

BEFORE THE COPYRIGHT OFFICE
UNITED STATES LIBRARY OF CONGRESS

In Re:)	
)	
Promotion of Distance Education)	Docket No. 98-12B
Through Digital Technologies)	
)	
)	
)	

REPLY COMMENTS OF NATIONAL MUSIC PUBLISHERS' ASSOCIATION

This provides the reply comments of the National Music Publishers' Association ("NMPA") in response to the Request for Comments of the Copyright Office on the Promotion of Distance Education Through Digital Technologies (63 Fed. Reg. 71167 (Dec. 23, 1998)).

In general, NMPA believes that a constructive exchange of views occurred in the public hearings and first round of written comments on this important topic. One point in particular appears agreed to by all commenters: the present range of distance education techniques using digital technologies is broad and varied. The pace of technological change in this area is rapid, and predicting future uses in this area is almost impossible. The consensus on this point demands what NMPA believes is an inevitable conclusion by the Copyright Office: in light of enactment just four months ago of the Digital Millennium Copyright Act, it is too early to amend copyright law further with respect to digital technologies.

I. Support for Certain Comments.

A. Licensing.

Many commenters noted that licensing is the logical solution to the copyright challenges posed by distance education, emphasizing that digital technologies will facilitate such licensing to a previously unobtainable extent.^{1/} Indeed, this observation came from copyright users as well as owners.^{2/} The Copyright Clearance Center ("CCC"), the foremost entity for clearance of paper coursepack materials in the educational environment, noted in its comments that: (1) a relatively smooth and uniform system now exists for clearing rights to utilize paper course packs, and (2) CCC has established and is expanding an Electronic Course Content Service for the swift clearance of electronic rights to material desired to be used by educational institutions.

Yale University Library has established a site it calls "LIBLICENSE" for the purpose of "licensing digital information." One portion of Yale's site, entitled "Publishers' Licenses," provides "links to

^{1/} See e.g., Comments of Recording Industry Association of America, Motion Picture Association of America, Association of American Publishers, Broadcast Music, Inc., and American Society of Composers, Authors and Publishers.

^{2/} See Comments of Consortium of College and University Media Centers, & (e).

texts of actual licenses supplied by the kindness of publishers already doing business with electronic texts." Thirty-seven license-site links were listed on the day this site was visited.^{1/}

The above facts demonstrate that the clearance process for "paper" course packs now runs relatively smoothly. Electronic clearance and licensing systems are not perfected but are developing rapidly (such as the CCC Service and the Yale site), and most parties acknowledge the technical capacity of on-line systems and networks to facilitate the licensing of copyrighted material in digital distance education programs -- either today or in the very near future. Given the likely emergence of a "technological solution," it would be premature for the Office to recommend statutory changes directed specifically at distance education before such solutions have the opportunity to take hold.

B. Existing Publishing Activities.

The Association of American Publishers joined NMPA in observing that a healthy educational publishing market exists now that would be threatened by the broad distance-education exemptions proposed.

AAP members believe that today's vibrant marketplace for diverse and innovative materials used in distance education programs has developed in reliance upon, and without the need for significant change in, the basic principles of U.S. copyright law, including the protection of exclusive rights of copyright subject to limited exceptions under Section 107 (fair use) and Section 110 (instructional use) of the Copyright Act.

^{3/} <http://www.library.yale.edu/~llicense/publishers.shtml>, visited Feb. 22, 1999.

An example from the music industry is instructive. The Hal Leonard Corporation began its print publishing operations in 1947, at a time when most school bands played "serious" music. The company founders had professional band experience, and they used their skill to arrange "popular" music for school bands. Their work was a success: soon band directors across the country wanted their arrangements. Eventually many music publishers began licensing Hal Leonard to provide school band arrangements of their songs. Thus began the Hal Leonard publishing business and -- importantly -- an entirely new line of the music publishing industry, geared to the needs of the educational market.^{4/} Companies such as Hal Leonard, G. Schirmer, Cherry Lane Music Publishing, Alfred Publishing Co., and Warner Publications would be directly and substantially injured if the digital distance education proposals addressed herein were to be adopted. The Office must proceed cautiously in recommending any legislative changes that could eliminate an existing line of the publishing business or prejudice the ability of publishers to develop their products to satisfy new electronic markets.

C. Protective Technology.

There was broad agreement among all commenters that a variety of technologies exist to protect works from digital copyright infringement.

