

Copyright, Distance Education, and New Technologies:
Meeting the Needs of Indiana Educators
and Copyright Owners in A Digital Society

A report to the
UNITED STATES COPYRIGHT OFFICE
regarding
recommendations to the United States Congress
on revising copyrights laws affecting distance education

prepared by
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The Indiana Commission for Higher Education¹ (ICHE) and the Indiana Partnership for Statewide Education² (IPSE) *Working Group* and *Copyright Committee* welcome the opportunity to participate in revising copyright law to “promote distance education through digital technologies,” while recognizing the needs of educational users and balancing the privileges of copyright owners. To focus our effort, we called upon representatives of all of Indiana’s institutions of higher education and others to participate in a conference on January 21, 1999 to discuss and work through the list of factors that the Copyright Office shall consider in recommending revisions to the United States Congress.³ The following report is an outgrowth of that meeting and reflects a consensus of representatives from twenty-two colleges and universities in the State of Indiana. It details the scope of distance education in Indiana today, demonstrates the many problems of educators in applying existing section 110(2) to sophisticated distance education initiatives, and proposes balanced solutions that would enhance the educational opportunities of distance education students and maintain the economic and intellectual integrity of works of authorship. The report is submitted generally on behalf of Indiana’s educators and specifically for the benefit of Indiana’s approximately 300,000 students enrolled in our many colleges and universities. Any revision in the copyright law will directly affect the quality and cost of their education, and the education of all of Indiana's citizens.

¹ The General Assembly of Indiana created the Indiana Commission for Higher Education in 1971 as a coordinating agency that would work closely with Indiana’s public and independent institutions. Commissioner Stanley G. Jones oversees the activities of the Commission for Higher Education. ICHE also maintains strong working relationships with many other agencies involved in educational activities.

² The Indiana Partnership for Statewide Education is an association of seventy-seven independent and postsecondary institutions. The fundamental mission of the IPSE is providing collaborative development and delivery of distance education and focusing on delivery of courses and various programs through distance learning technology. These courses and programs benefit all of the citizens of Indiana.

³ 63 Federal Register 71167 (December 23, 1998)

**Institutions represented and assembled on January 21, 1999 at the
offices of the Indiana Commission for Higher Education:**

Anderson University
Ball State University
Butler University
Grace College and Seminary
Hanover College
Holy Cross College
Indiana State University
Indiana University
Indiana University Kokomo
Indiana University
-Purdue University Indianapolis
Indiana Wesleyan University

Ivy Tech State College
– South Bend
Marian College
Purdue University
Rose-Hulman Institute of
Technology
St. Mary-of-the-Woods College
Taylor University
University of Evansville
University of Indianapolis
University of St. Francis
University of Southern Indiana
Vincennes University

Statement of Principles:

As educators, librarians, and other members of diverse institutions of higher education in the State of Indiana, we recommend to the U.S. Copyright Office the following set of principles for revising Section 110(2) of the United States Copyright Act of 1976. We believe that a revision consistent with these principles will realize the core mission of our institutions to nurture the development of tomorrow's innovators, to foster and advance the continued growth of knowledge, and to serve the fundamental needs of our students and fellow citizens. We believe that a revised law consistent with these principles can promote distance learning and facilitate lifelong learning for social and economic advancement. We also share an interest in safeguarding the rights of copyright owners, and we believe that these principles further those interests in a manner consistent with the constitutional objective of "promoting the progress of science and the useful arts."

These principles reflect our judicious and deliberative discussion on January 21, 1999, regarding the revision of copyright law. These principles appropriately balance the privileges of copyright owners and the needs of educators who inevitably must make use of copyright works in successfully meeting our central obligation of teaching and learning.

Principles of Agreement and Support:

- ◆ Promoting and undertaking the secure use of copyrighted works in our community of scholars and students by exploring and implementing reasonable means, both practical and technological, that will allow access to materials by students enrolled in specific courses, and restrict unauthorized access.
- ◆ Informing our communities about the appropriate use of copyrighted works in order to further education and simultaneously prevent misuse of such materials.
- ◆ Establishing a vision and definition of "classroom" that reaches beyond the narrow confines of physical space and comprises a community of educators and learners, reflecting the practical realities of technological capabilities and serving the rapidly changing needs of a mature and technically sophisticated student population with diverse learning needs and abilities.
- ◆ Encouraging the selection of teaching and learning materials based upon their effectiveness for solving a learning need, and not predicated on distinctions derived from the content, medium, nature, producer, or origin of the copyrighted work that are not related to fulfilling educational needs.
- ◆ Clarifying that fair use under Section 107 of the Copyright Act continues to allow innovative and constructive developments in teaching strategies, techniques, and technologies that may not be explicitly served by the language of a distance education statute.

