

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)
) Docket No. RM 98-12A
Promotion of Distance Education)
Through Digital Technologies)

REPLY COMMENTS OF
THE PUBLIC BROADCASTING SERVICE,
THE ASSOCIATION OF AMERICA’S PUBLIC TELEVISION STATIONS AND
THE CORPORATION FOR PUBLIC BROADCASTING

The Public Broadcasting Service, the Association of America’s Public Television Stations and the Corporation for Public Broadcasting (collectively, “public broadcasters”) hereby reply to the initial comments filed by interested parties in response to the Request for Comments and Notice of Public Hearing that appeared in the *Federal Register* on December 23, 1998.

To put our comments in this proceeding in the proper context, public broadcasters wish to reiterate the unique, noncommercial status and the statutory mission of public broadcasting. Public broadcasters will make specific comments with respect to the statutory provisions in question, namely Section 110(2) and relevant provisions of the Digital Millennium Copyright Act (“DMCA”) that certain parties have suggested meet the needs of the educational community. In particular, public broadcasters would encourage the Copyright Office to avoid narrowing the scope of the Section 110(2) exemption, clarify that Section 110(2) applies to digital transmissions, and permit further use of archival material by public broadcasters. Public broadcasters also urge the Copyright Office to monitor the effect of the DMCA on public broadcasters.

I. Public Broadcasting’s Mission

Public broadcasting's statutory and organizational mission is to make educational, informational and cultural programming available to all Americans. Each organization participating in this filing helps to facilitate that mission.

The Public Broadcasting Service ("PBS") is a non-profit organization owned by its member public television stations that, among other things, helps finance the production or acquisition of noncommercial television programming. PBS itself does not generally produce this programming. Rather, since its inception, PBS, on behalf of these stations, has contracted with program producers (including numerous independent producers and many member stations) to acquire national television programming.¹ PBS then distributes this programming via satellite to stations, which define their own particular programming focus and mix of programming, including scheduling. Local stations may broadcast these programs at the time they receive the PBS feed or they may hold them for showing at a later date, as permitted by statute or license, as described below.

The Corporation for Public Broadcasting is the largest single source of funding for public radio and television programming. The Association of America's Public Television Stations represents public television station views on a national level before federal agencies, Congress, the executive branch and other federal policy makers.

Congress has repeatedly recognized and supported public broadcasting's important mission. Because of concerns about continued universal access to public television programming as new telecommunications media developed, Congress enacted legislation requiring certain retransmission providers to carry public television signals so that audiences receiving programming through cable or direct broadcast satellite, as opposed to local signal, will continue to receive public television programming.²

¹ PBS funds its activities through a variety of sources. While PBS does charge license fees for the Adult Learning Services that are provided to colleges and universities, these license fees are used to pay the costs of providing this service and other services provided by PBS and not to generate profits that are ultimately distributed to shareholders or other investors.

² Under 47 U.S.C. § 535, cable operators are required to carry a certain number of local public television signals. Under 47 U.S.C. § 335(b), providers of direct broadcast satellite service must set aside 4% of their channel capacity for "noncommercial programming of an informational or educational nature" by making

Under the federal copyright law, in recognition of the difficulty public broadcasters have in clearing rights for certain types of programming at reasonable rates, Congress instituted a compulsory licensing scheme for certain types of works used by public broadcasters. Under Section 118(d), a public broadcasting entity has the right to transmit a performance of copyrighted non-dramatic music and published pictorial, graphic and sculptural works, so long as it compensates the owner of the work, either through private negotiations or the compulsory license procedure established under this section. Under subsection (3) of Section 118 (d), public broadcasting entities, nonprofit institutions and governmental bodies also have the related right to reproduce the work simultaneous with the transmission for use for seven days from the transmission.

In addition to this compulsory licensing scheme, Congress has created certain limited exemptions from the copyright holder's exclusive rights for various educational uses of copyrighted materials by public broadcasters. Section 114(b) exempts public broadcasters from copyright liability for sound recordings included in their educational television programs (although public broadcasting may not, under this section, commercially distribute copies of these programs to the general public). Section 112(b) grants special rights to facilitate permitted transmissions by public broadcasters and other nonprofit instructional broadcasters. The limited exemption in Section 110(2) was intended, in part, to enable public broadcasters to provide valuable educational tools for the nation's schools. The "fair use" exemption under Section 107 has also been useful to public broadcasting, although it was not designed specifically for public broadcasters.

