and the student, or between the students themselves, often limited to phone lines or correspondence. The addition of digital technologies enables more teacher-to-student and student-to-student interaction. E-mail and chat rooms, for example, allow continuous collegial discourse among students separated by distance. As a result of the new technologies, distance education programs are offering a more interactive experience that more closely parallels face-to-face teaching -- in effect creating a virtual classroom.²⁷

The new technologies have also made distance education courses more convenient and better suited to the needs of different students. Historically, distance education programs have been divided into two categories, synchronous and asynchronous. Examples of the former are programs delivered by broadcast and closed circuit technologies, which are set in real time, allowing the student to participate from a distance, but imposing scheduling constraints.

²⁷ CASSIDY ET AL., *supra* note 22, at 12: "During most of this century, distance learning has provided important educational opportunities, which bridged differences in location or time, with interactivity limited to the particular form of communications being used. With the advent of electronic technologies and their use in distance education, the emergence of school reform efforts and the support of the Federal government, new models of distance and distributed education have emerged to allow us to envision more highly interactive, global, distance-distributed models for learning in the 21st century."

Traditional asynchronous programs are exemplified by correspondence and videotape courses. They allow for a time lapse between the delivery of material by an instructor and its reception by a student, but do not involve “live” elements.

With the advent of interoperable digital media, distance education has increasingly incorporated both synchronous and asynchronous tools into the same course, providing students with the benefits of both. Asynchronous technologies, such as e-mail, threaded discussion and self-paced testing, are often used in conjunction with synchronous elements such as chat rooms and streaming audio.²⁸ The same material may be delivered by both synchronous and asynchronous methods. For example, a lecture may be delivered in real time by streaming audio, and then archived and made available to students for later review.

4. Library Resources.

In the course of providing distance education programs, institutions draw on their library resources in several ways. Often, they rely on librarians in negotiating and obtaining licenses, since librarians tend to have experience in this area. Libraries also provide facilities and support staff for making online courses available to students, assist in preparing materials in digital form, and advise on copyright law. Frequently, distance educators provide access to selected library resources in digital form for their classes. These selected resources may be designated as electronic reserves, or “e-reserves,” similar in concept to the use of reserve materials for on-campus classes, which the instructor sets aside for outside reading to

²⁸ These technologies are described *infra* Part III(B).

supplement primary course materials.²⁹ These or other electronic resource materials are sometimes made available to remote-site students pursuant to institutional licenses obtained through the library.³⁰

5. Copyright Policies.

Educational institutions are making significant efforts to adopt and implement appropriate policies on the copyright issues involved in distance education. These efforts include promulgating written policies, conducting training for faculty and staff, and educating students about copyright law.³¹

6. Accreditation.

As distance education programs become increasingly incorporated into mainstream curricula, the issue of accreditation has become a focus of attention. Essential to the continued success of distance education courses is public acceptance of such courses as comparable in quality to classroom instruction. This is an important issue both for students, who must choose among available programs, and for educators who must assess the knowledge imparted

²⁹ See, e.g., Comment 45, University of Illinois at Urbana-Champaign (“U. of Ill.-Urbana”) at 1.

³⁰ See *infra* Part II(A).

³¹ Comment 28, UMUC at 10; DC Testimony at 120-22, *supra* note 26, 131 (Richard Fisher, U. of Delaware (“U. of Del.”) and Donald Swoboda, U. of Neb.); see also Hinds Report at 30-33. One institution testified that it required its students to take a brief online quiz about copyright principles before participating in its distance education courses. D.C. Testimony at 131 (Richard Fisher, U. of Del.).

by those programs.³² Formal accreditation has traditionally provided that assurance of quality.³³

Many distance education programs offered by nonprofit public and private universities are formally accredited by the same bodies that provide accreditation to those institutions for traditional courses and programs.³⁴ For-profit universities have also recently begun to receive accreditation by these bodies.³⁵ Some have raised questions about the standards for accreditation in this context, on the ground that distance education courses have unique characteristics that require specialized evaluation. Regional accrediting bodies, for example, will have to find new ways to evaluate distance education programs with dispersed components such as administrative offices located far from academic headquarters.³⁶ In addition, some distance education programs may involve stand-alone courses offered through collaboration

³² For a comprehensive discussion of this issue, see The Institute for Higher Education Policy, The Council for Higher Education Accreditation, *Assuring Quality in Distance Learning*, (April 1998) (<http://chea.org/Perspective/assuring.html>).

³³ There are two types of accrediting bodies: Regional Accrediting Bodies (of which there are eight) and smaller national, professional and specialized accrediting bodies. The Regional Accrediting Bodies typically accredit institutions, although their accreditation process includes quality review of the distance education courses offered by the institution. All courses, degrees and certificate programs, whether in-class or by distance, are subject to the same standards of review for adequate library and media resources, quality of teachers, access to counseling, proper testing standards, acceptable learning outcomes and other criteria. Most higher education institutions actively seek accreditation by the Regional Accrediting Bodies, as this is often a prerequisite for state and federal grant programs and the ability to offer students financial aid. The smaller accrediting associations often approve individual courses or programs (e.g., the American Bar Association or the American Physical Therapy Association). See *id.*

³⁴ See, e.g., Comment 19, Northern Virginia Community College (“NVCC”) at 2; Comment 20, U. of TX Syst. at 3 (both entities state that their distance education programs are accredited by the traditional accrediting body of the Southern Association of Colleges and Schools); Comment 29, UEN at 3; Comment 33, Oregon SU, at 2.

³⁵ Pamela Mendels, *Online Education Gets a Credibility Boost*, N.Y. TIMES (March 13, 1999) (<http://www.nytimes.com/library/tech/99/03/cyber/articles/13learning.html>) (reporting accreditation of Jones International University, a for-profit subsidiary of Jones International Ltd., a privately held company).

³⁶ Comment 38, American Association of University Professors (“AAUP”) at 6.

among multiple institutions, rather than by a single already-accredited institution. This can pose problems for bodies that have traditionally accredited only institutions as a whole.³⁷

B. WHO IS TAKING THE COURSES?

Distance education helps students overcome such barriers as full-time work commitments, geographic inaccessibility, the difficulty of obtaining child or elder care, and physical disabilities. It can also provide the advantage of convenience and flexibility. With digital technologies enabling courses to reach and appeal to wider audiences, interest in distance education is growing. It has been predicted that by 2002, the number of students taking distance courses will represent 15% of all higher education students, up from 5% in 1998.³⁸

While all segments of the population are reached by the range of courses offered today, the college audience is increasing at a particularly rapid pace. According to recent statistics, the number of college students enrolled in distance learning courses will reach 2.2 million in 2002, up from 710,000 in 1998.³⁹ Distance education owes much of its explosive growth over the last decades to its responsiveness to the needs of an older, non-traditional student population. The average distance education student is thirty-four, employed full-time and has

³⁷ See, e.g. Comment 38, AAUP at 6; D.C. Testimony at 75-76 (statement of John G. Flores, Global Distance Learning Association (“GDLA”)); Comment 58, ISTE at 3.

³⁸ International Data Corp., *Distance Learning Takes Off, Fueled by Growth in Internet Access*, (Press Release, Feb. 2, 1999) (<http://www.idc.com/Data/Consumer/content/CSB020999PR.htm>).

³⁹ *Id.*

previous college experience.⁴⁰ More than half are female.⁴¹ Students in other countries are also increasingly served by U.S. digital distance education programs, allowing them to benefit from educational opportunities without relocating.⁴²

Many students drawn to distance education at higher education levels are professionals whose jobs prevent them from attending classes on a campus. This is a fact that institutions offering distance education courses have recognized. Even traditional private universities like Harvard, Stanford and Duke, known for their on-campus degree programs, are developing distance courses for working adults.⁴³ Such courses are often geared towards professional development or training.

Retirees often take advantage of distance education opportunities as well. Greater disposable income and/or greater leisure may lead older students to take courses for life-enhancing reasons, rather than for academic or professional advancement. Senior citizens may choose to take courses online due to restricted mobility or a desire to study privately.

C. WHO IS PROVIDING DISTANCE EDUCATION?

The expansion of the field of distance education has led to changes among its providers. Although many distance education programs are offered by established public and private colleges and universities, the traditional model of nonprofit K-12 and post-secondary

⁴⁰ Comment 35, American Society of Composers Authors and Publishers (“ASCAP”) at 9, n.12.

⁴¹ Peterson’s, *Who Is Learning at a Distance* (<http://www.petersons.com/dlearn/who.html>).

⁴² See e.g., D.C. Testimony, 14-20 (John Flores, GDLA).

⁴³ Pamela Mendels, *Universities Embrace Distance Learning for Busy Professionals*, N.Y. TIMES (July 29, 1998) (<http://www.nytimes.com/library/tech/98/07/cyber/education/29education.html>).

education is no longer as predominant. Distance education courses are offered today by both nonprofit and for-profit entities, on both a nonprofit and for-profit basis, and through varieties of partnerships involving both educational institutions and corporations.

1. Providers in General.

Providers of distance education courses and components of courses cover a broad spectrum. There are providers at the K-12 level, among community colleges, among public and private universities, in continuing education, and among educational publishers. There are also providers who are solely engaged in the provision of distance education courses, sometimes called “virtual” universities.

With greater technological capabilities available and increasing technological sophistication among educators, the number of institutions offering digital distance education has correspondingly increased. It has been predicted that by 2002, 85% of two-year colleges will be offering distance learning courses, up from 58% in 1998, and 84% of four-year colleges will be offering distance learning courses, up from 62% in 1998.⁴⁴ A number of well-known schools are already offering entire degree programs online, such as Stanford University, the University of Illinois and Western Governors University.⁴⁵

⁴⁴ International Data Corp., *supra* note 38, at 2.

⁴⁵ Pamela Mendels, *Online University Set to Open Its (Virtual) Doors*, N.Y. TIMES, (March 4, 1998) (<http://www.nytimes.com/library/tech/98/03/cyber/education/04education.html>); David Koeppel, *A Sample of Cyberschools*, N.Y. TIMES, April 4, 1999, § A4 at 28; *see also* Comment 28, UMUC at i (“more than 6,200 UMUC students are enrolled in 150 online courses and are able to fulfill all of the requirements for seven degrees online”); Comment 21, North Carolina State (“NCS”) at 4-5 (“offers distance education credit courses and degree programs to more than 3000 people throughout North Carolina, in almost every state in the country, as well as in more than fifteen countries”); Comment 19, NVCC at 1 (three “degree programs are available totally at a distance”).

Consortia have been formed to pool resources and offer classes from multiple institutions. For example, the Colorado Community College Online offers 35 courses from 12 different accredited institutions.⁴⁶ The Southern Regional Electronic Campus carries approximately 1,500 credit courses and 60 degree programs from 175 different colleges.⁴⁷ Western Governors University offers courses from over 30 institutions across the United States.⁴⁸

2. Nonprofit v. For-Profit Education.

In the United States, academic and professional education has become a \$100 billion a year business.⁴⁹ This fact, combined with the increasing public appetite for distance education courses, is having an effect on the roles played by providers. Once a primarily nonprofit activity, distance education is now perceived as a potentially lucrative market. Nonprofit institutions continue to offer nonprofit courses, but new for-profit educational institutions have entered the field, while some nonprofit institutions have begun to engage in distance education activities for profit.

The predominant model remains nonprofit. Schools at all levels continue to produce distance education offerings on a nonprofit basis. The tuition paid for a distance education

⁴⁶ Colorado Community College Online (<http://www.ccconline.org/>).

⁴⁷ Southern Regional Electronic Campus (<http://www.srec.sreb.org/>) (85% of these courses are web-based, about 10% are live satellite-delivered, and the remainder are CD-ROM and videotape). California Virtual University, another well-known consortium that testified in the Copyright Office's hearing process, ceased operations between the initiation of this study and the date of its release. "California Virtual University Will End Most of Its Operations," Chronicle for Higher Education, April 2, 1999.

⁴⁸ Western Governors University (http://www.wgu.edu/wgu/smartcatalog/browse_edu.asp).

⁴⁹ Richard Vigilante, *Semesters in Cyberspace*, New York University Virtual College at 1 (Sept. 1996).

course at these institutions is typically no different than that charged for an on-campus course, although additional fees may be charged to cover technology costs.⁵⁰

For-profit entities play an increasing role in distance education. There are a number of educational institutions, with the University of Phoenix (“UOP”) the most well-known example.⁵¹ As the largest for-profit based university in the country, the UOP online campus enrolls about 9,000 students.⁵² Corporate entities, such as commercial publishers, are also entering this market directly as providers of full-service distance education curricula.⁵³

A hybrid category is comprised of nonprofit educational institutions that are launching for-profit distance education projects. New York University, for example, is planning to create a wholly-owned, for-profit subsidiary to offer online courses apart from those offered by the university itself. The courses will be marketed to corporations, colleges and universities, and individual students. The subsidiary will enable the university to earn money through a stock offering or the sale of partnership interests.⁵⁴

⁵⁰ See Comment 47, U. of Missouri-Columbia (“U. of M-C”), at 3-4; Comment 20, U. of TX Syst. at 2; D.C. Testimony at 80 (Kathleen Burke, UMUC).

⁵¹ Comment 20, U. of TX Syst. at 2; see also Pamela Mendels, *Online Education Gets a Credibility Boost*, *supra* note 35.

⁵² Peter Applebome, *Education.com.*, N.Y.TIMES, April 4, 1999, A4 at 26.

⁵³ See, e.g., D.C. Testimony at 190 (Robert Antonucci, AAP); Transcript of Hearing, Chicago, IL February 12, 1999 (“Chicago Testimony”) at 211 (William Bowe, Software and Information Industry Association (“SIIA”)).

⁵⁴ Karen W. Arenson, *N.Y.U. Sees Profits in Virtual Classes*, N.Y.TIMES (Oct. 7, 1998) (<http://www.nytimes.com/library/tech/98/10/biztech/articles/07nyu.html>); Karen W. Arenson, *More Colleges Plunging Into Uncharted Waters of Online Courses*, N.Y.TIMES (Nov. 2, 1998) (<http://www.nytimes.com/library/tech/98/11/biztech/articles/02online-education.html>). There is at least one other non-profit institution operating some of its distance education activities for profit, and other universities are currently considering the option of doing so. *Id.*

3. Partnerships.

Two distinct varieties of partnership have emerged as the result of the growth of distance education, one between nonprofit and commercial entities, and the other among educational institutions.

In recognition of the value of the educational market, and the need for courses tailored to accommodate busy schedules and business training needs, corporations have partnered with universities to design, produce and transmit distance education courses. One major benefit of these arrangements is that educational institutions have the costs of expensive distance education technologies defrayed by their corporate partners, while the corporate partners “acquire an invaluable ‘laboratory’ for application of their technology in educational environments, and often gain access to the latest research of leading academics as reflected in their curriculum.”⁵⁵ AT&T, for example, has designed a Learning Network Virtual Academy in partnership with a number of colleges and universities, including Pennsylvania State University and the George Washington University, which offers a range of professional development options for educators.⁵⁶

Educational publishers are also increasingly collaborating with educators to create courses to be marketed commercially. For example, Houghton-Mifflin, a major educational

⁵⁵ Alan G. Chute and Kate M. Gulliver, *Distance Education and Partnerships: Tools for the Future* (1996) (<http://www.lucent.com/cedl/distedpart.html>).

⁵⁶ U.S. DEP'T OF EDUCATION, *STAR SCHOOLS MAKES A DIFFERENCE, 1998-1999* (pamphlet).

publisher, has developed a general chemistry course in cooperation with the State University of New York at Binghamton.⁵⁷

Educational institutions, recognizing the potential of sharing resources and expertise in this expanding field, are collaborating with each other to create programs that span state lines and university systems. Colleges and universities have a long history of association, and distance education has provided new incentives to develop partnerships with peer institutions. These partnerships, such as the consortia discussed above, can provide a mechanism for different institutions to offer classes through a unified distribution system, or for institutions new to the field of distance education to access an infrastructure through which to offer online courses. They can also allow institutions to benefit from access to each other's faculty, with two or more institutions sharing faculty and technological support to create a class offered by both institutions.⁵⁸

D. FEDERAL LEGISLATION

The federal government has been active in recognizing and promoting the benefits of distance education.⁵⁹ This section describes a few key pieces of federal legislation.

⁵⁷ HMChem, exhibited at the Copyright Office demonstration of distance education programs and technologies. *See supra* Introduction; Appendix D. These partnerships can capitalize on the different skills of educators and business corporations. Often, the educational institution will create the course itself, and partner with the private enterprise, such as a telecommunications company (see discussion of Star Schools Program *infra* Part I(D)(2)) to provide communication services or technology.

⁵⁸ D.C. Testimony at 109 (Donald Swoboda, U. of Neb.).

⁵⁹ Many of the institutions that participated in the Copyright Office study also indicated that they were receiving some amount of state funding for their distance education programs. *See, e.g.*, Comment 29, U. of TX Syst. at 3; Comment 33, Oregon SU at 2; Comment 12, UNC-CH at 3.

1. The Higher Education Amendments Act of 1998.

The Higher Education Amendments Act of 1998 (“HEA”)⁶⁰ is the most far-reaching and recent federal legislation addressing distance education. Through this legislation, the government provides financial aid for distance education students, authorizes funding for the development of distance education programs, and establishes a high-level “Web-Based Education Commission” to assess the educational software available for students.

(a) *Student financial aid.* The HEA enables selected distance education programs to offer their students funding under federal student grant and loan programs. Distance education students have long been ineligible for many such government benefits. The “50 percent rule”⁶¹ has traditionally excluded institutions offering more than 50% of their courses remotely, or with more than 50% of their student body enrolled in remote courses, from offering financial aid to their students. The Distance Education Demonstration Program will fund up to fifty institutions over a five-year period, allowing a waiver of this rule.

(b) *Learning Anytime Anywhere Partnerships.* The HEA also establishes the Learning Anytime Anywhere Partnerships Program (“LAAP”), intended to promote “post-secondary . . . and career-oriented lifelong learning” through distance education.⁶² LAAP is a five-year grant program that will fund partnerships among “higher education, community

⁶⁰ Pub. L. No. 105-244, 112 Stat. 1581 (Oct. 7, 1998) (“HEA”).

⁶¹ U.S. Dep’t of Education, *Implementing the Higher Education Amendments of 1998: Update on Key Issues Briefing Document* (Jan. 1999) (<http://www.ed.gov/offices/AC/ACSFA/jan99brief/distED.html>); see also Pamela Mendels, *Distance Learning to Receive Some Federal Aid*, N.Y. TIMES (Oct. 21, 1998) (<http://www.nytimes.com/library/tech/98/10/cyber/education/21education.html>).

⁶² HEA at § 420E(a).

organizations, and other public and private organizations, agencies and organizations.”⁶³ The funds will be used to develop model distance education programs and supporting activities.⁶⁴

(c) *Web-Based Education Commission.* The amendments also provide for the establishment of a Web-Based Education Commission, with fourteen members appointed by the President, the Secretary of Education, and the Congressional leadership. The three members appointed by the President are to represent the Internet technology industry, and the three members appointed by the Secretary are to have “expertise in accreditation, establishing statewide curricula, and establishing information technology networks pertaining to education curricula.”⁶⁵ The mandate of the Commission is to “conduct a thorough study to assess the educational software available in retail markets for secondary and post-secondary students who choose to use such software.”⁶⁶

2. Star Schools Program Assistance Act of 1988.⁶⁷

Although the HEA focuses on post-secondary distance education efforts, federal funding is channeled to the K-12 grades as well. The Star Schools Program, funded through the Office of Educational Research and Improvement at the Department of Education, was begun in 1988 as part of the federal government’s work to support school reform efforts. The Star Schools Program was originally intended to increase foreign language, mathematics and

⁶³ *Id.*, see also, Learning Anytime Anywhere Partnerships, Information and Application Materials, Fiscal Year 1999 (<http://www.ed.gov/offices/OPE/FIPSE/LAAP/materials/>).

⁶⁴ *Id.*

⁶⁵ HEA at § 852 (b)(1)(B).

⁶⁶ *Id.* at § 853 (a)(1).

⁶⁷ 20 U.S.C. § § 6891-6900 (Title III, Part B).

science course offerings for K-12 students, but over time has expanded its scope. It may be viewed as a forerunner of the LAAP program, and provides similar funding opportunities to technology projects in the K-12 range.

The Star Schools Program provides grants to eligible telecommunications partnerships “to encourage improved instruction in mathematics, science, foreign language, literacy skills, vocational education, and other subjects, and to serve underserved populations through the development, construction, and acquisition of telecommunications facilities, equipment, and instructional programming.”⁶⁸ Star Schools grants are used “to obtain telecommunications facilities and equipment; develop and acquire instructional programming for students, staff development for teachers and administrators, and educational programming for parents and community members; and to obtain technical assistance for teachers, school personnel, and other educators in the use of the facilities and programming.”⁶⁹ Since its inception, the Program has been very successful, awarding more than \$125 million to telecommunications partnerships, providing services to more than 6,000 schools, and reaching approximately 1,600,000 learners.⁷⁰

⁶⁸ U.S. Dep’t. of Education, *Star Schools Program, Basic Information* (<http://web99.ed.gov/GTEP/Program2.nsf/>).

⁶⁹ *Id.*

⁷⁰ U.S. Dep’t. of Education, *Star Schools--What Is the Star Schools Program*, (http://www.ed.gov/prog_info/StarSchools).

II. LICENSING OF COPYRIGHTED WORKS

Section 403 of the DMCA instructs the Copyright Office to consider in this study, among other things, “the need for an exemption from exclusive rights of copyright owners for distance education through digital networks” and “the extent to which the availability of licenses for the use of copyrighted works in distance education through interactive digital networks should be considered in assessing eligibility for any distance education exemption.”⁷¹ In order to evaluate these issues, the Copyright Office sought information about the nature, scope and effectiveness of licensing practices today. Our questions focused on:

- the extent to which educators obtain licenses to use preexisting content in digital distance education programs, and the extent to which they rely on copyright exemptions as an alternative to licensing;
- how such licenses are typically obtained;
- what kinds of problems are encountered in the licensing process; and
- trends and possible future developments.

In addition to obtaining information through hearings, comments and meetings, the Copyright Office commissioned an independent consultant to examine licensing practices and issues. Her findings are attached as Appendix E.

This part of the Report summarizes the information gathered through these various sources. It describes the current operation of licensing mechanisms for uses of works in digital distance education, and the directions in which these mechanisms may evolve in the future.⁷²

⁷¹ See DMCA § 403.

⁷² Legal rules governing licenses are discussed *infra* Part IV(A).

A. ELEMENTS OF LICENSING

Licensing may play a role in digital distance education when preexisting copyrighted works are incorporated into curricula. In order to understand current practices, it is useful to begin with the basic elements of how works are used, who the participants in the licensing process are, and what types of licenses are used by distance educators.

1. Use of Preexisting Copyrighted Works.

Preexisting copyrighted works are used in digital distance education in a number of ways. The most obvious and common is the provision of physical copies of textual material. The purchase and use of print textbooks by students continues to be standard practice in digital distance education, just as in face-to-face and analog broadcast classes. In addition to the core text, instructors often provide students with supplemental materials relating to the course. Sometimes these materials are distributed to the students directly, in hard copies or electronically, as “coursepacks.” Or they may be set aside for the student’s use in an electronic reserve or “e-reserve” system, generally accessed through the institution’s library.⁷³

Copyrighted works may also be incorporated into the lesson plan itself, as an integral part of the instruction.⁷⁴ This use of preexisting content is different from its use in supplemental materials, where the instructor intends the student to experience the material independently. Incorporating a copyrighted work into a distance education lesson can be the functional equivalent of the performance or display of the work in the classroom, such as projecting slides of paintings during a class session on a particular artist.

⁷³ See generally Hinds Report, *supra* note 26, at 8-12.

⁷⁴ *Id.* at 12-13.

2. Participants in the Licensing Process.

The parties that interact in the licensing process can be grouped into three categories: educational institutions, copyright owners and collective licensing organizations.⁷⁵ The term “educational institutions” includes administrative staff, librarians and faculty who make decisions about using and licensing copyrighted material. “Copyright owners” are individuals or entities who own the rights in a copyrighted work. For the purpose of this discussion, the term “copyright owners” also includes publishers who manage permissions for works that they publish, but in which the copyrights are owned by others.

While educational institutions have traditionally been viewed as users/licensees, and copyright owners as licensors, there has always been some overlap. Educators also create works, and copyright owners also use preexisting content. This blurring is especially apparent in the field of digital distance education. Many of the educational institutions that invest resources in creating online courses are licensing those courses to other institutions, or foresee doing so in the future.⁷⁶ Likewise, with the growing emphasis on multimedia works in distance education, copyright owners such as educational publishers are incorporating more, and more varied, preexisting works, increasing their need to license content from disparate sources.⁷⁷

⁷⁵ Intermediaries, such as the commercial establishments known as “copy shops,” may also be relied upon by these parties in engaging in licensing transactions.

⁷⁶ See, e.g., Reply Comment 2, AAP at 2-4.

⁷⁷ Chicago Testimony at 43-44 (Kenneth Crews, American Association of Universities (“AAU”), American Council on Education (“ACE”) and National Association of State Universities and Land-Grant Colleges (“NASULGC”)); D.C. Testimony at 234-35 (Robert Antonucci, AAP); cf., D.C. Testimony at 223-24 (Vic Perlman, American Society of Media Photographers, Inc. (“ASMP”)).

Collective licensing organizations administer copyrights and facilitate licensing transactions between users and owners. These organizations do not own the content that they license, but are authorized by the owners to license certain uses of a large catalog of works. In the United States, each licensing organization manages primarily one type of use of one type of work (such as text or music), sometimes in competition with other organizations. Such organizations facilitate licensing in a number of ways. They provide a central point of reference for prospective users to contact, in order to license a particular type of use of a particular type of work. Due to their infrastructure and experience in licensing, they can process requests relatively quickly and easily. In some cases, they offer “blanket licenses” to users, which typically involve a flat fee for all covered uses of any of the works in their catalog during a set period of time.

There are several established collective licensing organizations in the United States today. The licensing of musical works is largely handled by such organizations: ASCAP, BMI and SESAC, which administer licenses for the performance of nondramatic musical works, and The Harry Fox Agency, which primarily administers licenses for the reproduction and distribution of musical works in phonorecords, as well as synchronization rights. Copyright Clearance Center (“CCC”) is well-recognized in the corporate and academic world as a central source for licensing reproductions of text⁷⁸ (especially photocopying).⁷⁹

⁷⁸ The term “text” is used here to refer to all types of printed material, including graphs, pictures and diagrams, as well as traditional literary works. See 17 U.S.C. § 101 (definition of “literary works”).

⁷⁹ There are also collecting societies organized to license certain types of work online, such as the Media Image Resource Alliance (“MIRA”), which licenses photographs. See *infra* Part II(E)(1) .

3. Types of Licenses.

There are three primary types of licenses in use today in conjunction with digital distance education courses: transactional licenses for analog uses, transactional licenses for digital uses, and site licenses.⁸⁰ The fee structures for these licenses typically differ depending on the type of license, the use and the user. Educators are often charged lower fees than commercial users, or may not be charged at all.⁸¹

Transactional licenses for analog uses are used in distance education to authorize coursepacks or other supplementary materials that are reproduced in paper copies and sent to distance education students. If a license fee is required, it is typically paid for each student.⁸² Transactional licenses for digital uses generally authorize a specific use of a work in digital form. In addition to covering coursepacks, such licenses may permit an educator to digitize analog materials, or to reproduce, distribute, perform or display a work in digital form. In most cases, the fee, if any, is calibrated to that use.⁸³

In contrast to fee-per-use transactional licenses, site licenses authorize all uses of a certain type of a number of copyrighted works, by a particular user or group, for a set length of time.⁸⁴ Site licenses are often relied on in the academic world to authorize university-wide

⁸⁰ See Hinds Report, *supra* note 26, at 6-7; Comment 32, Emporia State University ("ESU"), at 2; Comment 25, George Washington University ("GWU"), at 2.

⁸¹ See Chicago Testimony at 225-227 (Susan Schaffrath, Houghton-Mifflin Co. ("Houghton-Mifflin") and William Bowe, SIA).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ When the works included in a "site license" belong to a number of copyright owners and the use is priced on an established annual fee, the license is often referred to as a "blanket license." As discussed above, a blanket license is usually offered by collective organizations, which manage works for many different

use of software, or of databases of scholarly material, such as a collection of journals or periodicals.⁸⁵ The license is negotiated to cover the extent of projected multiple uses, based on the size and nature of the community that will be served. Typically the authorized group is limited to a physical site, such as a university campus, although site licenses can also authorize access and use by a defined group of users, regardless of their physical location.

B. EXTENT OF LICENSING TODAY

There are two separate but related issues regarding the extent of licensing in the digital distance education field. The first is how much content of what type is being licensed. The second is what practices or doctrines institutions rely upon as an alternative to licensing.

1. Amount and Types of Material Licensed.

Substantial licensing activities are taking place today in connection with the provision of content to distance education students, particularly in higher education.⁸⁶ So far, however, relatively few licenses are requested or granted for digital uses.

The bulk of the licensing for digital distance education at present relates to supplementary materials in analog form, such as coursepacks, which are photocopied and provided to the student. Many educational institutions engage in this kind of licensing for

owners.

⁸⁵ See Hinds Report, *supra* note 26, at 7; Comment 32, ESU at 2; Comment 25, GWU at 3.

⁸⁶ K-12 levels tend to incorporate less preexisting content into their distance education activities, since they engage in less remote delivery of mediated instruction, and use primarily pre-packaged software for self-paced learning activities. See *supra* Part I(A)(2).

their distance education programs.⁸⁷ Licensing for digital uses of material remains relatively limited, but is growing rapidly. Here too, the use of supplemental materials, whether electronic coursepacks or other resources, appears to represent a majority of such licenses today. Frequently, the use of these materials in digital form is authorized through site licenses, often library-based, applicable to the entire university.⁸⁸ Educators may limit their selection of supplemental materials to electronic resources already licensed by the university, avoiding the need to obtain a separate license.

The least common form of licensing seems to be for digital uses of copyrighted works incorporated into the class itself, comparable to the uses an instructor might make of a work in the course of classroom instruction.⁸⁹ Such instructional uses typically involve excerpts of works, and works of all kinds.

The extent and form of licensing is also related to the type of content being used. The overwhelming majority of works that are licensed in the context of digital distance education are textual materials.⁹⁰ Presumably this is because coursepacks and e-reserves, the materials most used digitally in distance education, are primarily text. Also, in a historical context, text was the first type of content to become available in digital form. Even for text, the overall proportion of licensing for digital uses, compared to paper copies, is so far very small.

⁸⁷ Hinds Report, *supra* note 26, at 9-10; *see also* Comment 1, ICHE at 2; Comment 25, GWU at 2.

⁸⁸ *See, e.g.*, Comment 20, U. of TX Syst. at 4; Comment 25, GWU at 2.

⁸⁹ *See* Hinds Report, *supra* note 26, at 37.

⁹⁰ *Id.* at 15.

Requests from educational institutions to use textual materials in digital form comprise only a small fraction of all academic licensing requests.⁹¹

The other types of content that may be used in a distance education course are pictorial and graphic works such as photographs and slides, motion pictures and other audiovisual works, musical works, sound recordings and software. On the whole, these works are licensed for instructional use much less frequently than text.

Digital uses for images are not yet the subject of much licensing, although several projects are underway to license high-quality digital archives of significant museum collections for educational use.⁹² Producers of audiovisual works, including both educational videos and commercial motion pictures, also report a low incidence of licensing requests for digital uses.⁹³ One reason may be the low volume of audiovisual materials available in digital form.

Nor does there appear to be much licensing for the use of musical works or sound recordings in digital distance education. Licensing for digital performances of music by academic institutions is virtually nonexistent.⁹⁴ ASCAP and BMI, the two largest licensing collectives in this area, have traditionally offered low-cost blanket licenses to educational institutions for analog performances.⁹⁵ Licenses permitting digital performances in education

⁹¹ *Id.* at 44-45.

⁹² *See id.* at 60-61.

⁹³ *Id.* at 51.

⁹⁴ *Id.* at 59-60.

⁹⁵ *Id.* at 59.

are under discussion, but not currently offered.⁹⁶ ASCAP and BMI do license websites, but such licenses do not seem to have been utilized in the academic environment.⁹⁷ Music publishers report not a single request for a license to reproduce or distribute musical works in digital distance education.⁹⁸

As to sound recordings, licensing for performance first became a possibility in 1996, after enactment of the Digital Performance Rights in Sound Recordings Act.⁹⁹ Recording companies report having received few licensing requests from educational institutions to reproduce or perform sound recordings in any form, and even fewer for digital uses.¹⁰⁰

Computer software is also licensed rarely, if at all, for use as the subject of study in a distance education class. In contrast, educational licenses for the use of software for its ordinary functional purpose are common, typically through site licenses. Institutions also often obtain licenses for software packages to use in creating or delivering distance education courses.¹⁰¹

2. Alternatives to Licensing.

There are a number of circumstances in which an educational institution may choose not to seek a license for digital uses of material. The institution may avoid incorporating

⁹⁶ *Id.* at 60.

⁹⁷ *Id.*

⁹⁸ Comment 34, National Music Publishers Association (“NMPA”), at 7.

⁹⁹ Pub. L. No. 104-39 (1995); *see infra* Part IV(B)(3)(b) .

¹⁰⁰ *See Hinds Report, supra* note 26, at 57.

¹⁰¹ *See id.* at 57; *infra* Part III(B) and Part II(B).

preexisting copyrighted content into the distance education course. Or it may rely on exemptions in the copyright law, tailoring its uses to avoid interfering with the copyright owner's rights.

Many courses contain few or no preexisting copyrighted works. In the years since online courses have become prevalent, faculty members have tended to create their own content without incorporating much third-party material.¹⁰² This may be in part because the technology used to create such courses has not in the past facilitated the inclusion of preexisting content. This situation is changing, as faculty become more technologically sophisticated, and more commercial software packages become available.¹⁰³ Notwithstanding new technological capabilities, many teachers may still prefer to create their own content for pedagogical purposes. Those who do include preexisting content often choose material from the public domain, in order to avoid copyright issues.¹⁰⁴

Where educational institutions affirmatively choose not to seek a license for the use of copyrighted material, they often base that decision on a judgment that the use is permitted by one of the exemptions in the Copyright Act.¹⁰⁵ Fair use is the most commonly invoked exemption, with many institutions reporting that they rely on principles of fair use in deciding not to seek a license.¹⁰⁶ They evince uncertainty, however, about how far the doctrine extends

¹⁰² See Hinds Report, *supra* note 26, at 12-13; Comment 8, AACC at 3-4.

¹⁰³ Hinds Report, *supra* note 26, at 10-12, 19. For a more complete discussion of such software packages, see *infra* Part III(B).

¹⁰⁴ See comment 33, Oregon SU at 2; Comment 25, GWU at 2.

¹⁰⁵ See discussion of current copyright law as applied to digital distance education *infra* Part IV.

¹⁰⁶ See, e.g., Comment 33, Oregon SU at 2; Comment 29, UEN at 3.

into the digital environment, and it is interpreted in different ways by different institutions.¹⁰⁷

The other basis for deciding not to seek a license is reliance on one of the specific exemptions in the Act, primarily the instructional exemptions in sections 110(1) and (2). Little evidence was presented as to how institutions interpret and apply the detailed conditions of these exemptions.

C. LICENSING PROCEDURES

It is difficult to generalize about licensing procedures because of the wide diversity in how licensing is handled among educational institutions and copyright owners. Within both communities, responsibilities for licensing are often decentralized, and there may be little training for those who hold such responsibilities. In general, the more resources devoted to licensing transactions, and the more centralized the responsibility, the more efficient and successful the process becomes.

1. Educational Institutions.

Different educational institutions delegate responsibility for seeking copyright licenses to different persons or offices. Several institutions have designated a staff member to be exclusively responsible for licensing for the entire institution. More frequently, however, individual teachers are responsible for obtaining licenses for their own courses. Librarians are often asked to manage copyright permissions, with that function seen as a natural extension of

¹⁰⁷ Compare Comment 25, GWU at 2; with Comment 20, U. of TX Syst. at 5. Some institutions consider as a pivotal factor their good faith attempt to obtain a license, resolving doubts in favor of fair use if a response is not received from the copyright owner. Hinds Report, *supra* note 26, at 29-30.

the library's involvement in licensing works for its collections or for reserve materials.¹⁰⁸

Other departments that may handle licensing are the legal counsel's office, department heads, or campus bookstore managers.¹⁰⁹ Sometimes licensing responsibility is divided according to the type of work or the type of use. Licensing for audiovisual materials may be the responsibility of the multimedia center, while the library handles licensing for e-reserves and the bookstore handles licensing for coursepacks.¹¹⁰

Educators seek licenses for works from both copyright owners and licensing organizations. They express familiarity and a degree of comfort with the procedures of the major licensing organizations,¹¹¹ and will generally approach one of them when they know a work is in its catalog. An educational institution may also contact the copyright owner directly, especially when the owner is well-known and easy to locate, such as a motion picture company or an educational publisher.¹¹²

2. Copyright Owners.

Copyright owners face similar challenges in the management of licensing procedures. The task of evaluating and responding to licensing requests is not always centralized or efficient.¹¹³ This is particularly true for requests for digital uses, as staff who manage license

¹⁰⁸ See Comment 12, UNC-CH at 6; Comment 25, GWU at 2.

¹⁰⁹ See Hinds Report, *supra* note 26, at 19-23.

¹¹⁰ See *id.* at 20-21.

¹¹¹ See Comment 8, AACCC at 5; Comment 10, U. of Mont. at 19; Comment 12, UNC-CH at 6; Comment 28, UMUC at ii.

¹¹² See Comment 10, U. of Mont. at 19; Comment 12, UNC-CH at 6; Comment 49, SIIA at 3.

¹¹³ See Hinds Report, *supra* note 26, at 40-41.

requests may not be familiar with the technology, or may lack established policies to use in generating a response.

The efficiency of license management for educational uses can differ substantially according to the size and sophistication of the copyright owner, its degree of interest in the educational market, and the types of works that it owns. Larger copyright owners, or those who have substantial experience with licensing, tend to have more established and consistent licensing practices. Copyright owners with an economic interest in the academic market are also more likely to invest resources in licensing infrastructures tailored for that market. For example, major educational publishers generally have established permissions departments and are able to respond to requests relatively quickly and predictably.¹¹⁴ In contrast, individual authors or smaller organizations may lack standard licensing mechanisms, and may process requests more slowly or erratically.¹¹⁵

D. PROBLEMS IN LICENSING

In the course of this study, educational institutions expressed dissatisfaction with the functioning of the licensing process in the digital environment. While some institutions engage in licensing for their distance education programs on an ongoing basis, many describe having experienced recurrent problems.¹¹⁶ These problems can be broken down into three categories:

¹¹⁴ See *id.* at 48.

¹¹⁵ See *id.* at 49.

¹¹⁶ Educational publishers have experienced some of the same problems in seeking to license content for inclusion in their materials, and have generally responded by finding alternative content. See, e.g., Chicago Testimony at 217-18 (Roger Rogalin, the McGraw-Hill Companies) (“McGraw-Hill”); Chicago Testimony at 220 (Susan Schaffrath, Houghton-Mifflin).

difficulty locating the copyright owner; inability to obtain a timely response; and unreasonable prices or other terms.

In some circumstances, it can be time-consuming, difficult or even impossible to locate the copyright owner. Locating owners of older, out-of-print or unpublished works, or works not marked with copyright management information, can be particularly problematic.¹¹⁷ In the digital environment, in which individual authors can easily disseminate their works without utilizing an established publisher as an intermediary, this problem may be even greater.¹¹⁸ Educational institutions note that an online course may incorporate many different works, making it burdensome for faculty or librarians to spend days trying to track down the owner of a single work.¹¹⁹ Even after a copyright owner is located, that owner may not have the rights to license all uses or all components of the work.¹²⁰

Educators also report lengthy delays in obtaining responses from copyright owners. Some copyright owners may take months to respond to requests, or not respond at all.¹²¹ Such delays can jeopardize the ability to prepare material for a course dealing with time-sensitive subject matter, or for an upcoming semester. Although not enough information was obtained

¹¹⁷ See, e.g., Comment 44, AAU, ACE, NASULGC (together “ACE”), at 4.

¹¹⁸ See, e.g., Hinds Report, *supra* note 26, at 17-18; see also Comment 28, UMUC at 4.

¹¹⁹ See, e.g., Comment 28, UMUC at 4; D.C. Testimony at 88 (Kim Kelley, UMUC).

¹²⁰ See D.C. Testimony at 89 (Kim Kelley, UMUC); Chicago Testimony at 216-17 (Susan Schaffrath, Houghton-Mifflin). Where the contract between the author and publisher of the work predated the development of today’s technologies, it is often uncertain whether the publisher has authority to grant permission for digital uses. In other situations, the chain of title to a work may be unclear. See Hinds Report, *supra* note 26, at 42.

¹²¹ See, e.g., Comment 28, UMUC at 4; Reply Comment 12, AACC at 2.

to evaluate the relative frequency of unacceptable delays or the circumstances in which they occur, this is a widespread complaint.

Another common concern among educators is the cost of a license. Charges for digital uses of material are often significantly higher than comparable licenses for analog uses -- sometimes too high to be affordable for nonprofit education.¹²² Other problems relate to the terms under which licenses are granted. In the digital context in particular, tight restrictions may be imposed on uses that would otherwise be permissible under copyright law.¹²³ Librarians describe difficulties with university site licenses that limit authorized users to on-campus students, either preventing remote students from accessing the material, or necessitating the payment of high fees to add them to the license.¹²⁴

The degree of difficulty in licensing seems to vary depending on the type of copyrighted work involved. The problems are consistently reported to be most serious with respect to journal articles and audiovisual works.¹²⁵

The problems described above are not unique to digital uses, but appear to be exacerbated in the digital context. To some extent this may be explained by the perception of copyright owners that the risks of unauthorized dissemination are much greater. Copyright

¹²² See, e.g., Comment 28, UMUC at 4, Chicago Testimony at 184 (Fritz Dolak, Indiana Partnership for Statewide Education (“IPSE”)); Comment 1, IPHE at 7.

¹²³ See, e.g., Comment 28, UMUC at i; Chicago Testimony at 23-26 (Trisha Davis, Committee on Institutional Cooperation (“CIC”)).

¹²⁴ See Comment 48, Association of Research Libraries, American Library Association, American Association of Law Libraries, Special Libraries Association, Medical Library Association (together “ARL”) at 5-6; Chicago Testimony at 23-26 (Trisha Davis, CIC).

¹²⁵ See Comment 20; U. of TX Syst. at 4; Comment 28, UMUC at 4; Chicago Testimony at 47 (Kenneth Crews, AAU, ACE and NASULG); Chicago Testimony at 184 (Fritz Dolak, IPSE).

owners may seek to charge fees proportionate to the increased risks of digital transmission, may impose more restrictive conditions to protect against those risks, or may even refuse to grant a license if the risks are deemed greater than the benefits.¹²⁶ For those copyright owners that depend largely on other sources of revenue, licensing for digital distance education may be economically disadvantageous if the transaction costs and risks outweigh the potential profit.¹²⁷ Another factor seems to be the elements of novelty and unfamiliarity. Some copyright owners are simply unsure what fees or conditions are appropriate for these new types of uses.¹²⁸

E. TRENDS AND FUTURE DEVELOPMENTS

A number of technological and organizational trends may facilitate the development of more effective digital licensing mechanisms in the near future. These developments in turn are likely to influence the evolution of copyright owners' approaches toward licensing for digital distance education.

1. Technological Protections and Online Licensing Systems.

As discussed in Part II and III of this Report and Part V of the Hinds Report, technological advances in several areas should play a large role in facilitating licensing for digital uses. Technological protection measures, as they continue to develop and enter into widespread use, are likely to make copyright owners more comfortable with licensing digital uses. In addition, technology to embed or link copyright management information in a digital

¹²⁶ See D.C. Testimony at 220, 222, 230 (Vic Perlman, ASMP); D.C. Testimony at 269-270 (Bruce Funkhouser, Copyright Clearance Center, Inc. ("CCC")); Chicago Testimony at 194 (Roger Rogalin, McGraw-Hill).

¹²⁷ See Hinds Report, *supra* note 26, at 38; Chicago Testimony at 223 (Susan Schaffrath, Houghton-Mifflin Co.).

¹²⁸ See, e.g., Comment 35, ASCAP at 25; Reply 13, NMPA at 3.

work, such as the name and location of the copyright owner, as well as licensing terms and conditions, is becoming more prevalent. This will aid licensing by allowing prospective users to locate sources more easily. The information may also function to link the work to an online site authorized to license it.¹²⁹

There are numerous projects underway or in development to facilitate and standardize online licensing, and to increase the availability of works in digital form.¹³⁰ Online permissions systems, licensing databases, and digital archives are proliferating.¹³¹ Some educational publishers have established online licensing mechanisms from which educators can seek licenses quickly and easily for all of their products.¹³² Other companies are building inventories of works which they will be authorized to license online, and/or creating digital archives to make certain types of works available in digital form.¹³³ Such sites can provide central access and a quick, standard licensing process for digital uses.

2. Collective Management.

New collective initiatives should also ease the licensing process. New entities are being created for the purpose of building and operating the online licensing sites discussed above. In addition, existing collective licensing organizations plan to expand, or have already started to

¹²⁹ See *infra* Part III(A).

¹³⁰ For a more detailed discussion of these developments, see Daniel Gervais, *Electronic Rights Management and Digital Identifier Systems*, 4 *Journal of Electronic Publishing*, (March 1999) (<http://www.press.umich.edu/jep/04-03/gervais.html>).

¹³¹ See Hinds Report, *supra* note 26, at 61-64; Part III(A).

¹³² See Hinds Report, *supra* note 26, at 62-63 (discussing ITP and CopyrightDirect projects)

¹³³ See *id.* at 61-64 (discussion of online licensing sites, CCC's electronic licensing, iCopyright project and digital archiving of audiovisual and graphic works); Comment 11, ASMP at 7; Chicago Testimony at 211 (William Bowe, SIIA); see also *infra* Part II(E)(1) .

expand, into the digital arena. For example, CCC's Electronic Course Content Service was launched in 1997 to license online material in digital form to educators for coursepacks and e-reserves. In 1998, it managed an average of 40 transactions per week; this volume has tripled in the first quarter of 1999.¹³⁴ ASCAP and BMI, as noted above, are currently discussing administering licenses for the digital performance of musical works.

There are certain limitations on the promise offered by collective management as an across-the-board solution. Because collective licensing organizations in the United States each license only a limited scope of rights and works, and are not authorized to represent all copyright owners of such works, the prospect of "one-stop" shopping for all digital uses of all categories of works appears unlikely in the near future.¹³⁵ For a growing number of uses, however, collective licensing will be an increasingly valuable and important mechanism.

3. Evolving Approaches to Digital Licensing.

Experience with licensing for digital uses is relatively small, as it is only in the past few years that this market has developed. Both licensing mechanisms and copyright owner approaches are in the process of catching up with technology. As digital uses become more common and familiar, copyright owners are becoming more flexible.¹³⁶ For example, as recently as three years ago, many publishers were routinely denying requests to digitize content for any purpose, corporate or academic.¹³⁷ In the last twelve to fifteen months, this

¹³⁴ See generally, Hinds Report, *supra* note 26, at 59; Comment 26, CCC.

¹³⁵ See Hinds Report at 42-43.

¹³⁶ See *id.* at 41-45.

¹³⁷ See *id.* at 45.

practice has shifted, and it has become standard practice to grant those requests, as long as users meet the criteria specified by the publisher.¹³⁸ The development of effective technological measures to protect copyrighted works, once widely available, should further reassure copyright owners, and result in more willingness to license digital uses.

It is difficult to predict, however, the extent to which the problems experienced with relation to digital licensing will subside, or how long the improvement will take. As long as the digital context is perceived as expanding risks and exposure, prices and other terms may continue to be more burdensome than for other types of uses. In addition, for certain categories of works, distance education may never be perceived as a valuable market. On the other hand, increased volume, enhanced protection technologies and the availability of online licensing systems and databases could exert a countervailing force, leading to easier, faster and less expensive licensing. Given the current state of development of the trends described above, a more definitive evaluation will be possible in the next few years.

¹³⁸ *Id. Cf.* Transcript of Hearing, Los Angeles, CA, February 10, 1999 (“L.A. Testimony”) at 55 (Howard Besser, University of Cal-Berkeley (“UC-Berkeley”), Progressive Librarians Guild (PLG”)) (describing improvements in availability of newspaper articles online).

III. TECHNOLOGIES INVOLVED IN DIGITAL DISTANCE EDUCATION

Technology has assumed an increasingly important role in the evolution of distance education. In the past decade, digital technologies have transformed the way distance education is accomplished, as well as affecting its potential impact on markets for copyrighted works. This part of the Report will describe some of the tools in use and in development for licensing, delivering and protecting content used in digital distance education. It draws on comments and testimony submitted during the study, published materials, and the insights of a panel of technology experts consulted by the Copyright Office.¹³⁹

The relevant technologies can be broken down into three major categories, with some overlap: 1) technologies that facilitate licensing; 2) technologies that deliver the content of the course; and 3) technologies that protect the delivered content. Within the last category, a further distinction can be made between technologies that restrict access, and technologies that restrict or detect uses of works after access has been gained.

