Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS

In the Matter of	:	
	:	Docket No. RM 98-12
Promotion of Distance Education	:	
Through Digital Technologies	:	

WRITTEN COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ON THE PROMOTION OF DISTANCE EDUCATION THROUGH DIGITAL TECHNOLOGIES

The American Society of Composers, Authors and Publishers ("ASCAP") submits these written comments ("Comments") in response to the request for comments and notice of public hearings of the Copyright Office (the "Office") published at 63 Fed. Reg. 71167 (Dec. 23, 1998).

The Office issued the notice in accordance with Section 403 of the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998)("DMCA"). That Section directs the Office to consult with affected parties and make recommendations to Congress on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the interests of users. Under the DMCA, the Register of Copyrights is directed to consider seven specific issues, as well as any other issues relating to distance education through interactive digital technologies that the Register considers appropriate. In accordance with those instructions the Office seeks and encourages comment on the following subjects: (1)

the nature of distance education; (2) the role of licensing; (3) the use of technology; and (4) the application of Copyright Law to distance education.

I. Introduction: Summary of ASCAP's Position

At the outset, ASCAP wishes to underscore its respect and support for education and in particular, all uses of music which contribute to the educational process or focus on the study or use of music in any way. Many of ASCAP's members earn a significant portion of their living as music educators. Others create music specifically for use in education and payment for the performances of their work form the basis for their livelihood. Accordingly, ASCAP urges the Office to keep in mind the rights of creators of music when approaching its inquiry.

ASCAP's Comments address some of the critical questions that the Office's report must necessarily answer before deciding whether to jump on the legislative or regulatory band wagons that have been pressed by some. These questions include: What is "distance learning?" Who is using it? What are the means to expand its use to those who need it most? What is the necessity for expanding the fair use and instructional use exemptions of Section 107 and 110 when the distance learning industry is flourishing? Would an expanded exemption assist in the further development of that industry or cripple it? What are the risks to copyright owners of extending the existing carefully crafted exemption to digital transmissions?

While certainly the concept of promoting education is a "Mom and apple pie" political issue, ASCAP urges the Office to examine whether expanding the existing exemptions to digital transmissions would -- in fact -- further this specific goal. ASCAP believes that the answer should be a resounding "NO." Based on ASCAP's understanding of the distance learning field,

there appears to be no genuine problem or any harm that could be remedied by expanded exemptions or even regulations.

At the end of the Office's analysis, ASCAP submits that the Office should make the following findings:

(a) that the "distance education train" has left the station with breathtaking speed and is chugging along just fine;

(b) that any expansion of the existing exemptions would in the long run only deny copyright owners, especially U.S. copyright owners, the right to control and be fairly compensated for the use of their works;

(c) that there is no evidence that an expanded exemption would assist in the delivery of distance learning to those who are perceived to be most in need; and,

(d) that, if anything, an expansion of the existing exemptions would impair that goal by stalling or even de-railing the distance learning train, harming copyright owners and the intended beneficiaries of distance education, alike.

ASCAP's Comments are divided into four sections. **First**, the Comments address ASCAP's standing as a representative of parties affected by the nature of this inquiry. **Second**, ASCAP sets forth its perceptions as to who appears to be offering and who appears to be using distance educational programs. (These issues, including the differences between digital and analog transmissions, will also be addressed in the testimony of Marc Morgenstern, ASCAP's Senior Vice President of Strategic Planning and New Media, to be presented in Los Angeles on February 10, 1999.) **Third**, ASCAP requests that the Office follow the findings of prior government groups and recommend to the present Congress that the market place be allowed to continue to develop appropriate legal licensing systems for digital transmissions, rather than proceeding down the dangerous slippery slope of expanding the fair use and instructional exemptions of Sections 107 or 110 to include digital transmissions. **Fourth and finally**, ASCAP

addresses its historical capability to license public performances of its members' works transmitted by new technology and its present capability to do so with respect to distance education.

II. ASCAP Serves as a Spokesperson for its Members as Copyright Owners of Musical Compositions and Their Public Performance Rights

ASCAP is the oldest musical performing rights society in the United States and holds the largest repertory of copyrighted musical works. ASCAP is a voluntary membership association with more than 79,000 writer and publisher members who are composers, lyricists and publishers of copyrighted musical compositions. ASCAP is also affiliated with over 58 foreign performing rights societies. The repertory of copyrighted musical compositions of ASCAP members and its affiliated societies represent all music genres – rock, pop, symphonic and concert, classical, jazz, country, R & B and standards – all of which form the backbone of our nation's rich musical heritage.