We do not support, on the other hand, any legislative recommendations that would constrain the use of copyrighted works in the development and implementation of distance education initiatives, condition the use of copyrighted works on impracticable distinctions, and prevent any students from having the benefit of an educational experience equal to that available to students in the physical classroom. We also cannot faithfully endorse licensing alternatives and models that in application would work no better than current practices, impose unduly rigid restrictions on the use of current and emerging technology, entail unreasonable fees or administrative costs, or further erode the principles of fair use and other rights of use under copyright law.

Nature of Distance Education

Of the challenges faced by the many educators, librarians, and others from twenty-two of Indiana's institutions of higher education attending the Indianapolis conference on January 21, 1999, the task of defining distance education was perhaps the most difficult of all. Participants easily identified the wide range of technologies employed in distance education, shared remarkably similar stories and anecdotes about the difficulties of licensing copyrighted works for distance education, and wholeheartedly agreed upon the growing significance of distance education today, and its vital importance tomorrow, for serving the fundamental needs of their students. They could not, however, readily resolve the seemingly obvious question: what is “distance education”?

The reason for this difficulty lies not within the group, however, but in the question itself. The general consensus showed that the “distance” in distance education is rapidly becoming, if not already, irrelevant. “Distance” suggests only a temporal and geographic relationship and not a pedagogical approach or teaching model. “Distance” illustrates only one mode of multiple modalities and blends of other tools and technology that support the work of educators. “Distance” implies only that the learning is occurring elsewhere and not that the learning or teaching should be different in focus or distinguished by the types of teaching materials used to enhance the educational experience. In fact, the participants overwhelmingly agreed that providing different materials to classroom and “distance education” students is unjust and serves neither sound pedagogical practices nor reasonable student expectations and needs.

On the other hand, the participants uniformly welcomed the opportunity to provide the U.S. Copyright Office with their perspectives and to share with it the following experiences and insights about “distance” education:

- ◆ **Rapidly evolving and complex societies will rely increasingly on digital technologies to further the education and advancement of its citizens.**
- ◆ **Technologies and appropriate instructional design will facilitate educational opportunities tailored to the unique needs and abilities of the individual learner.**
- ◆ **Distance education will allow the development and offering of courses in substantive areas that may not be served by more traditional means due to lower enrollments.**
- ◆ **Distance education will continue to support the economic, social, and personal need for life-long learning and enrichment and to spread into primary and secondary education.**
- ◆ **Distance education will increase overall educational levels as those students who cannot readily attend “traditional” classes join the higher education community.**
- ◆ **Digital technologies in use in the “traditional” classroom will further expand into the distance education realm, and it will become even more difficult to identify “distant” and “traditional” elements and students of a course. All educational activities are ultimately “education”— an activity no longer burdened by the adjective “distant.”**

Role of Licensing

In some instances, licensing can provide an expedient, cost effective, and relatively safe option for using copyrighted works to support some educational activities. Compiling a “coursepack,” for example, is often a licensed use. Library services, such as access to databases and deposits for electronic reserve, also may rely on successful licensing arrangements. Conference participants support the role of licensing as one of several means for using copyrighted works to further the advancement of knowledge and serve the needs of their students.

In numerous other instances, however, licensing can prove time-consuming, costly, and can produce unpredictable results. Many participants noted that fees are often unreasonable and not scaled to the realities of educational budgets. The administrative costs of hiring, training, and retaining personnel and supporting the requisite infrastructure for negotiating, executing, and monitor licensing agreements also are simply unaffordable to many institutions of learning. Boiler-plate agreements drafted by copyright proprietors are often unduly complex, granted as take-it-or-leave-it, and would license only “any rights held by licensor,” significantly lacking representations and warranties of ownership. In practical effect, this type of agreement would offer little or no protection for the unwary educator. It is akin to a latched seatbelt that was never secured to the car itself. The protection is illusory.

Most importantly, in many cases, licensing is simply not an alternative. The Copyright Act of 1976 dramatically reshaped the foundation of U.S. copyright law, eliminating notice requirements and granting copyright automatically to **all** works of original authorship. Consequently, education does not rely solely on copyrighted works that have easily identifiable authors and are institutionally groomed, promoted, and licensed. Digital technologies, the Internet, and works protected automatically by operation of law have combined to produce many “orphaned” copyrighted works. Individual authors post audiovisual works to the Web everyday that have little market value, but perhaps, greater educational value. But the identity of their creators is often never disclosed and consequently untraceable. As audiovisual works, they are not exempt under existing distance education law, and as orphans, they cannot be licensed from any authoritative source. Thus, even under an optimized, efficient, and sweeping “one-stop shopping” regime, licensing alone cannot obviate the clear need for a specific exemption promoting distance education through digital technologies.

