

TESTIMONY OF
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CONCERNING THE
TECHNOLOGY, EDUCATION AND COPYRIGHT
HARMONIZATION ACT OF 2001

ON BEHALF OF
ASSOCIATION OF AMERICAN UNIVERSITIES
AMERICAN COUNCIL ON EDUCATION
NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES
AMERICAN ASSOCIATION OF COMMUNITY COLLEGES
AMERICAN LIBRARY ASSOCIATION
ASSOCIATION OF RESEARCH LIBRARIES
CONSORTIUM FOR SCHOOL NETWORKING
EDUCAUSE
INTERNATIONAL SOCIETY FOR TECHNOLOGY IN EDUCATION
NATIONAL SCHOOL BOARDS ASSOCIATION
UNIVERSITY CONTINUING EDUCATION ASSOCIATION

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Distance Education Testimony

Mr. Chairman and Members of the Judiciary Committee, I am Gerald Heeger, President of the University of Maryland University College. I am pleased to have this opportunity to testify on S. 487, the Technology, Education, and Copyright Harmonization Act of 2001. I am testifying on behalf of the Association of American Universities, American Council on Education, National Association of State Universities and Land-Grant Colleges, American Association of Community Colleges, American Library Association, Association of Research Libraries, Consortium for School Networking, EDUCAUSE, International Society for Technology in Education, National School Boards Association, and the University Continuing Education Association. The colleges, universities, and libraries which are members of these associations strongly support S. 487 because it would bring copyright law into accord with the education realities of today, enabling a fuller realization of the enormous potential of digital distance education to expand teaching and learning in time, place, and richness of content.

The University of Maryland University College, or UMUC, is one of eleven degree-granting institutions within the University of Maryland System. Founded in 1947, its programs focus on the adult learner and it specializes in distance education. In the past few years, it has become the leading online university in the country, with over 43,000 online enrollments in the last academic year, and an estimated 70,000 enrollments this year. UMUC offers 14 undergraduate degrees and 14 graduate degrees, including the MBA, fully online. Last year, the University was the first recipient of the E-Learning Award. It was recognized recently by Forbes magazine for its excellence in Web-based instruction. Additionally, its librarian received a commendation from Maryland's Governor for creating the Maryland Digital Library, a resource for colleges and universities in the state that provides access to over 400 electronic books and nearly 3,000 electronic journals.

Education is the means by which we develop our nation's human resources. As we move into an international information age, where both cooperation and competition will be carried out world-wide, the ability of the United States to meet its domestic and international challenges and responsibilities will be directly dependent on the quality and capacity of its educational programs. That quality and capacity in turn will be determined by the content of those programs and their reach throughout our citizenry. For our nation to maintain its competitive edge, it will need to extend education beyond children and young adults to lifelong learning for working adults, and that education must reach all students of all income levels, in cities and rural settings, in schools and on campuses, in the workplace, at home, and at times selected by students to meet their needs.

Digital distance education makes this possible, and we are witnessing a steady growth in online education, both as distance education in the traditional sense, where instructor and student are separated in place and perhaps time, and in new hybrids of traditional, residential classroom education combined with online components. Increasingly, college students can register for courses online, submit class assignments by

email, and participate in discussions that connect students in a classroom with students beyond the classroom, sometimes beyond the nation's borders. Similarly, K-12 students can learn about the customs and cultures of other countries through real-time audiovisual conversations with pen pals from those countries; they can learn science in new ways by having scientific demonstrations and actual experiments conducted at distant locations brought to them in real time via the Internet. The National Science Foundation, the National Academy of Sciences, and other scientific societies and educational organizations are working hard to improve our nation's science and mathematics education; other groups are developing new ways to bring humanities and the arts to students and the broader public. Many of these new educational efforts draw on advances in information technology and digital networks.

Digital distance education also has special value to two groups with which UMUC is very familiar. One is the servicemen and women in the United States military, who benefit greatly from the ability to obtain instruction in remote locations. Additionally, the University's online course offerings are very attractive to disabled Americans. This past fall, we had nearly 400 disabled students, including around 200 disabled veterans enrolled in courses at the University.