ASCAP licenses, on a non-exclusive basis, the non-dramatic public performances of the repertory of its members and its affiliated societies to those individuals and entities which desire to make public performances of that music. ASCAP's licensees include, but are not limited to, commercial and noncommercial television and radio stations, concert halls, sports arenas and teams, hotels and airlines as well as colleges and universities. ASCAP collects fees from its licensees and distributes those fees to its members and affiliated foreign societies.

III. A Distance Education Exemption For Digital Transmissions Should Not Be Enacted Due to the Transformation of the Media Industry and the Educational System

Set forth below is ASCAP's review of who appears to be using and who appears to be supplying distance learning in all its myriad manifestations. The inevitable conclusion that must be drawn from this review is that this dynamic sector is flourishing and shows no need for an expanded exemptions or regulations.

A. The Metamorphosis of Education in America

The changes in today's environment have caused a corresponding change in the traditional educational model. The instructors, the students, and the manner and means of instruction have all radically evolved. What factors have caused this dramatic educational evolution?

(1) Change in Demographics. We are living in an aging society; 65 percent of the U.S. population is over 40 years old. Moreover, two-thirds of the workforce will still be employed in the year 2000 and 80% of that workforce will need retraining.[1]

(2) Change in Economic Climate. The marketplace and manufacturing environment has become more international, requiring additional knowledge to compete effectively. Changes in workplace technology and processes require ongoing education and training throughout one's career. Just-in-time manufacturing increases the demand for just-in-

---

[1] Distance Education at Penn State: Visions, Principles and Policies (Aug. 1, 1996)(http://www.outreach.psu.edu/de/programmatic_vision.html).

time training in education. Thus, knowledge and re-training are becoming essential for economic survival.

(3) <u>Change in Technological Environment</u>. Telecommunications and computing technologies are converging into a single, powerful communications environment that will merge work, entertainment and education. The ability to access technology for education from home or work directly contributes to their integration.

As a result of these changes, educational institutions are refocusing their long-term strategies. Distance education has become a major part of that focus. As stated in a University of Maryland report, the future outlook for distance education is based on:

> a renewed understanding of both strategic threats and opportunities of the next decade: changing student markets, new demands for accountability, need for greater diversity among institutions and their programs, external competition from institutions of higher education and entrepreneurial suppliers of educational services, and curricular transformation – all greatly influenced by dramatic developments in technology.[2]

1. Who Are The Students?

Today, the traditional definition of the higher-education student – the 18-23 year old full-time student – no longer characterizes America's student body. Currently, 6.7 million Americans are enrolled part-time in colleges and universities. Over 80% of these students are

---

[2] University System of Maryland, <u>White Paper from the Chancellor's Symposium on Policy and Distance Education</u> (1997) (http://umuc.edu/ide/whitepap.html).

adults aged 25 and over.[3] While many of these students enroll in traditional degree programs, most enroll in continuing education and certification programs which are offered by accredited colleges and universities and, increasingly, by professional associations, private for-profit learning centers and other nontraditional educational institutions. Traditional educational institutions are keenly aware of this trend and the growing competition seeking to win over this market.

As the Dean of New York University's School of Continuing and Professional Studies observed about the program which he oversees, its curriculum "is designed to set the stage for an affirmation that the relationship among education, professional growth, and career has changed: from preparation in advance of a career to a lifelong commitment carried through one's many careers."[4] As expected, the number of continuing education programs and their corresponding enrollments are significantly expanding. Certification programs are growing at a rate of 20% annually.[5] Continuing education programs are growing at an even quicker pace; at Stanford and Northwestern University's business schools, for example, the number of participants in their executive continuing education programs are up almost 50% since 1991 and 1994, respectively.[6]

---

3 New York University Virtual College Web Site (visited Feb. 2, 1999) (http://www.scps.nyu.edu/virtual/html/3evaluation.html).

4 New York University Web Site, A Message From Dean Gerald A. Heeger (1998) (http://www/scps.nyu.edu/dyncon/abus).

5 Time Select/Business Report , Time, July 20, 1998.

6 Id.

The changing student population can be characterized essentially by two types of students. The first are the "professional students," who, in response to recent needs and a growing desire for retraining and professional development, take courses related to, or in enhancement of, their careers. The second type of students are those that take courses for the sheer pleasure of knowledge; so called "recreational students," often older people who may have the luxuries of time and money to spend on such courses.

