

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)
PROMOTION OF DISTANCE) Docket No. 98-12B
EDUCATION THROUGH)
DIGITAL TECHNOLOGIES)

)

REPLY COMMENTS OF BROADCAST MUSIC, INC.

BROADCAST MUSIC, INC. ("BMI"), submits these reply comments, pursuant to the request for comments and notice of public hearings of the Copyright Office ("the Office") published in the Federal Register at 63 Fed. Reg. 71167 (December 23, 1998) and amended at 64 Fed. Reg. 9178 (February 24, 1999).¹

BMI has reviewed the many thoughtful and informative statements on this topic made by educators, librarians, service and technology suppliers as well as representatives of content providers speaking on behalf of the publishing, film, visual arts and music industries. It seems clear to us that despite a divergence of opinions, particularly between those in the academic and content provider communities, there are several areas where there is substantial common ground.

¹ BMI previously submitted the written statement of Marvin L. Berenson, Senior Vice President and General Counsel, dated January 26, 1999 and presented oral testimony of Judith M. Saffer, Assistant General Counsel, at the public hearings held in Washington DC on January 26, 1999.

BMI encourages the Office to focus on these areas in preparing its report and recommendations to Congress.

While some of those writing on behalf of colleges and universities, professors and librarians strongly advocated broad new distance education exemptions,² the panel of representatives from educational institutions took a more pragmatic approach in their oral testimony at the public hearings held in Washington, DC on January 27, 1999³. Near the end of this panel's testimony,⁴ Shira Perlmutter, Associate Register for Policy and International Affairs, asked the following in order to encapsulate the panel's views: "Just to clarify, I think I heard from at least a couple of witnesses a view that the fair use provisions in the current copyright law combined with fair use guidelines could be sufficient to deal with the new issues posed by digital distance education." (emphasis added). Each of the panelists responded with an unqualified "yes." (DC transcript at pp. 134-135). This perspective is similar to those offered by BMI, many content providers

² See e.g., Docket no. 2, Education Management Corporation at p.2 ("There is a compelling need for a broad exemption from exclusive rights of copyright owners for distance education utilizing digital technologies."); Docket no. 10, University of Montana, at pp 1-2; Docket no. 12, University of North Carolina at Chapel Hill at par 4(c); Docket no. 21, North Carolina State University at pp. 14-15. Docket numbers refer to written comments in the order they appear on the Office's Distance Education web site (<http://lcweb.loc.gov/copyright/disted>).

³ Citations to the transcript of these hearings are hereafter referred to as "DC transcript."

⁴ Panel number 2 consisted of: Dr. Kathleen Burke, Assistant Dean for Distance Education at the University Maryland University College; Dr. Kim Kelley, Assistant Vice President for Library Services at the same institution; Dr. Richard Fischer, Associate Provost for Distance and Continuing Education at the University of Delaware and speaking on behalf of the 415 member institutions of the University Continuing Distance Education Association; and Dr. Donald Swoboda, Dean of the Division of Continuing Studies at the University of Nebraska, Lincoln.

and other educators.⁵ We will briefly reiterate some of the reasons why the Office should encourage this approach.

Strong copyright protection provides the best incentive for the promotion of distance education through digital technologies. The materials used in distance education programs are best developed through the content providers and the educational community working together.⁶ As the educational community recognizes that they are both copyright users and owners,⁷ the best incentive for the creation of high-quality works is copyright ownership.⁸

That distance education programs are already well-developed and continue to grow is the best proof of the foregoing statements. For example, the University of Maryland already has a "virtual university" offering more than 150 distance education courses in 7 full-degree on-line programs.⁹ Moreover, the University of Texas is able to provide content for their distance education programs through

⁵ See e.g., Docket no. 36, Technical College of the Low Country at p. 2, Testimony of Bernard Sorkin, Time-Warner, Inc. (DC transcript at p. 216); Docket no. 4, Association of American Publishers at p. 2; Docket no. 22, Motion Picture Association of America at pp. 5-6 (endorses voluntary guidelines).

⁶ See, e.g., Testimony of John Flores, Global Distance Learning Association (D.C. transcript at p. 11-12); Testimony of Michael Palage, InfoNetworks, Inc. (D.C. transcript at p. 21); Testimony of James Bosco, Consortium for School Networking (D.C. transcript at p. 30); Docket no. 4, Association of American Publishers at p. 5 ("The development of distance education programs using digital technology is increasingly collaborative and involves partnerships binding the for-profit and non-profit sectors."); Docket no. 49, Software and Information Industry, Inc. at pp. 2-3.