Technologies to protect the security of distance education programs include cryptographic algorithms such as DES and RSA encryption, and kerberos and public key infrastructures. These ciphers and protocols are widely available and are incorporated into several research projects, most prominently VIC, available from the University of California at Berkeley.^{4/}

^{4/} http://www.halleonard.com/hal_original/history; visited Feb. 22, 1999.

^{5/} Comments of University of Michigan, & 3.

Other technologies that have been developed or are being developed for specific industries do not apply only in the educational context. In addition, a number of Commenters noted that Copyright Management Information technologies will enable copyright owners to facilitate and license many uses of works in ways that are convenient and economical for users.

All technologies, however, have their limits. As the University of Michigan acknowledged, "[p]roducts that incorporate [protective] technologies are able to prevent the unauthorized use of copyright materials, but do not serve to prevent unauthorized retention or re-use of copyright materials."^{9/} While technological protection is improving, "the answers are not yet complete. It can be anticipated that these technologies will mature over the next five years."^{10/}

Indeed, even recent systems attempting to provide comprehensive protection are not fail safe. Although passwords help protect digital materials online, they can be "hacked." University systems like The University of Texas have been working both in-house and with outside vendors to develop authentication procedures that are more secure. Trust infrastructures and

^{9/} University of Mich., Id.

^{10/} Id.

key encryption are two areas that will provide the security we seek. These technologies are here today but the costs of development are high.^{1/}

In short, technological solutions are promising but not yet "mature." The most advanced technologies are expensive to implement, so are not yet widely available, and most do not address the problems of inappropriate retention or re-use (i.e., do not protect creators and copyright owners against subsequent infringements of the reproduction and distribution rights by recipients of protected materials distributed in distance education). Finally, the newer technologies must be tested sufficiently to ensure that they cannot be readily "hacked." These facts again counsel for further study of the issue before the Office presents recommendations for legislative change.

II. Critique of Certain Comments.

NMPA wishes to emphasize its disagreement with the following comments.

A. American Association of Universities, American Council on Education, National Association of State Universities and Land Grant Colleges, American Association of Community Colleges, American Association of State Colleges and Universities, EDUCAUSE, and National Association of Independent Colleges and Universities (hereinafter, "AAU").

1. *"Section 110(2) should be changed to enable the display and performance of copyrighted works at remote locations at times elected by students."*

(Hereinafter, "AAU Comment #1").

This proposal attempts to cloak a wholesale abrogation of the reproduction and distribution rights in an exemption for the "display and performance of copyrighted works **at remote locations at times**

^{8/} Comments of the University of Texas System, & 3(b).

selected by students" (emphasis added). The exemption suggested reaches far, far beyond the current parameters of section 110. If video-teleconferencing alone were being suggested, then the performance and display rights are indeed the key rights implicated. Because the AAU proposes to employ the distance education exception through any electronic means available (including the Internet and other computer networks), however, the proposed exemption takes on an entirely different character.

Every major piece of copyright legislation addressing the digital environment has recognized that the rights of reproduction and distribution are directly implicated in the transmission of works via the Internet. It is pure sophistry to describe the reproduction and distribution of works of authorship being transmitted via the Internet as *incidental* to a *performance or display* on the other end. Once *loaded* onto the Internet, a work becomes fully reproducible and distributable without the control or authorization of the copyright owner. If the AAU's amendments to section 110(2) were made, copies of works "given" to students by educational institutions for distance education could be expected to "leak" onto the Internet to be reproduced by others with no arguable fair use or other privilege.

The AAU proposal ignores a fundamental distinction Congress has made between education-based exceptions to the performance right and to the reproduction and distribution rights. The present exceptions in section 110 apply to the performance right only and permit certain performances without the authorization of the copyright owner in specific instructional (or similar) situations. The education-based exceptions to the reproduction and distribution rights are contained in section 108, and they are much narrower. In essence, section 108 permits libraries and archives to make very limited reproductions or distributions of works for preservation or scholarship purposes "if the reproduction or distribution is made without any purpose of direct ***or indirect*** commercial advantage."^{1/} This principle was reinforced by Congress

^{9/} 17 U.S.C. § 108(a)(1) (emphasis added).

in 1998 in the term extension legislation. No use may be made by the library or archives of a work in its final term unless such library or archives undertakes a "reasonable investigation" into whether the work "is subject to normal commercial exploitation."^{10/} AAU Comment #1 clearly anticipates at least an indirect (if not direct) commercial advantage to the educational institutions conducting the distance education program and clearly does not limit the exceptions to works that are not subject to normal commercial exploitation. As such, AAU Comment #1 clearly exceeds the accepted boundaries on educational exemptions to the reproduction and distribution rights.

