

February 23, 1999

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Copyright GC/I&R
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Dear Attorney-Advisor Rajapakse:

Pursuant to Peter Givler's letter of December 4, 1998, to Shira Perlmutter registering the Association of American University Presses (AAUP) as an "interested party" in the Copyright Office's report on the promotion of distance education through digital technologies mandated by Section 403 of the Digital Millennium Copyright Act, I am writing to express the views of the AAUP now that we have had a chance to review the testimony given by other interested parties.

The AAUP is a nonprofit organization that consists of 118 member presses located in 45 states. Most of our members are affiliated with major U.S. research universities; others are the publishing arms of scholarly societies, private research institutions, and museums. These institutions may be copyright owners, and their faculty are our authors. Encouraging dissemination of the best of scholarly knowledge and research requires careful balancing of the intellectual property rights that foster innovative and valuable works with access to those works through distance learning and collaboration.

We start from the premise that it is becoming increasingly difficult to distinguish what is "distance" education from what is not. This is admitted by many of the groups testifying:

"The general consensus [of the Indianapolis conference on January 21] showed that the 'distance' in distance education is rapidly becoming, if [it is not] already, irrelevant. Digital technologies in use in the 'traditional' classroom will further expand into the distance education realm, and it will become even more difficult to identify 'distant' and 'traditional' elements and students of a course." (Indiana Commission for Higher Education)

"In real-life digital practice, distance education is a term used broadly to include a range of instructional concepts from courses taught completely on-line, with little or no true face-to-face contact, to selected enhancement materials placed on a web site by a professor for students to view. Generally speaking, the term 'distance education' as applied to digital media should cover any course-related material that is intended to be accessed via computer." (Visual Resources Association)

"Is there any difference between a remote student and a local student anymore when each comes into the classroom virtually? NO, there isn't." (The University of Texas System)

"As the number of classes with substantial Web components increases, it becomes difficult to dissociate distance learning classes from traditional ones." (Consortium of College and University Media Centers)

Whereas university presses have had little, if any, involvement in "distance education" in its traditional sense, the use of digital technologies that is transforming the field and making its distinctness from on-campus education harder to define cannot help but have substantial impact on the business of scholarly publishing in which we are engaged.

We are concerned about practices such as electronic reserve systems, which have already turned some libraries into coursepack suppliers to students on campus, becoming virtual republishers in an even more expansive distance-education environment. (In the CONFU discussions the AAUP participated in the negotiation of the e-reserve guidelines in the hope of forestalling this development.) A number of the universities testifying affirm that e-reserve systems are an integral part of distance education when it is digitally delivered: Texas claims that, "in a digital environment, there is no logical distinction between course materials made available online as supplemental materials, either reserves or what have been called coursepacks, and core course materials" and predicts that, "in the near future, a large part of all course materials will likely be provided to students over digital networks"; Maryland's University College argues that its "library, and other libraries that serve remote students, need an exemption which permits them to make a single [sic!] digital copy for use by an individual or students in a course" (though it appears to believe that e-reserves can be limited to "supplemental" materials) and even claims "a genuine need to retain the right to make digital copies of courses, parts of courses, and copyrighted articles for preservation and archival purposes." This latter vision would be tantamount to making the library a republisher complete with its own inventory of "backlist" titles!

Because the primary market for most of what university presses publish is the community of higher education, any broad exemption for "educational" use would strike at the heart of our business and have the effect of denying to that same community the benefits of our ability to continue publishing the works of scholarship that members of that community create and then want to use for teaching. The significant impact that uncompensated coursepack photocopying has had on the economic foundation of our enterprise will likely increase

manyfold when this copying is done digitally in an expansive distance-education universe, whether through e-reserve systems or otherwise. Our member presses have worked diligently, through the Copyright Clearance Center's Academic Permissions Service and bilaterally, to license the use of materials from our books and journals in photocopied coursepacks in a timely manner. We fear that an exemption for digital copying in distance education, where it covers "any course material that is intended to be accessed via computer" and will amount to "a large part of all course materials" in the "near future," will further erode a market for our works that has already been severely affected by the decline in library purchases of monographs and the resort to photocopying excerpts in coursepacks in place of having students buy the paperback editions we make available for many of our books. It is not just the "downstream" redistribution of our publications that worries us, as some groups allege, but the immediate provision of digitized anthologies of readings to large numbers of students simultaneously over networks, which like the creation and sale of photocopied coursepacks can generally not be justified as "fair use" when done without permission of the copyright owners of the contents.