Such efforts have or will soon come up against barriers set by current copyright law. In 1976, Congress wisely recognized the pedagogical value of allowing teachers to enrich the classroom learning of their students by permitting the performance or display of lawfully made copyrighted material without having to get clearance from the copyright owner. Thus, a teacher could show a movie or the performance of a drama, or could display a painting as part of the course of instruction. Recognizing the potential of distance education—which in 1976 was essentially remote instruction by television—Congress also authorized the display of any copyrighted material and the performance of non-dramatic literary or musical works at remote classroom settings.

The 1976 law was not written with the Internet and online education in mind, and its provisions governing distance education present two basic problems today. First, the limitation on the types of works that may be performed by remote transmission to non-dramatic literary and musical works drives an increasingly untenable wedge between content in the classroom and that at a remote location. Second, current law does not fully accommodate some of the technical aspects of delivering instructional content over computer networks.

Let me give just one example of how current law impedes the development of digital distance education. At a major university, the highly ranked cinema program recently tried to develop a distance education film course. The institution was committed to invest \$600,000 in the effort. Part of the course involved the use of film clips ranging from 5 to 30 seconds. Negotiations for rights went on interminably. Permissions had to be gotten from, and payments had to be made to, copyright owners and actors. Some people never responded, others demand a great deal of money, some simply said no. In the end, after losing a substantial amount of money, the failure to secure the rights to film clips less than a minute long shut down a promising program.

This example illustrates two stark realities confronting digital distance education. First, it is very expensive. The university above was prepared to invest \$600,000 in a single program; how many institutions can contemplate such an investment? Elementary and secondary schools, colleges and universities will have to find substantial new resources to invest in the computers, networks, and applications necessary to support digital educational activities, as well as in faculty development, teacher training, and the development of courseware and other course materials. Although digital distance education may in the future produce genuine economies, in the short run the start-up and delivery costs are *very* expensive, so that all institutions are limited by cost in what they can do, and some institutions are simply kept out of significant digital education activities because of its steep costs.

The second reality confronted by digital distance education is that, even if we find the resources to build the necessary infrastructure, digital education will be threatened with second-class status unless and until local and remote educational content are brought into closer accord. The inescapable fact is that for digital distance education to achieve its full potential, instructors must be able to conduct remotely all educational activities permitted in a physical classroom. Yet consider the university's effort to establish a distance education film course. This ultimately abandoned effort highlights four key points: (1) the copyright barriers are real, (2) no aspect of the proposed program would have possibly threatened anyone's market, (3) yet an opportunity to expand a first-class educational program beyond its residential boundaries was lost, and (4) if legislation such as that which we are considering today had been in place, a new distance education film course would be reaching new students.

Licensing is not the solution to copyright barriers. Licensing the use of content is slow, costly, and does not permit the instructor freedom in the selection of materials for transmission in the digital classroom. Further, there is a misperception that an online course is developed in advance, so getting permissions is reasonable and possible. However, in reality, that is not the case. Faculty members frequently supplement the "core" course materials "on the fly" and need flexibility to do so. Requiring licenses will limit the freedom for distance education faculty to use materials essential to the learning process. Provided that there are proper safeguards, the online environment should not be more restricted than the face-to-face teaching environment.

It is these copyright barriers that the Copyright Office addressed in its thoughtful 1999 report on distance education. The recommendations of the Copyright Office for statutory changes to current copyright law would go far toward accomplishing the objective stated above of enabling remotely all educational activities permitted locally, in a physical classroom. We strongly support the Copyright Office report and its recommendations for statutory changes to the current copyright law.

Our reading of S. 487 is that, in the main, it would effectively implement the statutory changes recommended by the Copyright Office, carefully balancing expansions of the distance education exemption with prudent safeguards.

The following provisions of the bill are particularly important:

- exempting digital transmissions from Section 106 rights to the extent necessary to permit such transmissions in the ordinary operation of the Internet,
- eliminating the physical classroom requirement for remote reception of educational material,
- enabling the asynchronous use of material by permitting material to be stored on a server for subsequent use by students,
- expanding the categories of work exempted from the performance right to include reasonable and limited portions of audiovisual and dramatic literary and musical works, as well as sound recordings of the musical works that already are within the scope of the exemption.