¹³⁹ The panel was composed of Professor I. Trotter Hardy, Professor of Law, William and Mary School of Law, Christopher Burns, independent consultant, and Dr. Clifford Lynch, Executive Director, Coalition for Networked Information. The published sources and comments included: INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE, THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995); JOHN P. WITHERSPOON, DISTANCE EDUCATION: A PLANNER'S CASEBOOK (Chris Daziel ed, 2d. ed. 1997); WESTERN COOPERATIVE FOR EDUCATIONAL TELECOMMUNICATIONS, THE DISTANCE LEARNING GUIDE (George P. Connick ed., 1999); RDR ASSOCIATES, INC. et al, NEW CONNECTIONS, A GUIDE TO DISTANCE EDUCATION (2d. ed. 1998); Comment 5, PBS; Comment 9, InterTrust ("InterTrust"); Comment 23, Recording Industry Association of America, Inc. ("RIAA"); Comment 33, Oregon SU; Comment 47, U. of M-C.

A. TECHNOLOGIES TO FACILITATE LICENSING

The role of licensing in digital distance education is discussed in depth elsewhere in this Report.¹⁴⁰ This section focuses on some technological aspects of emerging licensing systems that are worth highlighting.

One area of technology that facilitates licensing is the ability to attach licensing-related information to a work in a digital format. This information can be linked to or embedded in the work, and accessed by the user. In some instances the user will need special software to read information imperceptibly embedded in the work, and in others he can click on an external link to the information. Information so accessed can identify the copyright owner, point the user to the appropriate licensing site, or list licensing terms and conditions.¹⁴¹

Also useful are online rights and permissions services that can support a range of license and delivery functions, although not all services offer all functions. Electronic licensing and electronic delivery are separable, independent activities, and either or both can be accomplished by the same online service. Such services can provide central access to a large group of materials, standardized licensing terms that can be customized according to the content provider, and a quick turn-around time for requests. Several different online rights and permissions services are currently in use or development.¹⁴²

¹⁴⁰ See *supra* Part II; Hinds Report, *supra* note 26,.

¹⁴¹ See *infra* Part III(C)(2), for further discussion of embedded information.

¹⁴² Some of these digital rights management projects are discussed in *supra* Part II(E), and Hinds Report, *supra* note 26, at 61-64. They include both new companies that offer only online licensing, and established collective licensing organizations such as CCC that have expanded to offer services online.

The online permissions process itself allows a high degree of specialization. Menus for these online requests can divide users into different categories and subject them to different licensing terms, including grants of permission without a fee. For example, an educational requester could be asked to specify whether the proposed use is for a classroom, seminar, or dissertation. Users could be asked to identify themselves as nonprofit or for-profit, accredited or non-accredited, or any other characteristics that are significant to the copyright owner. The user could also respond to standard queries on the method of delivery, the size of the class, or the security of the website. Any information relevant to the decision whether to license and how much to charge can be obtained, and this information can be used to generate an automatic response based on pre-established agreements between the service and the copyright owner, or to query the copyright owner directly for permission.

In addition to processing licensing requests, some services may also accept payment for the license and deliver the content to the user digitally. Depending on the particular service, the material could be delivered with whatever technological protections the copyright owner specifies already attached.

As well as enabling licensing and delivery to take place online, technology can also facilitate access to licensors by the direct linking of works in a digital form to rights and permissions databases. This may be done with a link, such as an icon, at the end of text or an image, that a user may click on to go straight to an online licensing database.

An important development in licensing for digital uses is the convergence of permissions systems with other systems designed to identify and protect material. In the analog world, licensing tends to be a discrete transaction, separate from how the user gains

access to the material or what the user is able to do with the material once she has it. In the digital world, these functions are converging. A single online site may authorize use of a work, accept payment for that use, deliver a copy of the work to the user, and attach technological protections. Many of the secure container systems described below, which limit access to and use of a work, also include mechanisms for payment.

B. TECHNOLOGIES TO DELIVER CONTENT

Distance education today is delivered via both analog and digital technologies, including diverse combinations of telephone connections, telecourses, video conferences and computer transmissions. Because our mandate is to consider issues relating to the use of digital technologies, particularly the need for an exemption “for distance education through digital networks,”¹⁴³ we focus here on the use of digital network technology.

Other types of digital technologies may also be used to deliver distance education, such as digital television broadcasts or videoconferencing. These are examples of traditional media being used to carry digital, instead of analog, information. Telecourses and video conferences incorporate different degrees of interactivity, and may involve one-way video with two-way audio, or two-way video and two-way audio. At the highest level of interactivity, videoconferencing allows instructors and students to see and speak to each other in real time as if they were in a classroom together. These types of digital technologies function much like their analog counterparts, but are usually capable of carrying more information more efficiently. It is important to note that even non-networked transmissions, whether digital or

¹⁴³ DMCA at § 403.

analog, may incorporate elements of digital network technology. For example, telecourses or video conferences are often transmitted in conjunction with a computer connection between the students and the instructor, allowing simultaneous online interaction.

The computer is the most versatile of distance education instruments, since it can incorporate or perform the same function as a television or telephone, as well as providing more interactivity, delivering more content, and supporting more comprehensive services than any other single medium. Computers can be used to transmit texts and graphics, connect users in a variety of real-time and asynchronous dialogues, deliver messages between users, and receive both audio and video transmissions.

There are several commercial software products available to help educators construct online courses for students to access through personal computers.¹⁴⁴ These products are basically a template of a blank course website, offering a choice of many of the technologies common to such courses. The instructor is then free to fill in the site with content, and to choose which of the available options she wants to incorporate.

Despite the use of these common templates, there is no “typical” online distance education course. When the concept of a class is transported to a virtual context, it is no longer constrained by the attributes of a physical classroom, such as the duration of a lesson, the ways in which materials can be used in class, and the schedule of the teacher and students. The virtual classroom can be defined by its ability to be tailored to the needs of different

¹⁴⁴ These products include packages such as Web CT, Top Class and Web Course in a Box. There are few established standards in this area and institutions that wish to share course materials or collaborate on online course development may find it difficult to do so. To address this issue, Educause, an association of educational and information technology groups, is leading the Instructional Management Systems Project to create standard protocols, for interoperable standard educational course building programs. For more information on this project, see <http://www.imsproject.org/>.

instructors, students and subject matters. The commercial templates are designed to be customized by each instructor. In addition, many instructors, or the information services of their institutions, build their own courses from scratch. Factors such as the technological sophistication of the target student body, and the level of technology available to these students, will influence how many of the available “bells and whistles” are used in a given course.

There are constantly new products produced for this market, and numerous tools that can be employed in an online course. Although no list can be exhaustive, the technologies listed below are some of the most commonly used today:

- **E-Mail** - Electronic mail is a very common form of online interaction, and is present in virtually every distance education package. It is also used as an adjunct tool for communication between teachers and students in many “face-to-face” courses. E-mail is a delivery and receipt mechanism mostly for textual material, although other files, which could be textual or any other type, can be “attached” to the message. It allows educators and students to communicate with each other asynchronously, sending messages to individuals or groups easily and quickly. Messages can be written at any time, and can be read and responded to at any time. A file of e-mail messages sent and received is typically archived on the individual’s computer.
- **Threaded Discussions** - Threaded discussions are another form of asynchronous textual communications. An educator or student may post a message pertaining to a certain subject (i.e., a lecture topic) in a forum accessible to the whole class. Other participants can respond to that message or any of the responses, and so on. The evolution of the threaded discussion is displayed in hierarchical form to allow a participant to follow the discussion. A student or instructor can read the original message, the responses it generated, and the further comments generated by each of those responses. In this way, it seeks to recreate, in a time-independent environment, the flow of a classroom discussion while keeping a record of the discussion’s progress. This record is usually stored on the class website for the duration of the class.
- **Chat** - The chat function provides a synchronous meeting place online. Students and instructors who are online and in this program can write messages

back and forth in real time. As one student types a message, for instance, the text appears on the computer of all the other students present in the chat room. This technology allows for live discussion similar to classroom experiences. It is possible for the participants to keep copies of the chat session.

- **Whiteboard** - A whiteboard program is one that provides a common space in which students and instructors can work synchronously. Similar in use to a blackboard in class, whiteboard technology can be used for display or collaboration. During a whiteboard session, each participant has a blank application on their screen, a "whiteboard." Any participant can then cut, paste, draw or write anything into this common space, and it will be immediately displayed on the boards of all the other participants. This technology is useful for group projects or planning sessions, which require students to collaborate on creating something. It can also be used in connection with a lecture delivered through streaming technologies (see below), permitting the instructor to display images or text to the class as she lectures. Participants can save the contents of the board to their computer at any time.
- **Shared Applications** - Like the whiteboard, a shared application can be used for display or collaboration. A shared application is a computer program like a word processor or drawing program that permits several people to use the program at the same time from different locations. The participant with the program to be shared (usually the teacher) opens it and specifies that he wants to share it. Demonstrations can be accomplished this way or, if the instructor specifies that the application can be used for collaboration, anyone in the class can also use the shared application. For example, all participants in a class session might have access to the same word processing program or graphic design program, and would work with each other within the application to create a product. In some implementations, the work that is done in the application can be saved or printed only from the computer of the person who shared it. For someone else to obtain a copy of the final product after collaborating, the person who shared it must send the file to the other participants.
- **Streaming Video/Audio** - Streaming video or audio is similar to broadcast technologies, except that the transmissions are sent over a computer network. Instead of the receiving computer's waiting to receive an entire file of audio or video information before playing it back, the receiving computer begins to play back the file while it is still arriving over the network. Playback is done "on the fly," in other words. With enough network capacity ("bandwidth") the result is comparable to radio or television. In practice, however, the limits of the Internet's capacity today result in video images appearing small, with jerky movements. Sound quality is often quite good, though here again, the speed of

one's connection to the Internet, and the congestion on the Internet at the time, make substantial differences in the quality of playback. In common implementations today, streaming audio and video do not result in a complete copy of the entire transmission being placed on the user's computer, although a different implementation could be created that would do so. With appropriate equipment, such as cameras and microphones, the audio or video can also be two-way. This technology is used to deliver lectures to students, or hold class sessions with interaction.

- **Video/Audio Files** - Video and audio files can be used to illustrate lessons or teach specific subjects. For example, a foreign language class might contain sound clips of different pronunciations of words, or a history class might integrate video clips of recorded interviews of war survivors with the lecture material. These files reside on the class network site for the duration of the class, and can be copied and downloaded by the students.
- **Course Management** - Course management describes the infrastructure of the instructional content of the course. This could include the syllabus, written or recorded lectures, assigned reading, tests, and homework assignments. It generally involves posting material in common spaces on the network site, together with directions on how and when to access different portions of the material. For instance, an instructor might post a new lecture every week, with reading assignments, and a subsequent threaded discussion on the lecture. Or, she might choose to post all lectures and reading material at the beginning of the course, allowing students to read ahead, and organize chat sessions or threaded discussions every week on a different lecture. This information, once posted, generally remains on the course site for the duration of the class.
- **Links** - Links provide a way for students to quickly access material not present on the course site itself. Links to other websites can be embedded in the text, or listed separately. For instance, a lecture on computer programming might include a link to an Internet website rating different types of software. Links may also transport the student to the university's library, where a student may access electronic reserves of material put aside by the instructor for that particular class.
- **Interactive CD-ROMs and DVD-ROMs** - Some classes furnish students with a CD-ROM or DVD-ROM that interacts with the course website. These store large files, such as video, audio or animation, that would otherwise be posted on the websites. When the student clicks on the graphic or video clip in the course site, his computer obtains the file straight from the CD-ROM or DVD-ROM, instead of downloading it from the web page. This saves time, and also allows large files to be viewed with higher quality.

The above tools are generally used in classes that involve some form of instructor-student interaction. There are also tools available for self-paced independent learning -- the latter-day parallel to video and audio tape courses that can be taken home and used at the student's convenience, with no interaction with a teacher. In the digital environment, computer-based training is a common form of distance education. Programs on a variety of subjects can be obtained by the student from commercial vendors or in the course of instruction at an educational institution. The student reviews the material at his own pace, and tests himself on computer-generated exams. The programs themselves may contain a mixture of media, including video, audio, graphics and text. They could be contained in a CD-ROM, for example, downloaded from a network site, or accessed online. The student has little or no interaction with a teacher, although the student may send the results of the computer testing to an educational organization for grading or credit.

C. TECHNOLOGIES TO PROTECT CONTENT

With the ever-increasing ability to transmit huge amounts of material quickly and easily over computer networks, copyright owners and users in all sectors recognize the need to provide security for that material. Many technology companies and content-provider groups are working to develop technologies for protecting works in the digital environment that will be viable in the marketplace. Industries are also collaborating among themselves in an effort to develop broadly-based, effective technological standards.¹⁴⁵

¹⁴⁵ The Secure Digital Music Initiative ("SDMI") is an example of one such voluntary partnership. SDMI is an initiative of the Recording Industry Association of America, in collaboration with recording and technology companies, to develop a standard technology for providing security for recorded music

Technology can protect copyrighted works in many ways. It can restrict access to the work, restrict uses of the work and identify the terms and conditions of using the work. In some circumstances it can also find copies of the work on the World Wide Web and report their existence to the copyright owner, who can determine whether the copy is authorized.¹⁴⁶ While there is a substantial degree of overlap in these technologies, they can be separated into technologies that limit access to works, and technologies that prevent or detect uses of works after access.

Each method of technological protection varies in its cost of deployment and degree of security. As a general matter, there is a correlation between these two factors: the more expensive and complex the mechanism, the more inviolate the material. If the expense is high, the material to be protected may not warrant the outlay. As a result, the stronger protections may be used to protect only high market value works.

Although many of these technologies are highly effective, none provides absolute certainty. Any code can be broken, and any mechanism can be circumvented, with enough effort and investment.¹⁴⁷ The effectiveness of access control technologies in particular depends on the behavior of users, such as a student who is careless with his passwords or intentionally shares them with others. The goal of most of these technologies is to provide a high enough

in digital formats and delivery channels. Comment 23, RIAA at 3. The Electronic Book Exchange (“EBX”), which is an open standard for protection of E-books, is another recent example. James Martin, *More E-Books, More Ways*, PC Week Online (May 11, 1999) (www.news.com).

¹⁴⁶ The concept of technologies that can track the use of works has raised concerns about rights other than copyright, such as rights to privacy and free speech. While these issues are important, they are not related to the scope of copyright protection and are therefore not addressed in this Report.

¹⁴⁷ In some circumstances, such circumvention might involve a violation of the recently enacted section 1201 of the DMCA. See *infra* Part IV(C)(2).

level of protection that the cost of circumvention outweighs the value of access to the material protected.

1. Limiting Access.

A range of methods can be used to control access to content. Educational organizations may limit access to students enrolled in a particular class or at a particular institution through several different methods used separately or in combination. Listed below are some of the most common methods used in the educational environment:

- **Password Protection.** Password protection is probably the most common type of protection in educational settings, and most educational institutions seem to use some form of password protection to ensure that their distance education classes reach only registered students.¹⁴⁸ Access is restricted by use of passwords or “logins,” assigned codes used to identify an authorized user. These protection devices allow the institution to act as a gatekeeper, permitting only authorized users entry to shielded systems or select data. Each student can be issued a single password, which opens access only to a course for which the student has registered, or the student can be provided a different password for each class. Passwords typically expire at a predetermined time -- the termination of the class, the semester, the school year, or the student’s enrollment in the institution.
- **Firewalls.** Both intranets and firewalls are common methods of protecting computer networks, and are used in many educational institutions. An intranet is an internal network cordoned off from public access by use of a firewall. Firewalls are created by a server, located between the intranet and the public network, which has been programmed to prohibit unauthorized users from accessing internal data. The firewall itself is not an access control mechanism; rather, it prohibits users from accessing the internal data by any means other than whatever access control mechanism the university has in place.

¹⁴⁸ There are other user authentication technologies, such as biometrics, cryptographic certificates, personal challenge-response calculator authenticators, that can be used much like passwords, but are much more secure, expensive, and complicated. None of these technologies is currently in use in distance education, although cryptographic credentials are now being tested by some universities as a means of controlling university community access to licensed electronic resources.

- **IP Addresses/Domain names.** By screening for only specific IP addresses or domain names, it is possible to restrict access to a website or other content source to only those computers that are attached to a specific set of networks. This allows content to be restricted to machines on a specific campus. These methods of access control are somewhat limited in the distance education environment. Restriction by IP source address or domain name can be used to restrict access to members of an institutional community, but not to students registered in a specific class, since class registration does not correlate to either IP address or domain names. In addition, many distance learners do not work on campus computers, but work from home or some other place. Because they will not be working from addresses on the campus network, they would not be able to access the material.
- **Hardware Connections.** Physically connecting hardware is another way to restrict the access of unauthorized users to transmitted data. In the digital environment, connecting computers together can create a system similar to the “closed circuit” television systems in which cables connect the transmitting sites to the receiving sites, effectively limiting reception to within the circuit. This manner of transmission is still being used for both broadcast and digital network transmissions. Where computers can be physically connected to each other, unauthorized access to the transmission can be avoided.
- **Encryption.** While the use of intranets and passwords limits those who may enter or log on to a system, encryption technology limits access to information by protecting the information routed between a sender and a designated receiver. In an educational context, encryption allows instructors to send protected information which can be read only by students with the authorized decryption key. Encryption technologies are commercially marketed at a range of prices, depending in part on the level of protection. Encryption technology, in essence, encodes information from a sender into an unreadable form. Only an authorized receiver who holds the key to decode the information can access it.
- **Physical Control.** Putting the content into a physical object, such as a CD-ROM, which is given only to authorized users is another method used to control access to information. A CD-ROM is a physical copy of digital information that is inserted into the computer when the user wishes to access such information. The work may be viewed on the screen, but resides in the physical disk. Access to that work is therefore limited to students who are in possession of the CD-ROM. Although the

use of a CD-ROM has not traditionally thought of as a technological protection, using a CD-ROM as a delivery mechanism is more restrictive than posting a work on a website.

2. Controlling Downstream Uses.

Technologies that control access are only part of the equation. Standing alone, they cannot control what happens to the work once it has been accessed. After an encrypted work has been decrypted, or a password-protected site has been logged into, the material is available for further use, including printing, downloading to computer memory, or electronic distribution. Technologies that affect the downstream uses of protected works are intended to address this gap. Some restrict use of the work, and others allow unauthorized uses to be detected.

Several alternatives exist for restricting use of a work once it has been accessed. Few of these technologies are yet in common usage. Several have just been released on the commercial market; others are expected to be commercially launched in the very near future; and still others are projected for release in the next year. The state of flux of this type of technology is high. As these technologies all represent different methods of addressing similar problems, it remains to be seen which, if any, will gain widespread acceptance and use with consumers and content providers. New ideas for addressing the same problems may also surface tomorrow.

(a) *Digital containers and proprietary viewers.* Much attention is being focused on secure container/proprietary viewer technologies as a way to protect digitally transmitted works. There are a number of such technologies currently in the market or in

development, and some copyright owners are considering them as viable alternatives for selling and controlling works of high market value in the digital environment.¹⁴⁹ These technologies are often designed for a specific type of work (e.g., audio, video or text), and allow copyright owners to set rules for the use of their works. These rules are attached to all digital copies of the work, regardless of how they are further copied or distributed, and prevent anyone from making a use of the work that is not in accordance with those rules.

Basically, the technology works by encoding the digital work and wrapping it in a proprietary file format that can be opened only by software that reads and abides by the usage rules contained in the file. The file format contains the conditions of access and rules of use for the work. The conditions of access specify which users are allowed access.

The complementary software resides on the computer of the user. This software identifies the user (sometimes in conjunction with a password) and responds to the rules embedded in the container. It also acts as a viewer, allowing the user to see or use the content, filtered through the viewer, in accordance with the embedded rules. However, the content is never subject to distribution or copying in decrypted form. If the work is further disseminated, the proprietary file format moves with it, and the work cannot be accessed or used by anyone who does not have the proper viewer and authorization.

There are several examples of such technologies currently on the market, or in late stages of development. Most are designed to handle one type of content, although there are products which offer protection for all type of works. Some examples are listed below. This

¹⁴⁹ SDMI, as discussed above, is examining different forms of secure container technology as the technological standard for commercial dissemination of recorded music.

list is illustrative only, and focuses on some of the technologies brought to the Copyright Office's attention during the hearing and comment process. It is not intended to be comprehensive, or to endorse any particular product or service.

- **Adobe Acrobat Reader.** Acrobat is a system that includes a proprietary file format called PDF (portable document format), a reader and software to create the secure documents). The most recent version was released in late March 1999. The format is widely used in scientific and technical journals and many other electronic publications. Using Acrobat, the publisher can set privileges in the file that the Acrobat Reader obeys. The publisher may require the user to enter a password to view the document, and can permit or restrict printing, modification and cut and paste. The file format can accept text, graphics, Powerpoint slides and spreadsheets, and the new version allows more advanced access control mechanisms. Acrobat 4.0 is relatively inexpensive, selling for about \$200 to the publisher. The reader software is free and is often distributed as a plug-in for browsers. Acrobat Reader is widely used today. It is primarily designed for printing high- quality copies of documents rather than as a mechanism for viewing documents on-screen.
- **Liquid Audio.** Liquid Audio is a secure container technology currently used to sell recorded music files over the Internet. Liquid Audio both delivers content and accepts payment. It does not, at this point, allow specialization in the types of uses it permits or restrict. A customer using Liquid Audio has a limited number of choices -- he can hear a sample, see the album cover, and sometimes read the liner notes. Then, if he decides to buy the recorded music, it is downloaded, marked with the buyer's unique player ID. Only software obtained from Liquid Audio and installed on the user's computer with a serially numbered identifier can open that file. After purchase, the buyer can listen to the recording as often as he chooses, but cannot copy or distribute it further.
- **InterTrust.** InterTrust is one example of a secure container system for protecting all types of works. Works come in secure containers called "digiboxes" which are accessed and used through proprietary viewing technology on the user's computer, called the InterRights Point. Although not yet in commercial deployment, InterTrust began shipping system developer kits in June, 1998, and is in an advanced stage of development. The technology incorporates a permission system for obtaining authorization to use a work, a payment mechanism if a charge for such use is assessed, and a tracking mechanism, if desired and

consistent with privacy agreements, to monitor usage for the purposes of metered payment. It also allows a highly nuanced set of rules to be enforced.

Such technologies could be used in a digital distance education context. For example, the rules attached to a work through a secure container technology might provide that protected material could be accessed only by a registered student at a particular college, and that the student could view the work, and print out one hard copy, but could not save it to disk or distribute it to others electronically. A license fee, if any, could reflect these restrictions. The student's viewer could then identify the user as a registered student,¹⁵⁰ allow the student to see or print the work, but not allow the work to be sent through the viewer to the student's hard drive or e-mail system. If the information was being provided based on rules that required the institution to pay per use, the software could monitor the use for future accounting. This protection would apply to any kind of work and would persist in the work. The rules could also provide that after a certain time period, for instance a semester, the material would no longer be accessible.

Secure container technologies that protect a range of works are not currently in use in distance education, however. As these are relatively new technologies, it is difficult to predict the level of investment required to create and operate such technologies within an educational system. Some developers indicate that pricing could be geared for educational institutions.

¹⁵⁰ It is worth noting that any secured container can only establish the "identity" of the user, not the nature of the use. It cannot, for example, establish that the material will be used in a classroom, or as part of a distance education curriculum. It can only establish that the person has been identified by a university as a member of its faculty.

(b) *Streaming formats.* Streaming technologies for video and audio are not technically mechanisms to protect content, but rather to deliver it. However, using advanced streaming formats for video or audio, no copy of the whole work is created on the user's computer. Because these technologies do not facilitate the making of copies, they can hinder downstream uses by the receiver of the transmission. Therefore, a byproduct of the properties of the delivery mechanism is that it offers some degree of protection against redistribution.

(c) *Low resolution data.* Another manner to discourage downstream uses of protected works is to provide the works in a format that is not conducive to high quality reproduction or distribution. Low resolution digital copies can be provided to the user with less than the full complement of digital data, creating a copy of lower quality. Such a copy can be adequate for on-screen viewing but does not print well. This technology is currently used for marketing graphic images online, allowing a prospective user to view a low resolution copy of the work, but requiring a purchase in order to obtain a high-quality image. It does not appear to be in common usage in the distance education environment. This may be because it is difficult for instructors who rely on graphic images, such as graphic design or art teachers, to teach their classes effectively using low-quality images.

In addition to technologies that restrict the use that can be made of a work, technologies for embedding information in digital works to identify and track usage are also in development and use. Information may be attached to a work in a number of ways, from adding it to the image visually (e.g., a serial number at the end of a text) to integrating it invisibly in the digital data.

Since it is fairly easy to remove a visible identifier, the practice of digital watermarking, which does not permit easy removal, is growing. Digital watermarking is the technology of embedding information within the content of a digital file in a manner that is not ordinarily perceptible without the use of special software. A digital watermark does not hinder copying of a digital file, but the watermark will be present in the copy (or any subsequent copy made from that copy). Although it is possible to remove watermarks, it generally involves more than trivial effort and inconvenience, and some types are harder to remove than others.

Digital watermarks are typically used to embed information in a digital file about the copyright, such as the identity of the copyright owner and the terms and conditions of licenses. Users with the appropriate software can display this information and contact the copyright owner to clear rights to use the work embodied in the file. In general, it is easier to watermark some kinds of content, such as music and video, than others, such as text.

The same digital watermark can also be used to detect unauthorized copying. There are two kinds of identifiers commonly used to track copying. The first type simply identifies the copyright owner, stating in effect, "I am owned by X." The second type identifies not only the copyright owner, but also the entity that licensed that copy of the work, for example through a serial number issued to each licensee.

Using commercially available software or services, these identifiers can be used as a search object to find unauthorized copies on the World Wide Web. A number of different programs have been proposed or are in use, known as "web spiders" or "net crawlers," which automatically search the web for incidences of these unique identifiers and report the information to the copyright owner. The copyright owner can then look at the location of the

material and determine whether the use is authorized. If the type of identifier has been used that identifies the licensee, the owner can determine where the first unauthorized copy originated. Such programs ordinarily can only search material accessible on the World Wide Web, and not material stored on intranets, hard drives, or e-mail systems.

D. FUTURE DEVELOPMENTS

Significant and promising developments are occurring in all areas of technology involved in digital distance education. Although their outcomes are not certain, a few generalizations can be made. More efficient licensing mechanisms will continue to evolve and become more widespread. Delivery systems will become more sophisticated, more interoperable and capable of transmitting more material faster, making distance education even more varied and interactive.

Developments in technologies for protecting content are harder to predict. Here too there is reason for optimism. A number of technologies exist today that can provide effective technological protection for different types of works. Access control measures such as password protection are already common in distance education. Sophisticated technologies to prevent post-access uses of material are also a reality, although few are yet widely available. Some are in use in limited markets, some are in trial, and many are the focus of ongoing investment and development. The use of open standards is beginning to emerge.

In the near future it will be technically possible to protect works against both unauthorized access and dissemination with a high degree of effectiveness. It is an open question, however, whether these technologies will gain widespread usage and consumer

acceptance. Many promising projects in the past have not passed that hurdle, due to factors such as cost, inconvenience, or difficulty of use. It is therefore difficult to forecast the extent to which these effective technologies for downstream protection will be available in practical form for use in digital distance education at any given point in time.

IV. APPLICATION OF COPYRIGHT LAW TO DISTANCE EDUCATION

In order to determine whether changes in the law are advisable to promote distance education through digital technologies, it is necessary to examine current law. This part of the Report discusses ways in which copyright rights are implicated by digital distance education uses, and the extent to which existing exemptions permit such uses. Since there is not yet any case law applying copyright principles to distance education using digital technologies,¹⁵¹ our analysis is based on statutory language, legislative history and analogous cases. We begin with a description of general principles of copyright law, analyze the provisions that are most relevant to digital distance education, and conclude with a brief discussion of the international context.

A. GENERAL PRINCIPLES OF COPYRIGHT LAW

Copyright law protects original works of authorship, including literature, movies, plays, computer programs, music, works of art and sound recordings.¹⁵² Copyright confers on the owner¹⁵³ a bundle of exclusive rights to make or authorize certain uses of the work: (1) to reproduce it in copies or phonorecords; (2) to prepare derivative works (such as adaptations

¹⁵¹ The few reported cases that deal with distance education do not involve copyright, but address issues such as the right of the disabled to gain access to educational opportunities, institutional accreditation, or funding for distance education programs. See, e.g., *Maczarczyj v. New York*, 956 F. Supp. 403 (W.D.N.Y. 1997) (disabled plaintiff denied admission into master's degree program could not require college to enable him to participate in the program from home).

¹⁵² 17 U.S.C. § 102.

¹⁵³ The initial owner of a copyright is the author, who, in the case of a "work made for hire," is defined as the hiring party. 17 U.S.C. § 201(a)-(b). The question of who should be considered the owner of instructional materials created by faculty members is a topic of some controversy in the analog as well as the digital environment. Because it is not directly relevant to the issue of what uses of copyrighted materials should be permitted in what circumstances, it is beyond the scope of this study and will not be discussed here.

or translations); (3) to distribute copies to the public; (4) to perform the work publicly, limited in the case of sound recordings to performances by means of a digital audio transmission; and (5) to display the work publicly.¹⁵⁴ These rights are divisible, and may be licensed or sold together or separately.¹⁵⁵ The exercise of any of the exclusive rights in a copyrighted work without the authorization of the copyright owner is an infringement, unless an exception applies.¹⁵⁶ The Copyright Act contains numerous exceptions, including several that are particularly relevant to educational uses.¹⁵⁷

Different rights are implicated by different educational activities, depending in part on the technologies used. A teacher using a work to teach her class will almost invariably exercise one or more of the copyright owner's exclusive rights, when she reads from a work, displays it, or reproduces it and hands out copies. This is true whether the instruction is face-to-face, or takes place over a distance. A public performance or display of a work accomplished by means of a digital transmission, however, may implicate additional exclusive rights in a manner not contemplated by the instructor or perceived by the student. Unlike face-to-face teaching or broadcasting, acts perceived by the teacher and student as a performance or display of work, when transmitted over a digital network, will generally constitute an exercise of the reproduction right, and possibly the distribution right as well.

¹⁵⁴ 17 U.S.C. § 106.

¹⁵⁵ *Id.* at § 201(d).

¹⁵⁶ *Id.* at § 501(a).

¹⁵⁷ *Id.* at §§ 107-121.

Digital transmissions can be grouped into two categories for the purposes of this analysis: those that involve the automatic creation of copies during the transmission process, and those that do not. The first kind of digital transmission involves communication via a computer network. When material is transmitted to a distant location over a computer network, temporary RAM copies are made in the computers through which it passes, by virtue of the technological process of transmission.¹⁵⁸ The copy of the work that arrives on the recipient's computer is the ultimate copy in this process. This is an essential function of the way that digital information is transported over a digital network.

In addition to the necessary transient copies generated in the course of transmitting the performance or display, the reproduction right may be exercised in connection with a networked computer transmission in other ways. For material that is not in digital form, making a digital copy from the analog version also entails an exercise of the copyright owner's reproduction right. When a teacher scans a work into a computer, the reproduction right is implicated. Also, a student could make temporary or permanent copies by caching, downloading or printing out the material after receipt.

The distribution right is also implicated when a transmission results in a distribution of copies to the public. As a result of almost every digital transmission, a temporary copy is deposited on the recipient's computer, as well as, possibly, more permanent copies.¹⁵⁹

¹⁵⁸ The courts have consistently held that RAM copies implicate the copyright owner's reproduction right. See, e.g., *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), cert. dismissed, 114 S.Ct. 671 (1994); *Stenograph L.L.C. v. Bossard Assocs.*, 144 F.3d 96, 101-02 (D.C.Cir. 1998).

¹⁵⁹ Even technologies designed to transmit in "real time," such as audio and video streaming, result in the same creation of temporary copies along the network, as the material is broken up into packets and carried from the sender to the recipient. Unlike other transmissions, however, no complete copy of the transmitted material is "reassembled" on the recipient's computer, although segments of the material are briefly

The second kind of digital transmission is exemplified by digital television or radio transmissions, which may be communicated by satellite, microwave, or cable. These transmissions do not involve the automatic creation of intermediate copies. Therefore, from a copyright perspective, they are more similar to analog broadcasts than to online transmissions. Unless specifically noted, this section of the Report will treat such digital broadcasts¹⁶⁰ as comparable to analog television or radio broadcasts under copyright law, and will use the term “digital transmission” to refer only to the first type of digital transmissions, which involve reproduction over networks.

The fact that an educational use implicates one or more of the copyright owner’s exclusive rights does not necessarily mean that the use is an infringement. Only unauthorized uses can infringe, and permission to use the work may be expressly granted or implied.¹⁶¹ The copyright owner, either the author or the author’s transferee, can grant permission through an express license.¹⁶² An educator may contact the copyright owner, or a licensing organization acting on her behalf, to obtain a license to use the work.

copied into the computer’s memory as a buffer to create a continuous display. Future technology, and broader bandwidth, may support streaming transmissions which do not create these buffer copies on the recipient’s computer. The intermediate RAM copies will still be created.

¹⁶⁰ The term “digital broadcasts” is used throughout this Report to refer to those types of digital transmissions that function similarly to analog broadcasts, and that do not create automatic reproductions by virtue of the technical process of transmission. It is not intended as the equivalent to the term “broadcast” as defined and used in the Copyright Act. See 17 U.S.C. § 114(j).

¹⁶¹ The extent to which licenses are in use today for digital distance education, and how they may develop in the future, is discussed *supra* Part II.

¹⁶² 17 U.S.C. at § 101 (definition of “transfer of copyright ownership”); § 201(d); § 204 (rules for transfers of ownership); MELVILLE B. NIMMER and DAVID NIMMER, NIMMER ON COPYRIGHT, § 10.03[A] (1998) (“NIMMER”).

Even without such permission, courts may imply from a copyright owner's conduct an intent to allow the work to be used in a certain way, creating an implied license.¹⁶³ Applying this doctrine, certain educational uses could be found to be authorized by implication. For instance, a copyright owner who posts his work on a website without restriction may have impliedly licensed users to access the work in order to view it, including the making of those temporary reproductions required to do so. Such an implied license may be of limited utility to distance educators, because it would not authorize making or distributing other types of copies for use in a class.

If express or implied permission is not granted, the use of a copyrighted work may still be lawful if it falls within one of the various exceptions to the copyright owner's exclusive rights.

B. LAWFUL USES

The Copyright Act contains a number of exceptions to the copyright owner's rights, permitting various uses without the need to obtain a license.¹⁶⁴ The two main exemptions specifically designed for educators are provisions relating to face-to-face classroom teaching and instructional broadcasting, contained in section 110 of the Act. The fair use doctrine is the third major exemption applicable to educational uses. This section analyzes these three exemptions, which together largely define the scope of permitted uses for digital distance

¹⁶³ *Effects Assoc., Inc. v. Cohen*, 908 F.2d 555 (9th Cir. 1990), *cert. denied*, 498 U.S. 1103 (1991).

¹⁶⁴ 17 U.S.C. §§ 107-121.

education. It also discusses several other provisions of the Copyright Act which allow a distance educator to make certain limited uses of a copyrighted work.

1. The Instructional Exemptions.

In the 1976 Copyright Act, Congress provided two specific exemptions from the exclusive rights of a copyright owner for certain types of educational performances and displays. In order to understand their genesis and purpose, some background is useful. Prior copyright law limited the public performance right in nondramatic literary and musical works to performances that were “for profit.”¹⁶⁵ The right to perform dramatic works was broader, without the for-profit limitation. There was no general equivalent to the display right, however, and so no distinction between for-profit or nonprofit displays.¹⁶⁶

During the years of the revision process leading up to the 1976 Act, there was pressure from a number of groups, including the educational community, to continue and expand the “blanket exemption” approach to permit all nonprofit performances of any work. This approach was ultimately rejected, in favor of providing general public performance and display rights in all works, whether or not exercised for profit, subject to exemptions for particular types of performances and displays “that by their nature justify being exempted from copyright control.”¹⁶⁷ In explaining the shift to general rights with specific exemptions, the Register of Copyrights stated that “the present blanket exemption has become too broad in its application

¹⁶⁵ HOUSE COMM. ON THE JUDICIARY, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 27 (Comm. Print 1961) (“Register’s Report”).

¹⁶⁶ See 1909 Copyright Act, § 1(c)-(e).

¹⁶⁷ SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, PT. 6, HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 31 (Comm. Print 1965) (“Supplementary Report”).

to the new conditions of today, and . . . would involve serious dangers to the author’s rights if continued into the future.”¹⁶⁸

Two of the new specific exemptions addressed the use of works in the course of nonprofit educational instruction, reflecting general consensus that instructional uses justified a degree of special treatment under the copyright law.¹⁶⁹ One addressed face-to-face classroom teaching, while the other addressed instructional broadcasting.¹⁷⁰ In the legislative history of section 110, Congress stated that “[c]lauses (1) and (2) between them are intended to cover all of the various methods by which performances or displays in the course of systematic instruction take place.”¹⁷¹ Together with the doctrine of fair use, these provisions have essentially governed the range of exempted instructional uses for over twenty years.

(a) *Section 110(1)*. Section 110(1) exempts the performance or display of any work in the course of face-to-face teaching activities. By its terms, it does not apply to any distance education uses. It permits:

performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made

¹⁶⁸ *Id.* With prescience, the Register noted that “it is becoming increasingly apparent that the transmission of works by nonprofit broadcasting, linked computers, and other new media of communication, may soon be among the most important means of disseminating them, and will be capable of reaching vast audiences. Even when these new media are not operated for profit, they may be expected to displace the demand for authors’ works by other users from whom the copyright owners derive compensation.” Supplementary Report at 14.

¹⁶⁹ *Id.* at 21.

¹⁷⁰ 17 U.S.C. § 110(1), (2).

¹⁷¹ H.R. REP. NO. 94-1476, at 81 (1976) (“House Report”).

under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made.¹⁷²

According to the then-Register of Copyrights, section 110(1) reflects “general agreement that most ordinary instructional activities in classrooms should be exempt from copyright control.”¹⁷³ The potentially broad coverage of this exemption caused some concern to copyright owners, and the drafters therefore included a number of limiting factors to confine the permitted uses to purely instructional ones.¹⁷⁴

One limitation is that the performance or display must be made in the course of “face-to-face teaching activities,” which the legislative history explicitly states excludes educational broadcasts or transmissions.¹⁷⁵ The performance or display must also be made in a “classroom or similar place devoted to instruction,” which, according to the legislative history, excludes auditoriums used for school plays, graduations or school assemblies, but includes libraries, auditoriums or workshops used as classrooms in the course of systematic instructional activities.¹⁷⁶ The exemption was intended to extend, however, beyond the physical classroom itself to situations where the instructor and students are “in the same

¹⁷² 17 U.S.C. § 110(1).

¹⁷³ Supplementary Report, *supra* note 167, at 32.

¹⁷⁴ *Id.* at 33-35.

¹⁷⁵ House Report, *supra* note 171, at 81.

¹⁷⁶ *Id.* at 82.

building or general area,” and devices for amplifying or reproducing sound, or projecting visual images, are used.¹⁷⁷

Another limitation is that the exemption only applies to the teaching activities of “a nonprofit educational institution.” This parallels the prior law’s differentiation between for-profit and nonprofit performances, discussed above, and excludes “performances or displays in profit-making institutions such as dance studios and language schools.”¹⁷⁸

Finally, section 110(1) is limited in the rights that it covers. It exempts only the performance or display of a work -- the major ways in which a teacher would use works while engaged in face-to-face instruction. It does not authorize their reproduction or distribution, or the creation of derivative works.

(b) *Section 110(2).*

(i) *General.* Section 110(2) was designed to cover the then-extant forms of distance education, exempting certain uses of works in the course of instructional broadcasting. In the 1960s and early 1970s, when these exemptions were being considered, distance education methods included primarily open or closed-circuit television and radio broadcasting.¹⁷⁹ A proposal to limit section 110(2) to closed-circuit, on-campus broadcasts was considered but rejected as too narrow.¹⁸⁰ Ultimately, the scope applied to both open or

¹⁷⁷ *Id.* at 81.

¹⁷⁸ *Id.* at 82.

¹⁷⁹ Supplementary Report, *supra* note 167, at 36-37.

¹⁸⁰ *Id.*

closed-circuit broadcasting technologies, as long as the other requirements of the exemption were met. Section 110(2) authorizes:

performance of a nondramatic literary or musical work or display of a work, by or in the course of a transmission, if —

(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and

(C) the transmission is made primarily for --

(i) reception in classrooms or similar places normally devoted to instruction, or

(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment.

Like section 110(1), section 110(2) exempts only acts of performance and display. It does not authorize reproduction, distribution or the making of derivative works.¹⁸¹ It is narrower than section 110(1), however, in the categories of works it covers. While it permits displays of all works, it permits performances only of nondramatic literary or musical works. Thus, an instructor would not be able under this section to project a movie or perform a play via an educational broadcast.

During the revision process, educational groups had argued that the public interest in education would be furthered if the exemption permitted the performance of all types of

¹⁸¹ In a separate section of the 1976 Act, nonprofit educational institutions were given a narrow exemption allowing them to make up to thirty “ephemeral” copies of a transmission program embodying a performance or display permitted under section 110(2), upon compliance with certain conditions. 17 U.S.C. § 112(b). See *infra* Part IV(B)(3)(a).

works. However, the Register recommended maintaining the traditional distinction between dramatic and nondramatic works, exempting nonprofit performances only for the latter.¹⁸² The justification for the distinction was discussed in the Register’s Report on the revision of the copyright law.¹⁸³ The Register noted that copyright owners have had a general right of public performance in dramatic works since 1856, while the right to perform nondramatic works had always been limited to for-profit performances.¹⁸⁴ The Report listed a number of reasons for the difference in treatment, including that “public performance is usually the main source of revenue from a dramatic work; in the case of nondramatic works, revenue is also available from the sale of copies and sound recordings.”¹⁸⁵ The exclusion of performances of dramatic works thus recognizes that instructional broadcasts are more likely to supplant the intended market for such works. Audiovisual works, many of which are similarly dramatic in nature, were also excluded from the exemption. Nor is the performance of sound recordings authorized by section 110(2). This is not due to concerns about market impact, but rather because there was no exclusive right at the time for any type of performance of sound recordings, and therefore no need for an exemption.¹⁸⁶

¹⁸² Supplementary Report, *supra* note 167, at 35.

¹⁸³ Register’s Report, *supra* note 165, at 27-28.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 28. At the time this language was written, the term “sound recordings” was used to refer to the physical embodiments of sounds, now defined in the 1976 Act as “phonorecords.” 17 U.S.C. § 101.

¹⁸⁶ Current law now provides an exclusive right to perform sound recordings publicly by means of a digital audio transmission, subject to a number of limitations. See *infra* Part IV(B)(3)(b).

Section 110(2) also contains limitations on the nature and content of the transmission, and the identity and location of the recipients. First, the performance or display must be made as a regular part of systematic instructional activity by a nonprofit educational institution or governmental body. According to the legislative history, the concept of “systematic instructional activity” was “intended as the general equivalent of ‘curriculums,’ but it could be broader in a case such as that of an institution using systematic teaching methods not related to specific course work.”¹⁸⁷ Although the educational institution must be nonprofit, as in section 110(1), Congress indicated that “[t]he use of commercial facilities, such as those of a cable service, to transmit the performance or display, would not affect the exemption as long as the actual performance or display was for nonprofit purposes.”¹⁸⁸

Second, the performance or display must be directly related, and of material assistance, to the teaching content. This test of relevance and materiality connects the copyrighted work to the curriculum. It would rule out the section’s applicability to the use of a work for entertainment purposes, such as background music used simply to embellish the lesson.¹⁸⁹ Similarly, if more of the work is used than is material to the subject taught, in order to make the class more appealing or attractive, the additional use may not qualify.¹⁹⁰

¹⁸⁷ House Report, *supra* note 171, at 83.

¹⁸⁸ *Id.*

¹⁸⁹ *Cf.* House Report, *supra* note 171, at 81 (“The ‘teaching activities’ exempted by [section 110(1)] encompass systematic instruction of a very wide variety of subjects, but they do not include performances or displays, whatever their cultural value or intellectual appeal, that are given for the recreation or entertainment of any part of their audience.”)

¹⁹⁰ This aspect of § 110(2) is consistent with the fair use doctrine’s examination of the purpose and nature of the use, and the amount of the portion used. *See infra* Part IV(B)(2).

Third, the exemption provides certain restrictions on where the transmission can be received and who the recipients can be. The recipients must be located in a classroom or similar place of instruction, or they must be persons “to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms.”¹⁹¹ Legislative history indicates that “special circumstances” could include the inability of university students to take standard daytime classes because of work or other commitments:

There has been some question as to whether or not the language in this section of the bill is intended to include instructional television college credit courses. These telecourses are aimed at undergraduate and graduate students in earnest pursuit of higher educational degrees who are unable to attend daytime classes because of daytime employment, distance from campus, or some other intervening reason. So long as these broadcasts are aimed at regularly enrolled students and conducted by recognized higher educational institutions, the committee believes that they are clearly within the language of section 110 (2)(C)(ii). Like night school and correspondence courses before them, these telecourses are fast becoming a valuable adjunct of the normal college curriculum.¹⁹²

The transmission must be made primarily, but not solely, for reception by these persons. “[T]he transmission could still be exempt even though it is capable of reception by the public at large. . . . Factors to consider in determining the ‘primary’ purpose of a program would include its subject matter, content, and the time of its transmission.”¹⁹³ This flexibility was necessary because, using the technologies available, including open-circuit broadcasting,

¹⁹¹ 17 U.S.C. § 110(2). Recipients may also be officers or employees of governmental bodies receiving the transmission as a part of their employment. *Id.*

¹⁹² House Report, *supra* note 171, at 84.

¹⁹³ *Id.* at 83.

there was no practical way to ensure that the educational broadcasts reached only eligible students.

Taken together, these limitations, which exceed those in section 110(1), represent an attempt to balance the benefits and risks inherent in the practice of instructional broadcasting. Addressing this provision, the Register of Copyrights stated that “it . . . cannot be denied that educational broadcasting is in a special category. Its general aim is public and community service, and some of its instructional activities are essentially an extension, to a larger audience, of what schools have been doing for centuries.”¹⁹⁴ However, in explaining why limitations were needed, the Register also stressed the implications that such a wider audience could have for the copyright owner:

Fully acknowledging the unique public value of educational broadcasting and its need for financial support, we must also recognize the large public audiences it is now reaching, the vast potential audiences that are awaiting it, and the fact that, as a medium for entertainment, recreation, and communication of information, a good deal of educational programming is indistinguishable from a good deal of commercial programming. . . . In terms of good education, it is certainly true that the more people reached the better; but in terms of the author’s rights it is equally true that the more people reached the more he should be compensated. It does not seem too much to ask that some of the money now going to support educational broadcasting activities be used to compensate authors and publishers whose works are essential to those activities.¹⁹⁵

(ii) *Application to digital distance education.* As written, section 110(2) has only limited application to courses offered over a digital network. Taking the exemption

¹⁹⁴ Supplementary Report, *supra* note 167, at 35. The term “educational broadcasts” was used in this context by the Register to refer to transmissions of educational programs in the course of systematic instruction, within the scope of section 110(2), rather than to broadcast programs of a general educational nature.

¹⁹⁵ *Id.*

out of the original context of analog broadcasting in the 1970s, and placing it in the digital distance education world of the late 1990s, raises a number of questions. While in 1976 the two section 110 exemptions were sufficient to cover “all of the various methods by which performances or displays in the course of systematic instruction take place,”¹⁹⁶ this may not be the case today, given the computer network technologies used in distance education programs.

A threshold question is whether the term “transmission” used in section 110(2) includes digital transmissions. The section itself does not specify any particular technology. To “transmit” a performance or display is defined in section 101 of the Copyright Act as “to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.” Since the definition is explicitly technology neutral (“any device or process”), digital transmissions should be covered.

This conclusion does not resolve the matter, however. The problem is that most digital distance education is transmitted via computer networks. Section 110(2) does not effectively exempt these transmissions, as they implicate copyright rights other than the rights of performance and display. As discussed above, such digital transmission by definition involves multiple acts of reproduction, and often distribution, which are not covered by section 110(2). Therefore, even if the performance and display were exempted, these digital transmissions would result in an infringement unless the accompanying acts of reproduction and distribution were otherwise authorized.

¹⁹⁶ House Report, *supra* note 171, at 81.

Not all digital delivery methods would cause this problem. As discussed above, digital broadcasts that do not implicate rights beyond performance and display, and otherwise conform to the requirements of section 110(2), would be covered.

