Promotion of Distance Education through Digital Technologies
Copyright Office, Library of Congress

The University of Texas System

Comments

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1. Nature of Distance Education

(a) How may distance education be defined? In what sense does it differ from traditional face-to-face education? To what extent does it utilize digital technologies? In what sense does it differ from the general use of electronic communications in educational settings?

Distance education should be defined as any situation where teaching/learning occurs while the student and teacher are separated by time and/or space.

Distance education differs from traditional face-to-face education only in the sense of separation. Students must receive the same level of instruction and instructional interaction in both settings. In addition, students at a distance must have access to all student services, including library and digital information distribution. Distance education is highly dependent upon electronic means as part of the educational experience. With the advent of the World Wide Web, students are now located literally across the globe, where the primary means of access to instruction, supplemental materials, and library resources is electronic. The traditional classroom student may *choose* to access materials by electronic means; however, that student may also *choose* to visit the local bookstore or school library in person. The distance education student may not have those choices based on his or her geographical location.

(b) What is the nature of the distance education programs using digital technologies that are currently available, or in development? Do they involve students using the Internet as a resource, communicating with teachers by email, communicating with class members in chat rooms, or participating in classes conducted by teleconferencing? To what extent are they interactive? To what extent are they asynchronous? To what extent are copies made or kept, and by whom?

Although much of distance education is delivered by interactive videoconferencing and/or satellite technology, more and more courses are being developed for delivery via the World Wide Web.

Virtually every major university in the United States is involved in some form of distance education, as is almost every community college district. In addition, universities are relying more heavily on digital information to enhance the traditional classroom environment. Professors frequently use the Internet to communicate with students in the form of electronic mail lists (listservs) as well as through synchronous and asynchronous "chat rooms."

Almost every subject area is now represented in the distance education arena, from elementary to high school, from undergraduate to graduate, and from technical to professional. The very nature of distance education calls for the use of electronic, or Internet, means to send and receive instruction and information. The State of Texas' Telecommunications Infrastructure Fund (TIF) has provided every school district and every public library with the resources to wire buildings for Internet access. Therefore, we are likely to see an increase in the use of digital and Internet-based material access for distance and traditional education.

(c) Are course materials made available in electronic form? To whom are they made available? What restrictions are imposed on their access, use, modification or retention?

Distance education courses have been developed in electronic form for several years now. An issue in the development of such courses has been and continues to be secure access. To that end, most completely Web-based courses utilize password protection while designers continue to work with other authentication methods such as voice and fingerprint recognition. In addition, universities like The University of Texas are working on certificates of authority for this purpose as well as public key infrastructures (PKI).

(d) How are such programs funded? What proportion of the entities who develop or offer them are nonprofit? What types of fees are charged to students? Are the programs intended to, and do they, generate a profit?

The issue of funding and fees is at the top of most policy discussions concerning distance education. In some cases, programs are funded via traditional tuition and fee structures. However, more and more universities and colleges have realized the high development costs of distance education and, where long term benefits may exist, short term benefits are often blurred. Because the majority of distance education in higher education is offered by private or public institutions, offerings by profit-based entities are rare (for academic credit). The University of Phoenix is by far the largest profit-based university in the country.

Fees for distance education vary from institution to institution. Some universities have instilled a distance education fee for students involved in these types of courses. Others have opted to cover the costs themselves in an effort to attract more students to their programs (more tuition monies collected). In Texas, the Legislature passed a bill allowing public universities to waive certain incidental fees (parking, medical center, etc.) that are not relevant to the distance learner. Although most universities have not yet adopted this option, several are considering the possibility. Distance learners have indicated in several studies that while they oppose fees for services they are not able to

use, they are not necessarily opposed to fees that help offset the cost of bringing distance education courses to the home or desktop.

(e) What proportion of such programs are accredited? By whom are they accredited?

