

**REPLY COMMENTS MADE PURSUANT TO  
DECEMBER 23, 1998 FEDERAL REGISTER NOTICE  
CONCERNING U.S. COPYRIGHT OFFICE STUDY ON THE  
PROMOTION OF DISTANCE EDUCATION  
THROUGH DIGITAL TECHNOLOGIES.**

March 3, 1999

Sayuri Rajapakse, Attorney-Advisor  
Office of Policy and International Affairs  
U.S. Copyright Office, Copyright GC/I&R,  
P.O. Box 70400, Southwest Station  
Washington, DC 20024

Dear Ms. Rajapakse:

On behalf of the University Continuing Education Association (UCEA), we would like to thank you and the U.S. Copyright Office for conducting the recently completed hearings and demonstrations relative to digital distance education so ably. We hope that the information gathered will be useful to the Office of the Registrar as you craft legislative recommendations for the Congress' consideration.

In the course of testimony and demonstrations we believe several themes became apparent which need to be addressed and have sought to do so in the reply comments below:

1. No testimony suggested any significant changes to the fair use doctrine in the current copyright code. Representatives from all sectors testified that these provisions must be respected and continue. We envision fair use not as a substitute for an appropriate digital distance education exemption, but as another principle which works with it.

Understanding this concept, however, it is clear from the testimony the Copyright Office has heard and read, that distance education practitioners are unsure about

exactly when fair use applies in distance education. If you took one hypothetical situation and asked practitioners working in distance education whether or not fair use applied or not, you will probably receive (as you have heard) conflicting answers. As a consequence, distance educators frequently seek unnecessary licenses for materials which should apply under fair use.

Therefore, we suggest that it would be useful for your recommendations to Congress to include, some congressional findings that clarify in which specific situations fair use applies in distance education. The copyright law would benefit from being updated in this manner to make clear to practitioners in the field when licenses are necessary, when the fair use doctrine applies, and when a digital distance education exemption would be involved. Congress could clarify these distinctions by enacting specific examples and offer Congressional findings explaining where the lines should be drawn.

2. We suggest your recommendations recognize a balanced system in which licensing and a digital distance education exemption might work together for the benefit of both owners and users of copyright material. A system of mere licensing would not promote distance education and would become an unwelcome burden to taxpayers and students facing increased costs of higher education. A limited exemption could, if crafted correctly, allow for an exemption of some materials not otherwise available through licensing--either because of extraordinary cost, lengthy request time, or difficulty in determining ownership of the specific content's copyright.
3. Some other content owner groups fear that distance education students will profit from the piracy of their information through a distance education course. On the contrary, no testimony has provided evidence that distance education students are profiting from or infringing on any copyright. This suggests therefore that your recommendations to Congress should take into account that there is no evidence to support fears that distance education students will abuse copyright laws.
4. In crafting your recommended exemption for digital distance education we believe, based on the testimony you have received, that your work could be usefully guided by several principles:
  - An exemption for digital distance education should only exist for legitimate, serious educational activities and we would recommend you look toward

accreditation to serve this purpose. There is precedent for this type of quality assurance in other law including the Workforce Investment Act of 1998;

- The exemption should apply only for a course of instruction by an eligible educational provider and not include a plethora of other activities;
- The exemption must apply to a modern definition of classroom in a digital distance environment which includes asynchronous learning;
- The exemption should allow the display and performance of all classes of works in a digital distance education environment which are currently permitted in the traditional classroom environment. As a result, it must therefore be permissible to transgress any section 106 rights for the limited educational purpose outlined above; and finally
- To be eligible for such an exemption, eligible educators should be required to provide reasonable assurances under the circumstances against downstream abuse. These measures could include reasonable technological safeguards and education of faculty, staff, and students.

As you may recall, UCEA's 420 institutional members represent both owners and users of copyrighted works. The depth of their experiences in this regard and in distance education is available to you as a continued resource as your work proceeds. Please feel free to contact UCEA's Director of Governmental Relations and Programs, Phillip Robinson, at (202) 659-3130 to provide feedback to your draft proposals or provide any other assistance you may need.

Respectfully,

Kay J. Kohl  
Executive Director