

Impasse: Distance Learning and Copyright

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The Copyright Act has posed a problem for distance learning since its enactment in 1976. Performances and displays for face-to-face teaching are given a broad exemption in the Act, but for distance education, the restrictions in the current section 110(2) concerning educational transmissions create a roadblock that many educational institutions simply find impenetrable. For the past few years the education community has sought an amendment to the Act that would ease the restrictions on distributed education and treat distance learning as the modern equivalent of face-to-face teaching. Educational and library associations have been very active in this movement, and it was largely through their efforts that the Digital Millennium Copyright Act directed the Register of Copyrights to conduct a distance learning study.

The May 1999 report of the register contains many very practical recommendations to amend the Act to facilitate distance learning through digital technologies. If enacted, these recommendations would greatly enhance the ability of nonprofit educational institutions to perform copyrighted works for distance education. Educational institutions continue to experience difficulty in obtaining reasonable licenses for performing certain types of work in distance learning courses, even when the school has purchased a copy of the work. Copyright holders continue to assert, however, that the current licensing system is working well and that there is no need to amend the Act. Thus, the battle lines are drawn for a Congressional solution. There are legal theories that can be used to bolster either or both sides. Will the public good of nonprofit education triumph or will the "content providers" successfully persuade Congress that a pay-per-performance system is the ideal one for the future?

I. INTRODUCTION

Copyright law is not currently structured to facilitate distance learning. Educational institutions and teachers have encountered significant difficulties with using copyrighted works in their distance education courses, and as the number of distance education courses and programs offered increases, the problems escalate. For face-to-face teaching, the range of works that may be used in the classroom is unrestricted, but whenever the course is taught at a distance either through analog or digital transmission, the copyright law seriously restricts the types of works that may be performed. The Digital Millennium Copyright Act¹ charged the United States Copyright Office to conduct a study on how to facilitate distance learning through digital technologies while maintaining the

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¹ Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

balance between users of copyrighted works and copyright holders. The resulting report² provides the impetus for this article.

The number of distance education courses and degree programs offered in the United States grew by 72% from 1995 to 1998.³ Almost 1,700 institutions offer about 54,000 online courses with a total student enrollment of approximately 1.6 million.⁴ The number of certificate programs increased from 170 to 330 in the same period.⁵ Whether referred to as “distance learning,” “distance education,” or “distributed learning,” it is clear that educational institutions see the development of these courses and degree programs as the real area of growth for their institutions. Certainly, there is also a demand for courses and degrees offered through various technologies that permit learners to take courses from their homes, dormitory rooms, and places of employment. Even in traditional face-to-face teaching, instructors are adding digital components such as webpages that contain course content, email listservs, and discussion lists that students can access outside of class. The technology permits the continuation of classroom discussions in a new forum and creates permanent space where materials can be accessed away from the classroom, the building, or even the campus. While educators debate whether distance education can provide the kind of learning experiences that students need, how to improve courses taught over the Internet, and the like, the copyright law remains a serious impediment to distance learning, especially courses offered through digital technology.

This article addresses three primary issues: the performance and display of copyrighted works in the course of instruction over a distance, the distribution of course materials to distance education students, and library service to distance learners. Only the first issue is addressed by the Copyright Office report on distance learning and its recommendations for legislative change. This article discusses and critiques the report. These issues are bound to remain at the forefront for legislative change, and an amendment to the law is supported by a wide range of individuals and organizations in the distance education community. This article also discusses providing course materials to students and library service to distance education students.

² See generally U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION (1999) [hereinafter DISTANCE EDUCATION REPORT].

³ Dan Carnevale, *Survey Finds 72% Rise in Number of Distance-Education Programs*, CHRON. HIGHER EDUC., Jan. 7, 2000, at A57 (reporting the results of study by the National Center for Educational Statistics, U.S. Department of Education).

⁴ *Id.*

⁵ *Id.*

II. EXISTING LAW

A. *The Problem: Performance and Display in Distance Education*

The Copyright Act of 1976 favors educational uses by providing a number of important exemptions to the exclusive rights of the copyright holder. This favored status is based on the U.S. Constitution which provides that "The Congress shall have the Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁶ Promoting learning is the goal of copyright, and the rights given to copyright owners under the law are all aimed at furthering the public good of promoting learning among the populace. Thus, it would seem that learning—whether through a traditional classroom or courses offered through distance education—should be encouraged and promoted by the law and not restricted or hampered by it.

The current copyright statute is the source of a serious problem for performances and displays for distance learning. The law provides a broad exemption for nonprofit educational institutions engaged in face-to-face teaching (the classroom exemption).⁷ For transmissions in education, the exemption is much narrower.⁸ Section 110(1) permits teachers in face-to-face teaching in nonprofit educational institutions to perform or display any copyrighted work without seeking permission from the copyright owner. Students and teachers may, for example, sing a copyrighted song, read aloud from a copyrighted work, and view a copyrighted audiovisual work in its entirety. The only restriction is that the performance take place in a classroom, broadly defined in the legislative history to include any place where formal instruction is taking place,⁹ and that the teaching be face-to-face,¹⁰ i.e., simultaneous presence of teachers and students in the same place. Additionally, the copy of the audiovisual work or motion picture used for the performance or display of individual images must have been lawfully obtained.¹¹ Thus, teachers in nonprofit educational institutions have a broad exemption to use copyrighted works in the course of instruction.

Section 110(2) permits the performance of entire nondramatic literary and musical works and the display of any work in educational transmissions.¹² The section is broader than the classroom exemption in that it is not restricted to

⁶ U.S. CONST. art. I, § 8, cl.1, 8.

⁷ See 17 U.S.C. § 110(1) (1994).

⁸ § 110(2).

⁹ H.R. REP. NO. 94-1476 (1976), reprinted in 17 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 82 (1976) [hereinafter HOUSE REPORT].

¹⁰ 17 U.S.C. § 110(1) (1994).

¹¹ *Id.*

¹² § 110(2).

nonprofit educational institutions, but also includes government agencies that originate transmissions which will be received by their employees as a part of their employment.¹³ Otherwise, the statute is narrower.¹⁴ It is not absolutely clear why these restrictions are embodied in the Act. When the Act was passed in 1976, the only type of distance learning that Congress envisioned seems to have involved television technology and perhaps open broadcasts.¹⁵ An open broadcast of copyrighted works, such as motion pictures, certainly would compete with the copyright holder's rights to exploit the work through licensing it for exhibition in movie houses, on television, and later by the sale and rental of videotapes.¹⁶ The restrictions on the types of works that may be performed in instructional transmissions also may relate to copying. By 1976 one could reproduce copies of performances transmitted via television by videotaping movies or audio recording musical works such as opera. Such reproductions might conflict with the copyright holder's expectation of selling copies of these works. The contrast between the breadth of the section 110(1) exemption and the narrowness of section 110(2) must be based on these perceptions.

There are four specific restrictions on the performance and display right exemption contained in section 110(2). First, only certain types of works may be performed, specifically nondramatic literary and musical works may be transmitted for distance learning, although any work may be displayed.¹⁷ This would exclude motion pictures, audiovisual works, opera, and musical comedies as dramatic literary works. Second, the transmission of the performance or display must be part of the systematic instructional activities of the institution.¹⁸ Third, reception must be in a classroom or other place similarly devoted to instruction, although disabled persons and those with special circumstances may receive the transmission anywhere if their condition prevents attendance at a regular classroom.¹⁹ Fourth, the performance must be directly related and of

¹³ § 110(2)(A), (C)(iii).

¹⁴ For an excellent discussion of distance learning and copyright, see Kenneth D. Crews, *Copyright and Distance Education: Displays, Performances, and the Limitations of Current Law*, in *GROWING PAINS: ADAPTING COPYRIGHT FOR LIBRARIES, EDUCATION, AND SOCIETY* 377 (Laura N. Gasaway ed., 1997).

¹⁵ Sunrise Semester was an open broadcast of various college level courses based in Chicago. Begun in 1963, it aired for twenty-five years; the courses were often offered early in the mornings on national television. For a discussion of early distance learning, see Ken Freed, *A History of Distance Learning: Part 1—The Rise of the Telecourse*, MEDIA VISIONS WEBZINE, (1999), at <http://www.media-visions.com/ed-distlrm1.html>.

¹⁶ The legislative history is silent on this issue but does mention video courses. See HOUSE REPORT, *supra* note 9, at 84.

¹⁷ § 110(2).

¹⁸ § 110(2)(A).

¹⁹ § 110(2)(C)(i), (ii).

material assistance to the teaching content of the transmission.²⁰ Some of these conditions cause difficulty for modern distance learning.

The restriction on the types of works that may be performed is particularly troubling to teachers because it is counter-intuitive. If an instructor may play a videotape for students in face-to-face teaching without seeking permission from the copyright holder, why then—when that same course is offered to distance learners—must permission be sought and royalties paid to transmit the tape? It seems particularly nonsensical if the course is offered to students face-to-face in a classroom and simultaneously is transmitted to distance learners. The teacher sees no difference because the same content is presented to the two groups of students. Yet, the Act requires that permission be sought to transmit the videotape to distance learners. The impact of this restriction is primarily on the use of copyrighted videotapes used in instruction, but it also affects the types of music and dramatic works such as plays and musicals that can be performed and transmitted. Many schools currently seek permission and pay fees to use videotapes for distance learning. Some schools simply black out the time for distance learners when a tape is being shown to students for a course in the face-to-face classroom that is simultaneously transmitted. Other schools likely ignore the law or have made a determination that the performance is fair use.

The argument made by copyright holders is that absent distance learning courses, they would have sold individual copies of their works to the receiving sites. Thus, owners lose sales and should be compensated in the form of royalties for performances of their works outside of that permitted by section 110(2). It is not at all clear that there are lost sales. In fact, this has always seemed a strange argument to educators since not all educational institutions that may receive the transmission would have purchased copies of these works. Some simply would not have used the works at all because of budgetary restrictions. If the work is performed in its entirety and repeatedly for distance learning, this may represent lost sales. On the other hand, schools are likely to purchase works that will be used relatively heavily. If there is significant demand for the work to use in instruction, and the school can afford to purchase the work, it will do so. An occasional performance through a distance learning course is unlikely to represent a lost sale, however. It is much more likely that the faculty member simply would not use the work at all and the students would have no exposure to the works produced by this company at all.

