

Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of

PROMOTION OF DISTANCE)
EDUCATION THROUGH) Docket No. 98-12
DIGITAL TECHNOLOGIES)

REPLY COMMENTS OF GEORGETOWN UNIVERSITY
CONCERNING PROMOTION OF DISTANCE EDUCATION
THROUGH DIGITAL TECHNOLOGIES

These reply comments are submitted by the Georgetown University Project on the Future, a group comprised of faculty leaders, and University Information Services.

Georgetown University (GU) is committed to the promotion of distance education through digital technologies. Several faculties at GU already use distance education to supplement the traditional classroom experience and have launched experimental programs in such areas medicine and business. Many classes rely heavily on Web sites to access E-reserves, exams, class notes and, occasionally, multimedia course content. We plan to do much more than that in the future. Our Internet Development Staff provides support in the creation of new Web resources on campus and is developing next generation Internet 2 applications. The Networked Media Center, located within the graduate Program on Communication, Culture and Technology, develops new uses of online information by students, corporations and non-profit organizations.

As described below, GU welcomes the interest of the Copyright Office and Congress in reconsidering the existing educational provisions of U.S. copyright law. We believe that Congress pointed the way to greater cooperation between copyright owners and educational institutions in the Digital Millennium Copyright Act. Additional legislation is needed to allow distance education to make use of the full range of digital technology. Our comments are specifically concerned with licensing issues and the importance of fair use, including the earlier fair use guidelines.

The Main Campus Libraries of Georgetown University

GU libraries provide access to a wide range of information, including photographs and audiovisuals, used in distance education.

Electronic Reserves - GU libraries have an electronic reserves system in operation that parallels the traditional paper reserves system. This means that users must access the reserves either by course number or professor's name. The use of electronic reserves is restricted exclusively to the students and faculty in a specific course. Neither print or electronic reserves are available to the public.

Students and faculty can access electronic reserves from anywhere on campus. Authentication is needed so remote Georgetown users will "look" on the computer like campus users. The material used via electronic reserves is kept up for one semester at a time; that is, during the semester that the course is being offered.

Licensing - GU agrees with the University of Maryland University College and other commentators who believe that the playing field for negotiating licenses regarding the electronic distribution of course material is out of balance. Copyright owners often set arbitrary and inconsistent conditions on the use of their material, making licenses costly and cumbersome for universities. For instance, GU has some licenses that state that certain databases can be accessed only at the Reiss Science Library and not at the main Lauinger Library.

More broadly, the main campus libraries believe there should be:

- broad exemptions for the use of digitally copyrighted works for educational use and research purposes under the fair use guidelines. Restrictive guidelines can inhibit educational use and scholarly research.
- rules and licenses for students and faculty who use digital works that permit the same access to information that "traditional" technology allows.
- fair use guidelines that are flexible enough to encompass evolving technologies that the Library is not currently using or have yet to be developed.

Fair Use

Fair use has long played a special role in enabling teachers to utilize the available resources. GU agrees with the Consortium of College and University Media Centers that "Licenses and guidelines may have a role in facilitating distance education, but should not replace the application of fair use criteria."

It is unfortunate that the groups that met as part of the Conference on Fair Use (CONFU) were unable to reach consensus on proposed guidelines governing fair use in multimedia, distance education, and other areas. Some schools have independently been using the proposed multimedia guidelines or have adopted their own rules. The philosophy of fair use -- that use of a limited portion of a copyrighted work without compensating the creator advances the public welfare and involves only a relatively small loss by the creator-- remains strong. This is especially true in education.

Many of the comments, including those of the Recording Industry Association of America (RIAA), recognize that distance education programs would be well-served by an expansion of the fair use provision in Section 107.

Protections Against Unauthorized Use

The RIAA comments insist that university and college students presently operate the majority of pirate music sites on the Internet and recommend that any change in the copyright law be conditioned on the existence of appropriate security measures. RIAA writes, "we can only imagine what is happening on networks we cannot access, such as university and college intranets." University and college intranets, however, are run by professionals accountable to the school - not students. It should be noted that schools are keenly aware of the harms resulting from unauthorized use and have shown their willingness to implement security measures that are found to be effective.

Typical of many educational organizations, the Association of Community Colleges states: "As both owners and users of copyrighted works, community colleges share the concern of copyright owners about unauthorized copying and distribution of copyrighted works." The Association recommends that any change in the educational exemption "should be conditioned on the use of protections by the college or university that can easily prevent downstream copying and redistribution."

Don Swoboda, Dean of the Division of Continuing Studies at the University of Nebraska-Lincoln, observed in his testimony at the January 26 hearing that "the advent of digital technology has allowed for the application of some new protections for copyrighted material." Passwords and firewalls were the examples given.

