Before the COPYRIGHT OFFICE LIBRARY OF CONGRESS

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In the Matter of

: Docket No. RM 98-12

Promotion of Distance Education

Through Digital Technologies :

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WRITTEN REPLY 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") hereby submits these reply comments in response to the comments filed pursuant to the request of the Copyright Office (the "Office"), published at 63 Fed. Reg. 71167 (Dec. 23, 1998).

As a general observation, ASCAP is heartened by the many thoughtful comments in the proceeding. However, ASCAP is troubled by the black and white world depicted in many of the comments filed by educational institutions, wherein the need for expanded statutory exemptions is presented as a life and death matter for the future education of America. Many comments filed by educational groups rest on two fallacious assumptions: (1) that digital transmissions are not different than analog transmissions and, therefore, the expansion to digital would merely "update" the law; and, (2) that a market based licensing regime could not evolve, despite evidence that one already exists and is rapidly evolving.

ASCAP hopes and trusts that the Office will seek to temper the hysteric tenor of many of the comments with the facts it has gathered. To that end, ASCAP urges the Office to recommend to Congress that further reasoned study be done on these issues, rather than further comprising the rights of copyright owners in the name of "education" without justification. Moreover, the Office should urge Congress to consider the implications of allowing unprotected digital transmissions to be employed by educators and "electronic" library reserves. However "convenient" for educators and distance educational students, these transmissions could have serious, even if inadvertent, ramifications not merely for copyright owners, but also for the U.S. economy, ranging from the loss of foreign copyright royalty payments to the possible abrogation of U.S. treaty obligations.

Rather than taking the black and white approach to the exemption issue,

ASCAP urges that the Office recommend to Congress that a working group be established

under the Office's aegis, comprised of representative educational institutions and copyright

owners:

- (a) to produce suggested guidelines on technological measures to ensure the security of digitally transmitted copyrighted works that users and owners could agree to use as part of their overall licensing arrangements;
- (b) to produce guidelines on the "fair use" of digital transmissions of copyrighted works that would take into account the manner in which digital transmissions are different than analog transmissions; and,
- (c) to promote means by which information on obtaining copyright clearances and licensing and security matters can be made more readily

available, and thereby reducing the level of confusion and apparent ignorance as to how to obtain clearances and licenses, as well as allaying copyright owners' fears over giving clearances for and licensing digital transmissions of their works.

We believe that if educational users and copyright owners are encouraged to engage in a continuing dialogue focused on these issues, appropriate market driven licensing models will continue to develop. More and diverse licensing models will, in turn, better meet everyone's needs.

I. A STATUTORY EXEMPTION FOR DIGITAL TRANSMISSIONS IS UNWARRANTED

A. The Availability And Development Of Distant Education Is Not Dependent On A Statutory Response

ASCAP agrees that fostering the further development of distance education is an important goal. Nevertheless, no concrete evidence has been offered that the lack of a statutory exemption has impeded its rapid and impressive growth to date. Nonetheless, certain educators argue that it is critical for the development of distance education that the current law be "updated." They argue that an exemption for digital transmissions would reflect the reality that the definition of the classroom has changed. Distance education students, they argue, should not be "penalized" merely because they are not learning in the traditional face-to-face environment. See Comments of the National Historical Publications and Records Commission. The fallacy of this position is that it assumes that leaving the law "as is" will prevent the development of distance education, leaving distance

education students at a disadvantage. As one educator claimed: "[Distance education] is likely to be stunted and scrapped by protectionist copyright laws." Testimony and Comments of Howard Besser, University of California; see also Testimony and Comments of Thomas A. Henderson, University of Missouri-Columbia at 2 ("without this 'fair use' access, the potential avenue for education will be greatly limited").