The restriction that the performance or display be part of the systematic instruction offered by the educational institution presents little problem. What are eliminated by this restriction are performances for entertainment. While it is possible that an instructor in a distance learning course might perform a work to entertain students, it is unlikely that distance educators would perform entire

²⁰ § 110(2)(B).

copyrighted works solely for this purpose. Class time is simply too valuable and the methods of transmission too expensive for such frivolity.

Today, most distance learning courses may still be received in a classroom that meets the requirements of the current statute. Further, there are educators who believe that quality demands that there should be a teacher at the receiving site to direct class discussion. Despite this, classrooms are not likely to remain the dominant place for reception of such transmissions, especially as more online courses are developed and offered. Currently, many educational institutions offer distance learning courses through television technology, and reception of that programming is already in the home, so this would not comply with the current restrictions except for disabled students and those whose "special circumstances" prevent their attendance in a regular classroom.²¹

Modern distance learning courses are likely to be offered over the Internet and may be received wherever a student has access to a computer terminal and a modem. This is most likely to be the home, dormitory room, or job site. From 1995 to 1998 the Internet increasingly became the medium of choice for delivering distance education courses. The proportion of institutions offering asynchronous courses over the Internet increased from 22% to 60% over that period.²² At the same time, the number of both interactive video courses and recorded video courses dropped.²³

In addition to the section 110(2) exemption, fair use certainly applies to performances and displays in the course of instruction.²⁴ Instead of being an absolute exemption, however, fair use requires the application of four factors to determine whether a use is fair.²⁵ In fact, even the works excluded under the section 110(2) exemption may be performed for a distance education course if it is a fair use.

Purpose and character of use is likely to favor the use when the originator of the distance education course is a nonprofit educational institution. Although not all nonprofit educational uses are exempted, the fact that there is no commercial aspect may tip the balance in favor of the school claiming that the performance or display is fair use. *Nature of the copyrighted work* focuses on the work itself. One could argue that works produced for the education market should have fewer fair use rights attached to them. However, when the performance is of a work already purchased by the institution, a strong argument can be made that this factor favors the use for distance education if no downstream copying occurs since the work was produced so that it would be performed and used for instruction. *Amount and substantiality used in comparison to the work as a whole* means that the smaller

²¹ § 110(2)(C)(ii).

²² Carnevale, *supra* note 3.

²³ *Id.*

²⁴ *See* § 107.

²⁵ § 107(1)-(4).

the portion used, the less likely it will be found to be infringement. This is not a bright-line test, however. *Market effect* looks at the effect on the potential market for or value of the work. One could argue that if the educational institution has purchased or lawfully acquired a work it seeks to perform in a distance learning course, then there should be no adverse impact on the market. The sale was made and individual students are not likely to purchase individual copies of the work. However, courts have also looked at the right to license the work for reproduction and performance as a part of the market effect.²⁶ Licensing performances for entertainment also is a significant market, but licensing for distance learning has neither a long nor happy history.

B. *The Problem: Providing Textual Materials to Distance Learning Students*

Because distance learners may live a great distance from the campus bookstore, the problem of providing textbooks, coursepacks, and other materials to them is more acute. Some schools have developed mechanisms where distance education students can order their textbooks and coursepacks from the campus bookstore. As more online bookstores offer college textbooks to students, the problem of obtaining textbooks may be reduced, but the coursepack problem will remain. The weight of authority is that when a commercial entity produces coursepacks to sell to students at the request of a faculty member, royalties must be paid.²⁷ Whether a nonprofit educational institution that produces the coursepack must seek permission and pay royalties has not been litigated, although many such colleges and universities do request permission and pay royalties for reproducing coursepacks.²⁸

Fair use also applies to providing copies of materials to students. Fair use is called the safety valve of U.S. copyright law; it is an affirmative defense, a privilege in someone other than the copyright owner to use a copyrighted work without seeking permission of the copyright owner or paying royalties. In other words, activity that ordinarily would be infringement is excused if the use is fair. Fair use must be judged on a case-by-case basis, so it is difficult to predict whether a particular use is fair or not.²⁹ Fair use was incorporated into the statute

²⁶ See *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 930–31 (2d Cir. 1994). This was a case involving a for-profit company, so its application to a nonprofit educational institution is not clear.

²⁷ See *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381 (6th Cir. 1996); *Basic Books, Inc. v. Kinko's*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

²⁸ The National Association of College Stores recommends that royalties be paid for coursepacks regardless of whether the reproduction is done by the institution itself or a commercial copy service. See ASS'N AM. PUBLISHERS ET AL., Q & A: QUESTIONS AND ANSWERS ON COPYRIGHT FOR THE CAMPUS COMMUNITY 7 (1997).

²⁹ MELVILLE B. NIMMER & DAVID NIMMER, 4 NIMMER ON COPYRIGHT § 13.05 (2000).

when it was revised in 1976. The statute states: "the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."³⁰

The statute lists four factors that a court must consider when making a determination about whether a particular use is fair: (1) purpose and character of the use, (2) nature of the copyrighted work, (3) amount and substantiality of the portion used, and (4) effect of the use upon the potential market for or value of the work.³¹ In evaluating *the purpose and character of the use*, courts favor nonprofit educational uses over commercial ones. On the other hand, not all uses for education are fair use. In *Marcus v. Rowley*,³² the court held that when one teacher copied sections of another teacher's cake-decorating booklet and incorporated the sections into a short work she developed for her students at a community college, even though the use was for nonprofit educational purposes, it was not a fair use.³³ Nor are all commercial uses per se unfair. In *Campbell v. Acuff-Rose*,³⁴ the U.S. Supreme Court found that even commercial use may be fair under certain circumstances.³⁵ Productive uses, as opposed to those that merely reproduce a copyrighted work, are also favored.³⁶

Nature of the copyrighted work focuses on the work itself. The legislative history states that there is a definite difference in making a copy of short news note and in reproducing a full musical score.³⁷ There are some works that by their nature have no fair use rights, such as standardized tests and workbooklets that by their nature are meant to be consumed.³⁸ Certain types of works have greater fair use rights attached—for example, factual works such as scientific articles.³⁹

Amount and substantiality used considers how much of the copyrighted work was used in comparison to the copyrighted work as a whole. Generally, the smaller the amount used, the more likely a court will find the use to be a fair use. There is no bright line, however, for determining if a certain percentage, number

³⁰ 17 U.S.C. § 107 (1994).

³¹ § 107(1)-(4).

³² 695 F.2d 1171 (9th Cir. 1983).

³³ *Id.* at 1178-79. Even though the defendant sold the cake decorating booklets to her students for two dollars each, the use was not a commercial use. The low cost of the booklet indicates that the charge was merely the cost of photocopying and not compensation to the defendant.

³⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

³⁵ *Id.* at 584-85.

³⁶ *Id.* at 579.

³⁷ S. REP. NO. 94-473, (1975), *reprinted in* 13 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 64 (1976) [hereinafter SENATE REPORT].

³⁸ *Id.*

³⁹ *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 925 (2d Cir. 1994).

of words or bars of music used qualifies as a fair use.⁴⁰ It is clear, however, that the larger the portion used of a work, the less likely it is to be fair use. “Amount and substantiality” also is a qualitative test; even though one takes only a small portion of a work, it still may be too much if what is taken is the “heart” of the work.⁴¹

The fourth fair use factor, *effect on the market for or value of the work*, is the economic test for the copyright holder. Courts use this factor to determine whether there has been economic loss to the owner. Even if the loss an owner incurs from a particular use is not substantial, if the loss would become great should the practice become widespread, courts have found market effect to favor the copyright holder.⁴²

Certainly the four fair use factors should be applied to determine whether providing multiple copies of copyrighted works to students in a class in print or on a password protected website restricted to the students enrolled in the class is permissible under the Copyright Act. Many schools follow the Guidelines on Multiple Copying for Classroom Use (Classroom Guidelines)⁴³ in determining what is permissible on course websites.

During the course of the debates over the Copyright Act in the 1970s, representatives of publishers, authors, and education associations developed the Classroom Guidelines, which permit teachers in nonprofit educational institutions to reproduce one copy per student of certain copyrighted works. The Classroom Guidelines provide a safe harbor for teachers who wish to distribute copies of copyrighted works without seeking permission or paying royalties. The Classroom Guidelines contain certain tests that must be met for multiple copying for students to qualify as a fair use: brevity, spontaneity, and cumulative effects. Plus, each copy must contain a notice of copyright and there can be no charge to the students for the copies beyond the cost of making the copies.⁴⁴ The brevity test dictates word and portion limitations. Spontaneity means that the copying is done at the instigation of the individual teacher and that the decision to reproduce the work is made so late in the class term that there is no opportunity to obtain permission from the copyright holder. The cumulative-effects test specifies that the copying is done for only one course, and it places a limitation on what may be copied. For example, only one article per author or three per periodical volume or other collective work during the class term may be reproduced and distributed to students. There is also a restriction on reproducing the same item from term to term.⁴⁵ While the Classroom Guidelines allow reproduction of up to nine such

⁴⁰ PAUL GOLDSTEIN, 2 COPYRIGHT § 10.2.2.3 (2d ed. 1998).

⁴¹ Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 600 (1985).

⁴² *Texaco*, 60 F.3d at 928.

⁴³ HOUSE REPORT, *supra* note 9, at 68–70.

⁴⁴ *Id.* at 69–70.

⁴⁵ *Id.* at 68–69.

items during the class term, they do not state that exceeding this number would fail to qualify as fair use.⁴⁶

Despite their unpopularity, the Classroom Guidelines were agreed to by the American Council on Education for higher education organizations. Only the Association of American Law Schools and the American Association of University Professors specifically rejected the guidelines.⁴⁷ The guidelines also have been cited with approval by some courts.⁴⁸

Some educational institutions have placed electronic coursepacks on a website where students can download and print them locally. Whether permissions are obtained and royalties paid varies. This may or may not be a legitimate alternative to printed coursepacks, but clearly many faculty members believe this activity to be a fair use and see no reason to seek permission or pay royalties. The major higher education organizations have taken the position that the providing of course materials on a website should follow the holdings in the printed coursepack cases.⁴⁹ These organizations believe that any time royalties are due in the print world for obtaining course materials, the same should be true in the digital world.