The number of "professional students" is growing at a staggering rate; estimates range between 35 and 45 million people are taking classes or training related to their careers.[7] One survey found that employees rank continuing education as a more important benefit than child care, flextime and family leave.[8] "Academic and corporate professional education is a $100 billion a year business in the United States."[9] Corporate spending on education and training is $80 billion per year and growing.[10] For example, the law firm of Baker & McKenzie is investing about $5 million dollars for all its attorneys to take two-week executive-education management courses at the J.L. Kellogg Graduate School of Management at Northwestern University in order to prepare its employees for the dynamics of today's global marketplace. Similarly, the brokerage firm of Edward Jones immerse employees in 17 weeks of classes and study sessions at a cost of

---

7 Id.

8 Petersons Web Site, Who is Learning at a Distance (visited Feb. 2, 1999) (http://www.petersons.com/dlearn/who.html).

9 New York University Virtual College Web Site (visited Feb. 2, 1999) (http://www.scps.nyu.edu/virtual/html/3evaluation.html).

10 Distance Education at Penn State: Visions, Principles and Policies (Aug. 1, 1996) (http://www.outreach.psu.edu/de/programmatic_vision.html).

$50,000 to $70,000 per head[11] and Dartmouth University's Amos Tuck School of Business and the Harvard Business School provide the accounting firm of PriceWaterhouseCoopers special three-day and five-day executive education programs for its partners.

Recognizing the vast size of the market for recreational and professional students, educational institutions have identified distance education as a critical means of responding to this new market's demands. Distance education is geared perfectly to meet the demographics of this new student body that would otherwise find traditional education choices prohibitive due to work, time or other constraints. It is no surprise then that the average distance education student is 34 and is employed full-time. More than 40% have previous college credits or a completed degree.[12] Nearly 20% of higher education institutions with distance education courses offer courses designed specifically toward adult basic education or continuing education aimed at the recreational and professional student.[13] For example:

- New York University advertises its Courses Online as a part of its School of Continuing and Professional Studies as follows: "whether you are a busy professional who needs just-in-time learning or you are simply someone who prefers the convenience of taking a course from your home, SCPS offers you a wide variety of exciting on-line opportunities." Included within this program are non-credit recreational courses such as "Discipline: Setting Limits for Toddlers to 5-Year Olds" and "Intro to HIV Mental Health: A Primer For Counseling" as well as professional classes such as "Network Computing" and "Data Communications Systems" and programs that permit executives around

---

[11] The 100 Best Companies to Work For in America, Fortune Mag., Jan. 11, 1999.

[12] Learning to Avoid Scholastic Fraud; Education if You Plan to Earn a Degree Outside the Traditional Classroom, Doing Your Homework is Key to Finding a Legitimate School, L.A. Times, Nov. 16, 1998.

[13] U.S. Department of Education National Center For Education Statistics, Distance Education in Higher Education Institutions at 14 (Oct. 1997).

the world to learn about network and database technologies by using them in a richly endowed online environment.[14] Many of these courses are described by the director of the Information Technologies Institute Program as "so specific and narrowly focused that they would not really be applicable toward a degree."[15]

- Pennsylvania State University's distance education program offers more than three hundred courses to help one "work toward a degree, move up the career ladder, or expand your understanding of subjects as diverse as nuclear engineering and dietetic food systems management." Specially advertised is its "Philately Series," courses on stamp collection.[16]

- The University of Minnesota offers "anyone" through its online distant learning program the ability to "advance your career with skill-based courses" and to "enhance your life with courses in almost every subject area imaginable."[17]

- University of California at Berkeley offers on asynchronous on-line continuing educational extension program that offers "a wide array of accredited courses for college credit, professional development, and personal interest."[18]

- Parsons School of Design, in collaboration with the New School for Social Research, offers art related online courses, from children's book illustration to interior decoration and design. Other schools with similar online offerings include the Corcoran School of Art in Washington, D.C. and the Minnesota College of Art and Design.[19]

---

[14] Courses Online at New York University School of Continuing and Professional Studies (visited Feb. 2, 1999) (http://www.scps.nyu.edu/on-line/html/overview.html).

[15] Time Select/Business Report, Time Magazine, July 20, 1998.

[16] Pennsylvania State University Web Site (visited Feb. 2, 1999) (http://outreach.psu.edu/de/il/il.html).

[17] University of Minnesota Web Site (visited Feb. 2, 1999) (http://cee.umn.edu/dis).

[18] Tour of University of California Extension Online (visited Feb. 2, 1999) (http://www-emil.unix.berkeley.edu/online/tat2/default.html).

[19] Art Schools Become Creative About Online Instruction, Wall Street J., Feb. 4, 1999, at 87.