An additional question is raised by the exemption's limitation on eligible recipients. At least in part because of the changes in transmission technologies, distance education has gained in appeal to a wider audience,¹⁹⁷ and some of the new students may not fall within the scope of the exemption. Modern distance education programs could be considered the latter-day parallel of the "instructional television college credit courses" that, in the 1970s, were "fast becoming a valuable adjunct of the normal college curriculum."¹⁹⁸ Students taking distance classes because of daytime employment, geographic remoteness, child care, or similar reasons, would likely qualify as persons whose "special circumstances prevent their attendance in classrooms." Students who choose to take a distance course for simple convenience or preference, or as a supplement to classroom courses, may not have the type of "intervening reason" contemplated by section 110(2), and so may not qualify as recipients.

2. Fair Use.

Fair use is the broadest and most general limitation on the exclusive rights of copyright owners. It operates independently of the other exemptions in the Act, and can therefore exempt distance education uses not covered by sections 110(1) and 110(2). Codified in section 107, fair use is a flexible, technology-neutral doctrine, allowing reasonable and socially

¹⁹⁷ See *supra* Part I(B).

¹⁹⁸ House Report, *supra* note 171, at 84.

desirable uses of copyright works, even when they are not authorized by the copyright owner.¹⁹⁹

(a) *Application to education in general.* Fair use can apply to all types of uses, including educational uses. It is one of the exemptions intended to benefit education, with teaching, scholarship and research among the examples of fair use purposes cited in the statutory language. Section 107 begins by stating:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.²⁰⁰

The provision sets out four nonexclusive factors that a court must weigh in making a determination of whether any particular use is fair. The four statutory factors are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.²⁰¹

The Supreme Court has made clear that there can be no bright line test for fair use, but that it must be adjudicated on a case-by-case basis.²⁰² The fact-based nature of the balancing

¹⁹⁹ See, e.g., Nimmer at § 13.05 (1990); *Stewart v. Abend*, 495 U.S. 207, 236 (1990); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984).

²⁰⁰ 17 U.S.C. § 107.

²⁰¹ *Id.*

²⁰² *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 577 (1994).

test can make it difficult for a user to predict outcomes. Although many educational uses may qualify as fair use, others may not.²⁰³

(b) *Application to digital distance education.* The legislative history to section 107 explicitly noted the potential application of fair use to distance education:

The fair use doctrine would be relevant to the use of excerpts from copyrighted works in educational broadcasting activities not exempted under section 110(2) or 112, and not covered by the licensing provisions of section 118. In these cases the factors to be weighed in applying the criteria of this section would include whether the performers, producers, directors, and others responsible for the broadcast were paid, the size and nature of the audience, the size and number of excerpts taken and, in the case of recordings made for broadcast, the number of copies reproduced and the extent of their reuse or exchange. The availability of the fair use doctrine to educational broadcasters would be narrowly circumscribed in the case of motion pictures and other audiovisual works, but under appropriate circumstances it could apply to the nonsequential showing of an individual still or slide, or to the performance of a short excerpt from a motion picture for criticism or comment.²⁰⁴

Fair use continues to be a critical exemption in the digital distance education context.

It has been the broadest and most flexible exemption for educational users in the analog world, and will continue this role in the digital world. The question is not whether fair use applies to

²⁰³ See, e.g., *Marcus v. Rowley*, 695 F.2d 1171, 1174-79 (9th Cir. 1983) (distribution of multiple copies of copyrighted works to public school students held not fair use); *Wihtol v. Crow*, 309 F.2d 777, 780-81 (8th Cir. 1962) (same); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991) (for-profit copy center held liable for photocopying book excerpts for sale to students as part of "coursepacks" for university courses); *Encyclopedia Britannica Educational Corp. v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982) (consortium of public school districts held liable for recording educational motion pictures and videos broadcast on public television stations, and providing copies of the tapes to member schools).

There are few reported fair use cases dealing with educational uses. Reasons may include disinclination on the part of copyright owners to sue a university or library, both out of concern for public relations and because such institutions are major purchasers of copyrighted works. In addition, the financial incentive is generally low, given that the Copyright Act provides for the remission of statutory damages against nonprofit educational institutions, libraries and archives, or their agents or employees, who reasonably believed that their use was a fair use. 17 U.S.C. § 504(c)(2).

²⁰⁴ House Report, *supra* note 171, at 72.

distance education in a digital environment, but how it does. While there are not yet any cases addressing this issue, a court's analysis will depend on elements such as the subject matter of the course, the nature of the educational institution, the ways in which instructors use materials, and the kinds and amounts of materials used.

The first statutory factor, the purpose and character of the use, encompasses several variables. As discussed above, the first sentence of section 107 cites teaching, scholarship and research as examples of fair use purposes. To the extent that the use is for “nonprofit educational purposes,” as specified in the first factor, it is more likely to be fair. In addition, uses that are “transformative,” as opposed to merely reproductive or “consumptive,” are favored.²⁰⁵ A transformative use is one that uses the copyrighted work as raw material from which to produce insight or understanding, generally expressed in a new creative work.²⁰⁶ Education often involves such transformative uses, although it does not always do so.

The second factor is the nature of the copyrighted work. In weighing this factor, courts generally look to whether the work is creative or factual, and whether it is unpublished or published.²⁰⁷ Creative works are considered “closer to the core of intended copyright protection” than factual works, and therefore are less subject to fair use.²⁰⁸ Whether a work

²⁰⁵ *Acuff-Rose*, 510 U.S. at 577 (1994); *Sony*, 464 U.S. at 450 n.33 (1984).

²⁰⁶ *Acuff-Rose*, 510 U.S. at 577; Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990) (use is transformative when “quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings”).

²⁰⁷ *Acuff-Rose*, at 580; *Stewart*, 495 U.S. at 237-238; *Harper & Row, Publishers Inc. v. Nation Enterprises*, 471 U.S. 539, 563-64 (1985).

²⁰⁸ *Acuff-Rose*, 510 U.S. at 580 (collecting cases); see also *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 924-25 (2d Cir. 1994), *cert. dismissed*, 516 U.S. 1005 (1995).

used in the course of digital distance education is more factual or creative is likely to vary with the subject matter of the course. For example, a chemistry course is likely to use factual material, while a writing course is likely to focus on creative works.

Unpublished works are less subject to fair use than published ones because of the impact on the author's right to control the "first public appearance of his undisseminted expression."²⁰⁹ This aspect of the second factor is unpredictable in its application to distance education uses. Educators are likely to rely largely on published, available works to teach their classes. On the other hand, the curricula of certain types of classes, like graduate history courses, may incorporate unpublished materials such as letters or diaries.

Several other elements may be relevant to evaluation of the second fair use factor. In the educational context, a court may look at the intended audience for the copyrighted work itself. If it is a work prepared primarily for school markets, such as a textbook, "the defense of fair use would be far less appropriate than if the work were material prepared for the general public."²¹⁰ The work's commercial availability might also be considered.²¹¹ A user may have more justification for using a work without permission if it is "unavailable for purchase through normal channels."²¹² These aspects of the nature of the work may also be

²⁰⁹ *Harper*, 471 U.S. 539. Although fair use of unpublished works is narrow, "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the . . . factors." 17 U.S.C. § 107 (as amended by Act of October 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145).

²¹⁰ *Triangle Pubs., Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1176 n.14 (5th Cir. 1980); see also S. REP. NO. 94-473 at 64 (1975).

²¹¹ House Report, *supra* note 171, at 67.

²¹² S. REP. NO. 94-473 at 64 (1975).

relevant to the analysis of the other factors, particularly the impact of the use on the market for or value of the work.

The third fair use factor is the amount and substantiality of the portion used. The amounts of the portions of works used in an educational context will vary according to the teaching style of the instructor, the type of work, and the subject of the course. In some instances only excerpts of works may be used, such as in a survey course of English literature. In other cases the nature of the works being studied, such as short poems or paintings, will make it more likely that the whole work will be used. Because “the extent of permissible copying varies with the purpose and character of the use,” the evaluation of the amount used will relate to the first factor as well.²¹³

The fourth factor, the effect of the use upon the potential market for or value of the work, in effect weighs the extent of the market harm caused by the user’s conduct.²¹⁴ The market to be considered includes not only opportunities for sale or license of the work itself, but also opportunities to license the creation of derivative works.²¹⁵ This factor too will weigh differently for different distance education uses, and is intertwined with the analysis of the other three factors. The purpose of the use, the nature of the work, and the substantiality of the portion taken are all likely to bear on how much the market for or value of the work is

²¹³ *Acuff-Rose*, 510 U.S. at 586-87.

²¹⁴ While this factor has been described as the most important, *Harper*, 471 U.S. at 566, the Supreme Court recently made clear that “all [four factors] are to be explored, and the results weighed together, in light of the purposes of copyright.” *Acuff-Rose*, 510 U.S. at 578; see *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 113 (2d Cir. 1998); *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 77 n.8 (2d Cir. 1997); *American Geophysical*, 60 F.3d at 926.

²¹⁵ *American Geophysical*, 60 F.3d 913; *Acuff-Rose*, 510 U.S. at 593.

affected. Certain categories of works may be more susceptible to harm than others, such as materials produced primarily for use in instruction, or audiovisual works intended for a wide public audience that overlaps with traditional student populations. On the other hand, to the extent that a class is shown only a short excerpt of a work, the impact on the market is likely to be reduced.

In addition, the extent to which licenses are available for the work may play into the fair use balancing. The easy availability of a convenient mechanism for securing licenses at a reasonable cost, such as the Copyright Clearance Center, has been taken into account by the courts.²¹⁶ As a corollary, the unavailability of an effective licensing mechanism could weigh in favor of a finding of fair use.²¹⁷

In looking at digital distance education, characteristics specific to digital technologies are also likely to be relevant to the fourth factor. Despite the fact that the fair use doctrine is technology-neutral, the way it applies to a particular use may be affected by the technology used. In particular, the ability in the digital environment to easily make and distribute vast numbers of perfect copies could alter a court's evaluation of this factor.²¹⁸ Although this

²¹⁶ See *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1 (S.D.N.Y. 1992) (Leval, J.) (availability of CCC and other licensing systems for “prompt[] and inexpensive[]” access to articles weighed against fair use); *aff'd* 60 F.3d 913, 929-31 (1994) (including potential licensing revenues under fourth factor of fair use test).

²¹⁷ Cf. S. REP. NO. 94-473 at 64 (1975) (if work is “unavailable for purchase through normal channels the user may have more justification for reproducing it”); see also *Texaco*, 802 F. Supp. at 24 (distinguishing *Williams & Wilkins v. National Institute of Health*, 487 F.2d 1345 (1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975), on grounds that licensing options available to defendant did not exist when *Williams & Wilkins* was decided).

²¹⁸ Cf. House Report, *supra* note 171, at 72 (in the cases of copies of works made in educational broadcasts, “the number of copies reproduced and the extent of their reuse or exchange” should be weighed in applying the criteria of fair use).

aspect of the technology increases the risk to the copyright owner's markets, there are potentially countervailing elements as well. For example, the deployment of technological measures that control access to works, or control their downstream uses, may also be considered.

(c) *Fair use guidelines.* Several attempts have been made to provide greater certainty for both educational users and copyright owners under section 107, by crafting guidelines as to how fair use applies to educational uses. Guidelines are detailed standards describing permissible uses that represent a negotiated consensus among groups of interested parties. They do not have the force of law, do not control or alter statutory language, and are not binding on any party. Their purpose is to establish a "safe harbor" of conduct -- a minimum standard that those endorsing them agree would qualify as fair use.²¹⁹ They typically include guidance as to specific amounts of works that can safely be used for a particular purpose, the numbers of copies that can be made, and time periods for various uses. Operating within such guidelines substantially reduces the risk of suit. Accordingly, they are helpful to educators in planning their conduct. It is important to stress, however, that they are a floor and not a ceiling; conduct that falls outside the guidelines may qualify as fair use as

²¹⁹ See *Uniform Preamble for All Fair Use Guidelines*, CONFERENCE ON FAIR USE, FINAL REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE CONFERENCE ON FAIR USE 31 (1998) ("CONFU Final Report"): "While only the courts can authoritatively determine whether a particular use is fair use, these guidelines represent the endorsers' consensus of conditions under which fair use should generally apply and examples of when permission is required. Uses that exceed these guidelines may or may not be fair use. The endorsers also agree that the more one exceeds these guidelines, the greater the risk that fair use does not apply."

well.²²⁰ Despite the lack of legal force, courts have considered the contents of guidelines in evaluating fair use claims, and some have ruled in accordance with their principles.²²¹

During the drafting of the 1976 Act, and immediately following its enactment, guidelines were negotiated to address several types of educational use: analog classroom photocopying, educational uses of music, and off-air taping of broadcast programs for educational purposes. The legislative history of section 107 reproduces the guidelines for classroom photocopying and educational uses of music.²²² The effort to draft off-air taping guidelines began in 1977 and the guidelines were finalized in 1981.²²³ All of these educational guidelines have been endorsed by a number of entities,²²⁴ with many endorsers expressing the view that they increase certainty and security.

Congress encouraged the interested parties to “continue their efforts to provide additional specific guidelines” in the future in “areas where standards other than [the

²²⁰ House Report, *supra* note 171, at 70 (“The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107.”).

²²¹ See *Princeton Univ. Press v. Michigan Doc. Svcs., Inc.*, 99 F.3d 1381, 1390-91 (6th Cir. 1996) (en banc) (discussing legal effect of guidelines), *cert. denied*, 520 U.S. 1156 (1997); *Kinko’s*, 758 F. Supp. at 1527 (citing and discussing classroom photocopying guidelines); Nimmer at § 13.05[E][3][a].

²²² The classroom photocopying guidelines were agreed upon by representatives of certain author-publisher and certain educational organizations and endorsed as “reasonable” in the House Report. These guidelines permit a teacher to make single copies of a book chapter, newspaper article, short work, or graphic work from a book, periodical or newspaper; and multiple copies “for classroom use or discussion,” provided that the copying meets articulated tests of brevity, spontaneity, cumulative effect, and contains a notice of copyright. The companion guidelines for educational uses of music permit the making of one copy of a musical work per student for purposes other than performance, subject to a number of restrictions. House Report at 67-73.

²²³ They allow nonprofit educational institutions to record, use and store certain television broadcasts for limited periods of time under certain conditions. H.R. REP. NO. 97-495 at 8-9 (1982).

²²⁴ *Id.*

photocopying and music] guidelines may be appropriate.”²²⁵ After 1981, however, there were no efforts to draft fair use guidelines until the CONFU and CCUMC processes began in 1994, addressing the application of fair use in the digital environment.²²⁶

3. Other Exemptions.

Other exemptions in the Copyright Act may exempt certain distance education uses in limited circumstances, supplementing the exemptions discussed in the preceding section. While these additional exemptions are important to a full understanding of how the Copyright Act applies to education, they are unlikely to significantly expand the scope of permitted instructional uses in a digital environment.

(a) *Section 112 - Ephemeral recordings.* Section 112 permits the making of ephemeral recordings of transmission programs embodying the performance or display of copyrighted works in certain circumstances, for use in making transmissions that are authorized under various other provisions of the Act. This section was based upon “the traditional concept of ephemeral recordings as mere technical adjuncts of broadcasting that have no appreciable effect on the copyright owner’s rights or market for the copies or phonorecords.”²²⁷

Subsection (a) permits any transmitting organization to make a single copy of its authorized broadcasts under limited circumstances. It responds to arguments by broadcasters

²²⁵ House Report, *supra* note 171, at 72.

²²⁶ See *infra* Part V(A).

²²⁷ SECOND SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1975 REVISION BILL (1975) (“2^d Supplementary Report”).

that they needed to make limited reproductions for internal use to facilitate their broadcasts, and is intended to allow for the “practical exigencies of broadcasting.”²²⁸

Subsection (b) permits governmental or nonprofit organizations entitled to transmit displays or performances under section 110(2) or 114(a) (discussed below) to make not more than thirty copies of a transmission program embodying the performance or display, and to retain the copies for not more than seven years (other than a single archival copy).²²⁹ No further copies may be made from these copies.²³⁰ The exemption operates as an adjunct to the exemptions for performance and display under sections 110(2) and 114(a), allowing a nonprofit educational institution to make certain reproductions to facilitate the permitted performance or display without having to seek a separate license to do so. It is available only to the transmitting organization, and would not permit the making of copies by students.

This provision responds to arguments by educational organizations that recording instructional broadcasts was essential to their utility, since the same class would often be repeated asynchronously throughout the school day or over the years.²³¹ In describing an earlier draft of section 112, the House Judiciary Committee noted that it was “aware of the practical problems facing educational broadcasters and other transmitters if they are required to seek separate clearances of performing and recording rights. . . .”²³²

²²⁸ House Report, *supra* note 171, at 101. An example of such a use would be a radio broadcaster recording all the songs scheduled for a program on one tape, so that it could more easily play them in order.

²²⁹ 17 U.S.C. § 112(b).

²³⁰ *Id.*

²³¹ Supplementary Report, *supra* note 167, at 44.

²³² H.R. REP. NO. 90-83, at 60 (1967).

Section 112(b) has only limited applicability to digital distance education transmissions. It would permit, for example, the reproduction, and retention for seven years, of thirty copies of a digital broadcast of a transmission program authorized by section 110(2). It would also permit the making of archival copies of transmission programs involved in a course, provided that no further copies were made of the archival copies. However, it would not authorize the making of the transient reproductions necessary to the technical process of transmission in online courses for two reasons. First, it would be impossible, as a practical matter, to limit to thirty the RAM copies generated in the course of the transmission. Second, such copies inevitably generate further copies along the network, disqualifying the transmitting organization from the benefits of the exemption.

(b) *Section 114 - Scope of exclusive rights in sound recordings.* Until 1996, there was no performance right for sound recordings under U.S. copyright law. The Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”)²³³ amended section 106 of the Copyright Act to give owners of sound recordings the exclusive right “to perform the copyrighted work publicly by means of a digital audio transmission.”²³⁴ The DPRA also amended section 114, which limits the scope of exclusive rights in sound recordings, and additional amendments were subsequently made in 1998 by the DMCA.²³⁵ In its current form, section 114 divides the types of transmissions that carry performances of sound recordings into three categories. Depending on the category into which the digital audio transmission falls,

²³³ Pub. L. No. 104-39, 109 Stat. 336 (1995).

²³⁴ 17 U.S.C. § 106(6).

²³⁵ DMCA at § 405.

the performance of the sound recording could be subject to no right at all, a statutory license, or a full exclusive right. The three categories of transmissions in section 114(d) are: (1) nonsubscription broadcast transmissions (and certain retransmissions), which are completely exempted from the section 106(6) performance right; (2) subscription transmissions and certain “eligible nonsubscription transmissions” such as webcasting, which are eligible for a statutory license, subject to a list of criteria; and (3) interactive (on-demand) transmissions and other non-exempt transmissions that do not qualify for the statutory license, which are subject to the full exclusive performance right. All of these terms are defined at length in the statute.²³⁶

The application of this complex structure to digital distance education will vary depending on the nature of the activity involved. Distance education activities that entail digital “broadcast transmissions” of sound recordings will not be subject to the section 106(6) performance right. “Broadcast” transmissions are defined for this purpose as transmissions carried out by FCC-licensed radio or television stations.²³⁷

It is possible that some distance education activities will be eligible for a statutory license under section 114(d)(2). To qualify for a statutory license, a digital transmission must be either a subscription transmission or an “eligible nonsubscription transmission.” Certain distance education activities could entail subscription transmissions (transmissions that are controlled and limited to particular recipients, and for which payment is required).²³⁸ Other

²³⁶ 17 U.S.C. at § 114(j).

²³⁷ *Id.*

²³⁸ *Id.*

activities, such as those carried out synchronously by means of streaming audio, could be considered eligible nonsubscription transmissions. For either a subscription or eligible nonsubscription transmission to qualify for the statutory license, however, it must be noninteractive and meet a series of criteria set out in section 114, including not publishing the titles of the sound recordings in advance and not transmitting too many selections from the same phonorecord or by the same performer.²³⁹

Any digital transmission of a sound recording that is not exempt, and fails to meet all of the criteria to be eligible for the statutory license, will be subject to the full exclusive right under section 106(6). Because many asynchronous distance education activities are interactive, they will likely fall into this category.

Another paragraph of section 114 may also have some limited application to digital distance education uses. Section 114(b) limits the exclusive rights of reproduction, distribution and preparation of derivative works, so as not to apply to sound recordings included in “educational television and radio programs” distributed or transmitted by or through “public broadcasting entities,” as those terms are defined by law,²⁴⁰ provided that copies are not commercially distributed to the general public.²⁴¹ In an analog world this would mean that, in these circumstances, a sound recording could be performed, and the performance could be transmitted, reproduced, and distributed, since there is no analog performance right for sound

²³⁹ *Id.* at § 114(d)(2).

²⁴⁰ 47 U.S.C. § 397 and 17 U.S.C. § 118(g), respectively; 17 U.S.C. § 114(b).

²⁴¹ 17 U.S.C. § 114(b).

recordings.²⁴² In the digital world, however, the right to perform the work under section 106(6), not exempted by section 114(b), would still apply. Even if the performance was permitted under section 106(6), section 114(b) would not exempt uses by institutions other than public broadcasting entities, or uses in connection with instruction that do not qualify as “educational television or radio programs” within the meaning of the statute.

(c) *Section 111 - Secondary transmissions.* Section 111(a) exempts certain secondary transmissions of primary transmissions embodying a performance or display of a work.²⁴³ A secondary transmission is defined as “the further transmitting of a primary transmission simultaneously with the primary transmission,” or nonsimultaneously by a cable system outside the United States.²⁴⁴ Paragraph (a)(2) exempts secondary transmissions “made solely for the purpose and under the conditions specified by clause (2) of section 110.” This provision does not materially expand the exemptions for distance educators, but merely “make[s] clear that an instructional transmission within the scope of section 110(2) is exempt whether it is a ‘primary transmission’ or a ‘secondary transmission.’”²⁴⁵ For U.S. educational institutions, it would authorize only simultaneous transmissions of transmissions that are permitted under section 110(2).

²⁴² *Id.* at § 106(4) and (6).

²⁴³ *Id.* at § 111(a).

²⁴⁴ *Id.* at § 111(f).

²⁴⁵ House Report, *supra* note 171, at 92.

4. Compulsory Licenses.

Distance educators could obtain authorization to use some works in limited ways through a compulsory license. A compulsory license is a license established by statute that permits particular uses of works upon compliance with prescribed procedures, rates and terms. In addition to the section 114(d) compulsory license for certain transmissions of sound recordings discussed above, two other provisions may be relevant to educators.²⁴⁶ Section 115 establishes a compulsory license to make and distribute phonorecords of nondramatic musical works. Section 118(d) establishes a compulsory license for public broadcasting entities for certain uses of published nondramatic musical works, or pictorial, graphic and sculptural works, in the course of a transmission made by a noncommercial educational broadcast station, subject to the terms of any voluntary, industry-wide license agreement.²⁴⁷ There are a number of restrictions on the eligibility for these licenses. Because of their limited applicability, they are not likely to be much used by digital distance educators.

C. ADDITIONAL PROVISIONS RELEVANT TO DISTANCE EDUCATORS

This section discusses two titles of the recently enacted DMCA, one providing limitations on the liability of online service providers and the other establishing new technological adjuncts to copyright protection. While these provisions do not create new exemptions for distance education, they add a certain degree of security for both educational

²⁴⁶ Other compulsory licenses in the Copyright Act relate to secondary transmissions by cable systems or satellite carriers. 17 U.S.C. § 111(b)-(f) and 119.

²⁴⁷ In practice, virtually all of the uses covered by section 118 have been governed by voluntary agreements that preempt the terms of the compulsory license since enactment of the 1976 Act.

institutions and copyright owners disseminating and licensing material in the digital environment, and may relate to existing exemptions in various respects.

1. Section 512 - Online Service Provider Liability.

Educational institutions today often provide network access for their communities of faculty, staff and students. Section 512 of the Copyright Act, enacted as Title II of the DMCA, provides greater security that, merely by doing so, they will not become liable for infringing material transmitted over the network. This section limits the liability of online service providers for copyright infringement while engaging in certain types of activities. When the service providers, including educational institutions, meet the statutory criteria, they will not be held liable for damages.

In the course of providing digital distance education, an educational institution may act as a service provider rather than the originator of the transmission, and therefore be entitled to the benefit of section 512's limitations on liability.²⁴⁸ The limitations apply to four types of activity by a service provider: 1) transitory communications; 2) system caching; 3) storage of information on systems or networks at the direction of users; and 4) information location tools. Each limitation entails a complete bar on monetary damages, and restricts the availability of injunctive relief in various respects.²⁴⁹

²⁴⁸ For purposes of the first limitation, relating to transitory communications, "service provider" is defined as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received." 17 U.S.C. § 512(k)(1)(A). For purposes of the other three limitations, "service provider" is more broadly defined as "a provider of online services or network access, or the operator of facilities therefor." 17 U.S.C. § 512(k)(l)(B).

²⁴⁹ *Id.* at § 512(j). The conditions of applicability and requirements of these limitations are complex and beyond the scope of this Report. For a detailed summary, see The Digital Millennium Copyright Act of 1998, U.S. Copyright Office Summary (www.loc.gov/copyright/legislation/dmca.pdf) ("DMCA

In addition to detailed conditions contained in each of the four limitations, a service provider must meet two overall conditions: (1) it must adopt and reasonably implement a policy of terminating in appropriate circumstances the accounts of subscribers who are repeat infringers; and (2) it must accommodate and not interfere with standard technical measures used to protect and identify works.²⁵⁰

Section 512(e) provides special rules tailored to nonprofit educational institutions. It determines when the actions or knowledge of a faculty member or graduate student employee who is performing a teaching or research function may affect the eligibility of a nonprofit educational institution for the limitations on liability. In general, such a faculty member or graduate student shall be considered a separate person from the institution for purposes of determining who initiated the transmission, and his knowledge or awareness of infringement will not be attributed to the institution. For an institution to benefit from these rules, the following conditions must be met:

- the faculty member or graduate student's infringing activities do not involve providing online access to course materials that were required or recommended during the past three years;
- the institution has not received more than two notifications over the past three years that the faculty member or graduate student was infringing; and
- the institution provides all of its users with informational materials describing and promoting compliance with copyright law.

Summary").

²⁵⁰ 17 U.S.C. § 512(i).

Section 512 will not affect an educational institution's legal obligations as a provider of content. When an educator selects material to be used in teaching a course, and determines how it will be used and to whom it will be transmitted, he is subject to the standard copyright rules described above.

2. Chapter 12 - Technological Adjuncts to Copyright.

The DMCA also added a new Chapter 12 to Title 17 of the U.S. Code, providing technological adjuncts to copyright protection in order to make digital networks safe for the exploitation and licensing of copyrighted works.²⁵¹ These provisions should assist in lessening some of the risks involved in digital distance education. Section 1201 of this Chapter contains a prohibition against the circumvention of technological measures used by copyright owners to protect their works. Section 1202 protects the integrity of copyright management information ("CMI") that may accompany a copyrighted work, ensuring that the public is able to rely on such information.

Section 1201 divides technological measures into two categories: measures that prevent unauthorized access to a copyrighted work, and measures that prevent unauthorized copying.²⁵² As to either type of measure, the section makes it illegal to make or sell devices or services that are used to circumvent, in specified circumstances.²⁵³ As to access control measures only,

²⁵¹ The provisions of Chapter 12 are also described in greater detail in the DMCA Summary.

²⁵² "Copying" is used here to refer to the exercise of any of the exclusive rights of the copyright owner. Consequently, a technological measure that prevents unauthorized distribution or public performance or display of a work would fall in this second category.

²⁵³ See 17 U.S.C. § 1201(a)(1) (proscribing devices or services that: (1) are primarily designed or produced to circumvent; (2) have only limited commercially significant purpose or use other than to circumvent; or (3) are marketed for use in circumventing).

the act of circumvention in itself is also subject to a prohibition.²⁵⁴ While violations may give rise to both civil and criminal penalties, nonprofit libraries, archives and educational institutions are entitled to a complete remission of damages in civil cases if the violation was innocent, and are entirely exempted from criminal liability.²⁵⁵

The prohibition on the act of circumventing access controls does not take effect, however, until two years after the statute's enactment.²⁵⁶ It is subject to an exception for users of a work in a particular class of works who are likely to be adversely affected by the prohibition in their ability to make noninfringing uses.²⁵⁷ The applicability of the exception will be determined through a periodic rulemaking by the Librarian of Congress on the recommendation of the Register of Copyrights, after consultation with the Assistant Secretary of Commerce for Communications and Information.²⁵⁸ Those digital distance education uses that are exempted from liability in the Copyright Act, now or in the future, could be among the noninfringing uses taken into account in the rulemaking.

Section 1202 makes it illegal deliberately to remove or alter CMI, or to provide false CMI with the intent to assist infringement.²⁵⁹ CMI is defined as identifying information about

²⁵⁴ This distinction was employed to assure that the public will have the continued ability to make fair use of copyrighted works. Since copying of a work may be a fair use under appropriate circumstances, section 1201 does not prohibit the act of circumventing a technological measure that prevents copying. By contrast, since the fair use doctrine is not a defense to the act of gaining unauthorized access to a work, the act of circumventing a technological measure in order to gain access is prohibited.

²⁵⁵ 17 U.S.C. §§ 1203(c)(5)(B) and 1204(b).

²⁵⁶ *Id.* at § 1201(a)(1)-(A).

²⁵⁷ *Id.* at § 1201(a)(1)(B)-(E).

²⁵⁸ *Id.* at § 1201(a)(1)(C).

²⁵⁹ *Id.* at § 1202(a)-(b).

the work, the author, the copyright owner, and in certain cases, the performer, writer or director, as well as terms and conditions for use of the work, and such other information as the Register of Copyrights may prescribe by regulation.²⁶⁰

These provisions do not affect the existence or scope of digital distance education exemptions, or determine whether a particular use is infringing. They are relevant to distance education, however, in that they should strengthen the ability of both educators and copyright owners to effectively protect the security of transmitted material in a digital environment. By protecting against the circumvention of technological measures, and safeguarding the integrity of information which can be used to locate owners, license educational uses of digital materials, and identify infringing copies, these provisions can help to facilitate licensing and reduce the risks of unauthorized access and use.

D. INTERNATIONAL CONTEXT

1. Treaty Obligations.

The United States is a party to a number of treaties which impose obligations with respect to copyright. Any change to the copyright law of the United States must take into account these international obligations. The two major multilateral treaties dealing with copyright are the Berne Convention for the Protection of Literary and Artistic Works (Paris 1971) (“Berne”) and the World Trade Organization (“WTO”) Agreement on the Trade-Related Aspects of Intellectual Property Rights (1994) (“TRIPs”).²⁶¹ These treaties require member

²⁶⁰ *Id.* at § 1202(c).

²⁶¹ The TRIPs Agreement constitutes Annex IC of the Marrakesh Agreement establishing the World Trade Organization (1994).

countries to provide certain minimum copyright rights, and limit the scope of permissible exceptions to those rights.

The Berne Convention establishes the basic foundation upon which most other copyright-related treaties are built. Berne requires member countries to grant to authors certain exclusive rights, including rights of reproduction, public performance, broadcasting and other means of communication to the public, and adaptation.²⁶² Different rules govern the permissibility of exceptions to different rights.

Some Berne exceptions are applicable to all rights. Most relevant here is article 10(2), which allows members to adopt legislation "to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice."

As to the reproduction right, article 9(2) provides that exceptions are permitted in "certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."²⁶³ Other rights are subject to certain specific exceptions, supplemented by the "minor exceptions" generally agreed to be permitted by implication, provided that they are de minimis.²⁶⁴

²⁶² Berne, art. 9, 11, 11*bis*, 11*ter* and 12.

²⁶³ Berne, art. 9(2).

²⁶⁴ SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986, 535-537 (1987).

The TRIPs Agreement incorporates the substantive obligations of Berne,²⁶⁵ and goes beyond them in various respects. In particular, the limits on exceptions to the reproduction right established in Berne article 9(2) are extended to apply to exceptions to all exclusive rights. Article 13 of TRIPs states:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

Berne and TRIPs have recently been updated and supplemented by two new treaties concluded at the World Intellectual Property Organization (“WIPO”) in 1996: the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”) (together “WIPO Treaties”). These treaties, which are not yet in force,²⁶⁶ contain provisions to ensure that the balance of rights between copyright owners and users will be carried forward into the digital age. They include certain additional rights for copyright owners, and extend the Berne article 9(2) standard to all of these new rights, as well as to all rights in Berne.²⁶⁷ Both treaties contain identical Agreed Statements explicating the application of this traditional standard in the digital environment:

It is understood that the provisions of [this] Article . . . permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their

²⁶⁵ TRIPs, art. 9(1).

²⁶⁶ The WIPO treaties will enter into force three months after thirty instruments of ratification or accession by States have been deposited with WIPO. WCT, art. 20; WPPT, art. 29. The United States has implemented the obligations of these treaties through the DMCA, and the Senate has given its consent to ratification. So far, seven countries have ratified the WCT and five have ratified the WPPT. WIPO, *Signatories to Treaties Administered by WIPO Not Yet in Force* (<http://www.wipo.int/eng/ratific/index.htm>).

²⁶⁷ WCT, art. 10; WPPT, art. 16.

national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that [this] Article . . . neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

This language represents the consensus of the more than 100 countries that participated in the negotiations as to the interpretation of Berne article 9(2).

Any new or amended exemption for distance education should be drafted to be compatible with the standards of TRIPs article 13 and Berne article 9(2). Such an exemption should be confined to "certain special cases," and neither conflict with normal exploitation of the work, nor unreasonably prejudice the copyright owner. Under article 10(2), a use "by way of illustration . . . for teaching" may be permitted "to the extent justified by the purpose," if "compatible with fair practice." Whether any particular exemption would satisfy these standards will depend on its scope and effect. The broader the exemption, the more likely that our trading partners might claim that it was inconsistent with Berne and TRIPs obligations.²⁶⁸

2. Impact of Any Amendments Abroad.

An additional issue in the international arena is the effect that any new exemption for digital distance education might have abroad. When educational institutions in the United States transmit courses to students in other countries, a number of legal questions are raised, relating to choice of law. Which country's law determines the ownership of the course

²⁶⁸ An example of a current dispute over TRIPs consistency is the case initiated by the European Union against the United States in the WTO challenging section 110(5) of the Copyright Act, as amended in 1998 by the Fairness in Music Licensing Act. United States-Section 110(5) of US Copyright Act: Request for Consultations by the European Communities and their Member States, WTO Doc. WT/DS160/1 (Feb. 4, 1999).

materials (either the course itself or the preexisting materials it contains)? Which country's law determines whether particular license terms are valid, and how they should be interpreted? Which country's law determines the scope of the copyright owner's rights, and whether the acts of the educational institution constitute an infringement? If a lawsuit is brought, there may be additional procedural questions of jurisdiction, venue, and enforcement of judgments.

Under existing legal doctrines, the answers to these questions are far from clear. In the traditional analog world, the majority view has been that questions of authorship and ownership are determined by the law of the work's country of origin.²⁶⁹ The validity and meaning of a contract is generally determined by the law of the country with the most significant connections to the contract.²⁷⁰ The scope of rights, and therefore what acts constitute infringements, is determined by the law of the country where the acts took place.²⁷¹ The latter rule is based on the principle of territoriality, under which each country grants a national copyright, and defines the nature and scope of the rights that are enjoyed within its own borders.

The problem is that in the digital environment, it becomes less clear where the relevant act took place. In the case of a digital transmission, is it the country where the transmitting organization resides, where the server is located, where the student is enrolled, or where the transmission is received by the student? Various proposals have been suggested, but there are

²⁶⁹ See, e.g., *Itar-Tass Russian News Agency v. Russian Kurrier, Inc.*, 155 F.3d 82, 90-91 (2d Cir. 1998). Cf. 17 U.S.C. § 104 A(b) (copyright in a restored work “vests initially in the author or initial rightholder of the work as determined by the law of the source country of the work”).

²⁷⁰ See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 188 (1971); Convention on the Law Applicable to Contractual Obligations (Rome 1980) art. 4, 1980 OJ (L 266).

²⁷¹ See Berne, art. 5(2); *Itar-Tass*, 155 F.3d at 91.

no definitive answers.²⁷² It is therefore hard to predict whether any new exemption in U.S. law might be applied to the transmission of a distance education program by an American university to a student in another country.

If the law of the country where the transmission is received is found to apply, universities will have difficulty determining what conduct is permissible, especially if courses are transmitted to students in many countries. The content of other countries' laws on distance education will become increasingly important to U.S. educators. It should be kept in mind, however, that because most countries today are party to the Berne Convention or the TRIPs Agreement, their laws should comply with the restrictions described above.

Although it was not possible in the time allotted to this study to research thoroughly the laws of other countries, we understand that several are considering amendments to their copyright laws to deal with digital distance education issues. Their general approach is to update existing statutory or collective licensing provisions on educational photocopying and/or off-air taping to include digital reproduction by educational institutions. It is not clear what types of digital reproductions would be covered or whether other rights might be included. To our knowledge, the only country that has to date enacted such legislation is Denmark, although Canada and Australia are reportedly considering similar changes.²⁷³

²⁷² See generally Jane C. Ginsburg, *Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted through Digital Networks*, WIPO Doc. GCPIC/2 (November 30, 1998). (http://www.wipo.org/eng/meetings/1998/gcpic/pdf/gcpic_2.pdf). See also European Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, art. V(2), 1993 OJ (L 248), at 15-21 (satellite transmissions deemed to take place in the country of uplink).

²⁷³ Danish law provides for extended collective licensing for photocopying by educational institutions, under which all right holders in a particular category of works are bound by terms established by a collective licensing society of a majority of such right holders. The law was amended in June 1998 to cover

Finally, the European Union is considering a directive that would harmonize its member states' laws in this area. The proposed Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society,²⁷⁴ in the version currently being considered by the European Commission, would allow member states to establish limitations on the rights of reproduction and communication to the public permitting a single use for the purpose of illustration for teaching, as long as the source is indicated and to the extent justified by the noncommercial purpose, on the condition that the rights holder receives equitable compensation.²⁷⁵

digital reproductions, but the amendment has not yet been utilized because no collective licensing has been established for such uses.

²⁷⁴ COM (97) 628 final, 1998 OJ (C 108), at 6 (“Information Society Directive”).

²⁷⁵ *Id.* at art. 5(3a) n(as amended by the European Parliament, Eur. Parl. Doc. A4-0026/99, Amend. 46 (available at <http://www.europarl.eu.int/plenary/en>)).

V. PRIOR INITIATIVES ADDRESSING COPYRIGHT AND DIGITAL DISTANCE EDUCATION

A. FAIR USE GUIDELINES

The first in-depth public discussion of the issue of copyright law and digital distance education began nearly five years ago, in the context of an examination of how the fair use doctrine applies in the digital environment.²⁷⁶ Two different initiatives in this area began separately and proceeded on parallel tracks, with varying results. Both sought to develop guidelines interpreting the parameters of fair use in connection with certain educational uses of copyrighted works through digital technology.²⁷⁷

One working group was begun in June 1994, at the instigation of the Consortium of College and University Media Centers (“CCUMC”) and the Agency for Instructional Technology (AIT), to examine the possibility of drafting fair use guidelines for educational multimedia.²⁷⁸ The second was an outgrowth of the Conference on Fair Use (“CONFU”) convened in September 1994 by the Working Group on Intellectual Property Rights of the Clinton Administration’s Information Infrastructure Task Force, chaired by the Commissioner

²⁷⁶ See *supra* Part IV(B)(2) for a detailed description of the fair use doctrine of the Copyright Act, 17 U.S.C. § 107.

²⁷⁷ See *id.* for an explanation of the concept and legal effect of such fair use guidelines.

²⁷⁸ Educational Fair Access and the New Media National Conference, American University, Washington D.C. June 15-17, 1994.

of Patents and Trademarks.²⁷⁹ CONFU established a number of working groups on different topics, including one on distance learning.²⁸⁰

Both the CCUMC group and the CONFU Working Group on Distance Learning engaged in intensive debate of the issues over a period of several years. Each included a wide range of interested parties from the educational, library, and copyright owner communities, with different participants active in the process at different points.²⁸¹ While the two groups addressed different subjects, they shared numerous participants and kept abreast of each other's activities.

The outcomes of the discussions were mixed. One positive result was a greater mutual understanding of the issues, with considerable agreement developed as to which activities should or should not be permissible. Both groups were also successful in preparing draft guidelines, one dealing with the use of copyrighted works in educational multimedia projects created by educators or students, and the other dealing with the performance and display of copyrighted works in distance learning classes. Ultimately, the entire process became controversial, both because of conflicting views of the value and function of fair use guidelines generally, and due to anticipation of possible Congressional action, including on the subject of

²⁷⁹ Notice of First Meeting of Conference on Fair Use and the National Information Infrastructure (NII), 59 Fed. Reg. 46, 823 (1994).

²⁸⁰ Other working groups also addressed topics relevant to education, including the application of fair use to electronic reserve systems that permit storage, access, display and downloading of electronic materials intended to support the instructional requirements of a specific course within a nonprofit educational institution. While a subset of this working group circulated draft guidelines in March 1996, they did not receive widespread acceptance and were not disseminated as a formal work product of CONFU. CONFU Final Report, *supra* note 219, at 15-16.

²⁸¹ For a list of participating organizations, see CONFU Final Report, *supra* note 219, at 48 and 57-58.

distance education. As a result, none of the guidelines were formally adopted by CONFU.²⁸² Nevertheless, the educational multimedia and distance learning guidelines have had an impact on the world of education. As described below, a number of organizations and companies have officially endorsed them or unofficially rely on them for guidance.

These earlier efforts are of interest here in several respects. They are not directly relevant as a point of comparison, since the Copyright Office study is not limited to an examination of fair use, but focuses on proposed changes to section 110(2). There is substantial overlap, however, in the issues addressed in this Report and in the CONFU and CCUMC discussions, and in the consideration of which activities in the field of digital distance education are appropriate and should be permitted by the law.

1. The Educational Multimedia Fair Use Guidelines.

After two years of negotiation, the working group coordinated by the CCUMC issued a set of guidelines on educational multimedia in September 1996, and proceeded with its own process for review and endorsement. The guidelines were published in a non-legislative report of the House of Representatives Subcommittee on Courts and Intellectual Property, described as “an agreed upon interpretation of the fair use provisions of the Copyright Act by the overwhelming majority of institutions and organization affected by educational multimedia.”²⁸³ CONFU also subsequently adopted the Fair Use Guidelines for Educational Multimedia as a

²⁸² Three of the proposed guidelines were, however, included for reference in the Final Report, at pp. 33-59. For the convenience of readers, copies of the educational multimedia and distance learning guidelines are annexed as Appendices F and G, respectively.

²⁸³ SUBCOMM. ON COURTS AND INTELLECTUAL PROPERTY, COMM. ON THE JUDICIARY, 104th Cong., NONLEGISLATIVE REPORT RELATED TO FAIR USE GUIDELINES FOR EDUCATIONAL MULTIMEDIA (Comm. Print 1996).

CONFU proposal.²⁸⁴ Although maintained as a parallel initiative by CCUMC, these guidelines are also regarded as a product of the CONFU process.²⁸⁵

The guidelines provide guidance for “the fair use of portions of lawfully acquired copyrighted works in educational multimedia projects which are created by educators or students as part of a systematic learning activity at nonprofit educational institutions.”²⁸⁶ The guidelines cover students producing such projects for a specific course, and educators doing so “for their own teaching tools in support of curriculum-based instructional activities at educational institutions.”²⁸⁷ They set out specific criteria for the length of time the projects may be used, the portions of different types of copyrighted works that may be used, and the copying and distribution of the projects.²⁸⁸ They also state that students “should be instructed about the reasons for copyright protection and the need to follow these guidelines,”²⁸⁹ remind both educators and students to provide attribution and acknowledgments, and advise them that they must include a notice of use restrictions under copyright law on the opening screen of the program and any accompanying print material.²⁹⁰

Although the preamble states that the guidelines “are not intended to cover fair use of copyrighted works in other educational contexts such as . . . distance education, or electronic

²⁸⁴ CONFU Final Report, *supra* note 219, at 14.

²⁸⁵ *Id.* at 6.

²⁸⁶ *Id.* at 14.

²⁸⁷ Fair Use Guidelines for Educational Multimedia at § 2 (Appendix F).

²⁸⁸ *Id.* at § 4.

²⁸⁹ *Id.* at § 4.2.

²⁹⁰ *Id.* at § 6.2-6.3.

reserves,”²⁹¹ they do provide guidance for certain uses within a general definition of distance education. The guidelines state that educators may perform and display their own educational multimedia projects “for remote instruction to students enrolled in curriculum-based courses and located at remote sites provided over the educational institution’s secure electronic network in real-time”²⁹² They further allow for limited delayed or asynchronous use:

If the educational institution’s network or technology used to access the educational multimedia project created under Section 2 of these guidelines cannot prevent duplication of copyrighted material, students or educators may use the multimedia educational projects over an otherwise secure network for a period of only 15 days after its initial real-time remote use in the course of instruction or 15 days after its assignment for directed self-study.²⁹³

The Educational Multimedia Fair Use Guidelines have been endorsed by numerous associations representing educational institutions, licensing organizations and content providers, as well as individual companies, and support for them has been expressed by some governmental agencies.²⁹⁴ In CONFU, because there was substantial support but no general consensus among participants, it was suggested that the guidelines be tried and monitored for two or three years.²⁹⁵ Many educational institutions across the country at both the K-12 and post-secondary levels are using them as a reference or link to them on their websites.²⁹⁶

²⁹¹ *Id.* at § 1.1. This language is taken from the CONFU Uniform Preamble for All Fair Use Guidelines. CONFU Final Report, *supra* note 219, at 31.

²⁹² Fair Use Guidelines for Educational Multimedia at § 3.2.3 (Appendix F).

²⁹³ *Id.* at § 3.2.3.

²⁹⁴ A partial list of endorsers may be found in the CONFU Final Report, *supra* note 219, at 57. For a complete list, refer to the CCUMC website (<http://www.indiana.edu/~ccumc/mmfairuse.html>).

²⁹⁵ CONFU Final Report, *supra* note 219, at 15.

²⁹⁶ *See, e.g.*, University of Texas System website (<http://www.utssystem.edu/OGC/IntellectualProperty/ccmcguid.htm>).

2. The CONFU Proposal for Fair Use Guidelines for Distance Learning.

The CONFU Distance Learning Working Group submitted its draft guidelines as a proposal in November 1996, explaining:

The purpose of these guidelines is to provide guidance for the performance and display of copyrighted works in some of the distance learning environments that have developed since the enactment of Section 110 and that may not meet the specific conditions of Section 110(2). They permit instructors who meet the conditions of these guidelines to perform and display copyrighted works as if they were engaged in face-to-face instruction.²⁹⁷

The proposed guidelines apply to the performance and display of lawfully acquired copyrighted works, such as dramatic or audiovisual works, that are not included under section 110(2), as well as to types of uses that are not addressed in that section.²⁹⁸ The guidelines address the following uses: “(1) live interactive distance learning classes (i.e., a teacher in a live class with all or some of the students at remote locations) and (2) faculty instruction recorded without students present for later transmission. They apply to delivery via satellite, closed circuit television or secure computer network.”²⁹⁹

Although the guidelines interpret the fair use doctrine, they are explicitly informed by the principles of section 110(2), and adopt a number of its concepts. The guidelines similarly apply only to nonprofit educational institutions, but add the limitation that the use must also be noncommercial.³⁰⁰ The students who may view the transmission must be officially enrolled in

²⁹⁷ Proposal for Educational Fair Use Guidelines for Distance Learning at § 1.2 (Appendix G).

²⁹⁸ *Id.* at § 2.1.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at § 2.2.1, § 7.1.

the course.³⁰¹ Unlike section 110(2), the guidelines would permit the use of any category of copyrighted work. The acts described above are considered to fall within the guidelines only if various restrictions are met: First, the works performed must be "integrated into the course," as well as meeting requirements similar to those in section 110(2) of being part of systematic instruction, and directly related and of material assistance to the teaching content of the transmission. The performance may not be for entertainment purposes.³⁰² Second, technological measures must be used to prevent unauthorized access or copying, and the transmission must be received in a classroom or other location where the reception can be controlled by the institution.³⁰³ Finally, while there is no limit on the amounts of works that can be used, if an entire work or a large portion thereof is performed, it may be transmitted only once without obtaining permission.³⁰⁴

Although the working group discussed distance learning generally, the draft guidelines focused primarily on synchronous delivery. Some participants believed that the time was not ripe for consideration of asynchronous delivery over a computer network. They explained that "the technology is rapidly developing, educational institutions are only now beginning to experiment with such distance learning courses, and publishers and other content creators are in the early stages of developing materials and marketing strategies for publisher-produced

³⁰¹ *Id.* at § 2.2.2.

³⁰² *Id.* at § 3.1.

³⁰³ *Id.* at § 4; § 5.2.1.