C. *The Problem: Library Service to Distance Learners*

Academic and school libraries maintain collections of materials and other resources for their students and faculty. They also provide access to electronic resources. Since the development of the photocopier, libraries have also provided reproductions of copyrighted works to users. Section 108 of the 1976 Copyright Act contains several exemptions that permit libraries to make copies for users

⁴⁶ *Id.* at 68.

⁴⁷ *Id.* at 72.

⁴⁸ See *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1390–91 (6th Cir. 1996); *Basic Books, Inc. v. Kinko's*, 758 F. Supp. 1522, 1535–37 (S.D.N.Y. 1991).

⁴⁹ The Association of American Universities recognizes that coursepacks are not generally held to be fair use, and this applies whether the coursepack contains photocopies of copyrighted material or is mounted on a password-protected course website. Interview with John C. Vaughn, Executive Director, Association of American Universities, in Washington, D.C. (Jan. 27, 1999). The coursepack cases generally held that royalties had to be paid for coursepacks consisting of photocopies of copyrighted materials even though the ultimate user of the coursepack was a student who would use the material for educational purposes. See *supra* note 27 and accompanying text; cf. Laura N. Gasaway, *Written Testimony Concerning Promotion of Distance Education through Digital Technologies, on Behalf of the Association of American Universities, the American Council on Education, and the National Association of State Universities and Land-Grant Colleges* (Jan. 27, 1999), at <http://www.aau.edu/GasawayTest1.27.99.html> [hereinafter Gasaway—Written Testimony]. Even in the context of distance learning, educational organizations recognize that fair use may permit the placement of portions of material on a server for students to access. See *id.*; see also [Volume I] DISTANCE EDUCATION REPORT, *supra* note 2, at 34–35.

under certain circumstances.⁵⁰ Libraries must meet several criteria in order to qualify for the section 108 exemption. First, the section applies to making single copies of works for a user.⁵¹ Second, the reproduction and distribution must be made without direct or indirect commercial advantage.⁵² Third, the library must either be open to the public or to researchers not affiliated with the library doing research in a specialized field.⁵³ Fourth, copies reproduced by the library must contain the notice of copyright that appears on the work, or if the work does not have such a notice, the reproduced copy should include a statement that the reproduced work may be subject to copyright law.⁵⁴

Section 108 contains three subsections dealing with the reproduction and distribution of copies to library patrons. Section 108(d) states that the rights of reproduction and distribution apply when the user requests no more than one article from a periodical issue or other collective work, or a "small part of any other copyrighted work."⁵⁵ For example, when a patron asks the library to provide a copy of an article, the library may supply the request if three conditions are met: (1) the copy becomes the property of the user, (2) the library has no notice that the copy will be used for other than fair use purposes, and (3) the library places the register's warning on copy order forms and prominently displays the same warning at the place where orders are made.⁵⁶ After the distance learning student identifies him or herself as a student, the library usually presumes that the use is for a course or for other research. All the statute requires is that the library have no actual notice that the copy will be used for other than private study, scholarship, or research.⁵⁷

⁵⁰ 17 U.S.C. § 108 (1994 & Supp. IV 1998).

⁵¹ § 108(a).

⁵² § 108(a)(1).

⁵³ § 108(a)(2).

⁵⁴ § 108(a)(3).

⁵⁵ § 108(d).

⁵⁶ § 108(d)(1)-(2). The Display Warning of Copyright, pursuant to federal regulations, reads as follows:

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgement, fulfillment of the order would involve violation of copyright law.

37 C.F.R. § 201.14 (1999).

⁵⁷ 17 U.S.C. § 108(d)(1).

The single article from a journal issue restriction could be a problem when the student requests more than one article from an issue, but this problem is not unique to distance learners. In this situation, the library might either pay royalties for the second article, request it from an authorized document delivery service, or make a determination that the use is a fair use.

Section 108(e) provides another exemption for libraries, allowing reproduction of an entire work or a substantial portion thereof if certain conditions are met.⁵⁸ First, the library must conduct a reasonable investigation to determine that a copy cannot be obtained at a fair price.⁵⁹ The legislative history indicates that this normally requires: consulting commonly known U.S. trade sources such as wholesalers, retailers, and jobbers; contacting the publisher or author, if known; or using an authorized reproducing service.⁶⁰ Searching for a copy on the used book market is also required under this section. After an investigation turns up no copy of a work at a fair price, the library may then make a copy of it for a user, provided the three requirements from section 108(d) are met: (1) the copy must become the property of the user; (2) the library must have no notice that the copy will be used for other than scholarship, research, or teaching; and (3) the library must provide the user with the register's warning in advance of providing the copy.⁶¹

Libraries may also obtain copies for enrolled distance education students through interlibrary loan just as they do for on-campus users. Interlibrary loans are permitted under section 108(g)(2) of the Act, and the National Commission on the New Technological Uses of Copyrighted Works (CONTU) interlibrary loan guidelines apply.⁶² The section 108(g)(2) proviso states: "nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have as their purpose of effect, [receipt of copies] in such aggregate quantities as to substitute for a subscription to or purchase of such work."⁶³

⁵⁸ § 108(e)(1)–(2).

⁵⁹ *Id.* The American Library Association defines "fair price" for a work in its original format as the "prevailing retail price of an unused copy." For a reproduction, it is "the price as close as possible to manufacturing costs plus royalty payments. . . . If the original format was multivolume and single volumes are not available, it could be argued that the full set price is not a fair price for a single volume." JANIS H. BRUWELHEIDE, *THE COPYRIGHT PRIMER FOR LIBRARIANS AND EDUCATORS* 27 (2d ed. 1995).

⁶⁰ HOUSE REPORT, *supra* note 9, at 76. An authorized reproducing service is one that has permission for the copyright owner to reproduce the entire work. *Id.*

⁶¹ 17 U.S.C. § 108(e)(1)–(2).

⁶² HOUSE REPORT, *supra* note 9, at 74–79. CONTU was appointed by Congress specifically to draft the interlibrary loan guidelines and to decide what to do about computer software and databases. Congress liked the guidelines and published them in the report that accompanied the Act.

⁶³ 17 U.S.C. § 108(g)(2).

The CONTU interlibrary loan guidelines go on to specify what constitutes “such aggregate quantities as to substitute for a subscription to or purchase of a work.”⁶⁴ The guidelines state that each year a borrowing library may make five requests from the most recent five years (sixty months) of a periodical title. This is referred to as the “suggestion of five.” The guidelines take no position on materials older than five years. If the library either owns the title but it is missing from its collection, or if the title is on order, the library does not count the interlibrary loan copy in its suggestion of five. If the work is not a periodical, the library may make five requests per year for the entire life of the copyright. The borrowing library must maintain records for three calendar years. The lending library’s responsibility is to require a certification that the request conforms to the guidelines.⁶⁵

In addition to the specific library practices that are permitted under section 108, libraries also have fair use rights. Section 108(f)(4) states that “[n]othing in this section . . . in any way affects the right of fair use as provided by section 107.”⁶⁶ Thus, reproduction within the bounds of fair use can be done by libraries outside the specific practices detailed in the exemption.⁶⁷

III. CONFLICTING EXPECTATIONS

Each of the players in the distance learning equation have expectations about copyrighted works used in teaching the courses. These expectations often conflict, and that contributes to the difficulty in solving copyright problems. Further, many of the expectations are based on deeply held beliefs and values that shape the debate and make compromise difficult.

A. *Educators’ Expectations*

Teachers generally expect that they can use copyrighted works in distance learning courses under the same conditions that apply to face-to-face teaching. They view distance education as the modern equivalent of the classroom and expect that there is no difference in the types of works that may be performed or displayed.⁶⁸ They probably recognize that any transmissions for distance learning must be restricted to enrolled students, since faculty normally expect that all students attending their courses are officially registered. In fact, colleges and

⁶⁴ *Id.*

⁶⁵ HOUSE REPORT, *supra* note 9, at 74–75.

⁶⁶ 17 U.S.C. § 108(f)(4).

⁶⁷ The legislative history is not clear on this point. The Senate Report discusses the preparation of works in special forms needed by blind persons that is usually done by libraries. SENATE REPORT, *supra* note 37, at 66.

⁶⁸ There are some faculty who have the exact opposite belief, i.e., that they can use no copyrighted work in distance education without permission of the owner.

universities generally require faculty to verify that everyone attending the class is on the official roll.

Faculty members also expect that if they must seek permission to be able to perform or display copyrighted works, copyright holders will respond promptly, grant permission broadly, and if royalties are charged, they will be reasonable. They also expect that permission from publishers will extend for longer than one semester. Unfortunately, experience to date indicates that teacher expectation concerning permission is seldom met.

Instructors might not be realistic about making textual materials available on networks. Faculty often comment that coursepacks for which permission is obtained are simply too expensive for students to purchase, and many believe that scanning the works and placing them on a password-protected website is a good alternative to printed coursepacks. Often no permission is sought or royalties paid for materials available on a website. Teachers seldom recognize that restricting access to the website to members in the class or to campus may itself make a considerable difference about whether such activity is an infringement or not.

B. Educational Institution Expectations

The educational institution that originates the distance education course also has certain expectations about the use of copyrighted works. Schools often expect that if permissions are needed, individual faculty members will obtain them and the educational institution will itself incur no liability due to a faculty member's actions. They expect that teachers will have the authority to select the materials that they want to use in order to teach their courses.

Colleges and universities expect that copyright holders will not exert control over what content is taught by placing unreasonable restrictions or charging unreasonable license fees to perform their works for that course. They further believe that obtaining permission will be a relatively easy process. Institutions believe that publishers will treat distance education students as a part of the institution's student population when negotiating licenses. They expect that any royalties charged will be reasonable and that royalties for digital works will be roughly parallel to those charged for works in other formats. Institutions expect that publishers will not deny permission to use their works in digital format for distance learning courses when the school is willing to pay reasonable royalties. Most importantly, they expect that audiovisual works the school has purchased can be used for any course, whether offered in a traditional classroom or as an online course, without seeking permission or paying royalties. Educational institutions also expect that transmissions to distance education students are limited to students who are officially registered for the course. This also serves the school's interests since it will receive tuition and fees only for enrolled students.