There is a rational reason for the differences in approach between section 110 and section 108. A public performance occurs and then is over. The "use" is made during the single performance, and no residual or subsequent use occurs. Reproduction and distribution of a work, on the other hand, allows for repeated uses for a potentially infinite period of time. This is particularly true in the digital environment where a single act of reproduction can be the seed for countless infringing copies. Exceptions to the reproduction and distribution rights aimed at facilitating scholarship and research are therefore even narrower than section 110. AAU Comment #1 extends the educational use exceptions to the reproduction and distribution rights far beyond the model in section 108 and the recent Copyright Term Extension Act. The proposal should be rejected.

In support of its proposal, the AAU argues that:

^{10/} 17 U.S.C. ' 108(h).

current 110(2) exemptions are based on technologies extant more than two decades ago. These exemptions need to be updated to accommodate the expanded educational opportunities supported by new technologies.^{11/}

This argument fundamentally misconstrues both basic copyright principles and recent copyright legislation addressing digital technologies. The reproduction and distribution rights in sections 106(1) and 106(3) are not mere technology-tethered legalisms subject to change each time a Silicon Valley start-up launches the latest hardware craze. Rather, these rights embody the fundamental principles of copyright: one may not copy or disseminate the protected work of another without the permission of the rights owner -- whether such copying and dissemination is by stone tablet, piano roll, eight-track tape, or digital electronic hardware. Indeed, the drafters of the 1976 Act, when codifying the reproduction and distribution rights, recognized that they were establishing principles that would *transcend* technological change:

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

17 U.S.C. ' 102(a). This pre-Internet language reads with perfect fluency in the digital era. Regrettably, AAU Comment #1 ignores bedrock copyright principles in order to "achieve the educational objective." Not only does the AAU proposal violate the contours of sections 108 and 110, but it is an entirely short-sighted proposition: without availability of the right to reproduce and distribute a work, what copyright owner would consider making works available to the educational market?

^{11/} Comments of AAU at 2.

Congress has recognized and reaffirmed the importance of the rights of reproduction and distribution each and every time it has addressed the impact of digital technologies on copyright. In the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), the No Electronic Theft ("NET") Act of 1997, and the Digital Millennium Copyright Act of 1998 ("DMCA"), the drafters took pains to preserve the fundamental rights of distribution and reproduction, even when addressing thorny questions of specific uses in the digital environment. For example: (1) the DPRA clarified and confirmed that "a compulsory license under [section 115] includes the right of the compulsory licensee to distribute or authorize the distribution of a phonorecord of a nondramatic musical work by means of a digital transmission which constitutes a digital phonorecord delivery";^{12/} (2) the NET Act clarified that criminal liability can lie for certain noncommercial acts of infringement, "including by electronic means";^{13/} and (3) the DMCA, while creating certain safe harbors from liability for copyright infringement damages for on-line service providers that comply with specific standards of conduct, did not amend and did not directly or indirectly encumber the reproduction or distribution rights of copyright owners whose works were being disseminated electronically.^{14/} Moreover, during debate on the DMCA, "webcasters" and other parties argued that certain copies "incidental" to the public performance of a work should be exempt from copyright infringement liability. These arguments were rejected by Congress; no such provision is contained in the DMCA.

The AAU Comments reflect an underlying policy that directly conflicts with a series of carefully considered amendments to the copyright law crafted by Congress to address the challenges of the Internet. As the Office is well aware, the AAU proposal has broad policy implications for a range of

^{12/} 17 U.S.C. ' 115(c)(3)(A).

^{13/} 17 U.S.C. ' 506(a)(2).

^{14/} See, title II of P.L. 105-304 (Oct. 28, 1998).

technologies and commercial uses -- and ultimately for the general development of electronic commerce in copyrighted works. The Office should refrain from advancing such a sweeping and controversial proposal in the context of its distance education study. Instead, it should follow the clear congressional precedent and reject any proposals that would undermine protection for the exclusive rights of reproduction and distribution in the digital environment.

2. *"The distinction in current law between types of works that qualify for a distance education performance exemption should be eliminated."* (Hereinafter, "AAU Comment #2").

