

**Statement of the
Society of American Archivists
On
Copyright Issues for Archives in Distance Education**

February 10, 1999

The Society of American Archivists (SAA) is the oldest and largest association of professional archivists in North America. Representing more than 3,000 individuals and 400 institutions, the SAA is the authoritative voice in the United States on issues that affect the identification, preservation, and use of historical records.

The Society is very interested in the potential for the use of archival materials in distance education programs, as well as the potential for distance education in the training of archivists. We thus welcome the opportunity to contribute to the Copyright Office's investigation of the Promotion of Distance Education Through Digital Technologies.

There are four key points that we would like to make:

1. Archival, unpublished material can be an important component of distance education programs.
2. Licensing this material for use in a distance education program is not a viable option because in most cases it is impossible to identify the copyright owner.
3. Copyright law for distance education, while respecting the interests of the owners of copyrighted works, must not be drafted in a manner that makes it difficult for users to exploit those works abandoned or ignored by their copyright owners. Licensing should be the exception, and not the rule.
4. The current law must be updated to permit the use of current and emerging technologies in the important task of educating citizens.

The Role Of Archival Material In Distance Education

As archivists, we are deeply interested in the education of our citizens. Research and experience over the past half-century have conclusively demonstrated that the use of archival material as teaching material contributes to an effective curriculum. In higher education, the need for primary source material has led to the creation and maintenance of varied and rich documentary collections at most schools. While of fundamental importance for graduate education, these collections are also extensively used by undergraduates. At the K-12 level as well, the integration of primary source material into the classroom is an effective component of the curriculum plan. Many archives prepare

teaching packets to assist K-12 teachers in using archival materials, and the professional literature is filled with articles suggesting how to teach with primary sources.

There is no reason to assume that approaches and techniques that have proven effective in face-to-face teaching will not also prove effective in distance education. It is our assumption that the two ways that archival materials are used in courses today will continue in distance education courses. In some cases, individual pre-selected archival documents will be made available to students for their study and analysis. In other cases, students will be asked to conduct wide-ranging and open-ended research into groups of records, either created in or converted to digital form. The delivery methods outlined in Section 110 of the Copyright Act, while appropriate twenty years ago, will not be able to deliver archival material to students today.

The Copyright Status Of Archival Material And Licensing

The uncertain copyright ownership of many archival documents may hinder their use in distance education programs. The bulk of the material in the nation's archival repositories is unpublished. Almost all unpublished work is copyrighted at least until 1 January 2003, and much of it will remain copyrighted for a longer time. Yet for practical purposes, it is usually impossible to identify the current owners of the copyrights in archival materials (a necessary first step in securing their permission for the use of the material in distance education programs).

There are several reasons why the owners of copyright in an archival group of documents cannot be readily identified. For one, manuscripts collections and records groups tend to consist of material both sent and received by an individual or government agency. This means that any one of those bodies of archival material may have hundreds or thousands of separate authors whose permission could be needed before making copies of the material accessible over a digital network in a distance education program. Furthermore, most of the documents found in archives, especially in government repositories, were created by common citizens. In some cases, the author is anonymous. Even for those works where the author is known, it is usually impossible to determine if he or she is still living. If deceased, it can be impossible to identify and trace the current owners of the copyright. And even when the author and his or her heirs are known, it may not be known if the work was created as a work for hire, and hence subject to ownership by someone else.

For most of the unpublished, copyrighted works in the nation's archives it is impossible to identify the owners of copyright. It is therefore impossible to secure permission to license or to use this unpublished, copyrighted material in distance education courses. Some of this material will enter the public domain in 2003, but because Congress recently lengthened the term of copyright, most of the documents that help us understand the 20th century will remain under copyright well into the 21st century. At the same time, little of this material is subject to commercial exploitation. There is no community harm caused by distance education efforts using material already open to researchers

in an archival repository. Imposing an additional burden or fee for their use would hinder the development of distance education programs. Thus, unless extreme care is taken, it is possible that regulations intended to respect the rights of the owners of commercially-exploitable published materials may prevent the ready use of other kinds of material in distance education courses.

The Role Of The Professional Society In Education

The SAA does not only seek to encourage others to use archival materials in distance education. The Society, as do almost all professional associations, has an active education program. Recently we have sought to reach out to members in isolated areas through the development of Society-sponsored distance education courses. For these courses, it is necessary that readings consisting of documentary copyrighted materials be made available to the students. We would hope that they could be offered under the same conditions as if the teaching were face-to-face.

Responses To Selected Specific Questions

With this background in mind, we can now address some of the specific questions in the Federal Register notice of 23 December 1998 that are of most concern to archivists:

1. Nature of Distance Education

(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?

As noted above, there has been great interest in creating online versions of traditional primary source educational materials. The National Archives, for example, has created an "Online Classroom" <<http://www.nara.gov/>> that makes available digital versions of many paper documents as part of a curriculum package. It is likely that some schools may wish to incorporate electronic versions of unpublished paper documents into their course offerings. The access to this material could be limited to people in individual classes, or it could be made available worldwide via the Internet.

Many archival repositories have restrictions concerning the types of use of copies made from the material they are responsible for. Some, for example, demand that researchers using the copies cite the repository; others require that permission to publish copies of the documents be sought in writing; still others require that the copies be returned to the repository; and others may have additional requirements. It is anticipated that these restrictions on the use of analog copies can be put will be carried over into the digital world.

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?

As noted above, the difficulty in identifying the copyright owners of most unpublished material means that it is almost impossible to obtain the permission of the copyright owner to use material in distance education courses. There is little technology can do to ameliorate this situation. There have been private efforts to prepare registers of those copyright owners (primarily literary figures) who wish to enforce their copyrights in unpublished materials, but this only applies to a small number of well known figures. The Congressionally-funded documentary editing projects and many archival repositories have concluded that the reproduction for educational purposes of unpublished archival material of limited commercial value (and in the absence of any knowledge that the copyright owner wishes to enforce his or her copyright) is of overall benefit to society and should be permitted. It is our hope that this interpretation would be endorsed as part of the Copyright Office's study on distance education.

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?

As the above discussion has shown, existing law concerning the use of unpublished archival materials in distance education is inadequate. First, it does not adequately protect institutions that make a good-faith effort to locate copyright owners before posting material for a course. Secondly, the transmission methods identified in Section 110 no longer reflect the technology used in distance education. Section 110 should be amended to allow for the transmission of both dramatic and non-dramatic works over whatever the current communications medium may be. Finally, all the rights granted elsewhere in the Copyright Act to users of copyrighted works (including the right of fair use) should be available to people using material in distance education courses.