³⁰⁴ *Id.* at § 5.1.

computer network delivery of distance learning materials.”³⁰⁵ Other participants, primarily educational representatives managing network-based distance learning programs or assisting with their support, believed that guidelines for distance learning that failed to cover asynchronous delivery would not adequately address the concerns of the educational community. Given this lack of consensus and the limited time available, the proposed guidelines “do not cover asynchronous delivery of distance learning over a computer network, even one that is secure and capable of limiting access to students enrolled in the course through PIN or other identification system.”³⁰⁶

The proposed guidelines, like the Educational Multimedia Guidelines, do address certain asynchronous uses. Under the guidelines, an eligible institution “may record or copy classes that include the performance of an entire copyrighted work, or a large portion thereof, and retain the recorded copy for up to 15 consecutive class days (i.e., days in which the institution is open for regular instruction) for viewing by students enrolled in the course.”³⁰⁷ Permission is required, however, for further dissemination of recorded courses.³⁰⁸

The proposed guidelines on distance learning were included as an appendix to CONFU’s Interim Report, which was published in December, 1996.³⁰⁹ In May 1997, it

³⁰⁵ CONFU Final Report, *supra* note 219 at 12-13.

³⁰⁶ *Id.*

³⁰⁷ Proposal for Educational Fair Use Guidelines for Distance Learning, at § 5.2.1 (Appendix G).

³⁰⁸ *Id.* at § 7.2.

³⁰⁹ The publication of the Interim Report opened a six-month period during which parties could review the proposed guidelines and determine whether or not to endorse them formally. A list of endorsements was published in September 1997, along with a summary of the status of the working group discussions, in the Report to the Commissioner on the Conclusion of the First Phase of the Conference on Fair Use. See CONFERENCE ON FAIR USE, REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE FIRST PHASE OF THE

became apparent that while many organizations had endorsed the proposed guidelines, a significant number of CONFU participants were dissatisfied. Among the sources of dissatisfaction was the failure to address asynchronous computer network delivery.³¹⁰ The Distance Learning Working Group was expanded by inviting additional representatives from the educational community, with the goal of developing guidelines for asynchronous computer network delivery of distance learning courses. The reconstituted group met twice in the fall of 1997, but its discussions came to an end without conclusion in the midst of the controversy about the advisability of guidelines in general.

The CONFU proposed distance learning guidelines have been endorsed by a number of entities, including library and educational associations and content owners,³¹¹ and some institutions are using them as a reference or linking to them.

B. CONGRESSIONAL CONSIDERATION

This section describes the events in the 105th Congress that culminated in enactment of section 403 of the DMCA.

1. Legislative Proposals.

In 1997, two bills were introduced in the House and Senate, each proposing a number of amendments to the Copyright Act to address issues raised by digital technologies.³¹² One of

CONFERENCE ON FAIR USE 54 (1997).

³¹⁰ CONFU Final Report, *supra* note 219 at 13.

³¹¹ See CONFERENCE ON FAIR USE, REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE FIRST PHASE OF THE CONFERENCE ON FAIR USE 54 (1997) (preliminary list of organizations endorsing these guidelines, received as of September 1997).

³¹² The Digital Copyright Clarification and Technology Education Act of 1997, S. 1146, 105th Cong. (introduced by Senator John Ashcroft on September 3, 1997), and the Digital Era Copyright Enhancement

the proposed amendments in both bills dealt with the distance education exemption in section 110(2).

The bills would have amended section 110(2) to exempt:

- (2) performance, display **or distribution** of a work, by or in the course of **an analog or digital** transmission, if --
 - (A) the performance, display or distribution is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution;
 - (B) the performance, display or distribution is directly related and of material assistance to the teaching content of the transmission; and
 - (C) the **work is provided for reception by** --
 - (i) **students officially enrolled in the course in connection with which it is provided;** or
 - (ii) officers or employees of governmental bodies as part of their official duties or employment, . . .³¹³

Thus, the amendment would have clarified that the exempted transmission could be analog or digital. It would also have broadened the scope of the exemption by enlarging upon the works, the rights, and the locations covered. First, the categories of works would have been expanded, removing the existing limitation to a “nondramatic literary or musical work” and allowing performance of *any* type of work. Second, while the current Act exempts only the exercise of the rights of performance and display, the amendment would have added the right of distribution. Third, the amendment would have expanded the permissible locations to which the transmission could be made, removing the limitation that the transmission be made primarily for reception in classrooms and by people prevented from classroom attendance by

Act, H.R. 3048, 105th Cong. (introduced by Representative Rick Boucher on November 13, 1997).

³¹³ See S. 1146, *supra* note 312, at § 204(b); H.R. 3048, *supra* note 312, at § 5(b).

disabilities or other special circumstances, and allowing transmissions for reception by any student officially enrolled in the course.

The limits established by paragraphs (A) and (B) of existing section 110(2), however, would have remained. To qualify for the exemption, any transmitted work would still have had to be conveyed as part of the “systematic instructional activities of a governmental body or nonprofit educational institution,” and be “directly related and of material assistance to the teaching content of the transmission.”

No floor action was taken on these bills.

1. Senate Discussions.

In 1997, the Senate took up consideration of the World Intellectual Property Organization Copyright and Performances and Phonograms Treaty Implementation Act of 1997.³¹⁴ During discussions in the Committee on the Judiciary, the subject of digital distance education was raised.

In the spring of 1998, Senators Orrin G. Hatch, Patrick J. Leahy and John Ashcroft brought together various interested parties to determine whether an agreement could be reached on an amendment for distance education. When the parties were unable to reach agreement, Senators Hatch, Leahy and Ashcroft requested that the Copyright Office facilitate further negotiations on the subject and make recommendations within several days, including legislative language if possible.³¹⁵

³¹⁴ WIPO Copyright and Performances and Phonograms Treaty Implementation Act of 1997, S. 1121, 105th Cong. (introduced on July 31, 1997).

³¹⁵ Letter from Senators Orrin G. Hatch, Patrick J. Leahy and John Ashcroft, Committee on the Judiciary, to Marybeth Peters, Register of Copyrights (April 24, 1998) (Appendix H).

The distance education negotiations facilitated by the Copyright Office took place on April 27-28, 1998. They were presided over by the Register of Copyrights and involved representatives and associations of copyright owners, licensing organizations, educational institutions, and libraries and archives. Numerous issues were addressed, including the threshold question of whether or not the law should be changed to address the use of copyrighted works in digital distance education. Subsidiary issues included what, if any, limitations should be imposed on the type and quantity of works used, which exclusive rights should be covered, who should be eligible for any exemption, and appropriate limitations on the recipients of transmissions and their location. The participants discussed at some length the availability, effectiveness, and need for technological measures to limit reception of copyrighted works to authorized recipients and prevent unauthorized downstream use. The implementation of institutional policies and training about copyright for students and faculty engaged in digital distance education was also discussed, as was the role of licensing. Finally, the possibility was raised of a study assessing the system after an appropriate period of time.

During this process, it became clear that many complex and interrelated issues were involved that could not be given adequate consideration in the limited time available. Nor could all stakeholders be identified and consulted.

2. Initial Copyright Office Recommendations.

On April 29, 1998, the Copyright Office submitted its initial recommendations to Senators Hatch, Leahy and Ashcroft. The recommendations included statutory language for a

narrow amendment to section 110(2), and a proposal for a subsequent study of the broader issues involved in digital distance education.³¹⁶

The amendment to section 110(2) was intended to update it to allow the same instructional broadcasting activities to take place using digital technologies. It would have permitted:

(2) performance of a nondramatic literary or musical work or display of a work by or in the course of **an analog or noninteractive digital transmission, and reproduction of such work in intermediate, transient copies made in the course of a digital transmission,**

if —

(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and

(C) the transmission is made primarily for —

(i) reception in classrooms or similar places normally devoted to instruction, or

(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment; **and**

(D) any intermediate, transient copies made in the course of the transmission are retained for no longer than reasonably necessary to complete the transmission.

The Copyright Office also recommended adding the following definition of

“noninteractive” digital transmission to section 101:

A digital transmission is “noninteractive,” for purposes of section 110(2), when the transmission is made —

³¹⁶ Letter from Marybeth Peters, Register of Copyrights, to Senators Orrin G. Hatch, Patrick J. Leahy and John Ashcroft, Committee on the Judiciary (April 29, 1998) (Appendix I).

(1) through a communications medium that does not afford an opportunity for the recipient to communicate a response to the person making the transmission through that medium; and

(2) at a time or times determined by the person making the transmission.

Given the compressed time frame, this recommendation was intended as a minimalist approach, seeking to update the exemption without broadening it. It would have retained all of the existing limitations, adding only language that appeared necessary as a technical matter to permit instructional broadcasting to be carried out using digital broadcast technologies.

Because interactive transmissions raised more complex issues and potentially greater risks, the amended section 110(2) would have covered only noninteractive transmissions, and not on-demand digital transmissions. The Copyright Office did not at that time suggest alterations to the categories of works or the recipients and locations covered by the exemption, or include provisions regarding the use of technological protection measures or the implementation of copyright policies.

In the subsequent study, the Copyright Office proposed to address the extent to which a new exemption was appropriate for transmissions over the Internet, or for interactive or on-demand distance learning activities over digital networks generally. The Office further proposed to examine the extent to which additional categories of works should be covered, and whether the employment of technological protection measures in connection with digital transmissions of copyrighted works should be required as a condition of eligibility.

3. The DMCA Mandate.

The legislative amendment recommended by the Copyright Office in 1998 was not supported by the parties involved in the discussions. Some believed it was too narrow, and some too broad. The Senate opted not to amend section 110(2) at that time, instead mandating a study by the Copyright Office of the overall subject of the promotion of distance education through digital technologies.³¹⁷ Such a study was also incorporated into the version of the bill passed by the House,³¹⁸ and ultimately became section 403 of the DMCA.

³¹⁷ S. 2037, 105th Cong. § 403 (1998).

³¹⁸ H.R. 2281, 105th Cong. § 412 (1997).

VI. SHOULD CURRENT LAW BE CHANGED?

This part of the Report assesses the developments in technology and practices described above from the perspective of determining optimal copyright policy. The question is whether the new activities being conducted today in the field of distance education should lead to any change in current law. If so, how can appropriate amendments be made while retaining an acceptable balance of interests among copyright owners and educational users?

The second Federal Register Notice published by the Copyright Office, as well as the questions posed to witnesses at the hearings, sought comment on these questions in some detail. The information we received was extensive and helpful, and we summarize it here.³¹⁹ The remainder of this part presents the Office's analysis of that information, and our recommendations to Congress.

A. THE VIEWS OF INTERESTED PARTIES

1. Overview.

All participants in the Copyright Office process agree that digital distance education should be fostered and facilitated; all want the field to thrive. The disagreement centers on how best to achieve that result -- in particular, whether existing copyright law is adequate or should be changed.

As discussed above, the Copyright Act contains several doctrines that apply to the use of copyrighted works in the course of digital distance education. Some of these uses are excused as fair use; some fall within specific instructional exemptions; and some are handled

³¹⁹ Full texts of the comments and testimony are being published separately as Volumes II and III.

through various types of licensing mechanisms. There is wide consensus that all three of these possibilities should continue to coexist. The question on which views diverge is which distance education activities should fall into which area: what is the scope of fair use in the digital environment? should the instructional exemptions be broadened? and when is licensing appropriate and feasible?

The educational community (including both educators and academic libraries) believes that a change in the law is required to optimize the quality and availability of forms of distance education that take full advantage of today's technological capabilities.³²⁰ Members of this community argue that fair use is uncertain in its application to the digital environment, and that the exemptions in section 110 are outmoded and do not extend to the full range of activities involved in digital distance education. They report that licensing for such uses is not working well, and therefore does not offer a satisfactory alternative. Some educators also note that distance education is already an expensive proposition, involving substantial start-up and maintenance costs, and warn that adding the cost of licensing fees for copyrighted materials could make it prohibitive.

Copyright owners, on the other hand, do not believe statutory amendment is necessary or advisable.³²¹ They point out that digital distance education is flourishing under current law

³²⁰ See generally Comment 8, AACC; Comment 31, AAU, ACE, NASULGC, AACC, American Association of State Colleges and Universities ("AASCU"), EDUCAUSE, National Association of Independent Colleges and Universities ("NAICU") (together "AAU"); Comment 48, AALL, ALA, ARL, MLA, SLA (together "ARL"); Comment 1, ICHE; Comment 24, CCUMC; Reply Comment 17, ARL; Reply Comment 33, United States Distance Learning Association ("USDLA") at 6-7.

³²¹ See generally Comment 4, AAP; Comment 11, ASMP, Comment 22, Motion Picture Association of America ("MPAA"); Comment 23, RIAA; Comment 34, NMPA. Licensing organizations that addressed the issue expressed similar views. See Comment 3, Broadcast Music, Inc. ("BMI") at 9-11; Comment 35, ASCAP at 2.

— according to the statistics, growing by leaps and bounds. They see the fair use doctrine as strong and healthy, and urge further discussion among interested communities with an eye toward the eventual adoption of guidelines for its application. They are concerned that expanding the section 110 exemptions would harm their markets, both by interfering with licensing opportunities and by increasing the risks of unauthorized dissemination over the Internet. They assert that more efficient licensing systems are developing, and that the reported difficulties in obtaining permissions will ease with time and experience. Finally, they argue that educators who wish to use preexisting copyrighted content in their courses should regard licensing fees as one of the costs of distance education, comparable to the purchase of the necessary hardware and software.

The following sections discuss in more detail the positions of interested parties on the issues of fair use and the instructional exemptions in section 110. Licensing would, of course, be the standard regime for activities not falling within either the fair use doctrine or one of the exemptions. The current status of licensing for distance education uses, and the parties' perspectives on that issue, are discussed in depth in the Hinds Report, and summarized in Part III above.

2. Fair Use.

There is virtual unanimity that the doctrine of fair use should be fully applicable to uses of copyrighted works in the digital environment, including in distance education. (This does not mean, of course, that all share the same interpretation of which digital distance education activities would qualify as fair.) Accordingly, all see fair use as a critical component of the legal landscape in this area.

The central message from the educational community was the importance of ensuring that fair use would apply in appropriate circumstances to digital distance education activities. Only a small minority suggested that this would require statutory amendment.³²² Ambivalence was expressed by some, however, about the vagueness and lack of specificity of fair use. On the one hand, these commentators see value in the flexibility of the doctrine;³²³ on the other, they find the resulting lack of certainty to be problematic.³²⁴

It also became apparent during the course of the hearings and comment process that a number of misunderstandings cloud the public's conception of fair use. Most fundamental is a lack of awareness that fair use in its current form does apply in the digital environment, or that it does not exempt all nonprofit educational uses. In addition, a number of commentators evinced confusion about the relationship between the fair use doctrine and the specific exemptions in section 110. It was not clear to all that these are separate defenses, with fair use claims able to be asserted for conduct that does not fall within the detailed conditions of section 110.

Similar confusion occurred with regard to the meaning and effect of fair use guidelines. Some seem to interpret the absence of formally established guidelines dealing with the application of fair use in the digital environment as having a negative implication about the availability of fair use as a defense, or to believe that guidelines define the outer limits of permissible conduct.

³²² See, e.g., Comment 21, NCSU.

³²³ See, e.g., Comment 42, UCLA, UC-Berkeley, PLG at 1.

³²⁴ See, e.g., Comment 28, UMUC at 6-7; Comment 18, College Art Association (“CAA”) at 3; Comment 30, Association of Test Publishers (“ATP”) at 5.

As to the role of guidelines in the future, the messages were mixed. Many copyright owners recommend pursuing the development of guidelines regarding the fair use of copyrighted materials in digital distance education. They suggest that further discussion and negotiation among interested parties, resuming where CONFU ended,³²⁵ could be productive in achieving greater mutual understanding and certainty. They urge that Congress and the Copyright Office establish a process and structure that could lead to meaningful agreement.

Educational and library groups were less positive, expressing varying views. Some educators see guidelines as valuable guides to decisionmaking, and welcome their wider use in the digital world. Others are critical of the concept or doubtful about the efficacy of any results. As discussed above, the topic of guidelines as a whole has become controversial in recent years, at least in part due to concerns about their tendency to be treated as absolute rules, and their impact on possible legislative alternatives.

3. Instructional Exemptions - Section 110.

Most of the discussion of the specific instructional exemptions related to the advisability of expanding section 110(2).

In general, copyright owners argue that section 110(2) should not be changed.³²⁶ They are concerned that a broadening of the exemption would result in the loss of opportunities to license works for use in digital distance education -- a new, growing, and potentially lucrative market. They point out that a recognition of the value of the educational market led to a

³²⁵ See *supra* Part V(A).

³²⁶ See generally Comment 4, AAP; Comment 11, ASMP, Comment 22, Motion Picture Association of America (“MPAA”); Comment 23, RIAA; Comment 34, NMPA.

decision not to exempt all educational uses in the current Copyright Act, and assert that digital transmissions will expand that market, bringing their works to a much broader audience around the world. In particular, since many providers of distance education are pursuing a profit, copyright owners seek to share in that revenue when their works are used. They urge that Congress not foreclose the potential market by legislating prematurely or overbroadly.

The other major concern of copyright owners is the increased risk of unauthorized downstream uses of their works posed by digital technology. When works are distributed in digital form, once a student obtains access, it is easy to further distribute multiple copies to friends and acquaintances around the world. Depending on the type of work involved and the amount used, the result could be a significant impact on the market for sales of copies. This concern is heightened by the fact that students have in fact been a major source of piracy on the Internet, particularly for music, sound recordings and computer programs.³²⁷

Most educational and library groups, in contrast, support a broadening of section 110(2).³²⁸ They view fair use alone as either not clear enough or not extensive enough in its application. Their primary goals are to avoid discrimination against remote site students in their educational experience vis-a-vis on-site students; to avoid discrimination against new

³²⁷ See, e.g., the well-known case of *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994). See also Neil Strauss, *Free Web Music Spreads From Campus to Office*, N.Y. TIMES, April 5, 1999 (discussing proliferation of use of MP3 files) (<http://www.nytimes.com/library/tech/99/04/biztech/articles/05download.html>).

³²⁸ See generally Comment 8, AACC; Comment 31, AAU; Comment 48, ARL; Comment 1, ICHE; Comment 24, CCUMC. To the extent that it is possible to characterize the views of those that do not support a broadening of 110(2), they may either prefer to rely on fair use, perhaps supplemented by guidelines, or seek a new, more general exemption for various educational activities.

technologies vis-a-vis old ones; and to avoid the difficulties in licensing that many describe having experienced.

On this issue too, we note certain misunderstandings as to existing law. First, some commentators appear to use the term "fair use" broadly to refer to the entire body of exceptions that apply to nonprofit educational uses. Second, there is a widespread and erroneous belief that section 110(2) in its present form does not apply at all to works other than nondramatic literary and musical works, and in particular that it does not permit the display of entire visual works, such as paintings or photographs.

As to what changes are advisable, a range of proposals have been made. While some educators seek the ability to use any copyrighted material for nonprofit educational purposes, most ask for more targeted amendments, recognizing the interests on both sides. (Indeed, many identify themselves as copyright owners as well as users, given their interest in protecting the distance education materials they create.) In general, the educational community seeks the following changes: (1) elimination of the concept of the physical classroom as a limitation on the availability of the exemption; (2) coverage of rights in addition to performance and display, at least to the extent necessary to permit digital transmissions; and (3) expansion of the categories of works covered, by broadening the performance right exemption to apply to works other than nondramatic literary and musical works. Some would go further, advocating an exemption that would allow educators to do anything by means of digital transmission that they can do in the classroom under section 110(1). Such an approach would substantially expand the acts permitted today in

instructional broadcasting, eliminating a number of the restrictions contained in section 110(2).³²⁹

As to the risks involved, educational institutions believe they should take some responsibility for the security of the materials they disseminate. In fact, they point out that they already make such efforts; the use of password protection and other access controls is widespread.³³⁰ Many also require compliance with copyright policies and inform students, faculty and staff about the law. Even apart from copyright concerns, educational institutions have interests in security stemming from the desire to preserve the integrity of the evaluation process and to limit the benefits of the educational experience to those who meet whatever conditions are imposed (such as tuition payment or state residency).

Finally, educators believe that licensing should continue to play a role in distance education. Although they have difficulty defining the circumstances in which licensing should be necessary in lieu of an exemption, some express a willingness to license in more circumstances if obtaining a license becomes easy and affordable.³³¹

Libraries agree with educators on most of these points.³³² In addition, they seek to address activities beyond the incorporation of materials into a class session as part of mediated

³²⁹ See *supra* Part IV(B)(1).

³³⁰ Because of the use of such access control measures, many in the educational community argue that the online world is actually more secure for copyrighted works than the analog world. Copyright owners, however, perceive the increased risk posed by the ability of students to make and distribute multiple copies after gaining authorized access as outweighing the security provided by access restrictions.

³³¹ See, e.g., Chicago Testimony at 40 (Trisha Davis, CIC); L.A. Testimony at 96-97 (Michael Tanner, University of California).

³³² See *generally* Comment 48, ARL; Comment 42, Besser; Comment 28, UMUC; Comment 15, Visual Resource Association (“VRA”); Comment 13, Society of American Archivists (“SAA”).

instruction. They stress the importance of institutions being able to give access to resource materials in digital form in order to provide a high-quality, comparable educational experience for students at remote sites. They therefore urge that the law should permit student access to both electronic reserve materials and broader library collections for research purposes.

Library groups expressed additional concerns with regard to the adequacy of licensing. Within the academic community, librarians tend to have the greatest experience with licensing, particularly in the digital environment. As a result, they are particularly aware of and sensitive to contract issues, including problems in obtaining acceptable prices or other terms, and questions about the interaction of contractual restrictions with the lawful uses permitted under the copyright law.³³³ They also point out that the scope of legal exemptions can affect the relative bargaining power of copyright owners and users.³³⁴

4. Provisions of Any New or Amended Exemption.

If a new or amended exemption were to be enacted to address digital distance education, differing views were expressed as to its specific provisions.

(a) *Exclusive rights covered.* Most in the educational and library communities seek to add to section 110(2)'s coverage of the rights of performance and display the minimum additional rights that would necessarily be exercised in the course of a transmission -- namely, certain aspects of the rights of reproduction and distribution.³³⁵ Others

³³³ See discussion *infra* Part II(D); see also generally, Comment 48, ARL at 5-6; Comment 28, UMUC at i.

³³⁴ See, e.g., Comment 48, ARL at 5-6. See also D.C. Testimony at 292-93 (James Neal, ARL).

³³⁵ See Comment 31, AAU at 1-2.

would include the reproduction and distribution rights in their entirety.³³⁶ Finally, some advocate an exemption that covers all of the exclusive rights of the copyright owner, in order to avoid requiring educators to make technical legal distinctions.³³⁷

Copyright owners believe that the rights should be kept limited, focusing on the fundamental purpose of section 110(2) to permit performance and displays.

(b) *Categories of works.* As to the categories of works to be covered, educators urge that the law not draw distinctions of this kind.³³⁸ They argue that it makes no difference from a pedagogical perspective which category in the Copyright Act a work falls into, as long as the work is relevant to the teaching content of the course. They also note that distinctions among categories become increasingly meaningless and difficult to apply in an era of multimedia works.

Copyright owners, in contrast, argue against broadening the categories of works.³³⁹ They assert that the types of works that Congress decided to omit in 1976 are precisely those that are most vulnerable to market harm. In their view, the new technologies only exacerbate that vulnerability, and no countervailing new need to use these particular works has been demonstrated to have developed in the interim.

(c) *Quantitative limitations.* In response to questions about the extent to which quantitative limits should be imposed on the portions of a work that can be used, no

³³⁶ See, e.g., Comment 8, AACC at 3; Comment 13, SAA at 4; Comment 33, Oregon SU at 3.

³³⁷ See, e.g., Comment 2, EMC at 2; Comment 20, U of TX Syst. at 8.

³³⁸ See, e.g., Comment 1, ICHE at 5; Comment 2, EMC at 2; Comment 19, NVCC at 5; Comment 20, U. of TX System at 8; Comment 24, CCUMC at 3; Comment 31, AAU at 2.

³³⁹ See, e.g., Comment 22, MPAA; Comment 23, RIAA.

clear answers were given. Educators expressed the desire to be able to use entire works, as under section 110(1). They described this as necessary for some types of works, such as works of visual art or short poems, and beneficial for other types, such as a movie related to a topic studied in class. At the same time, however, most acknowledged that the amount of the work used could make a legal difference, particularly in the need to obtain a license. They were generally familiar with this concept through applying the fair use doctrine and photocopying guidelines.

Copyright owners object strongly to the possibility that entire works could be transmitted in digital form, particularly works marketed for popular entertainment such as movies and sound recordings.³⁴⁰

(d) *Eligibility for exemption.* In responding to the question of who should be entitled to invoke the exemption, there was widespread support for limiting it to "accredited" educational institutions.³⁴¹ Commentators from all communities were divided, however, on the issue of whether the institution should have to be "nonprofit," as under current law.³⁴² Some feel strongly that the nonprofit requirement must be retained, criticizing the use of copyrighted material to make money without sharing the proceeds with the creator of the material. Others recommend focusing exclusively on the value of education as a matter of public policy, no matter who provides it. On all sides of the issue, concern was expressed

³⁴⁰ See, e.g., Comment 7, American Society of Journalists and Authors ("ASJA") at 2; Comment 23, RIAA.

³⁴¹ See, e.g., Comment 38, AAUP at 6; Comment 7, ASJA at 5; Comment 12, UNC-CH at 9; Chicago Testimony at 73 (Trisha Davis, CIC).

³⁴² See, e.g., Comment 2, EMC at 3; Comment 15, VRA at 3; Reply Comment 33, USDLA at 7; Reply Comment 104, University of Nebraska at Kearney ("U. of Neb.-Kearney") at 4; Comment 4, AAP at 5.

about competition among commercial and nonprofit providers of similar distance education programs. Considerable discussion was generated about the blurring of distinctions between nonprofit and for-profit ventures in this area.³⁴³

(e) *Nonprofit nature of distance education activities.* Discussion of this issue was combined with, and similar to, the discussion of whether eligibility should be limited to nonprofit institutions.

(f) *Eligible recipients.* Participants generally agreed that the class of eligible recipients of the distance education materials should be limited to students officially enrolled in the course.³⁴⁴

(g) *Technological protection measures.* There was little if any disagreement with the concept that the use of technological measures should be required in order to protect against unauthorized access to and dissemination of copyrighted materials. Copyright owners stress that such measures are critical if their works are to be transmitted over digital networks.³⁴⁵

Most educational institutions use password protection today, and indicate a willingness to impose additional technological controls over unauthorized downstream uses if reasonable and feasible. The question they raise is what level of security is possible, at what cost, and how much should be required.³⁴⁶

³⁴³ See discussion *supra* Part I(C)(2).

³⁴⁴ See, e.g., Comment 47, U of M-C at 3.

³⁴⁵ See, e.g., Comment 23, RIAA at 2-3; Comment 30, ATP at 6-7.

³⁴⁶ See, e.g., Reply Comment 12, AACC at 3; Comment 19, NVCC at 5; Comment 18, CAA at 6; Comment 20, U. of TX Syst. at 9; Chicago Testimony at 133 (William Rugg, Central Michigan University

(h) *Availability of licenses.* As indicated above, no consensus or clarity emerged as to the extent to which the availability of licenses should be considered in assessing eligibility for any exemption. As a general rule, educators and librarians focused on the need for an exemption regardless of whether licensing was possible. On the other side, copyright owners indicated that licensing was generally appropriate. Few took an intermediate position on this issue, or addressed the specific question of the relationship between licensing options and eligibility for an exemption.

(i) *Limitations on student copying or retention of materials.* Similarly, there was not much comment on the question of whether there should be limitations on student copying or retention of copyrighted materials. The focus was more on the related issues of the capabilities of technological measures, the adoption of copyright policies, and educational efforts, including clear statements to students about the law. Educators and librarians did note the value of students having access to materials throughout the duration of the course, and the convenience to them of downloading physical copies.³⁴⁷ They also commented that they could not effectively police all student activity. Copyright owners expressed particular concern about further dissemination of materials copied by students.³⁴⁸

(j) *Coverage of electronic reserves.* The librarians and educators who addressed this issue sought to include electronic reserves in any exemption, citing the need to

("CMU").

³⁴⁷ See, e.g., Chicago Testimony at 85-87 (Leigh Estabrook, University of Illinois ("U. of Ill")); Reply Comment 33, USDL at 8.

³⁴⁸ See, e.g., Comment 11, ASMP at 4-5; Comment 50, Time Warner, Inc. ("Time Warner") at 3; D.C. Testimony at 230 (Denise Incorvaia, RIAA); D.C. Testimony at 269-70 (Bruce Funkhouser, CCC).

make these materials available to remote students.³⁴⁹ They see fair use as unclear in its application to materials in digital form, and view license terms as too restrictive. Copyright owners, in contrast, believe that electronic reserves should not be covered in a distance education exemption.³⁵⁰ The Copyright Clearance Center described collective licensing activities taking place in this area.³⁵¹

(k) *Provision of information about copyright law.* All concurred in the importance of providing information about copyright law to participants in the distance education process. Educational institutions indicated that they are doing this today, with their activities ranging from the adoption of policies about copyright, to training faculty and staff on how to handle copyright issues, to providing information about the law to students.³⁵² None expressed strong opposition to the concept of such a requirement in the law, as long as the requirement was not overly detailed or burdensome.

(l) *Other factors.* No other factors were separately identified.

B. ANALYSIS AND RECOMMENDATIONS

The development of digital technology has enabled and fostered the tremendous growth of distance education in this country. It is therefore important that the copyright law treat

³⁴⁹ See, e.g., Comment 19, NVCC at 6; Comment 20, U. of TX System at 10-11; Comment 28, UMUC at 3; see also Comment 45, ARL.

³⁵⁰ See, e.g., Reply Comment 15, American Association of American University Presses; Comment 7, ASJA at 6; Reply Comment 4, AAP at 9-10.

³⁵¹ Comment 26, CCC at 4-6.

³⁵² See, e.g., Chicago Testimony at 53-54 (Pam Gaitskill, Association of College & Research Libraries (“ACRL”)); Comment 28, UMUC at 10.

appropriately the activities of educators as they utilize the latest technologies to deliver instruction to students in ways that would not have been possible a few years ago.

As discussed above, current copyright law contains various doctrines that apply to the use of copyrighted works in digital distance education. Some of these doctrines, such as fair use and principles relating to licensing, are technology-neutral and equally applicable to the digital world as to the analog world. Others use specific statutory language, drafted more than twenty years ago with then-existing technologies in mind, which makes them inapplicable to many activities involved in digital distance education today. This section of the Report analyzes the question of whether the law should be changed, either to update it so that the same type of activity can continue using different technologies, or to alter existing rules because new circumstances justify a different result.

The analysis is complicated by the context in which it is made: a time of rapid development in both technologies and markets. Such rapid development is a hallmark of the digital age, and invariably complicates the formulation of policy. In the area of distance education, however, we are at a particularly crucial point in time. Sophisticated technologies capable of protecting content against unauthorized post-access use are just now in development or coming to market, and may become widely available in the near future. But they are not there yet in a convenient and affordable form that can protect all varieties of works, and market uncertainties remain.

Meanwhile, licensing systems for digital distance education are evolving. The initial fears of copyright owners, and the uncertainty caused by lack of familiarity with the nature of the uses involved, are beginning to ebb. Copyright owners and licensing organizations are

working to develop online rights management systems, as well as collective licenses for various digital uses. Those publishers that produce the types of works for which educators constitute a major market are far along in this process, implementing workable models. In other sectors, licensing is likely to become easier, but may not reach this level of effectiveness.

The challenge in making recommendations at this time is to determine how to set policy during such a period of flux. Many of the concerns on all sides stem from the inability to depend on the effective functioning of technological protections and licensing mechanisms. If technology were further along, broadened exemptions could be less dangerous to copyright owners; if licensing were further evolved, broadened exemptions could be less important for educators. The technical tools for both exist today; it will be clearer within the next few years how successfully they can be integrated into the real world of distance education. Given the timetable of the legislative process, the question is what steps Congress can and should take in the interim.

1. Scope of Recommendations.

Over the course of this study, numerous issues have been raised and discussed with regard to the promotion of distance education through digital technologies. Some of these issues are unrelated to copyright law, such as problems of funding and accreditation. Others are general copyright issues that affect distance education as well as other uses of copyrighted works. These include issues as to the ownership of copyright in materials created by faculty or staff; the impact of the new DMCA prohibition on the circumvention of technological

measures;³⁵³ the relationship between contractual restrictions and copyright exemptions; and the rules governing jurisdiction, venue and choice of law.

It would have been impossible to fully and adequately analyze all of these issues in the six months allotted for this study, particularly since many have broad implications going well beyond the field of distance education. Moreover, the mandate to the Copyright Office in section 403 of the DMCA instructs the Register to consider primarily "the need for an exemption from exclusive rights of copyright owners for distance education through digital networks," and the specific attributes of any such exemption. That mandate was in turn the outgrowth of consideration in the last Congress of proposed amendments to section 110(2) of the Copyright Act, which deals specifically with performances and displays of works in instructional broadcasting.³⁵⁴

Accordingly, our analysis focuses on the appropriate treatment under copyright law of materials delivered to students through digital technology in the course of mediated instruction. We do not address other uses of copyrighted works in the course of digital distance education, including student use of supplemental or research materials in digital form, such as electronic coursepacks, e-reserves, digital library resources, or materials found on the World Wide Web; the creation of multimedia works by teachers or students; and the downloading and retention by students of materials delivered digitally in the course of mediated instruction. Such activities, although an important part of digital distance education, do not involve uses analogous to the performances and displays addressed in section 110(2).

³⁵³ See *supra* Part IV(C)(2).

³⁵⁴ See *supra* Part V(B)(1).

2. General Principles.

As a fundamental premise, the Copyright Office believes that emerging markets should be permitted to develop with minimal government regulation. When changes in technology lead to the development of new markets for copyrighted works, copyright owners and users should have the opportunity to establish mutually satisfactory relationships. A certain degree of growing pains may have to be tolerated if the government is not to step in prematurely, in order to give market mechanisms the chance to evolve in an acceptable direction. At some point, however, existing but dysfunctional markets may require adjustments in the law. Timing is therefore key.

The desire to let markets evolve does not mean that the law must remain frozen. Where a statutory provision that was intended to implement a particular policy is written in such a way that it becomes obsolete due to changes in technology, the provision may require updating if that policy is to continue. Doing so may be seen not as preempting a new market, but as accommodating existing markets that are being tapped by new methods. In the view of the Copyright Office, section 110(2) represents an example of this phenomenon.

The exemptions in sections 110(1) and (2) embody a policy determination that certain uses of copyrighted works in connection with instruction should be permitted without the need to obtain a license or rely on fair use. In 1976, when the current Copyright Act was enacted, Congress expressed the intent to cover in these two sections together "all of the various methods by which performances or displays in the course of systematic instruction take place."³⁵⁵ As explained above in Part IV(B)(1)(b), the technological characteristics of digital

³⁵⁵ House Report, *supra* note 171, at 81.

transmissions have rendered the language of section 110(2) inapplicable to the most advanced delivery method for systematic instruction. Without an amendment to accommodate these new technologies, the policy behind the law will be increasingly diminished.

At the same time, it must be borne in mind that existing law was crafted to embody a balance of interests between copyright owners and users of works. In making any change, a comparable balance should be maintained. The coverage of an exemption cannot be expanded without considering the impact of the expansion on markets for copyrighted works. If the law is updated to address new technology, the risks posed by that technology must be adequately taken into account.

Updating section 110(2) to allow the same activities to take place using digital delivery mechanisms, while controlling the risks involved, would continue the basic policy balance struck in 1976. In our view, such action is advisable.

Other amendments that have been suggested in the course of this study would go further, and entail varying degrees of change in legislative policy. These include expanding the exemption to cover more categories of works or additional exclusive rights beyond those necessary for digital delivery, and otherwise resolving problems experienced in the licensing process. Here, the elements of timing and burden of proof are critical. From a pedagogical perspective, these suggested expansions are desirable. From a copyright owner's perspective, they endanger primary or secondary markets for valuable works. The question should not be whether users have established a need to expand the exemption, any more than whether copyright owners have established a need to retain the current limits, but rather whether given current conditions, the policy balance struck in 1976 should be recalibrated in certain respects.

As explained in detail below, we conclude that some policy recalibration may be appropriate at this point, relating primarily to categories of works covered. In other areas, we believe that existing restrictions should be retained and markets permitted to evolve, subject to further review. Critical to this conclusion is the continued availability of the fair use doctrine as a safety valve.

3. Recommendations as to Statutory Language.

In order to accomplish the goal of updating the language and the policy balance of section 110(2), the Copyright Office offers the following recommendations:

(a) *Clarify meaning of "transmission."* It should be clarified that the term "transmission" in section 110(2) covers transmissions by digital means as well as analog. We recommend doing so through legislative history rather than by statutory amendment. Because the term does not specify any particular technology, we interpret it to cover transmissions in any form, including digital. Amending the statute to add the words "digital or analog" is therefore unnecessary, and risks implying that references to "transmission" elsewhere in the Copyright Act are limited to analog transmissions.

(b) *Expand coverage of rights to extent technologically necessary.* The clarification that "transmission" includes digital transmissions should be sufficient to ensure the ability to deliver instructional materials through digital technologies that do not entail the making of copies. Because the exemption in its current form permits only acts of performance and display, however, digital transmissions over computer networks would not be excused. We therefore recommend expanding the scope of the rights covered, in order to add those needed to accomplish this type of transmission.

This does not mean that the rights of reproduction and/or distribution should be added in their entirety. Rather, the amendment should include these rights only to the extent technologically required in order to transmit the performance or display authorized by the exemption. In particular, the ability to make reproductions should be limited to transient copies created as part of the automatic technical process of the digital transmission of an exempted performance or display. Otherwise the exemption would be expanded so broadly as to diverge from its intended purposes.

Section 110 as a whole is entitled "Exemption of certain performances and displays," and subsections (1) and (2) were intended to cover only "performance or displays in the course of systematic instruction."³⁵⁶ Congress sought to permit the demonstration of material during a class -- an act that, by its very nature, is temporally bound and limited in its function -- rather than uses that serve as a substitute for the student obtaining copies of the material performed or displayed. Copies were still to be purchased, licensed, or made pursuant to other statutory exemptions such as fair use or section 108. In the course of this study, we have seen no reason to alter these basic concepts.

(c) *Emphasize concept of mediated instruction.* An exemption that includes elements of the reproduction right so as to allow a student to access individual works asynchronously³⁵⁷ raises a new, unintended problem. When a work is performed or displayed by an instructor in person, a student's ability to perceive it is limited by the manner and

³⁵⁶ House Report, *supra* note 171, at 81.

³⁵⁷ See discussion of proposed amendment to section 112, the ephemeral recordings exemption, *infra* Part VI(3)(i).

duration of the act of performance or display. This is true whether the student is in the classroom or receiving the class remotely. Once the work is posted on a network site, and can be performed or displayed at the student's discretion, these limitations disappear. If an entire work can be viewed on a computer screen, repeatedly, whenever a student chooses and for an indefinite duration, the performance or display could conceivably function as a substitute for the purchase of a copy. This problem may be particularly acute for textual materials produced for student use, like textbooks or coursepacks, which are normally purchased or licensed.

The current language of section 110(2) had no need to address this issue because the technology of 1976 did not make it possible for a display of a textbook to substitute for its purchase. It is necessary, however, to do so in the course of updating section 110(2). The key is to ensure that the performance or display is analogous to the type of performance or display that would take place in a live classroom setting. In other words, it is a use of the work as an integral part of the class experience, controlled by the instructor, rather than as supplemental or background information to be experienced independently. This might be accomplished by amending paragraph (A) of section 110(2), which requires the performance or display to be "a regular part of . . . systematic instructional activities," to focus on the concept of mediated instruction. Additional language could specify that the performance or display must be made by or at the direction of an instructor to illustrate a point in, or as an integral part of, the equivalent of a class session in a particular course.

(d) *Eliminate requirement of physical classroom.* In its current form, section 110(2) limits the location to which transmissions may be sent: they must be made primarily to a classroom or similar place normally devoted to instruction; to persons whose

disabilities or other special circumstances prevent classroom attendance; or to government employees. The nature of digital distance education makes this limitation conceptually and practically obsolete. The fundamental goal is to permit instruction to take place anywhere. Remote site students may access instructional materials wherever they can use a computer-- from their homes, from the workplace, or from a library. Eliminating the physical classroom limitation would better reflect today's realities.

At the same time, it is important to retain meaningful limitations on the eligible recipients of the transmission. The performances or displays of copyrighted works should not be made available to the general public. In testimony and comments submitted to the Office, there was widespread agreement that the exemption should benefit only students officially enrolled in the particular course for which the transmission is made. We therefore recommend permitting transmissions to be made to students officially enrolled in the course, regardless of their physical location.

While substituting the criterion of official enrollment for the criterion of the physical classroom removes a degree of control over the reach of the transmission, the new technologies make it possible to target the recipients more precisely. With the analog broadcast technologies contemplated at the time the exemption was enacted, it was not possible to ensure that the transmission could not be received by members of the general public. Section 110(2) requires only that the transmission be made "primarily" for reception by eligible recipients. Today, using digital and scrambling technologies, transmissions can be limited to identified recipients. Accordingly, when broadening the exemption to permit transmission to enrolled students wherever they are located, the requirement should be added

that the transmission must be made solely, to the extent technologically feasible, for reception by the defined class of eligible recipients.³⁵⁸

This proposed amendment would not constitute an extreme expansion in the coverage of the exemption. The statute already accommodates the needs of students who cannot attend a physical classroom because of "special circumstances" other than disabilities. The legislative history makes clear that Congress envisaged the term "special circumstances" to include those "who are unable to attend daytime classes because of daytime employment, distance from campus, or some other intervening reason."³⁵⁹ The amendment would add those students who are able to attend classes, but prefer to learn at a time and place of their own choosing.

(e) *Add new safeguards to counteract new risks.* It is undeniable that the transmission of works to students in digital form poses greater risks to copyright owners than transmission through analog broadcasts. Digital technologies make possible the creation of multiple perfect copies, and their rapid and widespread dissemination around the world. Apart from the effect of a broadened exemption on primary markets for licensing instructional uses, the unintended consequence could be harm to other markets, if the performances and displays can substitute for purchases of entertainment or information, or if copies are further distributed.

It is therefore critical, if section 110(2) is expanded to cover digital transmissions, that safeguards be incorporated into the statute to minimize these risks. We recommend including

³⁵⁸ An additional element of control is reestablished by emphasizing the concept of mediated instruction, as suggested above. This requirement would restore certain limitations similar to those inherent in a classroom setting.

³⁵⁹ H.R. REP. NO. 94-1476, at 84.

a number of safeguards as conditions on the applicability of the exemption, several of them adapted from provisions contained in Title II of the DMCA.³⁶⁰

First, any transient copies permitted under the exemption should be retained for no longer than reasonably necessary to complete the transmission.³⁶¹ This ensures that the partial coverage of the reproduction right is not broadened beyond its technological necessity in enabling performances and displays, and does not transform the limited purposes of this exemption into a mechanism for obtaining copies.

Second, those seeking to invoke the exemption should be required to institute policies regarding copyright, to provide informational materials to faculty, students, and relevant staff members that accurately describe and promote compliance with copyright law, and to provide notice to students that materials used in connection with the course may be subject to copyright protection.³⁶² These requirements would promote an environment of compliance with the law, ensure that participants in the instructional process were aware of their responsibilities in using copyrighted material, and prevent unintentional and uninformed acts of infringement. Nor should such requirements be overly burdensome. As discussed above, most institutions

³⁶⁰ 17 U.S.C. at § 512.

³⁶¹ *Cf.* 17 U.S.C. § 512(a) (in order for service provider to qualify for limitation on liability for acts of transitory communications, intermediate transient copies must not be retained for longer than reasonably necessary).

³⁶² In an online course, it would be appropriate and effective to have such notice appear on the screen when the student signs on. *Cf.* Fair Use Guidelines for Educational Multimedia, § 2-6.3 (Appendix F) (advising both educators and students to include a notice of use restrictions under copyright law on the opening screen of the multimedia program and any accompanying print material).

indicate that they are already engaging in these activities, some of which are required as a condition of eligibility for the DMCA limitations on service provider liability.³⁶³

Third, when works are transmitted in digital form, technological measures should be in place to control unauthorized uses. In order to effectively limit the risks to copyright owners' markets, these measures should protect against both unauthorized access and unauthorized dissemination after access has been obtained. The exemption should require the transmitting institution to apply such measures, described in language that is simple and neutral, avoiding specificity as to the type of technology to be used. Because no technology is one hundred percent effective and impervious to determined hackers, only measures that "reasonably" prevent these acts should be required. In addition, because copyright owners themselves may apply technological protections to their works, the law should impose an obligation not to intentionally interfere with these protections.³⁶⁴

As discussed in Part III(C) above, technologies for providing such protection are at varying stages of development. Access control measures, such as passwords, are already in widespread use. Technologies that control post-access uses for all types of works are not yet widely available. The broadening of section 110(2) to cover digital transmissions should be tied to the ability to deploy such measures in addition to access control. If copyrighted works are to be placed on networks, and exposed to the resulting risks, it is appropriate to condition the availability of the exemption on the application of adequate technological protections.

³⁶³ See 17 U.S.C. §§ 512(e)(1)(C), 512(i)(1)(A).

³⁶⁴ Cf. 17 U.S.C. §§ 512(i)(1)(B) (in order to be eligible for limitations on liability, service provider must accommodate and not interfere with defined "standard technical measures").

(f) *Maintain existing standards of eligibility.* The exemption in section 110(2) is available only to a governmental body or nonprofit educational institution. During the course of this study, there was extensive debate over the appropriateness of retaining the "nonprofit" element in the context of today's digital distance education. While mainstream education in 1976 was the province of nonprofit institutions, today the lines have blurred.³⁶⁵ Profit-making institutions are offering distance education; nonprofits are seeking to make a profit from their distance education programs; commercial entities are forming partnerships with nonprofits; and nonprofits and commercial ventures are increasingly offering competitive products. In fact, publishers licensing materials for distance education uses generally do not distinguish in the terms offered to nonprofit and for-profit institutions.³⁶⁶

In addition to the lack of bright lines in this area, there is an issue as to how to guarantee the bona fides of an entity that is entitled to the exemption. When "nonprofit educational institutions" are no longer a closed and familiar group, when anyone can transmit educational material over the Internet, and when the law could permit dissemination of works in digital form to an unlimited number of students around the nation or the world,³⁶⁷ it may be wise to incorporate some accepted seal of approval. In this regard, there was widespread support for requiring accreditation as a condition for eligibility.³⁶⁸

³⁶⁵ See *supra* Part I(C)(2).

³⁶⁶ See Hinds Report at 48.

³⁶⁷ See discussion of international implications *infra* Part VI(B)(6).

³⁶⁸ Cf. House Report at 84 (telecourses could be covered by section 110(2) if "conducted by recognized higher educational institutions") (emphasis added).

The Copyright Office considered several options to deal with these changes in the profiles of education providers, including deleting or defining the nonprofit requirement, adding or substituting the requirement of accreditation, or shifting the focus to the nonprofit nature of the course rather than the entity offering it. While each option has advantages, we are not convinced at this point that a change in the law is desirable.

In terms of policy, we have concerns about an exemption that permits commercial entities to profit from activities using copyrighted works without sharing that profit with the owners of those works. We also see dangers in adopting a standard that would be inconsistent with other provisions of the Act, including section 110(1), that refer to "nonprofit educational institutions." And while it may indeed be advisable to mandate accreditation, the result would be to rule out some institutions eligible for the exemption in section 110(1), and eligible in the past for the exemption in section 110(2). Finally, Congress has indicated a focus on the nonprofit sector, directing the Register in conducting this study to consult specifically with nonprofit educational institutions and nonprofit libraries and archives.³⁶⁹ This is nevertheless an important and evolving issue that deserves further attention.

(g) *Expand categories of works covered.* One of the most difficult issues to resolve is whether to expand the categories of works covered by section 110(2)'s exemption from the performance right beyond the current coverage of nondramatic literary and musical works.³⁷⁰ On the one hand, educators preparing a course do not differentiate the subject matter

³⁶⁹ DMCA at § 403.

³⁷⁰ While a number of participants in the study stressed the importance of being able to use visual works such as paintings or photographs in distance education, the display of any type of work is already permitted under section 110(2).

they wish to present to students based on the categories in section 102 of the Copyright Act. Under section 110(1), they can use any type of work in face-to-face classroom teaching, and seek to make distance courses an equally rich pedagogical experience. These considerations militate against continuing to limit the types of works covered under the distance education exemption of section 110(2).

On the other hand, the existing distinctions have been embedded in the law for more than twenty years. The exemption allowing performances in distance education, whatever the technology, has always been limited to nondramatic literary and musical works. This judgment was made in 1976, based on the potentially greater market harm to works such as dramatic works or audiovisual works, for which an educational transmission could substitute for entertainment.³⁷¹ Such distinctions are prevalent throughout the Copyright Act, based on similar judgments about the differing impact of particular uses on different types of works.³⁷² No efforts were made between 1976 and the introduction of the 1997 bills to expand the coverage of section 110(2) to additional categories. The question is why the original policy it implements should be altered now, in the context of a study examining the use of digital technologies.

The main categories of works that could be affected by an expansion are audiovisual works, sound recordings, and dramatic literary and musical works. In terms of primary markets, educational licensing may represent a major source of revenue only for educational videos. The potential effect on secondary markets, however, remains a serious concern for all

³⁷¹ See *supra* Part IV(B)(1)(b).

