TESTIMONY SUMMARY
of the
WESTERN COOPERATIVE for EDUCATIONAL TELECOMMUNICATIONS (WCET)
for the public hearing of the
U. S. COPYRIGHT OFFICE
on
FEBRUARY 10, 1999 in LOS ANGELES

This written commentary is sent to the U. S. Copyright Office in response to Section 403 of the Digital Millennium Copyright Act and is intended to be responsive to the questions asked by the Copyright Office in the Federal Register, Volume 63, No. 246. The Western Cooperative for Educational Telecommunications (WCET) and it's members desire that this information be useful to the Copyright Office in its preparation of recommendations for Congress on the promotion of distance education through digital technologies. In addition, WCET offers to be available, when appropriate and desirable, to the Copyright Office for continuing consultation on matters pertaining to the distance delivery of higher education.

WCET, established by the Western Interstate Commission for Higher Education (WICHE) in 1989, has 200 members, primarily in the higher education community, from 37 states and five foreign countries. WCET serves as a clearinghouse for telecommunications information and expertise, an advocate for effective policies affecting educational technology, and an evaluator and researcher on quality uses of educational telecommunications. WCET has developed and disseminated the "Principles of Good Practice for Electronically Offered Higher Education Degree and Certificate Programs," which have been adopted by all of the U. S. regional accrediting bodies in higher education. WCET has also brokered degree programs across state lines and has been promoting sound principles and practices in the provision of student services for distant learners. Among its other projects, WCET operates an Institute for the Management of Distance Education and has helped research the use of technology in teaching and learning and the costs associated with an institution's investments in technology and telecommunications.

1. Nature of Distance Education

Distance education can be described as a mode of instruction where the learner and instructor are not normally expected to meet at the same time and/or place. Since distances, in both time and geography, can be great, communications technologies are used to offer course content, enable instructor-student interaction, and facilitate student to student interaction.

Historically, a person would typically learn a trade at a young age and stay in that profession for the rest of his or her life. In today's environment, workers often must upgrade their skills and many begin totally new professions at various times in their lives. Distance education aids such students in avoiding or minimizing the costs in time and

money associated with relocating to a college campus and/or foregoing work to attend traditionally scheduled courses. In this age of technology, demand for such distance education opportunities is growing at a rapid pace and is attracting students of all ages, across every locale, and from every trade and profession.

Members and staff of WCET have created two publications that address many of the questions posed by the Copyright Office in preparation for these public hearings. *"Distance Education: A Planner's Casebook"* takes the institutional point of view and provides success stories of institutions using a variety of technologies to teach a wide range of subjects to many different audiences. *"The Distance Learner's Guide"* takes the student point of view, equipping the student with the knowledge to become an informed consumer of distance learning programs. An additional publication of interest is Ted Marchese's article, *"Not So Distant Competitors,"* written for the American Association for Higher Education (AAHE). It depicts the growing number of for-profit institutions that are joining traditional institutions in serving this market.

While the focus of these hearings is on distance education, it is important to also note the number of on-campus classes that now use digital technologies. The 1998 Campus Computing Survey indicates that 44.4% of all on-campus classes now use e-mail and 22.5% use Internet resources. This is a marked increase from 25% using e-mail and just 8.4% using the Internet only two years ago. While the needs of distance education have raised the copyright issue, recommendations made to Congress by the Copyright Office will likely have an impact on almost every higher education course.

2. Role of Licensing

From the input WCET has received, it appears that administrators and operators of distance education programs are more acutely aware of copyright issues in the context of the technological delivery of distance education than are individual professors. It appears that professors are more likely to rely upon the fair use doctrine, as they often have in the traditional classroom, but that administrators often take a more conservative approach to copyright and licensing issues in the technological context. In looking at Section 110 (1) and (2) of the Copyright Law, they worry that the relief provided by the limitations listed there and by the fair use doctrine in a face-to-face classroom may not be available with the use of audio-visual or dramatic works that are transmitted over a distance via technology. Some administrators worry to the extent that they question whether copyright law would even allow an institution to retain taped copies of their own classes that use copyrighted material.