Distance education programs in the US must adhere to the same guidelines as traditional programs with regard to accreditation. In many cases, accreditation is not affected when moving a degree program from the traditional classroom format to a distance education environment. Accreditation is awarded by regional accrediting agencies for higher education (such as the Southern Association of Colleges and Schools – SACS) as well as specific organizations, such as the American Association of Colleges and Schools of Business (AACSB).

(f) Who are the recipients of such programs? What communities are served? Are students primarily located in any particular geographic communities (e.g., urban or rural)? Are there particular criteria for enrolling in or otherwise gaining access to the programs? How many students participate in a program at a time? Are the programs made available to students in other countries?

Distance education originated as educators tried to meet the needs of students located in rural or isolated communities. These students were often unable to receive instruction in specialized subjects, such as foreign languages or accelerated mathematics. To that end, a variety of delivery systems have been used to meet this need, from print to satellite delivered programs. Today, however, there has been a shift in communities served. While rural students still receive distance education courses and programs, the urban students also seek this type of delivery. The convenience of taking courses with flexible time and space arrangements has become very appealing to students across the country. Indeed, many students taking courses on college campuses are also enrolling in distance learning courses as well. International students are active participants in US distance learning programs.

In most cases, the criteria for admission to a distance learning program will be the same as for the traditional format of face-to-face delivery. The only concern is whether or not the student has access to the technology required to access the courses and any supplemental materials associated with the course.

The number of students who might participate in a distance education program will vary, just as it does on a college or high school campus. However, based on the technology used to deliver the courses, these numbers may indeed be higher than those commonly found in a 100-seat lecture hall. When satellite or Web-based technology is used, the numbers may be even higher.

(g) At what level are such programs offered? Are they offered at the level of elementary school, high school, college, graduate school, or adult education? Are courses offered for credit, and as part of degree programs?

Distance education programs are offered at all levels, from elementary to graduate school to professional development. Courses may be offered for credit or non-credit. It is important to note that distance education has become a blended part of many school

programs. In other words, courses that are offered on a traditional campus (regardless of level or type of credit) may also be offered via distance education technologies. There are very few limits today on the ability to offer all types of courses via these methods.

(h) To what extent is new content created for such programs, and by whom? To what extent is pre-existing content used, and of what type (e.g., motion pictures, music, sound recordings, computer programs, books)? How is it used, and in what amounts?

The majority of distance education programs in the US are created in-house, or by faculty within the institution. However, many community colleges and smaller universities use content created by others for their programs. As a matter of fact, the community colleges are leaders in the US for "canned" distance education courses and "sell" these to other colleges across the country.

Motion pictures as full-length features are not often used in distance education, just as they are not often used in general on-campus academic courses. However, even the use of short video or audio clips has become less widely used due to the copyright issue. It is important for faculty to be able to use these supplemental materials as necessary for enhancement of their distance education course. Unfortunately, they have not been able to do so effectively or spontaneously due to the copyright restrictions for electronically delivered media.

2. Role of Licensing

(a) Where pre-existing content is used in distance education programs using digital technologies, to what extent do the persons or entities involved obtain permission for the use of that content? Is this accomplished by direct contact with the copyright owner, or in some other way? To what extent do the parties enter into negotiated licenses, or use form contracts?

We obtain permission for all proprietary content (search software and information content) that we provide through the University of Texas System Digital Library (UTSDL). We work directly with copyright owners and/or through aggregators or information resellers to negotiate license agreements. We are not serving any proprietary content through the UTSDL that has not been licensed by means of a formal, written document. Vendors provide contracts and we review the contracts and, using a variety of pre-established criteria, evaluate the contract as to our ability to execute the prescribed terms. We do negotiate with vendors on specific points and most contracts are amended before both parties sign them. The library community attempted to address the need for "form contracts" by organizing itself to address the problems associated with licensing. The library at Yale has created an excellent "licensing" website and librarians all around the world rely on information found there to help them through the licensing process by providing "boilerplate" language, guidelines, and sample agreements from vendors and other libraries.