³⁷² See, e.g., 17 U.S.C. §§ 108(h), 109, 110, 118(b), 121.

such works. This concern has been exacerbated beyond the threats perceived in 1976 by the capacities of digital technology. For entertainment products like motion pictures, transmission could well substitute for students paying to view them elsewhere, and if digital copies can be made or disseminated, could affect the broader public market. For sound recordings in particular, students circulating material on the Internet have been among the greatest sources of piracy in recent years.

Of course, the omission of these additional categories of works from the coverage of current section 110(2) does not mean that they can never be used in digital distance education without a license. Such works remain subject to fair use, particularly in circumstances where the work itself is the subject of study in a class offered by a nonprofit institution, only illustrative portions are used, and risks are controlled.

The considerations are different for sound recordings than for other categories. When section 110(2) was enacted in 1976, there was no public performance right for sound recordings. Educators were therefore free to transmit performances of sound recordings to students without restriction (assuming that the use of any literary or musical work embodied in the sound recording was authorized by statute or license). It was not until 1996 that owners of sound recordings were granted an exclusive public performance right, limited to certain digital audio transmissions.³⁷³ At that time, there was no discussion of whether sound recordings should be added to the coverage of section 110(2). This issue thus represents a new policy question that has not yet been considered, rather than a potential change in a judgment already made.

³⁷³ See *supra* Part IV(B)(3)(b).

The addition of sound recordings can be supported on the ground that Congress in enacting section 110(2) envisioned that sound recordings could be freely performed for distance education purposes. On the other hand, the issue was not squarely addressed in 1976, since at that time sound recordings could be freely performed for any purpose. More recently, Congress has decided to provide a digital public performance right for sound recordings, not limited by section 110(2).

The failure to include sound recordings in the scope of current section 110(2) does result in a discrepancy between a distance educator's ability to perform a nondramatic musical work and her ability to perform the sound recording in which it is embodied. In other words, the copyright owner of the music is essentially subsidizing some distance education activities, while the record producer remains free to charge for the same activities. One question is whether this makes sense, when typically a teacher will perform a musical work by playing a sound recording, rather than by a live performance.

It is the exclusion of audiovisual works, however, about which educators express the strongest concern.³⁷⁴ This concern is due to a combination of factors: the pedagogical value of using this important and popular category of work for teaching purposes; the inconsistency between the ability to perform audiovisual works in the classroom and the inability to do so at a distance;³⁷⁵ and the difficulty of obtaining digital licenses from motion picture producers. In fact, many of the greatest difficulties in licensing reported in the course of this study related to

³⁷⁴ The failure to focus on sound recordings may in part be due to the common lack of understanding that musical works and sound recordings are separate and distinct categories of works treated differently under section 110(2).

³⁷⁵ While this is true of all works other than nondramatic literary and musical works under current law, educators appear to perceive the problem as more significant in the case of audiovisual works.

motion pictures.³⁷⁶ Moreover, as digital distance education uses more and more multimedia works, which incorporate audiovisual works and may be considered audiovisual works themselves, the failure to cover this category may have an increasing impact.

In sum, there are valid reasons to preserve the exclusion of other categories of works from the coverage of section 110(2), and valid reasons to change existing policy and add them. While the judgment could be made either way, on balance we suggest a compromise. If audiovisual and other works are added, it should be done in a limited way, with greater restrictions than section 110(2) currently imposes. Thus, section 110(2) could be amended to allow performances of categories in addition to nondramatic literary and musical works, but not of entire works. An expanded exemption should cover only the performance of reasonable and limited portions of these additional works. A "limited" portion should be interpreted as the equivalent of a film clip, rather than a substantial part of the film. What amount is "reasonable" should take into account both the nature of the market for that type of work and the pedagogical purposes of the use.

This approach would accomplish the aims of educators while avoiding substantial harm to copyright owners. It would preserve the most significant primary markets, continuing the need for educators to license the use of an entire motion picture or sound recording. It would also remove most of the risk posed by downstream uses, since the availability of limited portions would not satisfy the public's interest in experiencing the work as a whole. At the same time, this approach should not substantially interfere with pedagogical goals. A teacher

³⁷⁶ See *supra* Part II(D).

will rarely wish to devote a full class session to performing a movie or record; rather, the typical instructional use involves a segment or clip used to demonstrate or illustrate a point.

It is important to note that the portion performed would have to be the subject of study in the course, rather than mere entertainment for the students, or unrelated background or transitional material. In its current form, section 110(2) requires that the performance or display be "directly related and of material assistance to the teaching content of the transmission." This requirement, combined with the limitation on the amount of the work that could be used, should further serve to limit any impact on primary or secondary markets.

Under the proposed amendment, the law would permit a teacher in a music appreciation course to play excerpts from sound recordings for the students, or the instructor in a film course to show clips demonstrating Hitchcock's directing style. (Students could then be referred to other sources in order to experience the entire work on their own.) While such uses might also qualify as fair use, their coverage through specific language in section 110(2) would provide greater certainty to both educators and copyright owners.

It nevertheless may be advisable to exclude from the added categories those works that are produced primarily for instructional use. For such works, unlike entertainment products or materials of a general educational nature, the exemption could significantly cut into primary markets, impairing incentives to create.

(h) Require use of lawful copies. If the categories of works covered by section 110(2) are expanded to include dramatic works, audiovisual works and/or sound recordings, we recommend an additional safeguard: requiring the performance or display to be made from a lawful copy. Such a requirement is already contained in section 110(1) for the

performance or display of an audiovisual work in the classroom. This would reduce the likelihood that an exemption intended to cover only the equivalent of traditional concepts of performance and display would result in the proliferation or exploitation of unauthorized copies. The educator would typically purchase the copy to be used, providing some revenue to the copyright owner. In addition, works that had not yet been placed on the market, such as first-run movies, would as a practical matter be rendered ineligible, mitigating further any possible impact on sales to the public.

(i) *Add new ephemeral recording exemption.* Finally, in order to allow the digital distance education that would be permitted under section 110(2) to take place asynchronously, we recommend an amendment to section 112, the ephemeral recordings exemption. The amended version of section 110(2) in itself would not permit the reproduction necessary for an educator to post the work to be performed or displayed to the course site, for later access by students.

Section 112 authorizes various entities that are entitled by law to transmit performances or displays of copyrighted works to make limited numbers of copies for limited time periods in order to enable or facilitate the permitted transmissions. Subsection (b) of section 112 applies to organizations entitled to perform or display works under section 110(2), but contains various conditions that limit its applicability in the case of digital transmissions.³⁷⁷ While it would cover archival reproductions of the entire transmission program, it may not cover the reproduction of a work uploaded to a server and used to transmit performances and displays to students.

³⁷⁷ See discussion *supra* Part IV(B)(3)(a).

Accordingly, we recommend adding a new subsection to section 112 that would permit an educator to upload a copyrighted work onto a server, to be subsequently transmitted under the conditions set out in section 110(2) to students enrolled in her course.³⁷⁸ The benefit of the new subsection should be limited to an entity entitled to transmit a performance or display of a work in digital form under section 110(2).³⁷⁹ Various limits should be imposed similar to those set out in other subsections of section 112, including the requirements that any such copy be retained and used solely by the entity that made it; that no further copies be reproduced from it (except the transient technologically necessary copies that would be permitted by section 110(2)); that the copy be used solely for transmissions authorized under section 110(2); and that retention of the copy be limited in time, remaining on the server in a form accessible to students only for the duration of the course. In addition, the reproduction should have to be made from a lawfully made and acquired copy; the subsection should not itself authorize the copying of a work from a website to the instructor's computer. Finally, the entity making the reproduction should not be permitted to remove technological protections applied by the copyright owner to prevent subsequent unlawful copying.

4. Clarification of Fair Use.

Fair use is a critical part of the distance education landscape. Not only instructional performances and displays, but also other educational uses of works, such as the provision of

³⁷⁸ Cf. 17 U.S.C. § 112 (a)(1), as amended by section 402 of the DMCA, (providing a statutory license for webcasters to upload to their servers a single copy of a sound recording to be used to enable webcasting performances permitted under a statutory license pursuant to section 114(f)).

³⁷⁹ The limitation that the work whose performance or display is transmitted must be in digital form is intended to ensure that the exemption does not itself authorize digitizing a work in analog form. Such authorization must be obtained from the copyright owner, or found in another provision of the law such as fair use.

supplementary materials or student downloading of course materials, will continue to be subject to the fair use doctrine. Fair use could apply as well to instructional transmissions not covered by the changes to section 110(2) recommended above. Thus, for example, the performance of more than a limited portion of a dramatic work in a distance education program might qualify as fair use in appropriate circumstances.

Because there is so much confusion and misunderstanding about the fair use doctrine, including the function of guidelines, we believe it is important for Congress to provide some clarification. The statutory language of section 107 is technology-neutral, and does not require amendment. But if any legislative action is taken with regard to distance education, we strongly recommend that report language explicitly address certain fair use principles.

First, the legislative history should confirm that the fair use doctrine is technology-neutral and applies to activities in the digital environment. It might be useful to provide some examples of digital uses that are likely to qualify as fair. It should be explained that the lack of established guidelines for any particular type of use does not mean that fair use is inapplicable. Finally, the relationship of guidelines to fair use and other statutory defenses should be clarified. The public should understand that guidelines do not have the force of law, and are intended as a safe harbor, rather than a ceiling on what is permitted. Guidelines therefore should not be deferred to as absolute codes of conduct, without leeway for reasonable activities that they may not adequately accommodate.

Although flexibility is a major benefit of the fair use doctrine, the corollary is a degree of uncertainty and unpredictability. These drawbacks are exacerbated by the context of new technologies, where little case law is available to draw upon in applying fair use to changed

circumstances. In the analog world, efforts such as the classroom photocopying and off-air taping guidelines have proved helpful in giving practical guidance for day-to-day decisionmaking by educators. While CONFU may not have produced definitive guidelines for the digital environment, the discussions that took place helped to further the parties' understanding of their respective interests and concerns.

The Copyright Office believes that additional discussion among the interested parties of fair use as applied to digital distance education could be productive and valuable in achieving a greater degree of consensus. Such discussions in themselves, however, cannot provide the certainty that guidelines can. If guidelines or similarly broad-based solutions are to be successfully developed, the parties must be ready to accept the concept. In the past, such efforts have been successful where a consistent group of participants worked within a structure established under the auspices of a government agency, with some direction provided by Congress.

5. Licensing Issues.

Licensing will continue to be the rule for educational uses not covered by exemptions or fair use. This could include, for example, performances of entire dramatic or audiovisual works or sound recordings, or non-transient multiple reproductions of works.

Educational institutions, and their library affiliates, are long-time participants in licensing systems. The fact that digital technologies impose new costs on delivering distance education does not itself justify abandoning or regulating those systems. Digital distance education entails the use of computer hardware and software, and the employment of trained support staff, all of which cost money. Digital distance education may also entail the use of

preexisting copyrighted works. This content is at least as valuable as the infrastructure to deliver it, and represents another cost to be calculated in the equation.³⁸⁰

It is worth noting that educational institutions, including nonprofits, are increasingly competing with commercial publishers. Sophisticated software packages allow the production of sophisticated instructional material, and institutions are investing resources in distance education as a field of tremendous growth, with potential for direct or indirect profit.³⁸¹ Commercial and noncommercial products, both of which may incorporate preexisting content, are becoming indistinguishable.

The critical question here is whether the markets in which distance educators participate are dysfunctional, and if so, to a degree that calls for a legislative remedy. As discussed above, many educators and librarians have experienced recurrent problems in licensing copyrighted works for use in connection with digital distance education, primarily involving difficulty in locating owners, inability to obtain a timely response, and unacceptable terms.³⁸² While these problems are not unique to digital distance education, they are heightened in the digital context due to factors such as fear on the part of copyright owners about increased risks; lack of certainty as to the scope of pre-digital transfers of rights; and general

³⁸⁰ It is a separate question where the funds should come from to pay the license fees. Possibilities run the gamut from student tuition and technology charges, to private grants, to tax revenues. The Administration has subsidized the costs of hardware, telecommunications services, software and teacher training for public schools and libraries to equalize access to technology for children around the country. *See, e.g.,* White House Education Press Releases and Statements, *Vice President Gore Announces Up to 47,000 Schools and Libraries to Receive Funds to Connect Children to the Internet* (November 23, 1998); Pub. L. No.103-382 (Administration's Technology Literacy Challenge Fund); 47 U.S.C. § 254 (Telecommunications Act of 1996). Similar policies could be seen to underlie the value of access to copyrighted content.

³⁸¹ *See* Hinds Report at 19.

³⁸² *See supra* Part II(D).

unfamiliarity with these new uses.³⁸³ In addition, the motivation to license may be low for owners of certain types of works, for which distance education may not be a remunerative market.

Many of the above factors should diminish with time and experience, lessening the frequency and extent of licensing problems. There are some indications that this is already happening. In addition, online licensing systems and collective licensing for digital uses will increasingly facilitate transactions. Nevertheless, problems will persist for the foreseeable future, as long as risks are perceived as high or benefits low.

We note that one of the problems identified by educators has special characteristics that can block the functioning of the marketplace. Where the owner of the work simply cannot be located, there is no opportunity to negotiate. We believe that the time may be ripe for Congressional attention to this issue generally. In 1995, in the context of pending term extension legislation, the Register called for a mechanism to deal with the problem of unlocatable copyright owners, noting relevant statutory provisions in the laws of other countries.³⁸⁴

Canadian law provides the possibility for a user to obtain a compulsory license for such an "orphan work." If the Copyright Board (a governmental body) is satisfied that the applicant for a license to use a published work has made reasonable efforts to locate the copyright owner and the owner cannot be found, the Board may in its discretion issue a nonexclusive license

³⁸³ *Id.*

³⁸⁴ H.R. 989, 104th Cong. (1995) and S. 483, 104th Cong. (1995). *See Copyright Term Extension: Continued Hearing on H.R. 989 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. (1995) (statement of Marybeth Peters, Register of Copyrights).

upon terms and conditions that it deems appropriate.³⁸⁵ The copyright owner may, not later than five years after the expiration of the license, collect the royalties or commence an action to recover them.³⁸⁶

When the Copyright Office examined this issue in 1995, it was difficult to evaluate fully the merits of the Canadian system, which had been enacted but not yet implemented. We had some concerns as to whether such a system would be appropriate for the United States, particularly given the Office's longstanding position that the creation of new compulsory licenses should be avoided.³⁸⁷ Since that time, Canada has implemented its law, and we can learn from its experience.

In addition, the problem may have become more acute over recent years. First, now that the term of copyright has been extended by an additional twenty years,³⁸⁸ more old works that are difficult to trace will be protected by copyright. Second, the new digital technologies have given new life to markets for older works, by expanding potential audiences and lowering the cost of reproducing and distributing those works. While the use of digital copyright management information may diminish the problem in the future, it will be of limited utility for older works existing today in analog form. Accordingly, the Copyright Office

³⁸⁵ Canadian Copyright Act, § 77.1 (1997).

³⁸⁶ *Id.* at § 70.7(3).

³⁸⁷ See, e.g., U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* at 32 (1997); 49 Fed. Reg. 14,944 (1984). In addition to domestic policy concerns, the creation of a compulsory license in this area could have implications under the Berne Convention. See Berne art. 15(4)(a) ("In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union").

³⁸⁸ Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298 (1998).

recommends consideration of elements of the Canadian approach, along with other possible options.

We have not otherwise seen sufficient evidence of a need for a legislative solution moving away from the general free market approach of current law.³⁸⁹ New statutory licensing mechanisms for distance education or restrictions on license terms, for example, do not seem justified. It should be borne in mind that the proposed amendments to sections 110(2) and 112 should obviate some of the greatest difficulties. Given the state of flux of online licensing systems and technological measures, and the waning influence of the elements of fear and unfamiliarity, problems of delay and cost may subside to an acceptable level. At this point in time we recommend giving the market for licensing of nonexempted uses leeway to evolve and mature.

Because the field of digital distance education is growing so quickly, and effective licensing and technological measures may be on the horizon, we suggest revisiting the licensing issue in a relatively short period of time. The passage of two or three years after enactment of any amendment would permit some evaluation of its impact. At that time, if substantial and systemic problems persist, a number of options could be considered. With the advantage of further experience, the approaches of other countries could be evaluated.³⁹⁰ Or Congress could seek to establish some form of legislative incentives for the development of more effective and acceptable licensing mechanisms.

³⁸⁹ We note that a copyright owner's decision to refuse permission to use a work in a particular way does not in itself demonstrate market failure.

³⁹⁰ See *supra* Part IV(D).

6. International Considerations.

The amendments proposed in this Report will have international implications, as does every change in copyright law relating to the global networked environment. It is important to consider the consistency of the amendments with the United States' international treaty obligations. Other issues involve the impact of U.S. law abroad.

(a) *Treaty obligations.* In making the above recommendations, the Copyright Office is mindful of the constraints of U.S. treaty obligations. In our view, the relevant criteria of the Berne Convention and the TRIPs Agreement are fundamentally in harmony with the domestic policy considerations discussed above. We believe our recommendations are fully consistent with the standards these treaties establish for limitations or exceptions to the exclusive rights of copyright owners.³⁹¹

In their current form, sections 110(2) and 112 have been part of U.S. law for more than twenty years. In the three and a half years since the TRIPs obligations have been in force for the United States, no country has challenged the scope of these exemptions or suggested that they were problematic.³⁹² The numerous restrictions and conditions in both exemptions ensure that they apply only to "certain special cases . . . [that] do[] not conflict with a normal exploitation of the work and do[] not unreasonably prejudice the legitimate interests of the

³⁹¹ *Id.*

³⁹² No questions about sections 110(2) and 112 were posed in the course of the 1996 TRIPs Council review of the copyright laws of the developed countries. See *Review of Legislation on Copyright and Related Rights - United States*, WTO Docs. IP/Q/USA/1, IP/Q/USA/1/Add.1 and IP/Q/USA/1/Add.2 (1996-97).

author."³⁹³ Similarly, section 110(2) meets the standard of Berne article 10(2). It "permit[s] the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in . . . broadcasts . . . for teaching," in a manner "compatible with fair practice."

The changes we are proposing would not alter the fundamental balance of either section, and therefore would not change that conclusion. Both sections would continue to fulfill the same or comparable public policy goals, relating to nonprofit education. Each would be updated to deal with new technologies and new realities, but with detailed conditions retained or strengthened to avoid interfering with markets for copyrighted works, and with meaningful safeguards added to account for the concomitant new risks.

(b) *Impact of U.S. distance education exemption abroad.* Many of the digital distance education programs offered today are made available to students in other countries. A substantial body of material created in the United States is being used elsewhere, and may therefore be subject to differing legal regimes.³⁹⁴

The international aspects of distance education raise a number of important questions. Which country's law determines ownership, the validity and interpretation of license terms, and the scope of the copyright owner's rights? Which country's courts would have jurisdiction, and where is venue proper? As discussed above, the answers are unclear. These are overarching questions with broad implications that go well beyond the scope of this study.

On the issue of the scope of rights in particular, the choice of applicable law will be

³⁹³ TRIPs art. 13. *See also* Berne art. 11bis(3) ("It shall be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts . . .").

³⁹⁴ *See* discussion *supra* Part IV(D).

critical. Whether a distance education transmission initiated in the United States and sent to a student in another country constitutes an infringement, falls within a collective or compulsory licensing scheme, or is exempted, could turn on whether a court chooses to apply U.S. law or the law of the recipient's country.³⁹⁵ This means both that the scope of the exemptions in the U.S. Copyright Act may have an impact on foreign markets for U.S. works, and that U.S. copyright owners have an interest in the scope of exemptions or statutory licensing rules adopted in foreign laws. Students in the United States may similarly be affected in their ability to obtain access to foreign distance education programs. Accordingly, the balance struck in U.S. law will have an importance beyond our borders, both through its potential application abroad and as a model for other countries examining the issue.

³⁹⁵

Id.

APPENDIX A

Commission hereby gives notice of a full review to determine whether revocation of the antidumping duty order on synthetic methionine from Japan would be likely to lead to continuation or recurrence of material injury. A schedule for the review will be established and announced at a later date.

For further information concerning the conduct of this review and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207). Recent amendments to the Rules of Practice and Procedure pertinent to five-year reviews, including the text of subpart F of part 207, are published at 63 F.R. 30599, June 5, 1998, and may be downloaded from the Commission's World Wide Web site at <http://www.usitc.gov/rules.htm>.

EFFECTIVE DATE: November 5, 1998.

FOR FURTHER INFORMATION CONTACT: Mary Elizabeth Sweet (202-205-3455) or George Deyman (202-205-3197), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202-205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000. General information concerning the Commission may also be obtained by accessing its internet server (<http://www.usitc.gov>).

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

Issued: November 9, 1998.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 98-30463 Filed 11-13-98; 8:45 am]

BILLING CODE 7020-02-P

DEPARTMENT OF LABOR

Office of the Assistant Secretary for Veterans' Employment and Training

Secretary of Labor's Advisory Committee for Veterans' Employment and Training; Notice of Open Meeting

The Secretary's Advisory Committee for Veterans' Employment and Training

Office of the Secretary and at the Commission's web site.

was established under section 4110 of title 38, United States Code, to bring to the attention of the Secretary, problems and issues relating to veterans' employment and training.

Notice is hereby given that the Secretary of Labor's Advisory Committee for Veterans' Employment and Training will meet on Tuesday and Wednesday, December 1-2, 1998, at the U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-2508, Washington, DC 20210. December 1 will be an all day meeting and December 2 will be half day, both days beginning at 9:00 a.m.

Written comments are welcome and may be submitted by addressing them to: Ms. Polin Cohanne, Designated Federal Official, Office of the Assistant Secretary for Veterans' Employment and Training, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-1315, Washington, D.C. 20210.

The primary items on the agenda are:

- Adoption of Minutes of the Previous Meeting.
- Workforce Investment Act of 1998.
- Other Matters of Interest of the Committee.
- Veterans Employment Opportunities Act of 1998.

The meeting will be open to the public.

Persons with disabilities needing special accommodations should contact Ms. Polin Cohanne at telephone number 202-219-9116 no later than November 23, 1998.

Signed at Washington, D.C. this November 9, 1998.

Espiridion (Al) Borrego,

Assistant Secretary of Labor for Veterans' Employment and Training.

[FR Doc. 98-30569 Filed 11-13-98; 8:45 am]

BILLING CODE 4510-79-M

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 98-12]

Promotion of Distance Education Through Digital Technologies

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of request for information.

SUMMARY: As required by section 403 of the Digital Millennium Copyright Act, enacted October 28, 1998, the Copyright Office is initiating its study of the promotion of distance education through digital technologies, for the purpose of making recommendations to

the Congress. Presently, the Copyright Office is establishing parameters for its study of the issues. Through this preliminary notice, the Office seeks to identify all interested parties and determine what matters those parties deem relevant and important. The Office anticipates the possibility of consultations and public meetings, as well as the submission of formal statements. At this time, the Copyright Office is soliciting only the identification of any and all potentially interested parties and an identification of the issues with which they may be concerned.

DATE: Written submissions are due by December 7, 1998.

ADDRESSES: If sent by mail, an original and five copies of written submissions should be addressed to Shira Perlmutter, Associate Register for Policy and International Affairs, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, D.C. 20024. If hand delivered, an original and five copies of written submissions should be brought to the Office of Policy and International Affairs, Office of the Register, James Madison Memorial Building, Room LM-403, 101 Independence Avenue, S.E., Washington, D.C. 20559-6000.

FOR FURTHER INFORMATION CONTACT: Shira Perlmutter, Associate Register for Policy and International Affairs, or Sayuri Rajapakse, Attorney-Advisor, Office of Policy and International Affairs. Telephone (202) 707-8350. Fax: (202) 707-8366.

SUPPLEMENTARY INFORMATION:

Background

In April 1998, Senator Orrin G. Hatch, Chairman of the Senate Committee on the Judiciary, with Senators Patrick J. Leahy and John Ashcroft, sent a letter to the Register of Copyrights requesting the Copyright Office to facilitate a series of discussions to be held on the subject of an exemption for digital distance education to be included in the Digital Millennium Copyright Act of 1998 ("DMCA"). Senators Hatch, Leahy and Ashcroft further requested the Copyright Office to report its findings to the Committee, and to develop policy options and legislative recommendations.

On April 27-28, 1998, the Register of Copyrights and her staff held intensive discussions with certain interested parties, including representatives of copyright owners, nonprofit educational institutions, and nonprofit libraries and archives. Through the process of negotiation it was possible to identify some areas of potential agreement among the parties. It also became clear,

however, that many complex and interrelated issues were involved. All of these issues could not be given appropriate consideration in the time available. On April 29, 1998, at the conclusion of the discussions, the Copyright Office submitted its recommendations to Senators Hatch, Leahy and Ashcroft in the form of statutory language for a narrow amendment to 17 U.S.C. 110(2), and a proposal for a study of the issues involved in interactive digital distance education. Rather than amending section 110(2) in the DMCA, the Senate mandated a broad study of the overall subject by the Copyright Office. Such a study was also incorporated into the version of the bill passed by the House.

On October 28, 1998, H.R. 2281, the Digital Millennium Copyright Act, was enacted into law. Section 403 requires that the Copyright Office consult with representatives of copyright owners, nonprofit educational institutions, and nonprofit libraries and archives, and thereafter to submit to Congress recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the interests of users. Such recommendations may include legislative changes.

The Register of Copyrights has been instructed to consider:

(1) The need for an exemption from exclusive rights of copyright owners for distance education through digital networks;

(2) The categories of works to be included under any distance education exemption;

(3) The extent of appropriate quantitative limitations on the portions of work that may be used under any distance education exemption;

(4) The parties who should be entitled to the benefits of any distance education exemption;

(5) The parties who should be designated as eligible recipients of distance education materials under any distance education exemption;

(6) Whether and what types of technological measures can or should be employed to safeguard against unauthorized access to, and use or retention of, copyrighted materials as a condition of eligibility for any distance education exemption, including, in light of developing technological capabilities, the exemption set out in section 110(2) of title 17, United States Code;

(7) The extent to which the availability of licenses for the copyrighted works in distance education through interactive digital

networks should be considered in assessing eligibility for any distance education exemption; and

(8) Such other issues relating to distance education through interactive digital networks that the Register considers appropriate.

Request for Information

The Copyright Office is initiating its study of the issues related to the promotion of distance education through digital technologies. In order to assist in planning and establishing parameters for the study, the Office is hereby seeking identification of any potentially interested parties and the issues with which they may be concerned. After this preliminary information is gathered, the Office will determine what additional activities are helpful and appropriate. Such additional activities may include consultations and public meetings, as well as the submission of formal statements.

Written submissions will be accepted from all interested parties. While there is no prescribe format for these initial informational statements, any written submission should include the interested party's name, title, organization, mailing address, telephone number, facsimile number, and e-mail address, if available, and a list and short description of any issues that he or she considers relevant and important.

Marybeth Peters,

Register of Copyrights.

[FR Doc. 98-30563 Filed 11-13-98; 8:45 am]

BILLING CODE 1410-30-M

NATIONAL CREDIT UNION ADMINISTRATION

Agency Information Collection Activities: Submission to OMB for Review; Comment Request

AGENCY: National Credit Union Administration (NCUA).

ACTION: Request for comment.

SUMMARY: The NCUA is submitting the following extension of a currently approved collection to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (P.L. 104-13, 44 U.S.C. Chapter 35). This information collection is published to obtain comments from the public.

DATES: Comments will be accepted until January 15, 1999.

ADDRESSES: Interested parties are invited to submit written comments to NCUA Clearance Officer or OMB Reviewer listed below:

Clearance Officer: Mr. James L. Baylen
(703) 518-6411, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428, Fax No. 703-518-6433, E-mail: jbaylen@ncua.gov

OMB Reviewer: Alexander T. Hunt
(202) 395-7860, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503

FOR FURTHER INFORMATION CONTACT: Copies of the information collection request, with applicable supporting documentation, may be obtained by calling the NCUA Clearance Officer, James L. Baylen, (703) 518-6411.

SUPPLEMENTARY INFORMATION: To ensure that federal credit unions make safe and sound investments, the rule requires that they establish written investment policies and review them annually, document details of the individual investments monthly, ensure adequate broker/dealer selection criteria and record credit decisions regarding deposits in certain financial institutions.

OMB Number: 3133-0133.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Title: 12 CFR 703 Investment and Deposit Activities.

Respondents: 6,900.

Estimated No. of Respondents/Recordkeepers: 6,900.

Estimated Burden Hours Per Response: 42.8 hours.

Frequency of Response: Other.

Estimated Total Annual Burden Hours: 295,481.

Estimated Total Annual Cost: N/A.

By the National Credit Union Administration Board on November 1, 1998.

Becky Baker,

Secretary of the Board.

[FR Doc. 98-30490 Filed 11-13-98; 8:45 am]

BILLING CODE 7535-01-U

NATIONAL SCIENCE FOUNDATION

Special Emphasis Panel in Advanced Networking Infrastructure; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92-463, as amended), the National Science Foundation announces the following meeting.

Name: Special Emphasis Panel in Advanced Networking Infrastructure Research (#1207).

Date & time: December 14 and 15, 1998; 8:30 a.m.-5 p.m.

Place: Room 1120, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230.

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DOCUMENT NO.

- 1. National Federation of Abstracting & Information Services
(Richard T. Kaser, Executive Director)**
- 2. Northern Virginia Community College
(Sandra Beeson, Coordinator)**
- 3. The College of William & Mary
(Scott Nelson, Assistant Professor of History)**
- 4. University of Hawai'i
(David Lassner, Director of Information Technology)**
- 5. State Historical Society of Iowa
(Lowell J. Soike, Ph.D. Historian, Community Programs Bureau)**
- 6. The Society of American Archivists
(Luciana Duranti, President)**
- 7. Organization of American Historians
(Arnita A. Jones, Executive Director)**
- 8. American Society of Media Photographers, Inc.
(Victor S. Perlman, Managing Director and General Counsel)**
- 9. National Coordinating Committee for the Promotion of History
(Page Putnam Miller, PhD)**
- 10. Ball State University
(Dr. Fritz Dolak)**
- 11. The Learning Institute for Nonprofit Organizations
The Chicago Bar Association Computer Law Committee
(Anne C. Keays, Schwartz & Freeman, Law Offices)**

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DOCUMENT NO.

- 12. The Authors Guild, Inc.**
(Paul Aiken, Executive Director)
- 13. Association of Research Libraries**
(Prudence S. Adler, Assistant Executive Director)
- 14. National Archives**
(Mary A. Giunta, Director for Communications & Outreach)
- 15. American Council on Education**
(Anthony V. Lupo, Arent Fox)
- 16. FUJITSU Limited**
(Akira Takashima, Senior Vice President)
- 17. American Library Association**
(Carol C. Henderson, Executive Director)
- 18. National Assoc. of State Universities and Land-Grant Colleges**
(C. Peter Magrath, President)
- 19. Association of College & Research Libraries**
(Althea H. Jenkins, Executive Director)
- 20. Corporation for Public Broadcasting**
(Kathleen Cox, General Counsel and Corporate Secretary & Robert M. Winteringham, Staff Attorney)
- 21. Art Museum Image Consortium**
(Jennifer Trant, Executive Director)
- 22. The Texas A&M University System**
(Barry B. Thompson, Chancellor)

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DOCUMENT NO.

- 23. Colorado State University (College of Business)**
(Jamie Switzer, Director)
- 24. Committee on Institutional Cooperation**
(Roger G. Clark, Director)
- 25. Diocese of Allentown**
(Jack Clark, Assistant Superintendent, Government Programs and Technology)
- 26. The Open University of the United States**
(Bob Masterton)
- 27. The Association of American University Presses, Inc.**
(Peter Givler, Executive Director)
- 28. Association of American Universities**
(John C. Vaughn, Executive Vice President)
- 29. The Teaching, Learning and Technology Group**
(Frank W. Connolly, Ph.D., Senior Associate)
- 30. George T.W. Miller, Jr.,**
Distance Learning Teacher, Utah
- 31. Oregon State University Libraries**
(Loretta Rielly, Head of Reference and Instruction Services)
- 32. University of Maryland University College**
(Anne S. Perkins, Vice President, Governmental Relations)
- 33. Medical Library Association**
(Marianne Puckett, Chair, Medical Library Association Governmental Relations
Committee)

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DOCUMENT NO.

- 34. Golden Gate University
(Steven Dunlap, Head, Regional Campus Services)**
- 35. Indiana University, Purdue University, Indianapolis
(Kenneth D. Crews, Associate Professor of Law and of Library and Information
Science, Associate Dean of the Faculties for Copyright Management)**
- 36. American Association of Community Colleges
(David R. Pierce, President)**
- 37. Visual Resources Association
(Jenni Rodda, President; Kathe Albrecht, Co-Chair, Intellectual Property Rights
Committee; Virginia M.G. Hall, Co-Chair, Intellectual Property Rights Committee)**
- 38. American Association of Law Libraries
(Robert L. Oakley, Washington Affairs Representative)**
- 39. The Magazine Publishers of America
(Michael R. Klipper, Meyer & Klipper, PLLC)**
- 40. The Association of Test Publishers
(Alan J. Thiemann, William Ashworth, Taylor Thiemann & Aitken, L.C.)**
- 41. Rio Salado College
(Linda Thor, President)**
- 42. Saint Joseph's College of Maine, Continuing and Professional Studies
(Krista Rodin, Ph.D., Dean, Continuing and Professional Studies)**
- 43. Consortium of College and University Media Centers
(Diana Vogelsong, Chair, Government Relations and Public Policy Committee)**
- 44. Johns Hopkins University
(Elizabeth Kirk, Electronic and Distance Education Librarian)**

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DOCUMENT NO.

- 45. University of North Carolina at Chapel Hill
(Edward Brooks, PhD, Associate Provost)**
- 46. Information Industry Association
(Dan C. Duncan, Senior Vice President, Government Relations)**
- 47. National School Boards Association
(Leslie Harris, President, Leslie Harris & Associates)**
- 48. International Society for Technology and Education
(Leslie Harris, President, Leslie Harris & Associates)**
- 49. Consortium for School Networking
(Leslie Harris, President, Leslie Harris & Associates)**
- 50. American Association of University Professors
(Ruth Flower, Director of Government Relations)**
- 51. American Society of Composers, Authors and Publishers
(I. Fred Koenigsberg, White & Case, LLP; Joan M. McGivern, ASCAP)**
- 52. The Recording Industry Association of America, Inc.
(Steven R. Englund, Arnold & Porter)**
- 53. Stanford Center for Professional Development
(Aubrey Harris, Chief Engineer)**
- 54. Home Recording Rights Coalition
(Ruth Rodgers, Executive Director)**
- 55. Digital Future Coalition
(Peter Jaszi)**

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DOCUMENT NO.

- 56. Association of America's Public Television Stations
(Marilyn Mohrman-Gillis, Vice President, Policy and Legal Affairs; Lonna Thompson, Director, Legal Affairs)**
- 57. University of Continuing Education Association
(Kay J. Kohl, Executive Director)**
- 58. Digital Media Association
(Seth D. Greenstein, McDermott, Will & Emery)**
- 59. Kansas State University
(Rosemary Talab, Associate Professor, Classroom Technology)**
- 60. The John Marshall Law School
(James R. Sweeney, Director)**
- 61. Special Libraries Association
(David R. Bender, Ph.D.)**
- 62. Georgetown University
(Submitted by Donna Demac, Adjunct Professor of Intellectual Property, and Online Law, Communication, Culture and Technology Program)**
- 63. Center on Distance Education for Lifelong Learning
(Donna Demac, Washington Counsel)**
- 64. Association of American Publishers, Inc.
(Patricia Schroeder, President and Chief Executive Officer)**
- 65. Motion Picture Association
(Fritz E. Attaway, Senior Vice President, Government Relations)**
- 66. National Education Association
(Jon Bernstein, NEA Government Relations, Senior Professional Associate)**

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DOCUMENT NO.

- 67. The Walt Disney Company
(Preston Padden, Executive Vice President, Government Relations)**

- 68. Broadcast Music, Inc.
(Marvin L. Berenson, General Counsel; Michael J. Remington, Drinker Biddle & Reath, LLP)**

- 69. American Association of State Colleges and Universities
(Edward M. Elmendorf, VP, Division of Government Relations and Policy Analysis)**

- 70. United States Catholic Conference
(Katherine G. Grincewich, Assistant General Counsel)**

- 71. The University of Utah
(Sarah C. Michalak, Director, Marriott Library; Clifford J. Drew, Associate Vice President for Instructional Technology and Outreach)**

- 72. Public Broadcasting Service
(Jeannette L. Austin, Vice President and Deputy General Counsel)**

- 73. Central Michigan University
(Richard Davenport, Provost and Vice President for Academic Affairs)**

- 74. Harvard University, John F. Kennedy School of Government
(Anne Drazen, Associate Dean of Information Technology; Jon Binks, Copyright Officer)**

- 75. The Florida State University
(Dr. Alan R. Mabe, Associate Vice President and Dean of Graduate Studies)**

- 76. American Association of Museums
(Edward H. Able, Jr., President and CEO)**

- 77. The University of New Mexico
(Bernard Moret, Research Policy Committee)**

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DOCUMENT NO.

- 78. National Public Radio
(Denise Leary, Deputy General Counsel)**
- 79. Intertrust
(Victor Shear, Chairman and Chief Executive Officer)**
- 80. Law Offices of Patrice Lyons
(Patrice Lyons)**
- 81. Southern Illinois University
(Carolyn A. Snyder, Dean, Library Affairs)**
- 82. American Bar Association
Consultant's Office on Legal Education
Council for the American Bar Association's Section of Legal Education and
Admission to the Bar
(Kurt Snyder, Esq., Assistant Consultant on Legal Education)**
- 83. National Music Publishers' Association, Inc. & The Harry Fox Agency, Inc.
(Edward P. Murphy, President)**
- 84. College of Extended Learning, California State University, Northridge
(Dr. Michael Reuben Stevenson, Executive Director)**
- 85. Oregon University System
(Jon R. Root, Director)**
- 86. OMITTED**

Submissions after Number 86 were received after December 7, 1998.

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DOCUMENT NO.

- 87. National Education Knowledge Industry Association
(C. Todd Jones, President)**

- 88. George Washington University
(David Nutty, Associate University Librarian for Information Services and
Technology)**

- 89. Nova Southwestern University
(Donald E. Riggs, Vice President for Information Services and University
Librarian)**

- 90. University of Washington
(Robert C. Miller, Jr., Associate Vice Provost for Research)**

- 91. University of Florida
(Carol Turner, Director for Public Services, George A. Smathers Libraries)**

- 92. Columbia University
(Michael Crow, Executive Vice Provost)**

- 93. University of North Carolina at Charlotte
(Cynthia Gozzi, Director of Library Services)**

- 94. PubWeb, Inc.
(Mark Miller, President)
The Copyright Group, Inc.
(Eamon T. Fennessy, Chairman & Chief Executive Officer)**

- 95. Minnesota State Colleges & Universities
(Dr. Harry Pontiff, Associate Vice Chancellor for Instructional Technology)**

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DOCUMENT NO.

- 96. University of San Francisco
(Vicki Rosen, Coordinator of Regional Library Services)**
- 97. Old Dominion University
(Virginia O'Herron, Assistant University Librarian for Information Services)**
- 98. University of Illinois at Urbana-Champaign
(Linda C. Smith, Professor and Associate Dean)**
- 99. University of Houston Libraries
(Martha Steele, Head of Access Services)**
- 100. University of Nebraska at Kearney
(Dr. Barbara Audley, Dean of Continuing Education, Michael Herbison, Director of Libraries)**
- 101. Technical College of the Lowcountry
(Richard N. Shaw, Director, Learning Resources Center)**
- 102. Naval Postgraduate School
(M. R. Bills, Deputy Superintendent, Captain U.S. Navy)**
- 103. South Dakota State University
(Steve Marquardt, Ph.D., Dean of Libraries)**
- 104. Olivet Nazarene University
(Kathy Zurbrigg, Director, Benner Library & Resource Center)**
- 105. Southwestern Oklahoma State University
(Beverly Jones, Library Director)**
- 106. St. Petersburg Junior College
(Dr. Susan Anderson, Director of Libraries)**

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DOCUMENT NO.

- 107. Arizona State University
(Sherrie Schmidt, Dean)**
- 108. State Technical Institute at Memphis
(Rosa S. Burnett, Director, Library of Services)**
- 109. Anne Arundel Community College
(Katherine Branch, Library Directory)**
- 110. American Society of Journalists and Authors, Inc.
(Eleanor Foa Dienstag, President)**
- 111. University of California, Los Angeles
(Howard Besser, Associate Professor, UCLA School of Education & Information)**
- 112. Volunteer State Community College
(Virginia S. Chambless, Reference/Distance Education Services Librarian)**
- 113. New Mexico Junior College
(Glen Gummess, MA.Ed., Media Resources Coordinator)**
- 114. Christopher Newport University
(Catherine Doyle, University Librarian and Director, CNU Online)**
- 115. California Western School of Law
(Andrea L. Johnson, Professor of Law and Director of CWSL Center for
Telecommunications)**
- 116. Louisiana State University
(Barbara Wittkopf, Reference/Distance Education Librarian,
Chair, LALINC Resource Sharing Distance Education Committee)**
- 117. University of Maryland
(Judith Broida, Associate Provost and Dean, Office of Continuing and Extended
Education)**

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DOCUMENT NO.

- 118. The Concord Consortium Educational Technology Lab
(Robert Tinker, President)**
- 119. University of Texas at Austin
(Larry R. Faulkner, President)**
- 120. Arista Knowledge Systems
(Jeffrey J. Munks, Chairman)**
- 121. Columbia University Press
(Kate Wittenberg, Editor in Chief)**
- 122. Time Warner
(Arthur B. Sackler, Vice President -- Law and Public Policy)**
- 123. National Association of College Stores
(Larry G. Daniels, CSP, Associate Executive Director — Industry Services)**
- 124. National Association of Independent Colleges and Universities
(David L. Warren, President)**
- 125. Dakota State University
(Deb Gearhart, Director of Distance Education)**
- 126. Copyright Clearance Center
(Daniel J. Gervais, Director of International Relations and Acting Director of
Rightsholder Relations)**
- 127. Rogers State University
(Laura Bottoms, MA, MLS, Acquisitions and Reference Librarian)**
- 128. University of Montana
(David Aronofsky, University Legal Counsel and Adjunct Faculty, Schools of Law
and Education)**

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DOCUMENT NO.

- 129. Guildford Technical Community College
(Keith Burkhead, Systems and Extension Librarian)**

- 130. Missouri Interactive Telecommunications Education (MIT-E) Network
(Vicki Hobbs, Director, MIT-EI-TV Network)**

- 131. University of California
(C. Judson Kling, Provost and Senior Vice President -- Academic Affairs)**

- 132. Georgia Department of Technical and Adult Education
(Orien O. Hall II, Educational Technology Services Coordinator)**

- 133. Indiana State University
(Louis R. Jensen, Dean of Continuing Education)**

- 134. Life University
(F. Robert Slotkin, Wilson Strickland & Benson PC)**

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DOCUMENT NO.

- 135. Indiana University Kokomo
Ms. Shelle Kelz, Dean**
- 136. Instructional Telecommunications Council
Mr. Chris Dalziel, Executive Director**
- 137. American Psychological Association
Mr. Marion Harrell, Assistant to the Director
PsycINFO**
- 138. Indiana Partnership for Statewide Education Copyright Committee
Dr Fritz Dolak, Chair**
- 139. New Orleans Baptist Theological Seminary
Mr. L. Thomas Strong III, Ph.D, Associate Dean of the College of
Undergraduate Studies
Chair, Dept. of Theological Studies
Associate Professor of New Testament and Greek**
- 140. Educause
Mr. Brian Hawkins, President**
- 141. The Learning Institute for Nonprofit Organizations
Ms. Anne C. Keays, Attorney**
- 141. The Chicago Bar Association Computer Law Committee
Ms. Anne C. Keays, Attorney**
- 142. The Association of America's Public Television Stations
Ms. Lonna Thompson, Director, Legal Affairs**
- 143. Board of Regents of the University System of Georgia
Mr. Corlis P. Cummings, Assistant Vice Chancellor for Legal Affairs**
- 144. Santa Rosa Junior College
Mr. William C. Baty, Associate Dean of Learning Resources and
Educational Technology**

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DOCUMENT NO.

- 145. Dickinson State University
Mr. Bernnet Reinke, Library Director**
- 146. The University of Oklahoma
Ms. Jan G. Womack, Ph.D, Associate Vice Provost for Academic Affairs**
- 147. Troy State University
Dr Mac Adkins, Web Coordinator**
- 148. Silver Lake College
Sister Maureen Anne Shepard, Vice President and Academic Dean**
- 149. Marymount University
Ms Lynn Scott Cochrane, Dean for Library & Learning Services**
- 150. Georgia State University
Ms. Beatrice Yorker, RN, JD, MS, Associate Professor of Nursing**
- 151. University of South Carolina Aiken
Ms Jane H Tuten, Interim Director of the Library
Head of Technical Services**
- 152. Pierce College Library
Ms. Sue Cole, Reference/Instructional Librarian**
- 153. Michael Best & Friedrich LLP
Steven L. Ritt, Esq, Partner**
- 154. North Carolina State University
Ms. Susan K. Nutter, Vice Provost and Director of Libraries**
- 155. The Mabee Learning Center/
Oklahoma Baptist University
Mr. Mark Herring, Dean of Library Services**
- 156. Montana State University
Ms Janis H Bruwelheide, Ed.D, Professor**
- 157. Univeristy of Texas System
Darcy W. Hardy, Ph.D, Director, UT Telecampus**

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DOCUMENT NO.

- 157. University of Texas System
Ms Georgia Harper, Office of General Counsel**
- 158. Jamestown College
Ms. Phyllis Ann K. Bratton, Director, Raugust Library**
- 159. Western Cooperative for Educational Telecommunications
Mr Russell Poulin, Associate Director**
- 160. Fort Hays State University
Ms Cynthia Elliott, Dean of the Virtual College**
- 161. University of Houston
Dr Marshall Schott, Associate Director, Distance Education**
- 162. National Association of Secondary School Principals
Mr Stephen DeWitt, Government Relations Manager**
- 162. National Association of Secondary School Principals
Ms Lenor Hersey, Director of Program Services**
- 163. Cincinnati State
Ron D Wright, Ph.D, President**
- 164. University of Kentucky
Mr Eugene Williams, Vice President for Information Systems**
- 165. American University
Ms Diana Vogelsong, Chair, Government Regulations and Public Policy
Committee
Consortium of College and University Media Centers**
- 166. AASA
Dr Paul D Houston, Executive Director**
- 166. American Association of Educational Service Agencies
Dr Brian Talbott, Executive Director**
- 166. National Rural Education Association
Dr Joe Newlin, Executive Director**

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DOCUMENT NO.

- 167. University System of Maryland**
Mr Paul Sweet, Associate Vice Chancellor, Res. Policy & Fed Relations
- 168. Black Hills State University**
Mr. Ben Dar, Associate VP for Technology
- 169. The University of Oklahoma**
Connie Dillon, Ph.D, Professor

APPENDIX B

LIBRARY OF CONGRESS**Copyright Office**

[Docket No. 98-12A]

Promotion of Distance Education Through Digital Technologies**AGENCY:** Copyright Office, Library of Congress.**ACTION:** Request for comments and notice of public hearing.

SUMMARY: The Copyright Office is preparing recommendations for Congress, in accordance with Section 403 of the Digital Millennium Copyright Act, on the promotion of distance education through digital technologies. This notice requests written comments from all interested parties, including representatives of copyright owners, nonprofit educational institutions, and nonprofit libraries and archives, in order to elicit views and information to assist the Office in its analysis of the relevant issues preparatory to making its report and recommendations. This notice also announces the schedule for, and invites participation in, a series of three public hearings to be held in Washington, DC, Los Angeles, California and Chicago, Illinois.

DATES: Written comments must be received in the Copyright Office on or before 5 p.m. E.S.T. on February 5, 1999. Interested parties may submit written reply comments in direct response to the written comments or the oral testimony offered at the hearings. Reply comments will become part of the record if received on or before 5:00 p.m. E.S.T. on February 24, 1999.

See **SUPPLEMENTARY INFORMATION** for hearing dates and additional submission deadlines.

ADDRESSES: All submissions should be addressed to Sayuri Rajapakse, Attorney-Advisor, Office of Policy and International Affairs. Those sent by regular mail should be sent to the U.S. Copyright Office, Copyright GC/I&R, PO Box 70400, Southwest Station, Washington, DC 20024. Submissions delivered by hand should be brought to the Office of Policy and International Affairs, Office of the Register, James Madison Memorial Building, Room LM-403, 101 Independence Avenue, Southeast, Washington, D.C. Submissions by telefax should be made to (202) 707-8366. Submissions by electronic mail should be made to "disted@loc.gov"; see **SUPPLEMENTARY INFORMATION** for file formats and other information about electronic filing.

See **SUPPLEMENTARY INFORMATION** for hearing addresses.

FOR FURTHER INFORMATION CONTACT: Shira Perlmutter, Associate Register for

Policy and International Affairs, or Sayuri Rajapakse, Attorney-Advisor, Office of Policy and International Affairs. Telephone: (202) 707-8350. Telefax: (202) 707-8366.