Obtaining licenses and permissions is often difficult and time-consuming in any teaching/learning setting, but the more private nature of the traditional classroom allowed professors to confidently rely upon the fair use doctrine. The potentially broader exposure that technology provides causes administrators to be more cautious. A conflict can arise here because professors, who may be unfamiliar with the permission process, are often making last minute decisions as to what materials to use so that they can accommodate the changing needs of a particular class and can use material provided by

current events. These flexible approaches often lead to more effective teaching, so it becomes problematic when restrictions imposed by administrators inhibit this flexibility.

Especially in a mult-media teaching environment, it is difficult to obtain all the licenses that may be required. While a few larger universities may use a clearinghouse, most institutions attempt to get these licenses directly from the copyright holders when they are apprehensive of the protection that the fair use doctrine or Section 110 may afford. Technology is being used to restrict access to the material, but WCET is not aware of technology being used to actually ameliorate the difficulties in the permission process itself.

If a digital work is made available at a fair price that includes the licenses needed by educators, regardless of the location of the students, such a license should exist and be required. If a work is not so available, educators should have the right to digitize the available work for display and performance, regardless of the location of the students, with appropriate safeguards against unnecessary copying, dissemination, and further distribution of the digitized version. Digital materials marketed directly to educators with the appropriate rights to permit use with local and distant students, offer obvious benefits over the continued use of analog materials. In such a market dynamic, copyright owners of non-digital material should be eager to see the application of the broader exemptions listed above, or they will likely face losing market share.

What other approaches could help ameliorate the problems associated with the use of copyrighted material in distance education? The creation of an easily accessible clearinghouse database for licenses and permissions may be helpful. Blanket licensing for an academic year (or longer) may help the situation, as may the possibility of a new membership organization, similar to BMI, which represents songwriters, and which can collect fees for the use of material copyrighted by its members. All these possibilities merit further exploration.

3. Use of Technology

Beginning late in the last century with correspondence study, distance educators have continually adapted each new communications technology into their courses. Examples of colleges using books, radio, television, fax, microwave and satellite transmission, computer software, videotapes, audiotapes, compressed video, and the Internet are abundant. Each of these technologies was developed for some other purpose and distance educators have adapted them to meet their needs.

While the focus of these hearings is on distance education in the context of digital technologies, there are still many distance education applications that use non-digital tools. Any recommendations made to Congress should cover all distance education applications, regardless of technologies used.

Educators have used a variety of methods to protect the security of distance education materials. The Internet can include password protection, can require client software, and

is developing software that validates a student's digital signature. It is even possible to limit the time during which such work is accessible. Security in other technologies can be more problematic. For instance, courses over cable television are usually available to every cable subscriber, but scrambling of broadcast signals may sometimes be possible. Access to tapes can be limited and monitored.

4. Application of Copyright Law to Distance Education

Copyright law should be reformed to make it clear that exemptions apply to all legitimate non-profit educational activities, regardless of the specific technology or the distances entailed in the delivery of such an activity and regardless of whether the work is in analog or digital form. Current law limits use based on the type of work. Multi-media presentations in distance education often weave different types of work into a single delivery or convert an analog work into a digital form. While authors' copyrights of all types of work should be protected, we believe the distinctions that now exist under the law are unreasonably and unnecessarily restrictive. Such distinctions can be eliminated, while still adequately balancing the rights and interests of authors, learners, and the public. Restricting any broadened exemptions or limitations to non-profit organizations would be consistent with the current language in Section 110 (1) and (2). This may further assure that no one other than the author "profits" from the protected efforts other than in an nominal and incidental way, but WCET suggests input from proprietary institutions of higher education be solicited by the Copyright Office prior to making recommendations to Congress on this point.

The class of eligible recipients of any such exemptions could be limited to students registered in the particular course using the material. However, a balance must be sought between the cost of imposing such limitations on institutions of higher education and the cost to the author of an occasional breach of such a limitation. Uses of technology, such as those mentioned above, could increase the likelihood that such limitations are in place and working, but may never be able to successfully guarantee 100% compliance. As security technologies become more sophisticated, the cost of implementing them tends to increase and usually translates into increased costs to the student, hence the need for a balance of interests.

Limitations on further student copying should be consistent with fair use. Consequently, making a copy for personal study of a reasonable portion by a student should be permitted while further uses by a student would not. Institutions of higher education, however, cannot reasonably be held responsible for student uses that go beyond those allowed by law, especially if the institution makes information on the matter available to students who are eligible recipients of copyrighted material.