⁷ See, e.g., Docket no. 8, American Association of Community Colleges at p. 3; Docket no. 10, University of Montana at p. 1; Docket no. 12, University of North Carolina at Chapel Hill p. 12; Docket no. 21, North Carolina State University at p. 12 ("The universities of this country create vast amounts of copyrightable intellectual property and they and their faculty are also copyright holders."); Docket no. 44, Albert Carnesale, o/b/o Association of American Universities, et. al. at p. 6.

⁸ Testimony of Lynne Schrum (D.C. transcript at p. 327).

⁹ Testimony of Kathleen Burke, (D.C. transcript at p. 79); Docket no. 28, University of Maryland University College at p. 1.

licensing (including online licensing), without the need to rely on public domain materials or even "fair use" exemptions.¹⁰

Some educators argue that academic freedom should give them the right to use others' copyrighted works for educational purposes.¹¹ However, the Copyright Act grants creators the right to determine how and to whom the rights to their works are granted.¹² The limited exemptions for teaching already contained in the Copyright Act, as well as its fair use provisions, provide the proper balance for these sometimes competing values. After all, the Register and others have noted that there is no "educational exemption" in the Copyright Act, per se.¹³

Educators also argue that distance education students should be treated the same as those on campus.¹⁴ Educational institutions maintain that it is costly to provide the hardware for these programs and that the transactions costs of licensing copyrighted materials is currently prohibitive in many instances, thereby

¹⁰ Docket no. 20, University of Texas System at pars. 2(a) and (b).

¹¹ See e.g., Docket no. 44, Albert Carnesale o/b/o Association of American Universities, et. al.; See also, Docket no. 8 American Association of Community Colleges at p. 5 quoting Testimony of Laura N. Gasaway of January 27, 1999 ("More fundamentally, the power to license is... ultimately, the power to deny access to information, too great a shroud to place over distance education."); Docket no. 31, Association of American Universities, et. al. at p. 4; Testimony of John Flores, (DC transcript at p. 15).

¹² See e.g., *Stewart v. Abend*, 494 U.S. 207, 229 (1990) ("a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work"); Testimony of Victor S. Perlman, American Society of Media Photographers (DC transcript at p. 222); Docket no. 11, American Society of Media Photographers at p. 6.

¹³ DC transcript p. 47; Docket no. 4, Association of American Publishers at p. 3.

¹⁴ See e.g., Testimony of Kathleen Burke, University of Maryland (DC transcript at p. 84). Docket no. 10, University of Montana at p. 19; Docket no. 19, North Virginia Community College at par. 4(a); Docket no. 21, North Carolina State University at p. 5; Docket no. 43, University Continuing Education Association at p. 2.

discriminating against their off-site students.¹⁵ For the reasons stated below, these costs will continue to come down. It is significant to note that those who maintain that these costs necessitate further copyright exemptions have failed to articulate a rationale as to why these costs should be shifted from the beneficiaries of the technology permitting distance education to the creators of the very works they desire to use.

There is an ongoing process of informing both the academic and content provider communities as to the opportunities and limitations of emerging digital technologies. With proper technological protections against unauthorized uses of their intellectual property, content providers are overcoming their reluctance to license their works and are embracing digital transmission technologies (as they have with formerly "new" technologies) as new markets for their creations rather than their being merely a boon to pirates.¹⁶ At the same time, the academic community is moving beyond an extreme position that content must be made available on the Internet and it must all be free -- at least to educators.¹⁷

¹⁵ See e.g., Docket no. 8, American Association of Community Colleges at p. 5; Docket no. 38, American Association of University Professors at p. 3; Docket no. 44, Testimony of Albert Carnesale o/b/o Association of American Universities, et. al. at p. 3, Testimony of Kathleen Burke at p. 80.

¹⁶ See e.g., Testimony of Bernard Sorkin, Time-Warner, Inc. (DC Transcript at p. 212); Docket no. 26, Copyright Clearance Center, Inc. at pp. 7-8.

¹⁷ See e.g., Docket no. 10, University of Montana at p. 7; Docket no. 12, University of North Carolina at Chapel Hill at par. 4(c) ("the ability to license is the ability to deny access"); Testimony of Victor S. Perlman, American Society of Media Photographers, (D.C. transcript at pp. 221-222); Docket no. 11, American Society of Media Photographers at p. 5. See also, Docket no. 8, American Association of Community Colleges at p. 5 quoting Testimony of Laura N. Gasaway of January 27, 1999 ("More fundamentally, the power to license is... ultimately, the power to deny access to information, too great a shroud to place over distance education." Testimony of John Flores, (DC Transcript at pp. 15-17).