SUPPLEMENTARY INFORMATION:**Written Comments**

The Copyright Office will be placing all comments and reply comments on its Website (<http://lcweb.loc.gov/copyright/disted/>). Comments and reply comments should be sent, therefore, in one of the following formats:

If by regular mail or hand delivery: Send, to the appropriate address listed above, two copies, each on a 3.5-inch write-protected diskette, labeled with the name of the person making the submission, his or her title and organization. The document itself must be in a single file in either Adobe Portable Document File (PDF) format (preferred), or in Microsoft Word Version 7.0 or earlier, or in WordPerfect Version 7 or earlier. The file name must be no longer than eight characters with a three-character extension.

If by electronic mail: Send to "disted@loc.gov" a message containing the name of the person making the submission, his or her title, organization, mailing address, telephone number, telefax number and e-mail address. The message should also identify the document clearly as either a comment or reply comment. The document itself must be sent as a MIME attachment, and must be in a single file in either Adobe Portable Document File (PDF) format (preferred), or in Microsoft Word Version 7.0 or earlier, or in WordPerfect 7 or earlier. The file name must be no longer than eight characters with a three-character extension.

Anyone who is unable to submit a comment in electronic form should submit ten paper copies by hand or by mail to the appropriate address listed above.

All written comments should contain the name of the person making the submission, his or her title, organization, mailing address, telephone number, telefax number and e-mail address.

Public Hearings

The Copyright Office will hold three public hearings.

The first hearing will be held in Washington, DC, on January 26 and 27, 1999, beginning at 9 a.m. E.S.T. on both days, at the Postal Rate Commission, third floor Hearing Room, 1333 H St., Northwest, Washington, DC. This hearing will be preceded, on January 25, 1999 from 2 p.m. to 5 p.m., E.S.T. by a demonstration of distance education programs using digital technologies in the Automation Orientation Center, LM

G-45, James Madison Building, Library of Congress, Washington, DC.

The second will be held in Los Angeles on February 10, 1999, beginning at 9 a.m. P.S.T., at the University of California at Los Angeles (UCLA), James West Alumni Center Conference Room, 325 Westwood Plaza, Los Angeles, California.

The third will be held in Chicago on February 12, 1999, beginning at 9:30 a.m. C.S.T., at the University of Illinois at Chicago, College of Medicine, Room 423, 1853 West Polk St., Chicago, Illinois.

Anyone desiring to testify at one of the hearings should submit a written request by hand delivery or telefax which should be received no later than 5 p.m. E.S.T. on January 12, 1999. All requests to testify should identify clearly the hearing to which reference is made and the individual or group desiring to appear. The Copyright Office will notify all witnesses of the date and expected time of their appearance, and the maximum time allowed for their testimony.

Anyone desiring to testify at one of the hearings must also submit a summary of their testimony, so designated. The summary may be delivered by hand or sent by telefax, electronic mail or regular mail. It must be received by 5 p.m. E.S.T. at least 10 days prior to the date of the hearing at which the testimony will be presented. Ten copies of the summary are required if delivered by hand or sent by regular mail.

Background

On October 28, 1998, H.R. 2281, the Digital Millennium Copyright Act, was enacted into law (Pub. L. 105-304, 112 Stat. 2860). Section 403 requires that the Copyright Office consult with representatives of copyright owners, nonprofit educational institutions, and nonprofit libraries and archives, and thereafter to submit to Congress recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the interests of users. Such recommendations may include legislative changes.

The statute instructs the Register of Copyrights to consider:

(1) The need for an exemption from exclusive rights of copyright owners for distance education through digital networks;

(2) The categories of works to be included under any distance education exemption;

(3) The extent of appropriate quantitative limitations on the portions of works that may be used under any distance education exemption;

(4) The parties who should be entitled to the benefits of any distance education exemption;

(5) The parties who should be designated as eligible recipients of distance education materials under any distance education exemption;

(6) Whether and what types of technological measures can or should be employed to safeguard against unauthorized access to, and use or retention of, copyrighted materials as a condition of eligibility for any distance education exemption, including, in light of developing technological capabilities, the exemption set out in section 110(2) of title 17, United States Code;

(7) The extent to which the availability of licenses for the use of copyrighted works in distance education through interactive digital networks should be considered in assessing eligibility for any distance education exemption; and

(8) Such other issues relating to distance education through interactive digital networks that the Register considers appropriate.

In accordance with its mandate, on November 16, 1998, the Copyright Office published a Notice of Request for Information in the **Federal Register** asking for the identification of parties interested in the promotion of distance education through digital technologies and of the issues with which those parties were concerned. 63 FR 63749 (Nov. 16, 1998). Although December 7, 1998 was fixed as the deadline for receipt of communications from interested parties, due in part to the large volume of late responses, the Office continued to accept materials for consideration and inclusion in the public record until December 14, 1998. By that date, 175 responses were received. The Office is in the process of reviewing all received materials.

Specific Questions

The Office seeks comment on the following specific questions. Parties need not address all questions, but are encouraged to respond to those as to which they have particular knowledge or information.

1. Nature of Distance Education

(a) How may distance education be defined? In what sense does it differ from traditional face-to-face education? To what extent does it utilize digital technologies? In what sense does it differ from the general use of electronic communications in educational settings?

(b) What is the nature of the distance education programs using digital technologies that are currently available, or in development? Do they involve students using the Internet as a resource, communicating with teachers by e-mail, communicating with class members in chat rooms, or participating in classes conducted by teleconferencing? To what extent are they interactive? To what extent are they asynchronous? To what extent are copies made or kept, and by whom?

(c) Are course materials made available in electronic form? To whom are they made available? What restrictions are imposed on their access, use, modification or retention?

(d) How are such programs funded? What proportion of the entities who develop or offer them are nonprofit? What types of fees are charged to students? Are the programs intended to, and do they, generate a profit?

(e) What proportion of such programs are accredited? By whom are they accredited?

(f) Who are the recipients of such programs? What communities are served? Are students primarily located in any particular geographic communities (e.g., urban or rural)? Are there particular criteria for enrolling in or otherwise gaining access to the programs? How many students participate in a program at a time? Are the programs made available to students in other countries?

(g) At what level are such programs offered? Are they offered at the level of elementary school, high school, college, graduate school, or adult education? Are courses offered for credit, and as part of degree programs?

(h) To what extent is new content created for such programs, and by whom? To what extent is pre-existing content used, and of what type (e.g., motion pictures, music, sound recordings, computer programs, books)? How is it used, and in what amounts?

(i) Are there institutional policies in place with regard to the creation and use of such programs? Is any instruction provided to students or teachers in connection with such programs regarding copyright law, or regarding the giving of attribution or credit?

2. Role of Licensing

(a) Where pre-existing content is used in distance education programs using digital technologies, to what extent do the persons or entities involved obtain permission for the use of that content? Is this accomplished by direct contact with the copyright owner, or in some other way? To what extent do the parties enter into negotiated licenses, or use form contracts?

(b) To what extent do the persons or entities providing such programs rely on defenses available under the copyright law in choosing not to obtain a license (e.g., fair use, section 110(2), or the doctrine of implied license)? To what extent do they use public domain material, and if so, of what type?

(c) Have there been difficulties in obtaining licenses? If so, for what reason(s)? Are the difficulties different in nature or degree than for other types of uses, including traditional education and including multimedia uses generally?

(d) To what extent can technology be used now or in the future to ameliorate any difficulties in licensing? Can it serve to facilitate the identification of rights holders, the clearance of rights and the process of obtaining licenses, including price differentiation based on such attributes as the user's purpose, need, institutional affiliation, or ability to pay?

(e) What other options exist for making the permissions process easier? How likely is the development of collective or blanket licensing, or "one-stop shops," and within what time frame?

3. Use of Technology

(a) What technologies are used to prepare and disseminate digital distance education programs? Are these technologies specifically developed or produced for the distance education programs, or are they generally commercially available?

(b) What technologies are available to protect the security of digital distance education programs? In particular, are there technologies in use or under development that can prevent the unauthorized reception, use, or retention of copyrighted materials incorporated into such programs, or that can authenticate materials or protect their integrity? What is the time frame for the availability of such technologies? What parties or entities are developing them, and what type of costs are involved in implementing them?

4. 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?

(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)?

(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?
- What categories of works should or should not be covered?
- To what extent should there be quantitative limitations on the portions of a work that can be used?
- Who should be entitled to the benefits of such an exemption? Accredited or nonprofit institutions only?
- How should the class of eligible recipients be defined?
- Should such an exemption be limited to nonprofit distance education activities?
- 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?
- To what extent should the availability of licenses for the use of copyrighted works be considered in assessing eligibility?
- Should there be limitations on student copying or retention of the copyrighted materials?
- Should the provision of electronic reserves be included?
- Should the provision of any information about copyright law be required as a condition for eligibility?
- Are there other factors that should be taken into account?

(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?

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

Dated: December 18, 1998.

Marybeth Peters,

Register of Copyrights.

[FR Doc. 98-34010 Filed 12-22-98; 8:45 am]

BILLING CODE 1410-30-P

NATIONAL COUNCIL ON DISABILITY

Advisory Committee Conference Calls.

AGENCY: National Council on Disability (NCD).

SUMMARY: This notice sets forth the schedule of the forthcoming conference calls for NCD's advisory committees—International Watch and Technology Watch. Notice of this meeting is required under Section 10 (a)(1)(2) of the Federal Advisory Committee Act (P.L. 92-463).

INTERNATIONAL WATCH: The purpose of NCD's International Watch is to share information on international disability issues and to advise NCD's International Committee on developing policy proposals that will advocate for a foreign policy that is consistent with the values and goals of the Americans with Disabilities Act.

DATE: January 20, 1999, 12:00 noon-1:00 p.m. est.

FOR INTERNATIONAL WATCH INFORMATION, CONTACT: Lois T. Keck, Ph.D., Research Specialist, National Council on Disability, 1331 F Street NW, Suite 1050, Washington, D.C. 20004-1107; 202-272-2004 (Voice), 202-272-2074 (TTY), 202-272-2022 (Fax), lkeck@ncd.gov (e-mail).

TECHNOLOGY WATCH: NCD's Technology Watch (Tech Watch) is a community-based, cross-disability consumer task force on technology. Tech Watch provides information to NCD on issues relating to emerging legislation on technology and helps monitor compliance with civil rights legislation, such as Section 508 of the Rehabilitation Act of 1973, as amended.

DATE: January 15, 1998, 1:15 p.m.-3:15 p.m. est.

FOR TECHNOLOGY WATCH INFORMATION, CONTACT: Jamal Mazrui, Program Specialist, National Council on Disability, 1331 F Street NW, Suite 1050, Washington, D.C. 20004-1107; 202-272-2004 (Voice), 202-272-2074 (TTY), 202-272-2022 (Fax), jmazrui@ncd.gov (e-mail).

AGENCY MISSION: The National Council on Disability is an independent federal agency composed of 15 members appointed by the President of the United States and confirmed by the U.S. Senate. Its overall purpose is to promote policies, programs, practices, and procedures that guarantee equal opportunity for all people with disabilities, regardless of the nature of severity of the disability; and to empower people with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.

These committees are necessary to provide advice and recommendations to NCD on international disability issues and technology accessibility for people with disabilities.

We currently have balanced membership representing a variety of disabling conditions from across the United States.

Open Conference Calls

These advisory committee conference calls of the National Council on Disability will be open to the public. However, due to fiscal constraints and staff limitations, a limited number of additional lines will be available. Individuals can also participate in the conference calls at the NCD office. Those interested in joining these conference calls should contact the appropriate staff member listed above.

Records will be kept of all International Watch and Tech Watch conference calls and will be available after the meeting for public inspection at the National Council on Disability.

Signed in Washington, DC, on December 16, 1998.

Ethel D. Briggs,

Executive Director.

[FR Doc. 98-33999 Filed 12-22-98; 8:45 am]

BILLING CODE 6820-MA-M

NATIONAL GAMBLING IMPACT STUDY COMMISSION

Meeting

AGENCY: National Gambling Impact Study Commission, Indian Gambling Subcommittee.

ACTION: Notice of public meeting.

DATES: Thursday, January 7, 1999, 9:00 a.m. to 5:30 p.m. (PST).

ADDRESSES: The meeting site will be: Doubletree Hotel Seattle Airport, 18740 Pacific Highway South, Seattle, WA 98188, (206) 246-8600.

STATUS: The meeting is open to the public. However, seating may be limited. Members of the public wishing to attend are kindly requested to contact Dr. Kate Spilde at (202) 523-8217 to make arrangements.

SUMMARY: At the January 7 meeting of the Indian Gambling Subcommittee of the National Gambling Impact Study Commission, established under Public Law 104-169, dated August 3, 1996, the Members of the Subcommittee will hear testimony on Indian gambling issues as well as discuss the drafting of a subcommittee report to the full Commission.

CONTACT PERSONS: For further information on the agenda, meeting location or other matters contact Dr. Kate Spilde at (202) 523-8217 or write to 800 North Capitol St., N.W., Suite 450, Washington, D.C. 20002.

APPENDIX C

With respect to potassium permanganate from Spain, Inv. No. 731-TA-126 (Review), the Commission found that both the domestic interested party group response and the respondent interested party group response to its notice of institution¹ were adequate and voted to conduct a full review.

With respect to potassium permanganate from China, Inv. No. 731-TA-125 (Review), the Commission found that the domestic interested party group response was adequate and the respondent interested party group response was inadequate. The Commission also found that other circumstances warranted conducting a full review.²

A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's web site.

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: February 18, 1999.

Donna R. Koehnke,
Secretary.

[FR Doc. 99-4569 Filed 2-23-99; 8:45 am]
BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 731-TA-777-779 (Final)]

Certain Preserved Mushrooms From China, India, and Indonesia

Determinations

On the basis of the record¹ developed in the subject investigations, the United States International Trade Commission determines, pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. § 1673d(b)) (the Act), that an industry in the United States is materially injured by reason of imports from China, India, and Indonesia of certain preserved mushrooms, provided for in subheadings 0711.90.40 and 2003.10.00 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce to be

sold in the United States at less than fair value (LTFV).² Vice Chairman Miller and Commissioners Hillman and Koplan find that critical circumstances exist with respect to subject imports from China. Chairman Bragg and Commissioners Crawford and Askey find that critical circumstances do not exist with respect to subject imports from China.

Background

The Commission instituted these investigations effective January 6, 1998, following receipt of a petition filed with the Commission and the Department of Commerce by the Coalition for Fair Preserved Mushroom Trade and its members: L.K. Bowman, Inc., Nottingham, PA; Modern Mushroom Farms, Inc., Toughkenamon, PA; Monterey Mushrooms, Inc., Watsonville, CA; Mount Laurel Canning Corp., Temple, PA; Mushroom Canning Co., Kennett Square, PA; Sunny Dell Foods, Inc., Oxford, PA; and United Canning Corp., North Lima, OH.³ The final phase of these investigations was scheduled by the Commission following notification of preliminary determinations by the Department of Commerce that imports of certain preserved mushrooms from China, India, and Indonesia were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. § 1673b(b)). Notice of the scheduling of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of August 19, 1998 (63 FR 44470). The hearing was held in Washington, DC, on October 15, 1998, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this investigation to the Secretary of Commerce on February 11, 1999. The views of the Commission are contained in USITC Publication 3159 (February 1999), entitled *Certain Preserved Mushrooms from China, India, and Indonesia: Investigations Nos. 731-TA-777-779 (Final)*.

By order of the Commission.

¹ The notice of institution for both of the subject reviews was published in the **Federal Register** on Nov. 2, 1998 (63 FR 58765).

² Commissioner Crawford dissenting.

³ The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

² Commissioners Crawford and Askey dissenting with regard to Indonesia.

³ On March 9, 1998, the Commission received notice that Southwood Farms, Hockessin, DE, had joined the petitioning coalition.

Issued: February 19, 1999.

Donna R. Koehnke,
Secretary.

[FR Doc. 99-4575 Filed 2-23-99; 8:45 am]

BILLING CODE 7020-02-M

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 98-12B]

Promotion of Distance Education Through Digital Technologies

AGENCY: Copyright Office, Library of Congress.

ACTION: Extension of deadline for submission of reply comments.

SUMMARY: The Copyright Office is extending the period for submission of reply comments in the above-referenced study on the promotion of distance education through digital technologies.

DATES: Reply comments must be received in the Copyright Office on or before 5:00 p.m. E.S.T. on March 3, 1999.

ADDRESSES: All submissions should be addressed to Sayuri Rajapakse, Attorney-Advisor, Office of Policy and International Affairs. For information on formats, see **SUPPLEMENTARY INFORMATION** for file formats and other information about electronic filing. Those filings sent by regular mail should be sent to the U.S. Copyright Office, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, D.C. 20024. Submissions delivered by hand should be brought to the Office of Policy and International Affairs, Office of the Register, James Madison Memorial Building, Room LM-403, 101 Independence Avenue, Southeast, Washington, D.C. Submissions by telefax should be made to (202) 707-8366. Submissions by electronic mail should be made to "disted@loc.gov."

FOR FURTHER INFORMATION CONTACT: Sayuri Rajapakse, Attorney-Advisor, Office of Policy and International Affairs. Telephone: (202) 707-8350. Telefax: (202) 707-8366.

SUPPLEMENTARY INFORMATION: On December 23, 1998, the Copyright Office published a request for comments and notice of public hearing on the promotion of distance education through digital technologies, in connection with the Office's study of distance education in accordance with Section 403 of the Digital Millennium Copyright Act of 1998. (Pub. L. 105-304, 112 Stat. 2860) 63 FR 71167 (December 23, 1998). Comments were due to be filed by February 5, 1999; reply

comments were due to be filed by February 24, 1999.

The Office, however, has decided to extend the deadline for filing reply comments by a period of seven days, to March 3, 1999. The Office takes this action in response to a motion to extend the reply period, given the short time to respond and the extensive comments received.

Formats

The Copyright Office will be placing reply comments on its Website (<http://lcweb.loc.gov/copyright/disted/>). Reply comments should be sent, therefore, in one of the following formats:

If by regular mail or hand delivery: Send, to the appropriate address listed above, two copies, each on a 3.5-inch write-protected diskette, labeled with the name of the person making the submission, his or her title and organization. The document itself must be in a single file in either Adobe Portable Document File (PDF) format (preferred), or in Microsoft Word Version 7.0 or earlier, or in WordPerfect Version 7 or earlier. The file name must be no longer than eight characters with a three-character extension.

If by electronic mail: Send to "disted@loc.gov" a message containing the name of the person making the submission, his or her title, organization, mailing address, telephone number, telefax number and e-mail address. The message should also identify the document clearly as either a comment or reply comment. The document itself must be sent as a MIME attachment, and must be in a single file in either Adobe Portable Document File (PDF) format (preferred), or in Microsoft Word Version 7.0 or earlier, or in WordPerfect 7 or earlier. The file name must be no longer than eight characters with a three-character extension.

Anyone who is unable to submit a comment in electronic form should submit ten paper copies by hand or by mail to the appropriate address listed above.

Dated: February 19, 1999.

Marybeth Peters,

Register of Copyrights.

[FR Doc. 99-4549 Filed 2-23-99; 8:45 am]

BILLING CODE 1410-30-P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration, Office of Records Services—Washington, DC.

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before April 12, 1999. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: To request a copy of any records schedule identified in this notice, write to the Life Cycle Management Division (NWML), National Archives and Records Administration (NARA), 8601 Adelphi Road, College Park, MD 20740-6001. Requests also may be transmitted by FAX to 301-713-6852 or by e-mail to records.mgt@arch2.nara.gov.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Michael L. Miller, Director, Modern Records Programs (NWM), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001. Telephone: (301)713-7110. E-mail: records.mgt@arch2.nara.gov.

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape,

and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs the records to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

Schedules Pending

1. Department of Commerce, Office of Executive Assistance and Management (N1-40-98-1, 2 items, 2 temporary items). Records relating to the Department of Commerce's compliance with environmental laws and regulations pertaining to such subjects as recycling, hazardous waste reporting, and procurement of environmentally preferable products. Also included are files relating to implementation of

APPENDIX D



UNITED STATES COPYRIGHT OFFICE

DISTANCE EDUCATION STUDY

Demonstrations of Distance Education Programs Using Digital Technologies

Library of Congress, Madison Building, Rm. G-45

January 25, 1999

2:00 p.m. - 5:00 p.m.

PROGRAM:

Introduction by Marybeth Peters, Register of Copyrights

Demonstrations:

GROUP ONE -

1. **CLASS** (Communications, Learning and Assessment in a Student-Centered System) - a University of Nebraska program whose goal is a complete accredited high school diploma sequence available on the World Wide Web. *class.unl.edu*
2. **Utopian Visions '99** - a project operated out of the University of Texas in which secondary school classes from all over the world subscribe to the program and submit reports about their own town or municipality over three hundred-year intervals to other subscribing classes. *www.en.utexas.edu/uv*
3. **World Campus** - a collection of undergraduate courses operated by Pennsylvania State University available through the Web and multi-media based technologies. *www.worldcampus.psu.edu*
4. **UI-OnLine** - Internet-based post-baccalaureate and undergraduate programs offered by University of Illinois, primarily designed for populations of Illinois citizens who do not have direct access to on-campus programs. *www.online.illinois.edu*
5. **UNET** - a curriculum offered by the University of Maine providing almost one hundred courses, mostly undergraduate, via interactive television, the Web, and video to remote classrooms across the state. *www.unet.maine.edu*
6. **Johns Hopkins Business of Medicine Executive Graduate Certificate Program** - a graduate credit certificate program developed to provide physicians

with business management knowledge and skills and offered at twenty-eight networked centers across the United States. www.scs.jhu.edu/busofmed

7. **LEEP3** - a master's degree program in Library and Information sciences offered by the University of Illinois providing live Web-based instruction. www.lis.uiuc.edu/gslis/leep3

GROUP TWO -

1. **Wiley Interscience** - specific features of an Internet database of John Wiley & Sons' scientific journals that allow it to be incorporated by teachers into an on-line coursepack. www.interscience.wiley.com
2. **MicroMash** - a Harcourt Brace site offering a variety of on-line and disk based courses for continuing professional education, primarily for accountants and lawyers. www.micromash.com
3. **MathXL** - a Pearson/Addison Wesley developmental math tool designed to help students entering college to improve their math skills to pass college required courses such as Algebra. www.mathxl.com/default.asp
4. **HMChem** - a Houghton Mifflin site, developed collaboratively with the State University of New York at Binghamton, intended for use in conjunction with a Chemistry course being taught by a professor. hmchemdemo.clt.binghamton.edu
5. **Archipelago** - content-based multimedia and Web courses intended for colleges and advanced placement in high schools, developed by an educational multimedia publisher division of Harcourt Brace. www.archipelago.com
6. **KnowZone** - a Pearson/Addison Wesley hybrid CDROM/Internet product designed to teach mathematics at the elementary school level. www.kz.com

APPENDIX E

**MARKETPLACE FOR LICENSING IN
DIGITAL DISTANCE EDUCATION**

For the U.S. Copyright Office
ISABELLA HINDS
APRIL 1999

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I. INTRODUCTION

Licensing has become an increasingly important tool for managing the delivery and use of educational materials of all media types in the last ten years. The emphasis on customized, supplemental educational materials has substantially increased the amount of transactional licensing (permissions) activity in educational institutions. There has also been substantial growth in the amount of scholarly materials published and delivered digitally under license, typically a site license which defines in some detail what material will be provided, for how long and who may use it and how. Because licensing for digital uses is still in its infancy, however, it lags behind analog licensing in consistency and efficiency.

The rapid introduction of digital technologies into distance education has created a new set of licensing needs to support course development and delivery, the distribution of related educational materials, and the subsequent uses of that course. Since today's digital technologies, described in detail in the Technology section of the Copyright Office Report, encourage the use of all types of media in a single course or distance education program, it is becoming more necessary to negotiate licenses for multiple types of content for a single course. Also, to meet the growing demand for digital content, a variety of organizations, including but not limited to traditional content producers, are creating new content and converting key collections of analog materials into digital form to meet market need. License agreements that govern digital material typically establish the eligible users and uses for the product, as well as a fee structure. In each instance, distance education is affected by the extent to which licenses are available for digital uses and, if so, the extent to which the terms and conditions for those licensed products accommodate the unique needs of the distance students.

A. PURPOSE OF THE STUDY

This investigation was commissioned by the United States Copyright Office to provide a comprehensive description of the current licensing activities that impact distance education, particularly digital distance education. The purpose of this investigation was to examine, in as much detail as time and resources allowed, the relevant licensing policies and practices of both content owners and educational institutions. It was equally essential to understand how those policies worked in practice.

The goal was to review how the implementation of policy by both content providers and educational institutions (i.e., their day to day operations) impacted the effectiveness of their licensing transactions. By reviewing both policy and practice, it became possible to assess and interpret the often conflicting views of content owners and educational institutions about how well licensing works.

This in-depth review provided information to answer a number of questions. How was policy development instituted and what parts of the organization were involved? What types of licensing documents were in use? To what extent were licensing arrangements customized or standard? How easy, or difficult, were the licensing systems to use? Were there unique difficulties in licensing for digital distance education? What steps were being taken to improve efficiency and effectiveness? What was the level of investment in managing the licensing process? It was often difficult for content producers to address questions about licensing activities specifically focused on digital distance education. In general, content owner licensing policies and practices have not distinguished between uses for distance education and other analog and digital uses.

That observation led to one additional line of inquiry in the investigation: what steps were content producers and educational institutions taking to anticipate and accommodate foreseeable demands for licensing activity to promote digital distance education?

B. METHODOLOGY

Information was gathered primarily through an extensive series of phone interviews. Respondents were identified through their written expressions of interest in the study in early December or their testimony at the Copyright Office Hearings conducted in Washington, D.C., Los Angeles, and Chicago in January and February. Those interviewed were in turn asked to identify colleagues with specific knowledge or experience who were subsequently contacted. Several associations were asked to identify knowledgeable members other than those who were selected to testify at the hearings. Finally, a sample of practitioners was selected at random from various lists online discussion groups or listservs concerned with distance education and they were interviewed. Few of those contacted by this method were aware of the study, but all were cooperative and eager to share their experiences.

Those interviewed on the content side included senior executives, counsels and general counsels, marketing directors, sales managers, licensing managers, rights specialists, and association executives. From educational institutions, interviewees included senior administrators, counsels and general counsels, directors and managers of distance learning programs, librarians, instructional designers, and faculty as well as association executives. Every effort was made to contact distance educators in a variety of roles and at all educational levels. Higher education interests were most heavily represented among those expressing interest in the Report and that emphasis was also reflected in data gathering on licensing.

Licensing is less widely used or understood at the K-12 level. Within higher education, respondents were selected from various types of institutions (public and private, research universities and community colleges, institutions with established programs and those just starting out).

One of the interesting aspects of digital distance education is the appearance of for-profit entities successfully providing the same kinds of distance education to the same populations as traditional, not-for-profit educational institutions. Recently, several traditional universities have established their own distance education programs as for-profit subsidiaries. At least one major university, New York University, has established its distance education program as a for-profit subsidiary. A particular effort was made to include respondents from those for-profit organizations since they have a different standing under the current copyright exemptions than their not-for-profit counterparts.

In addition to content owners and educational institutions, educational licensing activities are influenced by a variety of intermediaries, both not-for-profit and commercial organizations. Not-for-profit licensing collectives have served as licensing agents for content owners for music and text publishers for a number of years.

New technologies and emerging markets such as those in digital distance education have given rise to other types of collectives and commercial organizations attempting to exploit these opportunities. New, not-for-profit, collectives have been established for the specific purpose of converting valuable content into digital form for licensing to educational institutions. Several commercial entities are developing products and services that are affecting, or will soon affect, licensing for digital distance education. These include

commercial providers of digital information, commercial entities concerned with rights management for digital content, and print, and the software and service providers marketing the technologies used in distance education.

In addition to the interviews, a number of license agreements were analyzed. Wherever possible, data on licensing activity were collected from both content owners and educational institutions. The data analysis for license activities directly related to digital distance education was limited by the lack of systematic data, regularly collected, clearly identified, and categorized consistently across and between content owners and educational institutions. Most of the time, the amount of data available was simply too small to support meaningful analysis.

Finally, several key publications in higher education and conference/workshop listings were monitored systematically over the first quarter of 1999 to identify the frequency and nature of discussions related to copyright licensing for digital distance education.

In sum, numerous individuals engaged in policy development, administration, development of materials, and instruction contributed their observations to this licensing investigation. A list of those interviewed is appended to this Report. The results of this investigation into licensing and digital distance education are presented below in four sections:

- II. Role of licensing in digital distance education
- III. Licensing Policies and Practices: Educational Institutions
- IV. Licensing Policies and Practices: Content Owners
- V. Organizational, commercial, and technological initiatives in digital licensing

II. ROLE OF LICENSING IN DIGITAL DISTANCE EDUCATION

The first task in understanding the role of licensing in digital distance education is to identify the types of licenses, the primary kinds of course materials, and the nature of their uses. It is then possible to understand the relatively low volume, and the inherent problems, of licensing material for use in digital distance education.

A. TYPES OF LICENSES

Licensing has been described as the practical exercise of copyright ownership. It has become a much more widely used tool in educational institutions, allowing reproduction, distribution, repurposing, access, and storage to course and resource materials of all types. Two forms of licensing have predominated in the digital world: transactional licenses and site licenses.

Transactional licenses, often referred to as “permissions,” are most frequently employed for an ad hoc use of a small portion of the copyrighted work for a specific purpose with a specific, and typically defined, target audience. Examples in digital distance education might include course pack permissions, electronic reserve permissions, permissions to include a clip from a video in a course module. Transactional licenses for educational purposes are typically characterized by one time use fees, simple form agreements, and limited duration (i.e., the permission is good for a short time frame). Transactional licenses are not always restricted to portions of a work, particularly for certain types of works such as art images, photographs, poems when the use of the “whole” work is likely to be required. Transactional licenses are also described as “after market,” indicating that the desired use was not necessarily anticipated when the product was initially created. Typically a transactional license

is a relatively low value transaction with a high administrative cost. Those administrative costs can appear particularly burdensome in total when a transactional license is secured over and over for the same piece of information for essentially the same type of use.

Site licenses define for specific materials the class of eligible users and uses in a specified length of time and typically include complex provisions regarding technology, security, access, and archiving. They are becoming increasingly important to educational institutions, generally for resource materials, as significant collections of information, data, images, etc. are being developed and delivered in electronic format. An example of a site license is an academic press database of journals that licenses an entire university to access and use the journal database. Such licenses typically are the result of extensive negotiation, much of which is driven by their “before market” use. In such negotiations, the licensee attempts to define as inclusively as possible the users that may wish to access the information, the uses they may reasonably contemplate for the information, and other provisions that will enhance the overall utility and value of the information to the institution. Licensors must balance the range of uses with an appropriate price for the information as well as protection of the intellectual property from misuse or use that could preclude the sale of future products. Pricing structures as well as actual prices are an important component of these negotiations and can impact how often, how much, and how widely the information is used.

It should be noted that the licensing of electronic information in the scholarly community has become a major focus of experimentation, development, and debate for the last five or more years. The estimated value of electronic products acquired by educational institutions today is over \$2 billion. The licensing of electronic resources has been the subject

of articles in scholarly journals as well as the focus of conference proceedings and reports since the mid 1990s. Numerous conferences, both face to face and electronic, as well as workshops, have been held on the relevant topics of copyright issues, contract law, the economics of publishing and acquiring electronic information, and the management of electronic property.

B. FORMS OF MATERIALS USED IN DIGITAL DISTANCE EDUCATION

Before describing the kinds of material that may be licensed within a distance education course, it is helpful to understand why most primary course materials used in digital distance education do not involve licensing. Currently, the primary course material for most distance education courses at every level, including many graduate level courses, is a core print textbook purchased by students. Many institutions arrange for their own college bookstore to provide phone, fax, or e-mail ordering for distance students. The materials are then shipped or mailed directly to the student. In the last two years, several national online college bookstores have been established. These include eFollett (www.eFollet.com) and Varsity Books (www.varsitybooks.com). These operations serve all types of students including distance students, emphasizing convenience at a low cost. Distance students taking a course at or near a satellite location or campus may purchase the primary course materials at that site. Whether these core materials are in the form of a conventional analog text, a digital format such as CD-ROM's or floppy disks, or some mixture of the two, they are sold, rather than licensed, to the student.

Increasing numbers of course texts are now accompanied by supplemental materials, (i.e., data sets, study guides, and, as the technology improves, videos, simulations, and other

relevant materials) delivered over the World Wide Web. Use of the World Wide Web expedites delivery and allows for continual updates and enhancement of the material. Educational publishers, the primary producers of these materials, currently provide much of this material at no charge. In other instances, access is controlled by the sale of passwords to students who purchase the material. This system does pose some security risks; for example one student might resell her password to other students in the class who opt not to purchase it at full market price. In general, this model replicates the standard business model for educational materials, requires no licensing negotiations, and relies primarily on traditional distribution channels and payment systems.

In addition to materials purchased by the student or provided by content owners for free, digital distance education programs also rely on a range of other material to meet their pedagogical needs. Licensing is one gateway for meeting those needs. However, licenses to make a digital copy of preexisting content and/or to transmit that content in digital form are today a very small portion of the total activity. The majority of licensing activity, even in distance education sources, is still for analog reproduction of material to be sent to enrolled students.

The use of materials to supplement the core text book is a common practice in undergraduate and graduate distance education courses of all types. Providing these additional materials to students may involve excerpting, compiling, copying, distributing or displaying preexisting content, in either analog or digital form.

1. Course Packs or Course Anthologies.

The most frequent form of supplemental materials for distance students, as well as traditional students, is the analog “course pack” or custom “course anthology” which has grown in popularity over the last decade. These custom course materials are compilations of journal articles, book chapters, magazine and newspaper articles, images, and original content typically developed by the instructor. This material has been selected and/or created by the instructor. Currently, from 75 – 100% of these materials are still printed and mailed to distance education students once a paid order is received. Policy and practice at most educational institutions, particularly in the aftermath of two key court decisions¹ require that most of these excerpts be licensed from the copyright holder, or its agent. This broad scale transactional licensing, or permissions processing, for course pack material has been developed over an eight year period. Though systematic data is not readily available, the number of permissions transactions related to course packs may exceed one million on an annual basis. For digitally delivered course packs, however, the proportion of licensing is minimal. A well established collective copyright permissions service for text, the Copyright Clearance Center (“CCC”), has just recently started providing some licenses for electronic course packs. Thus far, the response has been minimal although it is expected to increase.²

¹ Basic Books Inc. v. Kinko's, 758 F. Supp. 1522 (S.D.N.Y. 1991); Princeton University Press v. Michigan Document Svcs., 99 F.3d 1381 (6th Cir. 1996).

² See *infra* section V(A).

2. Electronic reserve systems.

Electronic reserve systems support both traditional and distance learning students and have been growing in colleges and universities since 1995. Such systems, now in active use in 200 to 300 colleges and universities, have replaced the traditional Reserve Desk at which students could check out specific, supplemental course materials assigned by the professor. A traditional Reserve Desk circulated materials for a limited period of time. Many students made personal photocopies of those items for subsequent use. In an electronic reserve system, digital copies of the selected material are made and stored by course for access by students enrolled in that course.

These electronic reserve systems allow the library to scan the supplemental course materials assigned by the faculty (usually journal articles, newspaper excerpts, and book chapters) into one of several available software systems. Electronic reserve systems are comprised of hardware components (a flatbed scanner, secure server, and networked workstations), software (document management and administration, user authentication and access controls), and administrative systems (procedures for identifying enrolled students, for administering the material, and the like). These systems, some of which are commercial and others of which have been developed within university libraries, manage the scanned materials (generally text materials); manage access for enrolled and authorized students only, generally by password; and may restrict further copying or distribution of the materials. The earliest systems limited viewing to workstations in the library, but today authorized students can often access these materials from any desktop including those in their dormitory rooms, at home, or both.

Content owners and educational users, particularly librarians, are divided over whether electronic reserve systems require licensing or may properly be considered fair use. Most publishers of all types of text view an electronic reserve system as a “digital course pack” and insist that a license is required. On the other hand, most publishers refused to license such digital conversion until early to mid-1998 and some number still do. Many librarians, on the other hand, have contended that the use of digital technology does not alter the fundamental nature of the Reserve Desk activity which had long been widely permitted without licensing even when libraries made their own print copies to ease congestion at peak use periods. In most instances in which libraries contend fair use, however, they do follow the practice of limiting access to students enrolled in the course, provide on screen information on copyright and fair use, and place restrictions what students may further do with the materials.

Because of the uncertainty as to whether these materials can be made available under fair use or require a license, electronic reserve systems vary in the type of content included. Systems are often initiated with only non-copyrighted material; some systems incorporate copyrighted materials, but only those readings that are not required for the course;³ others actually include required, copyrighted materials which may in fact also be purchased in hard copy form at the bookstore.

A minority of institutions with electronic reserve systems do seek licenses for these materials. This small number of electronic reserve requests comprise over one half of all

³ This approach reflects the distinction between required and non-required reading made in the preliminary Electronic Reserve Guidelines discussed during the CONFU process but never adopted.

requests for digital conversion of text materials reported by a key sampling of publishers (educational, scholarly, university presses).

3. Preexisting content in the course of instruction.

Overwhelmingly, the material delivered today in digital format is original content developed by instructors and staff in various programs. Increasingly, as technology improves and faculty competence and confidence with the use of that technology grows, instructors opt to convert preexisting content in all media (text and images primarily) into digital form so that it can be delivered directly with course materials or incorporated into their lesson plan.

Determining the amount of such preexisting content currently converted into digital form for inclusion in, or distribution with, digitally delivered courses was surprisingly difficult. Based on reports from a variety of educational institutions, it appears that at present this activity is relatively limited in volume, concerned primarily with text and to a lesser extent audiovisual materials.

C. COMPLEXITIES OF THE LICENSING PROCESS

It is easy to appreciate the hurdles faced by both educators and owners in attempting to license and use works. On a regular basis faculty and staff involved in digital distance education make decisions about when to license or when to rely on fair use. They evaluate whether a license offered will permit their students to use the material in the ways they are likely to need and want. They also must evaluate whether the material is offered at a “reasonable value,” what portion of their budgets to allocate to license fees, and whether to pay those license fees directly or pass them along to students. Similarly, representatives of content owners make decisions about whether to offer a license in response to a specific

request and if so, what terms and conditions to offer and how to establish fees. Both licensees and licensors are engaged in multiple transactions with multiple types of institutions or content owners with different needs and levels of resources. Both licensees and licensors must find ways to manage this complex process practically and cost effectively. Resource constraints, inexperience with transactions of this type, and operational issues affect their efforts as decidedly as the legal and policy frameworks within which they work. These practical considerations, including level of staff resources and budgets as well as decidedly different frames of reference regarding the purpose of licensing profoundly affect the perceptions of all parties on how copyright licensing is working.

1. Growing Pains in Licensing Digital Uses.

Experience with licensing for digital uses of any kind is generally limited to the last two to three years. The volume of licensing activity specific to digital distance education in all media is small. As a result of that lack of experience, policies and license agreements themselves are in evolution. The issues from the content owner's perspective are complex: what uses and users to allow, how to evaluate the technological basis for securing the material, how to evaluate the impact of such licensing on future product sales, how to value and price the material for this type of use. The combination of inexperience and complex issues often results long delays in decisions and irregular pricing, terms and conditions.

The frustration from educational institutions is intense. Pressure to compete with successful for-profit distance education organizations, expectations of faculty and students increasingly adept at technology, and the proliferation of course technologies combine to create a compelling sense of mission that is at odds with focus of content owners on protection of

their property. They complain of inability to find content owners, long delays in response time, or no response at all, and of unreasonable prices, terms and conditions. Educators and librarians testified about the importance of supplying distance learners with adequate library resources. The growing amount of text and image material acquired under license in digital form creates the potential for distance learners to have practical access online to many of the library resources of the institution in which they are enrolled.⁴ However, many of the site licenses under which the libraries access material do not allow, or charge higher fees for, off campus access for remote students.

Licensing activity for converting preexisting content into digital form and for delivering electronic material over digital networks is comprised dominantly of text materials; audiovisual materials (primarily educational videos and television programming) rank second. Other media types still rank a very distant third. The technology for using this material, however, is improving. Equally important, the training, confidence, and competence of faculty with that technology is also increasing. The predictable result is that more demands will be placed on licensing for images, music, and motion pictures. It is difficult to project the exact nature of those needs or the rate at which demand will develop. Because the overall market for materials is competitive and has very significant revenue potential, respondents from both educational institutions and content owners predict that new products, i.e., digital content, will flow rapidly into the market. It is unclear how the availability of a significantly

⁴ We have already seen that certain for-profit organizations providing digital distance education are committed to making a rapid transition to licensing electronic collections of full text articles to meet the information needs of their distance students.

increased volume of high quality digital material will impact the nature and volume of uses for preexisting content in the digital distance education market.

Policy and operational weaknesses in the licensing systems of both licensees and licensors for analog materials are carrying over into the digital environment. Content owners and educational institutions have not developed common definitions, shared understandings and expectations, or agreed upon standards of practice, in any area of licensing. There are few economic incentives to resolve these problems. The cost of administering licensing systems is high and the revenue streams rarely more than five figures annually even for the largest publishers. There are few forums in which to collaborate.⁵

2. Identifying and Locating Copyright Owners.

Problems also arise for educational institutions, and content owners alike from materials whose copyright owner cannot be readily identified or, if identified, cannot be located, the so-called “orphan” copyright owners. Given the active role of librarians in many distance education programs and the proliferation of search tools and bibliographic resources available online, the copyright owner can eventually be identified for most text material. The World Wide Web also offers access to databases, college and university web sites that provide faculty names, and other resources that help locate individual authors and creators. Though publisher practices vary, some do provide contact information for their authors, illustrators, and other individual copyright owners when permission, or in some instances additional

⁵ There are some efforts underway to begin a dialogue, however. A conference in March 1999 on Problems in Scholarly Communication, sponsored by the Association of American University Presses, the American Association of University Professors, the American Council of Learned Societies, and the Association for Research Libraries, brought publishers, librarians, university officials, and technologists together around common concerns. It identified distance education as one of its three key topics.

permission, is required from that individual. In other media, audiovisual works for example, established practice has the producer or distributor contacting other stakeholders for necessary rights clearance or other use-type permissions.

New products to expedite the process of identifying and locating those individual organizations are being encouraged by digital technology as are online versions of established bibliographic and reference tools. These tools have proved useful to the educational institutions that have them but they are expensive to develop and even more expensive to maintain and priced out of the reach of many smaller educational institutions. One new model of interest for text products is PubList (www.publist.com), an Internet directory of publications. Built on other database products, this World Wide Web tool is available at no charge to users. It promises to provide locator information for publications, as well as links to other services such as rights and permissions, for a growing list of text publications.

Users report frustration that it is sometimes the most critical journal article, sound clip or film footage for which they cannot get permission. In fact, it is often the most valued or sought after authors and artists who in today's market can successfully negotiate to retain specific rights or copyright ownership altogether. If this trend persists, the diversity of copyright owners that a single user may need to contact could increase exponentially.

The Author's Registry, created by a consortium of writers' organizations including the Author's Guild, the American Society of Journalists and Authors, the Dramatists Guild, and the Association of Authors' Representatives, is seeking to build a repository of data to assist in the identification and location of thousands of authors for the purpose of remitting licensing royalties to them, initially via agreements with publishers.

In the future, the importance of individual authors, illustrators, photographers, and other creators in the licensing process will likely increase. Authors, indeed all creators, are becoming more attentive to exploiting their rights for electronic uses. They are also increasingly capable of disseminating their works without organizational support. Whether authors will seek to license their works directly, or through a collective licensing agent, or continue to grant that authority, under contract, to a content producer remains to be seen. It is likely, however, that individual creators will become an increasingly vocal presence in ensuring that the exclusive rights of ownership and the revenues associated with licensing prerogatives are not exercised only by large, visible commercial organizations.

Tools for identifying, and locating, copyright owners are also most readily available for text materials. In other media, such reference tools are much more difficult to find, but new products are in development. For example, Academic Press has recently launched The Image Directory, a central and comprehensive repository of information on images of all kinds.

The Image Directory, which includes “thumbnail,” i.e., small, low resolution images, is offered to institutions under a license agreement with fee structures designed to accommodate educational institutions of various sizes. The amount of information and number of images catalogued in the Image Directory grew so rapidly that it had to be removed from the market in October 1998 so the product could be transferred to a more robust database platform. The product will be back on the market in mid to late 1999 with additional contributions from museums, art institutes, and other collections.

These underlying problems will be examined in greater detail below in reviewing how both educational institutions and content owners develop and implement their licensing systems.

III. LICENSING POLICIES AND PRACTICES: EDUCATIONAL INSTITUTIONS

Universities committed to distance education, whether launching new initiatives or moving their established programs into a digital environment, have spent considerable time, effort, and money organizing their resources to support these activities. At a minimum, educational institutions have invested in hardware and software; established necessary administrative units; added or enhanced functional areas such as instructional design; and provided training, technical, and support services to faculty. Some have contracted with a range of commercial vendors providing sophisticated software and service packages to support digital distance education. These packages allow universities to outsource their technology needs, and in some instances, training and support needs as well. Though financial information is difficult to obtain, and to validate, various sources estimated total costs, inclusive of staff time and overhead, of developing a complete digital distance education course for delivery over the World Wide Web at \$10,000 to \$15,000 per course. There are, however, also faculty cited examples of activities at much lower costs.

Copyright licensing is very rarely identified as a specific consideration in planning a distance education program. For example, in the course of this investigation, the programs and agenda of over 25 conferences and workshops for distance educators were reviewed. Only one had any reference to copyright or licensing.⁶

⁶ That instance was a workshop designed for academic administrators to discuss faculty creation and
(continued...)

A. GENERAL ORGANIZATION OF LICENSING ACTIVITIES

Typically there is no central locus of responsibility for copyright licensing for any purpose in educational institutions and little formal or informal coordination among the various administrative units engaged in acquiring permissions and negotiating licenses. As a result, there is little opportunity for sharing data, successful negotiating strategies, or efficiencies in process and practice. No respondent interviewed could confidently identify all the units on their campus involved in licensing generally, or for digital distance education in particular.

Those interviewed also described a number of different models for involvement by university counsel in licensing activities. The respondents from larger research institutions reported “consistent involvement and accessibility, especially for issues relating to digital uses of any kind,” while others reported limited access to legal advice in their institutions.

Though licensing activity suffers from fragmentation, the established model for licensing of virtually all kinds is the availability of a centralized, “expert” support staff to provide guidance to faculty, manage the workload, and to some degree interpret university policy and directives. Few of these central licensing resources, whether for course packs, image resources, or audiovisual materials, accept responsibility for monitoring whether licenses are obtained. Instead, they assist faculty in their copyright licensing activities, still a tedious, labor intensive process. In addition, there may be many different “experts” on any campus, each dealing with a different type of work.

In most colleges and universities today, particularly since the Basic Books Inc. v.

(...continued)

ownership of distance courses. The workshop was heavily subscribed almost immediately.

Kinko's, 758 F. Supp. 1522 (S.D.N.Y. 1991), and Princeton University Press v. Michigan Document Svcs., 99 F.3d 1381 (6th Cir. 1996), decisions regarding course packs, there is a designated department or campus organization, such as the bookstore, which is responsible for licensing materials for course packs. Audiovisual materials are licensed through a separate academic department or multimedia center. Music performance licenses are normally negotiated through the purchasing department.⁷ Image resources are licensed by yet another appropriate department or specialized library or resource center. The central library in most universities is also deeply involved in license negotiations for electronic products and for electronic reserve systems as well.

As a result of this fragmentation, the resources that a single faculty member needs to license a range of materials for a single digital course or program in distance education may be scattered through the campus. In fact, individual faculty members were often not aware of resources available on their campuses, particularly if that resource was concerned with media and materials not commonly used in their disciplines. Content producers of audiovisual materials in particular report a growing volume of calls from faculty with no experience in licensing in that media and little knowledge of the relevant copyright law.

Historically, the reliance on librarians and media specialists for copyright and licensing advice and information was the result of their expertise, their role within the information system in the institution, and their knowledge of, and working relationships with,

⁷ Music performance licenses for educational institutions have changed little in terms or conditions for many years. Fee schedules are negotiated with the designated licensing collectives on a national basis by the National Association of College and University Business Officers and the American Council for Education. Individual institutions make the purchase decision from among several models but have, as a practical matter, no option to negotiate individually.

content owners of all kinds. As electronic reserve systems evolved, copyright and licensing issues, where applicable, were usually managed by the librarian, although there are some institutions that require faculty to obtain them. Recently, initiatives to centralize permissions and licensing activities reflect institutional concerns about liability, control, and efficiency as well. This is particularly true with respect to analog course pack licensing which represents the most recent case study in the development of a relatively high volume transactional licensing system around a specific educational need. The Kinko's decision in 1991, and the Michigan Document Services decision several years later, intensified the discussions of what constituted educational fair use. University counsels and administrators were concerned about the potential liability of their institutions in the wake of these court decisions although neither decision involved a not for-profit educational institution. They also took note of the number of faculty who appeared to believe that any educational use was a fair use. Finally, universities assessed the administrative costs and burdens of the licensing process itself. At the same time in the mid 1990s, a number of commercial organizations began to explore the potential market for course pack production and sale. These vendors developed a commercial market for services to produce and sell course packs grew up at the local, regional, and national level. Because of the court decisions in the “course pack” cases, the major commercial vendors made “copyright clearance” one of their hallmark features when seeking commercial relationships with colleges and universities.⁸

⁸ Section V of this Report discusses the different practices in copyright licensing of commercial organizations interested in advancing digital distance education.