C. *Student Expectations*

Students in distance learning courses expect that they will not be treated differently than students who take the same course in a traditional classroom. They believe that their learning experiences will not suffer because of restrictions on the types of materials that are performed or displayed in the course, restrictions that do not apply to the traditional classroom. They expect that the school will provide course materials for them just as it does for local students through coursepacks, access to webpages, and through other materials. They also assume that access to these materials will not be more expensive than it is for on-campus students. Students expect that the library in the educational institution will provide copies of books, articles, and other materials needed for their research and study for the course. They also expect the library to provide access to electronic journals, which are available to other students enrolled in the school. In fact, some students appear to believe that because they are paying tuition, they are entitled to do virtually anything.

D. *Library Expectations*

Library staff anticipate that they will be able to meet the needs of distance learners by providing copies of materials under sections 108(d) and (e) of the Copyright Act. They expect that they can provide copies to these students obtained for them via interlibrary loan. Libraries expect that they can create electronic reserve systems that will be available to all students, including distance learners. They assume that they will be able to negotiate licenses for digital materials for students, faculty, and staff on campus as well as for enrolled distance learning students who are located off-campus. Libraries also expect that they will be able to implement authentication technology that will not require all users to have the same “.edu” address but rather will authenticate them as having access under the license. They believe that license fees will be reasonable in comparison to license fees for printed works and that license terms will not be inordinately restrictive. Libraries expect that publishers will respond quickly to their requests and will respect the time-sensitive nature of these requests. They expect that the Copyright Clearance Center will cover an increasingly larger number of publishers and types of materials for digital copying.

Finally, although sections 108(b) and (c) prohibit use of digital preservation copies outside the premises of the library, libraries nevertheless expect to be able to make such copies available to enrolled distance learning students.⁶⁹

⁶⁹ The statute unequivocally states that the digital copy may not be used outside the premises of the library, but there is little legislative history to explain how one treats a CD-ROM, also a digital work, that is reproduced in a CD-ROM facsimile. Nor is there any recognition of how one deals with distance learners who do not have access to the library's premises but who are members of the library's patron base. 17 U.S.C. § 108(b)-(c).

E. *Copyright Holder Expectations*

The owners of copyrighted materials used in distance education expect that educational institutions that originate distance learning courses will purchase these materials. They expect that schools that provide online courses will obtain licenses for providing digital access to textual materials. Owners presume that distance education providers will restrict access to their copyrighted works to enrolled students and will implement technological controls to prevent downstream copying.

Copyright holders also expect that schools will treat distance learning and face-to-face courses differently when it comes to performances and displays, and that they will obtain licenses to perform any audiovisual work or dramatic literary or musical work in the course of instruction for distance education. Now that sound recordings have a limited performance right for digital transmission,⁷⁰ copyright holders most likely believe that educational institutions will obtain a license to use sound recordings in digital computer network delivery of distance education courses.

IV. CONFERENCE ON FAIR USE

The first attempt to deal with the copyright problems in distance education took place during the Conference on Fair Use (CONFU). CONFU was convened by the Commissioner of Patents and Trademarks in response to the call in the *White Paper*⁷¹ to address the broader issues of fair use guidelines for the use of copyrighted digital works in libraries and educational institutions.⁷² The focus was on guidelines because the commissioner announced that CONFU should not make recommendations to amend the Copyright Act. Representatives of various groups of copyright holders along with library and education associations met over a period of nearly three years. Early in the process there was considerable enthusiasm on the part of both the educational and library association representatives as well as the content providers about the possibility of reaching

⁷⁰ 17 U.S.C. § 106(6) (Supp. IV 1998).

⁷¹ BRUCE A. LEHMAN, INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: REPORT OF THE WORKING GROUP IN INTELLECTUAL PROPERTY RIGHTS 89 (1995) [hereinafter WHITE PAPER].

⁷² Actually, the *White Paper* repeated the call for the conferences initially made in the *Green Paper*, a 1994 draft of the *White Paper*. BRUCE A. LEHMAN, INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: PRELIMINARY REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 134 (1994). They were specifically to be a series of fair use conferences convened for the purpose of negotiating fair use guidelines. *Id.* CONFU held its first meeting in October, 1994. Three sets of guidelines were ultimately proposed (visual images, distance learning, and multimedia) but none received wide acceptance. The final meeting of CONFU was held on May 19, 1997.

agreement and developing guidelines. Discussions were helpful to all participants who learned about the developing technology, the interests on the part of users in extending fair use to the digital environment, and the concerns of copyright entrepreneurs that they might lose control of their copyrighted works.

CONFU's charge was to determine if it could develop fair use guidelines in areas such as interlibrary loan, electronic reserves, digital images, and distance learning. Although CONFU participants worked over two years to draft guidelines in some of the areas, the resulting guidelines did not receive broad support from either the library and education communities, or copyright holders.⁷³

The Working Group on Distance Learning⁷⁴ did reach consensus on draft guidelines for three types of distance learning delivery: live interactive (such as video conferencing), taped for later broadcast, and live interactive computer network delivery. The proposed distance learning guidelines differed substantially from the other two sets of guidelines produced in the CONFU process in that they imposed no numerical portion limitations. Left for future negotiations were guidelines on asynchronous computer network delivery, because there were so few examples of such courses being offered at that time, and the technology was so new. The guidelines suggested that asynchronous computer network delivery should be revisited in three to five years in hopes that the technology would have stabilized and that there would be additional models of asynchronous distance education that could be examined.

The thrust of the guidelines was to extend the face-to-face exemption to distance learning for one-time use.⁷⁵ There were important restrictions, however, recognizing the difference in the method of delivery of the course and what the technology permits. The basic exemption allowed teachers to perform any work in its entirety for distance learning; thereafter, permission to continue to use the work would be required.⁷⁶ If the teacher used only small portions of works that would qualify for fair use, then the guidelines were not triggered. The guidelines contained other important requirements: (1) only courses offered by a nonprofit educational institution or a governmental body for its employees qualified under the guidelines; (2) students receiving the course had to be officially enrolled in the course; and (3) students were not permitted to make copies of copyrighted works that were performed in the class sessions, but the receiving site could make a copy

⁷³ See BRUCE A. LEHMAN, THE CONFERENCE ON FAIR USE, FINAL REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE CONFERENCE ON FAIR USE 10 (1998), available at <http://www.uspto.gov/web/offices/dcom/olia/confu/confurep.htm> [hereinafter CONFU REPORT].

⁷⁴ The author served as the chairperson and principal drafter of the CONFU Proposed Distance Learning Guidelines.

⁷⁵ CONFU REPORT, *supra* note 73, at 44.

⁷⁶ The Classroom Guidelines have similar requirements. See HOUSE REPORT, *supra* note 9, at 68–69.

and retain it for fifteen class days during which time students who missed the performance could view the class. The guidelines retained the requirement from section 110(2) that use of the copyrighted work be of material assistance and directly related to the teaching content.⁷⁷ The proposed distance learning guidelines focused solely on performance and display. They did not address providing textual and other materials to distance learners or library service to these students.

None of the guidelines proposed by CONFU received substantial support, although each of them received some endorsements. The last meeting of CONFU on May 19, 1997, ended with agreement that the working groups would continue to meet and attempt to develop either guidelines or statements of good practice. The Distance Learning Working Group met through the fall of 1997 but disbanded after it was clear that the impetus for and interest in guidelines had waned on the part of most of the library and educational associations. Many valuable lessons were learned from the CONFU process. Even though the distance learning guidelines were not broadly endorsed, the dialogue with publishers and other copyright owners created a cooperative spirit between the users of copyrighted works and the owner community. As the process concluded, the groups that made up CONFU began to shift their attention to the legislative arena.

V. DISTANCE LEARNING LEGISLATION

Two bills were introduced in the fall of 1997 that would ensure the extension of fair use to the digital age. The Digital Copyright Clarification and Technology Education Act of 1997⁷⁸ was introduced in September by Senator John Ashcroft. This was followed in November by the Boucher-Campbell bill, known as the Digital Era Copyright Enhancement Act.⁷⁹ Although not identical, both bills included provisions that would aid distance learning. Both bills stated directly that neither the means by which a work has been performed, displayed, or distributed, nor the application of an effective technological measure would affect fair use. Under either bill, fair use would apply regardless of the technological measures by which the copyright owner chose to make the work available.

Neither bill would have given the education community a blank check for distance learning, but they did make it clear that distance learning would not be limited to analog broadcast and closed circuit television. Both bills would have amended section 110(2) of the Copyright Act by adding the word "distribution" to performance and display of a work. Further, the limitation on the types of works that could be used for distance learning and on the place of reception were

⁷⁷ *Id.*

⁷⁸ S. 1146, 105th Cong. (1997).

⁷⁹ H.R. 3048, 105th Cong. (1997).

removed. Passage of these bills would have considerably facilitated teaching distance learning courses by removing many of the copyright restrictions that impede distributed education. On the other hand, the proposed legislation did not give institutions a free hand; schools still would have to continue to pay license fees for reproducing works, for producing coursepacks for distance learners whether in print or digital format, and for the use of works that are not directly related to the teaching content of the transmission. These bills had considerable support from the educational and library community.

During work on the Digital Millennium Copyright Act (DMCA)⁸⁰ in 1998, the need for an expanded distance learning section was already under discussion. A provision was added at the last minute that called for the Register of Copyrights to conduct a study on distance learning. Section 403 of the DMCA required the register to determine whether the Copyright Act should be amended to promote distance education while maintaining the balance between the copyright holder and the users of copyrighted works. The register was to consult with nonprofit educational institutions, nonprofit libraries and archives, and copyright holders in conducting the study. The Act directed consideration of the following factors: (1) the need for exemption from exclusive rights of holders for distance education through digital networks; (2) the categories of works to be included; (3) the extent of appropriate quantitative limitations on portions of works; (4) the parties who should benefit from any exemption; (5) the parties who should be designated as eligible recipients of distance education materials under any exemption; (6) technological measures to prevent unauthorized access (whether appropriate and what type); (7) the extent to which availability of licenses should be considered in assessing eligibility; and (8) other factors the register deems important.⁸¹

VI. THE REGISTER'S REPORT

A. Hearings

The register held a series of hearings in early 1999, and used a consultant on licensing, a panel on technology, and other representatives to assist in gathering information for background for the report. Notice of a Request for Information and then a later notice asking for responses to specific questions were published in the *Federal Register*.⁸² Hearings were held in early 1999 and a total of fifty

⁸⁰ Pub. L. No. 105-304, 112 Stat. 2860 (1998).