These assertions are contradicted by the facts; many of which ASCAP set forth in its initial comments dated February 5, 1999. In many instances, these facts were directly taken from a U.S. Department of Education study on the issue of distance education. For example, the number of distance education programs and students is growing at a phenomenal pace. In 1995, one third of higher institutions offered digitized distance education courses. In the following three years another 25% instituted distance education programs. With the explosive growth of the Internet and web-based distance education programs, this trend will only continue.

Indeed, ASCAP has shown to great extent that the proliferation of distance education programs has only spurred competition. Distance education is not, as the educators seem to indicate, merely an outgrowth of traditional education. It is primarily a response to the demands of adult professional and recreational students who comprise the bulk of the distance education population. Some educators readily admit this fact. See Testimony and Comments of Thomas A. Henderson, University of Missouri-Columbia at 4. As a result, the non-profit universities have consciously stepped into the multi-billion dollar market in direct competition with commercial education suppliers. And, as ASCAP demonstrated in its comments, many non-profit universities are joining into partnerships

with commercial ventures specifically to meet this market need. Thus, it is clear that the present availability of distance education has not been impeded by the lack of a statutory exemption.

B. Section 110's Exemptions were Narrowly Circumscribed

Various educators argue that an amendment to Section 110 to include digital transmissions will only "update" the current law to reflect the current state of education because "education is education." See Comments of the University Continuing Education Association. These educators fail to account for the fact that copyright law simply does not give a blanket exemption for educational uses. They also wholly ignore the narrow nature of the exemptions granted under Section 110(1) and (2).

The 1976 Copyright Act endeavored to impose on the exclusive rights of copyright owners on an expressly limited and narrow basis. One educator, filing comments in this proceeding, described the exemption as a "policy judgment that, on balance, educators should not have to spend time and money getting advance clearance to use certain copyrighted materials in particular ways." Comments of University of Maryland University College at 6. Regardless of how the purpose behind the exemption is characterized, the narrowness of the exemptions cannot be avoided. Section 110(1) was limited to face-to-face teaching by nonprofit educational institutions. Section 110(2), while allowing for transmissions, still required that the performance be part of a systematic instructional program by a government or nonprofit and be of material assistance or directly related to the teaching content of the transmission. The exemption was further restricted by

limitations on where the transmissions could be received and by whom; for example, requiring that the transmission be primarily for reception in classrooms or similar places "normally devoted to instruction."

Congress is required under the Constitution to promote the arts and sciences by securing to copyright owners exclusive rights in their creations, albeit for a limited term. The exemptions enacted in the 1976 Act attempted to satisfy this obligation on Congress by virtue of making these exemptions found in Section 110 (1) and (2) explicitly circumscribed and narrow in application. Many of the educators appear to have turned Congress' constitutional mandate on its head, calling for the use of the copyright law to further education. See Comments of the University Continuing Education Association (Copyright law is "vital" to "promulgate knowledge" which is an "objective worth legislating"). While undoubtedly the advancement of knowledge is a societal good, for Congress to fulfill its constitutional mandate requires that copyright owners' exclusive rights be protected, including the rights to receive due compensation for use of their works and to control the use and exploitation of their works. Granting broad exemptions for instructional use for digital transmissions, without accounting for the way in which digital transmissions are different, would be an unreasonable compromise of those rights.

The language of Section 110(2) admittedly uses the term "transmission" and thus, even though only analog transmissions were originally considered, the Office may now conclude that Section 110(2) can cover digital transmissions. But, the Office should not reach this decision without a significant qualification to account for the different risks digital transmissions pose to copyright owners. Because a copyrighted work that is

transmitted digitally faces risks not at issue in an analog transmission of that same work, the Office must still ensure that copyright owners are able to control the security of any digital transmissions made under Section 110(2). Without according copyright owners some rights to determine appropriate controls over digital transmissions made under exemptions, owners lose control over the use and future exploitation of their work. Such a loss of control was simply not contemplated when the narrow exemptions of either Section 110(1) or (2) were enacted in the 1976 Act.

