

STUDY OF DISTANCE EDUCATION
THROUGH DIGITAL TECHNOLOGIES
UNDER §403 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT
BY THE UNITED STATES COPYRIGHT OFFICE

COMMENTS OF ASMP,
THE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS
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I. Introduction.

The American Society of Media Photographers, ASMP, submits the following comments in connection with the study of distance education through digital technologies which the Copyright Office was mandated to conduct under §403 of the Digital Millennium Copyright Act. ASMP was founded 55 years ago to protect and promote the interests of those professional photographers who earn their livings by making photographs for publication in the various media. Over those 55 years it has grown to become the world's leading organization of its kind. ASMP currently has nearly 6,000 members, almost all of whom are freelance photographers.

Ever since the Copyright Act of 1976 became effective, freelance photographers have generally been the owners of the copyrights to the works that they create, and it is through the creation and licensing of those works that they earn their livings. The residual copyrights to the photographs of freelance photographers has given rise to an entire segment of the industry: stock photography. There are essentially only two ways in which freelance photographers create, license, and get paid for the use of their photographs: assignment photography and stock photography. Of the two, the stock photography market segment has by far the larger inventory of images.

Freelance photographers are typically self-employed individuals operating small businesses. As such, they receive no benefits, no paid vacations, no employer-provided health or other insurance, no employer contributions to retirement plans, and no job security or unemployment compensation. The costs of the basic equipment necessary to go into business as a freelance photographer come to approximately \$70,000., and that figure is close to the minimum. Equipment costs are often higher, and they are part of the ticket price for becoming a freelance photographer. If the photographer does studio work, rather than photographing in the field, those costs escalate dramatically. The costs of film and processing add many thousands of dollars to each photographer's annual overhead.

When photographs are made on assignment, freelance photographers are paid by their clients for the creation and usage of their copyrighted works. When photographs are made for stock, they are generally made without any specific client, and all the costs of

producing those photographs fall on the photographers. Such photographs are made with the mere hope that they may someday be licensed and that the photographer will then receive some payment. Unfortunately, the realities are that freelance photographers are so under-compensated that all but a relative handful would make more money by doing almost any other kind of work.

II. An educational exemption from copyright for distance education would be an unconscionable taking of photographers' property and a devastating financial blow to photographers.

As an example of the low rate of return on the photographer's investments, consider the economics of stock photography. We all know what has happened to the costs of film and processing in recent years. At a local, snapshot quality, one-hour lab near ASMP's office, it costs over \$22., plus tax, to buy and process a single roll of Kodak 35 mm. 400 speed, 36 exposure print film. This number should be increased by at least 25% to reflect the fact that professional quality film and processing costs are substantially higher per photograph than what amateurs pay. One can next safely assume that a pro will shoot many hundreds of photographs during a good day's shoot. On these numbers, a dozen rolls will cost approximately \$330., plus tax, and produce 432 photographs. Of those 432 photographs, however, like fish eggs, only a small number will ever survive. Industry reports tell us that an average of 2% of the photographs made by professional photographers get through the editing process and make their way into stock libraries.

Of those images that are put in stock libraries, industry reports tell us that only 2% will ever produce any revenues during the life of the photograph.

For that 2% of 2% that actually sell, our information is that the average price of a stock sale is approximately \$220. Of that amount, the agencies that license the stock images take commissions that now exceed 50% on average and are rapidly being moved by stock agencies up to 70%, plus expenses. Thus, for each of the few images that sell, photographers receive an average of \$100. or less, from which they have to pay all of their direct and indirect costs of production and sales.

Many of us remember the 1966 Antonioni movie, Blow Up, and recall David Hemmings pulling his Nikon out of the glove compartment of his Rolls Royce. For many of us, that was and is our image of professional photographers. Unfortunately for professional photographers, the Rolls Royce is every bit as unrealistic as is a pro's storing of a camera in a car's glove compartment. Most freelancers would probably make more money doing almost anything else, especially if they invested the money they expend for equipment, film and processing in the stock market instead of stock photography, but they continue to make photographs, despite the economics, because they love what they do. However, if one considers the finances described above, it immediately becomes clear that depriving photographers of revenues from images used for distance education, which one day will probably be the majority of educational uses, will turn what is already a marginal economic proposition into a losing one. While professional photographers may be willing to work for relatively little money, nobody can stay in a

business in which he or she loses money.

