

Testimony of

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**Concerning Promotion of Distance Education Through Digital Technologies
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I am Laura N. Gasaway, Director of the Law Library and Professor of Law at the University of North Carolina at Chapel Hill. I am grateful to have this opportunity to present testimony on distance education on behalf of the Association of American Universities, the American Council on Education, and the National Association of State Universities and Land-Grant Colleges, as well as the organizations listed at the end of this testimony.

Education is the principal societal function for developing our nation's human resources. As we move into an information age where both cooperation and competition will be played out on a global stage, the ability of the United States to meet its domestic and international challenges and responsibilities will depend critically on its educational capacity.

For decades, distance education has expanded the reach of educational programs in time and space, thereby expanding the nation's capacity to educate its citizens. New developments in information technology and digital networks provide the opportunity to expand and enrich distance education. Whether it is professionals working long hours or parents meeting family commitments at home, the flexible nature of technology now allows people to access educational programs when their own schedules permit.

Our institutions are using technologies in innovative ways to provide instruction via satellite, one and two-way video, and over the Internet. Some are combining several forms of advanced telecommunications and technologies. For instance, students can watch live lectures over cable television, submit class assignments by email and participate in discussion groups with students around the world. Moreover, new applications permit the enrichment of educational content through creative multimedia combinations. Soon, it will become commonplace to conduct fully interactive classes over the Internet.

However, changes in copyright law will be necessary to fully exploit these new capacities.

The basic objective of distance education legislation should be to enable remotely all instructional activities that are currently permitted in the classroom, provided that adequate safeguards exist against the misuse of copyrighted material that would harm the market for that material.

The following changes in copyright law should be made to achieve this objective:

1. Section 110(2) should be changed to enable the display and performance of copyrighted works at remote locations at times selected by students. Where such display or performance is distributed over digital networks, such a capacity for performance and display will necessarily require an exemption from Section 106 rights of distribution and copying, since the material must be "distributed" over networks to a computer terminal or other device and since ephemeral copies are necessarily made in the course of transmission.

The current 110(2) exemptions are based on technologies extant more than two decades ago. These exemptions need to be updated to accommodate the expanded educational opportunities supported by new technologies. Appropriate legislation should focus on the educational goal and reason back from

that objective to accommodate the intervening steps necessary to realize the goal. For distance education, the goal is to deliver remotely through display or performance of copyrighted material the same educational content that can be delivered through display or performance in the traditional classroom. Since material delivered over computer networks will technically involve "distributions" and "reproductions" that fall under Section 106 proprietary rights, the 110(2) distance education exemption must be expanded to exempt such distributions and reproductions that are necessary but incidental means to achieve the educational objective.

2. The distinction in current law between types of works that qualify for a distance education performance exemption should be eliminated. The distinction between dramatic and non-dramatic works has never made educational sense and is now untenable in the context of new multimedia capabilities.

Now that technology allows almost any type of work to be combined with other types of work in a multimedia presentation, a law that allows a still image to be displayed distantly, but does not allow that same image in motion media to be performed distantly undermines the educational possibilities of distance education. But the current 110(2) exemption limits the performance right to non-dramatic literary or musical works, placing significant handicaps on distance education programs. Scholarship does not draw such distinctions between the many and varied forms of art, music, literature, and other forms of information and entertainment. One cannot study modern culture or ancient civilizations without studying all their manifestations, but the current exemption draws educationally

irrational distinctions that limit the quality of a distance education course for the student. Moreover, it adds to the cost of producing the programs, because courses prepared for and presented in the classroom must be specially edited in order to qualify for distance education.

Performances allowed in a traditional classroom should also be allowed in distance education, and the law should be changed accordingly.

3. These extensions of the 110(2) display and performance exemptions should be available under circumstances where the educational institution can provide reasonable protection against downstream reproduction and redistribution.

Copyright owners have a valid concern about unauthorized copying and distribution. Colleges and universities, which are owners as well as users of copyrighted materials, share this concern. To protect against unauthorized copying and distribution, the extension of the distance education exemption to include all material that can be displayed or performed in a traditional classroom should be limited to circumstances where reproduction and redistribution can reasonably be prevented.

Under these circumstances, there is no reason to treat performance or display in distance education differently from performance or display in a classroom. The educational benefits to society are considerable, and the risk of market harm is minimal. This approach also eliminates the shifting distinctions between different and rapidly evolving kinds of technology and between categories such as synchronous and asynchronous transmission, local and remote delivery of educational content, and classroom and non-classroom settings that currently cloud the debate about copyright and distance education.

With this approach, the exemption would apply when the copyrighted material is transmitted to students at a remote location through video-teleconferencing. The exemption would also apply when the material is transmitted to a student over the Internet to a home computer terminal, if the technology used reasonably prevents downloading or redistribution of the work.