In particular, digital distance education programs are being geared to take advantage of the need for continuing professional development and business training. As stated by one major corporation that collaborates with universities to operate a strong distance learning program:

> Organizations must train and retrain their employees to increase their knowledge base. Knowledge is viewed as a corporate asset, and the sharing of knowledge is a key to the future competitiveness. Higher education has the faculty expertise, the instructional experience, and the ability to award credit and degrees. In a rapidly changing educational environment, colleges and universities must expand their 'markets', find new students or 'consumers' for their 'products', and develop new products geared to the needs of those new consumers.[20]

2. Who is Offering Distance Learning Programs?

One method of reaching these "new" types of students is, as discussed above, through online or other digital continuing education classes aimed at the general public. But, colleges and universities recognize that the "consumers" for their "product" are not only on campus, but also in the offices and cubicles of workplace America. Thus, a second method for colleges and universities to reach these "profitable new markets and [obtain] greater opportunities to increase their exposure"[21] is by transmitting digital distance education courses directly into the workplace. Corporations, for their part, perceive distance education as a valuable means to educate their employees. As a consequence, corporations are partnering with universities to transmit distance education programs directly to, and often developed specifically for, the

---

[20] Lucent Technologies Web Site, Distance Education and Partnerships: Tools for the Future (visited Feb. 2, 1999) (http://www/lucent.com/cedl/distedpart.html).

[21] Id.

professional development and training needs of a particular corporation. Examples of these corporate partnerships abound:

- In 1996 New York University and IBM announced a partnership to provide information-system courses over a global computer network to IBM professionals worldwide. N.Y.U. is discussing similar on-line course formats with other companies.[22]

- Stanford University developed its Center for Professional Development which provides live and asynchronous distant education courses and customized educational seminars in a variety of formats including Internet, CD-rom and video to technology professionals at over 300 corporate and government entities.[23]

- Baylor College of Medicine and General Electric Co.'s GE Medical Systems have teamed up to beam 24-hour distance continuing education programs to hospitals for a fee.[24]

- Columbia University has entered into a partnership with AT & T whereby Columbia transmits courses to employees of AT & T. Columbia's goal is to develop and enhance partnerships with industry and provide the professional science and engineering communities with access to Columbia resources.[25]

- AT&T developed its AT&T Learning Network® Virtual Academy, which through collaboration with Pennsylvania State University's World Campus, George Washington University and other universities, provides access to online courses that provide a range of professional development options for educators.[26]

---

[22] Time Select/Business Report, Time Mag., July 20, 1998.

[23] Stanford University Web Site (visited Feb. 2, 1999) (http://stanford-online.stanford.edu/live/forum.html).

[24] Wall Street J., Feb. 2, 1999, at A1.

[25] See Lucent Technologies Web Site (visited Feb. 2, 1999) (http://www/lucent.com/cedl/cu.html).

[26] AT&T Web Site (visited Feb. 2, 1999) (http://www.att.com/learningnetwork/virtualacademy/intro.html).

- United Technologies Corporation ("UTC"), an international corporation with $21 billion in sales, developed a program with Boston University, University of Connecticut, Rensselaer Polytechnic Institute and other universities, to transmit distance education seminars, short courses and degree courses to UTC employees.[27] For example, Massachusetts Institute of Technology transmits presents seminar that discusses conducting business with Japanese companies, covering cultural and business topics.

- Pennsylvania State University operates a Distance Education Contract Program through which it customizes professional training programs for corporations. Illustrations of past programs include those established for pesticide applicators and carpenters.[28]

- The University of Wisconsin-Extension provides, through the Educational Teleconference Network, continuing education classes to physicians, nurses and other professionals at 165 sites around the state.[29]

Colleges and universities realize that they must shift their focus to this burgeoning corporate segment of the student body not only because that is where the students are, but because they are competing with: (a) corporations and (b) private for-profit entities, both of which aim to gain a part of the new distance education market.

This trend is illustrated by the fact that corporations, which have traditionally run training programs for their employees, are now developing distance education programs on their own for in-house continuing professional development. For example, Graduate Health Systems, a Pennsylvania corporation with hospitals and health care units uses video conferencing for its employees' continuing medical education. GHS felt it needed the continuing education because

---

[27] Lucent Technologies Web Site (visited Feb. 2, 1999) (http://www.lucent.com/cedl/utc.html).

[28] Pennsylvania State University Web Site (visited Feb. 2, 1999) (http://outreach.psu.edu/de/contprog/contract_programs.html).

[29] Lucent Technologies Web Site (visited Feb. 2, 1999) (http://lucent.com/cedl/wisline.html).