III. The issue is money and the stakes are the financial survival of individual authors.

The oral testimony and written statements submitted by many of the members of the educational community in these hearings have used buzz words and catch phrases like “academic freedom,” “denial of access to information,” “advancing learning,” “incentives to encourage creativity,” et cetera. Those words are purely and simply red herrings. The matter of copyright in a digital distance education environment consists of one issue and one issue only: money. The only question being decided first here and then in Congress is whether certain users of copyrighted material will have to pay for the rights to those uses. There is no information that will be withheld from the academic community; all the information that educators could ever want, and far more, will be readily available to them --- all they have to do is pay for it.

The fact that the users in question are educational institutions is a distracter, an aspect of the problem that gets in the way of a logical analysis. There is no educational exemption when schools, teachers and students want to buy computers. There is no exemption when the educational community buys the electricity to run those computers. There is no broad exemption under the Copyright Act when the educational community wants to license the software to run in those computers. And there should be no exemption just because that same group wants to increase its use of that software.

The reality is that the money needed to acquire proper rights to use copyrighted materials is relatively insignificant to the educational community, but crucial to the authors’ community. Even if the market at stake were a very large number, say \$100 million per year, when divided among all of the members of the educational community, schools, teachers, students, and even taxpayers, that number becomes tiny in its direct, per person impact. On the other side of the ledger, however, when divided among the comparatively small number of authors who own the rights to those works, that number becomes very significant, perhaps the difference between financial survival and extinction. In the President’s recently released budget for fiscal year 2000, more than \$150 million are proposed for funding under the Library Services and Technology Act, along with a \$25 billion bond initiative for buildings and \$1.4 billion for more teachers. \$286 million are proposed under the Reading Excellence Act. In fact, \$450 million are budgeted for the Technology Literacy Challenge Fund, an increase of \$25 million specifically to help pay for items such as educational software! The money is there.

In her testimony before the Copyright Office’s panel on January 26, 1997, Mary Burgan, the General Secretary of the American Association of University Professors pointed out that “Poets don’t make a lot of money and ought to be reimbursed (for the usage of their work).” Poets are, in that regard, no different from photographers. Most of them make very little money from the creation of their very valuable works. To give the educational community additional uses of those copyrighted works without paying additional fees for them would be an unconscionable, and socially undesirable, taking

of property from the very people who can least afford it.

IV. There is no need for any kind of exemption for distance education.

The demonstrations of digital distance education programs that were presented in connection with these hearings demonstrated clearly that there simply is no need for special treatment of distance education under the Copyright Act. There were programs created by both educational institutions and commercial publishers. They were indistinguishable in quality, which was uniformly very high. The programs demonstrated by the educators revealed that their needs for access to information are currently being met far more than adequately. Their programs left nothing to be desired. The programs demonstrated by the publishers revealed that the need to clear rights does not interfere with the production of quality programs. Commercial publishers in all media understand, and are not hampered by, the need for licenses of copyrighted works. In fact, the representatives from Pennsylvania State University specifically stated that they clear the rights before using any copyrighted materials for their distance education programming; and it was obvious from the demonstration that their educational endeavors are not impeded in any way by the policy and practice of obtaining licenses.

Perhaps the most revealing aspect of the distance education demonstration was the prominence given to the copyright notices placed by the educational institutions on the programs that they created. It was crystal clear that they have no intention of giving others the same free access to copyrighted materials that they are asking others to give them. The greatest irony is that, if the educational community were given a copyright exemption for distance education, its members would use that exemption for materials to create works from which they would seek to make a financial return.

V. The internet is not a classroom.

The very limited exemption under §110 does not apply to distance education. That exemption applies only to “face-to-face teaching activities” and only when they take place “in a classroom or similar place devoted to instruction.” Computer programs, whether delivered over the internet, via CD-ROM, or otherwise, do not meet either of those requirements under §110(1). Nor do they meet the requirement under §110(2) that the transmission of educational material be “... made primarily for... reception in classrooms or similar places normally devoted to instruction.” The world at large is simply not a classroom.

