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My remarks, on behalf of the University Continuing Education Association (UCEA), will draw upon my experience as dean of continuing education and UCLA Extension, the largest single-campus program of its kind in the United States, insofar as that experience is representative.

The role of university continuing education is anchored in more than a century of practice, growing out of public service commitments to extend the value and resources of higher education beyond the doors of the academy. University continuing education brings to millions of adult learners each year access to instructional and other programs that fulfill myriad academic and professional needs. Those educational opportunities provided by the 415 institutional members of UCEA reflect the academic rigor and professional standards of the higher educational community as a whole.

Distance education has long been associated with university continuing education, where it has historically been housed. Indeed technologically assisted teaching and learning have their origins in the outreach mission of continuing education. For much of the century, extensive use of analog broadcast media, such as educational radio and television, video delivery, or satellite up-and-downlinks have offered avenues to reach outlying areas in sparsely populated states, global partner institutions, or individuals studying through independent learning modalities. For hundreds of thousands of such students, these facilitations made it possible to pursue degree study or prepare professional careers. The same infrastructure in many state educational systems also provided—and continues to provide--essential contributions to medical diagnostics at a distance.

Today, the digital transformation of distance education technologies may be having its greatest impact *within* the traditional university setting. *Intra muros*, it becomes distributed learning, allowing for significant enhancements for interactive mastery of subjects and enriched understandings. These are closed systems, however, and essentially private. They are used for matriculated students taught by faculty and are regulated by academic administrative

infrastructures that are unwaveringly attentive to assuring the balance between necessary academic freedom and access to intellectual resources, and the obligation to respect intellectual property and copyright protections.

While these same technologies are accelerating the potential of institutions to serve an ever greater number of external students, there is every reason to believe that the same standards and values that prevail internally are scrupulously respected in the distance education programs of UCEA's members, in ways that I will help illustrate below.

This is a vital point, because we must assume that digitally-based distance learning methodologies will be increasingly incorporated into the structure and rhythm of traditional learning, to allow greater flexibility as to the time, place, costs, and pace of the pursuit of higher and extended education. It is noteworthy that the enabling technologies are already enhancing collaboration among universities for research and evaluation, and with regard to combining resources from different institutions, for addressing the aggregate educational needs of communities of learners who cannot be served by any single institution. Unnecessary impediments constraining access to intellectual resources would certainly restrict the promise of expanded learning opportunities, so necessary for the human capital requirements of the global knowledge economy.

Thus setting up a dichotomy between digital distance education and traditional instructional models is illogical, and does not reflect standards of practice. There are four essential truths that support this argument:

- 1) **Education is education.** Students are students and instructors are instructors, regardless of the medium in which the learning experience takes place. The academic requirements and standards of practice do not vary as the medium varies. Thus the existing frameworks that govern "live" education apply uniformly in comparable "distance" formats, whatever the technological platform.
- 2) **Security is already in place.** Students in distance learning courses must register, identify themselves, and be subject to evaluation and assessment. Access is carefully controlled. Indeed, unlike the traditional lecture class, there can be no "invisible" auditors.

An example drawn from my own institution is representative. For a student to take one of UCLA Extension's online courses, he or she must formally register with us, providing the same kinds of identification required of those studying in a bricks and mortar classroom. For the quarter of instruction, the student is issued a unique password, specific to the course and expiring at the end of the defined registration period. This assures that only legitimately registered students may enroll. Moreover, as registration with us involves the student's

obligation to comply with UCLA's code of student conduct, unethical use of copyrighted materials by the student could be the basis of disciplinary action, including dismissal, at any time.

Of equal importance, UCLA Extension also has in place an instructor's code of conduct and *obligatory* formal training for those engaged in our distance education program. One component of that preparation involves orientation about appropriate use of digital resources. Here is a brief illustrative excerpt from our materials:

*...When in doubt, ask for permission.* In requesting permission, be sure to tell the other party whether you are using the material on a closed, password operated site, or an openly accessible website. Some parties will want to know how long you intend to make it available, and most will stipulate the type of copyright notice they want you to include with your posting.

Always state the copyright info[rmation] for any materials you reproduce and if appropriate, tell students that the material is for classroom use only, not for distribution.

Pay attention to the information contained on a site--some will allow reproduction but only under certain circumstances. Others will permit free use for educators, but still want to be asked and cited.

In addition, exploiting the technology of the web for a salutary purpose, we ourselves refer instructors to the relevant websites of our own and sister universities and colleges and professional associations, precisely to encourage them to remain aware of the federal policy governing appropriate use.

Indeed, one of the frequently asked questions among colleagues using the distance learning listserve of UCEA is help in identifying available guidelines and functioning methodologies for ensuring that instructors, students, and institutions respect the operative regulatory frameworks.

Hence, to some extent, distance learning environments and the institutional support apparatus that sustain them are demonstrably as vigilant—if not more vigilant—in protecting against activities that might lead to improper use of intellectual property as is the traditional university classroom. Moreover, there is arguably no greater risk in a digital environment than in that using less advanced technologies. The experience of our association members suggests that concerns about downstream infringement of intellectual property rights are misplaced.