Our discussions in Indiana revealed these common and recurring licensing obstacles:

- ◆ **The copyright holder will not license the desired material for use in digital form or for use in distance education activities at any price, much less at a reasonable price.**
- ◆ **After a diligent search, the educator or librarian cannot identify the owner of the work, cannot contact the owner of the work, or receives no reply from the owner of the work.**
- ◆ **The desired work is no longer available in the marketplace. One participant, for instance, noted that motion picture soundtracks tend to have a limited commercial life.**
- ◆ **The license is granted substantially later than an identified and agreed upon deadline.**

Use of Technology

Conference participants first and foremost stressed that the primary purpose of using technology in distance education is to share knowledge and facilitate learning. That knowledge may be shared collectively with an entire class through a given technology, or it may be focused individually on one student through yet a different technology. Each learner has a unique style and a distinct competency. Participants held this multi-technology, blending approach to distance education in the highest esteem, emphasizing that this approach offered the richest learning environment and assured the most effective learning experience. They tended to classify educational technologies as two types: delivery mechanisms and learning resources. The term “delivery mechanism” reflected the way that technology might connect the teacher to the learner. For example, the Internet, the Web, intranets, satellite, terrestrial, digital video and audio one-way and two-way interactive transmissions, the telephone, facsimile, and digital-networked environment would fall within this definition. “Learning resources,” on the other hand, tended to identify a particular storage medium: videotapes, audio tapes, computer diskettes, CD-ROMs, DVDs, and other such mediums.

However, conference participants also overwhelmingly recognize that the rapid rate of change in the technology community is likely to continue unabated, opening entirely new vistas of opportunity for educators. Technologies existing today will become obsolete, falling to more advanced, yet easier to use, technologies. The remaining analog technologies will fade away as completely digital technologies take hold. Yet many institutions will continue to use analog technologies into the indefinite future, and any revision of distance education law must accommodate them and emerging technologies. In fact, the majority of participants expressed great concern about limiting the revised law to any specific technologies, strongly opposing such models of revision. Instead, a consensus developed that any revised law should accommodate all technologies, thereby encouraging the further development of and experimentation with emerging technologies and allowing the continued use of any existing and older technologies currently used by the diverse institutions of education throughout the nation.

These technologies are currently used by educators to facilitate distance learning:

- ◆ **Email**
- ◆ **Websites**
- ◆ **Cable television**
- ◆ **Closed circuit transmissions**
- ◆ **Satellite broadcasting**
- ◆ **Terrestrial broadcasting**
- ◆ **Intranets**
- ◆ **the Internet**
- ◆ **Internet II**
- ◆ **Videotape**
- ◆ **Audio tape**
- ◆ **Software**
- ◆ **Interactive Video**
- ◆ **Facsimile**
- ◆ **Digital networks**
- ◆ **CD-ROMs**

The inherent security of these diverse technologies varies greatly. Some assure virtually absolute access control, while other have no limitations. Indiana’s educators anticipate that any revised law may allow greater use of materials in the most secure setting and limit some uses in more accessible situations. The participants supported such limitations as necessary to appropriately respect the privileges of copyright owners and balance the needs of the educational community.

Application of Copyright Law to Distance Education

The individual opportunity created by digital technologies has opened new and vital occasions to assure an increasingly educated and technologically literate society. Institutions of higher learning are striving to serve this fundamental, yet ever-changing, need by using technology to enrich educational experiences in the “traditional” classroom. The dynamics of technology and a rapidly expanding adult student population, however, are pressing educators to reach beyond the physical confines of the “face-to-face” classroom and into the ether of “cyberspace.” These dynamics also have underscored the clear need for providing life-long enrichment through widespread and innovative educational strategies, including techniques fully exploiting today's technological riches. These strategies and techniques inevitably rely on the use of copyrighted works, many of which today are audiovisual, to provide effective learning experiences. Yet, the Copyright Act of 1976 offers little assistance to distance educators undertaking this important mission of pursuing and nurturing a better society.

Existing section 110(2) speaks to now outmoded, predigital technologies and imposes conditions no longer reflecting the technologies themselves. Digital technologies inherently make ephemeral copies, yet section 110(2) considers only the need of educators to be exempted from the exclusive rights of performance and display. Moreover, in most instances, a “transmission” of a work in digital form also creates an ephemeral copy of at least a portion of the work at the receiving end merely to make the work perceivable to users, thereby implicating the exclusive right of distribution. This ephemeral copy need not be necessarily, and may not be functionally, suitable for further reproduction or distribution. But it can exist, if only for 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.