⁸¹ *Id.* at 2889-90.

⁸² Notice of Request for Information, 63 Fed. Reg. 63,749 (Nov. 16, 1998); Notice of Request for Information, 63 Fed. Reg. 71,167 (Dec. 23, 1998).

witnesses representing organizations, companies, and educational institutions presented testimony.⁸³

During the Copyright Office hearings many people testified to the importance of distance education for the future. A highly educated populace and workforce is essential for the twenty-first century, and distance education will help make this possible for many people who either live miles away from educational institutions or have family or career limitations on their attendance at traditional schools.⁸⁴

Many of the representatives of education and library organizations stated that the existing exemptions in the Copyright Act have been of great assistance in teaching and learning. Because technology has changed and face-to-face teaching has expanded to encompass what is known as distance learning, most of these representatives stated that it is now time to modernize the educational exemptions in the copyright law.⁸⁵ Changes are needed in the statute to facilitate distance education and help achieve these educational goals, and these changes should be an expansion of the section 110(2) exemption.⁸⁶ An exemption is different from fair use. With an exemption, there is no balancing of factors. An exemption would be absolute, a bright line test. An exemption for distance learning would not replace fair use.⁸⁷

The Association of American Universities, National Association of State Universities and Land Grant Colleges, and the American Council on Education testified that the objective of distance education legislation should be to enable instructional activities that are offered at a distance and to extend the classroom exemption in section 110(1) to distance education provided that adequate safeguards exist against the misuse of copyrighted works that would harm the market for these works.⁸⁸ Universities and colleges occupy a unique position because they are both the producers of copyrighted works through their faculties

⁸³ See [Volume III, Hearing Testimony] DISTANCE EDUCATION REPORT, *supra* note 2.

⁸⁴ See *Testimony before the U.S. Copyright Office, Concerning Promotion of Distance Education through Digital Technologies, on Behalf of the Association of American Universities, the American Council on Education, and the National Association of State Universities and Land-Grant Colleges* (Jan. 27, 1999), in [Volume III, Hearing Testimony] DISTANCE EDUCATION REPORT, *supra* note 2, First Colored Divider [Washington, D.C.], at 330 (statement of Laura N. Gasaway) [hereinafter Gasaway Statement].

⁸⁵ See, e.g., INDIANA COMM'N FOR HIGHER EDUC., COPYRIGHT, DISTANCE EDUCATION, AND NEW TECHNOLOGIES: MEETING THE NEEDS OF INDIANA EDUCATORS AND COPYRIGHT OWNERS IN A DIGITAL SOCIETY—A REPORT TO THE UNITED STATES COPYRIGHT OFFICE 4–5, at <http://lcweb.loc.gov/copyright/disted/comments.html> (Jan. 21, 1999).

⁸⁶ [Volume III, Hearing Testimony] DISTANCE EDUCATION REPORT, *supra* note 2, Third Colored Divider [Chicago Hearing], at 28.

⁸⁷ Gasaway Statement, *supra* note 84, at 333–34; see also Gasaway—Written Testimony, *supra* note 49.

⁸⁸ Gasaway Statement, *supra* note 84, at 331.

and staff, and publishers through university presses. At the same time they are major users of copyrighted works.⁸⁹

The testimony made three recommendations. The first is that section 110(2) should be amended to permit display and performance in distance education just as they are permitted in face-to-face teaching. If such display and performance were distributed over digital networks, a limited distribution right would be required to enable the performance and display. A full distribution right is not necessary because it is simply a means to an end, a way to get the performance to the student. To do that over a network requires that the distance education provider distribute the copyrighted works it is using and make a few ephemeral copies, but that is not the end.⁹⁰

The educational groups' second recommendation was that the distinction between types of works that currently exists in section 110(2) should be eliminated. The third recommendation—perhaps the most important—was that extension of the performance and display exemptions should be available under circumstances where the educational institution can provide *reasonable* protection against downstream reproduction and distribution. Under these conditions, there is no reason to treat such performances and displays differently than in the face-to-face classroom. The educational benefits are great, and the risk to the market is small. Reasonably secure modes of delivery do not provide absolute assurance, but the degree of security should be what is reasonably secure in the industry. This is the same degree of security provided when publishers offer their own works in digital form. Plus, copying can take place in the classroom today.⁹¹ Where access is limited to enrolled students, but the mode of delivery cannot provide reasonable protection against reproduction and distribution, some form of exemption should be provided that might require stronger assurance against market harm, such as limiting the conditions of performance. Further, any legislation should specify desired policy outcomes rather than requiring technology-specific means to achieve that end.⁹²

In addition to the specific recommendations, the educational groups agreed that they would have a responsibility to warn students about downstream copying. They also indicated that this responsibility would be taken seriously in colleges and universities across the country.⁹³

Librarians and library associations testified about the range of library services provided to students located at a distance and the access to printed and digital materials that they provide for these students. Libraries increasingly are called upon to expand services as well as access to information for off-campus students

⁸⁹ *Id.*

⁹⁰ *Id.* at 332.

⁹¹ *Id.* at 333.

⁹² Gasaway—Written Testimony, *supra* note 49.

⁹³ Gasaway Statement, *supra* note 84, at 334–35.

and faculty. Libraries and educational institutions spend more than \$2 billion annually to purchase and license information resources,⁹⁴ and they want to ensure that licenses permit access to any student registered for a course.

Libraries unequivocally stated that licensing cannot substitute for a statutory balance of rights. Several of the witnesses noted difficulties with negotiating licenses that permitted enrolled off-campus students the same access as that enjoyed by on-campus students. In fact, the terms of some site licenses make it impossible to provide access to materials to distance learning students at all.⁹⁵ There are even licenses with terms so restrictive that they prevent making a copy of a work that would be permitted under fair use.⁹⁶

Copyright holders also testified that they wanted distance education to thrive, but most stated that there was no reason to amend section 110(2).⁹⁷ Instead, they pointed to the fact that distance learning courses were growing rapidly and that this in itself was evidence that no change in the law was required. Unlike educators and librarians, copyright owners encouraged further discussion among the various stakeholders in order to develop further fair use guidelines. Understandably, the primary concerns of copyright owners is harm to their markets through both lost opportunities to license their works and unauthorized dissemination over the Internet.⁹⁸ Dissemination of works without permission could lead to a total destruction of the market for a work, and the experience to date with students and infringement over the Internet does not give comfort to content providers, especially owners of musical works, computer software, and sound recordings.⁹⁹

The Association of American Publishers (AAP) focused on the materials produced by their members for the education market, many specifically aimed at distance learning courses and many that are in modules to be integrated into courses in a variety of ways.¹⁰⁰ The copyright law has never excluded educational materials from copyright protection nor treated them differently from other

⁹⁴ *Written Testimony of James G. Neal, Before the U.S. Copyright Office Concerning Promotion of Distance Education Through Digital Technologies*, (Jan. 26, 1999), at <http://www.arl.org/info/letters/neal.html> [hereinafter Neal Statement].

⁹⁵ *Id.*

⁹⁶ [Volume II, Public Comments] DISTANCE EDUCATION REPORT, *supra* note 2, Cmt. 28, at I (1999), available at <http://www.arl.org/info/letters/umuc.html> [hereinafter Maryland Statement].

⁹⁷ [Volume II, Public Comments] DISTANCE EDUCATION REPORT, *supra* note 2, Cmt. 4, at 3 (1999) (written statement of the Association of American Publishers), available at <http://lcweb.loc.gov/copyright/disted/comments.html> [hereinafter AAP statement].

⁹⁸ [Volume I] DISTANCE EDUCATION REPORT, *supra* note 2, at 128–29, 131.

⁹⁹ *Id.* at 132.

¹⁰⁰ [Volume II, Public Comments] DISTANCE EDUCATION REPORT, *supra* note 2, Cmt. 4, at 2–3 (1999) (written statement of the Association of American Publishers, Feb. 5, 1999), available at <http://lcweb.loc.gov/copyright/disted/comments.html> [hereinafter AAP statement].

materials. Moreover, educational uses have not been exempted from the rights of the copyright holder. The AAP questioned the assertions made by many educators that the current statute was a serious impediment to the furtherance of digital distance education.¹⁰¹ Not surprisingly, the AAP opposed any blanket exemption for performances and displays in distance learning.¹⁰² Another important factor is that digital distance education courses are not restricted to the United States; instead, they may be received all over the world, which exacerbates the potential harm to the copyright holder.¹⁰³ The AAP pointed to the DMCA's anti-circumvention provision¹⁰⁴ as evidence that the modern trend is to expand protections for copyright holders rather than to limit them further. An expansion to the section 110(2) exemption would not restore the balance between copyright holders and users of copyrighted works but rather would tip it in favor of education at the expense of the content providers who provide the resources to develop the works.¹⁰⁵

The Motion Picture Association of America (MPAA) indicated that it did not believe that the mere fact that technological developments had occurred was enough reason to assume that the copyright law was not working.¹⁰⁶ In fact, the MPAA joined other content providers in stating that it believed even greater protections for copyright holders were needed.¹⁰⁷

The American Society of Composers, Authors, and Publishers (ASCAP) agreed with the AAP, but also pointed out that many of its members were music educators while others earned a significant portion of their income by writing music for the education market.¹⁰⁸ ASCAP licenses many types of organizations for the non-dramatic performance of its repertory, including educational institutions.¹⁰⁹ Music is more important than ever in distance learning, not only as a substantive subject but also to enhance other subjects that are taught. When music is used in digital distance education, it is subject to being copied and retransmitted without compensation to the copyright holder. Not only can music be copied, but it can be separated from larger multimedia works and copied. Moreover, the copies that can be made are perfect copies. The need to protect

¹⁰¹ *Id.*

¹⁰² *Id.* at 4.

¹⁰³ *Id.*

¹⁰⁴ 17 U.S.C. § 1201 (Supp. IV 1998).

¹⁰⁵ AAP Statement, *supra* note 100, at 6, 8.

