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Office of the Register
Library of Congress
James Madison Memorial Building
Room LM-403
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To the Office of the Register:

My name is Jeff Clark, and I am the Director of Media Resources at James Madison University (Virginia). I had the opportunity and privilege at the January 26th hearing in Washington, DC to help present the views of the Consortium of College and University Media Centers.

At this time, however, I would like to expand further upon my own views. These are an outgrowth of ten years of working with copyright concerns in an academic media center, following copyright developments, and educating faculty on the issues involved in a non-legal capacity. In addition, I have read most of the written comments submitted in detail. Doing so has caused me to reconsider some initial thoughts I had on the Copyright Office's set of questions on distance education through digital technologies, in light of observations made both by copyright holders and educators contributing to these hearings.

I've found this review process helpful in clarifying my own thinking and convictions at this point.

Here, I've decided to be as general and integrated in my reply observations as possible—that is, not to organize them by the questions directly--and focus where possible on the larger picture.

Hence, an overall judgment and objective first:

Education does not, in my opinion, need a blanket, discrete exemption for distance education as a function in the digital realm. Instead, it needs coordinated adjustments in the law that at the very least allow its existing prerogatives in using some resources (the most privileged) for educational purposes in the analog realm, to be extended into the digital realm for all resources.

Libraries and other facilities, staff and resources of their educational institutions are involved in this process, so I will not attempt to distinguish and assign definitively where the following points in support of the objective above need to fall. Likewise, I won't attempt to characterize exact changes in specific copyright law sections 107,108, 110 or elsewhere to the same end.

Some features of this objective:

- What faculty, staff and most especially students have the ability to do with legitimately published and acquired informational resources in the physical, "in person" mode, should be extended to remote users as well.

- To accomplish this, institutions need to be able to make digital copies of analog materials within their collections—and provide them with comparable restrictions on their use to remote users. The same applies to original digital format materials not otherwise contractually constrained by terms of their acquisition (i.e., typically "sold" as discrete publications under conditions of the "first sale doctrine"). This means that the discordant patchwork of what is or may be permissible in terms of the yoked activities of copying, public display, and public performance needs to be resolved and integrated, so that all three as applicable work together to achieve the same access available to on-site teachers and learners.

- Part of this effort will also involve a realistic and useful (though not open-ended or vague) redefinition of the terms "classroom," the limitation on "face to face teaching," "library," "transmissions" and possibly others—to free their functioning from outmoded constraints of specific teaching techniques and technology. Constraints on what constitutes formal teaching and learning, and how they are accredited, also have to be delineated.

- Part of this effort will be to establish requirements for reasonable security in the areas of limiting access and limiting copying capability appropriately.

- Part of this effort need *not* involve a specific reference to distance education *per se*.

An educational institution's remote users may be engaged in nontraditional techniques of instruction and learning, almost fully mediated by technologies—many of which (techniques and technologies) may be used by traditional, on-campus users as well. However, the resource needs of each type of user are closer to being—if not in fact exactly—identical. Only barriers technological (can we deliver it?) and legal (do we have the right to deliver it in this way?) form an obstruction.

There are varied resources that might be used in a "distance" or "on campus" educational setting. Course resources may or may not coincide with library-provided resources, and may or may not be commercially acquired and intact products. They made instead be "repurposed" pieces of existing commercial products combined with original faculty-created materials (including their own contextual presentation of these products).

"Fair use" provisions in general do not seem to favor the long-term, permanent resource needs of curriculum support. They are more safely interpreted to support the changing, often impromptu needs of faculty on an occasional and provisional basis. The "Fair Use Guidelines for Educational Multimedia," however, are a useful attempt (whatever one's agreement or disagreement with them as a whole) to extend what we might term comfortably justifiable fair use in regard to duration--two years' use. This aids faculty in determining if what they've devised to support their teaching is worth keeping on more than a provisional basis—and thus worth acquiring the necessary copyright permissions to do so.

Resources that are part of a permanent educational need and strategy—whether connected with an institution's library, academic departments, or other information technology infrastructure—aren't really addressed by the spongy provisions of the fair use section in any supportable interpretation with which I've had experience. But these resources are hampered, in the digital realm, by outdated terminology and uncoordinated provisions in the rest of the copyright law.

If a library wants to convert its collection of books—or its slide library—into the digital realm, and make either available under comparable restrictions to those in the analog realm, we need to facilitate this. If one copy of a book or a slide will serve anticipated need in hard-copy, with proper restrictions it should serve local and remote users in the digital environment on the same basis—one user at a time for each legitimate copy, and without ability to further digitally copy—if the technology can be applied to reasonably insure this. Every institution will have a mixture of resources available under varying conditions to the set or a subset of its user population, and these matters of sliding-scale access and acquisition can be addressed in time by application of technology and licensing, where appropriate. The mixture of *how much access* and *which resources* are needed, will always vary and be adjusted—but the legal *ability* to offer and adjust this mixture to all qualified users, regardless of location, should not be curtailed as the nature of education evolves.

Should we condition copyright law in the direction that I (among others) am suggesting, copyright holders have raised an overriding concern and an alternative to handle educational needs. I offer now a few comments related to these two issues.