Use of tightly controlled copyrighted resources is very limited for most distance education providers; most have to depend either on entities with "blanket agreements"

already in place (such as libraries that publish some journal articles online, accessible only after university passwords have been entered) or on commercial content providers whose charges are usually prohibitive (such as Lexis-Nexis). Even professors who wish to use journal articles often have trouble displaying them online, since academic journals usually retain copyright and are notoriously stingy about their holdings.

(b) To what extent do the persons or entities providing such programs rely on defenses available under the copyright law in choosing not to obtain a license (e.g., fair use, section 110(2), or the doctrine of implied license)? To what extent do they use public domain material, and if so, of what type?

The Library does not rely on any defense available under the copyright law. We obtain licenses for all proprietary content to which we provide access. We rely very little on public domain materials at this point. The most useful and valuable content that we can provide is usually only available directly from the copyright owner or by means of information resellers and these entities require signed agreements and access fees. There are three categories of "free" information (not necessarily in the public domain) that we provide access to:

- Remotely served content. There are several public domain information services that we point to, but those sites state that they are open to all users at no cost. The Vanderbilt Television News Archive, for example, is committed to making its index freely available to anyone on the Web;

- Locally served content. This is content from the Library's own collections that it chooses to makes available, freely, on the Web;

- Public domain content served from Library servers. This is content that is in the public domain that we have added value to and chosen to re-distribute on the Web. The example here is the PCL Map Collection, which consists of maps from the CIA country maps collection. We have systematically taken the paper maps and created digital copies of them.

“Fair use” is becoming less and less reliable as an assumption for educators using the Internet; very few that worry about the copyright question at all will not display any copyrighted work without permission.

(c) Have there been difficulties in obtaining licenses? If so, for what reason(s)? Are the difficulties different in nature or degree than for other types of uses, including traditional education and including multimedia uses generally?

The difficulties we have experienced pertain to methods we use to control access to the licensed content. Vendors require us to restrict access of their content to students, faculty and staff and we must demonstrate that we are capable of doing that to their satisfaction. Usually this involves our providing the vendor with IP addresses for the authorized user population. In general, we do have difficulties in advancing the notion, among vendors, that perpetual access to previously licensed information content is critical to our (the

Library's) ability to leverage our own investments in information technology the most cost effective way possible. This applies to electronic journals and books primarily. For example, if we license access to the last five years of journal data and then cancel our subscription next year, we will not continue to get access to the backfiles - even though we paid a premium for access to the journal.

Prior to the emergence of the Web, we simply didn't have much trouble licensing information. We bought printed materials and stored them forever. Now, however, we are faced with the aftermath of the "Access v. Ownership" debate. Libraries increasingly provide only access to digital information - we store only a very small percentage of the digital content we provide access to and the content we do license typically forces us to make significant, ongoing financial commitments. This is a problem primarily because students and researchers still rely heavily on the print-based collections, and libraries are forced to use existing budgets to support both print and electronic resources - which is impossible to do.

(d) To what extent can technology be used now or in the future to ameliorate any difficulties in licensing? Can it serve to facilitate the identification of rights holders, the clearance of rights and the process of obtaining licenses, including price differentiation based on such attributes as the user's purpose, need, institutional affiliation, or ability to pay?

Most of the difficulties in the licensing have nothing to do with the process - most involve the overarching concern that we live in a society of "information haves" and "information have-nots," and the gap between them is ever-increasing due to the rising cost of information. However, from the point of view of process we believe that technology will have a large impact on what we now know as the "licensing process" due to the fact that the business community is heavily invested in electronic commerce and in developing the ability to identity valid users of their digital services and systems, characterize their use, quantify the use of e-products and services, and control the use of e-products and services.

(e) What other options exist for making the permissions process easier? How likely is the development of collective or blanket licensing, or ``one-stop shops,'' and within what time frame?