¹⁰⁶ [Volume II, Public Comments] DISTANCE EDUCATION REPORT, *supra* note 2, Cmt. 22, at 2 (1999) (written statement of the Motion Picture Association of America, Feb. 5, 1999), available at <http://lweb.loc.gov/copyright/disted/comments.html>.

¹⁰⁷ *Id.* at 4.

¹⁰⁸ [Volume II, Public Comments] DISTANCE EDUCATION REPORT, *supra* note 2, Cmt. 35, at 2 (1999) (written statement of the American Society of Composers, Authors, and Publishers, Feb. 5, 1999), available at <http://lweb.loc.gov/copyright/disted/comments.html>.

¹⁰⁹ *Id.* at 4.

such music from copying is paramount for ASCAP.¹¹⁰ Likewise, ASCAP has always coped with the transmission of music performances that use new technologies such as radio and television; online distance education courses should be treated the same and copyright holders compensated for these performances.¹¹¹

B. *The Register's Recommendations*

The register's report was published in May 1999. The education and library communities were generally pleased with the recommendations contained in the report.¹¹² If adopted, the recommendations to amend the Copyright Act would go a long way to solve the problems created by the existing section 110(2) limitations. The recommendations do not deal with problems about distribution of core materials to distant learners or library service to remote students. Instead, they focus on performances and displays in educational transmissions. There are nine recommendations along with some other areas for additional study and discussion.

1. *Clarify meaning of "transmission"*¹¹³

The best mechanism for making it clear that the term "transmission" includes digital as well as analog transmissions is to include such a statement in the legislative history. The statute is technology neutral, and therefore, inserting any additional language into the statute dealing with digital transmissions is not necessary. It would help, however, if in the legislative history such language were included to provide guidance.¹¹⁴

2. *Expand coverage of rights to extent technologically necessary*¹¹⁵

As currently written, the statute currently covers only acts of performance and display, so this recommendation would not excuse transmissions over computer networks. Thus, it is necessary to expand the scope to include making a copy, but it is only a narrow reproduction and distribution right, and not a wholesale right. Instead, it would permit only transient copies created as a part of

¹¹⁰ *Id.* at 18–19.

¹¹¹ *Id.* at 25–26.

¹¹² See, e.g., Am. Library Ass'n, *Copyright Office Issues Report on Distance Education*, 8(50) WASH. OFF. ONLINE, May, 27, 1999, at <http://www.ala.org/washoff/alawon/alwn8050.html>.

¹¹³ [Volume I] Distance Education Report, *supra* note 2, at 146.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

an automatic technical process—part of the digital transmission itself. Because the statutory exemption is limited to performance and display, the acts are “temporally bound and limited in its function.” The statute does not intend that the performances and displays substitute for a student purchasing copies of materials performed or displayed. Copies are to be purchased or made pursuant to other statutory exemptions like section 108, and these concepts would remain intact.¹¹⁶

3. *Emphasize concept of mediated instruction*¹¹⁷

In a classroom performance or display, a student sees the work only once. When the work is placed on a network to be viewed repeatedly on a computer screen, it changes the nature or manner of performance and display. A student can then access it repeatedly, and limitations on the traditional exemption are eliminated. If a student can view the performance or display repeatedly, this may serve as a substitute for purchasing a copy. The problem would be especially acute for textbooks and coursepacks. The key to this recommendation appears to be to make the performance and display on a computer network analogous to that in a face-to-face classroom. In the live classroom the teacher controls the performance and display, and a student sees it only once. It is not supplemental or background information to be consulted repeatedly. The report does not define the term “mediated instruction,” but it appears to mean that mediated instruction is what happens in the face-to-face classroom situation where the instructor controls the performance experienced by students.¹¹⁸ The recommendation is to make this equivalent to face-to-face instructional performances, and the statement that the performance or display must be part of systematic instruction might be amended to make it clear that it is only *mediated* performances and displays that qualify for this exemption. So, the performance would have to be “at the direction of an instructor to illustrate, or as an integral part of, the equivalent of a class session in a particular course.”¹¹⁹ It is not clear whether “mediated instruction” could include using short portions of performances of works in an asynchronous site where the clips were surrounded by analysis and instructional explanations. One could argue that this is also under the direction of the teacher.

¹¹⁶ *Id.* at 146–47.

¹¹⁷ *Id.* at 147.

¹¹⁸ *Id.* at 147–48.

¹¹⁹ *Id.* at 148.

4. *Eliminate requirement of physical classroom*¹²⁰

The restriction that the transmission be received in a traditional classroom is made obsolete by the very nature of digital transmission. Remote site students could access the instructional materials wherever they have access to the Internet. Changing this part of the statute would better reflect today's realities. If the requirement of a physical classroom is removed, then it will be important to retain a limitation on who can receive the transmission. Clearly, it should not be available to the general public. In fact, there was widespread agreement among participants in the study and witnesses who provided testimony that only students officially enrolled in the course should receive the transmission. So, this requirement should be added if the place of reception is broadened. Such an addition also inserts some element of control. In the current statute, the control is found in the requirement that the transmission be primarily intended for reception in a classroom; today the technology permits control by restricting access to enrolled students.¹²¹

The statute already permits transmission to disabled students and to those with "special circumstances," which Congress intended to cover those with "daytime employment, distance from campus or some other intervening reason."¹²² The amendment would add "those students who are able to attend classes, but prefer to learn at a time and place of their own choosing."¹²³

5. *Add new safeguards to counteract new risks*¹²⁴

Clearly, digital transmissions of works to students present greater risks to copyright holders than analog broadcasts, because storage in digital format makes possible perfect copies that can be transmitted everywhere. This impacts licensing for educational transmissions, but it also could have unintended consequences of harming other markets by substituting for "purchase of entertainment or information, or if copies are further distributed." To minimize these risks, safeguards are necessary; they can be adapted from Title II of the DMCA.¹²⁵ These safeguards should include the following:

a. Any transient copies that the exemption allows should be retained only so long as is reasonable necessary for the transmission itself. The purpose of this

¹²⁰ *Id.*

¹²¹ *Id.* at 148–50.

¹²² *Id.* at 150 (citing HOUSE REPORT, *supra* note 9, at 84.)

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 150–51. Title II of the DMCA is codified at 17 U.S.C. § 512 (Supp. IV 1998).

requirement is to ensure that the partial expansion of the reproduction right is not broadened beyond what is technologically necessary.¹²⁶

b. Those who take advantage of this new exemption must implement policies regarding copyright and provide to students, staff, and faculty informational materials that promote compliance with copyright laws. This requirement should not be overly burdensome but should just make everyone aware of their own responsibilities under the law. Some institutions are already doing this under the DMCA's online service provider provision.¹²⁷

c. When digital materials are transmitted, technological measures must be in place to control unauthorized use.¹²⁸ These would include protection against "unauthorized access and unauthorized dissemination."¹²⁹ The exemption should require the educational institution that is providing the distance learning course to apply measures to protect against unauthorized access and dissemination. The statutory language need not specify what type of technology is to be used, but instead, should contain simple, neutral language. No technology is completely effective at preventing unauthorized access, so only measures that "reasonably" prevent access would be required.¹³⁰ Access-control technologies are currently under development, and the expansion of the exemption should be tied to the development of these technologies. If digital works are to be available on a computer network, which increases the possibility of unauthorized access and dissemination, it is appropriate to condition this availability on technological controls.¹³¹

6. *Maintain standards of eligibility*¹³²

The section 110(2) exemption is available only to governmental bodies and nonprofit educational institutions.¹³³ Today, the lines between profit and nonprofit have blurred even though in 1976 most education was provided by nonprofit schools. Profit-making entities are now offering distance education courses. In fact, they actually compete with nonprofit providers. Publishers that license materials do not differentiate between for-profit and nonprofit educational institutions in the terms they offer. But it is difficult to understand why profit-

¹²⁶ [Volume I] DISTANCE EDUCATION REPORT, *supra* note 2, at 151.

¹²⁷ *Id.* at 151–52 (referring to 17 U.S.C. §§ 512(e)(1)(C) and 512(i)(1)(A) (Supp. IV 1998)).

¹²⁸ *Id.* at 150–52.

¹²⁹ *Id.* at 152.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 153.

¹³³ *Id.* at 153–54.

making entities should profit from activities that use copyrighted works and not compensate the copyright owners.¹³⁴

7. *Expand categories of works covered*¹³⁵

Educators do not differentiate between categories of works they use to teach, and under the classroom exemption for face-to-face teaching they can perform or display any work.¹³⁶ The reason for the limitation originally may have been the potential harm to the copyright holder from lost royalties for performances for entertainment if the recipient instead could enjoy the same performance as a part of a distance learning course. The main works that would be affected if there were an expansion of the categories would be “audiovisual works, sound recordings and dramatic literary and musical works.”¹³⁷ The primary market for educational videos is education, and licensing may be a major source of revenue for these content providers.

There is a potential impact on the secondary market for all these works. The concern about this impact is exacerbated by the potential of digital technologies. Instead of viewing the digital transmission of educational videos for distance education, the students might use them for entertainment purposes. Furthermore, the materials could then be downloaded for further distribution. Together these potential consequences might affect the sales market. For the past few years, students have been circulating sound recordings on the Internet and this is one of the largest sources of record piracy. Of course, fair use would still apply even without a license for the performance.¹³⁸

The 1996 addition of a performance right for sound recordings is limited to certain digital audio recordings.¹³⁹ At the time of the amendment, there was no discussion of whether sound recordings should then be added to section 110(2). It could be argued that Congress intended the use of sound recordings for distance education in 1976, but it was not squarely addressed at the time because “there was no performance right for sound recordings.”¹⁴⁰ The failure to do so “result[s] in a discrepancy between an educator’s ability to perform a nondramatic musical work and her ability to perform the sound recording in which it is embodied.”¹⁴¹ This means that the music copyright holder is subsidizing distance education

¹³⁴ *Id.* at 154.

¹³⁵ *Id.*

¹³⁶ *Id.* at 154–56.

¹³⁷ *Id.* at 155.

¹³⁸ *Id.* at 156.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 157.

while the record producer is free to charge for using the recording in the course, and this makes little sense.¹⁴²

The category of works excluded that has raised the most concerns from educators is audiovisual works.¹⁴³ This concern is based upon the value of such works as teaching materials, “the inconsistency between the ability” to use them in the classroom without restriction and the educational transmissions, and “difficulty in obtaining digital licenses” for distance learning use.¹⁴⁴ As multimedia works are created, there will be increased reliance on them in teaching, and the failure to include this category might have considerable impact.

