

Before the
LIBRARY OF CONGRESS, COPYRIGHT OFFICE
Washington, DC 20024

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

REPLY COMMENTS OF
MOTION PICTURE ASSOCIATION OF AMERICA

In its earlier submissions in this proceeding MPAA:

1. expressed support for distance education objectives and the judicious use of new digital technology to achieve those objectives;
2. called for consideration of whether the rights of copyright owners should be expanded, as well as whether they should be contracted, in light of new digital technology;
3. highlighted the fact that the burden is on the proponents of new limitations on the rights of copyright owners to show that such limitations are necessary to achieve national educational objectives, and that such limitations will maintain an “appropriate balance” between the rights of owners and the needs of users;
4. recommended that the Copyright Office look first to voluntary guidelines as the preferred approach to resolving problems raised by distance educators and cautioned that any

recommendations for further limitations on the rights of copyright owners for purposes of facilitating distance education:

- a. should be reserved for clearly defined, bone fide educational activities by bona fide, non-profit educational institutions;
- b. should not interfere with the normal exploitation of copyrighted works;
- c. should be conditioned upon deployment of effective safeguards, including technological measures, to prevent reproduction and to limit access to bona fide students enrolled in bona fide courses of study; and
- d. should be limited to the use of excerpts and portions of works.

The comments that were submitted by proponents of additional limitations on the rights of copyright owners to promote distance education objectives generally reflect dissatisfaction with:

1. the fees asked by copyright owners for the use of their works in distance education activities;
2. the burden of seeking, reviewing and complying with license agreements permitting the use of works;
3. the difficulty in some instances of locating the owners of certain works;
4. the amount of time required to negotiate and obtain licenses from copyright owners; and
5. the fact that some works are not made available for distance education uses.

These complaints reflect frustrations encountered by almost all users of copyrighted material (or any other property for that matter), including motion picture companies. The making of motion

pictures frequently requires the licensing of other works, and that process is often burdensome, time consuming, expensive and even at times fruitless. It would certainly be much easier, from the perspective of the user of copyrighted works, to not have to go through the process of getting permission to use intellectual property that belongs to someone else. However, from the perspective of the creators of intellectual property, and from that of society as a whole, it is a very good thing that property rights, including copyrights, are highly valued in this country.

The issue in this proceeding is not whether it is inconvenient, or even burdensome, for distance educators to obtain the rights to use copyrighted material. The issue is whether the burdens of obtaining such rights in certain circumstances outweigh the value of respecting the property rights of copyright owners. The record of this proceeding to date does not support additional limitations on the rights of copyright owners.

The comments filed by distance educators do not establish, or even make a *prima facie* case, that effective robust distance education cannot take place without further limiting the rights of copyright owners. Perhaps one reason for the lack of evidence in this regard is that distance education is in its early stages of development, as is the technology that makes it possible. Everything is changing and evolving rapidly. Which is why the American Library Association, the Association of American Universities and the American Council on Education concluded that it was premature to adopt formal guidelines on fair use in the digital environment. (see comments filed by the Association of American Publishers pp. 9-10)

A headlong rush to limit the rights of copyright owners in the name of distance education would produce negative consequences not only for the creators and distributors of copyrighted works, but for distance education as well. The bulk of educational material used in the classroom is created for that purpose by persons or companies in the business of creating educational material. Without the promise of compensation, the material would not be created, or assembled for effective educational use. In a mature distance education environment instructional material created specifically for distance education use will be essential.

Moreover, the development of sophisticated, state of the art material designed for broad distance education application will alleviate many of the difficulties pointed to by commenters in this proceeding. The premature enactment of limitations on the rights of owners of such material will discourage its creation.

In addition to the lack of evidence that further limitations on rights are necessary to carry out effective distance education activities, the record of this proceeding lacks information on how the use of material, with or without the permission of owners, will be confined to qualified students in bone fide educational programs.

The present Copyright law in Section 110(1) permits the unauthorized use of works in narrowly prescribed classroom situations. A principal justification for this limitation on the rights of copyright owners is that the use is narrowly confined to situations where the financial interests of owners are not likely to be severely harmed. In order to justify unauthorized uses of works in a distance education setting, there must be a reasonable level of confidence that such

uses will be strictly confined to teaching activities and that works will not “leak out” into the stream of commerce. No such showing has been made.

It is one thing to propose that bone fide non-profit educational institutions be permitted under certain circumstances to use works for bone fide instructional purposes. It is quite another thing to suggest that such use be permitted without any assurance whatsoever that works will not be accessed by anyone with a computer, freely copied, and freely retransmitted around the world. Any recommendations for extending the provisions of Section 110(1) of the Copyright Act to distance education activities must take into account the critical differences between the classroom and the distance education environments.

The DMCA requires the Copyright Office to make recommendations that maintain “an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works.” Such a balance cannot possibly exist without a high degree of confidence that uses by distance educators will not result in unauthorized use by students or widespread access to and use by the general public. The record of this proceeding does not provide the necessary showing.

While the record now before the Copyright Office does reflect the frustrations encountered by most frequent users of copyrighted material, it does not provide any basis for recommending further limitations on the rights of copyright owners. At most, this proceeding suggests that copyright owners and those involved in distance education should renew their efforts to resolve real life problems, many of which may be only transitory, through voluntary guidelines that will provide the versatility required in this period of rapid technological change.

The utility of such guidelines has been proven and this flexible approach should be exhausted before consideration is given to any statutory amendments.

Respectfully submitted,

MOTION PICTURE ASSOCIATION
OF AMERICA, INC.

By: _____

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