I doubt we will see a preponderance of blanket licenses. The business model for making money in the maturing Web-dominated information marketplace is changing too rapidly and new products and services continue to have significant impact on end-user products and services. We are more likely to see an attempt by information providers to assemble quantities of information into datastores ("one-stop shops") and control access to the central repository - this is happening now.

3. Use of Technology

(a) What technologies are used to prepare and disseminate digital distance education programs? Are these technologies specifically developed or produced for the distance education programs, or are they generally commercially available?

There are a variety of means by which to deliver distance education programs in a digital format. The most common formats today are CD-ROM and the Internet (World Wide Web). These technologies certainly were not developed specifically for distance education, although many software application products have been developed to deliver courses via these media. There are currently hundreds of authoring packages for both CD-ROM and WWW development and delivery of distance education courses. Some universities have developed their own systems for developing Web courses, but the majority is looking to vendors for these products.

(b) What technologies are available to protect the security of digital distance education programs? In particular, are there technologies in use or under development that can prevent the unauthorized reception, use, or retention of copyrighted materials incorporated into such programs, or that can authenticate materials or protect their integrity? What is the time frame for the availability of such technologies? What parties or entities are developing them, and what type of costs are involved in implementing them?

Authentication procedures have been a part of distance education since the WWW became available as a delivery option. Before the Web, most distance education courses were delivered via satellite or digital videoconferencing. In those cases, it was relatively easy to provide a secure delivery mode for materials. Students could not access the course unless they were seated in the delivery classroom.

Today, however, everything has changed. Although passwords help protect digital materials online, they can be "hacked." University systems like The University of Texas have been working both in-house and with outside vendors to develop authentication procedures that are more secure. Trust infrastructures and key encryption are two areas that will provide the security we seek. These technologies are here today but the costs of development are high.

4. Application of Copyright Law to Distance Education

(a) Is existing law adequate in addressing current and anticipated forms of distance education using digital technology? If not, in what ways is it inadequate? Are there reasons why digital transmissions should be treated differently from education through broadcasting or closed circuit technologies, or in a traditional classroom?

Existing law that permits the display and performance of works in distance learning is inadequate because it limits use based on the type of work. This basis for determining what may be performed is no longer tenable in our digital environment. When any type of work may be combined with another type of work in a single medium, a law that allows a still image to be displayed distantly, but does not allow that same image in motion media to be displayed distantly seems irrational to an educator.

On the other hand, there are good reasons to treat in a different way works that are displayed and performed digitally to protect the very real security interests of content owners. Those interests are not necessarily related to the type of work, however. ***All*** types of works should be protected from unnecessary copying and distribution or further

dissemination. The possibility that a work may be unnecessarily copied or distributed or further disseminated should not, however necessitate so severe a limit on its use as would make such use unlikely. Rather, if educators can institute reasonable protections to minimize abuses among those who receive a remote performance, their right to perform and display any type of work should be the same across types.

(b) Is it preferable to deal with the copyright issues raised by digital distance education through specific exemptions like section 110(2) or through a flexible balancing approach like fair use? What role should be played by voluntary guidelines such as the Fair Use Guidelines for Educational Multimedia (sometimes referred to as the Consortium of College and University Media Centers (CCUMC) guidelines)?

Fair use is vague and ambiguous, making it difficult to explain and difficult to obtain agreement on and compliance with its parameters. Its vagueness invites disputes as to its borders. Sections 110 (1) and (2) on the other hand are relatively clear, crisp and easy to understand. I would not advocate that the display and performance rights to which they pertain be made ambiguous. In any event, if Sections 110 (1) and (2) are inadequate to the needs of educators, they have recourse to fair use. Fair use provisions apply to all of the rights of the copyright owner, including the right to display and perform publicly.

I do not find the CCUMC guidelines to be particularly helpful, except as broad indicators of the kinds of issues to consider in determining whether a use may be fair in the multimedia context. In particular, I do not find the minute calculations as to portions that may be included in a work to be helpful, as discussed below.