It should also be recognized that the reproduction of copyrighted material that takes place with new digital technologies is often of a temporary nature. As the Indiana Commission for Higher Education put it, "in most instances, a 'transmission' of a work in digital form also creates an ephemeral copy, thereby implicating the exclusive right of

distribution. This ephemeral copy need not be necessarily and may not be functionally suitable for further reproduction. *It can exist for only a fleeting instant.* Thus, any revision to the law must consider the fundamental operations of digital technology and their potential legal ramifications under copyright law as it is currently interpreted." (emphasis added)

In 1976, after a series of negotiations with educational and other non-profit organizations, the music industry agreed to guidelines for the educational use of music. These guidelines, which list five categories of permissible uses and set forth specific prohibitions, are a sensible approach to the problem, though they were never well publicized.

These music guidelines are but one example of the ways in which copyright owners and educational institutions have managed to find common ground. The Visual Resources Association points out that the task of identifying the rights holders of images so that a teacher may seek permission becomes impossibly time consuming. For audiovisual works, the VRA maintains, rules for "how we define the extent of the work that may be used, the length of time such work may be posted and similar sorts of parameters, have existed for years and were developed through agreements and court interpretations prior to the introduction of the latest technology."

The rise of digital technologies presents new issues, but there is no reason that the compromises of the past cannot be extended to this new realm. GU believes there is no reason that the principles of fair use cannot be applied to distance learning and the entire digital environment. The issues of copyright protection and educational use are not simple, yet the process whereby competing interests form the basis of negotiations aiming for compromise is the only way that fair and balanced agreements (and law) can be achieved.

The Digital Millennium Copyright Act

The Digital Millennium Copyright Act contains a section known as the Online Copyright Infringement Liability Limitation Act. Under Section 512 of the DMCA, the liability of service providers, including educational institutions, can be significantly reduced if certain conditions are met. The service provider must appoint a designated agent and provide the Copyright Office with contact information, including the agent's name, phone number and electronic address. Another provision requires educational institutions to provide all its users with information about compliance with the copyright laws of the United States. In addition, the Copyright Office is to maintain a current directory of designated agents available to the public. Finally, the DMCA calls for the identification of an alleged infringer and the issuance of a subpoena by a U.S district court at the request of the copyright owner.

The steps mapped out in the DMCA are a significant advance in ensuring that both universities and copyright holders will have a neutral directory of agents designated

by educational organizations who can be notified about suspected infringement. The Act stipulates requirements (which have been further clarified in regulations issued by the Copyright Office) whereby universities operating computer networks can minimize their liability. It also supplies content owners with various possible remedies against suspected infringers.

Section 110

GU supports the recommendations presented by Dean James G. Neal in his testimony on behalf of the major library organizations at the hearing of the Copyright Office on January 28, 1999. Specifically, Dean Neal stated that there should be no distinction between what is permitted in a classroom setting and in a remotely controlled environment. Section 110 of the Copyright Act is based on technology in use some thirty years ago and contains restrictions that make no sense in a multimedia environment. The convoluted restrictions in the second part of Section 110 permit only literary or musical works to be transmitted, which makes little sense to educators who want to create digital lessons by incorporating different types of media. The same subsection allows a still image to be displayed remotely, but does not allow the same image in motion media to be used in distant instruction.

The University of North Carolina and the American Association of Universities, among the many who support revision of Section 110, believe that Section 110 should be amended to permit all types of works to be performed and transmitted wherever students are located, as long as the educational institution can provide reasonable protection against downstream production and redistribution. Copyright considerations are very important, yet the law should not intimidate educators from making use of a variety of resources -- as it does today.

The Motion Picture Association denies that there is evidence that Section 110 has seriously hampered distant education and insists that the "competitive global marketplace" is sufficient to address the needs of educators. Such arguments are difficult to accept. In reality, prohibitive pricing in the licensing of motion pictures and other audio/visual works have caused a united cry from educators for change in U.S. copyright law. There are many examples in which a creative idea for use of video material over distance was not acted upon because an educator believed this to be in violation of the law. It is unclear precisely what changes should be made in Section 110, but it is clear the law must be modified.

Conclusion

Georgetown joins other commentators in recommending that any revisions to U.S. copyright law should neither prescribe nor exclude technologies that might later prove to be well-suited for distance education.

The Copyright Office has an opportunity to promote the use of digital technology and content by including supportive language in its report to Congress that emphasizes the importance of fair use in distance education and recommends improvements in Section 110 of the 1976 Copyright Act. The education, library and fair use provisions of the copyright law reflect the balance between the rights of copyright owners and educational users. Licensing must not become a substitute for a statutory regime that reflects the interests of all the significant parties and promotes "the progress of science and the useful arts," as mandated in the U.S. Constitution.

Respectfully Submitted,

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