"health care is so competitive * * * [and they had] to continue growing [their employees]."[30] Another example is Metropolitan Life Insurance Company's use of video conferencing to hold training on various topics such as contracts and corporate responsibility.[31]

Similarly, private for-profit entities now operate distance education programs which compete with those offered by colleges and universities. Examples of such entities and their course offerings include:

- ZD Inc. Online University offers Internet users unlimited asynchronous online classes for $7.95 a month or $69.95 per year.
- The American Institute for Computer Science, Inc. is a state licensed virtual educational institution, which provides online asynchronous distance education classes. Students can earn Bachelor of Science and Master of Science degrees in computer science.[32]
- Scholars.com is an online educational training provider, which provides courses designed for experienced computer professionals.[33]
- University of Phoenix which bases its online headquarters in San Francisco enrolls some 4,000 students in its online continuing education classes.[34]

Some colleges and universities and these for-profit educational providers are coming to realize that their interests overlap and are now working together to reach the evolving

---

30 Id.

31 Id.

32 American Institute for Computer Sciences, Inc. Web Site (visited Feb. 2, 1999) (http://www.aics.edu/scholars/join.html)

33 Id.

34 Classrooms Without Walls; More Students are Taking College Courses Online, S. F. Chron., July 20, 1998.

student market. Accordingly, many of these for-profit institutions contract with colleges and universities to use of the latter's courses as part of their distance education "product." For example, Sylvan Learning Systems, Inc., a publicly traded corporation which provides personalized instructional services to individuals and training to more than 300 corporations, created the Caliber Learning Network, Inc. through a joint initiative with MCI Communications Corporation. Caliber operates numerous "campuses" where it makes available materials from universities and other educational "content providers" to corporations and professional students through integrated PC-based workstations, Internet access and satellite and video conferencing technology. As explained by Caliber:

> Caliber acts as the ultimate bridge between businesses and universities – helping corporations assess their specialized needs and then identifying the most expert university or commercial source to provide instruction. After a partnership has been established and a curriculum has been designed, Caliber configures the content for enterprise-wide delivery across its multi-site network.[35]

Yet another illustration is America Online's Digital City, a leading for-profit online supplier of continuing education and operator of OnlineLearning.net, which has teamed up with UCLA to offer classes from UCLA-Extension within its online offerings.[36] Some universities recognizing the commercial nature of education, are beginning to take a "if you can't beat them,

---

[35] Caliber Learning Network, Inc. Web Site (visited Feb. 2, 1999) (http://www.caliberlerning.com/customsolutions.html).

[36] See Onlinelearning.net Web Page (visited Feb. 2, 1999) (http://www.onlinelearning.net/corporateinformation/pressreleases/pr1_0199.html).

join them" approach. New York University, for example, offers its online courses through NYU on-line, Inc., a for-profit spin-off of the university, which NYU intends to take public.[37]

As illustrated above, digital distance education is the evolving response to the changing nature of education in America. These courses are not aimed primarily at the traditional student, but rather are utilized increasingly for the benefit of the growing market of new students. In response to which the for-profit sector competes or partners with traditional colleges and universities.

3. What is Being Charged and by Whom?

Just as the line between universities and corporations is beginning to become blurred, even the concept of "private" company can be deceiving here and thus, complicate the question of what is being charged by whom and for what. For example, as noted above, NYU, the not-for-profit university, is intending to take its for-profit spin off, NYU on-line, Inc., public. Some private companies have under their wing private foundations that offer the on-line courses and others are not-for-profit entities, which offer courses through their fee charging subsidiaries. For example, the Public Broadcasting Corporation ("PBS"), a not-for profit corporation, through a subsidiary, charges a license fee for its Adult Learning Service to some 2000 colleges and universities. Over 600 universities and schools pay license fees to PBS for use of its Adult

---

[37] 99 People to Watch in 1999, Time Out New York, Jan.28, 1999 - Feb. 4, 1999, at 24.

Learning Satellite Service® and Ready To Learn® digital satellite distance learning programs.[38] Total license fees paid to PBS for distance education courses totaled nearly $11 million in 1997.[39]

Tuition for "distance education" courses runs across a wide range, from low monthly charges to "attend" recreational courses to steep fees. The fee range itself is yet another reflection of the diverse range exemplified by distance students. Tuition for full-degree distance education programs can reach as much as $80,000.[40] Even noncredit, continuing education courses, such as those offered by New York University, can range in costs as high as $5,000 and can go as low as $400.[41]

While it is clear that students are being charged some form of fee to participate in distance education courses, it is less clear who is receiving the "benefits" of these tuition fees. In some cases as noted above, universities have entered into alliances with the technology companies. These collaborations appear diverse, including ones where the university pays the private companies to supply the programs to true joint ventures in which the risks and benefits are shared. Whatever the arrangement, two facts are clear: colleges and universities are investing substantial sums to offer distance education and the private entities involved in this process, on their own, or through collaborations, are receiving some financial benefit from their collaborative efforts.