By the mid 1990s, most four year colleges and universities had a centralized, designated locus of responsibility for obtaining licenses for creating course packs. Management of the process might reside with the university print center or independent book store, could be outsourced to a leased bookstore or other course pack production vendor, or occasionally functioned as a separate office within the university's own operations. These centralized units set up systems to locate copyright owners; develop and maintain databases of contact, ownership, policy and pricing information for content owners; track permissions and make payments. In a functional sense, these units replicated the "resource expert" role in copyright management that librarians and multimedia specialists had traditionally filled.

These central clearing houses for course pack permissions often used the services of the CCC, a collective licensing agent which established an Academic Permissions Service (APS) in July, 1991. The APS provided centralized authorization for transactional licenses from thousands of domestic and international print publishers. As their experience grew in the mid to late 90's, the campus-based clearinghouses also began to negotiate direct relationships with individual content providers, to reduce the extensive administrative burdens for users involved in tracking and paying for hundreds of permissions on an individual basis, term by term.

Electronic reserve systems were not envisioned as a new use for a new type of student, but as the application of advanced technology to ease access to, and management of, large quantities of reserve material. As indicated earlier, there are significant differences of opinion and practice among institutions as to whether electronic reserve systems fall squarely under fair

use or whether the creation of a digital copy in and of itself requires a license, regardless of the nature of the use.

The role of librarians and other resource specialists in the negotiation of licenses for large scale collections of electronic content, whether text or images or music, will be discussed later in this section.

B. LICENSING PRACTICES FOR DIGITAL DISTANCE EDUCATION.

In institutions that encourage and/or require faculty to secure licenses for digital distance education, typically there is some central resource to facilitate the process, though not always. Invariably, respondents who reported that licensing was expected described the policy as “conservative,” “we’re extra careful here,” or “better to be safe than sorry.” Faculty and staff are not always convinced it is legally necessary, but are taking no chances. This ambiguity reflects a pervasive uncertainty across most campuses about what constitutes fair use in a digital environment. The fair use/licensing discussion will be detailed further below. Several policy experts pointed out that this uncertainty may be at least partly responsible for the heightened sensitivity to the difficulties of the process and the resentments about license prices. Although underlying attitudes about licensing go beyond the scope of this study, they appear to be quite relevant to a licensing process that can be obviously contentious between the parties at a number of points.

1. Management.

It has been noted several times that the actual experience base for licensing preexisting content for digital distance education uses is very small. With that point reemphasized, some

general observations can be made based on the consistency of the available information on the licensing experience.

The level of resource allocation for managing the licensing process, the level of training offered to support that process, and the policy direction and administrative support provided all impact on the success of the licensing process within educational institutions.

More positive reports came from those institutions where:

- staff were allocated to the purpose,
- the university counsel was accessible,
- resource materials and relevant data bases were available, and
- budgets for royalty fees were allocated.

These organizations reported that they could identify and locate copyright owners virtually all the time; secure an answer, typically a grant, virtually all the time; and negotiate an acceptable price about 85% of the time. Frequently it was also the case that those charged with digital distance education had prior experience with managing licensing requests as well. Some staff were convinced that their prior business relationships with a variety of content owners have helped their success. It was also suggested by one experienced licensing professional that the status of the institution he represented was a factor in his high success rate. Content producers of all types welcomed the opportunity to have their material associated with this institution's courses. This is one example of the sometimes personalized nature of the licensing process. Most content producers do have a standard fee and a standard process for licensing and those have become more institutionalized in recent years. It is still relatively easy, however, for educational institutions, individual faculty members, or academic

departments to secure “special arrangements” by calling upon other business relationships, for example sales or editorial, with the content producer. These special privileges have been granted in some instances for digital content as well.

The experience of for-profit organizations providing digital distance education with licensing should be noted. These companies believe that they do not have fair use privileges under the current law. As a result, it has been their policy to license all materials in whatever form they are delivered to students. Most materials are currently printed and delivered via mail rather than transmitted digitally. One such organization, however, has initiated an aggressive plan to secure licenses with a number of information aggregators, including Ebsco Publishing, UMI, and Information Access Company (IAC) who provide full text articles in electronic form. It is believed that these electronic information products will provide up to 80% of the articles faculty are most likely to use. The goal is to negotiate flat fees to ensure that student use is encouraged and that costs are predictable. Access to these products is expected to supplant reliance on licenses for print materials, reducing production and distribution costs and improving the quality of access for students. Efforts are also underway to secure digital licenses from major content producers whose materials are not included in such products.

2. Cost Burdens.

In the business model which governs supplemental materials delivered to students in print or videotape, via US mail or shipping services, royalty fees are paid directly by students at the point of sale. When those materials are delivered in digital form, the cost burden usually shifts to the budget of an academic department, the library, the distance learning office

or other institutional budgets. At current volumes of digital licensing activity, the total cost burdens are modest. It is unclear how policies and practices may change if and when the volume of activity and the associated costs grow.

Currently about one third of permissions for licenses to digitize material are offered at no charge. As a point of reference, less than 20% of materials licensed in print course packs is offered at no charge. Although several licensing offices reported that all the fees proposed by content owners were acceptable to them, at least two reported that up to one third of the fees were unacceptably high. One of those institutions also reported that their budget for licensing fees had not increased for five years. Generally, content producers whose print license fees have always been higher than the norm now charge higher than average fees for their new digital licenses as well.

3. Access Controls.

Provisions for control of access have a decided affect on the availability of resources for students in digital distance education. Many license structures also rely heavily on the number of users with access to the material. Developing mutually acceptable definitions for quantifying and charging for distance education students is a challenge still ahead for educational institutions and many content owners.

It is simply not clear whether issues of access for distance students reflect the state of maturity of this market or more fundamental policy differences. Access problems for distance education students do arise directly out of the terms and conditions of the licenses for electronic products offered to universities. Other problems are the indirect result of

administrative procedures. Some publishers do intentionally restrict access to their electronic products to individuals in the actual library building.

A number of scholarly publishers, on the other hand, expressed surprise that their products were not available to students officially enrolled in formal distance education courses. These restrictions are sometimes an unintended by-product of the established means of authenticating students and faculty so that they may access electronic products. For example, authenticating IP addresses has emerged as a common means for controlling access because the technology for doing so is widely available and much of the work can be automated, reducing the administrative burden for the library. Because distance learners are typically dialing into the university network, they cannot be routinely authenticated by this method. Technological and contractual solutions to this problem are available but are dependent upon the priority both librarians and content owners accord to access for distance students and the related resource burdens of alternative approaches that do accommodate the needs of distance learners.

C. LICENSING AND FAIR USE

Defining fair use in a digital age for educational institutions goes far beyond the scope of this effort. However, every discussion about licensing with faculty, administrators, and university counsels begins or ends with a reference to fair use. As one counsel at a major state institution articulated it, fair use is underrepresented by the various guidelines and overrepresented by those who say any use by an educational institution is fair use. The challenge is defining what falls in between, particularly in a digital distance education environment.

There is a pervasive sense of uncertainty about what constitutes fair use in a digital environment at every level of the institution. University counsels typically focus on the lack of

case law, the absence of any guidelines (“even if they weren’t law, they were something”), and an overall lack of experience with digital fair use in all settings, including digital distance education. Others within the university are somewhat more plain-spoken. As a distance education coordinator at a major public university commented, “Everyone’s afraid that even though they’re trying to do the right thing, they’re going to get skewered.”

“Rules of thumb” about when to rely on fair use and when to license were reported in most interviews with educators. One faculty member described fair use as “whatever the professor feels comfortable with.” Another defined fair use as “anything that doesn’t take a sale out of an author’s pocket.” Guidance and consultation on copyright and licensing issues is becoming more available to faculty. In fact, several universities have established policy and/or practice centers specifically to advise the university on copyright issues. Several are discussed in detail below. On a day-to-day basis, many faculty and staff take a more direct and action oriented approach to the “analysis” which can best be described as exercising the “fifth factor.” The “fifth factor” or “good faith effort” represents an effort by faculty or staff to cope with that murky line between what constitutes a fair use in a digital environment and what constitutes a use that requires a license. The approach was summed up by one law school instructor in a digital distance education course this way: “I think I probably should get permission to put materials online for my digital distance education course. Therefore, I try to identify the copyright owners and seek permission. If I can’t identify or locate the owner, then it’s a fair use. If I can identify the copyright owner and I request a permission and get approval, I will pay the royalty fee and use the material. If I get a refusal, I don’t use the material. If I don’t get an answer in a “reasonable time,” then it’s a fair use.”

Standards for what constitutes a “good faith” effort to locate and identify copyright owners or a “reasonable time” are idiosyncratic to each institution and even to the individual with the responsibility. Like “reasonable price,” these standards are rarely discussed or evaluated. However, many individuals with day to day operating responsibilities for licensing, most of whom are not copyright experts, describe their licensing activities in terms that parallel the process sketched out above. Based on the comments of respondents, the “good faith” effort seems to satisfy a sense of professional responsibility as well as a sense of responsibility to the educational institution while functioning in an environment characterized by rapid growth, demanding faculty, and institutions communicating a strong need to expand digital distance education.

To reiterate, defining digital fair use goes far beyond the scope of this study. In the view of many practitioners involved in digital distance education, however, the definition of one is perceived as impacting the scope of the other. It is unclear at this point where progress will come first: through the emergence of a more widely held consensus by educational institutions of what they believe constitutes digital fair use, and how that impacts on digital distance education; through the development by content owners of licensing systems better adapted to the use of all types of media in digital form;⁹ or through a voluntary or mandated process for formulating guidelines or some other authoritative guidance on what constitutes digital fair use.

D. COPYRIGHT POLICIES

⁹ The efforts to date of content owners and their intermediaries is discussed in Section IV of this Report.

In the absence of specific administrative direction regarding the need for securing licenses for a particular type of educational use, the school's copyright policy is the basic framework within which faculty and staff evaluate their need for licensing copyrighted material for a specific use for a digital distance education program.

1. Variety of Models.

Copyright policies vary considerably in their formulation. Some, such as the recent Statement from the University of California system,¹⁰ attempt to articulate a set of principles to guide faculty in their decision making. A second model can be found at Indiana University/Purdue University at Indianapolis ("IUPUI"), which establishes a strong statement regarding the unique role of educational institutions in relation to intellectual property and then offers guidance on how to apply that framework in individual situations.¹¹ The third model is found at the University of Texas, which attempts to translate the concepts of copyright and copyright compliance into practical examples of acceptable institutional behavior.¹²

Virtually all four year colleges and universities report having some sort of intellectual property policy, but only about 50% of such institutions have a current policy that includes significant consideration of digital technology. Community colleges are somewhat less likely to have a copyright policy but most do. Virtually every university contacted indicated that its

¹⁰ University of California Copyright Legislation and Scholarly Communication, Basic Principles, (www.ucop.edu/irc/wp/wp_Docs/wpd0006.html).

¹¹ Indiana University, Purdue University, Indianapolis Web Site (www.iupui.edu/~copyinfo/).

¹² Association of Research Libraries Office of Scholarly Communication Web Site, (www.arl.org/scomm/copyright/Texas.htm).

copyright and intellectual property policy was currently under review or in revision, an overall process that may take up to two to four years including final faculty adoption.

The two most commonly cited reasons for that current review of the copyright policy were the impact of certain provisions of the Digital Millennium Copyright Act (“DMCA”) and vigorous campus discussions about ownership of the university’s own intellectual property, particularly courses developed for delivery over the World Wide Web.¹³ Both of these issues, the implementation of provisions to limit liability for educational institutions under the DMCA, and ownership of World Wide Web courses, go beyond the scope of this study.

However, the context in which licensing policies and practices are being developed as well as the relative priority of those issues is relevant. Interest in revising or reviewing policies to meet the criteria established in the DMCA have also resulted in the creation, especially on many larger campuses, of a committee comprised of senior administrators, a university counsel or sometimes outside counsel, as well as key staff and faculty, and discussion of university-wide copyright concerns sometimes for the first time in many years.

2. Copyright Policy Centers.

When IUPUI established its Copyright Management Center five years ago, it was a unique effort. Creating a central resource for policy development and advice on the university’s role in its intellectual property was a new concept. A few other large research institutions have since initiated similar efforts. These universities have established centralized resource centers to provide policy guidance, advocacy for the unique concerns of educational

¹³ Discussions of intellectual property ownership are less likely to include courses which are broadcast in real time or videotaped for asynchronous viewing. Because of the extensive use of university-owned equipment and support staff, faculty and universities report a greater presumption that the university does own the material.

institutions in intellectual property policy and interpretation, and copyright education. These centers reflect quite different institutional models and organizational structures. The IUPUI copyright center reports to the Academic Affairs office. At the University of Texas, the copyright resource center is located within the University Counsel's office. At North Carolina State, the office is a part of the library. The role of these centers in direct management of licenses, whether for electronic resources to be made available on a university-wide basis or for transactional licenses for preexisting content, varies in relation to the mission of the organization of which it is apart. For example, the centers at the University of Texas and North Carolina State, located within the office of the university counsel and the library respectively, are more involved on an operational level than the IUPUI center, which is a part of academic affairs.

Several additional institutions have reported receiving approval in early 1999 for a proposed office for copyright coordination. One such center is directly linked to the established distance learning program at a large state university. The advocates for these centers believe that the fact of the DMCA itself played a part in the approval process since many university administrators perceive the passage of the DMCA to be an important milestone. It represented specific legislative action on digital information issues and had specific provisions relating to educational institutions.

As indicated above, the increasing focus on today's campus on copyright issues is often driven by the role of the educational institution as a licensor, rather than as a licensee. Senior administrators and university counsels in particular characterize copyright issues today as encompassing a variety of obligations and business relationships and the management of the

university's own resources in an increasingly global and complex market. As a result, the office of university counsel is being consulted more and more regularly on such issues.

Those needs are creating a need for complex contracts that reflect business partnerships that go beyond simple license agreements. For example, a major university planned to deliver live video of a specific class to several satellite sites and wanted to deliver the text digitally as well. The text for the course was not available in digital form, nor did the publisher have the resources, or the expertise, to convert it. In subsequent negotiations, the university and the publisher fashioned a mutually beneficial contract in which the university assumed responsibility for the conversion and was accorded the right to transmit the digital text as well.

3. Copyright Education.

The DMCA has, based on campus reports, motivated many universities to focus on their role in copyright education for faculty and staff and to increase their investment. In requiring institutions which seek to limit their liabilities as Internet service providers to provide educational materials that "accurately describe and promote compliance with the copyright law," the Act has led to a new level of scrutiny of those materials and programs.

In the academic year 1998 – 1999, about one third of the institutions contacted offered copyright education to their faculty in the form of workshops. The educational programs offered are delivered more frequently, provide more extensive information, and are more likely to be attended by faculty than in previous years. The instruction is voluntary for faculty. As one trainer remarked, "the new faculty come and the established faculty don't."

Historically, universities have rarely communicated with content owners as policies and

practices were developed. A recent initiative may impact that pattern. In April 1999, several major trade associations representing educational institutions and one group of copyright owners cautiously began discussions about a different kind of educational effort. The intent is for both parties to collaborate on a set of common educational messages about copyright responsibilities within an educational setting. The goal is to reach a broad base of faculty and students with as common a message as possible, acknowledging differences clearly where they exist.

E. CHANGING ROLES OF EDUCATIONAL INSTITUTIONS IN INTELLECTUAL PROPERTY

The digital revolution has brought significant changes in the role of educational institutions in the creation, management, and dissemination of intellectual property. At most of the institutions contacted, with the exception of several of the community colleges, there is a policy or contract in place, or under active discussion, regarding the copyright ownership, royalty share arrangements, and future exploitation of digitally supported courses.

Though this Licensing Report does not extend to the institutional/faculty discussion over ownership of original content created by faculty, this issue will begin to affect licensing practices and needs at educational institutions within the foreseeable future. Administrators and university attorneys are already anticipating complex negotiations as faculty leave the institution at which they were employed during the development of a digital course for a different institution. Will the faculty member be entitled to take the course to her new institution? If the educational institution owns the course in question, will it agree to license the course to the second institution? Under what terms and conditions? For what time period? At what fee? How will these negotiations be affected if preexisting content has been licensed

for inclusion in the course? If preexisting content has been included in the digital course under a fair use claim, how will licenses be negotiated for distribution outside the original institution?

These ownership discussions are not limited to higher education. They are beginning on a much more limited scale in K-12 educational systems as well. Teacher unions in some states, for example Maine, have included provisions about ownership of courses and curricula in their teacher contracts. In other instances, local school districts are beginning to take the necessary steps to assert a copyright claim in their curriculum.

IV. LICENSING POLICIES AND PRACTICES: CONTENT OWNERS

Content owners generally develop licensing policies and practices for both types of licenses, transactional and site, in reaction to a visible market need. The volume of requests for digital use of material in the academic market represents a small fraction of the total license requests for academic uses. Even among text publishers and producers of educational audiovisual materials who receive licensing requests for digital uses, and specifically for uses in digital distance education, the numbers are small. Moreover, the description of the uses, the numbers of users, the conditions under which the material will be used, the amount of material requested, and the type of technology to be used vary significantly even within that small absolute number of requests. As a result, no content owner in any media specifically tracked decisions on requests to digitize content for distance education activities. Respondents across all media reported that those requests are evaluated and processed on a relatively ad hoc basis.

The digital age has led to the development of a growing number of information and

image products delivered in electronic form under license agreement. These site licenses are sometimes are negotiated directly with the content owner and sometimes with an information intermediary who delivers content on behalf of the owner or owner(s). The emphasis in these license negotiations is on defining, and anticipating, as clearly and comprehensively as possible, the range of institutional users who will require or desire access to the material and the uses to which that material may be put. One highly regarded expert on such licenses argues that some of the most productive areas for these license negotiations are in such areas as vendor performance; accommodations in technology; archiving; or securing the rights for incidental uses such as course pack permissions or limited document supply, which may preclude the necessity for other transactional licenses. Site licenses will not be appropriate in all areas, however. As a general rule, such licenses restrict users to on-campus students, creating a disparity of access between on-campus and remote students. Also, site licenses cover a range of uses over a range of time, and may not be an efficient mechanism for licensing one-time or very limited uses. The value of site licenses that incorporate rights for certain uses of material that usually require ad hoc transactional licenses is primarily in the savings of administrative costs to both the educational institution and the content owner.

The relative success of site licensing practices is in contrast to the problems of the permissions or transactional licensing process. Very often the costs to both the licensee and licensor outweigh the value of the information/use being negotiated. This is especially true for transactional licenses for digital uses, which represent the smallest fraction of licensing used in digital distance education. Resource constraints in staff and technology to support greater automation and improved transaction processing are typical among content owners.

The explanation from more senior executives and industry observers is that the business model to date (i.e, the revenue return on investment) simply does not justify additional expenditures. In all types of media, particularly works with a high commercial value such as motion pictures, educational licensing requests are competing with more lucrative business to business transactions. Developments in technology driven rights management and technology aided licensing may alter the business model substantially, particularly for digital material. Those technologies and business models¹⁴ are, however, too early in their development to predict their impact on the transactional licensing market.

A. LICENSING AND PROTECTION OF MARKETS

A primary concern of content owners in managing transactional licenses in particular is to establish policies and practices that protect its market for sales of its current and future products. Licensing can and does serve as a vehicle for exploitation of existing content in new ways. However content owners are conflicted when their primary market seeks permissions to use material in a way that may supplant the need for the content producer's own product or future products. The majority of content producers involved in the sale of text, audiovisual, and image materials to the academic market described either significant investment in creating new products in digital format or in converting existing products into digital form or both. The rapidly growing market in digital distance education is one prime target for these new products. The strategic emphasis and resource investment among content owners is on new products which may be licensed or sold in the future.

¹⁴ See Section V of this Report.

The changing role of educational institutions in creating and managing intellectual property was described in the prior section. Roles, and approaches to content development, are changing among content producers as well. Several educational publishers highlighted new products, developed for delivery over the World Wide Web and suitable for use in digital distance education, which were developed in collaboration with educational institutions. Content producers of educational audiovisual works report that they are actively analyzing the market need represented by a growing number of requests to use content digitally. The response has been to investigate new products and services to meet the market demand reflected in those needs rather than to develop their permissions systems further.

In addition, all major educational publishers, as well as a number of key publishers of professional and business information, have developed and continue to experiment with new products specifically designed for both the academic and corporate digital distance education market. Delivery and maintenance of these digital products typically requires coordination among the publisher, the educational institution, and a software vendor or vendors. As one regional sales manager for a major educational publisher's distance learning products commented, the business relationship between content producers and educational institutions is evolving.

B. INTEGRATION OF LICENSING AND STRATEGIC PLANNING

Large content producers with significant investments in building products, new sales strategies, and appropriate support systems for the growing distance education market have not consistently considered the role of licensing or permissions as a component in their strategic planning. The same faculty member whom a publisher may be actively courting to adopt a

web based curriculum, with extensive free materials available online, may have to go through a time consuming and tedious permissions process to use his or her favorite portion of a print text from that same publisher. Distributors of educational audiovisual materials increasingly find they need to fill an educational role between their producers and their customers, explaining the impact of the digital revolution on education to producers and the complex rights and licensing issues involved for producers to educators.

These discontinuities in the management of customers, which are often perceived negatively by customers and potential customers, are beginning to be identified and addressed within some large educational publishing organizations and among more innovative video producers. New strategies and organizational communication links are being established by the innovators to ensure responsiveness to customers. One large educational publisher has developed a sophisticated system for collecting data on customers requesting digital use of materials. That data is regularly forwarded to the sales and marketing departments, and includes information on the types of institutions, the types of materials, and the types of uses requested. Within this particular publishing organization, the presumption is that those seeking permissions of any kind are “our customers.” This philosophy is supported structurally in that the rights and permissions department reports to the same senior manager responsible for customer service.

In another major educational publishing organization with a strong and rapidly growing division devoted to developing distance education materials, a different approach is being considered. Recognizing the disparity between that division’s approach to rapid product development and flexible responses to customer sales and service and the routine experiences

their customers have in seeking permissions, this organization is considering adding a licensing function within its own customer support unit.

C. RIGHTS MANAGEMENT

In order to grant any license, the content producer must have, and must know that it has, the rights in question. Relatively few content producers in any media have made the necessary investment over time to build complete, accurate, and detailed information on what they own and/or what rights they have to the material in question. The information that is available is not in an easily accessible format.

A few innovative content owners have ad hoc efforts underway to develop relational databases to support the acquisition and granting of rights. Others have initiated major software development efforts to structure and manage this data, but discontinued those efforts because of the significant expense entailed, the absence of a business model to justify the investment, or confidence that such an investment would provide significant strategic benefit. Collective licensing organizations in music and text serving as agents for several hundred thousand works have developed relational databases to support online interactive licensing, but these products are still in development.

In fact, the value of portions of content in digital form, packaged and repackaged in a variety of formats and products, is underscored in the digital marketplace. Content owners, particularly in text and music are discovering additional reasons to develop the necessary data systems for technology-based rights management which can support more automated licensing systems. Several current and anticipated commercial efforts in the area of rights management promise, at least at present, to create a competitive marketplace for developing such systems

for digital products. In fact, rights management, development of common terms and definitions for rights data or metadata, and efforts to ensure interoperability across media are all widely understood to be essential for significant growth in the delivery of digital products. However, the prognosis for applying more sophisticated rights management systems to preexisting content is more doubtful, given the large volume of historical material the high cost of developing the necessary databases and populating those databases and the relatively low economic value of license revenues for older materials.

Publishers, indeed all content owners, report a greater level of care when granting rights to digitize material in any setting to ensure that the rights are there to grant. As noted above, creators (authors, illustrators, photographers, etc.) have become both more sophisticated about their electronic rights, and more aggressive about protecting or exploiting those rights. As a result, content producers report greater caution in granting requests for digital uses if the rights are not clear, as they are not for many contracts that predate the digital revolution. The caution encompasses not only legal concerns but also concerns about relationships with their authors. The potential to alienate creators in ways that could affect future business relations is perceived as a significant risk in granting any digital rights in which the original creator may have, or believe they have, interests. Sensitivities in the business relationship beyond the specific rights question were also reported from the music and motion picture industries who further reported that such issues may influence whether a request is granted, the time it takes to grant a request (e.g., the artist may need to be contacted) and the fee associated with the grant.

D. ONE STOP SHOPPING

The term “one stop shopping” is used to describe a mechanism that allows a user to go to one centralized site to request permissions for all the works he would like to use. In concept, this would eliminate many of the problems cited by educators today, and is often mentioned as a remedy to the current inefficiencies in the licensing process. In practice, however, one-stop shopping is an idea with real-world limitations, at least under current business practices in the United States.

Although digital objects are interchangeable, licensing practices for different types of content are not. The licensing systems, particularly for transactional licenses or permissions, are quite distinct. Consolidation in the publishing, information, multimedia, and entertainment industries notwithstanding, there are literally thousands and thousands of individual content producers of all types. Yet each media type, text, audiovisual images, and music, has a unique industry organization; established practices, or lack thereof, for licensing; its own licensing intermediaries, or lack thereof; and only rudimentary cooperation at the operational level. Collective licensing organizations¹⁵ ease, but do not solve, these issues by industry. They have virtually no impact on coordinating license activities across media on behalf of the educational user.

E. USER ACCESS AND INTERFACE

Faculty and staff actively involved in digital distance education are largely a self-selected group of individuals who understand and rely heavily on electronic communication. They use information resources on the Web constantly and acquire software, information, and other items in support of their educational mission over the Web. Most content producers also

¹⁵ Section V of this Report.

now have World Wide Web sites, some quite sophisticated, that offer rich information resources that enhance products, boost sales, and generally allow online purchasing or ordering of some type.

However, information on how to obtain permissions for additional uses of those products, both analog and digital, is frequently unavailable and buried on the site, does not carry clear or useful guidelines or directions, and requires that the requestor rely on mail or fax to initiate the requests. Only a handful of text publishers have established an e-mail link to their permissions departments.

F. PRACTICES OF CONTENT OWNERS BY MEDIA TYPE

1. Text Materials.

(a) *Digitizing preexisting text content to support distance education.* For the purpose of the following analysis, this Report looks at a cross section of publishers, with an emphasis on educational publishers and those in scholarly or academic publishing. Given the disproportionate number of distance education programs in business and technology, publishers with significant programs in these fields were also contacted. Their descriptions of activity in this market were remarkably consistent.

Requests to digitize preexisting content for inclusion in a digitally delivered course or for use in an electronic reserve system still comprise less than 1-2% of all requests received for reproduction of materials for distribution to students.¹⁶ One large educational publisher counted approximately 30 such requests in 1998 for their business, computing, and engineering

¹⁶ Requests for digital courses in distance education are not tracked separately from requests for digital courses for students in residence.

materials. Scholarly publishers and university presses report a “handful,” “1 or 2.” The CCC¹⁷ introduced a centralized licensing service for requests to digitize preexisting content for use with academic courses in the spring of 1997. CCC’s Electronic Course Content Service received a volume of requests in the academic year 1997 - 1998 that was less than one half of 1% of the total requests processed under their course pack program.

Staff who manage these licensing requests directly report a narrow understanding of the technology, the educational environment in a distance education program, and the practices and procedures used to administer distance education courses and programs. Because digital uses of any type are less than two to three years old and not well understood, there is no body of experience against which to evaluate individual requests. Since the number of requests is small, experience with various technologies, software, and learning environments in use in digital distance education is limited. Often more detail is required from the user. In sum, the permissions process is often iterative and time consuming. The licensing, or permissions, process overall remains primarily a manual, labor intensive effort. Relatively few content owners have automated their systems for accepting and responding to license requests.

As recently as three years ago, requests to digitize materials for any use, academic or corporate, were routinely denied by the majority of publishers. As of the current academic year, 1998-99, the majority of educational and scholarly publishers contacted do grant requests to digitize preexisting content as long as those requests meet the criteria specified below.

Publishers targeting the academic market, whether with textbooks, scholarly monographs, or

¹⁷ The Copyright Clearance Center is a collective licensing agency for print publishers. It serves as the Reproduction Rights Organization in the U.S. The role of CCC and the details of the Electronic Course Content Service will be examined further Section V of this Report.

journal literature, report universally that it has become standard practice to grant such requests today. They also acknowledge that such granting is a significant change in practice that has taken place within the last twelve to fifteen months.

The process each publishing organization described for making the change in policy was similar. A specific request or set of requests raised the issue. In order to respond, the publishing organization began to learn a little more about the nature of the technology and the uses described. Next, the staff receiving the requests proceeded to brief various decision makers in the organization. It was then necessary to take a new draft policy through a complete organizational review. Once new policy was developed, a form agreement had to be adapted from existing permissions agreements. That process is repeated, publisher by publisher. One publisher who processes grants for such requests today acknowledged that the first such request required over six months for a response. Though this description is specific to text publishers, it is typical of the process by which new policies, criteria for grants, fee schedules, and form agreements are developed for other media as changes in educational practice and/or available technologies generate new types of requests.

Limited knowledge, uncertainty, even suspicion, about technology used in digital distance education and electronic reserve systems including security, controls on access, and downstream uses were the norm a year ago, according to publishers contacted. Today those attitudes are being replaced by a slowly growing consensus that such requests can be approved as long as certain key elements are incorporated into the license to protect the interests of the publisher. First, the amount of material requested must be limited. Second, access must be limited to students enrolled in the course, typically by student ID and/or password and/or IP

address authentication. Copyright notices must appear on screen. Students must be advised (means not specified) as to limits on their use of the material. Material must be deleted or, access blocked, at the end of the course.

Publisher agreements are typically one page in length, specify the elements above, and are issued in the form of a simple letter agreement. Because the experience base is still very small and terms are not thoroughly understood, areas of confusion and potential misunderstanding persist. For example, though agreements generally prohibit students from making an “electronic copy,” they are often silent on whether a student can make a personal, print copy. It is not always clear as to whether the prohibition on an “electronic copy” is intended to bar a personal copy on the student’s hard drive. Agreements reviewed also failed to define time frames for storing the material consistently: how is the “end of a course” defined? Is there a specified grace period between the conclusion of the course and the date the material must be removed or blocked on the server? If material is blocked, not removed from the server, can it be made accessible for a student doing make-up work for the original course? Concerned educators raised all of these questions/issues during the course of the Copyright Office hearings. The early stage agreements in the market place today are currently silent on these practical points.

The majority of scholarly and educational publishers consistently report that they deny only two to three percent of the requests they receive to digitize preexisting content. Typically, requests are denied only when the publisher judges that too much material has been requested. Educational institutions contacted, however, reported denial rates ranging from none to as much as one third of all requests. In describing denial rates, users tend to aggregate

specific refusals, failures to respond, as well as instances in which, as the potential licensee, they were unable to identify or to locate the actual copyright owner of the material.

Moreover, many respondents are reporting primarily on small samples in which the impact of one content owners' decision to reject the request or to set a particular fee may be disproportionate.

(i) *Fees.* Educational and scholarly publishers generally report that they have set fees for a license to digitize a portion of a work for use in digitally delivered education or in electronic reserve systems that are roughly comparable to those charged for a course pack use, i.e., cents per page per student enrolled. Instances in which fees are substantially higher do occur when the content (i.e., the article, the individual case, the excerpt) can be purchased directly or as part of a complete digital product that is sold or licensed at an institution-wide fee.

Fees for digital uses are somewhat more likely to be structured as a flat fee, regardless of the size of the class or number of students who will have access. This practice reflects a presumption that, inevitably, more individuals will, or could, access the digital version. Content owners report a higher fee as a way of protecting the property, or at least the value of the property, in some way. The resulting fee per student may be judged unacceptable by the licensing institution.

No publisher reported differentiating between not for-profit and for-profit entities in setting fees, as long as the nature of the use was comparable and occurred in an accredited educational setting. In fact, it was unclear whether a majority of permissions professionals had a good understanding of the variety of for-profit organizations providing digital distance

education and how they do, and do not, differ from established not for-profit educational institutions.

(ii) *Differing responses by type of publisher.* Educational publishers with established permissions departments generally respond within two to three weeks, or less, with generally consistent prices, terms, and conditions. Thus, over time, a faculty or staff member who frequently requests their material will be able to predict the response with reasonable accuracy. Other publishers with a clear stake in the academic market – university presses, scholarly publishers, professional and reference publishers – report similar response times.

Denials, long delays in response, or unpredictable pricing are more likely to occur with smaller publishing organizations – small, independent publishers, niche publishers, organizations of one time publications that lack a traditional publishing infrastructure. These organizations are often uninformed about digital distance education and the processes and technology that support it. The number and frequency of requests any individual publisher receives do not create an incentive for them to become more informed. It is simply less risky to reject a request or set a prohibitively high fee. Alternatively, a publisher may delay action instead. Large publishing organizations that have a relatively low stake in the academic market often delay as well. Anecdotes of such extended delays by newspaper or trade publishers are relatively common among educational institutions.

Of great concern to educational institutions are denials from established publishers who own titles of particular significance in a specific discipline. Professional and reference materials are the types most often cited in these discussions. Often these publishers already offer the content in question in electronic form, often on a subscription basis either directly

from the publisher or through an intermediary. Currently, electronic content is most likely to be delivered as a package (whole journals, multiple journals, thousands of full text articles, etc.) licensed for access by large numbers of faculty and students with commensurate price tags. Publishers report that they deny requests for digitizing smaller components at a low fee because such permissions may jeopardize sales; users find the pricing or delivery model too inflexible to accommodate the specific needs of a specific distance education course. The result may be an impasse over material that the faculty member deems crucial to the course.

Overall, therefore the licensing experiences of individual educational institutions may vary depending on the disciplines in which they offer distance education, the levels of those courses and the resulting kinds of literature required, and the types of publishers whose products they request. Digital uses also tend to exacerbate different information needs among different disciplines. Disciplines requiring historical and archival material may have significant problems in locating copyright owners in order to secure permission. On the other hand, courses requiring public documents, current news coverage, and the like benefit from the ready availability of much of that content online at no charge.

(b) *Licensing of electronic journals and databases.* In general these licenses for electronic products are only in their first or second generation of negotiation. Terms are changing but the supporting definitions, and the procedures for managing information, are challenging to develop and often require a significant investment. Publishers, particularly those with greater experience in electronic publishing, report that their issue is not whether distance students should be included, but how they can be included on a secure basis at an acceptable cost.

In general publishers have articulated a willingness to include enrolled distance students if:

- a methodology for controlling access can be worked out with the library
 - the educational institution is willing to assume some level of responsibility for enforcing the terms of the license with those students, and
 - the license fee reflects any increase in the number of enrolled students.
2. Audiovisual, images and music.

The World Wide Web, in particular, is a medium that invites the use of audio and visual materials. The most technically literate faculty now involved in creating digital distance education courses are already experimenting with original video and audio content. Based on the rate of growth in inquiries to video producers and educational broadcasters, the interest in digitizing preexisting content is growing though the absolute number of requests is currently very small. Digital delivery of courses will drive demand for more visually interesting and diversified materials in order to retain student interest.

(a) *Audiovisual materials.* Video producers report a very low incidence of requests to use their material in distance learning environments – either via broadcasts to remote locations or via digitizing clips for inclusion in Web delivered courses. Responses such as “a handful,” “a couple,” and “occasionally” are common, though there is widespread agreement that the numbers are increasing at a significant rate. Among major video producers, only the Public Broadcasting System routinely incorporates into its license agreement authorization to transmit the video content within a building, single campus, or cluster of buildings on a closed network, “where those rights are available.”

Other producers generally grant such requests if they have the necessary rights from

the creators. Educational video distributors are generally willing to contact the producer on a customer's behalf. In fact, at least one major producer described itself as having an important role in educating producers about the changing needs of educational institutions as technology evolves. As with print publishers, use agreements tend to be simple, one page agreements. The small number of requests is seen as an insufficient basis for developing a more sophisticated document. Every video producer contacted indicated that use fees were also in development and currently calculated based on the specifics of the request. Larger organizations stressed that they strive to keep fees low so that their products remain affordable on a per student basis. One major producer described a relatively new practice of issuing licenses in perpetuity, or in continuity, meaning simply a license to use the video in the manner described for as long as needed for one initial license fee.

Educational video producers, facing a growing market in digital distance education, generally are still uncertain about when and how and how much of their current product line should be converted to digital form. One producer described an active program for digitizing their content; this organization had digitized about 10% of its archive and had set a goal of digitizing over 50% of that archive by the end of 1999. The marketing director in this particular firm described the current market as "in an awkward transition while we go from analog to digital. Three years from now everything we do will be in a digital format."

For audiovisual works in particular, individual faculty are encountering the complex copyright issues in this medium with little knowledge or experience. Educational video producers too appear to be focusing on meeting the needs of faculty with new products and services, rather than improved licensing systems. As a result, one video organization launched

an active program to contact their academic customers and determine what kinds of content they needed in digital form and what kinds of uses they anticipated for that content. A second, an organization in educational television, described initiating contact with their teacher education/teacher resource center to develop resources and programs to assist educators achieve new kinds of programs. Another has mounted a searchable catalogue of available footage on the World Wide Web. In general, these organizations are convinced that the technology, expertise, and resources required to produce high quality materials will drive the market to different kinds of partnerships between educational institutions and content producers for the production of audiovisual materials for digital distance education.

Motion picture companies also report small volumes of requests by educational institutions to use “clips” in the classroom. One estimate of the volume of such requests, which extend to a variety of instructional uses in educational settings, was “two to three per week.” Motion picture producers do acknowledge that locating the correct department and/or individual to handle a “permissions” request is not a simple process within their organizations. One studio, however, has a specific phone line with extensive recorded information on how to submit requests of all kinds, what information to provide, and what to expect in terms of response times.

Many of the issues that affect licensing and permissions for motion pictures are similar to those described for other media: does the studio have all the rights required to grant the request? If not who needs to be contacted for further rights? Even if no contractual rights per se are involved, does the clip or still involve a performer with whom good business relationships are exceptionally valuable? Does that individual prefer to approve all uses?

Does the requestor need a physical copy of the clip? What time and costs will be required to produce that clip? Educators are often surprised when motion picture producers take the position that clips cannot be legally duplicated from “home use” videos and find the costs involved in securing the clip from the studio to be prohibitive.

Permission for these requests is generally granted if the rights are available, sometimes with no royalty fee. The decision to grant, and the decision whether to charge a fee and, if so, how much, depends on the product in question, the nature of the use, the age of the product, the fame of the segment and/or the artists involved. Generally, grants are provided when the request is to use less than three minutes of the film. Most requests are for still images or far less than three minutes of film.

The time frame for approving requests can be lengthy, in part because of the questions of rights and/or business sensitivity to the preferences of a valued performer. Furthermore, all licensing requests funnel through a single channel. Educational use requests must compete with more valuable, and often more clearly defined, business to business licenses which may be processed first.

Requests to convert film into digital form and/or to transmit digitally are generally denied. Motion picture producers expressed serious concerns about technological security. As a result of those concerns, virtually no digital uses of any kind are authorized. At this stage in the development of the technology, even commercial requests for digital rights are denied at this time.

(b) *Images.* Art educators, and visual resource specialists and librarians engaged in arts teaching and scholarship, have described in comments and testimony the

unique problems they face in assembling the images needed for digital distance education courses in the visual arts. A typical course in the visual arts may require anywhere from 1,000 to 2,000 individual images. Moreover, many existing slide collections have been assembled over a period of time and are comprised of images acquired commercially, material developed and donated by faculty, and a variety of images from other sources now exceedingly difficult to identify. Identifying and locating copyright owners across such a spectrum, particularly for such a large number of images, is difficult, expensive, and not always successful. Thus seeking transactional licenses or permissions to incorporate preexisting content into digital art courses is not viewed as a practical option.

At least one commercial vendor has developed an “On-site Digitization Policy” and offers a standard license that authorizes educational institutions to scan slides (within certain specified technical standards) for teaching and research uses at a standard fee per image. Such licenses, however, are specifically limited to on-site/campus uses only.

Following a pattern seen in other media, content owners, producers, and distributors in the visual arts, rather than focusing on ways to improve transactional licensing systems for analog products, are creating alternative digital products to meet the growing need for digital arts collections. Several key commercial image vendors are releasing a number of digital collections under license agreements that may, for example, authorize the inclusion of the thumbnail images in a course syllabus. One vendor even offers instructions at its World Wide Web site on how to integrate these digital images into a digital course. Again, the license offered limits use to the campus intranet and does not authorize any transmission over the

World Wide Web. The vendor expects to offer additional sets of a digital collection for multiple sites at a substantially reduced license fee in the near term.

In addition to the offerings of vendors who have served the educational market for some time, are newer, more diversified, image vendors such as Corbis Corporation (www.corbis.com). Though Corbis has not targeted educational institutions per se, it does receive a small number of inquiries weekly from academics who generally license images at the low individual rates. Licenses for those images do allow for web use, i.e., they could be used in digital distance education courses. Corbis does routinely rely on web crawlers to locate its watermarked images on the World Wide Web. Such scans generally do uncover unauthorized (i.e., unlicensed images at academic sites). This practice of web crawling to detect unauthorized uses of watermarked images is becoming more common among a variety of stock photo organizations.

In the last two years, museums and art institutes have also undertaken two initiatives to create large repositories of their images which are being offered to educational institutions under institutional, or site, licenses. Both consortiums are designed to deal with the broad issues of the quantity, quality, and accessibility of digital art and photographic images for educational institutions. These initiatives are described in detail in Section V below.

The growing availability of large collections of high quality images are meeting many needs among art educators generally. Two limitations are evident, however. Such licenses generally do not currently accommodate the specific needs of distance education in that images are licensed only for use on the campus network and distribution on the World Wide Web is

not authorized. Moreover, these image collections do not, and according to art educators may never, provide all the relevant images an instructor would need for a course, particularly those in more narrow and/or advanced areas of scholarship.

(c) *Musical works and sound recordings.* Licensing of musical works is, as a practical matter, one of the most complex, given the several, distinctive rights involved in any digital use and the fact that the licensing for each of those rights is handled by a different type of content owner or a different collective licensing organization. Public performance rights and “mechanical” rights of musical works, i.e., the right to use the music in online delivery, as well as tapes or CD’s, are managed by collective organizations. Those licensing activities are discussed in Section V of this Report.

Requests to reproduce sound recordings in an analog or digital format or to perform them by means of a digital transmission, are handled directly by the individual recording companies. Those companies again report few requests for educational uses of any type and even fewer requests for the rights for digital uses in educational settings. When requests are received, they are handled on a case by case basis with fees set case by case as well. Factors that might affect the fee levels include the promotional value of the work and whether it was in or out of print. A letter agreement is developed for each request granted. Practice on requests for digital uses varies, with organizations reporting both that they decline all such requests and other organizations granting requests for digital excerpts of sound recordings, as long as the clip is limited to 30 seconds. There is a standard form agreement for such grants, which, among its other provisions, reminds the user that other rights are involved and additional licenses may be required.

3. Software.

The software that enables the delivery of the electronic material is an enabling technology. This type of operating software is often licensed by the university along with the electronic content being delivered. In some instances, the content owner has developed proprietary platforms for delivering the content. In others, software for managing and delivering the content has been licensed from a third party vendor with the necessary rights for broad scale distribution. The use of particular pieces of software, as examples or illustration of a point, in digitally delivered courses is yet another area in which licenses are rarely requested or issued.

V. ORGANIZATIONAL AND COMMERCIAL INITIATIVES IN LICENSING

The first four sections of this document have attempted to summarize the kinds of licensing activities, the volume of those activities, and the policies and practices of the direct participants in the licensing process, educational institutions and content owners. This final section will examine the current, and potential role, of other types of organizations that impact the market for licensing in digital distance education. The organizations reviewed below include licensing collectives, commercial rights management organization, and finally the software and service providers who support, and in some instances, drive the digital distance education market. The predominantly not-for-profit licensing collectives serve as agents for defined constituencies of content owners and offer centralized or collective licensing systems to educational institutions for activities such as digital distance education. The section on commercial organizations developing new models for rights management in digital information reprises some of the organizations identified in the Technology section of the Report. The

intent in this Appendix is to elaborate further on the business models and the likely applicability of these technologies to the educational environment.

A. LICENSING COLLECTIVES

1. Text.

The not-for-profit CCC has provided a centralized transactional licensing service for text materials for course pack permissions since 1991. CCC offers an online automated service and back end processing that manages both customer billing and royalty distribution. Royalty fees are based on individual pricing by copyright owners and the CCC adds a service charge per transaction. Drawing on its extensive experience in academic licensing and its established business relationships with both content owners (publishers and authors) and universities, CCC debuted a rights clearance service for electronic reserve systems in the spring of 1997.

Though re-named the Electronic Course Content Service (ECCS) in the spring of 1998, the majority of customers, and transactions, are still related to electronic reserve systems. Digital distance education courses are eligible for the service, however, and the expectation from CCC, publishers, and key university customers is that such requests will increase. Though the ECCS has managed fewer than 2000 transactions to date, response from publishers has been positive and customers clearly value the convenience of the collective model. Several referenced the convenience of the CCC in their testimony at the Copyright Office Hearings. In fact, the number of requests received by ECCS in 1998-1999 are running at a rate that would produce annual requests almost triple the number of request received the year before.

2. Music.

Both performance and “mechanical” rights are managed for the music industry by established collectives. The established performance rights organizations, the American Society of Composers, Authors, and Publishers (ASCAP at www.ascap.com) and Broadcast Music, Inc. (BMI at www.bmi.com) have provided comprehensive, relatively low cost performance licenses to academic institutions for decades. Negotiated with two key organizations representing educational institutions, the National Association of College and University Business Officers (NACUBO) and the American Council on Education (ACE at www.acenet.org), these licenses cover virtually any kind of non-dramatic performance a faculty member or student might undertake.

Both organizations currently license Web sites, but the focus on these licensing programs is on commercial rather than educational organizations. They also seek out on a regular basis non-licensed sites, including academic sites, with music in digital form using a variety of techniques including web crawlers. The responsible individual is contacted and licensing is offered. The kinds of uses uncovered typically include activities such as college radio stations, for which a standard license fee is \$250. Although standards and technology to protect music on the Web are only in the earliest stages of development, these performance licensing organizations believe they must move ahead with licenses now in keeping with their fiduciary obligations to their licensors. Though a license for digital uses is currently “under discussion,” the terms are confidential, as is any estimate of when such a license might be available in the market place.

“Mechanical” rights, i.e., the licensing of music for use in records, tapes, CD’s and online delivery are managed by The Harry Fox Agency, Inc., a wholly owned subsidiary of

the National Music Publishers' Association. Harry Fox has invested in the development of an interactive, online licensing system which is scheduled to be launched within 1999. The potential licensee will be able to log on to the agency's database of over 600,000 compositions and request a license for a particular use. Though the range of uses that can be licensed in this fashion at launch may be limited, the agency's plan is to include digital uses relevant to distance education in the near term.

3. Images.

Two unique not-for-profit organizations have also been established in the last two years with a mission to digitize and license significant museum collections for educational uses. The more established of the two is AMICO, the Art Museum Image Consortium (www.amico.org). AMICO, with twenty six member museums in its beta year of operation, has created a "library" of digitized works of art, described and indexed, which are made available for study in educational institutions. The database currently contains over 40,000 high resolution images. Access to the library is provided on a subscription basis, with fees based on the type of not-for-profit institution subscribing and the potential number of users. The subscription price comprises both the license fee and the access fee and covers, in one annual payment, searching, all allowed uses, and technical support.

The AMICO license incorporates specific language designed to ensure its content is available to all enrolled students regardless of their location. The license also requires the university subscriber to adopt and effectively disseminate policies and procedures governing the proper use of the electronic collection.

The Museum Digital Library Collection, Inc. is expected to launch a collection of 20,000 high resolution images representing nineteenth century culture in the United States and Canada. An institutional license will be offered to the educational community at no charge initially, while data is gathered to help determine a reasonable and appropriate fee structure. The MDLC has also focused on standardizing and rationalizing the licensing process for commercial uses. By pairing commercial and educational licensing, MDLC hopes to develop a business model that can succeed in both environments.

B. COMMERCIAL DEVELOPMENTS IN RIGHTS MANAGEMENT

Licensing in a digital environment will require clear and immediate knowledge of whether rights are available for that licensing request and a structured method for accessing information on those rights. A persistent problem in the analog world, granular rights management has been a universal, cross media focus as content creators prepare for the delivery of digital products. From mid-1998 through early 1999, a series of initiatives in digital rights management have been announced. The number, scope, funding resources, and type of corporate backing in place all suggest that the market is moving substantially closer to solving the problem of copyright protection for digital materials. Whether these technologies and business models will flow backward, impacting the rights management problems and licensing issues for preexisting content is less certain.