While ASCAP believes that in time, security measures may alleviate these concerns, many educators in this proceeding did not dispute that security measures presently available do not properly protect the rights of copyright owners and that the technology to do so is still evolving. See Testimony of R. Michael Tanner, University of California, Santa Cruz.

ASCAP takes some comfort in the fact that Congress has recently demonstrated that it appreciates the threat posed to copyright owners by digitized archival copies. For example, Section 108, recently amended by the Sonny Bono Copyright Term Extension Act, Public Law 105-298, 112 Stat. 2827 (1998), limits the right of a library -- including a nonprofit educational institution acting as such -- to perform, reproduce, distribute and display a copy of a work in digital form for purposes of preservation, scholarship or research only if the work is accessed on the library premises.

In the present proceeding, some parties argued for a broad exemption permitting distant access to electronic library reserves and access to digital archives. They simply ignored Congress' recent demonstrated willingness to restrict access to digital

copies, requiring that copyrighted works be reviewed on the premises of libraries and archives. If Congress was willing to accord such restricted access to copies of such works, surely Congress will be concerned over the greater vulnerability of digital transmissions of copyrighted works. Accordingly, ASCAP urges the Office to recommend that Congress foster means by which private parties, users and copyright owners together, can develop methods for secure digital transmissions of copyrighted works.

C. Fair Use Guidelines for Digital Transmissions Can Be Developed

Some educators in this proceeding asserted that an expanded exemption is needed because guidelines cannot be achieved. They point to the fact that the CONFU negotiations over fair use guidelines for distant education broke down as evidence that such guidelines are unworkable.

To the contrary, ASCAP believes that a consensus on "fair use" guidelines for distant education was not reached then, due in part, to the fact that they were not urgently needed, and in part, because of the hope of copyright users that a statutory exemption would be enacted. Therefore, a recommendation by the Office against an exemption for digital distant education transmissions would actually act to propel users and owners towards a workable agreement by cutting off users' reliance on statutory action as a remedy. ASCAP would be amenable to practical distant education guidelines. Certainly, ASCAP and other copyright owners have shown a willingness to sign off on fair use guidelines in the past ("Proposal for Fair Use Guidelines for Educational Multimedia," Appendix J to the Final Report to the Commissioner on the Conclusion of the Conference on Fair Use, November

1998 ("CONFU Final Report")(available at http://www.uspto.gov under Conference on Fair Use).

II. A Licensing Regime Is A More Practical And Workable Solution

A. Licensing is Already a Reality in Distance Education Programs

Digital distant education programs currently operate by including materials created by the instructor or educational institution and those created by others, the copyrights for which are licensed by the educational institution. In this proceeding, various educators were critical of present licensing practices, including claims that: (1) license fees are too high; (2) licenses are too complicated; (3) some owners refuse to license; (3) many licenses prohibited digital use, including distant education; (4) licensing is too time consuming; and, (5) owners of certain works cannot be located.

Despite these complaints, the comments reflect that licensing of copyrighted works for distant learning courses and library reserve databases appears to be widespread.

See, e.g., Testimony of James G. Neal, University Libraries Johns Hopkins Libraries

(University of Maryland has 56 licensed electronic databases for use in research and study).

As stated by one leader in the industry:

Libraries and educational institutions negotiate hundreds, indeed thousands of licenses each year in support of educational activities. In the Library community we purchase or license approximately \$2 billion of information resources each year. <u>Licensing has become a fact of life in our institutions</u>. (Emphasis added.)

Testimony of James G. Neal, University Libraries Johns Hopkins Libraries. While certainly educators might prefer to have some part of this \$2 billion in information costs

"subsidized" in part by broadened exemptions, why should copyright owners be forced to carry this involuntary subsidy? Certainly, if the suppliers of computer hardware or telecommunications equipment were required to provide their products and services to educators for free, this would also reduce the costs of delivering distance education.