---

38 See PBS Filing of Interest (Dec. 7, 1998) at 2.

39 PBS 1997 Financial Report, PBS Web Site (visited Feb.2, 1999) (http://www.pbs.org).

40 Geteducated Web Site, Leap Ahead With Distance Ed: The Virtual MBA (May 4, 1998) (http://www.geteducated.com/leapahead/leap050498.htm).

41 Time Select/Business Report, Time Mag., July 20, 1998.

In sum, with between 35 and 45 million people taking continuing education courses, and many of whom now forming the growing sub-set paying tuition to take distance education courses, there would appear to be no reason why copyright owners should be denied the right to negotiate some form or compensation related to the use of their property in these courses.

B. The Use of Music in Distance Education

With the advent of digitized computer and on-line multimedia educational uses, music has gained a new place in distance education. Particularly within CD-rom, other computer based courses, within on-line asynchronous courses, music is being used increasingly to enhance the overall technological experience and not as substantive course material, i.e. music instruction. For example, music is being used in non-music courses as opening themes, background, topic breaks and transitions. Music is also beginning to be studied as a component of other traditional courses, like political science, history and sociology, and more newly developed courses, like music therapy for autistic and disturbed children.

To the extent a musical work is part of a digital transmission, that work is now vulnerable to being copied, perfectly, millions of times, and re-transmitted globally, all without compensation to the copyright owner of the musical work and without that owner's ability to control his or her work's use or further use, much less the ability to prevent the work from being distorted, decompiled or reassembled.

Digital transmissions differ from analog transmissions in numerous respects. Digital files, particularly music files, can be simply copied, permitting perfect duplicates of the

original recording. Additionally, the music files can be isolated and stripped from a larger multimedia work. Once isolated, perfect copies can be retransmitted indefinitely. A well-known practice among users of the Internet is to seek out, copy, download, and retransmit these digital files. Not too long ago copying and downloading a digitized music file would take hours. Today's technology permits files containing music to be done in minutes. For example, the MP3 digital format permits very substantial compression of digitized music allowing users quicker and easier access to copyrighted musical works. Recently a company designed a pocket-sized player (similar in size to those used for cassettes and compact disks) to listen to MP3 downloaded music files. The damaging effects this will have to copyright owners are obvious.

For example, the New York University's Virtual College offers a teleprogram using Lotus VideoNotes technology. VideoNotes permits users to capture and embed video files in Notes documents and databases; the files are sent directly from the NYU server to the students' personal computers giving the student the ability to make a local copy on his or her own student personal computer's hard disk. Considering, as discussed above, that music is increasingly being used as enhancement to the technological experience, as openings, background and breaks, music is thus even more vulnerable when course material is sent to students in this manner.

From ASCAP's perspective, the need for security measures to protect digitally transmitted music is plain. However, the manner and method of implementing these measures is not. There is no end to the creative and innovative solutions that parties are presently evolving. The music industry, at all levels, is working on security measures aimed at preventing "pirating" of music. It is experimenting with numerous products and systems including encryption (which ensures that only the person who is entitled to download the music can play it back), identification (creation of digital watermarks with imbedded information about who sent it, wrote it and owns

it) and copy protection (prevents copying or limits the storage period of a downloaded file).[42] Nevertheless, these systems are not failsafe. Indeed, as soon as one system hits the market, pirates are figuring out ways to circumvent it. ASCAP appreciates that Congress has taken concerns about preventing circumvention seriously enough to address them in the DMCA, but the reality is that private parties are the ones left to enforce their rights and are best able to figure out methods of protecting against unauthorized acts of copying.

ASCAP urges the Office to recommend that Congress support the wisdom of allowing parties who have a stake in protecting their works -- from the educators whose products are being transmitted to the copyright owners whose works are made a part of that product – to work together in developing, negotiating and implementing the security provisions which meet their needs.

Last, it should be noted that ASCAP is only authorized to license the non-dramatic public performance rights of its members and that many of its members are also members of the National Music Publishers' Association and the Harry Fox Agency, Inc. The latter organizations are authorized to represent these members' other rights relating to reproduction and distribution. Here, ASCAP's expressions of concern over the capability to make and distribute perfect copies of music from digital transmissions are not meant to encroach on these other organizations' rights to speak to these issues. Rather, ASCAP's concern stems from the likely link between more pirated copies leading to the likelihood of more transmissions, without compensation, of ASCAP members' works and members' loss of control over the nature and terms of these performances.

---

[42] Trying To Get In Tune With The Digital Age, N.Y.T., Feb. 1, 1999, at C1.