(c) If a new or amended exemption or exemptions for distance education were to be adopted:

- **Which section 106 rights should or should not be covered?**
    - Because digital displays and performances inherently involve copying and distribution, the rights to make copies and to distribute copies ***necessary to the permitted displays and performances*** are essential. Further, in some fields of creative endeavor, derivative works may appropriately be created; thus, all five rights probably are implicated at times, and should be covered.
- **What categories of works should or should not be covered?**
    - All categories should be covered. In a digital multimedia environment, nothing short of all categories is logically defensible.
- **To what extent should there be quantitative limitations on the portions of a work that can be used?**
    - Once a copy of a work has been legitimately acquired, it does not further protect the rights of the copyright owner to limit the amount of such work that can be displayed or performed. Such limits will only interfere with educators' abilities to make good choices based on pedagogy. The better

protections for content owners are limits on who may receive a work under what circumstances and what they may do with it once received.

- **Who should be entitled to the benefits of such an exemption? Accredited or nonprofit institutions only?**
    - Accredited and nonprofit institutions have the strongest claim to such an exemption.
- **How should the class of eligible recipients be defined?**
    - It seems reasonable to limit access to those students registered for a class.
- **Should such an exemption be limited to nonprofit distance education activities?**
    - To the extent that there is an economic element to this exemption, it is reasonable to claim it only for nonprofit educational institutions. Additionally, it will likely leave a market for permissions or price differentiation if for-profit educational institutions of which there may be increasing numbers do not have such an exemption.
- **Should the use of technological measures to protect against unauthorized access to, and use or retention of, copyrighted materials be required? If so, what types of measures?**
    - Technological measures can increase the likelihood that a work will be used only for the permitted purpose and should be employed where ever reasonable. For example, password protection for a site, requiring an authenticated logon; and limiting the time over which a work is available all promote responsible use of the work once it is received. Other technologies that permit reception but not copying and further distribution, such as streaming, can also play a role in securing for copyright owners the protections that should ease their concerns about unauthorized use. I would not, however, support a requirement to use a specific set of limitations as technological measures are evolving quickly. The goals of limitation, to prevent unnecessary copying, dissemination or further distribution, should be clearly stated, but exactly what one does to effectuate those goals should be left flexible.
- **To what extent should the availability of licenses for the use of copyrighted works be considered in assessing eligibility?**
    - This is perhaps the most complex and crucial question. On the one hand, it is reasonable to suggest that the availability of a license covering all expected uses at a reasonable price, both in terms of transaction costs and the actual price for the use, is an important consideration. If publishers are able efficiently to accommodate educators' needs, one of the ostensible and major premises of Section 110 is considerably diminished. That is, there is no market failure for the law to step in and ameliorate.

- On the other hand, however, if this exemption is designed to provide a financial benefit to nonprofit education including a savings in transaction costs and avoidance of lost educational opportunities, where even a low price may be too much for educators to pay, where, in short, educators will forego a use rather than pay for it, the availability of a license is irrelevant. One might argue that as a policy matter, the definition of a public performance should not include nonprofit educational classroom uses, and that 110(1) accomplishes this for face-to-face teaching.
- If educators want merely to extend these rights they already have from face-to-face teaching to remote teaching, with the appropriate safeguards against unnecessary reproduction, dissemination or subsequent distribution, the same argument logically applies in the digital environment: the mere performance for strictly educational purposes of a legitimately purchased videotape should not be an infringement. From an educator's perspective, it makes no sense to try to draw a distinction between showing a movie to 100 students in class and showing the same movie to 100 students remotely.
- Clearly, however, licensing of digital works is going to have a significant effect on the need for this exemption. But, we aren't there yet and will not be for many years to come. While content owners are struggling to determine whether and how they might make their works available digitally, this exemption is critical to the ongoing use of analog materials over digital networks. It may be many years before all the works that Universities need to use are available at a fair price through licensing mechanisms that fit the various needs of different kinds of institutions. In fact, there may always be some works whose copyright owners, for whatever, reason, never see fit to offer them digitally. For these works, over whatever period of time they exist, this exemption is crucial and should be expanded as set forth herein.