While the mutual education of these two groups continues in fora such as the present one, licensing organizations such as BMI, ASCAP and the CCC as well as technology suppliers such as InterTrust and InfoNetworks are developing more efficient means (including on-line licensing) to bring these two communities even closer together by enabling the content providers to make the highest quality materials readily available at reasonable rates to those in the educational community legitimately entitled access to them.¹⁸

The increasing use of watermarking and encryption technologies, as well as the availability of online databases will enable licensing organizations to become even more responsive to the needs of both the content provider and educational communities.¹⁹ These technological improvements should alleviate the concern identified by certain educators who favor additional copyright exemptions based upon the alleged premise that it is often difficult to identify the copyright owner of a particular work.²⁰ In particular, blanket licenses such as those offered by music performing rights organizations could be utilized, thereby obviating the need of the licensee to identify individual owners. In fact, CCC maintains that it has a

¹⁸ See e.g., Testimony of Michael Palage, InfoNetworks, Inc. (DC transcript at p. 21); Docket no. 9, InterTrust Technologies Corp. at pp 2-7; Docket no. 49, Software and Information Industry Association at pp. 2-3.

¹⁹ Testimony of Bruce Funkhouser, Copyright Clearance Center, Inc., (D.C. transcript at pp. 263-265); Docket no. 26, Copyright Clearance Center, Inc.; Docket no. 35, American Society of Composers, Authors and Publishers pp. 25-27.

²⁰ See e.g., Docket no. 1, Indiana Commission for Higher Education at p. 2; Docket no. 12, University of North Carolina at Chapel Hill.

"repertoire license system for [its] corporate users for internal duplication similar to the music licenses made available by BMI and ASCAP."²¹

There is an emerging view in the educational community that better licensing technology and procedures will ameliorate many of their concerns regarding the quick and affordable availability of works.²² BMI and many other interested parties remain confident that forthcoming advances in digital technology will remedy current problems, facilitating the licensing of copyrighted works to specifically targeted users.²³ As Dr. Lynne Schrum noted in testifying on behalf of the International Society for Technology in Education: "Over the next decade we can expect that the extraordinary growth in distance learning will encourage further technological innovation to enhance the quality of the delivery and [sic] protect the content of courses delivered via digital networks."²⁴ Such rapid development will be hindered if the creators of intellectual property are unable to reap the benefits of their labors because of new copyright exemptions.

The United States is a signatory to the Berne Convention for the Protection of Literary and Artistic Works (the "Berne Convention"). Accordingly, our government has agreed that it generally will not enact copyright legislation in derogation of a creator's right to receive compensation of the use of such works.

²¹ Testimony of Bruce Funkhouser, Copyright Clearance Center, Inc. (D.C. transcript at p. 263-264).

²² Docket no. 24, Consortium of College and University Media Centers at p. 3 ("Licensing can be an efficient means of obtaining access to educations resources, particularly for large bodies of material"); Docket no. 29, Utah Education Network at par. 7 ("If licensing of educational materials were inexpensive enough to allow schools to be involved with interactive, digitally delivered distance educational materials then it might not be necessary to allow for exemptions."); Docket no. 14, University of Michigan at p. 3; Docket no. 49, Software and Information Industry Association at pp. 2-3.

Berne Article 9(2) states: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the authors." At a minimum, this suggests that the market should be allowed to develop in order to determine what a creator's legitimate interests are.²⁵ Article 11 *bis* allows member countries to enact legislation with respect to, among other things, communicating works to the public by wire or broadcast, provided that such legislation "shall not in any circumstances be prejudicial... to [the author's] right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority." An analogous provision is contained in Article 13(1) with respect to the distribution of sound recordings of a musical work. These provisions suggest that the Office should be circumspect in proposing anything that would broaden the current exemption relating to the public performance rights in a copyrighted musical work.

The recently concluded WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty encourage copyright owners to protect their rights on the Internet by using technological measures.²⁶ Content providers and licensing

²³ See e.g., Docket no. 14, University of Michigan at p. 3.

²⁴ Testimony of Lynne Schrum (DC transcript at p. 327)

²⁵ See e.g., Docket no. 34, National Music Publishers Association at pp. 3-4,14-19.

²⁶ See e.g., WIPO Copyright Treaty Arts. 11 and 12; WIPO Performances and Phonograms Treaty Arts. 18 and 19.

organizations are in the process of developing these technologies now. The Office should not remove the incentive to continue to do so by recommending further exemptions to the Copyright Act.

For all of the foregoing reasons, BMI would urge the Office to make recommendations which will allow the market for distance education materials to continue to develop. In concluding, I would like once again to thank the Office, particularly the Register and members of her staff, for providing all interested parties with the opportunity to present our views on this vital and growing area of national and international importance. BMI continues to look forward to working with the Office and members of various constituencies toward an appropriate resolution of the outstanding issues pertaining to the proportion of distance education through digital technologies.

Respectfully submitted,

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Dated: March 3, 1999