Naturally, a law enacted in 1976 could not have anticipated today's technologies any more reliably than laws revised today can accurately predict tomorrow's technologies. This reality underscores the importance of avoiding direct ties to the “cutting-edge” of technology when crafting any revisions to section 110(2). If history is an accurate gauge, the cutting-edge of technology may quickly dull, and we may again revisit the same issues before the U.S. Copyright Office today in the not so distant future.

Most importantly, however, existing law delineates uses of materials in ways that are no longer conducive to the growth of learning and scholarship. The Congress of 1976 could not have envisioned the revolution in technology occurring today. Its report describes a distance education world based on broadcasts delivered through the public airwaves or through simple “closed-circuit” arrangements. Unlike in the “face-to-face” environment, these “transmission” technologies left educators little chance of restricting access to teaching materials solely to enrolled students. Materials were delivered scattershot to enrolled students and to others capable of receiving a particular broadcast frequency. Students and nonstudents alike might access copyrighted materials intended solely for student enrichment, potentially allowing widespread, unauthorized uses of these works.

To address the concerns of copyright owners, Congress severed distance education from more traditional modes of teaching: Section 110 encourages far broader and educationally beneficial

uses of copyrighted works in the restricted “face-to-face” classroom than allowed in the previously unrestricted “distance education” environment. Under existing law, the palette of distance educators is limited to the performance of only “a nondramatic literary or musical work.” This restriction results in the exclusion of the entire spectrum of what has become today the literature of social discourse: film, television, computers, the Internet, and other audiovisual media. Moreover, digital technology is rapidly becoming the means for carrying on that social discourse in a constitutionally protected forum. Yet, under existing law, distance educators cannot easily join the digital revolution to more appropriately serve and further the education of their students. Any revision of section 110(2) must allow for the use of audiovisual works if it is to serve the needs of educators and the greater society.

Educators in Indiana recognize the concern of copyright owners regarding the use of works in digital form, including the potential ease of downstream reproduction and distribution. As the authors of numerous copyrighted works, we share this concern and have sought ways to ameliorate it. The *Statement of Principles* included in this report reflect a good-faith effort to lessen opportunities for inappropriate uses. Today’s digital technologies, for example, increasingly allow targeted access, merging the security afforded to copyrighted materials used in the “face-to-face” classroom with the benefits accorded to students learning from more distant locations. In fact, the community of copyright owners has embraced the security and reliability of such “technological means” of protection in the recently enacted *Digital Millennium Copyright Act*.

We also acknowledge the need for safeguarding copyrighted works by informing the educational community about copyright to further lessen the possibility of inappropriate uses. The conference in Indianapolis confirmed the overwhelming desire of the educational community to follow the law and respect the rights of copyright owners. Many participants noted that their institutions already offer basic information about copyright to users of copyrighted materials, particularly their library communities, some institutions have formal and informal policies and procedures, and other institutions have sophisticated copyright education programs well prepared to address copyright law as it relates to education.

Conference participants also understand, on the other hand, the absurdity of continuing to define the “classroom” as a physical place in an age of digital communications. The classroom for distance educators is where the learning occurs, not where teaching is conducted. The participants concluded that the “distance” in distance education identifies only a situation and not a type of education. “Distance” is only an adjective describing where the teacher and learner are physically located in relation to each other. It is not a educational model, but an expression of geographic and temporal relations. In fact, the notion of “distance” is quickly collapsing, and educational efforts prepared initially for “distance” students also are increasingly used to reach “local” students. Consequently, the legal model that may emerge for application to distance education may become ultimately the model for the use of copyrighted works in much of the future innovation in teaching and learning. A new law clearly will not be for only a small segment of education, but potentially for all of education.

It was the unanimous finding of participants that unlike the “broadcast” distance education world of 1976, today’s distance education, digital “classroom” may indeed make use of copyrighted

works for educational enrichment in a reasonably secure manner, yet simultaneously, escape the confines of a defined physical space. The “classroom” need not necessarily occupy a location to effectively protect copyrighted materials on terms similar to that afforded by existing section 110(1). It also need not exist at a physical place to further the central mission of higher educators in nurturing and fostering the advancement of knowledge.

Examples of Licensing Obstacles:

The following situations exemplify the problems encountered by educators in the State of Indiana when attempting to license the range of copyrighted works that may be needed to enhance the learning opportunities of students. While most of the examples are not specifically in the context of distance education, the difficulties in securing licenses for distance education will undoubtedly be more challenging.