These limitations are of extreme importance: they keep the extent of unlicensed usage of copyrighted works to a reasonably controlled level, without creating significant damage to the revenues to which the copyright owners are entitled, and in a supervised environment where the opportunity for infringements are minimal. The extension of any exemption to the digital, distance learning environment would throw those critically important limitations and protections out the window. There would be no supervision. There would be the potential for instantaneous and global infringements, perhaps by students without the maturity and experience to foresee and understand the

consequences of their actions. Users would have the ability to make not just copies, but absolutely perfect clones, indistinguishable from the original. In the world of photography, a photographer's signature image, potentially worth many thousands of dollars over the life of the copyright, could be altered and/or copied and distributed around the world at the speed of light, reducing its value to nil.

During the testimony on January 26, 1999, representatives of the educational community occasionally referred to student infringements as "chicanery." That word is so misleading in its connotations of harmlessness and frivolity as to be an antonym for an accurate description of the situation. Student infringements in a digital environment have the potential for wholesale and global destruction of the value of copyrighted works. Such acts, surely, are far more than mere "chicanery."

This situation is especially serious for photographers. In practice, when the creators of educational materials use copyrighted works, they tend to use small pieces or portions of those works: a few seconds or minutes of a motion picture, a few seconds of a musical recording, a few lines or perhaps pages from a book or play, etc. However, when it comes to photographs, the reality is that educators use the entire work, not just a portion of it. This makes photographs different from most other types of copyrighted works.

Under the fair use provisions of §107, it is clear that educational usage is one, and only one, of the factors to be considered in determining whether the fair use defense applies to an infringement. It is also equally clear that fair use does not grant a general educational exemption from copyright. Further, it is fundamental that the drafters of the fair use provisions, and the judges who handed down the decisions on which those provisions are based, never imagined that they would be applied routinely to entire works. It is just as basic to copyright law that each individual photograph is a work. Thus, while there might be a valid fair use defense for using small portions of other kinds of copyrighted works for distance education, that logic simply does not apply to photographs. Despite that, the unauthorized use of entire photographic works is precisely what educators would seek to do through distance education.

VI. Beware of getting caught up in the *Wired* mentality.

The testimony of some representatives of the educational community demonstrated a dangerous mind set that seems to live and thrive in denizens of the internet: an attitude that whatever can be made available in an digital environment should be, and without any fees, irrespective of any copyright or other proprietary considerations. One educator who testified before this panel said that the "... educator should be able to use whatever is necessary to achieve the goal." Ms. Burke's testimony delivered a clear message that if they could clear the rights, they would use the material, and if they could not clear the rights, they would use it anyway. If we were talking about computer hardware, instead of software, we would be talking about theft, and there would be no thought or discussion of any sort of exemption from the owner's proprietary rights. Somehow, when we talk about intellectual property rights, particularly in a digital environment, the logic gets twisted, and many people assume that there are, or should

be, no such rights. The prevailing attitudes among a large and vocal portion of internet users, combined with the technology at their fingertips, provides the largest single threat to the very existence of copyrights that has emerged since copyrights were first conceived.

Aside from the the obvious financial impact of such an attitude, it ignores one of the fundamental rights of property owners: the right (with apologies to Nancy Reagan) to just say No. Many photographers routinely refuse to allow their images to be used by certain industries, such as tobacco or alcohol, or by particular clients, or for some specific purposes. That should not change when the user becomes an educational institution. If, for example, a copyright author did not want his work used by a particular, right-wing college, he should have the right to make and enforce that decision. It must be remembered that, in the context of photography, we are generally talking about the taking of complete works, not just portions. Photographers and other copyright owners have the right to determine whom and what uses he or she wishes to license, and they should not be deprived of that right just because the user or the use is educational.

VII. The internet is a global environment, and any copyright exemption in the United States will create serious difficulties in other countries.

The very concepts of educational exemptions and fair use are unheard of in many, if not most, of the foreign countries that enforce copyrights. It must be remembered that the internet is a borderless environment, and one is often unaware of whether a person to or from whom information is being sent is around the corner or around the world. An attempt to achieve at least some level of uniformity is at the base of the various international copyright conventions to which the U.S. and other countries belong. It was part of the impetus behind the WIPO treaties that the U.S. recently adopted. It would be the supreme irony if the WIPO implementation legislation that was the vehicle to which the current study was attached turned out to be the means by which we adopted copyright law modifications that would be complete anathema to many of the other signatories to the WIPO treaties.