A reasonably secure mode of delivery does not provide absolute assurance that the displayed or performed material cannot be reproduced or redistributed; indeed, it is technically possible to reproduce a classroom performance. Reasonable protection would mean that material is not easily reproducible or redistributable. Under these circumstances, digital works made available for distance education would be

at no greater risk than digital works made available directly by publishers to consumers. In practice, material distributed by higher education institutions in the context of institutional policies governing the appropriate use of copyrighted material may foster greater compliance with appropriate use policies than would otherwise be the case.

Legislation should specify the policy outcome-display and performance of all material in distance education circumstances where reproduction and redistribution can reasonably be prevented-without attempting to specify technology-specific means to achieve that end.

4. In circumstances where access to information is controlled-e.g., limited to registered students through passwords or other technological controls-but the mode of delivery cannot provide reasonable protections against reproduction or redistribution, some form of exemption should be provided but might require a stronger assurance against market harm-for example, by limiting the conditions of performance.

Thus, an institution should be permitted to perform any work in a distance education environment if reproduction and redistribution can reasonably be prevented. However, in a less secure environment where reproduction or redistribution, though unlikely, cannot reasonably be prevented, the institution might only be permitted to distribute a performance that would not have a significant market impact if inappropriately reproduced or redistributed. Such performances might include student performances or other non-commercial performances of a current dramatic work.

Although we cannot specify at this time exactly how such distinctions would be drawn, the general principle should be that the extent of a distance education exemption should vary directly with degree of control over material that can reasonably be assured. Moreover, in both secured and controlled environments, distance education programs should be accompanied by institutional policies governing appropriate use of copyrighted materials and educational efforts to inform students and faculty about the rights of copyright owners, the limitations to those rights, and the circumstances under which they apply.

Fair Use

A specific exemption for distance education must not be construed to replace or preempt a fair use defense to an infringement claim. Fair use provisions apply to all of the rights of the copyright owner, including the right to display and perform publicly. But beyond display and performance, a fair use defense would apply to all uses of information in distance education as it would in any other circumstances. For example, a student should be able to reproduce a portion of material made available in distance education if the use to which that reproduction were put met the four-factor test of Section 107. Similarly, if copying material onto a server for students to access is not exempted under Section 110(2), an instructor might still be able to do so on the basis of fair use.

Licensing

The availability of licensing does not obviate the need for a distance education exemption. The purpose of such an exemption is to promote the public benefits provided by distance education. While licensing is now and will continue to be an important means of defining the terms for use of copyrighted works, licensing cannot substitute for the need for a distance education exemption for display and performance of works, both for economic reasons and reasons of principle.

Requiring 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 the power to determine the terms of use and ultimately, the power to deny access to information, too great a shroud to place over distance education. We do not mean to suggest any a priori obligation on the part of a copyright owner to make material available, but to argue that a reliance on licensing to the exclusion of a distance education exemption could unbalance

the relationship between copyright owners and educators.

For distance education to be able to flourish under the new educational dimensions enabled by technological advances, colleges and universities need a set of statutory provisions that define appropriate uses of lawfully acquired material. Within statutory boundaries, faculty and students are then free to use such material to advance educational interests without having to try to manage conflicting license provisions, uncertain costs, differing expirations, and complicated renegotiations.

Licensing should remain a voluntary overlay on distance education policy that includes a prudently expanded 110(2) exemption and the appropriate application of fair use. The continuation of limitations to and exemptions from the proprietary rights of copyright owners will also play an important role in defining the appropriate terms of licenses that are negotiated.

Conclusion

The Constitution authorizes copyright for the purpose of "promot[ing] the progress of science and the useful arts." The framers recognized that a limited monopoly on one's creative work provides a social benefit by providing an incentive for creativity and invention. Copyright does not establish an exclusive right to the ideas or information embodied in a work, however. For science and the useful arts to progress, it is necessary that members of society have access the information and be able freely to grapple with the ideas produced by creative work.

The current education exemptions from the proprietary rights specified in copyright law recognize that educational uses of copyrighted material are a special category of use. The purpose of our nation's educational system is uniquely congruent with the fundamental purpose of copyright. That is, educational institutions directly promote the progress of science and the useful arts, to the benefit of society as a whole. Distance education technologies magnify the capacity of educational institutions to serve this public interest.

The changes in law that we have suggested here will achieve the educational goal stated earlier of permitting remotely all instructional activities that are currently permitted in the classroom, provided that adequate safeguards exist against the misuse of copyrighted material. This updated exemption for distance educational uses of copyrighted materials supports the purpose of copyright articulated in the Constitution, and is the appropriate policy to further the public interest.

Testimony also presented on behalf of:

*American Association of Community Colleges
American Association of State Colleges and Universities
EDUCAUSE
National Association of Independent Colleges and Universities*

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