



**Reply Comments of EDUCAUSE to the U.S. Copyright Office**

**Concerning**

**Promotion of Distance Education Through Digital Technologies**

**March 3, 1999**

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This statement is submitted on behalf of EDUCAUSE, an association dedicated to transforming education through information technologies. EDUCAUSE members include over 1600 institutions of higher learning as well as over 150 corporations.

EDUCAUSE firmly believes that information technology will have a profound and beneficial effect on education and learning, in addition to the tremendous economic and social benefits our society is already realizing with the increasingly important information infrastructure. Since 1994, the National Learning Infrastructure Initiative of EDUCAUSE has worked to promote sensible implementation of information technology in education delivery, with the belief that IT will improve the quality of teaching and learning, contain or reduce rising education costs, and provide greater access to American higher education.

EDUCAUSE seeks to collaborate with the private sector in creating guidelines --within the market economy -- that provide faculty and students ubiquitous access to educational information by digital technologies at reasonable costs. EDUCAUSE recognizes that future technologies will affect current licensing practices, and we look forward to working with the private sector to ensure that a mutually workable solution is promulgated.

At the same time, however, the public's right to use copyrighted material for education should not diminish with the introduction of new communication mediums. EDUCAUSE supports changes in existing copyright law that would exempt distance learning from Sec. 106 rights granted to copyright owners to control distribution and copying until other remedies are proven to equally protect educational use and the rights of copyright owners. As new technologies are developed, we must ensure that copyright law strikes a fair balance between protecting copyright owners' investment in their work and providing the public the ability to use copyrighted work in a reasonable manner for the purpose of education.

### **Response to Copyright Owners' Concerns**

The Association of American Publishers (AAP) strongly opposes what it perceives as "blanket exemption proposals" that would allow works to be displayed and distributed through the Internet; this could potentially harm copyright owners' ability to "exploit their intellectual property interests through licensing in a competitive marketplace." Their rationale is that existing copyright law provides sufficient protection to copyright owners "subject to limited exceptions under Section 107 (fair use) and Section 110 (instructional use) of the Copyright Act" and that any substantial changes in copyright law are unnecessary. The AAP comments imply that conventional intellectual property licensing practices will strike the proper balance. In the absence of tested intellectual property management techniques for the Internet, EDUCAUSE disagrees with this assessment and believes that copyright law must be updated if education is to flourish in the digital realm.

During its last session, Congress took steps to promote the unfettered development of e-commerce. Distance learning through digital technologies provides America with the opportunity to meet another national objective - providing more Americans broader access to higher education at lower costs.

### **With current technologies, licensing is not a substitute for a distance learning exemption**

As content providers, the higher education community also has a vested interest in protecting the market value of copyrighted work. Our call for a distance learning exemption is not an effort to devalue copyrighted works. EDUCAUSE believes that current licensing methodologies simply are not sufficient to allow students the practical ability to use works for educational purposes.

As testimony during these proceedings has demonstrated, licensing has not worked thus far for distance education. Licenses are rarely available for distance learning, and delays in obtaining permission from the copyright clearance center are substantial. The cost of obtaining licenses – apart from the cost of the license itself –substantially hinders educational institutions’ ability to implement viable distance education programs. Contrary to the assertion of content providers, distance education is not flourishing under the current regime.

As Laura Gasaway noted in her testimony, “the power to license is the power to determine the terms of use and ultimately, the power to deny access to information, too great a shroud to place over distance education.” Updating copyright law to allow a distance learning exemption in the digital environment will help ensure that the content industry does not have unfair leverage in crafting licenses for usage of copyrighted material.

### **Shared Responsibility to Restrict Unauthorized Copying**

Copyright owners and providers fear that allowing an exemption for distance learning in the digital realm will result in unlimited distribution of perfect reproductions of copyrighted material over the Internet, undermining the incentive for creators to utilize the Internet as a commercial distribution medium. While acknowledging that unauthorized copying is indeed a problem, content owners’ claims of destructive piracy are unsupported in the educational context.

To date the university community has cooperated with copyright owners to work toward preventing unauthorized \*downstream\* copying conducted over their networks. There is no reason why this process will not continue. The Digital Millennium Copyright Act (DMCA) OSP liability provision formalizes this process, mandating that universities and other educational institutions that provide network services designate an agent to respond to complaints of copyright infringement. This is a mutually beneficial relationship; it grants on-line service providers protection from illegal activities of their customers (in

higher education's case, faculty and students), while giving copyright owners a direct means of communication and ensuring that their grievances are settled in a timely matter.

### **Guiding Principles for a Distance Learning Exemption**

The higher education community is not requesting a blanket exemption to distribute copyrighted works, but rather a tailored exemption for distance learning that supports the following guiding principles for use of copyrighted works in the digital environment:

1. Should apply to resources the institution has legally acquired by fair use, gift, or licenses.
2. Must be for legitimate, educational activity; accreditation is one measure of that "educational purpose".
3. Must be in the course of instruction.
4. Must permit all forms of distance learning.
5. Must not be restricted to the traditional perception of the classroom.
6. Must extend exemption to all classes of works, including audiovisual.
7. Must be permitted to perform and display anything in a distance environment that is permissible to perform and display in a classroom.
8. Exemption must include Sec. 106 rights necessary to accomplish this purpose.
9. Institutions must provide reasonable assurances against unlawful uses of copyright works
10. Copyright owners must not be permitted in a digital environment to use licensing to limit other privileges that apply such as fair use.

### **Future Remedies**

The elusive "technological fix" alluded to during the Copyright Office hearings may soon be a reality. Technologies such as Digital Object Identifiers (DOI) that track copyright material, in conjunction with other technologies that hinder unauthorized copying, are currently in development. Some have suggested the implementation of "fair-use licenses" that would permit teachers and students to make a limited number of copies. Others believe that a well-designed system of "micro-payments" may prove to be more economically efficient as more course material is produced in the digital environment. We should note, however, that many in the education and research community fear the Internet becoming a "pay as you go toll road," placing an undue financial burden on educators and students that rely on the Internet and other information technologies.

Until an effective, mutually beneficial technological remedy can be implemented (balancing the rights of both content providers and the public interest), distance education should be granted an exemption from Sec. 106 restrictions. This will ensure that all students, regardless of distance and time constraints, will have equal access to the materials required to pursue their education and research endeavors.

EDUCAUSE looks forward to working with the U.S. Copyright Office, the education and library communities, and the content provider industry to ensure that any distance learning exemption is tailored and fair to all parties involved. We seek an environment that will continue to reward and honor the intellectual efforts of those that produce while simultaneously allowing all Americans fair access to educational opportunity.