InfoNetworks Inc.
a CIX company
4400 PGA Blvd., Suite 307, Palm Beach Gardens, FL 33410 -- Telephone: 561-630-8060 -- Facsimile: 561-625-4685

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Sayuri Rajapakse
Attorney-Advisor, Office of Policy and International Affairs
Copyright Office, Library of Congress

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RE: "Promotion of Distant Education Through Digital Technologies" – Written Comment

Dear Ms. Rajapakse:

I respectfully submit herewith my written comments in connection with the above reference matter as set forth in Federal Register Vol. 63. No. 246 pg. 71167.

Thank you for your time and attention in this matter. If you require any further material or information please do not hesitate to contact me by phone at (561) 630-8060.

Sincerely,

Michael D. Palage, Esq.
Chief Information Officer,
InfoNetworks, Inc.

Enclosure:
Promotion of Distant Education Through Digital Technologies – Written Comment

SUPPLEMENTARY INFORMATION

Speaker: Michael D. Palage, Esq.
Title: Chief Information Officer
Address: InfoNetworks, Inc.
4400 PGA Blvd. Suite 307
Palm Beach Gardens, FL 33410
Telephone: (561) 630-8060
Facsimile: (561) 625-4685

Promotion of Distant Education Through Digital Technologies
Written Comment

I. INTRODUCTION

The evolution of the Internet as an educational medium has opened up a Pandora's box of complex legal issues. The most hotly contested issue during the recent hearings in Washington, D.C. was whether the educational exceptions found in the Copyright Act of 1976 should be modified to meet the needs of educators and librarians in the digital age. Although I addressed this issue specifically in my testimony, I believe there are many other equally important issues that should not be overlooked, specifically:

A. Modification of 17 USC §110;
B. Properly defining "distance learning education" under copyright laws to meet the needs of educators and copyright owners;
C. Revising the exceptions to liability contained in §512 of the recently enacted Digital Millenium Copyright Act;
D. Modifying the relevant provisions of the Copyright Act of 1976 dealing with copyright ownership, specifically the work-for-hire doctrine, to conform with today's digital environment;
E. Addressing complex jurisdictional issues arising from online activity; and
F. Addressing the role of technology technological safeguards in protecting the interests of copyright owners.

II. ISSUES

A. Modification of 17 USC §110

Two specific issues emerged from testimony presented at the Copyright hearings in Washington:

- Protecting the interests of copyright; and
- If it is not broken, don't fix it

Although most parties universally agreed on the first point, there was a great dichotomy among the speakers on the second point. Those speakers representing the interests of educational institutions encouraged the adaptation of existing copyright law to meet the specific needs of educators in a digital world. In contrast, speakers representing the interests of the copyright owners advocated a wait and see approach.

As an intellectual property attorney, I understand first hand the need to protect the interests of intellectual property creators. However, as the Supreme Court stated in Reno v. American Civil Liberties Union, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), "[t]he Internet is "a unique and wholly new medium of worldwide human communication."

Therefore, there is a strong need for an interim, and, possibly, a permanent, limited exemption from exclusive rights of copyright owners for nonprofit educational institutions (as defined in the Copyright Act), who provide distance education through digital networks, where distance education is defined to include the mediated instruction between the instructor(s) and the pupil(s) other than when the instructor(s) and all of the pupil(s) are physically present at the same location. This exemption would extend the provisions of §110 by removing, in limited instances, the face-to-face requirement of §110(1), and specifically include distant education in §110(2).

The exemption would include all categories of works, provided that the perception, reproduction, or communication of the work either directly or with the aid of a machine or device would not, in and of itself, constitute distance education (e.g. an instructional video tape performed over a closed circuit television system would not constitute *de facto* distance education). The limitations of the distance education exemption should not be based upon the portion of work used, but should be focused on the nature of the party transmitting the materials (e.g. nonprofit institutions).

All parties who are authorized by the instructor to receive the materials should be eligible recipients of distance education materials under any distance education exemption. However, the exemption would not extend to any re-transmission, reproduction, display or performance by the party, which is not necessary for the party to participate in distance education.

The extent to which the availability of licenses for the use of copyrighted works in distance education through interactive digital networks should be provided any greater weight in assessing eligibility for any distance education exemptions than the existing exemption under §110.

