

Introduction

Time Warner is pleased to respond to your request for supplementary comments on this highly important issue. Time Warner fully appreciates and supports the societal value inherent in distance education. To reiterate our testimony, Time Warner has long cooperated with educators on a wide variety of aspects of education, including distance education. Among many other things, we have established the TIME to Read program and wired more than 12,000 schools for cable.

We do not then disagree with the proposition that distance education should not only be preserved, but adapted to and enhanced by a digitized, interconnected world. However, we also strongly believe that doing so must not entail the breaching of bedrock principles of copyright or fail to recognize and uphold the economic and other benefits to society as a whole that those principles support.

It is in attempting to deal with this issue without unnecessarily constricting distance education and its development as propounded primarily by the education community that we encounter the apparent stark differences exhibited at last week's hearing.

These differences bear close examination.

No Witness Has Pointed to Any Disadvantageous Effect of Current Copyright Protection on Distance Learning

Much as in Conan Doyle's *The Hound of the Baskervilles*, the resolution of the issues presented at the hearing before the Copyright Office is made clear by something that did *not* take place. In the course of, at least, the first day's testimony (January 26, 1999), no one suggested that any request to use copyrighted material in a distance learning context had been refused or subjected to onerous terms; no one suggested that anything in the current Copyright Law had resulted in a prevention or inhibition of distance learning; no one suggested that copyright owners were interested, so far as distance learning is concerned, in anything other than encouraging it both because of its social benefits as well as its potential business benefits. In short, no reason was offered to modify extant copyright protections.

Digitization Offers Opportunities But Also Severe Problems

A number of propositions were uncontroverted and it is fair to assume that there is common ground with respect to them. First, that digitization of copyrighted works will open doors to new markets and new uses creating economic and social benefits for copyright owners as well as society at large. Distance learning is an area which will benefit greatly from that technological advance. It is also common ground that digitization's many advantages are accompanied by serious dangers to the protection of copyrighted works. The ability to reproduce works without any degradation of quality even when copies are made from copies; the ability to disseminate works over the Internet throughout the world including into jurisdictions that have little or no adequate copyright protection; the ability to modify copyrighted works with a few clicks of computer keys – all of these endanger copyright and its creators and owners. These problems call for maintaining copyright protection and not decreasing or eliminating it by creating additional exemptions from protections in the Copyright Law.

There is No Need for Exemption From Copyright Protection

It is, in this light, clear that any contention that exemptions are necessary for the development of distance learning is, at best, “not proven”. Indeed, even the Report from the Committee on the Judiciary with respect to the Digital Millennium Copyright Act of 1999 pursuant to which the Copyright Office is making this inquiry does not lend support to that contention. On page 23 of the Report, the Committee says that it:

“...believes that the scope of the distance education exemption should be re-examined in light of the range of educational activities made possible by digital technologies”.

It is no doubt true that digital technologies make possible a “range of educational activities” hitherto not available or not available to some people. Here is one of the areas of great opportunity referred to above. Nothing, however, in the Report suggests that current Copyright Law stands in the way of the progress of distance learning or taking advantage of the “range of educational activities made possible by digital technologies”.

It is true that some panelists expressed strongly worded positions. For example, Dr. John Flores said that “to deny access borders on intellectual crime”. Neither Dr. Flores (nor any other witness), however, suggested that anyone had been denied access. Prof. James Bosco expressed specifically and others more generally a concern that the Digital Millennium Copyright Act “not provide constraints that would inhibit distance learning”. Here, too, there was no suggestion that any such “constraints” were applied. It has been suggested in

some quarters, (but, at least so far, not in these hearings) that charging a license fee or sales price for copyrighted works would be such a “constraint”. It would be an ironic turn of events if such a proposition were injected into these discussions particularly in view of Dr. Flores’ testimony that institutions of higher education use distance learning as a “business to make money – they want to sell their courses in state and out of state” and, secondly, in view of a teleconference scheduled for January 28, 1999 under the sponsorship of the Instructional Telecommunications Council to “..showcase the formulae, philosophies, and strategies colleges use to compensate and reward their distance learning faculty”. One assumes, perhaps unfairly, that this teleconference is not arranged with a view to seeking reduction or elimination of faculty salaries. There is no reason, particularly in light of the record being barren of any suggestion that current copyright law is detrimental to distance learning, to focus on copyright protection as the area in which “assistance” to distance learning will be required.

At Present, Technological Protections Are Inadequate

A good part of the hearing was devoted, quite appropriately, to discussion of technological protection devices. This, of course, is vitally necessary because of the dangers to copyrighted works described above. It is clear from the testimony thus far adduced that technological protection is at this time limited. While some attention was given to devices that would allow for identification of students so as to limit the availability of the distance learning materials to *bona fide* students enrolled in a *bona fide* course, this aspect of protection is only a small part of the problem. In response to a question from the Copyright Office as to how to deal with “unauthorized downstream uses”, Dr. Flores suggested that “there will always be piracy” and that encrypting the work should solve the problem. That “there will always be piracy” is neither comforting nor a sound basis for recommendation of legislative action. Be that as it may, encryption simply would not do the trick. For a student to get any advantage from the work, it must, of course, be put “in the clear” and the problem is how to protect the work after that is done.

There Are Important Differences Between In-Class and Distant Students

In that same context, Dean Kathleen Burke and Dr. Richard Fischer suggested that there should be no “discrimination” against distant students. This suggestion is consistent with the statement made several times during the hearing that the distinction between classroom learning and distance learning should be eliminated, for example, by modifying Section 110 of the Copyright Law. These suggestions overlook what is very obvious: students in the classroom and students located away from the classroom are in different situations insofar as delivery to them of educational material is concerned. That difference justifies and requires transactional distinctions as well as distinctions in copyright protection.

Fair Use Discussions May Lead to a Satisfactory Resolution

There seems to have been agreement by the representatives of the education community that the fair use doctrine as currently embodied in the Copyright Law together with some fair use guidelines would be an adequate response to the needs of distance learning. As the Copyright Office knows, much time and energy was devoted by the education community and copyright owners to trying to develop such guidelines. Unfortunately, that effort came to naught although it seemed to be close to success. Time Warner is willing to resume such discussions.

Conclusion

Insofar as this current inquiry is concerned, it is Time Warner's recommendation that licensing and sales procedures under the current copyright law be given the chance to operate – after all, they have worked well in the analog world and no reason has been offered as to why they should not work well in the digital world. Of course, if those procedures do inappropriately prevent or inhibit distance learning, then any problems that arise can be addressed.

Respectfully Submitted,

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