Public broadcasters continue to rely on all of these statutory provisions as vital to achieving the educational mission of public broadcasting. Public broadcasters produce a rich variety of educational programs that are provided directly to the public by PBS and its member

capacity available to "national educational programming suppliers" on "reasonable prices, terms and conditions."

stations,³ and to educational institutions for use in teaching students. Many of these programs were described in detail in our initial filing in this proceeding. These educational programs are provided to the general public by broadcast, cable and satellite,⁴ and to specific users or user groups by videocassette and electronically via the Internet through the PBS ONLINE® Website and websites operated by member stations or by other electronic means. It is the application of the Section 110(2) to these methods of distribution of educational programming that is the reason for public broadcasters' interest in this proceeding.

II. The Section 110(2) Exemption

Public broadcasters have the right to distribute educational programming either because they acquire the necessary rights through negotiated or compulsory licenses, or because they are exempt from the copyright laws under one of the statutory exemption provisions. These statutory exemption provisions include the exemption under 110(2).

Some parties to this proceeding have suggested that the Copyright Office narrow the existing exemptions under the copyright law. Public broadcasters are opposed to any "clarification" of the law that would effectively narrow any of the existing exemptions.⁵ While public broadcasters are not prepared at this time to make definitive comments on the scope and utility of the fair use exemption, we note the inherent difficulty of having a balancing test, such as that required under a fair use analysis, that can be applied in a systematic and understandable manner. Public broadcasters agree that this difficulty has been successfully addressed in the

³ All entities that operate public television stations must be noncommercial educational institutions, but they are diverse in their ownership. Some stations are operated by state boards of education or other state governmental agencies, others are operated by universities and colleges, and others are operated by civic non-profit organizations. A few are operated by local school districts.

⁴ As mentioned in our initial comments in this proceeding, as public broadcasting transitions toward digital television as a means of programming distribution, we anticipate that the additional capacity that will be available will enable public broadcasters to enhance their mission of providing educational programming. The mandatory transition from analog to digital television, which we described in our initial comments, involves considerable investment by public broadcasters and their viewers and funding organizations, both public and private.

⁵ For example, uses of copyrighted works other than those listed in Section 110(2), such as dramatic works or audiovisual works, for certain education purposes might be permissible under the fair use exemption.

past by the adoption of voluntary guidelines by interested participants, as in, for example, the Fair Use Guidelines for Educational Multimedia developed in the CONFU proceedings. In these same proceedings, however, the parties involved in developing the voluntary guidelines on educational fair use for distance learning were unable to agree upon final guidelines.

Public broadcasters further submit, however, that Section 110(2) should not be as narrowly construed as some commenters suggest, although we suggest that the Copyright Office consider clarifying the application of the Section 110(2) exemption, as discussed below.

Section 110(2) provides that the following is not an infringement:

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 transmission is directed because of 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 part of their official duties or employment;

Public broadcasters submit that nothing in this statutory language or the legislative history would indicate that this exemption does not apply to both digital and analog transmissions. Rather, the statute and the legislative history specifically suggest that both transmissions are covered.

Under Section 101 of the Copyright Act, “[t]o ‘transmit’ a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent”. Further, in the context of defining the copyright holders’

exclusive rights under Section 106, the House Judiciary Committee stated in the Judiciary Committee Report⁶ that “[t]he definition of ‘transmit’ . . . is broad enough to include all conceivable forms and combinations of wired and wireless communications media, . . .”. The Judiciary Committee Report further stated that “[e]ach and every method by which images or sounds comprising a performance or display are picked up and conveyed is a ‘transmission,’ . . .”.

Like other parties in this proceeding, however, public broadcasters believe that some clarifying adjustments may be required because the nature of digital transmissions is such that ephemeral copies are necessarily created in the transmission. We recommend that the Copyright Office consider making these clarifying adjustments, subject to examining and providing for technological safeguards to prevent further distribution and/or copying.⁷

Public broadcasters also note that while Section 110(2)(C)(i) requires that a transmission be made primarily for “reception in classrooms or similar places normally devoted to instruction,” that Section 110(2)(C)(ii), in the alternative, states that the transmissions may be made primarily for “reception by persons to whom the transmission is directed because . . . other circumstances prevent their attendance in classrooms or similar places normally devoted to instruction”. Public broadcasters note that the Judiciary Committee Report stated that in its discussion of clause (C)(ii) of Section 110(2), that the language was intended to include instructional television college credit courses. According to this report, “[t]hese 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” but only “[s]o long as these broadcasts are aimed at regularly enrolled students and conducted by higher educational institutions”. Public broadcasters see no reason why this logic does not apply to similar students who are enrolled at

⁶ Notes of Committee of the Judiciary, House Report No. 94-1476, Revision Notes and Legislative Reports 1976 Acts (the “Judiciary Committee Report”).

⁷ Public broadcasters are not recommending, however, that any other or further copying be permitted under this exemption.

institutions other than higher educational institutions. Public broadcasters supply educational materials used for K-12 students as well, and submit that the Section 110(2) exemption by its terms does not exclude these learners. Public broadcasters submit that the Copyright Office may wish to clarify this exemption accordingly to ensure that distance learning settings are covered by Section 110.