IV. Prior Government Studies Have Recommended Against Expansion of These Narrowly Drawn Exemptions

Should the Office conclude, as ASCAP urges, that no expansion of the fair use or instructional exemptions is needed, the Office will not be alone in that conclusion. The issue of digital transmissions has been studied repeatedly in the past few years by various government commissions and task forces. All have reached the uniform conclusion that leaving this sector and the parties involved to develop methods of licensing on their own is preferable.

The Information Infrastructure Task Force by the President of the United States, whose Working Group on Intellectual Property (the "Working Group"), after extensive public comment and testimony, produced a Report on Intellectual Property and the National Information Infrastructure. That report surveyed the unprecedented challenges to the copyright marketplace made by the growth of computer and digital technology. The Working Group concluded in its final report that "[t]he marketplace should be allowed to develop whatever legal licensing systems may be appropriate for the [National Information Infrastructure]."[43] This position is also supported by governmental agencies, such as the FCC which notes that technological shifts associated with the Internet dovetail with the communications industry's transition to a world of

---

[43] Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group On Intellectual Property Rights 53 (Sept. 1995).

overlapping competitive firms, and that the greatest contribution the government can make to the development of the Internet is successfully opening the communications sector to competition.[44]

The Working Group further concluded that the impact of digital technology on the fair use of copyrighted works by librarians and educators, in particular, needed to be studied and accordingly, convened a Conference on Fair Use ("CONFU") to discuss fair use issues, and if appropriate and feasible, to develop guidelines for fair uses of copyrighted works by librarians and educators, including distance learning. A Distance Learning Working Group met through 1997 but failed to reach a consensus on the need for, much less to develop acceptable guidelines on distance education.[45] The Distance Learning Work Group attributed its failure to reach distance education guidelines to among other reasons, the dynamic and evolving nature of the whole field. As stated in the CONFU Report:

> Although participants in the working group believe that fair use applies in some aspects of such instruction, they did not develop fair use guidelines to cover these situations because they felt that the area was still unsettled, in that the technology is rapidly developing, educational institutions are only now beginning to experiment with such distant learning courses, and publishers and other content creators are in the early stages of developing materials and marketing strategies for publisher-produced computer network delivery of distant learning materials. The working group suggested that the issue of fair use guidelines for asynchronous

---

[44] See FCC Office of Plans and Policy, OPP Working Paper No. 29: Digital Tornado: The Internet and Telecommunications Policy (Mar. 1997) cited in U.S. Copyright Office, A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals, In the Matter of Revision of the Cable and Satellite Carrier Compulsory License, Docket No. 97-1 (Aug. 1, 1997).

[45] See The Conference on Fair Use, Final Report to the Commissioner on the Conclusion of the Conference on Fair Use at 14 (Nov. 1998).

computer network delivery of distance learning courses be revisited within three to five years. (Emphasis added)[46]

By contrast, another CONFU Working Group, did result in a consensus on acceptable guidelines in other contexts. For example, the Consortium of College and University Media Centers ("CCUMC"), comprised of a large group of copyright owners and users that agreed upon guidelines for educational multimedia.[47] Although ASCAP did support these guidelines, it should be underscored here that these guidelines represent the type of private and voluntarily arrived at arrangements that parties – if left free – can arrive achieve more efficiently and flexibly than government imposed regulations. Thus, in response to the Office request for comment as to the role such guidelines should play (63 Fed. Reg. at 71169), ASCAP would request that the Office find that private parties are equipped and able to arrive at guidelines, which are tailored, to their particular concerns.

Notably the growth in Internet access, just like the growth in distance learning, does not appear to have been impaired by the lack of an expanded exemption to included digital transmissions. The availability of expanded bandwidths is speeding and easing digital transmissions over the World Wide Web. Internet use is growing by leaps and bounds. An estimated 40 million people accessed the Internet in 1997; by 1999 the number will quintuple to 200 million.[48] Indeed, the Federal Government has made it a goal to dramatically enhance access

---

[46] The Conference on Fair Use, Final Report to the Commissioner on the Conclusion of the Conference on Fair Use at 12-13

[47] Id. at 14 – 15; and see Appendix J.

[48] Danthu Thi Phan, Note, Will Fair Use Function On The Internet?, 98 Colum. L. Rev. 169, 186 (1998).

through the National Information Infrastructure; Vice President Gore vowed to provide Internet access to every classroom, library and hospital by the year 2000.[49] Educational institutions certainly realize the significance of the Internet. In 1995 only 22% of those higher education institutions which offered distance education courses used the Internet and other computer based technologies as a means to transmit their courses. By 1998 that figure quadrupled to nearly 85%.[50] Given these trends, one can only conclude that distance education programs of all kinds will be increasingly available and deliverable.