- ◆ Student members of a university science club develop a teaching tool for K-8 students that would excerpt brief, five to six second clips from a well known animated series to demonstrate the physical impossibility of certain activities in the real world. The clips were intended to interest the students and then juxtapose the key learning points with the animated events. The faculty planned on showing a compiled tape of these excerpts in face-to-face settings. They sought permission from the rightsholders, and after significant legwork, contacted the appropriate rightsholder. They were quoted a licensing fee of over \$100,000 for using 20 clips; each clip was only a few seconds in length.
- ◆ As part of an educational broadcast conducted for credit in a degree program, faculty member sought permission to transmit nineteen curriculum development videos to a remote class site comprised solely of practicing K-12 teachers working on their master's degrees. The videos were from ten to twenty minutes in length. Many campus faculty members, including the requesting faculty member, belong to the association that produced the videos. The association offered to grant a one-time transmission license for the sum of \$27,271, approximately \$1,435 for each video. The cost for even one video was prohibitive. The instructor previously had used these videos in face-to-face teaching every year for interpretive discussions on various publishers' K-12 textbooks. Because these videos could not be reasonably licensed for use by the thirty K-12 teachers at the broadcast sites, the university had to redesign of the course in order to continue matriculation, contractual obligations, educational offerings, and production demands on schedule. The redesign of the course for distance education students required the faculty member, a graduate assistant, an instructional designer, a graphics designer, an on-air director, and continuing education personnel to devote significant additional time, efforts, and resources to develop a similar course not using the copyrighted materials but offering the same learning opportunities.
- ◆ An institution of higher education in Indiana offers educational opportunities tailored to the needs of a more mature student body already pursuing careers but seeking advanced degrees to enhance their professional opportunities. Enrollment at the institution is small. Expenditures for copyright permissions for works used in degree programs totaled over \$21,000 in the prior year. The faculty and administration have eliminated the use of copyrighted works in one degree program due to the costs of licensing. Other programs are following suit to lessen the costs to students.
- ◆ Faculty member sought permission to duplicate a classical music recording that accompanied an assigned textbook in repeated use. Publication of the musical recording had been discontinued, and it was no longer available in the marketplace. Publisher failed to respond to repeated telephone and written requests over several months seeking permission. The

faculty member ultimately wrote a letter to the publisher indicating that the lack of response would be interpreted as implied permission to make the required use. The publisher immediately responded with a mechanical license allowing the reproduction of the work in no less than 500 copies. That condition far exceeded the number of copies actually needed by the faculty member and was not negotiable. The course was dropped from the university's offerings.

- ◆ Requests to reproduce brief excerpts from an already purchased copy of a videotape for face-to-face teaching are routinely denied by the copyright owner. Instead, the instructor must “cue-up” the tape on the videocassette player for the first clip, then “re-cue” the tape for the second clip, and continues this activity during valuable class time until all clips are shown. Licensing for use in a digital form is invariably denied.
- ◆ Separate permissions are required for the same materials for use in traditional forms, such as course packs, and for use in digital mediums, even if, for example, the website is password protected. This requirement increases the transaction and monitoring costs for the separate permissions. Copyright also has often reverted from the publisher or other previous rightsholder to the original author, and the publisher cannot provide contact information for that author. Or, the publisher is not certain whether it still owns the copyright by assignment, or whether it has returned to the original author by the agreement or operation of law. Moreover, many materials cannot be licensed for use in digital form at all.
- ◆ Mergers in the information and content communities have produced additional problems beyond those typically found in seeking permissions. For instance, the mergers have raised issues of asset transfers and have confused the identity of the actual copyright owner of an identified work. More importantly, mergers have caused great difficulties in re-licensing a previously licensed use as the previous term nears completion. The changing structure and policies of new companies often make permission impossible to secure. Such situations normally require much phone work and written communication.
- ◆ Many faculty members are solely responsible for seeking clearances to use copyrighted works in their teaching at many universities. In most instances, they simply work around using copyrighted works in order to avoid the complex, arduous, and time-consuming process of seeking permissions. They simply do not have the time or the know-how. Instead, they discontinue educationally viable and sound practices.

These examples represent the typical and common responses of educators, librarians, and others in the educational community. Conference participants agreed that such licensing norms directly impair educational experiences that rely on copyrighted works in the classroom. Moreover, existing law and the concerns of copyright owners about licensing digital works further limit the choice of materials that may be used in distance education, thereby lessening the opportunities for distance education students to enjoy the full range of educational opportunity available in the traditional classroom.