We understand the difficulty of achieving full parity between local and remote educational activities due to the risks of unauthorized reproduction and redistribution of digital content. The Copyright Office report addresses these concerns in a forthright and informed analysis. In its translation of this analysis into legislative provisions, S. 487 would enact a number of safeguards, including:

- limiting transmission of material to students officially enrolled in the class,
- limiting the retention of temporary copies,
- limiting the use of materials to circumstances that involve mediated instruction in order to assure that materials are used remotely as they would be in a classroom,
- requiring the use of technological measures that reasonably prevent downstream redistribution, and
- limiting performances of audiovisual works, dramatic works and sound recordings to reasonable and limited portions.

S. 487 translates the Copyright Office recommendations for statutory modifications into a carefully bounded but extremely important set of legislative provisions that will permit the fuller development of digital distance education.

One major reservation we have with the legislation is its failure to include reasonable and limited portions of instructional material works in the expanded categories of works exempted from the performance right. We understand the concern that such an exemption could threaten the primary market for instructional material. However, excluding instructional material from the performance exemption will impose a serious constraint on the development of distance education. Instructional material often

will be essential to effectively harmonizing the content of local and remote instruction. Moreover, the exemption provided by the proposed bill would provide important guideposts in license negotiations and would help ensure that all educational markets, not merely the one for which a particular licensing regime had been developed, will have access to the work.

One particularly cogent example from my university is teacher education. We are newly engaged in the training of teachers online to alleviate a significant teacher shortage in the State of Maryland. Whether it's training new teachers who are changing careers or training current teachers to educate their students in an online environment, our effort to provide proper instruction online would suffer from the inability to show instructional videos. Especially at a time when the need for teachers nationally is so great, it would be advantageous to have this bill allow the use of instructional materials in the training of teachers.

We believe that the limitations contained in the bill will provide substantial protection for the copyright owner. Accordingly, we urge you to consider including instructional materials within the scope of the exemption.

We are developing several other suggestions for changes in the legislation that would, we believe, make a valuable bill even better, and we would appreciate the opportunity to forward such suggestions to you in the near future once we have refined those suggestions.

We also would like to comment on Sec. 4 of the bill. This section calls on the Copyright Office to issue a report on licensing of copyrighted works in digital distance education programs and the use of copyrighted works in such programs, and to convene a conference to develop guidelines for use of copyrighted works in digital distance education under the fair use doctrine and section 110(1) and (2) of the copyright code. A report on licensing and use of copyrighted works in distance education that stems from the same thorough, open and balanced process that the Office used to produce its excellent report on distance education would undoubtedly be useful for Congress and external parties, and we support this proposal.

The legislation calls for the Office to convene a conference in order to develop guidelines on the use of copyrighted works in distance education, and for the Office, if it deems it appropriate, to submit those guidelines to the Senate and House Committees on the Judiciary. We are concerned with the presumption that appears to be inherent in this process that the conference will develop guidelines. Efforts to develop guidelines have proved difficult and controversial. The fair use doctrine is inherently—and, in our judgment, wisely—imprecise, calling for a judgment on four factors to determine if a use is fair. Thus, we would prefer that, if S.487 is to call on the Copyright Office to convene a conference, the conference bring together interested parties to discuss the use of copyrighted material in distance education, and only if the Office and the conference participants deem it feasible, would the conference develop guidelines. We note that the section-by-section analysis of the bill describes something closer to this preferred process: that the Office would convene a conference “on the subject of the use of copyrighted works in education and, to the extent the

Office deems appropriate, develop guidelines . . . for submission to Congress . . .” and urge that the same approach be included in the text of the bill.

In closing, I would like to reiterate the importance for the future of distance education of allowing the same educational content remotely that occurs locally in a physical classroom. Anything short of that will doom distance education to second-class status and cripple its enormous potential to expand dramatically the educational capacity of our nation and its ability to compete in the new world economy. As both local and remote educational content increasingly involves new multimedia material, the disparity in treatment under current law will place a growing burden on digital distance education. Thus, enactment of legislation such as S. 487 is imperative to the development of distance education and its capacity to expand the boundaries of teaching and learning in time, place, content, and category of student.

We commend you for this bill, and we look forward to working with you to add refinements to it and enact it into law.

Thank you for this opportunity to testify on this important legislative and educational initiative.