However, it would not be fair, just as it is not fair to force copyright owners to provide their work for free.

B. ASCAP's Blanket License Would be an Efficient Method for Licensing

Distance education, employing digital transmissions, the widespread use of the Internet and sophisticated multimedia programs in schools are all recent phenomena. So too are the methods for licensing these media. ASCAP has been licensing the performances of nondramatic musical works for 80 years. Over those years, ASCAP has encountered numerable new means of transmitting performances of works in its repertory. For each, ASCAP has stepped up and met the challenge of developing a fair and simple manner by which to license those works.

ASCAP offers numerous forms of licenses, designed to meet the needs of users of ASCAP's repertory. However, ASCAP has always believed that the most efficient method by which to assure full access to its repertory and the ability to use it freely is through the use of blanket licenses. ASCAP uses blanket licensing in dozens of industries, from airlines and hotels to taverns and sports teams and leagues. Indeed, ASCAP has been licensing colleges and universities under a blanket license for over two decades. More recently, ASCAP became the first performing rights organization to offer licenses for

performances on the Internet. The blanket license mechanism has long been accepted as the most efficient licensing mechanism for nondramatic musical rights. It permits a user to perform any work in the ASCAP repertory, or in the repertories of ASCAP's affiliated foreign societies, during the license term for a negotiated fee. The license fee can be, among others, a flat dollar fee, a per subscriber or gross revenue fee. ASCAP's licenses are governed by a consent decree (the "Consent Decree") entered with the approval of the United States District Court for the Southern District of New York (the "Rate Court"). Generally, the Consent Decree mandates that ASCAP's proposed license fees be reasonable and non-discriminatory for similarly situated users. Users always retain the option of licensing directly with the copyright owner, and not ASCAP.

The benefits to a blanket license are numerous. First and foremost, the license allows the user to perform the millions of copyrighted works of ASCAP's writers and publishers whenever they want without the worry of infringement litigation. This avoids the unnecessary risks of guessing whether their use is exempted under the Act. Secondly, the user avoids costly and timely administrative expenses. Otherwise, the user would be required to negotiate licenses separately with each copyright holder, keeping track of their performances and accounting for and calculating license fees based on individual performances. Given the vast number of users, members, and performances, without ASCAP's blanket license it would be impractical and cost prohibitive for ASCAP's members and users of its music to negotiate licenses in advance of musical works being performed.

As Marc Morgenstern, the Senior Vice President of Strategic Planning and New Media for ASCAP, testified before the Office, "the beauty of the blanket license is that there is room to accommodate." (Transcript of February 10, 1999 Hearing at 180:20-21). In the case of colleges and universities, it is not practical for ASCAP to examine every classroom use, or for every educator to get clearance on every use of music, especially when it is spontaneously employed. Instead, ASCAP's blanket license for colleges and universities which covers a broad range of music used on campuses, from fraternity parties to recitals, also accommodates under its coverage the "gray areas" of classroom use. Thus, even if the use was specifically examined and ASCAP and the educator were to disagree on whether the use was inside or outside the existing fair use and instructional use exemptions, the present license generally makes such a debate unnecessary.

Use of a blanket licensing structure for digital transmissions would not be impractical and unduly burdensome for educators. ASCAP has a long history of negotiating with industry groups acting on behalf of thousands of users. Local television, local radio, background and foreground music, and the hotel industries are some examples of the major user industries with whom ASCAP has achieved agreements after arms-length negotiations. Colleges and universities already negotiate market licenses with ASCAP at five-year intervals for the right to perform music on their campuses. Such licenses could be negotiated to include digital performances in distance education courses offered by these institutions. While such a license has not yet been negotiated, in all likelihood, it would constitute a negligible percentage of an institution's costs of operating a digital distance education program.

