

"The Copyright Infringement Liability Of On-Line And Internet Service Providers"

Joint Testimony Of National Library And Educational Organizations Before The United States Senate Committee On The Judiciary

**Presented By Prof. Robert L. Oakley
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Good morning, Mr. Chairman, Sen. Leahy, and Members of the Committee. My name is Robert Oakley. I am a Professor of Law at the Georgetown University Law Center and Director of the Law Center's Library. I also serve as Washington Affairs Representative for the American Association of Law Libraries. I am honored to appear before the Committee today not only on behalf of AALL, but for 17 of the nation's other principal educational and library organizations.

These educational and library organizations are committed to balanced intellectual property law and policy. By "balanced," Mr. Chairman, I mean that these organizations respect and support strong copyright protection. We are equally committed, however, to strong statutory respect for the Constitutional objective that is the foundation of copyright law: "the Progress of Science and useful Arts," and to the principle of Fair Use.

Copyright is at root about promoting creativity. As creators and owners of intellectual property we understand that creativity results not just from the financial incentive for authors and inventors codified in Title 17 of the U.S. Code, but also from many provisions in the statute which promote access to copyrighted information. As I indicated when I appeared before this Committee last May, the best measure of our copyright law's success is whether it fairly balances those equal priorities in the service of the Framers' commitment to the broad dissemination of knowledge and information in a democracy.

The library and educational communities encompass a broad range of public and private institutions whose primary missions include education, research, and the preservation of our scientific and cultural heritage. In the process of carrying out their missions, these institutions -- which include research universities, colleges, libraries, and schools -- are both creators and consumers of scholarly communication. As such, these institutions participate in the full spectrum of activities regulated by the laws governing copyright and must be sensitive to the balance of interests embodied in them. Thus, they are keenly interested in the emerging debate over OSP liability.

As they revolutionize the means by which information is recorded, disseminated, accessed, and stored, digital technologies are changing the technical limits that have supplemented the legal framework of balance between ownership and public dissemination. The unlimited technological capacity to disseminate by transmission in ways that can violate the rights of copyright holders confronts equally unlimited technological capacity to prevent works from being used in ways contemplated by law. Carried to its logical extreme, either trend would destroy the balance, with results that would likely undermine core educational functions as well as radically transform the information marketplace.

Intellectual property is a significant form of social capital, whose growth depends on its circulation, exploitation, and use. As a major arena in which intellectual property is created and disseminated, educational institutions and libraries have nurtured an ethic of intellectual property based on:

- respect for the rights of creators and copyright owners;
- accurate attribution of authorship and respect for a work's integrity;

- assurance that copyrighted works may be preserved from deterioration;
- promotion of information dissemination and access; and
- economic viability of the scholarly communications system.

Unfortunately, educators and librarians will not be able to fully exploit the creative benefits of new technology if they are subjected to unwarranted on-line service provider liability or are unable to purchase or use devices essential for displaying or recording educational materials or useful other information.

Accordingly, the issue of "on-line service provider" liability is as important to libraries and educational institutions as it is to those in the telecommunications and Internet services industries. Unlike last year's debate, there now appears to be clear appreciation domestically and internationally that balanced intellectual property policy cannot stand on proprietors' rights alone. In addition, *remedies to enforce proprietors' rights*, and exceptions to those rights, have been and must continue to be the critical second and third pillars -- indispensable and integral elements -- of this nation's copyright system.

The education and library communities believe that four key principles should be considered as Congress debates any "on-line" liability system:

1. Copyright law should foster an environment in which the broadest possible spectrum of the public enjoys the educational and cultural benefits of the Internet;
2. Any liability system ultimately adopted should permit libraries and educational institutions to use state-of-the-art "navigational" systems and practices to facilitate access to information.
3. In those instances where institutions are appropriately held indirectly liable for copyright infringement, such liability should be limited to injunctive relief; and
4. Any service-provider liability regime adopted should respect and incorporate the general practices and principles adopted by libraries and educational institutions to protect individual privacy.