Perhaps I should make explicit that my points of reference are accredited institutions of higher education, such as the members of UCEA and those associations that UCLA Chancellor Albert Carnesale represented earlier in this panel. This relates to my next point:

- 3) **The infrastructure to ensure uniform respect of standards already exists.** My reference above to the energetic pursuit of best practices among responsible academic officials reflects the self-regulatory nature of U.S. higher education. Peer-evaluation and internal auditing methodologies have long guaranteed the vitality and standards of excellence that characterize U.S. higher education and have made it the envy of the world. They can be counted on to do the same in the digital age. Accrediting bodies, the scholarly and professional communities, and the major associations within the higher education establishment are vigilant about insisting that distance education conform to those same shared values and practices upon which the international renown of U.S. post-secondary education for outstanding teaching and global leadership in research has long depended. Because the standing of educational institutions depends upon these long-established mechanisms that promote the free exchange of ideas and respect for intellectual property, they represent the best means to ensure that distance educators create and implement whatever procedures are needed to provide protection of copyright in technologically-mediated instruction.

Again the experience of UCLA Extension may be illustrative here. When we developed online courses that fulfilled components of our California state-approved teacher credential programs, we had to confer with the relevant state commission beforehand.

The commission's authorization relied on one assumption: We would be abiding by the known internal standards of our program within UCLA and by respect for the criteria that conditioned our original authorization to teach and administer a state-approved credential program. Any evidence emerging to suggest that our online instructional program failed to meet the approved standards in teaching and evaluation could lead to our loss of that authorization.

In short, I submit that as standards for digital intellectual commerce are adopted and promulgated, accredited institutions can be counted on to respect them rigorously. <sup>1</sup>

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<sup>1</sup> The Copyright Office may wish to consult the websites of the regional accrediting bodies, such as that of the Western Association of Senior Colleges (WASC): <http://www.wascweb.org/senior/guide/regulat.htm>

- 4) **“Reasonable standards” are sufficient.** Distance education providers should be directed to use all reasonable means to adopt the use of electronic safeguards to protect copyright holders, as these are being developed. But advocacy of any specific technology at the present time would be deleterious.

From the legislative record, UCEA acknowledges that your office is conducting these hearings and study in the spirit of Congress’s instructions to the Copyright Office. Section 403 of the Digital Millennium Copyright Act (DMCA) required this process for the purpose of helping you make specific recommendations to Congress for possible *expansion* of the existing exception for institutional broadcasting in section 110(2) of the Copyright Code. As we understand those instructions, Congress expects your recommendations for its consideration to include legislative frameworks to pertain to materials delivered digitally.<sup>2</sup> Thus we appreciate that you are not free to recommend *no* changes; nor would we advocate your doing so.

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<sup>2</sup> Senator Ashcroft of Missouri, a chief proponent of Section 403 and a former educator, explained his view of the purpose for the study, namely to gather more information to support an effort to continue an exemption for distance education in the digital format. Speaking from the floor of the Senate, Senator Ashcroft stated, “When I was a professor . . . I used to teach a television course. The very same procedures I used in analog technology for television transmission might well have been illegal if the TV signal had been transmitted digitally. It is important that we give the capacity for distance education in the digital age the same potential that we had for distance education in the analog age . . . . Additionally, this legislation begins the process to allow distance education in the digital world. We should not tolerate laws that discriminate against technology, instead we should seek to guarantee that what people can do in the analog that they can continue those actions in the digital world. A study will be undertaken to help Congress to sort out the many technological and legal challenges of updating the copyright law regarding distance education. At the beginning of the next Congress I fully expect to introduce legislation specifically on distance education and I understand that both Senators Hatch and Leahy have agreed to support legislation based on the study conducted by the Copyright Office. In addition, I look forward to working with both the education community and the content community to pass, not block, this important legislation. Distance education is of fundamental importance to Missouri, as it is to most rural states, and of great importance to the many parents who home school their children.” 144 CONG. REC. S4887 (daily ed. May 14, 1998) (statement of Sen. Ashcroft).

Senator Leahy of Vermont, the Ranking Member of the Senate Judiciary Committee, echoed Senator Ashcroft’s expectation of specific recommendations from the Copyright Office at the conclusion of the study. Upon receiving the Copyright Office’s recommendations, it is my hope that the Judiciary Committee will promptly commence

UCEA's members are both content users and owners. Our institutions share many of the same concerns aimed at protecting the rights of copyright owners that our colleagues representing the other content-owner associations have shared with you in earlier testimony. However, UCEA members differ in two important respects from them:

- We concur that the Copyright Code should be updated to reflect the changing realities of today's classroom, in keeping with the expectations of Congress.
- We believe that the focus of your investigation and recommendations should be advocacy for distance education, including greater flexibility in the application of "Fair Use" for legitimate distance education purposes—rather than fear about theoretical downstream abuses. To compromise the legitimate promotion of digital distance education out of reaction to the anticipated harmful action of renegades would cripple perhaps the greatest expansion of educational opportunity in the United States since the GI Bill. More pertinent perhaps is that such an approach runs counter to current trends in American law reconciling the use of new technologies with the need to promulgate other salutary objectives.