Moreover, a provision should be specifically added to the Copyright Act designating that any reproduction, distribution, display, performance, or transmission of the work by the nonprofit educational institution during the distance education should be deemed to have taken place in the nonprofit education institution's system. This would prevent the nonprofit educational institution from being forced to litigate a suit for copyright infringement in any foreign jurisdictions through which the materials were transmitted or in which the materials were received by a pupil.

Critics to this proposal at the hearings argued that removing the “face to face” requirement would be opening the flood gates to a sea of potential unauthorized uses of copyright owners’ works. However, any modifications to section 110 should be viewed as a narrowly defined exception clearly setting forth what constitutes “distant learning education” and who qualifies for this new more restrictive exception (addressed in more detail below).

B. Defining Distance Learning Education under the Copyright Act

The terms “distant education” and “distant learning” are interchangeable terms. Regardless of what “term” is formally adopted to define distance learning education programs, it should be defined in terms flexible enough to meet the need of educators and librarians while still safeguarding the interests of copyright owners. The danger of adopting a rigid definition of “distance learning education,” is that in doing so it may impermissibly impede the overall development of digital distant learning education programs.

Adopting a clear definition of distant education safeguards against the dangers inherent in legal ambiguities.

The following definition of distant education, used by unionized educators in the Commonwealth of Pennsylvania, provides a good starting point:

> "1. Distant Education:
>
> a. Distant Education is defined as mediated communication/instruction between FACULY MEMBER(S) and student(s) other than when FACULTY MEMBER(S) and student(s) are physically present in the same classroom. This linkage with technology allows real time or delayed interaction using voice, video, data and/or text. Examples of technology methods that can be used singly or in combination include audio transmissions, satellite transmissions, fiber optics transmissions of full-motion video, video conferencing using compression video, cable television, microwave transmission, audiographic/computer, videotapes, electronic mail , facsimile, world-wide web and CD-ROM. It is the intent of this Article also to cover distant education by other technologies as they develop.
>
> b. Distant education does not include the use of movies, filmstripes, videotapes, computers, and their related technologies, or other forms of aural or visual recordings, to the extent that they are used as part of course instruction, by a FACULTY MEMBER who is in the same classroom as the students. However, where a FACULTY MEMBER is in the same classroom as the student, but simultaneous transmission of some form occurs to students in other off campus locations, this Article shall cover both the FACULTY MEMBER in the classroom as well as the education of students at the off campus location.

C. Exemption Provided by §512 of the Digital Millenium Act

Section 512(e) of the Digital Millenium Act, entitled “Limitation on Liability of Nonprofit Education Institutions,” appears to limit the exemption to “institution[s] of

higher education" only. The language in this section should be expanded to include coverage for K-12 institutions, as well.

The definition of faculty or graduate students should also be expanded, especially if K-12 institutions are included. For example, the broader definition should include all teaching assistants, regardless of whether they are a paid employee or volunteer.

D. Jurisdictional Issues

There is currently a tremendous disparity in the courts on the issue of whether personal jurisdiction can be found based upon Internet related activity. This creates the possibility that an educational institution might be required to expend significant legal fees to defend a copyright action stemming from distance education in a foreign jurisdiction, in which it would not otherwise find itself subject to suit. Where there are multiple parties, i.e. teacher and institutions located in a number of different jurisdictions, jurisdiction should be determined by the "home site" of the distant education program.

Home site, in this instance, could be defined as set forth in the example noted above from the Commonwealth of Pennsylvania:

> "2. Home Site
>
> Home site means the site at which the distant education originates. There may be more than one (1) home site for a distant education course, if more than one (1) FACULTY MEMBER is involved . The site at which a distance educational course is recorded or otherwise stored for later transmission or replay shall be deemed a home site."

E. Copyright Ownership

Copyright ownership is one of the more complex legal issues raised by the digital revolution sweeping our society. Recently courts have struggled with how to handle the role of the independent computer contractor in today's digital workforce. *See for example,* "Whose Copyrights Are They? Congress should revise the works-for-hire doctrine for the age of the independent contractor", Lawrence J. Siskind, IP Magazine, January 1999.

As Mr. Siskind accurately points out in his article, the current embodiment of the work-for-hire doctrine was drafted in 1965. This was four years before the creation of the ARPANET, the predecessor to the Internet, and twelve years before the formation of Microsoft. It is a fairly accurate statement that a lot has changed since 1965.