The distinction between dramatic and nondramatic works was important in the pre-digital era and remains so today. Quoting a leading treatise:

Section 110 reflects the judgment that, because performances typically generate only a small portion of the revenues earned from the dissemination of nondramatic literary works, exempting their performance in a narrow range of circumstances will serve the interests of performers and their audiences without depriving the copyright owner of the economic returns it needs to support its investment in the work. By contrast, ***since performances represent the principal source of revenue from the dissemination of dramatic works***, Congress did not exempt the performance of dramatic works, even under section 110's closely circumscribed conditions.

Goldstein, COPYRIGHT, ' 2.9.2 (emphasis added).

With regard to dramatic musical works, the distinction is even more critical. Dramatic musical works tend to have relatively limited markets, and the potential prejudice to the creator and copyright owner of exemptions from coverage for such works is substantial. The identical concern caused Congress to apply the "mechanical" compulsory license in section 115 to ***nondramatic*** musical works only. See 17 U.S.C. ' 115(a)(1).

The AAU claims that "the distinction between dramatic and nondramatic works has never made educational sense" ^{15/} That, of course, is only half the story. The distinction makes absolute sense from

^{15/} Id.

the copyright owner perspective (described above), and Congress has recognized it appropriately. The policy behind section 110 is not to exempt any use that would arguably benefit educational institutions, but rather to exempt only certain educational uses where doing so is unlikely to injure the copyright owner. When balancing the interests of educational institution and copyright owner, eliminating the distinction between dramatic and nondramatic works is inequitable.

The AAU argues further that, "[n]ow that technology allows almost any type of work to be combined with other types of work in a multimedia presentation, a law that allows a still image to be displayed distantly, but does not allow that same image in motion media to be performed distantly undermines the educational possibilities of distance education."^{1/} This line of argument is misleading. It is possible that use of a small portion of a "motion media" work in a multimedia educational presentation may qualify for the fair use privilege under section 107. The scope of AAU Comment #2, however, is infinitely broader: it would allow the Drama Department of the University of California at Berkeley to perform "Les Miserables" via an Internet connection to 21,738 undergraduate students at the Berkeley campus, 19,343 undergraduate students at the UC Davis campus, 23,925 undergraduates at the UCLA campus, 9,599 undergraduates at the UC Santa Cruz campus, and 16,700 undergraduates at the UC Santa Barbara campus, and would allow each student to keep an electronic copy for subsequent viewing. The copyright owner in this example would be without recourse as to any of the public performance, reproduction, or distribution rights that had been or would be infringed, even though the public performance market and market for the sale of copies of 90,000 people had been harmed. Such a result is grossly unfair and unacceptable.

^{16/} Id.

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

Recognizing the problems inherent in wholesale encumbrance of the reproduction and distribution right, AAU Comment #3 would limit the proposed extensions of section 110(2) to circumstances where the educational institution can provide reasonable protection against downstream reproduction and redistribution.¹⁷ This is, however, a hollow and ineffective limitation.¹⁸

First, what does "reasonable protection" mean? The AAU Comments state that it "would mean that material is not *easily* reproducible or redistributable".¹⁷ This definition renders the limitation meaningless. In the digital, Internet context, protection against copyright infringement must be meaningful, because the ease of mass copying and the creation of perfect copies make even a small vulnerability to infringement potentially fatal to the copyright owner's interests. Indeed, the "anticircumvention" provisions of the DMCA were enacted in recognition of this fact.¹⁹ If material digitally transmitted in distance education programs is merely not "easily" reproducible or redistributable, then even a novice computer hacker could overcome the protection. Such hackers have been known to attend educational institutions, and indeed pirate music sites on the Internet are often operated by university and college students.¹⁹ The level of protection suggested is simply

¹⁷/ Comments of AAU at 3 (emphasis added).

¹⁸/ See 17 U.S.C. §§ 1201, 1203, 1204.

¹⁹/ See Comments of RIAA at 2 ("Over the past three years, we have seen a proliferation of pirate music sites on the Internet . . . University and college students operate the majority of these sites.")

not sufficient to protect copyrighted material, or to avoid prejudice to the legitimate interests of creators and copyright owners.

In addition, AAU Comment #3 only offers protection against **downstream** reproduction and "redistribution." That means that students (whatever their number) listening to a "performance" of Winton Marsalis' most recent jazz CD via an Internet connection in a distance jazz education course may use an MP3 file and download a perfect copy of that song for later use. Instantly, the market for a certain work or works would decrease -- why pay for that work if it is available for nothing? Soon, the incentive for creation of artistic works would resultingly diminish -- and for some works quite substantially. In this light, the statement that "the educational benefits to society [of the AAU proposal] are considerable, and the risk of market harm is minimal"^{1/} is nonsensical. AAU Comment #3 ignores the potential audience -- in sheer numbers -- of distance education programs, and ignores the current availability of authorized uses that both serve society's needs and avoid harm to creators and owners of protected works.