C. Licensing Practices Are Developing

Notably, ASCAP's blanket licensing model was singled out by educators as an example of a potentially workable license. Indeed, Mr. Aronofsky, a professor of international law at the University of Montana, conceded that he could easily envision extending ASCAP's present license to cover performances of music for distance learning programs:

Let me make a case for licensing if I might, not so much from the owner of copyright perspective but rather just as a general observation. . . . I think the music industry has done a magnificent job up to a point in creating - especially the most recent version of the agreements -- . . . a mechanism where we can get a licensing agreement that authorizes literally millions of multiple uses -- . . I think that what ASCAP and BMI have set up conceptually makes some sense here, if we can get some definitional parameters that everyone can agree on as to how these things might be used in [an] educational context. For example, my guess is that a lot of what our most recent music agreement doesn't as opposed to does permit is a lot of distance educational digital use of music, and perhaps the agreement itself needs to be expanded for a modest cost increase, if that's what it's going to take, to cover all these digital uses. . . . But I think it would be possible in my judgment to take a copyright clearinghouse center approach. . . . (Transcript of February 10, 1999 Hearing at 97:9 – 98:8).

For the record, we note that the complaints expressed by educators about licensing did not concern music, but rather concerned experiences with the owners of print media, photographs and images. Nevertheless, ASCAP is confident that licensing systems as simple and effective as those of the music industry will eventually encompass the print industry, whether by way of blanket licensing or one-stop license clearinghouses. Twenty years ago the Copyright Clearance Center ("CCC") was created to act as a licensing clearinghouse for paper photo-copies on an as-needed basis. Although problems and

difficulties existed at the outset –similar to those testified to here by the educators -- that system has developed into a simple and uniform licensing process for paper copies. See Comments of the Copyright Clearance Center. Today, to meet the move to digital technology, CCC instituted its Electronic Course Content Service ("ECCS") as a means to clear licenses for electronic course packs and reserves, as well as the Media Image Resource Alliance ("MIRA") to license photograph and image collections. See Comments of the Copyright Clearance Center. Undoubtedly, if licensing programs such as these are allowed to compete and develop, they will reach the fluidity and ease of the analog print licensing system that is the standard of countless educators, libraries and research centers.

Certain educators commenting in this proceeding complained of being unable to license works because of an inability to identify owners of some works or the refusal of some owners to license digital uses. These "problems," however, are not unique to the world of digital distance education, but are part and parcel of copyright life. Users will always be required to locate alternative or public domain works, or if applicable, rely on fair use provisions. See Testimony and Comments of Howard Besser, University of California (relying on fair use when copyright ownership is unknown). More importantly, the basis of copyright ownership is the exclusivity of rights. It is the owner's choice to license those rights. Some educators appear to fail to appreciate that one of a copyright owner's exclusive rights is the right to say "no" and to withhold or regulate the terms of a license. The main exception to this rule is fair use, and, as discussed above, ASCAP believes that copyright owners are willing to negotiate appropriate guidelines for digital transmissions.

Educators also complained of the refusal by owners to license their works for use in digital forms and transmissions. See University of Maryland University College. This is certainly understandable, if true. At this early stage of digital technology, with horror stories of illegal reproduction and distribution abounding, owners are still somewhat fearful of licensing digital uses. However, we believe that a market based licensing system could work to allay these fears. If the educators' demand and need for copyrighted works are as strong as they claim, owners and users will both work toward building a secure and effective system. Owners, understanding the income potential that can be earned in the growing digital world, will have the incentive to license their works to educators and to develop and advance effective security measures and easy and workable licensing systems. Users, who want the broadest possible access to copyrighted works, will work with the owners to develop those systems and programs. Prices, which serve as a concern to some educational licensees, will accordingly drop in relation to the increased competition that would flow directly from the development of more effective systems.

Fostering the development of effective licensing for educators and copyright owners will in the long run be the most effective way for Congress to promote distance education through digital technologies. ASCAP urges the Office to consider recommending to Congress its proposals as set forth at the beginning of these reply comments.

Respectfully submitted,

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