VIII. If any special treatment of the educational community were necessary, which is not the situation, there are many tools available to it that are more than adequate.

The demonstrations of distance education programs laid to rest any concern that the educational community might not be able to produce the best possible material unless it received some exemption or other special treatment under the Copyright Act. Virtually, if not literally, all of the copyrighted materials presented in the demonstrations had been properly licensed. Not one demonstrator even mentioned during those demonstrations or in testimony before this panel that his or her program would have been better if only he or she had been able to use some material to which the rights could not be licensed. The evidence made it clear that any arguments based on the difficulty of clearing rights is something between a myth and a red herring. Both the educational and the commercial publishers of the distance education programs that

were demonstrated were able to put together extremely impressive teaching tools without needing any exemption from the Copyright Act.

Assuming for the sake of the argument that the educational community does need some special relief, that already exists in the form of fair use. Further, even though fair use does not generally apply to the use of whole works, in a spirit of cooperation, ASMP recently acceded to the requests of representatives of the educational community by allowing certain numbers of whole photographic works to be used under the umbrella of fair use pursuant to the recently completed guidelines for fair use in multimedia (generally referred to as the CCUMC guidelines). If this panel is convinced for some reason that the educational community needs a special dispensation, the CCUMC guidelines could easily be modified to fit the context of on-line delivery.

Further, the licensing of works is rapidly becoming easier, faster and more efficient. In addition to the Copyright Clearance Center's regular operations, it has developed with ASMP's licensing agency, the Media Photographer's Copyright Agency (MP©A), a project called MIRA, the Media Image Resource Alliance, which currently is on-line (www.mira.com) and provides on-line licensing and delivery of photographic images. We stand ready to develop and implement pricing and licensing protocols for educational uses as soon as we have an indication from the educational community that it wants and will use this service.

In addition, CCC is working with representatives of the Creators' Alliance (ASMP, the National Writers Union, and the Graphic Artists Guild) to develop a program along the lines of MIRA to provide a one-stop-shop for digitally licensing and delivering text, photographs, and graphic illustrations at a single internet location.

There are also two things that the Copyright Office could do that would greatly facilitate the identification of authors and works and the licensing of those works. First, the Office could become a registry of authors, in addition to a register of copyrights and depository of works. There would then be a central location for tracking and locating authors. Such a registry could easily include contact information for both the authors and their designated licensing and collecting agencies. Such a system could put the burden on the authors to provide and maintain accurate information, possibly combined with expanded fair use for users who made good faith efforts to locate the authors, which proved to be ineffective due to the fault of the authors rather than the users.

Second, Digital Object Identifiers (DOIs), especially if combined with an authors' registry, would make the tracking of authors and works as easy as logging onto an internet service provider's gateway to the internet. For this reason, if fair use were to be expanded for some reason, any such expansion should not apply to works with DOI labels. There would simply be no reason to expand fair use to works that have a simple and easy way to locate the rights owners right there for the world to use.

IX. Conclusion.

We are at a difficult state of the art. Our technology is just advanced enough to be

really dangerous, but not yet sophisticated enough to control or prevent those dangers. So-called watermarking and other security devices simply do not work. They are too easy to defeat intentionally, and often are lost inadvertently through the use of the “protected” works. Encryption is a political hot potato, and it does nothing to prevent abuses once a work is de-encrypted. These problems will be solved technologically in the future, but nobody knows how long it will take for solutions to be perfected.

The Copyright Act is, and must be, technologically blind. Any changes in the law based on distance education would be rooted in technology; they would be driven by the advent of the digital era. Changes in the law to deal with technologically-created problems would fly in the face of the fundamental philosophy that the Copyright Act should be technologically blind. Worse, as a practical matter, they would create legislation that would take years to change, assuming that it could eventually be changed at all, in an attempt to deal with a technology that changes as quickly as Clark Kent in a phone booth. Such an approach is doomed to fail. If any change from the status quo is found by this panel to be needed, and ASMP submits that none is, only guidelines can provide the necessary flexibility to deal with technological devices that have the lifespan of a May fly and that are obsolete before they even reach the market.

We thank the Register and the other members of this panel for the opportunity to present our views and for giving them fair consideration.

Respectfully submitted,

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