AACC

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COMMENTS
of the
AMERICAN ASSOCIATION OF COMMUNITY COLLEGES
Before the
U.S. COPYRIGHT OFFICE
in
PROMOTION OF DISTANCE EDUCATION THROUGH DIGITAL TECHNOLOGIES
Docket Number 98-12A

The American Association of Community Colleges ("AACC") is the major national organization representing over 1,000 of the nation's two-year, regionally accredited, associate-degree granting institutions of higher education. Community colleges enroll over 9 million credit students each year throughout the country. AACC welcomes the opportunity to submit these comments in response to the Copyright Office's December 23, 1998 request for information in connection with the Registrar of Copyrights' development of recommendations to Congress under Section 403 of the Digital Millennium Copyright Act on how to promote distance education through digital technologies.

Introduction

Community colleges have been pioneers in the use of analog and digital telecommunications technologies, including the Internet, to deliver education and training to students on-campus, across town, and across the country. AACC's members believe that the strength and vitality of the Nation's economy and its ability to compete in the global marketplace in the 21st Century hinges on an ever better educated and continually trained workforce[1]. Colleges and universities are, in part, responding to this challenge and to the rapidly changing educational and training needs and learning styles of U.S. residents, through digital technologies and delivery systems. This proceeding, therefore, is of vital importance. In the end, it is essential that the Registrar's recommendations to Congress strike the proper balance between the equally

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[1] Congress has recognized this fact in a number of recent actions. The Learning Anytime Anywhere Partnerships Program and the Distance Education Demonstration Program, together with amendments to the student aid programs authorized by the Higher Education Amendments of 1998 and the earlier passage of the Hope Scholarships and Lifelong Learning tax credits reflect unambiguous Congressional support for distance education and its role in keeping America competitive in the world.

important and legitimate needs of learners and educators and the interests of copyright holders. Accordingly, AACC seeks an outcome that fairly, reasonably and equitably facilitates the use of copyrighted works in the networked educational environment while according fair, reasonable, and equitable protection to copyright holders. The overall goal of community colleges in employing digital technologies is to enable their remote students to have access to the same instructional materials and activities that their classroom-based students have, with the caveat that adequate, reasonable, and affordable safeguards are in place to protect against the misuse of copyrighted works in a way that would harm the market for the works. A failure to strike the proper balance of interests will seriously inhibit distance education.

Distance Education

The term "distance education" has an expansive meaning. At its core, however, distance education means the delivery of instruction via one or more analog or digital telecommunications technologies to traditional and non-traditional students or learners who are separated from the instructor by distance and/or time. The hallmark of distance education is not miles, but the use of technology to mediate instruction in a classroom, library or computer lab on a college or university campus or in a student's residence, workplace, or other location physically removed from the originating site on campus. Instruction may be live or asynchronous, may be video or text, or multimedia based, or a combination. It may be interactive, and may be taken for credit as part of a degree or certificate of competency program, for a continuing education unit, to improve employability, or just for a student's personal enrichment. Distance education technologies are employed to offer programs in hundreds of disciplines, from complete undergraduate and degree programs, to non-credit short courses.

The majority of distance education students are the same students who receive their instruction in an institution's traditional classrooms. They must meet the same prerequisites and admission criteria as traditional on-campus students, but they need greater flexibility in scheduling and/or location due to family or job-related time constraints, disability, and/or distance from the campus.

There is a clear national policy to promote distance education. This policy is reflected, in part, not only by this proceeding, but also by the Distance Education Demonstration Program that Congress recently authorized in the Higher Education Amendments of 1998.[2] Earlier this week the U.S. Department of Education published a notice soliciting colleges and universities to apply to be demonstration sites[3]. The Department notes that student demand for distance education programs has been steadily increasing throughout the country. Therefore, one of the purposes of the Demonstration Program is to "Provide for increased student access to higher education through distance education programs". (Notice at 5705). AACC agrees with the Department of Education's assessment that

> This growth in distance education has occurred in response to increasing

[2] Public Law 105-244, 105th Cong., 2nd Sess. (October 7, 1998).

[3] 64 *Federal Register* 5704 (February 4, 1999) ("Notice").