Permit me to elaborate on each of these principles:

I. Copyright law should foster an environment in which the broadest possible spectrum of the public enjoys the educational and cultural benefits of the Internet.

The 125 nations represented at the WIPO conference in Geneva this past December -- including the United States Government -- unanimously agreed without debate that simply providing "facilities for enabling or making a communication" should not serve as the basis for copyright infringement liability based solely on the actions of someone who uses those facilities. Mr. Chairman, many of our institutions are being asked by policy makers at every level of government to be the public's "on-ramps" to the information superhighway -- a role that many institutions are actively pursuing. Indeed, Congress recently voted to assure that many of our institutions receive discounted telecommunications services rates so that we can accomplish that mission.

Without reasonable insulation from liability based solely on the activities of school and library network users over which our institutions have no control, educational and library institutions may be forced by the prospect of crippling liability to call a halt to building new, or to dismantle or disable existing, access points to the Internet.

Copyright law should uphold the principle that liability for infringing activity in the network environment rests primarily with the infringing party rather than with third parties. Institutions should accept responsibility for acts undertaken at their behest, but should not be held liable for the acts of individuals -- whether or not associated with the institution -- who act independently. This principle is an essential underpinning of academic freedom.

The educational and library communities thus oppose OSP copyright legislation that would make institutions liable for the acts of individuals acting on their own initiative, or that would impose prior censorship. Copyright enforcement provisions should uphold principles of due process in determining whether specific allegations of infringement are valid. Educational institutions accept responsibility for establishing policies, carrying out due process when appropriate, and creating climates in which all those who use their facilities and resources use copyrighted materials appropriately.

For example, Mr. Chairman, Utah State University -- an active member of one of the national organizations I have the pleasure of representing today -- is a highly respected land grant university with an on-campus population of approximately 16,000 and 4,000 off-campus, non-traditional students. Utah State provides approximately 21,000 points of access to the Internet for e-mail, Internet browsing, library services and information exchange. These services are used in campus-based and distance learning. In fact, in most cases, the end-users (students and faculty) access the network from locations which cannot be supervised, such as residence halls, offices and laboratories. Utah State does, however, advise users of its system of their obligations and responsibilities to respect intellectual property rights through training programs, log-in messages, and on-line and print information provided by the University's Computer Services department.

We believe, Mr. Chairman, that no service provider, no phone company, no educational institution and no library which operates a computer network should be forced to factor into its plans to bring the benefits of the Internet to the public potential liability based solely on its role as an information conduit. Just as protection against the illegal use of copyrighted information is a prerequisite for copyright owners to putting their "content" on-line, so too is insulation from unreasonable liability a prerequisite for both commercial and non-commercial institutions to building, deploying and accessing the Internet.

II. Any liability system ultimately adopted should permit libraries and educational institutions to use state-of-the-art "navigational" systems and practices to facilitate access to information.

As you may know, Mr. Chairman, library and higher education organizations were privileged to be represented in the "all party" liability negotiations directed by Congressman Bob Goodlatte of Virginia. It is our understanding that Chairman Coble has asked Mr. Goodlatte to reconvene those talks this year and we look forward, once again, to participating.

Early in last year's discussions regarding on-line service provider liability, it became clear that the provision of "links" to other parties' information sites on the Internet might be considered a significant factor in assigning liability to an information access provider. The entire concept of "highlighting-" and "linking-based" liability was and remains of great concern to educational institutions and libraries because of its potential to make illegal valuable activities historically at the core of education and librarianship: the pedagogical presentation and organization of lawfully acquired or referenced copyrighted information.

Libraries and educational institutions share our commercial colleagues' view that linkage is a unique and fundamentally positive technological tool. In our universes, it certainly has enormous potential to greatly enhance the educational process and the public's access to information. It should, therefore, be presumptively viewed as a practice and protocol to be encouraged rather than chilled by the Copyright Act. It is important to note that in contrast to the "conduit" issue, "one-size" policies and definitions regarding "highlighting" and "linking" may not fit all stakeholders in the complex debate to come.

