

Testimony on Distance Education and Copyright Law

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The California Virtual University is a project of the four segments of higher education in the State of California. These segments include the three public systems—The University of California, the California State University, and the California Community Colleges—and the independent colleges and universities. The CVU Web site (**Error! Bookmark not defined.**) went on line in Fall 1997 with 700 courses; today, it hosts 2,000 courses offered by 112 accredited universities and colleges. The CVU projects that at the end of its fifth year its online catalog will contain 15,000 courses offered by about 240 institutions.

The CVU does not grant degrees. Students use the Web site to find appropriate programs and courses from participating universities and colleges. They then enroll in those institutions and receive their degrees or certificates from the school from which they took their courses. The CVU estimates that in Spring 1999 there will be about 25,000 students enrolled in courses listed on its Web site. In four years, that number is expected to be in the hundreds of thousands.

The rapid growth of online education, both in the number of courses offered and the number of students enrolled, reflects the transformation of our economy into a “knowledge economy.” That term means that the greatest engine of economic growth today is the production and sale of knowledge. The fastest growing companies in the economy emulate the past success of General Electric, Dow Chemicals, and 3M, three companies that grew to giants by developing new products based on research. The best part of the U.S. economy now rests on the making and use of knowledge.

An economy so founded must make education one of its principal activities. The growth of knowledge requires the continuous and pervasive education of the workforce and the customers. Both companies and their customers need an educational system that gives people the tools to make and use the new products on which our prosperity rests.

All knowledge production rests on the use of knowledge; old knowledge is the raw material from which new knowledge is manufactured. Education is the activity through which people expand their knowledge and improve their intellectual skills. **Education is no longer a stage of life; it is a condition of life.**

Telecommunications technology now permits a truly interactive distance teaching-learning experience that approaches the quality and effectiveness of the traditional classroom. People really can get first-rate advanced education without stopping their careers or leaving their families. People are eager to take advantage of the new opportunities to advance or just keep up with their careers.

Copyright Law and Education

The educational market is huge, and copyright holders earn fortunes there. The issues raised by the language of the current copyright law focus on uses of information for educational purposes that cannot be accomplished through the normal market. These include the use of copyrighted materials that have gone out of print, which is a major problem for educators, and the use of materials in electronic form.

The difficulty of getting permission to use out-of-print materials—usually through copying and in the new media through distribution to students via the Internet—often greatly hinder the educational process. Faculty members have to use works that are not at good or apposite as the ones they had wanted to use, or they have to do without any material on a subject that they regarded as important for their course. Many of the battles over coursepacks—collections of materials for courses that are created by faculty members and produced by copy shops—center on the use of copyrighted works that either have gone out of print or that are parts of large, prohibitively expensive books.

Information resources either converted to or created in electronic formats are licensed, not purchased. Licensing replaces the copyright law with contract law, and universities have found themselves at a disadvantage in dealing with publishers. Licenses are time-bound as well as restricted to specific audiences. No one is uncomfortable with the restrictions to audiences, as long as the requirements do not also restrict the locations or technologies through which those audiences can gain access to the materials. However, education does not conform to strict time limits. Students constantly need additional time to complete courses; time-bounded licenses deprive them of access to the information resources they need after the clock has run out.

Moreover, universities are repositories of information for the use of future students and scholars. The licensing system wipes out our intellectual and cultural memory after the license runs out. This diminution of our intellectual capital is a major problem, in some cases a catastrophe, both for the schools and for the wider society, which has always relied on universities and their research libraries to preserve the hard won gains of intellectual work.

All of these problems are magnified for distance education, because these programs are almost totally dependent on the use of information in electronic formats. Nonetheless, you may ask why distance educators see a problem in the law, when our programs and enrollments are growing so rapidly. One answer is that we are in the very early stages of this new dimension of education, and the rate of growth results from the small base on which we are building.

A second answer is that we have so far done the easy things—the professional courses and programs that rely on information resources specifically prepared for them. The expansion of distance education to its full potential will have to rely on materials that

were not produced for the education market. Of course, any complete educational program must study information produced for ordinary business, social, political, or entertainment purposes.

Finally, a third answer is that the problems in the current copyright law are already evident in the library. Restrictions on the use of library materials that are in electronic form and the difficulty that libraries have providing digital resources to the academic community are clear indications of the problem for all educational users of the new media.