We agree that "fair use" should continue to apply in a digital environment, but we are disturbed by the frequent equation of "fair use" with "free access" (see the "Concluding Observations" of the College Art Association's testimony) as though its main function were to promote the proliferation of copies and thus the provision of "access" to larger numbers of people. Rather, it is worth emphasizing that the core meaning of "fair use" is the privilege it provides for creators to build upon the work of their predecessors in a "transformative" way and thereby further "the progress of science and the useful arts" that it is copyright's basic purpose to support. It is this, not the sheer multiplication of copies (Section 107's reference to "multiple copies" used in teaching notwithstanding), that is the essential task "fair use" performs for education generally. As Judge Newman said in writing his majority opinion in the *Texaco* case, "whatever social utility copying of this sort achieves, it is not concerned with creative authorship" and is something quite different from "fair use" as traditionally understood. This simple truth is too often overlooked in debates over "fair use" in our technological age, where the ease of making copies, analogue or digital, has overshadowed the historical function this concept has performed in copyright law.

Our concerns about uncompensated photocopying beyond "fair use" (to the limited extent it applies to mere duplication of copies) grow greater when that copying becomes digital within the confines of a single campus, but grow greater still when it enters the less controlled, and controllable, environment of the Internet. As noted in the testimony of the University of North Carolina, "one essential difference between the use of electronic communications on campus versus off campus is the reliability and security of access over a campus network that is under the control of campus personnel." An exemption for distance education in this environment would become a blank check for both superdistribution of copyrighted works and also neglect of responsibilities for ensuring the accuracy and attribution of works transmitted. The American Society of Composers, Authors, and Publishers notes how digital transmission undermines copyright owners' "ability to prevent the work from being distorted, decompiled, or reassembled." Similarly, the American Society of Journalists and Authors argues that "an exemption of this nature would also threaten the integrity and authenticity of the copyrighted materials made available for distance learning through digital networks because without strong

copyright protection, there is no way for users to be sure that the information received is truly what it is claimed to be." We share these concerns.

Exemptions without corresponding measures for ensuring attribution and accuracy of the works that are transmitted ultimately will devalue the role of technological delivery of information. If it is established that an exemption is needed, such a measure should be implemented only in conjunction with guidelines that preserve the value added by the selection, editing, and peer review of the scholarly publishing process.

It is the publisher as licensor that can make sure such important considerations are not lost in the rush to provide wide access to copyrighted works. Licensing also provides flexibility in meeting the needs of different types of users, at appropriately differential levels of fees, as pointed out by the Association of Test Publishers. We are still in the early stages of licensing digital uses; even the Copyright Clearance Center, long in the business of licensing photocopying, has only recently launched its Electronic Course Content Service and MiRA (its digital-image service). It seems premature, as many have observed, to shortcircuit this process of experimentation with licensing digital uses by offering any kind of blanket exemption. At most, if the complaints of some of the user community's representatives about the difficulty of determining ownership of certain types of material (such as those mentioned by the American Society of Archivists) prove to be worth special consideration, perhaps some additional limitations on the remedies open to the hard-to-locate rightsholders could be inscribed in law, or the Copyright Office might encourage copyright owners to help out by establishing a "registry of authors," as the American Society of Media Photographers suggests. Similarly, if certain rightsholders prove unwilling to facilitate licensing, either bilaterally or collectively, perhaps they should be given extra incentives to do so (of the kind that an "umbrella statute" might provide).

But it may be too early yet even to implement such added measures of quasi-coercion. As the National Music Publishers Association rightly observes, users in nonprofit educational institutions already are insulated in many ways from risks of copyright infringement, not least by the protection against statutory damages afforded by Section 504(c)(2). These special provisions give academic institutions wide latitude for interpreting "fair use" to their advantage. The addition of an outright exemption, as NMPA notes, would give these institutions "no incentive to obtain permission or licenses, or to otherwise respect copyrights, and it would encourage other entities with marginal claims to the exemption to try to shoe-horn themselves into a distance education definition" (especially, we might add, at a time when--as shown by ASCAP's testimony--there are many mixed nonprofit/for-profit ventures in providing distance education under way). Nor would it give them any incentive to renew the CONFU process and enter into further negotiations over "fair use" guidelines.

We conclude, then, with many other rightsholders' organizations, that a special exemption for distance education--even assuming some clear definition of what it encompasses can be achieved--is not justified at this yet early stage of our digital "learning curve" and might, indeed, inhibit progress toward working out cooperative arrangements, whether guidelines or licenses, between copyright owners and users. Worse yet, the premature adoption of an

exemption for distance education--especially in the most far-reaching form where "distribution" is not restricted as just an ancillary function to enable "performance" and "display" (as in the more modest proposal of the Association of American Universities and its associates) but is contemplated as having no boundaries of quantity or duration at all (as in the proposal first made by Senator Ashcroft and recommended in this testimony by North Carolina State University)--could have seriously damaging effects to our future survival as scholarly publishers. Surely, such an outcome would not be in the best interests of higher education, not to mention the public at large.

Yours sincerely,

Robert L. Faherty
President