4. *"In circumstances where access to information is controlled . . . but the mode of delivery cannot provide reasonable protections against reproduction or redistribution, some form of exemption should be provided but might require a stronger assurance against market harm"* (Hereinafter, "AAU Comment #4").

^{20/} Comments of AAU at 3.

Given the definition of "reasonable protection" in AAU Comment #3, AAU Comment #4 effectively argues that distance education programs should be able to reproduce, distribute, perform and display copyrighted works ***even if they might be easily reproduced or redistributed.*** Acknowledging the risk of infringement, the AAU qualifies this Amodest proposal@ by stating that an exemption in this circumstance should only apply if it Awould not have a significant market impact if [the work were] inappropriately reproduced or redistributed. Such performances might include student performances or other non-commercial performances of a current dramatic work.@^{21/}

NMPA believes that if the work may be easily reproduced or distributed in the digital environment, then the work should not be available for distance education using digital technologies unless the copyright owner or its agent provides written authorization. It would be outrageous to compel a copyright owner of a dramatic work to have his or her work transmitted over an insecure digital network where further reproduction or distribution may be achieved with ease -- even if Aonly@a student or Anoncommercial@ performance of such work would result. Once a work has been reproduced and distributed through the Internet, some market for the work has been reached and some prejudice to the legitimate interests of the copyright owner has occurred. This fact is particularly true in new and emerging digital markets.

5. *Licensing.*

The AAU observes, A . . . fundamentally, the power to license is the power to determine the terms of use and ultimately, the power to deny access to information@^{22/} This is flashy rhetoric, but it has no basis in copyright law.

^{21/} Id. at 3-4.

^{22/} Id. at 4.

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. ' 102(b). Educational institutions are free to teach any idea, concept, principle, or discovery they wish -- whether through digital distance education programs or otherwise. They are not free, however, to violate any proprietary right they wish to in the process. As educational institutions know well, a rich variety of works are made available today in digital form through licensing arrangements that serve the needs of the institutions, instructors, and students. Copyright owners have every incentive to continue to work with the education community to develop products, licensing mechanisms and terms that serve its needs.

6. *AAU Conclusion.*

The AAU concludes by arguing that, because educational institutions directly promote the progress of science and the useful arts, to the benefit of society as a whole, this congruence with the Copyright Clause of the Constitution justifies whatever copyright exemption is requested by these institutions. One can only hope that such tortured logic is not regularly being taught by educational institutions to our nation's youth.

The AAU proposals would directly hinder the progress of science and the useful arts by denying protection to any works transmitted in the course of digital distance education, thus suppressing the incentive to create such works. The proposals would threaten certain lines of the publishing business geared to development of educational materials. How can the elimination of educational materials and courses of instruction, especially developed for the education market -- coupled with the potential for significant harm to other works of authorship -- be viewed as promoting the progress of science and the useful arts? This argument, if extended to its logical extreme, would excuse any act of infringement by an educational institution: for example, a professor or an academic department could post a book on a website for anyone, anywhere to download for free, thus destroying the market for that book. Educational institutions are able to

teach any subject matter, from the classics to popular culture. The balance struck by the Constitution, however, does not give educational institutions the right to stand in the shoes of publishers and to make decisions regarding the distribution of works that will ultimately conflict with the exploitation of such works.

B. Consortium of College and University Media Centers.

The Comments of the Consortium of College and University Media Centers ("CCUMC") confirm that many distance education proposals are breathtakingly broad. While the CCUMC should be commended for stating with clarity the exemption it desires, NMPA must take strong issue with the cavernous exception proposed.

1. Definition of "Distance Education". The extent of the exemption is best understood through the Comments' definitions of key terms.

[D]istance education, also referred to as distance learning or ***distributed education***, covers a broad range of approaches and techniques. Delivery systems make use of cable, satellite, ***Internet***, campus networks, and telephone lines. Software is as varied and may include groupware, ***Web based programs***, videoconferencing, teleconferencing, cable tv, e-mail and others.