- **Should there be limitations on student copying or retention of the copyrighted materials?**
  - Limitations on student copying should be in line with fair use. Thus, making a copy of reasonable portions for personal study should be permitted, whereas further distribution of such a copy, or making and/or distributing multiple copies should not be permitted without permission.
- **Should the provision of electronic reserves be included?**
  - In a digital environment, there is no logical distinction between course materials made available online as supplemental materials, either reserves or what have been called coursepacks, and core course materials. In the near future, a large part of all course materials will likely be provided to students over digital networks.

- If so, then the question of whether to include reserves in those materials to which Section 110 applies is the same as the question about licensing: Will we need a separate right to display and perform works when they can easily be acquired by the institution digitally, under license, with all the rights we need to use them locally and remotely? Is there any difference between a remote student and a local student anymore when each comes into the classroom virtually? NO, there isn't. All the terms of access and use should be in the license for all those users defined by the license. In effect, very different kinds of rights all should be folded into one right in the digital environment: the right to ***use***. As users, we don't care whether that use involves copying, displaying, performing, distributing, or whatever. We just want to acquire and use the work.
- But any reliance on licensing will always leave out those materials that are analog and whose owners do not make them available digitally. Such analog works will be subject to the laborious and expensive (and at this time, disfunctional) market for permissions. Again, it is these works to which Section 110 should address itself, or rather, perhaps by default, it is only these works to which Section 110 will ultimately apply. The question about reserves then becomes, should the right to digitize and display and perform analog works be limited by the scope of the fair use right to copy as it may be now, or should it be the other way around? If one owns a work in analog form, shouldn't the right to copy it (digitize it) to facilitate a permitted display under Section 110 be considered a fair use or expressly permitted by Section 110?
- This suggests a rule for reserves as well as for other course materials that if a work is available digitally at a fair price, and includes in the license all the rights that educators need to make full use of the work with their students, regardless of where those students may be located, Universities should license that work. If a work is not so available, educators need the right to digitize it and display and perform it to students regardless of how the work might be characterized (supplemental, reserves, core course materials, etc.) and regardless of the students' locations, with appropriate safeguards against unnecessary copying, dissemination and further distribution of the digital work, without restrictions as to type of work or portion limitations. This would provide an appropriate incentive to content owners to make their works available efficiently and at a fair price, while giving Universities the right to use works whose owners do not step up to the plate, so to speak.

- **Should the provision of any information about copyright law be required as a condition for eligibility?**
  - The requirements set forth in the Digital Millennium Copyright Act respecting the Internet Service Provider limitation of liability are reasonable and should be included in an expanded Section 110.

- **Are there other factors that should be taken into account?**
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(d) What would be the economic impact of such an exemption, including the impact on the actual or potential markets of copyright owners of different types of works?

Since all users will have to buy the works that they wish to perform in the classroom or remotely, and since there is not at this time, a ready market for mere permission to show an already purchased analog product to a class of persons for educational purposes, the economic impact on the analog market will be negligible.

On the other hand, if content owners imagine that in the absence of this exemption they will develop a sliding scale for analog product prices based on intended uses or a vigorous market for permission to perform works in this context separate from the rights that are acquired when one buys the product, they could argue that the economic impact will be very significant.

With respect to digital works, any exemption is unlikely to affect the continued rapid development of a healthy digital alternative to analog materials. Digital materials marketed directly to educators with the appropriate rights to permit use with all students will offer obvious benefits over using analog materials in a digital environment. If a copyright owner does not offer digital versions of analog works, the exemption should make undertaking to convert the work and use it locally and remotely a reasonable response to the market's failure.

(e) What would be the international implications of such an exemption? Would it be consistent with U.S. treaty obligations?

I am not aware of any treaty obligations that this expanded exemption would violate.