Finally, ASCAP submits that the Office's report should remind the present Congress that at the time the existing exemptions were enacted, the Congressional reports accompanying Sections 107 and 110 sought to underscore the highly circumscribed and narrow application intended for the transmissions to be exempted.[51]

---

[49] Id. at 171 fn.11. citing Vice President Al Gore, Remarks as Delivered to the Superhighway Summit (Jan. 11, 1994) (http://www.whitehouse.gov./WH/EOP/OVP/other/superhig.txt).

[50] U.S. Department of Education National Center For Education Statistics, Distance Education in Higher Education Institutions at 38 (Oct. 1997).

[51] H.R. Rep. No. 94-1476, at 65-74, 81-84, reprinted in 1976 U.S.C.C.A.N. 5659, 5678-5688, 5695-5698; S. Rep. No. 94-473, at 61-687, 73-76.

V. ASCAP and All Copyright Owners Should Be Permitted to Support Distance Learning and Protect Their Rights Through Free-Market Licensing

ASCAP remains firmly committed to ensuring that its members and members of affiliated societies are compensated for the public performance of their works. Throughout its almost century of existence, ASCAP has embraced technological innovation and the increased opportunities for public performances of music that innovations in transmission technology have brought for its members. At the same time, on behalf of its members and members of affiliated foreign societies, ASCAP has sought to ensure that reasonable compensation is paid for these new forms of transmitting copyrighted musical works publicly. When radio appeared as a viable means for music performance, ASCAP ensured that members would realize due compensation from those performances. With the advent of television, cable and satellite technologies, and other means of transmitting public performances of music, such as in elevators, on-hold telephone lines and airplanes, ASCAP has sought to ensure that members would be duly compensated for the performance of their works through these new means of transmission and thereby, ensure that members have an incentive to create music for these new forms of media transmissions.

That commitment continues to date. With the dawn of digitally transmitted music over the Internet, ASCAP became the first performance rights society to offer web sites a license to transmit works within ASCAP's repertory.

ASCAP stands ready to negotiate appropriate forms of licenses suited to the use of music in distance educational programs and by their providers. As this industry is so dynamic, diverse and changing, ASCAP does not now have any fixed ideas on how to set a reasonable fee

for the public performance of members' works in distance learning or whether it would even seek to license all forms of distance learning.

Nonetheless, ASCAP is confident that with time, with its own increased understanding of distance education and with the good faith efforts of users of music involved in distance education, it can negotiate appropriate licenses for this field —licenses that will be reasonable and efficient. More to the point, ASCAP has numerous licenses which it can point to as proof that it is capable of licensing all forms of transmissions containing public performances of works in ASCAP's repertory. ASCAP can look to several existing licenses that could be used as starting points for licensing distance education programs. For example, ASCAP has had a twenty-year history of licensing colleges and universities under a blanket license. These licenses have been successfully negotiated through "common agents" (in the parlance of the Copyright Law), such as the National Council on Education ("ACE") and the National Association of College & University Business Officers ("NACUBO"), and similar entities that represent most of the college and universities in this country. ASCAP also issues a license covering training and development programs as well as a "Music in Business License." More recently, as noted above, ASCAP has offered licenses to web site operators performing music.

By and large, these licenses have been blanket licenses for modest, but reasonable fees with minimal reporting obligations, in exchange for which, the user of ASCAP's repertory is given total access and rights to perform publicly any of the works in the repertory over the medium being licensed. For the area of distance education, ASCAP could envision that in addition to negotiating a reasonable fee, it might also negotiate acceptable devices and measures for ensuring the security of the copyrighted music contained in digitally transmitted distance learning programs in exchange for permitting a certain type of licensee access to the repertory.

In conclusion, ASCAP urges the Office to recommend to Congress that no legislation or regulatory schemes be imposed relating to an expansion of the fair use or instructional use exemptions and that the Office recommend instead that Congress permit a market based system for the licensing of public performances of copyrighted works in digitally transmitted distance education.

Respectfully submitted,

/s/_____
I. Fred Koenigsberg
Samuel Mosenkis
White & Case
1155 Avenue of the Americas
New York, New York 10036
Tel. (212) 819-8200
Fax (212) 354-8113
e-mail Koenifr @ newyork.whitecase.com
e-mail Mosensa @ newyork.whitecase.com

/s/_____
Joan M. McGivern
ASCAP
One Lincoln Plaza
New York, NY 10023
Tel. (212) 621-6204
Fax (212) 787-1381
e-mail Jmcgivern @ ascap.com

Dated: February 5, 1999