Public broadcasters also ask the Copyright Office to consider clarifying the exemption to make it clear that the reference to “nonprofit educational institutions” specifically includes public broadcasters, regardless of their ownership structure, when engaged in the transmission of educational materials for covered educational activities.

III. Use of Archived Material

As PBS observed in prior testimony submitted jointly with National Public Radio,⁸ public broadcasting has thousands of hours of educationally valuable programming in its archives that was cleared only for limited broadcast use before other educational uses, particularly online electronic uses, were even contemplated. This programming often lies dormant because of the expense and difficulty in clearing the rights for these other uses. In its testimony in this prior proceeding, PBS suggested consideration of a limited duration compulsory license to public broadcasters of works first broadcast on public television that have not been exploited in any subsequent audiovisual form for a period of years sufficient to evidence a lack of commercial interest in the work (such as five years). A mechanism to “unlock the archives” of public broadcasting solely for educational use would be of incalculable benefit to educators and the nation’s students. It is precisely this sort of situation, a great administrative burden that precludes a clear public benefit, that justifies statutory compulsory licenses.

Public broadcasters note that the Society of American Archivists commented in this proceeding that they had also had a concern about the use of archival, unpublished material where the copyright owner cannot be identified and the material is of limited commercial value.

⁸ Testimony of the Public Broadcasting Service and National Public Radio on H.R. 2441 “The NII Copyright Protection Act of 1995,” Submitted to the House Subcommittee on Courts and Intellectual Property, February 15, 1996.

In the case of public broadcasting's archived programs, however, public broadcasting is not asking for free use of its archived programming. Rather, public broadcasting recommends a compulsory license where the copyright holder would receive fair compensation for this additional use.

IV. Certain Digital Millennium Copyright Act Provisions

Several commenters have stated that nonprofit educational institutions should be less concerned about liability under the copyright laws because of certain new provisions in the Digital Millennium Copyright Act ("DCMA"), such as the limitation of liability for online service providers set forth under Title II of the DCMA.

Public broadcasters have not had the time to analyze all of these new provisions in detail as of the date of this filing. However, with respect to the provisions affecting online service providers, public broadcasters are not certain which, if any, of their activities will enable them to qualify as "online service providers" under the DMCA and, therefore, entitle them to the limitations of liability provided to online service providers. For example, for some of the online activities of public broadcasters, it may be difficult to argue that a public broadcaster is merely "an entity offering the transmission, routing, or providing of connections for digital 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," as required by Section 512(k)(1)(A). Even if a public broadcaster's particular activities in providing online educational materials allow the public broadcaster to meet the broader definition of an online service provider that is set forth in Section 512(k)(1)(B), the additional conditions required for specific activities may be such that the public broadcaster may not reasonably be able to meet them.

Public broadcasters, like other copyright holders, are concerned about and in favor of mechanisms that assist them in protecting their copyrighted works. Public broadcasters, like other parties to this proceeding, are also concerned that the anti-circumvention provisions of the DMCA may have a significant adverse impact on the exemptions under the copyright law for certain uses that may be relied upon by public broadcasters in connection with digital educational programming. The anti-circumvention provisions of the DMCA, although delayed

in application until two years after the date of enactment, prohibit any person from circumvention of “a technological measure that effectively controls access” to a protected work. Congress also recognized that these provisions might have the effect of limiting the fair use or exempt use of protected materials. As a result, Congress required periodic rulemaking proceedings on the record by the Librarian of Congress to determine whether these users’ non-infringing uses are likely to be adversely affected by these provisions. This is a concern shared by public broadcasters.

V. Conclusion

Public broadcasters urge the Copyright Office to consider their longstanding interest in distance learning, as well as the interests of traditional nonprofit educational institutions, as it determines what recommendations to submit to Congress as to how to promote distance education through digital technologies. In particular, public broadcasters urge the Copyright Office to (1) avoid any attempts to narrow the scope of the exemption set forth in Section 110(2); (2) explicitly recognize that the Section 110(2) exemption applies to digital transmissions; (3) permit further use of archival material by public broadcasters through a compulsory license or other mechanism; and (4) monitor the effect of the DMCA on public broadcasters.

Respectfully submitted,

Gregory Ferenbach
Jeannette L. Austin
Public Broadcasting Service
1320 Braddock Place
Alexandria, Virginia 22314
703-739-5056

Marilyn Mohrman-Gillis
Lonna M. Thompson
Association of America’s Public

Television Stations
1350 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
202-887-1700

Kathleen Cox
Robert M. Winteringham
Corporation for Public Broadcasting
901 E Street, N.W.
Washington, D.C. 20004
202-879-9600

March 3, 1999