> demand from students who are restricted in their ability to enroll in more traditional programs, including working adults, parents, people who live in rural communities, and students with disabilities. * * * The richness of the available technology has made the delivery of high quality distance education possible and desirable for many more postsecondary education programs and students.[4]

Technologies Employed

Community colleges employ a wide variety of basic and advanced telecommunications technologies to serve their students, including, for example, one-way and two-way open or scrambled broadcast, cable and satellite delivery, fiber optic and microwave links, CD-ROMS, and the Internet. Some courses employ combinations of these technologies, but increasingly, higher education institutions are employing the Internet for delivery of courses because it is easy for students to access no matter where they happen to be. The Internet exponentially increases the amount of interaction between student and instructor and among students, a boon for a delivery method often incorrectly perceived as solitary. AACC believes that the full potential of distance education to meet the instructional needs of learners will be inhibited without reasonable modifications to copyright law.

Amendment of Section 110(2) of the Copyright Act

To create parity between classroom and remote student access to instructional material, AACC urges the Registrar to recognize that the telecommunications technologies and types of works currently sanctioned for distance education delivery by Section 110(2) of the Copyright Act in 1976 are far too limited to "promote" distance education today and into the 21st Century. Rather, AACC believes that the law should recognize that all performances allowable in a traditional classroom should be permitted as well in distance education. Accordingly, AACC urges the Registrar to recommend to Congress that Section 110(2) be amended to permit the performance, display, copying, and distribution of any type of copyrighted work to students at distant locations over digital networks so that remote and traditional classroom students have the same access to educational content delivered through display or performance. In short, performance of any type of copyrighted works allowed in a physical classroom should similarly be permitted wherever an enrolled distant student happens to be. Without this modification, the expanded educational opportunities afforded by the new technologies, including digital networks and the Internet, cannot be fully realized.

A Balanced Approach. As both owners and users of copyrighted works, community colleges share the concern of copyright owners about unauthorized copying and distribution of copyrighted works. In addition, AACC's members are concerned with protecting the integrity of their classes and the integrity of the testing process. Faculty are encouraged to provide instructional material in the format most convenient to the student. In addition to creating

[4] The Department defines "distance education" as "an educational process that is characterized by the separation, in time or place, between instructor and student." Notice at 5704.

courses exclusively for use in digital environments, instructors can create and post the same lecture notes, quizzes, assignments, and syllabi on-line that they provide in the classroom. The same text book used in the classroom setting generally is assigned to on-line students. Since the traditional textbook cannot conveniently be delivered on-line because it would require too much time and effort for the student to access and download page-by-page, and too expensive for the institution to acquire the state-of-the-art technology that is needed to fully appreciate textbook graphics on-line, distance education courses actually increase the number of textbooks that are purchased by students by increasing the number of students taking a course.

In light of these factors, AACC believes that its proposed expansion of Section 110(2) to encompass display and performance should be conditioned on the use of protections by the college or university that can reasonably prevent easy downstream copying and redistribution. This may involve limiting access to enrolled students and the use of passwords and firewalls. AACC also notes the cooperative effort of academic institutions, including Miami-Dade Community College, publishers, the high tech industry, and the government, to develop and secure the widespread adoption of standards for building the Internet architecture for on-line learning. The Instructional Management Systems Project[5] ("IMS") (*http://www.imsproject.org*) holds great promise for balancing the interests of educational material copyright owners and users. One aspect of the IMS initiative is the development of products for access control, session management, tracking students' progress, installation of learning resources, control over the virtual learning environment, storage/retrieval of learning contents, and security.

While AACC believes that institutions should employ technological safeguards if they want the full benefits of a modified Section 110(2), it does not believe that course protection requires the level of sophistication needed to guard military secrets at the Pentagon. Thus, higher education institutions should be required to employ technology that provides reasonable and affordable protection against copying and redistribution, bearing in mind that the level of protection that is appropriate should reflect the economic value of the content. In other words, it is unlikely that a pirate will spend the considerable time and money needed to access Pysch 100 in order to be able to make unauthorized copies of copyrighted works. Where, however, an institution's delivery system does not provide such reasonable protection, a more limited scope exemption would be appropriate, provided there is an assurance against the potential of significant market harm from unauthorized reproduction or redistribution. This could be accomplished, for example, by limiting the conditions of performance; *e.g.*, permit distribution of a performance of a current dramatic work by students in a controlled setting.