Therefore, the recommendation represents a compromise for including audiovisual works in the exemption.¹⁴⁵ The restriction would allow performance of a reasonable portion of such works rather than performance of the entire work. To determine what is reasonable will require a balancing of factors such as the type of work, the educational purpose for the performance, and the market of the copyright holder.¹⁴⁶ The value of this test is that it permits educators to use the material to give a flavor of the work without any permissions while still requiring them to obtain permission to perform entire audiovisual works. In no way would this interfere with the copyright holder’s market, because public demand for the work is not affected when only a portion is used. And pedagogical goals are not thwarted because the material can still be used, but such use is just restricted to reasonable portions. Even with this restriction, the report states that it might be advisable to exclude from the exemption audiovisual materials produced primarily for the educational market, because, unlike entertainment works that have other markets, educational works have a single market that can be reduced by distance learning transmission.¹⁴⁷

8. *Require use of lawful copies*¹⁴⁸

The current section 110(1) exemption requires that when audiovisual works are performed in face-to-face teaching, the copy used must be a lawful copy.¹⁴⁹ If the expansion of categories for transmissions for distance learning is adopted, then there should also be a requirement that performance or display be restricted to lawful copies.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 158–59.

¹⁴⁶ *Id.* at 158. The balancing of the factors that make the portion reasonable is similar to a fair use test.

¹⁴⁷ *Id.* at 159.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 159–60.

9. *Add new ephemeral-recording exemption*¹⁵⁰

The final recommendation is to add an ephemeral-recording exemption to section 112 as a new subsection.¹⁵¹ This section permits entities that are allowed to transmit performances and displays to make a limited number of copies of that performance or display to facilitate the transmission. These copies may be retained only for limited time periods, however. An amendment to section 112 is needed to allow teachers to place a copyrighted work on a server and to be subsequently transmitted to enrolled students. Any copy made should be “retained and used solely by the entity that made it, and no further copies should be reproduced from it,” except the transient, technologically necessary copies that would be permitted under section 110(2).¹⁵² Additionally, the copy on the server that is available should be accessible to students only “for the duration of the course.”¹⁵³ The lawfully made copy requirement should apply here too.

C. *Nonstatutory Recommendations*

1. *Fair use*

The register’s report also contains nonstatutory recommendations dealing with fair use and licensing.¹⁵⁴ Fair use should apply to instructional transmissions as well; for example, limited portions of restricted works may even qualify. Congress should provide clarification of the fair use doctrine that would include the function of guidelines. Clarification is needed because there is “so much confusion” about fair use and the function of guidelines.¹⁵⁵ Section 107 “does not require amendment” however.¹⁵⁶ Instead, Congress should confirm that the fair use doctrine is “technology-neutral” and that it applies to activities in the digital environment.¹⁵⁷ The lack of guidelines in a particular area does not mean that fair use does not apply. Further, Congress should take the opportunity to clarify the relationship of guidelines to fair use and other statutory defenses.¹⁵⁸ Guidelines are not “absolute codes of conduct,” but instead they permit “leeway for reasonable activities” that may be outside of the guidelines.¹⁵⁹

¹⁵⁰ *Id.* at 160.

¹⁵¹ *Id.* at 160–61.

¹⁵² *Id.* at 161.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 161–63.

¹⁵⁵ *Id.* at 162.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

2. Licensing

“Licensing will continue to be the rule” for activities and uses that fall outside the distance education exemption.¹⁶⁰ Educational institutions and libraries are “long-time participants in licensing activities.”¹⁶¹ The fact that the digital world “imposes new costs on deliver[y] of distance education does not itself justify abandoning or regulating those systems.”¹⁶² The critical questions are how well the markets for licensing distance education materials are operating; and if they are “dysfunctional,” is it so serious that a “legislative remedy” is appropriate.¹⁶³ Librarians and educators have experienced considerable difficulties in licensing materials for distance education. The main difficulties have been in locating owners and in getting timely responses, but these problems are not unique to the digital environment. However, “they may be heightened in the digital context due to factors such as fear on the part of copyright owners concerning increased risk[s,] the lack of certainty as to the scope of pre-digital transfers of right[s] and general unfamiliarity with these new uses.”¹⁶⁴ Further, there may be little motivation for certain copyright owners to license their works for distance education because “it may not be a remunerative market.”¹⁶⁵

A particular problem noted by educators is when the owner of the work cannot be located at all.¹⁶⁶ Missing owners really block the marketplace since there is “absolutely no opportunity to negotiate.”¹⁶⁷ It may well be time for Congress to deal with the problem of disappearing copyright owners. In Canada, a user can obtain a compulsory license for “orphan works” when “the copyright board (a governmental body) is satisfied that the applicant for the license” has taken all reasonable steps to locate the owner.¹⁶⁸ The problem has become “more acute over recent years” with the twenty-year expansion of the copyright term.¹⁶⁹ Moreover, the digital environment has given new life to old works “by expanding potential audiences and lowering the costs” of making these works available.¹⁷⁰ In the future, the use of digital copyright management information may reduce or

¹⁶⁰ *Id.* at 163.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 164.

¹⁶⁴ *Id.* at 164–65.

¹⁶⁵ *Id.* at 165. Libraries have also had a great deal of difficulty with authenticating users for whom they have paid a fee for access to ensure that they actually can access licensed digital resources.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 166.

¹⁷⁰ *Id.*

even eliminate this problem, but for the foreseeable future, this problem will remain.¹⁷¹

D. *Critique of the Register's Recommendations*

While the education and library communities were very pleased with the overall report and the care with which it was crafted, there are a few areas where the user community believes that it did not go far enough. If copyright holders' major concern is unauthorized access and downstream copying, then it appears that the focus should be on permitting performances and displays if the educational institution has purchased or otherwise lawfully acquired a copy of a work that it wants to use in a distance education course, and it has taken reasonable measures to prevent unauthorized access and reproduction. The restrictions on enrolled students and relationship to the teaching content of the course are logical. All of the other restrictions except taking reasonable steps to prevent unauthorized access and downstream copying, may be superfluous if such copying is the primary concern. Reasonable steps might include adopting industry standards on technological controls for downstream copying, using passwords to prevent unauthorized access, and warning students who receive the transmission that copying is prohibited.

The primary area of disagreement is with the recommendation that expands the categories of works but limits performances of audiovisual works "to a reasonable portion" instead of the entire work. Portion limitations generally are not an acceptable alternative for these works, but at least the "reasonable portion" approach looks at the educational purpose of the performance and display. This means that the determination could take into account issues such as the level of the course, the number of students and the like. This does not mean that educational and library organizations agree with the recommended limitation on performing audiovisual works without a license. For example, a short excerpt of a motion picture may indeed give a flavor or create a mood, but educational videotapes are different. Many of these works are short, and their very nature makes them useless if less than the entire work is used. For example, if the audiovisual work is a videotape about the digestive system of humans or the reproductive system of dogs, what educational goal is served by performing only a portion? The work was meant to be shown in its entirety to teach the content. Producers of educational videotapes traditionally have relied on sales of the works and not license fees for performance. Often they are small producers and are not equipped to deal with licenses at all. Thus, this restriction may not even aid the copyright holder's market, but it will seriously harm educational goals.

The experience with licensing performances for distance education has not been good. If a license is required in order to perform an educational audiovisual

¹⁷¹ *Id.*

work in its entirety, some of the producers are likely not to respond at all to the request, others may charge exorbitant fees for permission to use the work, and some may refuse to let the work be shown to distance learners. This treats remote students differently than on-campus students when it comes to course content. Although producers of motion pictures may have better systems for dealing with permissions and licenses than educational audiovisual work producers, they still may charge license fees that prohibit use of the work for distance education even though the originating institution has purchased a copy of the motion picture, limits the performance to officially registered students, and takes reasonable steps to prevent downstream copying.

Licensing works is fine as a model for reproduction that goes beyond fair use, but a statutory exemption for performances and displays for distance learning courses should make licensing unnecessary if: (1) the transmission is limited to officially registered students; and (2) reasonable efforts are undertaken to prevent downstream copying. Even if licensing becomes easier to manage with the new technology, the question remains as to whether licensing is the appropriate mechanism for distance education performances and displays. “[T]he ease and cost of license is irrelevant to the question of how to best update the policy balance at the core of section 110(2).”¹⁷²

There is also a serious concern about academic freedom and the control that content providers can exert by whether and to what extent they allow their content to be used in distance education courses. The power to refuse to license or to offer terms that an educational institution cannot afford or cannot accept is the power to control what is taught in courses. If students cannot have access to the work, the ideas embodied in the works are withheld. A copyright holder can forestall any criticism of its works by offering unreasonable terms, which raises First Amendment concerns as well as academic-freedom issues for faculty.¹⁷³

VII. POTENTIAL FOR STATUTORY AMENDMENT

On June 24, 1999, the House Subcommittee on Intellectual Property held hearings on whether an amendment was needed to the Copyright Act for distance education.¹⁷⁴ This was a very limited hearing and only eleven individuals were

¹⁷² *Reply Comments: Promotion of Distance Education through Digital Technologies, on behalf of the American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association and Special Libraries Association*, in [Volume II, Public Comments] DISTANCE EDUCATION REPORT, *supra* note 2, Reply Cmt. 17, at 6 (Mar. 3, 1999), available at <http://www.arl.org/info/letters/dereply.html>.

¹⁷³ *Id.* at 8.

