

Reply Comments
Promotion of Distance Education Through Digital Technologies
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As the Copyright Information Officer at the University of Washington, I have an opportunity to see first hand how copyright issues affect the entire university community as it conducts its teaching, research and public service activities. One of the most challenging and complex issues today surrounds the application of copyright law to the digital environment in which we work. I would like to take this opportunity to respond to several issues raised by representatives of the publishing, music, motion picture and photographic artists and rights holders in their comments in accordance with Section 403 of the Digital Millennium Copyright Act on promotion of distance education through the use of digital technologies.

Certain copyright content providers have asserted in their statements that distance education is flourishing and thus there is no need to change the laws. If distance education is flourishing, it is not as a consequence of Section 110 of the Copyright Act. Educators have been forced to exclude most music, video, visual art and dramatic works from those classes to be broadcast or transmitted, since reasonable licensing options are not available. Educators can and do create new original materials or draw on works from the public domain, but a vital component of education is the ability to comment, criticize, and evaluate works of expression created by others. Under Section 110, commentary, study and viewing of other works is allowed in the physical classroom, but not outside its walls. These awkward limitations! defeat the purpose of using new technologies in teaching altogether.

Representatives of the educational community have provided comments and testified in recent hearings held by the Copyright Office that the technological limitations in Section 110 of the Copyright Act do not adequately address current, let alone future, technologies used to transmit instructional materials to students. I concur with this position and endorse the recommendation that Section 110 needs to be reconsidered in the light of the changes that are taking place in American education. Today's classroom is being extended and re-invented in the context of information technology. The new educational environment as that of a "virtual classroom" where students may access instructional materials outside the physical walls of the classroom.

Out of Balance: The Rights of Copyright Owners and the Interests of Users

In the current environment, there are no reasonable means by which educators can reliably identify copyright holders nor secure rights specific to classroom use or other distance education instructional activities. Copyright management information is all too often incomplete, inaccurate, misleading, or altogether absent. Many works that are still protected by copyright are no longer published, the publishers have gone out of business, the authors are deceased, and there is no path to locate the current rights holder(s), even after an exhaustive search. Even if rights holders are identified, many questions remain. It is not easy to determine if a work published when notice and renewals were required met the conditions necessary to continue copyright protection. Works belong!ong to individuals enjoy protection for life of the authors plus 50 or 70 years, making it necessary to determine if and when the author(s) died. If the work was a work made for hire, a different term of protection would apply. Seeking rights for a new digital use of a work may involve securing rights from several rights holders if the original bundle of rights has been split between different publishers in different media.

The complexity of this issue is further compounded by the fact that copyright owners may not be able or willing to grant the rights requested by an educator. Educators often seek to copy excerpts from works and recast them in a new format for instruction, such as a compilation. For example, if a film history professor wants to compile excerpts from 20 popular motion pictures that have been made available for the home video market, he or she is unable to show the legally purchased or rented videos in the classroom because only “home use” copies are available. A home use version may be available at the local video store for \$19.95, but there is not a well established channel to purchase the same video for “public educational use”, even at a higher price. If the educator o!nly wants to use a few minutes of each video, one would expect a nominal fee based on the nature of the use. The Indiana Commission for Higher Education has cited one example in which a licensing fee of over \$100,000 was quoted for using 20 clips from an animated series, each only a few seconds in length. Even if this is an unusual pricing strategy, it is indicative of the underlying problem: the rights holder has a monopoly which fails to respond to non-profit educational needs.

Rights holders are able to dictate to educators not only what published and publicly displayed materials may form the basis for education, but also in what forums and in what fashion such works may be introduced. If educators cannot have reasonable use of the published products of American learning and culture for the purposes of instruction, then we truly have reached the end of the argument for the primary value of formal education in our democracy. Rather than have educators decide what works might benefit the instruction of students, we will have allowed private individuals and commercial enterprise to have sole discretion over what materials are used in information technology-based education by virtue of their ability to price educators out of the market.

Pay Per Use System Is Not A Viable Solution

In the written comments provided on behalf of Broadcast Music, Inc., Marvin Berenson contends that educators argue “...because licensing of copyrighted works for use on the Internet is currently too costly and too time consuming for them, a copyright exemption is therefore required.” It is true that the current process is costly and time consuming, but Mr. Berenson’s statement fails to fully elaborate the aim of the non-profit

educational community: to enjoy a clear, statutory exemption to use materials in the routine and systematic instruction of enrolled students, whether that be in traditional face to face instructional settings, over the Internet, video taped for time-shifted viewing, or other format, as long as reasonable measures are taken to prevent unauthorized! access and unlimited downstream copying.

Victor Perlman, on behalf of the American Society of Media Photographers, stated that "...the money needed to acquire proper rights to use copyrighted materials is relatively insignificant to the educational community..." The University of Washington expended over \$200,000 last year for photocopy course pack copying permissions and over \$20,000 for music performance rights, and these numbers are far from insignificant. It is important to recognize that a costly and time consuming process, in an age when information can be exchanged almost instantaneously, simply does not make sense. Further, the volume of requests for such permissions is likely to translate to hundreds of thousands of potential transactions. Neither the industry content providers nor the educational community can afford the cost of conducting this effort on a case-by-case transactional basis now, and our society's use of digital technologies is growing at an incredible rate with no signs of slowing down. It is appropriate, and in the public interest, to allow educational activities to continue to develop without unreasonable restrictions imposed by the inability of commercial content publishers to respond to the needs of the educational community.

Adherence To Minimal Use Thresholds Are Not Appropriate

Several parties urge the adoption of voluntary portion limitations, in particular those advocated by the Consortium of College and University Media Centers (CCUMC). No universities endorsed these guidelines because they are not appropriate for the current technology and teaching methodology. As a remedy to poorly drafted or antiquated language, they fail to clarify the law. Guidelines create poor compromises governed by those with the greatest resources to agitate for their economic interests. If guidelines are to be a useful adjunct to the language of Section 110, they must *extend* the freedom of educators and students to act *beyond* Section 110, not limit activities or create administrative burdens for educators under Section 110.

A Balanced Exemption: Not A License to Infringe

The limitations in Section 110 have not kept pace with changes in technology and as a result, rights holders can prohibit educational uses of their materials by pricing them out of the reach of non-profit institutions, or by making the process so burdensome that educators will have finished teaching the class by the time the permission is resolved. Copyright owners should recognize that the volume of copyrighted works in circulation is not going to decline and the public interest is served by developing a marketplace in which educators can readily obtain permissions, in the time frames they need, and at costs that are reasonable in light of the nature of the use and public purpose served by non-profit educational institutions.

Section 110 needs to be redrafted to include an exemption for non-profit educational institutions so that they may fully realize the educational possibilities in the virtual classroom.