Because we agree that the Copyright Code is cumbersome to implement in its current treatment of distance education, we believe it is wise to seek its improvement to assure its continued relevance and protections.

How does UCEA suggest, as part of the Copyright Office's proposed recommendations to Congress that section 110(2) be updated? The accommodations accorded traditional educational practice should accommodate distance education on the same bases.

However, we also believe that distance educators could be required *to use all reasonable technological means as available in the current marketplace to protect the rights of intellectual property owners*. The stress should be on "reasonable." We believe that such an admonition would provide all adequate insurance to protect the rights of content owners.

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hearings on the issue and move expeditiously to enact further legislation on the matter. I know that all members on this Committee are as anxious as I am to complete the process that we started in Committee of updating the Copyright Act to permit the appropriate use of copyrighted works in valid distance learning activities." 144 CONG. REC. S4886 (daily ed. May 14, 1998) (statement of Sen. Leahy).

From these examples and the legislative record, the Copyright Office must conclude some changes must be suggested as that is Congress's clear expectation.

As new technologies develop and are widely available to the professional community, distance educators would adopt these new safeguards. Concurrently, copyright holders should be encouraged to develop new methodologies to expedite approvals and releases for use of their materials for educational purposes.

However, any new legislation must **not** specify a particular technology, given the rapidity of the introduction and adoption of new software, hardware, and platforms, not to mention the corollary rapidity of obsolescence in the digital environment. The powerful constraints on and competition for limited resources within higher educational institutions make the maintenance of existing infrastructure hard enough. In consideration of the need to ensure internal *and* external technological connectivity because of the reliance on electronic communication for scholarship, research, and teaching, it would be disastrous to mandate the adoption of specific technologies for only one (albeit an expanding) component of the academic enterprise, generating costs at the margin that would jeopardize the core.

That is why the promulgation of *a reasonable standard* is thus called for. Furthermore, it builds on the enlightened self-interest of the academic marketplace, as generator and user of intellectual property, that is likely to ensure a functioning system better than efforts to control what might otherwise be uncontrollable.

As the Copyright Office investigates the potential for such a standard, it might be helpful to look at how other legislation has promoted the achievement of desired objectives by advocating a more fluid expectation for the adoption of technologies as they emerged.<sup>3</sup>

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<sup>3</sup> The best example known to me derives from the grave and well-founded anxiety arising in parts of the scientific community in the late 1970s and early 1980s about the effects of the depletion of the earth's ozone layer. Specifically, scientists were concerned about its likely destruction as a result of chlorofluorocarbons (CFC's). Since CFC's had a variety of widespread industrial uses since the 1930s, members of the international community met in Montreal to develop an international treaty to deal with the issue. Representatives from the chemical companies who produced CFC's argued during these early negotiations--like some content owners have suggested today on the issue before you--that the law should not ban CFC's until an environmentally safe alternative was developed.

Fortunately the parties to the Montreal Protocol understood that temporizing would aggravate the potential danger, and instead agreed to set certain time frames (not technologies) for the end of the use of CFC's. Without mandating the "how," the "what" and "when" were clearly defined.

It was determined that in the allotted time, CFC producers would develop safe alternatives for use in air conditioners, refrigerators, etc. As we now know, within a matter of just a few years, the same chemical companies had developed the

It is our view that as the new technologies against infringement emerge and become broadly accessible to the community of practitioners, distance educators would be expected to adopt them.

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In conclusion, let me observe how appropriate it is that these hearings are being conducted. A sound and enforceable Copyright Code is vital for sustaining the capability of our society--through our educational system--to instruct, discover, originate, protect, and promulgate knowledge responsibly. It is true that mounting distance education programs presents several challenges, not the least of which is protecting intellectual property, including that generated by participating faculty and students. Fortunately, for all distance instructional programs across the country, where students are enrolled in an accredited institution and their work is formally evaluated by their teachers, there are already operational safeguards in place that conform strictly to the regulations of the parent institution, as well as those of external associations to whose standards it must adhere.

Lifelong learning is critical not just for the expansion of educational opportunity but for guaranteeing a competent and competitive workforce and an informed citizenry. Distance education is a tested means for instructional delivery and self-paced learning. Consequently a broadening of the exemption in section 110(2) to include digital and new media applications is both appropriate and without reasonable risk. It is also arguably in the national interest by fostering, rather than impeding, the capacity of higher educational institutions to help the United States achieve a continuously educated society. *That* is an objective worth legislating.

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mandated alternatives to CFC's. The lesson learned from this experience in environmental law is that when industry was faced with a general law with targeted outcome, the marketplace responded with the desired result.

I believe that this analogy is instructive for our shared purposes, especially with regard to the issue of downstream abuses of copyrighted material. The argument has been made that no changes to the law should be made until the technology exists to prevent such abuses. However, the environmental debate concerning CFCs suggests that the law can promote a desired outcome before all the solutions to achieve it are known.