¹⁷⁴ *Intellectual Property Security Registration and the Report of the U.S. Copyright Office on Copyright and Digital Distances Education, Before the House Subcomm. on Courts and Intellectual Property of the Committee on the Judiciary*, 106th Cong. (1999), available at <http://www.house.gov/judiciary/ct0624.htm>.

invited to testify. Two representatives of content providers testified that no change in the law was needed. Representatives of the AAP and the MPAA testified that licensing of these works for distance education was working fine and that there was no need to expand the exemption.¹⁷⁵ Major concerns were articulated about the prevention of downstream copying and the fact that there have been no technological measures developed to ensure that such copying does not take place.¹⁷⁶

In addition to the Register of Copyrights, who spoke in favor of an amendment, two witnesses spoke in favor of amending the statute.¹⁷⁷ At the time of this writing, no legislation has been introduced in either the House or the Senate, but there continues to be considerable interest on the part of some legislators as well as educators. Representatives of these groups have been meeting to discuss drafting an amendment similar to the recommendations made by the register. There will continue to be considerable need for an amendment despite the current uncertainty about Eleventh Amendment immunity for state-supported institutions of higher education.¹⁷⁸

VIII. PROVIDING CORE COURSE MATERIALS AND LIBRARY SERVICES

A. *Course Materials*

According to the register's report, most of the licensing for distance learning today is for providing materials such as texts or coursepacks or for electronic reserves. There have been few licenses for providing digital works to date, but such licenses will surely increase.¹⁷⁹ The primary course materials used are printed textbooks that are purchased by the individual students. These are ordered by students either from the campus bookstore or from other national online stores.

¹⁷⁵ *Id.* Both Patricia Schroeder, President and CEO of the AAP, and Fritz Attaway, Senior Vice President for Congressional Affairs and General Counsel of MPAA, commended the efforts of the Copyright Register, but adamantly argued that further legislation was unnecessary. *Id.*, available at <http://www.house.gov/judiciary/schr0624.htm>; <http://www.house.gov/judiciary/atta0624.htm>.

¹⁷⁶ *Id.*, available at <http://www.house.gov/judiciary/schr0624.htm>; <http://www.house.gov/judiciary/atta0624.htm> (testimony of Patricia Schroeder on behalf of the AAP; testimony of Fritz Attaway on behalf of the MPAA).

¹⁷⁷ This author represented the major higher education and library associations, and John T. Cross, a law professor at the University of Louisville, spoke eloquently for educational institutions and distance learning.

¹⁷⁸ See *Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 684–85 (1999). Although outside the scope of this paper, there is every indication that the *Florida Prepaid* decision, which held that state institutions enjoy immunity from suit for patent infringement damages under the Eleventh Amendment, may also make state institutions immune from suit for damages in copyright.

¹⁷⁹ [Volume I] DISTANCE EDUCATION REPORT, *supra* note 2, at 34–35.

Although the primary form of these materials is the printed textbook, some courses also use CD-ROMs and other digital formats that are sold by traditional publishers. Coursepacks are also used, and these are primarily traditional coursepacks, consisting of copies of articles, book chapters, and the like, the same as those purchased by campus-bound students.¹⁸⁰

Faculty and educational institutions are also interested in creating self-contained online courses comprised of the teacher's own materials, all of the readings for the class, exercises, examinations, supplemental materials, performances, and displays of copyrighted works and the like. The courses might be provided online through a password protected system. There may be faculty members and even educational institutions that want to provide these self-contained courses that incorporate other copyrighted works without seeking permission or obtaining a licensing. Possibly the first use of some of this material might be permissible, but repeated use is unlikely to be fair use. Nothing in the proposed amendments to section 110(2) addresses this issue or requires copyright holders to be more responsive and realistic in permissions and licenses.

Library associations testified that they favor a policy that would deal with the difficulties educational institutions experience in licensing access to copyrighted materials.¹⁸¹ They believe that content providers are able to pursue a "take it or leave it" attitude in negotiations, which often results in a total denial of access to materials by distance learning students.¹⁸²

As the number of distance education courses continues to grow, perhaps better licensing systems will develop. Compulsory licenses are not generally favored in this country although they could provide one alternative, but what mechanism would be appropriate for setting the rates for a compulsory license for the various types of copyrighted works? Another royalty tribunal? Blanket licenses might also work, but it is difficult to imagine how blanket licensing might be designed to cover the wide variety of types of works that might be incorporated into self-contained distance learning courses. Even more difficult to envision are agreements by copyright holders on blanket licensing, because producers of the various types of works often have little in common.

Because content providers apparently do not differentiate between profit and nonprofit providers in their licensing,¹⁸³ this might be another area of exploration if the law is amended only with respect to performances and displays in educational transmissions. Does it not make sense to recognize the unique role nonprofit education plays in society and offer lower rates for licensing works to them than to the for-profit providers who are using their profits to pay dividends

¹⁸⁰ ISABELLA HINDS, MARKETPLACE FOR LICENSING IN DIGITAL DISTANCE EDUCATION, *in* [Volume I] DISTANCE EDUCATION REPORT, *supra* note 2, app. E, at 8-10.

¹⁸¹ Neal Statement, *supra* note 94.

¹⁸² *Id.*

¹⁸³ *See generally id.*

to shareholders? Schools complain that the cost of digital materials is significantly higher than for the same material in printed form. The terms of the license also may be quite restrictive. The most difficult problem is with licensing journal articles and audiovisual works. It may be that copyright holders do not know that the fees or license terms they insist upon are inappropriate, or perhaps they really do not understand the nature of distance learning courses.¹⁸⁴

B. *Library Services*

University libraries report difficulties with several licensing issues. When there are off-campus students who are officially enrolled for distance education courses, libraries struggle with license terms that restrict access only to on-campus students. Library associations wanted to solve this problem and sought help from the Copyright Office study. The problem is a licensing issue, however, and not one that can be solved by an amendment to section 110(2). Instead, it concerns how a library can assure copyright holders that the library can authenticate authorized users so that they may get access. When a library has paid for access to full text materials for its students, it justifiably wants to include all of its students whether they are campus-based students or those taking a distance education course. This may require better authentication procedures on the part of the educational institution to verify that persons seeking access are enrolled students.

Libraries jointly have begun to discuss acceptable license terms for online resources to meet the needs of their user population, including students and faculty who are located at a distance from the physical campus.¹⁸⁵ Too many publishers still take an all-or-nothing approach to licensing, and distance education students are the most disadvantaged group when this occurs. Perhaps libraries can exert pressure through professional associations to ensure more satisfactory license terms.

Licenses for electronic reserves also have been problematic. Many academic libraries have created electronic reserve (e-reserve) systems to serve their students. E-reserve systems benefit not only the students who can access the materials outside of the premises of the library but also the library itself by increasing the efficiency of managing the reserve system, reducing the amount of space required for reserve materials and the like.¹⁸⁶ Librarians want to ensure that distance learning students have the same access to e-reserve materials that on-campus students have. Many libraries have assiduously attempted to obtain

¹⁸⁴ *Id.*

¹⁸⁵ AM. ASS'N OF LAW LIBRARIES ET AL., PRINCIPLES FOR LICENSING ELECTRONIC RESOURCES (July 15, 1997), at <http://www.arl.org/scomm/licensing/principles.html>.

¹⁸⁶ Laura N. Gasaway, *Library Reserve Collections: From Paper to Electronic Collections*, in GROWING PAINS: ADAPTING COPYRIGHT FOR LIBRARIES, EDUCATION & SOCIETY 125, 142 (Gasaway ed., 1997).

permission for works placed in electronic reserve systems. The Copyright Clearance Center (CCC) provides some help with its Electronic Course Contents Service,¹⁸⁷ but obtaining permission is slow and not very responsive to the short time-frames in which academic libraries operate their course reserve collections that are bound to the semester or quarter systems. Also, many publishers refuse to allow the CCC to negotiate e-reserve licenses for them, which forces the educational institution either to contact the publisher directly¹⁸⁸ or to put the material into the e-reserve system without permission. If the library makes the decision to contact the publisher directly, this simply extends the time required for obtaining permissions. More problematic are the publishers that simply refuse to license their materials for e-reserves at all.¹⁸⁹

If a content provider will not license its works for inclusion in coursepacks or online courses, and if it refuses to license them for electronic reserves, the copyright holder likely views this as protecting its property. The consequence to the educational institution, however, is control over what is taught in the course and the dissemination of ideas. This is not acceptable to faculty, librarians, or students. Neither should it be acceptable to society.

IX. CONCLUSION

The register's recommendations to amend section 110(2) would solve many but not all of the copyright problems for distance education. If adopted, they will reduce the need to seek permission for performing certain types of works but not all. The recommended limitation on performance of audiovisual works to "reasonable portions" does not solve the problems of educators and still disadvantages distance education students in comparison to on-campus students. Therefore, educational and library associations must work diligently to persuade Congress that section 110(2) should be amended to make distance education the equivalent of the face-to-face classroom. In order to do this, educational institutions will have to assume greater burdens, such as educating their students and faculty about copyright, implementing procedures to restrict access to distance learning courses that incorporate copyrighted works to students officially registered for the course, and taking reasonable measures to prohibit downstream copying.

As the public demands more distance education courses, perhaps pressure from the public will encourage publishers to rethink their restrictive license provisions for providing access to materials either as core course materials or for

¹⁸⁷ The CCC's Electronic Course Content Service is described at COPYRIGHT CLEARANCE CTR., DATABASE, at <http://www.copyright.com/Database/default.html> (last visited Apr. 7, 2001).

¹⁸⁸ Maryland Statement, *supra* note 96, at 4.

¹⁸⁹ *Id.* at 5.

electronic reserves. The demand for digital access is not likely to decrease. The value of an educated populace is self evident, and the general public can help considerably to convince their legislators of the value of distance education courses and the need to ensure fair access to copyrighted works for these students.

On the other hand, content providers are pressuring Congress not just to preserve the balance that has existed between users of copyrighted works and copyright entrepreneurs, but actually to strengthen protections provided under the copyright law. Lobbying efforts on behalf of both groups have been strong. In an effort to sort out the concerns of the stakeholders, Congress mandated that the Register of Copyrights prepare a report on distance education. The Copyright Office has had a number of important reports assigned to it in the past few years, several in the DMCA itself: distance education, boat hull designs, the first-sale doctrine and digital works, and the impact of anti-circumvention technologies. Thorough studies and examination of issues may be the wave of the future in a time of rapidly developing technology, changes in society, new forms of education, and pressures from various groups for congressional action.

What Congress now does with the results of these studies is what is important. Will these well thought out and reasoned recommendations be adopted in the form of amendment to the Copyright Act or simply be ignored? There are considerable pressures from citizens in this area as the demand for distance learning increases, and it is perhaps the citizenry who will ensure that the changes needed in section 110(2) are made so that distance education will not only grow, but will flourish. These changes can restore the copyright law to one that serves the constitutional mandate to promote the progress of science and the useful arts.