[5] The members of the IMS cooperative include, in addition to Miami-Dade Community College, Apple Computer; Asymetrix; AT&T Learning Network; Buena Vista University; the California State University; the Centre for Learning Technologies, Singapore; COLLEGIS; COLLEGIS Research Institute; the Committee on Institutional Cooperation; the Department of Education, Training and Youth Affairs-Australia; the Educational Testing Service; Empower Corporation; Farance, Inc.; the Gateway to Educational Materials; George Mason University; IBM Education; International Thomson Publishing; the Joint Information Systems Committee; KPMG Peat Marwick LLP; Macromedia; Microsoft; the National Institute of Standards and Technology; Oracle; PeopleSoft; Simon & Schuster; Sun Microsystems; UNISYS; the University of California; the University of Michigan; the University of North Carolina at Chapel Hill; the U.S. Department of Labor; and Virginia Tech.

Respect for Copyright. AACC further suggests that access to the benefits of a broadened Section 110(2) be conditioned on colleges and universities having in place institutional copyright policies for both faculty and students concerning the appropriate and permissible use of copyrighted works. Such policies and educational efforts should fairly and accurately describe both the rights of copyright holders and the limitations on those rights embodied in the Copyright Act.

Fair Use

AACC urges that the Registrar's report to Congress include the recommendation that the fair use defense to a claim of infringement codified in Section 107 of the Copyright Act applies equally in the digital environment. Further, the Registrar should recommend that any distance education exemption should not be considered to be a preemption of or alternative to fair use. AACC believes that all uses by college and university faculty and students of copyrighted works in research, teaching, comment and criticism, whether in an on-line course or in a traditional classroom lecture, may be permitted under the fair use defense even if the use of the work is not permitted under Section 110(2) or other provisions of the Copyright Act. Student and faculty reproduction or other use of a portion of a copyrighted work in the context of an on-line course should be permitted as long as the use satisfies the four use elements enumerated in Section 107.

Licensing

AACC's member institutions believe that licensing is an important element of an overall resolution of distance education copyright issues and will continue to be part of the definition of the terms of use of copyrighted works. However, licensing is not and should not become an alternative to either a distance education exemption or the fair use defense. AACC shares the concerns about licensing stated by Laura Gasaway of the University of North Carolina at Chapel Hill in her January 27, 1999 testimony in this proceeding that "[r]equiring licensing of lawfully acquired material that institutions may only want to display or perform could prove to be an economic burden on some institutions, and a transactional burden on all. More fundamentally, the power to license is . . . ultimately, the power to deny access to information, too great a shroud to place over distance education."[6]

Moreover, while licensing protects the interests of copyright owners, AACC notes that obtaining a license often can be very difficult. There is little consistency among copyright owners in the manner in which they want to be approached about licenses or their willingness to negotiate a license, and many colleges and universities providing instruction in technical and scientific areas have found that some materials are so obscure that it can be extremely difficult and time consuming to locate the copyright owner or to even know where to ask to obtain a license. While the Copyright Clearance Center ("CCC") often works well for obtaining copyright permission, it is not a complete answer. It can be difficult and, sometimes, almost impossible to determine ownership of a copyright, compounded by the fact that not all owners cooperate with CCC and others may refuse to license their works for digital delivery. A central one-stop database and

[6] Testimony of Laura N. Gasaway (January 27, 1999) 4.

clearinghouse would facilitate licensing where it is appropriate but, again, licensing must not become a replacement for a statutory regime incorporating a balanced distance education exemption and the availability of the fair use defense. A clearly stated and understandable regime is essential because most community colleges lack the budgetary resources for full time intellectual property legal staff. Rather, community colleges devote their limited financial resources to fulfilling their educational mission.

Conclusion

From the earliest days of the Nation, copyright protection has been a carefully balanced mechanism that on the one hand promotes the creation of printed and visual works and, on the other hand, protects society's right to use those works. Over the years, that protection has been extended as new technologies expand the means of creative expression of ideas and information. But the Constitution's injunction to Congress to "promote the progress of science and the useful arts" was never construed by Congress or the courts to create a monopoly. The law has always recognized that society as a whole, and educators and students in particular, must have reasonable and fair access to copyrighted works if the Nation is to continue to flourish.

The transmission of ideas and information from one generation to the next is at the very core of the mission of colleges and universities. The education and library exemptions and the fair use defense of the current law reflect the balance between the rights of copyright owners and educational users of such works. This balance must not be abandoned merely because of a change in the way that educational services are delivered to students. In short, the education and library exemptions and the fair use defense in the 21st Century must be technology neutral, *albeit* paired with reasonable safeguards, if distance education is to be able to serve the instructional and training needs of all Americans.

Respectfully submitted,

American Association of Community Colleges
Dr. David R. Pierce, President

February 5, 1998