One recent rights management initiative within the educational organization of a large content company will have a direct impact on its licensing for digital distance learning as well as other academic use licensing. International Thomson Publishing (www.thomsonrights.com) has announced a set of strategic initiatives for its educational companies that test a new

business model for managing rights acquisition and granting. Recognizing the business opportunities in maintaining structured, accessible rights information on all its properties, ITP has been building across all its operating companies a rights management database that will support re-purposing (i.e., the reuse in different forms, products, and services) of all its content in a cost effective manner. By viewing rights acquisition and rights licensing as integrated activities, ITP's project incorporates the development of rights information for each component into the product development process, minimizing incremental costs.

Another initiative by a global media company focused on image material. The Scholastic Online Digital Archive ("SODA") at Scholastic Inc. brought online in June of 1998 is a multi-purpose project designed to identify, consolidate, digitize and archive the visual and textual resources acquired over time by all the units within the larger publishing organization. In addition, the material is being described and indexed to aid editorial staff and product developers in locating the articles and types of images they need. This latter task represents a major, and essential investment, for virtually all projects to convert image material into searchable digital files. To date, SODA has captured over 80,000 digitized files and images. SODA was initiated to support internal product development and achieve cost savings. This project, and others like it, provide the data, access, and resources which could be instrumental in facilitating licensing activities.

Beyond the activities internal to content producers, several commercial organizations have been launched in the last six to twelve months which purport to have a combination of technologies and business models that will improve rights management and support more cost effective and flexible licensing systems for digital content. These include Copyright Direct

(www.copyrightdirect.com), a New Hampshire based subsidiary of an established academic book distributor; iCopyright (www.icopyright.com), based in Washington state and launched in September of 1998; and Replicator Inc., (www.replicator.com) of Buffalo, New York (formerly Rights Exchange), a licensee of the Intertrust Corporation (www.intertrust.com) which in late 1998, received an infusion of capital from the Microsoft Corporation to develop a range for the Intertrust technology.

The Copyright Direct system, currently in beta test with at least one major educational publisher, focuses on publisher controlled rights management and pricing, coupled with a complex set of use templates which would allow a variety of users, including those interested in digital distance education, to automate their permission requests from an icon imbedded in the digital material. The Copyright Direct beta currently supports legacy rights data for previously published content. This system gives publishers direct control and instant, secure, access to their own rights and pricing information.

The newest enterprise in rights management, iCopyright, offers technology that will allow copyright owners to embed a series of rule sets (terms and conditions and prices for specific uses) into digital objects. These rule sets could then be accessed readily by end users and a licensing transaction could be initiated by an individual consumer relying on an automated credit card for payment. This system, like the other three, permits fair use copies by virtue of inclusion of that option in the rule sets. Users affiliated with an academic institution could be authenticated through a master account system and individual uses could be billed to that institution. iCopyright has been endorsed by the newly created Software and Information Industry Association as a solution for managing digital copyrights.

Replicator Inc. is a corporate licensee of the Intertrust Corporation whose technology was described in the Technology section of the Report. Both Replicator and iCopyright have launched their initial products/demos with information suitable for the corporate community. At this point, only Copyright Direct has announced an intent to serve the educational market.

VI. CONCLUSION

Licensing electronic resources has been described as an evolving art. The expanding market for digital information products in all media types and growing experience in defining the needs of users of all types as well as appropriate terms and conditions to address those needs will provide the incentives to support that evolution. The growing body of experience with licensing of electronic products points to four trends in that process that may be instructive about the general evolution of licensing practices for digital products. First, universities have provided few, if any, additional resources to manage this new licensing task. Typically libraries, and the office of university counsels, were required to reallocate existing staff and support resources to manage license negotiations, contract maintenance, and license renewals.

Second, and related to the first, library associations have undertaken a series of initiatives in training and education related to negotiations. Through the LIBLICENSE housed at Yale University and funded in part by the Council for Library Resources, librarians have access to a model license; checklists to guide their evaluation of individual licenses offered by content owners; and an active list serve through which questions, problems, and solutions with

licensing generally, and with the licenses of specific publishers and/or vendors, can be shared.¹⁸

Third, the license documents themselves, and their terms and conditions, have been evolving as users become more adept and sophisticated at defining their needs and content owners have an expanded base of experience to evaluate risks and opportunities in this market. In general, the licenses for electronic products are only in their first or second generation. Terms are evolving as experience grows with both the terms themselves and the procedures and technology required for managing electronic information, and the security, access, archive, and other emerging issues.

Fourth, just as the licensing documents themselves are in evolution, the business models for delivering electronic information are also in evolution. Some of these appear to favor wider distribution of information resources. For example, consortium licensing, rare five years ago, is a growing phenomenon today. Through consortium licensing, electronic files are made available to all the libraries in a consortium at negotiated fees. Though the basis for fees varies, the emerging principle is that all the libraries in the consortium gain access to all the material at an expense level based related to the subscription revenues generated by the original subscriber members of the consortium. Since a number of digital distance education programs have also been organized around state and regional consortiums, consortium licensing models provide an experience base for developing licenses to support these regional digital distance education programs.

¹⁸ In the ten weeks of research for this report, the Liblicense list serve had virtually no activity on the topic of licensing issues specific to digital distance education.

Whether conditions in the transactional licensing, or permissions market, will support significant evolution in these areas is less clear. Obstacles to that evolution include the sheer numbers of content owners across all media and the uneven and unpredictable pace at which large numbers of content owners are developing a thorough understanding of digital technology and what threats, and opportunities, it does and does not pose for their content. Although content owners generally have agreed to use of their materials in digital distance education programs as they become more knowledgeable about the use and the technology that supports it, there is no certainty that thousands of others, across all media, will reach the same policy conclusion.

It is also unclear whether content owners and educational institutions will opt, over the long run, to invest resources in developing transactional licensing systems for preexisting content. Other alternatives for developing accessible, high quality digital content to meet the needs of instructors in digital distance education and any other digitally delivered courses in at least some media may meet the pedagogical needs and offer better economic rationales. Given the differences in licensing practice, rights management, and technological protections, it is unlikely that meaningful “one stop shopping” for licensing will emerge in any reasonable time frame. In addition, for certain types of content, it may never be in the copyright owners’ interest to license works when the market is small and licensing competes with their primary market.

Two other issues are likely to impact on the future of license development: the development of some level of agreement as to what constitutes fair use in a digital environment and improvement in the level of copyright knowledge among staff and instructors at

educational institutions at all levels. Currently progress in defining the licensing/fair use boundary is “stuck.” Educators, vested in preserving fair use in a digital environment, are slow to seek licenses that might inadvertently undermine their interests in fair use preservation. Content owners, who typically develop transactional licensing policies and practices in reaction to requests received, are slow to do so because the volume of such activity is low. Finally, both educational institutions and content owners alike would undoubtedly benefit from improving the level of copyright knowledge among instructors generally so that they become informed, not merely frustrated, participants when decisions about licensing must be made and licensing negotiations are involved.

APPENDIX

The following individuals were interviewed in preparing the Licensing Report. Generally, the interviews were focused on experiences in developing, administering, or using licensing systems. Individuals described their personal experiences and did not necessarily represent the views or policies of their institution or organization.

EDUCATIONAL INSTITUTIONS, LIBRARIES AND RELATED ENTITIES OR ASSOCIATIONS

Sheila Trice Bell
National Association of College and University Attorneys

Jon Binks
Kennedy School of Government, Harvard University

Wendy Bohlke
Office of the Attorney General, State of Washington

Clint Brooks
NorthWest Arkansas Community College

Johanna Bowen
Cabrillo Community College

Dwayne Butler
Indiana University/Purdue University at Indianapolis

Mary Case
Association of Research Libraries

Cindy Clennon
Committee on Institutional Cooperation

Lenore Coral
Cornell University

Kevin Cranman
Georgia Institute of Technology

Kenneth Crews
Indiana University
Purdue University Indianapolis

Christine Dalziel
Instructional Telecommunications Council

Larry Daniels
National Association of College Stores

Trisha Davis

The Ohio State University

Joseph Dial
Seattle Community Colleges

Fritz Dolak
Ball State University

Larry Dooley
University of Texas

Rhonda Edwards
Northwestern Michigan College

Laura Gasaway
University of North Carolina

Virginia M. Hall
Johns Hopkins University

Georgia Harper
University of Texas

Leslie Ellen Harris
Leslie Harris & Associates

Frank Heller
Global Village Learning

Karen Hersey
Massachusetts Institute of Technology

Kim Kelly
University of Maryland University College

Peg Koonz
Trident Community College

Candice Lee
Central Michigan State University

Jonathan Lindsay
Harvard University Law School

Steve McDonald
The Ohio State University

Maggie McVay
Franklin University

Dr. Janet Nepkie
State University College, Oneonta, New York

Kurt Slobodzian

University of Phoenix

Lynne M. Schrum
University of Georgia

John Sneed
Portland (Oregon) Community College

Sue Spinks
University of Texas

Jamie Switzer
Colorado State University

Elizabeth Tebeaux
University of Texas

John Vaughn
American Association of Universities

Marjorie Whiteleather
Cornell University

Rolena Woo
University of Phoenix

CONTENT OWNERS, DISTRIBUTORS, AND RELATED ASSOCIATIONS

Paul Aiken
The Author's Guild

Mark Ansorge
Warner Music Group

Melinda Ball
Cambridge Educational

Diane Bilello
Films for the Humanities

Dan Carlinsky
American Society of Journalists and Authors

Maren Christiansen
Universal Studios

Paul DeGiusti
Software and Information Industry Association

Paul Dzus
MIT Press

Mark Eisenberg

Sony Music Entertainment

John Elliott
Academic Press

Janet Fisher
MIT Press

Julie Froelich
Pearson EducationNetwork

Matt Gerson
Universal Studios

Peter Givler
American Association of University Presses

Joanne Grason
The Annenberg/CPB

David Green
Corbis Corporation

Daphne Gronich
20th Century Fox

Carline Haga
International Thomson Publishing

Diane Korta
Addison Wesley Longman

Bill McKenna
Harvard Business School Press

Steve Marks
Recording Industry Association of America

Craig Mertens
Houghton Mifflin

Patricia Nelson
Addison Wesley Longman

Ron Reed
United Learning

Bernard Rous
ACM

Burt Schachter
Scholastic , Inc.

Alan Shearer
Washington Post, Inc.

Bernard Sorkin
Time-Warner

Vladimir Stefanovic
WGBH, Boston

Morey Sudac
Commonwealth Films

Sanford Thatcher
Penn State University Press

Lois Wasoff
Houghton Mifflin

LICENSING AND OTHER ORGANIZATIONS

Chris Amenitis
American Society of Composers, Authors, and Publishers

Edward Colleran
Copyright Clearance Center

John Dobrin
RealEducation

John Flores
US Distance Learning Association

Kelly Frey
Yankee Rights Management

Patrick Gaynes
Motion Picture Licensing Corporation

Daniel Gervais
Copyright Clearance Center, Inc.

Betty Gorseger
National Media Market and AIME

Laurie Hughes
American Society of Composers, Authors, and Publishers

Kelly Kroll
Replicator, Inc.

Judith Saffer
Broadcast Music, Inc.

Geoffrey Samuels
Museum Digital Library Collection, Inc.

Joan McGivern
American Society of Composers, Authors, and Publishers

Rajan Samtani
REAL Systems Software, Inc.

Charles Sanders
Harry Fox Agency

Jerry Schwartz
icopyright, inc.

Jennifer Trant
AMICO

APPENDIX F

FAIR USE GUIDELINES FOR EDUCATIONAL MULTIMEDIA*

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1. INTRODUCTION

1.1 Preamble

Fair use is a legal principle that provides certain limitations on the exclusive rights** of copyright holders. The purpose of these guidelines is to provide guidance on the application of fair use principles by educators, scholars and students who develop multimedia projects using portions of copyrighted works under fair use rather than by seeking authorization for non-commercial educational uses. These guidelines apply only to fair use in the context of copyright and to no other rights.

There is no simple test to determine what is fair use. Section 107 of the Copyright Act*** sets forth the four fair use factors which should be considered in each instance, based on particular facts of a given case, to determine whether a use is a “fair use” : (1) the purpose and character of use, including whether such use is of a commercial nature or is for nonprofit educational purposes, (2) the nature of the copyrighted work (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work.

While only the courts can authoritatively determine whether a particular use is fair use, these guidelines represent the endorsers’ consensus of conditions under which fair use should generally apply and examples of when permission is required. Uses that exceed these guidelines may or may not be fair use. The participants also agree that the more one exceeds these guidelines, the greater the risk that fair use does not apply.

The limitations and conditions set forth in these guidelines do not apply to works in the public domain -- such as U.S. Government works or works on which copyright has expired for which there are no copyright restrictions -- or to works for which the individual or institution has obtained permission for the particular use. Also, license agreements may govern the uses of some works and users should refer to the applicable license terms for guidance.

*These Guidelines shall not be read to supersede other preexisting education fair use guidelines that deal with the Copyright Act of 1976.

**See Section 106 of the Copyright Act.

***The Copyright Act of 1976, as amended, is codified at 17 U.S.C. Sec.101 et seq.

The participants who developed these guidelines met for an extended period of time and the result represents their collective understanding in this complex area. Because digital technology is in a dynamic phase, there may come a time when it is necessary to review the guidelines. Nothing in these guidelines shall be construed to apply to the fair use privilege in any context outside of educational and scholarly uses of educational multimedia projects.

This Preamble is an integral part of these guidelines and should be included whenever the guidelines are reprinted or adopted by organizations and educational institutions. Users are encouraged to reproduce and distribute these guidelines freely without permission; no copyright protection of these guidelines is claimed by any person or entity.

1.2 Background

These guidelines clarify the application of fair use of copyrighted works as teaching methods are adapted to new learning environments. Educators have traditionally brought copyrighted books, videos, slides, sound recordings and other media into the classroom, along with accompanying projection and playback equipment. Multimedia creators integrated these individual instructional resources with their own original works in a meaningful way, providing compact educational tools that allow great flexibility in teaching and learning. Material is stored so that it may be retrieved in a nonlinear fashion, depending on the needs or interests of learners. Educators can use multimedia projects to respond spontaneously to students' questions by referring quickly to relevant portions. In addition, students can use multimedia projects to pursue independent study according to their needs or at a pace appropriate to their capabilities. Educators and students want guidance about the application of fair use principles when creating their own multimedia projects to meet specific instructional objectives.

1.3 Applicability of These Guidelines

(**Certain** basic terms used throughout these guidelines are identified in bold and defined in this section.)

These guidelines apply to the use, without permission, of portions of lawfully acquired copyrighted works in educational multimedia projects which are created by educators or students as part of a systematic learning activity by nonprofit educational institutions. **Educational multimedia projects** created under these guidelines incorporate students' or educators' original material, such as course notes or commentary, together with various copyrighted media formats including but not limited to, motion media, music, text material, graphics, illustrations, photographs and digital software which are combined into an integrated presentation. **Educational institutions** are defined as nonprofit organizations whose primary focus is supporting research and instructional activities of educators and students for noncommercial purposes.

For the purposes of these guidelines, **educators** include faculty, teachers, instructors and others who engage in scholarly, research and instructional activities for educational institutions. The copyrighted works used under these guidelines are **lawfully acquired** if obtained by the institution or individual through lawful means such as purchase, gift or license agreement but not pirated copies. Educational multimedia projects which incorporate portions of copyrighted works under these guidelines may be used only for **educational purposes in** systematic learning activities including use in connection with non-commercial curriculum-based learning and teaching activities by educators to students enrolled in courses at nonprofit educational institutions or otherwise permitted under Section 3. While these guidelines refer to the creation and use of educational multimedia projects, readers are advised that in some instances other fair use guidelines such as those for off-air taping may be relevant.

2. PREPARATION OF EDUCATIONAL MULTIMEDIA PROJECTS USING PORTIONS OF COPYRIGHTED WORKS

These uses are subject to the Portion Limitations listed in Section 4. They should include proper attribution and citation as defined in Sections 6.2.

2.1 By Students:

Students may incorporate portions of lawfully acquired copyrighted works when producing their own educational multimedia projects for a specific course.

2.2 By Educators for Curriculum-Based Instruction:

Educators may incorporate portions of lawfully acquired copyrighted works when producing their own educational multimedia projects for their own teaching tools in support of curriculum-based instructional activities at educational institutions.

3. PERMITTED USES OF EDUCATIONAL MULTIMEDIA PROJECTS CREATED UNDER THESE GUIDELINES

Uses of educational multimedia projects created under these guidelines are subject to the Time, Portion, Copying and Distribution Limitations listed in Section 4.

3.1 Student Use:

Students may perform and display their own educational multimedia projects created under Section 2 of these guidelines for educational uses in the course for which they were created and may use them in their own portfolios as examples of their academic work for later personal uses such as job and graduate school interviews.

3.2 Educator Use for Curriculum-Based Instruction:

Educators may perform and display their own educational multimedia projects created under Section 2 for curriculum-based instruction to students in the following situations:

3.2.1 for face-to-face instruction,

3.2.2 assigned to students for directed self-study,

3.2.3 for remote instruction to students enrolled in curriculum-based courses and located at remote sites, provided over the educational institution's secure electronic network in real-time, or for after class review or directed self-study, provided there are technological limitations on access to the network and educational multimedia project (such as a password or PIN) and provided further that the technology prevents the making of copies of copyrighted material.

If the educational institution's network or technology used to access the educational multimedia project created under Section 2 of these guidelines cannot prevent duplication of copyrighted material, students or, educators may use the multimedia educational projects over an otherwise secure network for a period of only 15 days after its initial real-time remote use in the course of instruction or 15 days after its assignment for directed self-study. After that period, one of the two use copies of the educational multimedia project may be placed on reserve in a learning resource center, library or similar facility for on-site use by students enrolled in the course. Students shall be advised that they are not permitted to make their own copies of the educational multimedia project.

3.3 Educator Use for Peer Conferences:

Educators may perform or display their own educational multimedia projects created under Section 2 of these guidelines in presentations to their peers, for example, at workshops and conferences.

3.4 Educator Use for Professional Portfolio

Educators may retain educational multimedia projects created under Section 2 of these guidelines in their personal portfolios for later personal uses such as tenure review or job interviews.

4. LIMITATIONS - TIME, PORTION, COPYING AND DISTRIBUTION

The preparation of educational multimedia projects incorporating copyrighted works under Section 2, and the use of such projects under Section 3, are subject to the limitations noted below.

4.1 Time Limitations

Educators may use their educational multimedia projects created for educational purposes under Section 2 of these guidelines for teaching courses, for a period of up to two years after the first instructional use with a class. Use beyond that time period, even for educational purposes, requires permission for each copyrighted portion incorporated in the production. Students may use their educational multimedia projects as noted in Section 3.1.

4.2 Portion Limitations

Portion limitations mean the amount of a copyrighted work that can reasonably be used in educational multimedia projects under these guidelines regardless of the original medium from which the copyrighted works are taken. In the aggregate means the total amount of copyrighted material from a single copyrighted work that is permitted to be used in an educational multimedia project without permission under these guidelines. These limitations apply cumulatively to each educator's or student's multimedia project(s) for the same academic semester, cycle or term. All students should be instructed about the

reasons for copyright protection and the need to follow these guidelines. It is understood, however, that students in kindergarten through grade six may not be able to adhere rigidly to the portion limitations in this section in their independent development of educational multimedia projects. In any event, each such project retained under Sections 3.1 and 4.3 should comply with the portion limitations in this section.

4.2.1 Motion Media

Up to 10% or 3 minutes, whichever is less, in the aggregate of a copyrighted motion media work may be reproduced or otherwise incorporated as part of an educational multimedia project created under Section 2 of these guidelines.

4.2.2 Text Material

Up to 10% or 1000 words, whichever is less, in the aggregate of a copyrighted work consisting of text material may be reproduced or otherwise incorporated as part of an educational multimedia project created under Section 2 of these guidelines. An entire poem of less than 250 words may be used, but no more than three poems by one poet, or five poems by different poets from any anthology may be used. For poems of greater length, 250 words may be used but no more than three excerpts by a poet, or five excerpts by different poets from a single anthology may be used.

4.2.3 Music, Lyrics, and Music Video

Up to 10%, but in no event more than 30 seconds, of the music and lyrics from an individual musical work (or in the aggregate of extracts from an individual work), whether the musical work is embodied in copies, or audio or audiovisual works, may be reproduced or otherwise incorporated as a part of a multimedia project created under Section 2. Any alterations to a musical work shall not change the basic melody or the fundamental character of the work.

4.2.4 Illustrations and Photographs

The reproduction or incorporation of photographs and illustrations is more difficult to define with regard to fair use because fair use usually precludes the use of an entire work. Under these guidelines a photograph or illustration may be used in its entirety but no more than 5 images by an artist or photographer may be reproduced or otherwise incorporated as part of an educational multimedia project created under Section 2. When using photographs and illustrations from a published collective work, not more than 10% or 15 images, whichever is less, may be reproduced or otherwise incorporated as part of an educational multimedia project created under Section 2.

4.2.5 Numerical Data Sets

Up to 10% or 2500 fields or cell entries, whichever is less, from a copyrighted database or data table may be reproduced or otherwise incorporated as part of an educational multimedia project created under Section 2 of these guidelines. A field entry is defined as a specific item of information, such as a name or Social Security number, in a record of a database file. A cell entry is defined as the intersection where a row and a column meet on a spreadsheet.

4.3 Copying and Distribution Limitations

Only a limited number of copies, including the original, may be made of an educator's educational multimedia project. For all of the uses permitted by Section 3, there may be no more than two use copies only one of which may be placed on reserve as described in Section 3.2.3.

An additional copy may be made for preservation purposes but may only be used or copied to replace a use copy that has been lost, stolen, or damaged. In the case of a jointly created educational multimedia project, each principal creator may retain one copy but only for the purposes described in Sections 3.3 and 3.4 for educators and in Section 3.1 for students.

5. EXAMPLES OF WHEN PERMISSION IS REQUIRED

5.1 Using Multimedia Projects for Non-Educational or Commercial Purposes

Educators and students must seek individual permissions (licenses) before using copyrighted works in educational multimedia projects for commercial reproduction and distribution.

5.2 Duplication of Multimedia Projects Beyond Limitations Listed in These Guidelines

Even for educational uses, educators and students must seek individual permissions for all copyrighted works incorporated in their personally created educational multimedia projects before replicating or distributing beyond the limitations listed in Section 4.3.

5.3 Distribution of Multimedia Projects Beyond Limitations Listed in These Guidelines

Educators and students may not use their personally created educational multimedia projects over electronic networks, except for uses as described in Section 3.2.3, without obtaining permissions for all copyrighted works incorporated in the program.

6. IMPORTANT REMINDERS

6.1 Caution in Downloading Material from the Internet

Educators and students are advised to exercise caution in using digital material downloaded from the Internet in producing their own educational multimedia projects, because there is a mix of works protected by copyright and works in the public domain on the network. Access to works on the Internet does not automatically mean that these can be reproduced and reused without permission or royalty payment and, furthermore, some copyrighted works may have been posted to the Internet without authorization of the copyright holder.

6.2 Attribution and Acknowledgement

Educators and students are reminded to credit the sources and display the copyright notice and copyright ownership information if this is shown in the original source, for all works incorporated as part of educational multimedia projects prepared by educators and students, including those prepared under fair use. Crediting the source must adequately identify the source of the work, giving a full bibliographic description where available (including author, title, publisher, and place and date of publication). The copyright ownership information includes the copyright notice (©, year of first publication and name of the copyright holder).

The credit and copyright notice information may be combined and shown in a separate section of the educational multimedia project (e.g. credit section) except for images incorporated into the project for the uses described in Section 3.2.3. In such cases, the copyright notice and the name of the creator of the image must be incorporated into the image when, and to the extent, such information is reasonably available; credit and copyright notice information is considered “incorporated” if it is attached to the image file and appears on the screen when the image is viewed. In those cases when displaying source credits and copyright ownership information on the screen with the image would be mutually exclusive with an instructional objective (e.g. during examinations in which the source credits and/or copyright information would be relevant to the examination questions), those images may be displayed without such information being simultaneously displayed on the screen. In such cases, this information should be linked to the image in a manner compatible with such instructional objectives.

6.3 Notice of Use Restrictions

Educators and students are advised that they must include on the opening screen of their multimedia project and any accompanying print material a notice that certain materials are included under the fair use exemption of the U.S. Copyright Law and have been prepared according to the educational multimedia fair use guidelines and are restricted from further use.

6.4 Future Uses Beyond Fair Use

Educators and students are advised to note that if there is a possibility that their own educational multimedia project incorporating copyrighted works under fair use could later result in broader dissemination, whether or not as commercial product, it is strongly recommended that they take steps to obtain permissions during the development process for all copyrighted portions rather than waiting until after completion of the project.

6.5 Integrity of Copyrighted Works: Alterations

Educators and students may make alterations in the portions of the copyrighted works they incorporate as part of an educational multimedia project only if the alterations support specific instructional objectives. Educators and students are advised to note that alterations have been made.

6.6 Reproduction or Decompilation of Copyrighted Computer Programs

Educators and students should be aware that reproduction or decompilation of copyrighted computer programs and portions thereof, for example the transfer of underlying code or control mechanisms, even for educational uses, are outside the scope of these guidelines.

6.7 Licenses and Contracts

Educators and students should determine whether specific copyrighted works, or other data or information are subject to a license or contract. Fair use and these guidelines shall not preempt or supersede licenses and contractual obligations

APPENDIX A: (Endorsements and letters of support received as of July 31,1997)

1. ORGANIZATIONS AND INSTITUTIONS ENDORSING THESE GUIDELINES

Agency for Instructional Technology (AIT)
American Association of Community Colleges (AACC)
American Bar Association - Section on Intellectual Property
American Intellectual Property Law Association
American Society of Journalists and Authors (ASJA)
American Society of Media Photographers, Inc. (ASMP)
American Society of Composers, Authors and Publishers (ASCAP)
Association for Educational Communications and Technology (AECT)
Association for Information Media and Equipment (AIME)
Association of American Publishers (AAP)*
Association of American Colleges and Universities (MC&U)
Association of American University Presses, Inc. (AAUP)
Author Guild/Authors Registry
Broadcast Music, Inc. (BMI)
Consortium of College and University Media Centers (CCUMC)
Creative Incentive Coalition (CIC)**
DeKalb College/Clarkson, GA
Educational Technology Officers Association/State University of N.Y. (EdTOA/SUNY)***
Educational Testing Service (ETS)
Information Industry Association (IA)****
Instructional Telecommunications Council (ITC)
Iowa Association for Communication Technology (IACT)
Maricopa Community Colleges/Phoenix
Motion Picture Association of America (MPAA)
Music Publishers' Association of the United States (MPA)
National Association of Regional Media-Centers (NARMC)
National Association of Schools of Art and Design (NASAD)
National Association of Schools of Dance (NASD)
National Association of Schools of Music (NASM)
National Association of Schools of Theatre (NAST)
National Council of Teachers of Mathematics (NCTM)
Northern Illinois Learning Resources Consortium (NILRC)
Picture Agency Council of America
Recording Industry Association of America (RIAA)
Software Publishers Association (SPA)*****
Special Libraries Association (SLA)
Tennessee Board of Regents Media Consortium

*The Association of American Publishers (AAP) membership includes over 300 publishers

**The Creative Incentive Coalition membership includes the following organizations:

- Association of American Publishers
- Association of Independent Television Stations
- Association of Test Publishers
- Business Software Alliance
- General Instrument Corporation
- Information Industry Association
- Information -Technology Industry Council
- Interactive Digital Software Association
- Magazine Publishers of America
- The McGraw-Hill Companies
- Microsoft Corporation
- Motion Picture Association of America, Inc.
- National Cable Television Association
- National Music Publisher's Association
- Newspaper Association of America
- Recording Industry Association of America
- Seagram/MCA, Inc.
- Software Publishers Association
- Time Warner, Inc.

-Turner Broadcasting System, Inc.
-West Publishing Company
-Viacom, Inc.

***EdTOA/SUNY represents all 64 State University of New York campuses.

****The Information Industry Association (IIA) membership includes 550 companies involved in the creation, distribution and use of information products, services and technologies

****The Software Publishers Association (SPA) membership includes 1200 software publishers

2. INDIVIDUAL COMPANIES ENDORSING THESE GUIDELINES:

Houghton Mifflin
John Wiley & Sons, Inc.
McGraw-Hill
Time Warner, Inc.

3. U.S. GOVERNMENTAL AGENCIES SUPPORTING THESE GUIDELINES:

U.S. National Endowment for the Arts (NEA)
U.S. Copyright Office
U.S. Patent and Trademark Office

APPENDIX B: ORGANIZATIONS PARTICIPATING IN GUIDELINE DEVELOPMENT: **Being a participant does not necessarily mean the organization has or will endorse these guidelines.**

Agency for Instructional Technology (AIT)
American Association of Community Colleges (AACC)
American Association for Higher Education (AAHE)
American Library Association (ALA)
American Society of Journalists and Authors (ASJA)
American Society of Media Photographers (ASMP)
Artists Rights Foundation
Association of American Colleges and Universities (AAC&U)
Association of American Publishers (AAP)
-Harvard University Press
-Houghton Mifflin
-McGraw-Hill
-Simon and Schuster
-Worth Publishers
Association of College and Research Libraries (ACRL)
Association for Educational Communications and Technology (AECT)
Association for Information Media and Equipment (AIME)
Association of Research Libraries (ARL)
Authors Guild, Inc.
Broadcast Music, Inc. (BMI)
Consortium of College and University Media Centers (CCUMC)
Copyright Clearance Center (CCC)
Creative Incentive Coalition (CIC)
Directors Guild of America (DGA)
European American Music Distributors Corp.
Educational institutions participating in guideline discussion
-American University
Carnegie Mellon University
-City College/City University of New York
-Kent State University
-Maricopa Community Colleges/Phoenix
-Pennsylvania State University

-University of Delaware
Information Industry Association (IIA)
Instructional Telecommunications Council (ITC)
International Association of Scientific, Technical and Medical Publishers
Motion Picture Association of America (MPAA)
Music Publishers Association (MPA)
National Association of State Universities and Land-Grant Colleges (NASULGC)
National Council of Teachers of Mathematics (NCTM)
National Educational Association (NEA)
National Music Publishers Association (NMPA)
National School Boards Association (NSBA)
National Science Teachers Association (NSTA)
National Video Resources (NVR)
Public Broadcasting System (PBS)
Recording Industry Association of America (RIAA)
Software Publishers Association (SPA)
Time Warner, Inc.
U.S. Copyright Office
U.S. National Endowment for the Arts (NEA)
Viacom, Inc.

Prepared by the Educational Multimedia Fair Use Guidelines Development Committee, July 17, 1996

MULTIMEDIA GUIDELINES WEB SITE (The final Fair Use Guidelines for Educational Multimedia Document with a current list of endorser can be found on the following web sites.)

<http://www.indiana.edu/~ccumc/>

APPENDIX G

PROPOSAL FOR EDUCATIONAL FAIR USE GUIDELINES FOR DISTANCE LEARNING¹

Performance & Display of Audiovisual and Other Copyrighted Works

1.1

Fair use is a legal principle that provides certain limitations on the exclusive rights² of copyright holders. The purpose of these guidelines is to provide guidance on the application of fair use principles by educational institutions, educators, scholars and students who wish to use copyrighted works for distance education under fair use rather than by seeking authorization from the copyright owners for non-commercial purposes. The guidelines apply to fair use only in the context of copyright.

There is no simple test to determine what is fair use. Section 107 of the Copyright Act sets forth the four fair use factors which should be considered in each instance, based on the particular facts of a given case, to determine whether a use is a "fair use": (1) the purpose and character of the use, including whether use is of a commercial nature or is for nonprofit educational purposes, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work.

While only the courts can authoritatively determine whether a particular use is a fair use, these guidelines represent the endorsers' consensus of conditions under which fair use should generally apply and examples of when permission is required. Uses that exceed these guidelines may or may not be fair use. The endorsers also agree that the more one exceeds these guidelines, the greater the risk that fair use does not apply.

The limitations and conditions set forth in these guidelines do not apply to works in the public domain -- such as U.S. government works or works on which the copyright has expired for which there are no copyright restrictions -- or to works for which the individual or institution has obtained permission for the particular use. Also, license agreements may govern the uses of some works and users should refer to the applicable license terms for guidance.

The participants who developed these guidelines met for an extended period of time and the result represents their collective understanding in this complex area. Because digital technology is in a dynamic phase, there may come a time when it is necessary to revise these guidelines. Nothing in these guidelines should be construed to apply to the fair use privilege in any context outside of educational and scholarly uses of distance education. The guidelines do not cover non-educational or commercial digitization or use at any time, even by nonprofit educational institutions. The guidelines are not

¹ The Guidelines shall not be read to supersede other preexisting educational use guidelines that deal with the 1976 Copyright Act.

² See Section 106 of the Copyright Act.

³ The Copyright Act of 1976, as amended, is codified at 17 U.S.C. *et seq.*

intended to cover fair use of copyrighted works in other educational contexts such as educational multimedia projects,⁴ electronic reserves or digital images which may be addressed in other fair use guidelines.

This Preamble is an integral part of these guidelines and should be included whenever the guidelines are reprinted or adopted by organizations and educational institutions. Users are encouraged to reproduce and distribute these guidelines freely without permission; no copyright protection of these guidelines is claimed by any person or entity.

1.2 BACKGROUND

Section 106 of the Copyright Act defines the right to perform or display a work as an exclusive right of the copyright holder. The Act also provides, however, some exceptions under which it is not necessary to ask the copyright holder's permission to perform or display a work. One is the fair use exception contained in Section 107, which is summarized in the preamble. Another set of exceptions, contained in Sections 110(1)-(2), permit instructors and students to perform or display copyrighted materials without permission from the copyright holder under certain carefully defined conditions.

Section 110(1) permits teachers and students in a nonprofit educational institution to perform or display any copyrighted work in the course of face-to-face teaching activities. In face-to-face instruction, such teachers and students may act out a play, read aloud a poem, display a cartoon or a slide, or play a videotape so long as the copy of the videotape was lawfully obtained. In essence, Section 110(1) permits performance and display of any kind of copyrighted work, and even a complete work, as a part of face-to-face instruction.

Section 110(2) permits performance of a nondramatic literary or musical work or display of any work as a part of a transmission in some distance learning contexts, under the specific conditions set out in that Section. Section 110(2) does not permit performance of dramatic or audiovisual works as a part of a transmission. The statute further requires that the transmission be directly related and of material assistance to the teaching content of the transmission and that the transmission be received in a classroom or other place normally devoted to instruction or by persons whose disabilities or special circumstances prevent attendance at a classroom or other place normally devoted to instruction.

The purpose of these guidelines is to provide guidance for the performance and display of copyrighted works in some of the distance learning environments that have developed since the enactment of Section 110 and that may not meet the specific conditions of Section 110(2). They permit instructors who meet the conditions of these guidelines to perform and display copyrighted works as if they were engaged in face-to-face instruction. They may, for example, perform an audiovisual work, even a complete one, in a one-time transmission to students so long as they meet the other conditions of these guidelines. They may not, however, allow such transmissions to result in copies for students unless they have permission to do so, any more than face-to-face instructors may make copies of audiovisual works for their students without permission.

The developers of these guidelines agree that these guidelines reflect the principles of fair use in combination with the specific provisions of Sections 110(1)-(2). In most respects, they expand the provisions of Section 110(2). In some cases, students and teachers in distance learning situations may

⁴ In general, multimedia projects are stand-alone, interactive programs incorporating both original and pre-existing copyrighted works in various media formats, while visual image archives are databases of individual visual images from which images intended for educational uses may be selected for display.

want to perform and display only small portions of copyrighted works that may be permissible under the fair use doctrine even in the absence of these guidelines. Given the specific limitations set out in Section 110(2), however, the participants believe that there may be a higher burden of demonstrating that fair use under Section 107 permits performance or display of more than a small portion of a copyrighted work under circumstances not specifically authorized by Section 110(2).

13 DISTANCE LEARNING IN GENERAL

Broadly viewed, distance learning is an educational process that occurs when instruction is delivered to students physically remote from the location or campus of program origin, the main campus, or the primary resources that support instruction. In this process, the requirements for a course or program may be completed through remote communications with instructional and support staff including either one-way or two-way written, electronic or other media forms.

Distance education involves teaching through the use of telecommunications technologies to transmit and receive various materials through voice, video and data. These avenues of teaching often constitute instruction on a closed system limited to students who are pursuing educational opportunities as part of a systematic teaching activity or curriculum and are officially enrolled in the course. Examples of such analog and digital technologies include telecourses, audio and video teleconferences, closed broadcast and cable television systems, microwave and ITFS, compressed and full-motion video, fiber optic networks, audiographic systems, interactive videodisk, satellite-based and computer networks.

2. APPLICABILITY AND ELIGIBILITY

2.1 APPLICABILITY OF THE GUIDELINES

These guidelines apply to the performance of lawfully acquired copyrighted works not included under Section 110(2) (such as a dramatic work or an audiovisual work) as well as to uses not covered for works that are included in Section 110(2). The covered uses are (1) live interactive distance learning classes (i.e., a teacher in a live class with all or some of the students at remote locations) and (2) faculty instruction recorded without students present for later transmission. They apply to delivery via satellite, closed circuit television or a secure computer network. They do not permit circumventing anti-copying mechanisms embedded in copyrighted works.

These guidelines do not cover asynchronous delivery of distance learning over a computer network, even one that is secure and capable of limiting access to students enrolled in the course through PIN or other identification system. Although the participants believe fair use of copyrighted works applies in some aspects of such instruction, they did not develop fair use guidelines to cover these situations because the area is so unsettled. The technology is rapidly developing, 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. Thus, consideration of whether fair use guidelines are needed for asynchronous computer network delivery of distance learning courses perhaps should be revisited in three to five years.

In some cases, the guidelines do not apply to specific materials because no permission is required, either because the material to be performed or displayed is in the public domain, or because the instructor or the institution controls all relevant copyrights. In other cases, the guidelines do not apply because the

copyrighted material is already subject to a specific agreement. For example, if the material was obtained pursuant to a license, the terms of the license apply. If the institution has received permission to use copyrighted material specifically for distance learning, the terms of that permission apply.

2.2 ELIGIBILITY

2.2.1 ELIGIBLE EDUCATIONAL INSTITUTION: These guidelines apply to nonprofit educational institutions at all levels of instruction whose primary focus is supporting research and instructional activities of educators and students but only to their nonprofit activities. They also apply to government agencies that offer instruction to their employees.

2.2.2 ELIGIBLE STUDENTS: Only students officially enrolled for the course at an eligible institution may view the transmission that contains works covered by these guidelines. This may include students enrolled in the course who are currently matriculated at another eligible institution. These guidelines are also applicable to government agency employees who take the course or program offered by the agency as a part of their official duties.

3. WORKS PERFORMED FOR INSTRUCTION

3.1 RELATION TO INSTRUCTION: Works performed must be integrated into the course, must be part of systematic instruction and must be directly related and of material assistance to the teaching content of the transmission. The performance may not be for entertainment purposes.

4. TRANSMISSION AND RECEPTION

4.1 TRANSMISSION (DELIVERY): Transmission must be over a secure system with technological limitations on access to the class or program such as a PIN number, password, smartcard or other means of identification of the eligible student.

4.2 RECEPTION: Reception must be in a classroom or other similar place normally devoted to instruction or any other site where the reception can be controlled by the eligible institution. In all such locations, the institution must utilize technological means to prevent copying of the portion of the class session that contains performance of the copyrighted work.

5. LIMITATIONS:

5.1 ONE TIME USE: Performance of an entire copyrighted work or a large portion thereof may be transmitted only once for a distance learning course. For subsequent performances, displays or access, permission must be obtained.

5.2 REPRODUCTION AND ACCESS TO COPIES

5.2.1 RECEIVING INSTITUTION: The institution receiving the transmission may record or copy classes that include the performance of an entire copyrighted work, or a large portion thereof, and retain the recording or copy for up to 15 consecutive class days (i.e., days in which the institution is open for regular instruction) for viewing by students enrolled in the course. 5 Access to the recording or copy for such viewing must be in a controlled environment such as a classroom, library or media center, and the institution must prevent copying by students of the portion of the class session that contains the performance of the copyrighted work. If the institution wants to retain the recording or copy of the

transmission for a longer period of time, it must obtain permission from the rightsholder or delete the portion which contains the performance of the copyrighted work.

5.2.2 TRANSMITTING INSTITUTION: The transmitting institution may, under the same terms, reproduce and provide access to copies of the transmission containing the performance of a copyrighted work; in addition, it can exercise reproduction rights provided in Section 112(b).

6. MULTIMEDIA

6.1 COMMERCIALY PRODUCED MULTIMEDIA: If the copyrighted multimedia work was obtained pursuant to a license agreement, the terms of the license apply. If, however, there is no license, the performance of the copyrighted elements of the multimedia works may be transmitted in accordance with the provisions of these guidelines.

7. EXAMPLES OF WHEN PERMISSION IS REQUIRED:

7.1 Commercial uses: Any commercial use including the situation where a nonprofit educational institution is conducting courses for a for-profit corporation for a fee such as supervisory training courses or safety training for the corporation's employees.

7.2. Dissemination of recorded courses: An institution offering instruction via distance learning under these guidelines wants to further disseminate the recordings of the course or portions that contain performance of a copyrighted work.

7.3 Uncontrolled access to classes: An institution (agency) wants to offer a course or program that contains the performance of copyrighted works to non-employees.

7.4 Use beyond the 15-day limitation: An institution wishes to retain the recorded or copied class session that contains the performance of a copyrighted work not 'covered in Section 110(2). (It also could delete the portion of the recorded class session that contains the performance).

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APPENDIX H

ORRIN G. HATCH, UTAH, CHAIRMAN

STROM THURMOND, SOUTH CAROLINA
CHARLES E. GRASSLEY, IOWA
ARLEN SPECTER, PENNSYLVANIA
FRED THOMPSON, TENNESSEE
JON KYL, ARIZONA
MIKE DEWINE, OHIO
JOHN ASHCROFT, MISSOURI
SPENCER ABRAHAM, MICHIGAN
JEFF SESSIONS, ALABAMA

PATRICK J. LEAHY, VERMONT
EDWARD M. KENNEDY, MASSACHUSETTS
JOSEPH R. BIDEN, JR., DELAWARE
HERBERT KOHL, WISCONSIN
DIANNE FEINSTEIN, CALIFORNIA
RUSSELL D. FEINGOLD, WISCONSIN
RICHARD J. DURBIN, ILLINOIS
ROBERT G. TORRICELLI, NEW JERSEY

MANUS COONEY, *Chief Counsel and Staff Director*
BRUCE A. COHEN, *Minority Chief Counsel*

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

April 24, 1998

Ms. Marybeth Peters
Register of Copyrights
Copyright Office
Library of Congress
Washington, D.C. 20540

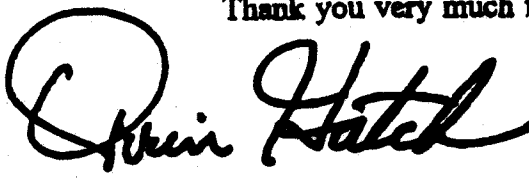
Dear Ms. Peters:

We would like to commend the Copyright Office for its valuable contribution to our effort to resolve the outstanding issues regarding the Digital Millennium Copyright Act (DMCA). Ms. Shira Perlmutter and Mr. Jesse Feder were extremely helpful in clarifying issues and in suggesting legislative language.

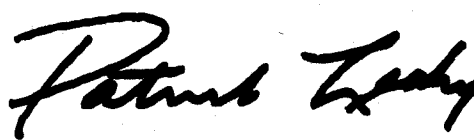
We would like the Copyright Office to continue its assistance in resolving the remaining issues. In an effort to continue serious negotiations on the issue of distance education among the interested parties, we request the Copyright Office to facilitate discussions with a view toward making recommendations, including specific legislative language if possible, that may be incorporated into the DMCA at its final mark-up, which is scheduled for Thursday, April 30, 1998. We would appreciate having your recommendations by close of business, Tuesday, April 28th.

We would like you to make every effort to resolve this issue within this time frame, building on the specific points that have already been identified in previous negotiations. We look forward to receiving your recommendations.

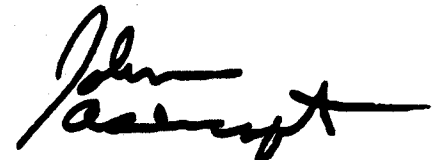
Thank you very much for assisting us in this matter.



ORRIN HATCH
United States Senator



PATRICK LEAHY
United States Senator



JOHN ASHCROFT
United States Senator

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APPENDIX I



The Register of Copyrights
of the
United States of America

Library of Congress
Department 17
Washington, D.C. 20540

(202) 707-8350

April 29, 1998

Dear Senators Hatch, Leahy and Ashcroft:

Thank you for giving the Copyright Office the opportunity to facilitate discussions with interested parties in an effort to formulate recommendations on an exemption for digital distance education to be included in the Digital Millennium Copyright Act (DMCA). I attach copies of our recommendations in statutory language, and explain their rationale below.

My staff and I met with a representative group of interested parties, and all participants negotiated intensively in meetings lasting over a two-day period. Significant progress was made in coming closer to agreement on both concepts and terms. It became apparent, however, that digital distance education is an evolving field, and the range of activities contemplated is diverse and potentially far-reaching in impact and scope. Many of the issues raised are complex and interrelated, and require greater consideration than was possible by our deadline at the close of business on April 28. These issues include: the categories of works to be included under any distance education exemption; the parties who should be entitled to the benefits of any distance education exemption; the extent of appropriate limitations on the portions of works that may be used under any distance education exemption; the degree to which technological measures exist and how they should be used to prevent unauthorized, non-exempted uses of copyrighted works; and the extent to which the availability of licenses should be considered in assessing eligibility for any distance education exemption.

Nevertheless, we were able to identify certain respects in which the copyright law can be updated at this time to accommodate new technologies for accomplishing existing distance education activities. We are pleased to recommend statutory changes to the current exemption for instructional broadcasting, section 110(2) of the Copyright Act, to reflect changes in broadcast technology. Our recommended changes would update section 110(2) to accommodate digital instructional broadcasts, permitting the same range of distance education activities that take place under the current provision to be carried out by means of digital broadcasting technologies such as High Definition Television (HDTV). We consider this an important step in updating the existing exemption to make clear that it extends into the digital age.

As to the broader question of interactive digital distance education, substantial work remains to be done. Broadening the current exemption to embrace a range of new activities raises complex issues that require further information and input from a wider range of interested parties than was possible in this short time frame. A number of interested parties were not present at the negotiations, as some were only identified during the course of discussions, and others may have yet to be identified. The development of an exemption addressing the delivery of works by transmission through interactive digital networks raises issues that merit the input of all potential stakeholders.

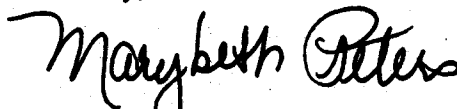
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We therefore recommend that the broader issues involved in interactive digital distance education be subject to further study in consultation with the affected parties. The Office would make specific recommendations to the Congress within a reasonable time frame from enactment of the DMCA, to be determined upon consultation with the Committee on the Judiciary.

Although we recognize that the issues surrounding distance education are complex and will take time to explore, the Copyright Office is committed to working toward their timely resolution. As a service unit of the Library of Congress, we are well aware of the concerns of nonprofit libraries and archives, as well as of nonprofit educational institutions, and will work to find a beneficial result that reconciles these concerns with the concerns of copyright owners.

We look forward to working with the Committee to see this process through to its completion, and to presenting the Congress with further recommendations.

Sincerely,



Marybeth Peters
Register of Copyrights

Enclosures

The Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
131 Senate Russell Office Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

The Honorable John Ashcroft
United States Senate
316 Hart Senate Office Building
Washington, D.C. 20510



The Register of Copyrights
of the
United States of America

Library of Congress
Department 17
Washington, D.C. 20540

May 25, 1999

(202) 707-8350

Dear Mr. Speaker:

I am pleased to present the Copyright Office's Report on Copyright and Digital Distance Education, prepared pursuant to section 403 of the Digital Millennium Copyright Act of 1998 ("DMCA").

The DMCA directs the Register of Copyrights to consult with representatives of copyright owners, nonprofit educational institutions, and nonprofit libraries and archives, and thereafter to submit to Congress "recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works." The recommendations are to include any legislation the Register considers appropriate to achieve this objective.

Over the past six months, the Copyright Office has conducted an intensive study of the copyright issues involved in digital distance education. Through public hearings and comments, as well as consultations with experts in various fields, we have gathered a wide range of information and views. This Report summarizes much of that information, and the appendices and supplemental volumes reproduce the comments, reply comments and hearing transcripts in their entirety, as well as certain reference materials.

This Report gives an overview of the nature of distance education today; describes current licensing practices in digital distance education, including problems and future trends; describes the status of the technologies available or in development relating to the delivery of distance education courses and the protection of their content; and discusses prior initiatives to address the copyright issues through the negotiation of guidelines or the enactment of legislation. It also provides an analysis of the application of current copyright law to digital distance education and an assessment of whether the law should be changed, and if so, how. We conclude by recommending several amendments to sections 110(2) and 112 of the Copyright Act, as well as the clarification of aspects of the law in legislative history, and further discussion and review of certain specific issues.