Courts are constrained in applying the work-for-hire doctrine to software works. For example, in Sasnett v. Convergent Media Systems Inc., a district court located in

Massachusetts' "Route 128 Technology Arc" had to resolve a copyright ownership dispute over a software program. Although an objective analysis of the facts using the factors set forth by the Supreme Court in Community for Creative Non-Violence v Reid would appear to find the programmer an independent contractor, the court nevertheless found the programmer at issue to be an "employee." In her ruling the judge stated that "[m]y findings in this regard are leavened by the fact that the computer software context can be different than other copyright contexts…" Conversely, expanding the scope of what constitutes an "employee" exacts a price from corporate software publishers. For example, in Viscanio v. Microsoft, the Ninth Circuit held that certain Microsoft worker hired through temporary employment agencies qualified as "employees" for participation in the company's stock option benefit program.

Distant education programs are not immune from these potentially complex ownership issues. Historically, some educational institutions have taken the position that an educator at that institution, as the author of a work, retains all rights to the following types of works, without limitation: books (including textbooks), educational courseware, articles, non-fiction novels, poems, musical works, dramatic works including any accompanying music, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures and other similar audio-visual works, and sound records, regardless of the level of use of the institution's facilities, or other types of works created with minimal use of the institution's facilities.

For example, the contract between the Commonwealth of Pennsylvania and its unionized education staff currently provides that, "the STATE SYSTEM/UNIVERSITIES may at their sole discretion, negotiate individual agreements with the creator(s) to govern ownership of intellectual property created that is related to distant education."

Creating a patchwork network of contracts and policies in regard to works created for distance education will make it extremely difficult for educators to know what they own without retaining legal counsel to guide them.

Another example of the growing complexity of ownership issues related to distant learning education programs is demonstrated by an online course hosted by the University of Dayton Law School entitled "Cybercrimes" (see < http://cybercrimes.net/ >). One of the objects of this course, taught by Associate Dean and Professor Susan Brenner, is the development of a Model State Computer Crimes Code. This Model Code is the collective work of individual students working in the course in groups. It is Professor Brenner's intention that future classes will revise and expand upon this initial Model Code. This raises the issue of who owns the underlying copyright protection in the initial work and any derivatives works created therefrom.

More clearly defining ownership rights in regard to works created in distance education is similar to Congress' previous establishment of the existing work-for-hire provisions set forth in the Copyright Act. Providing clear guidelines for such ownership rights will be highly advantageous to the advancement of distant learning education. Without any incentive to create new education programs, educators will simply maintain the status

quo and will not push for the furtherance of distance education, especially in light of the lack of any safe harbor provision for the educator themselves under the current §512(e).

F. Use of Technology

The technology that exists today allows educators and institutions to provide for varying degrees of access. This wide range of technology was amply demonstrated during the demonstration of distant education programs held January 25, 1999 in Washington.

However, progressively more restrictive means of access will require additional capital and staffing requirements, and may place an undue burden on educators and their institutions. Balancing the competing interests of copyright owners and the goal of educators and librarians requires walking a fine line.

However, before Congress mandates restrictive technological guidelines, it may be prudent to instead follow the laissez-faire approach that Congress recently adopted with the passage of the Internet Tax Freedom Act. This approach allows the underlying activity, whether distant learning education or e-commerce, to grow and prosper before burdening it with federal mandated regulations and/or guidelines.

Two graduate level courses demonstrate the varying degrees of distant learning technology. The first course, entitled “Critical Issues in Cyberspace,” is a graduate course taught at Drexel University. This course is traditional in the fact that it requires scheduled classes in a classroom. However, it is non-traditional in the fact that all course materials are provided online. No other materials are required. The course materials are all primary sources found on the Internet, with external hypertext links to each. This course can be accessed by anyone with access to the Internet at the following URL: <http://www.ipwarehouse.com/IP_Library/Drexel_Course/ >.

The second course is the "Cybercrimes" course taught at the University of Dayton Law School. This course is the only course in the United States using true distant learning education which is accredited by the American Bar Association. This course is revolutionary in the legal educational community in that all course interaction and learning occurs online asynchronously. Unlike the Drexel course, access to the course requires a user id and password.