Security in the digital realm:

There seem to be conflicting reports and opinions on the capability of existing, or soon-to-be-existing technology to achieve the necessary restrictions on illegal dissemination in the digital realm. But we know we will get there—just as we know that measures will never be perfect, as they never have been in any realm. However, at risk of flinging a gauntlet too rudely, I must point out that there is never an assurance in any realm of life—digital or analog—of complete security; and more importantly that security, in the end, is a provision that cannot overrule the operation of copyright law for its intended purpose. "Security" is not a governing right of the copyright holder, such that it restrains or eliminates the rights of users if it cannot be perfectly guaranteed. Protective principle, and obligation of all parties for honest and reasonable effort at its implementation, are all the law can, and should, insure where security measures are involved. To allow them to determine rights is a distortion favoring commerce over the purpose of the copyright law.

On licensing as a substitute for fair use or other modifications to existing law, suggested above or by others:

Some copyright holders among the witnesses have pointed to the distance education demonstrations prior to the DC hearing as illustrating the lack of major obstacle in obtaining proper permissions when a project is diligently undertaken. Witness testimony from among the educational community has indicated the contrary, providing in some cases, examples of past licensing difficulties. From my own practical experience, I have to side with the latter. The demonstration projects are not typical of the full range of distance education projects, nor the support resources available for

conducting them at most institutions in no position yet to undertake "flagship" type projects. It must be remembered that, while licensing among copyright holders fosters a profit-making/job-creating industry in the utilization of intellectual property, on the educational side it is simply an added cost of doing business. This is not to claim that education should go license-free. Licensing should be active where proper and necessary within the law, to augment and make legally available needed educational resources in compliance with holders' rights—but it should *not* become a mechanism serving as substitute for proper protection of users' rights in accord with the purpose of copyright law.

To substitute licensing for a legitimate and useful "balance of rights" in the law not only erodes the law's purpose, but introduces further complications. I'm in agreement with those who would suggest that even were users willing to give up their rights to this mechanism, the vagaries of the marketplace are not adequate nor to be trusted to achieve the desired results. "Competition" is not always a useful operative in the same way it is elsewhere in the marketplace: sometimes for education, you need to use specific intellectual property to teach and illuminate culture, and no competitor's product will serve in substitution. In effect, an abdication to licensing would be to establish a kingdom of large and small monopolies on intellectual property—without any formal regulatory mechanism functioning on behalf of education and other users. This is not to say that I distrust wholesale the motives and cooperative spirit of copyright holders in working with educators to meet everyone's needs. But as easily as it is claimed that all of us can work toward reasonable licensing arrangements in the digital environment, we could show similar diligence, creativity and commitment in working toward security compliance in the same realm. Thus licensing can be restricted only to those areas where it is justified, not applied as a "one size fits all" solution. To do the latter would again be a capitulation to commerce over principle and purpose in the law. Licensing as a solution, too, still does not address security concerns that would continue, justified or not. In fact, the existence of those concerns might often adversely affect the negotiation of licensing fees for education. Fee structures might routinely factor in the "leakage" possible to illegal users—analogous to the way in which the Audio Home Recording Act (1992) places surcharges on blank digital audio media and recorders, to accommodate the assumption of illegal copying for which all digital tape consumers are obliged to pay regardless of their personal needs and activities.

In closing, I need to revisit first principles. Repeatedly, I've referred to the purpose of copyright law, as has other witness commentary. We would be wise to keep the purpose of copyright and the law that serves it in mind: "to promote the progress of science and the useful arts." Remuneration for creative labor is a mechanism to this end, which insures that this labor is disseminated and enriches further creative social and cultural dialogue. But this end cannot be narrowly re-interpreted as a sort of full and ever-expanding employment act for the creation, and especially the management, of intellectual property. This is precisely the direction in which the historical shaping of copyright law has trended, as intellectual property has undergone pressure to be redefined as "real" property. (The recent passage of the Sonny Bono Copyright Extension Act is another milestone in this attempted property "transference.") To effect this redefinition requires the establishment of intellectual property as private property to which the holder has a "natural right"—a measure which the recodification of copyright law in the 1976 act emphatically denied by providing the holder's right with the identity of a statutory grant instead. Nothing of which I know in the new Digital Millennium Copyright Act overturns this principle.

Perhaps the most cogent treatment of the nature of copyright law and its development is provided by Patterson, L. Ray & Lindber, Stanley W. *The Nature of Copyright: a law of users' rights* (Athens & London: U. of Georgia Press, 1991). The authors trace, with comprehensiveness and far more authority than I can, the forces that have shaped the law historically and, in effect, compelled it to drift from its original and vital purpose, placing the "balance of rights" we so routinely speak of in serious question.

Users' rights should be redressed now by appropriate modification of copyright law, so that education can achieve its diverse goals on behalf of society--regardless of the communication vehicle involved--albeit responsibly as well. The rapid development of technology can be applied to the benefit both of these rights and those of copyright holders—as well as to help resolve any conceivable conflict that may occur with WIPO legislation.

We should not head into digital technology and the digital realm—where practically everything is destined, sooner or later—repeating the same distortions of copyright law, the same crippling limitations on user rights, as prevail in the analog world. It's time to un-skew our perspective on what we value… and, in a fresh and unexpected sense of the old saw, really put our money where our mouths are.

Sincerely,

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