III. In those instances where institutions are appropriately held indirectly liable for copyright infringement, such liability should be limited to injunctive relief.

Libraries and educational institutions do not seek a blanket exemption from liability of any kind. Implicit in that position is a recognition that, under certain circumstances yet to be fully defined, a library or educational institution may be held liable for copyright infringement and subject to appropriate penalties. We believe, Mr. Chairman, that except in cases of direct liability, the exposure of libraries and

educational institutions can and should be limited to injunctive relief. Unless reasonably limited in this manner, library and educational institutions (many of them publicly funded) will be especially vulnerable to the kind of strategic litigation practices already evidenced by some "content" industries. As discussed earlier, educational and public access to the Internet will be the inevitable casualties of such campaigns. In any event, they should not be subjected to the threat of criminal penalties.

IV. Any service-provider liability regime adopted should respect and incorporate the general practices and principles adopted by libraries and educational institutions to protect individual privacy.

Last year's debate and negotiations made clear that information proprietors may request that service providers either disclose information concerning the identity or information access patterns of individuals suspected of copyright violation, or terminate services provided to the individual under suspicion. Members of the library and educational communities wish to call attention to certain special characteristics of our activities that must be taken into account in any legislative solution to the issue of service provider liability.

For example, when you or I use the facilities of a telephone company, Internet access provider or on-line service provider facilities, we do so pursuant to a contract or subscriber agreement in which we typically acknowledge that service may be terminated under specified conditions. When a student or teacher uses a school-based information network, or a member of the public uses a branch library, however, the bases of the "transaction" -- the ground rules -- are quite different. Educational institutions have honor codes built on broadly accepted professional principles which, when breached, can result in expulsion or loss of privileges such as network use. Similarly, someone who breaches a library's "acceptable use" policy can lose print and electronic library privileges. In educational and library settings, however, individuals may enjoy a higher expectation of privacy than in the commercial environment. Moreover, they have a justified expectation that their rights to engage in lawful discourse, print and electronic, will be respected.

These expectations arise from institutional codes and policies which are not based on contract. Rather, they have their roots in our collective mission: promoting the growth and dissemination of knowledge. Academic freedom and the Constitutional guarantees of freedom of thought, association, and speech require that these policies be respected. Clearly, those who break the law or violate institutional use policies must be punished. But, unless the unique concerns, in particular privacy and confidentiality, which manifest themselves in library and educational institutions are recognized and respected in the service provider debate, we will put at risk the very objective on which the Framers grounded the Constitution's Copyright Clause: promoting the "Progress of Science and useful Arts."

As creators and repositories of vast amounts of intellectual property, educational institutions and libraries have both a responsibility and a need to assure that their own institutional practices conform to the requirements of intellectual property law and that their constituencies are well informed about their responsibilities. Institutional practices should set high standards for compliance and can serve as an educational tool for heightening the consciousness of individuals within the educational and library communities of what the law demands.

In conclusion, Mr. Chairman, the nation's educators and librarians are committed to developing a digital environment that fosters a robust information market by providing effective incentives for the creation of intellectual property, the reliable protection of proprietary rights, and appropriate exemptions from those rights designed to assure the widest possible access to and use of information. In sum, we believe that the best way to achieve that goal, and with it an effective liability system governing on-line information access, is by carefully balancing all of the affected interests.

Thank you and the Committee for this early and important opportunity to help establish the framework of the coming debate. We look forward to working closely with the Committee to update the Copyright Act to meet the challenges, and maximize the opportunities, of the digital environment.

Thank you again, Mr. Chairman.

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American Association of Community Colleges
American Council on Education
American Library Association
Association of American Universities
Association of Research Libraries
Consortium for School Networking
Federation of American Research Networks
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Instructional Telecommunications Council
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