As written, the law hinders all education, not just distance education. The technologies that permit high quality distance education also permit the enrichment and improvement of on-campus education. Increasingly, faculty members are introducing the Internet technologies into their on-campus, classroom-based courses. The language of the current law does as much damage to traditional educational programs as it does to distance programs.

Moreover, the current law has two defects, not one. The first is that the distinction that the law draws between dramatic or performed work and nondramatic or merely read work is a significant stumbling block to educators. Works meant to be performed, which exist fully only in their performances, have dominated world culture since the middle of the 20th century. It is not possible to educate today's students in any of the humane or social sciences without the study of such works. The law's distinction between types of works hinders the educational process and should be removed.

Furthermore, the law should not restrict the amount of a work that may be used in an educational program. The reading or viewing of entire works—the works as their authors or makers intended them to be experienced—is a crucial element of a good education. When understanding is the objective, the small part cannot suffice for the whole work. A complete education requires the study of complete works of literature, complete films, and complete dramas.

The second defect of the current law is that it defines educational institutions in purely physical terms. The framers of the law knew that education rests on access to information and in Section 110 granted educational institutions an exemption from the strict requirements of Section 106, the basic law. This exemption consisted in a transfer of authority to use a work from the copyright owner to the educator. The law says that in certain circumstances and within the confines of a non-profit educational institution and for the purposes of education, faculty members have the right to use copyrighted materials without asking permission of or paying royalties to the owner.

The problem is that the law defines the educational institution as a physical space, the classroom. Educational activities in the classroom are exempt from the law. The walls of a classroom block out the legal authority of the copyright owner. They form a containment building.

Now, the new telecommunications technology is doing to the classroom what it has already done to the library. The library no longer has opaque walls and neither does the classroom. Both of these institutions—the library and the classroom—have had a glorious past; they will have a glorious future only if we let them out of their physical boxes. Unfortunately, the current copyright law relies on and reinforces the packaging.

The current law traps the institutions in the past, limiting their ability to fulfill the social and economic demands put on them. We cannot survive as a successful society if we do not permit our schools to evolve and change to meet new needs.

In fact, the current law contains the solution to this problem. Section 106 refers repeatedly to the copyright owner's power to control the **public** use of his or her creation. By implication, Section 110 treats educational institutions as private enterprises. So long as a copyrighted work is used within the **private, non-profit community** of a college or university, the use is exempt from the law.

The physics of education is changing, but the basic purposes and character of the academic community of faculty and students are not. The faculty member and his or her students still form a private, non-profit community such as the one envisioned in the current law. However, the exemptions of Section 110 must be rewritten to define educational institutions in terms of community rather than of physical setting or specific technologies of teaching and learning.

A copyright law that would serve the needs of education, both distance and campus-based, would permit the transmission of copyrighted works within the academic community of a school—i.e. among the faculty and registered students of the school. Modern telecommunications technology provides ways to restrict access to materials on the Internet, and the exemption of Section 110 should rest on the willingness and ability of academic institutions to restrict use of copyrighted materials to authorized persons.

The language of the statute should not restrict educational institutions any more than the technology does. The text should make clear the purpose of the exemption and should define educational institutions according to their members, not their methods. This is the way that schools actually define their communities when they issue identification cards for access to campus facilities and institutional services.

In conclusion, current copyright law deals with the public use—sale, distribution, and control—of copyrighted materials and exempts educational uses on two grounds. First, it defines the audience of non-profit, academic institutions as private rather than public, because this audience sits in a classroom, and second it distinguishes among types of copyrighted works. The exemption is valid for some works but not for others, for parts of works but not whole works. On behalf of the community of educators represented in and by the California Virtual University, I urge a revision of the law in two respects:

- First, the law should define the private community of the educational institution by membership—faculty, staff members, and registered students. Modern telecommunications technology has added a non-physical dimension to schools; distance education is only an expression of that new dimension. The current law treats the physical reality of an educational institution as the whole. It is now only a part, and, in distance education, a very small part. The new law should define the academic community as a community, not as a place.
- Second, the law should not distinguish between types or genres of copyrighted work. U.S. law should not restrict the capacity of educational institutions to educate. Such a restriction contradicts the underlying policy of the law, which embodies the value our society puts on education. The restriction is also bad for copyright holders, because the value of their copyrights depends on the existence of an educated public, a public that needs information and ideas.

Thus, so long as an institution can restrict the use of copyrighted materials to those who are members of the university's community and promulgates policies that instruct the members of its community about the proper use of copyrighted materials, the exemption of Section 110 should prevail.