(Emphasis added.) This definition demonstrates the breadth of the exception being sought for distance education: in essence, distance education includes distribution of copyrighted works through the Internet and similar mechanisms of electronic dissemination. Indeed, as noted in the CCUMC comments, "distance education encompasses ***global distribution*** as well as delivery across single campuses" ^{23/}

This definition also exposes as disingenuous the AAU contention that distance education relies primarily on the performance or display rights where "distributions and reproductions . . . are necessary but ***incidental*** means to achieve the educational objective." ^{24/} The CCUMC definitions demonstrate that

^{23/} CCUMC Comments at 2 (emphasis added).

^{24/} AAU Comment #1, at 2 (emphasis added).

exemption from the distribution and reproduction rights is not merely incidental but essential to the distance education objectives of many of the commenters. As such, the proposed exemption for distance education is unrealistically broad. Encumbrance of copyright owner rights under sections 106(1) and 106(3) would do substantial damage to copyright owners (indeed, potentially eliminating most educational publishing lines of business) and is entirely inappropriate.

2. Definition of "Classroom". The CCUMC Comments advocate "the delivery of distance education courses to enrolled students wherever they may be, and make clear that places devoted to instruction may include the home, or perhaps even the workstation." The broadening of a copyright exemption from face-to-face teaching activities at accredited nonprofit educational institutions to the home and the for-profit work place would: (i) create an exception that will swallow the rule, and (ii) far exceed the discrete policy basis for any exemption under section 110. According to the CCUMC, exemptions from reproduction, distribution, performance and display rights should be available for "learning" by any person, in any setting, and by any electronic means, including the Internet. With an exception this broad, no underlying rule would remain.

3. Portions and time limitations. The CCUMC Comments state that, "Use of a full poem, complete images, and even perhaps display of a full motion picture, for example, are legitimate and appropriate classroom uses of legally obtained material." This begs the question of "legally obtained for what purpose?" If a complete copyrighted musical work is "legally obtained" for home use, the obtaining party has absolutely no right to further reproduce or distribute that work without the permission on the copyright owner. If the party obtains a license to use the work more extensively, then further reproduction and distribution would be allowed within the scope of the license. This appears to be exactly the type of permission, however, to which the CCUMC objects.

NMPA is surprised by the breadth of the exemptions proposed by these comments. In discussions with CCUMC representatives regarding fair use guidelines, there was substantial conceptual agreement that certain uses limited to specified portions of works in digital multimedia educational contexts would fall within the fair use privilege, and broader and more extensive uses would require the permission of the copyright owner. The CCUMC Comments, unfortunately, appear to reject this shared conceptual starting point.

4. Fair Use. CCUMC observes that, "Affirmation of fair use for digital materials in distance education is essential if [distance education] initiatives are to continue." As stated above, NMPA believes this is a reasonable proposal, notes that it is much different from an absolute exception to copyright protection, and is prepared to engage in discussions to clarify fair use in the digital environment. Indeed, NMPA engaged in similar discussions with CCUMC representatives in 1996. It is prepared to do so again. Educators are now engaging in distance education programs and many institutions are developing their own materials for this purpose. Many commercial publishers are also developing new products and means to offer licenses for new as well as existing works. The demonstration of distance education programs hosted by the Copyright Office featured a range of institution-produced programs -- many of which bore a copyright notice. Distance education is developing and expanding rapidly under the flexible framework of existing law. No amendment is needed or warranted

III. Conclusion.

As described above, the proposed distance education amendments to the Copyright Act effectively eviscerate the reproduction and distribution rights in the digital environment and should therefore be rejected. In addition, because online licensing options are developing swiftly, and because protective technology is improving but is not advanced enough to protect copyright owner rights in the digital

environment, it would be premature for the Office to recommend legislative changes before these critical areas have developed further.

NMPA does not object, however, to the establishment of pilot programs that would test distance education proposals advanced by educational institutions, if the pilot program is entirely internal to the nonprofit educational institution (or to any other party that volunteers to participate in such a pilot program). For example, where employees of a nonprofit educational institution are the authors of copyrighted works or teaching materials that such institution wishes to use in the course of a digital distance education program, that institution could negotiate with other interested institutions terms of use of the works in question that are consistent with distance education objectives. The Copyright Office could study these distance education pilot programs and report back to Congress on: (1) the extent to which they increase the effectiveness of the distance education mission, and (2) their ability to protect copyright-owner interests. A study such as this may provide valuable information to be applied on a larger scale, and would avoid errors inherent in amending the Copyright Act prematurely before online licensing and copyright-protection technologies and regimes have sufficiently evolved.

Respectfully submitted,

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