

REPLY COMMENTS OF THE
ASSOCIATION OF AMERICAN UNIVERSITIES
AMERICAN COUNCIL ON EDUCATION
NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES

CONCERNING

PROMOTION OF DISTANCE EDUCATION
THROUGH DIGITAL TECHNOLOGIES

MARCH 3, 1999

Submitted by:
John Vaughn
Executive Vice President
Association of American Universities
1200 New York Avenue, NW
Suite 550
Washington, D.C. 20005
email: John_Vaughn@aau.edu
phone: 202-408-7500
fax: 202-408-8184

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The Association of American Universities, the American Council on Education and the National Association of State Universities and Land-Grant Colleges take this opportunity to reiterate their proposal for amendments to Section 110(2) of the Copyright Act to allow performance and display remotely of all such educational activities currently permitted in the classroom, provided reasonable assurances against the misuse of copyrighted material that could harm the market for that material. The objective of this proposal is to permit all students to benefit from instructional activities currently permitted in face-to-face classroom settings.

The existing Section 110 reflects the well-established public policy that the social benefits of certain educational uses of copyrighted material justify an exemption from the exclusive display and performance rights of copyright owners. Revisions in the law are necessary, however, because the existing Section 110(2) exemptions for educational transmissions reflect concerns about the potential misuse of copyrighted material by means of technologies extant more than two decades ago. The need for a revised exemption has been amply demonstrated by institutions attempting to provide quality educational products to distance education students. Without such a revision, new educational possibilities will be lost, as institutions will be unable to fully utilize technological capacities, increasing the disparities between the on-site classroom and distance education. The proposed limited revision to 110(2) will promote distance education and advance the public policy objectives of Section 110, while maintaining appropriate protection for the rights of copyright owners.

Therefore, we propose the following revisions to Section 110(2) of the Copyright Act with respect to distance education.

- I. Where the educational institution can provide reasonable assurance against downstream reproduction and redistribution, Section 110(2) should be changed (a) to allow the display and performance of copyrighted works at remote locations and at times selected by students, and (b) to eliminate the distinction between types of works that qualify for a distance education performance exemption and apply the exemption to all types of works. Since displaying or performing material over computer networks technically involves “distributions” and “reproductions” that fall under Section 106 proprietary rights, the revised 110(2) distance education exemption must, therefore, allow those distributions and reproductions that are necessary for but incidental to the transmission of the display or performance.

Where reasonable protections against downstream reproduction and redistribution exist, performance or display in distance education should not be treated differently from performance or display in a classroom. Such an exemption — permitting, for instance, video-conferencing of a class, or a display on a computer screen using a technology that does not allow the display to be copied onto a viewer's hard drive or redistributed to a third party — would not harm the market for a copyrighted work.

Reasonable protections may not provide absolute assurance that material displayed or performed in distance education cannot be reproduced or redistributed, but they would significantly reduce the likelihood. Copyright owners would face no greater risk of downstream reproduction and redistribution of materials used in distance education than they do from digital materials distributed directly to consumers through commercial channels. Driven by the need of copyright owners to protect their interests in a digital environment, technology has been and will continue to be developed that will reduce the risks of downstream reproduction and redistribution to acceptable levels.

The purpose of these 110(2) revisions is to enable institutions to deliver remotely the same educational content that can be delivered through display or performance in the traditional classroom when the risks of misuse of copyrighted materials are similarly low. The current 110(2) exemption is limited to the performance of non-dramatic literary or musical works, which undermines the ability of educators to exploit the capacity of new technologies to combine almost any type of work in multimedia presentations that enrich educational content. Thus, the current 110(2) provision unnecessarily limits the content and quality of a distance education course for the student and adds to the cost of producing the programs. Because the proposed exemption is limited to the transmission of a performance or display of a work, however, the exemption would not replace the need for students to purchase textbooks and published course materials for their own use.

II. Where access to information is controlled—e.g., limited to registered students through passwords or other technological controls—but reproduction or redistribution cannot reasonably be prevented, a more limited exemption permitting the transmission of a display or performance of copyrighted material should be allowed. Under these circumstances, the scope of the exemption might be scaled to the potential for market harm.

In a controlled environment where reproduction or redistribution, though unlikely, cannot reasonably be prevented, the institution should continue to be permitted to transmit a display of any work, but to transmit a performance of a work not currently allowed only if that work would not have a significant market impact if inappropriately reproduced or redistributed. Such performances might include student performances or other non-commercial performances of a current dramatic work.

In both types of distance learning environments, distance education programs should be conducted in the context of institutional policies governing appropriate use of copyrighted materials, and should be accompanied by educational efforts to inform students and faculty about

the rights of copyright owners, the limitations to those rights, and the circumstances under which they apply. Educational institutions taking advantage of the exemption should also continue to make every reasonable effort to attribute materials accurately in accordance with copyright management information provided by a producer. In addition, accreditation might be used as a means of assuring that the exemption is available for serious, formal programs of instruction and not misused for private gain rather than public benefit.

This proposal does not contemplate a categorical exemption for educational uses of copyrighted material. Nor does the proposal remove all of the substantial hurdles that distance education programs must negotiate in order to flourish. The proposed exemption is narrowly drawn to allow the transmission by an educational institution and reception by a bona fide student of the display or performance of a copyrighted work.

Concepts of fair use would still apply to reproduction and distribution of materials for faculty and student use. Licenses would still be necessary in order to exploit fully the potential of distance education. However, licensing schemes, dependent as they frequently are on separate negotiations with multiple copyright owners even for a single work, will not reliably convey the minimum rights necessary for transmission of a display or performance of that work. The transaction costs of negotiating such licenses, particularly in the context of changing technologies, would often dissuade institutions from even attempting to exploit the educational potential of digital environment. Under such circumstances, distance education would not expand, and its potential social benefits would be lost.

The suggested changes in law will achieve the limited goal of allowing performance and display remotely of all such educational activities currently permitted in the classroom, provided that adequate safeguards exist against the misuse of copyrighted material. Moreover, as outlined herein, the proposed exemption would create no greater impediments to market experimentation and publishing than the existing Section 110 exemption. This updated exemption for distance educational uses of copyrighted materials in the digital environment supports the purpose of copyright articulated in the Constitution, and is the appropriate policy to further the public interest.