

## The Promise (and Problems) of Distance Education: A Publisher's Perspective

(prepared for the conference on "Copyright & Distance Education: What You Don't Know Can Hurt You," Suny Institute of Technology at Utica/Rome, May 28, 1999)

Although I can't claim to know a lot about distance education, I welcomed the invitation to participate in this conference not only because I could use this opportunity, selfishly, to learn more myself about how copyright law is related to distance education but also because I could provide you with a perspective that is all too rarely heard in such discussions within the academy. Indeed, it is not an exaggeration to say that university presses are the silent partner when questions of copyright management arise on college campuses. In reviewing the copyright policies and new efforts to revise them ongoing at most major universities as a member of Penn State's Intellectual Property Task Force, I was disappointed but not surprised to find hardly any references to university presses in them, even at universities that have their own presses. Notable exceptions are the University of Illinois and the University of North Carolina--but the latter can be explained by the fact that one member of the task force there is the editor-in-chief of the University of North Carolina Press, who also happens to be a member of the Copyright Committee of the Association of American University Presses, which I chair!

Yet omission of any references to university presses should be surprising because we manage a great amount of copyrights for our respective institutions, probably more than any other single unit and perhaps more than all the other units combined at some universities. Consider that the 120 members of the AAUP (of which 87 are based at universities in the U.S.) published around 9,000 new books in 1998 accounting for \$430 million in sales (or 2% of all U.S. book sales) and also maintained the ongoing publication of some 700 journals, and you'll get some idea of the magnitude of what I'm talking about here. Despite the expertise that presses have gained over one hundred years in managing

the copyrights assigned to them--advising their authors about when permissions are needed and when "fair use" applies, licensing subrights to other publishers and on-campus users, recording documents and registering copyrights with the U.S. Copyright Office, etc.--it rarely happens that university press staff, whom even intellectual property officers and legal counsel at universities often credit with knowing more about copyright than they do (since patent and trademark issues have, historically, occupied much more of their attention), are consulted about issues pertaining to the revision of copyright policies at their universities, much less invited to participate as members of formal committees involved in this process. When I asked press directors a couple of weeks ago how many of them and their staff were so involved, I learned to my dismay that only seven other people at university presses besides myself actually had sat on such committees or were on them now. But think about how this absence of input from university presses can skew the discussion about copyright.

"Fair use" is a good example. The lead on defining what "fair use" means in the academic context has been taken by librarians, who much to their credit early identified the need to speak out about copyright issues as crucial for protecting their interests, which primarily of course reflect their stake in serving users of copyrighted materials. But should this be the only voice heard? I think not. I will have more to say about "fair use" later, but right now just let me leave you with this thought: the fourth factor in any "fair use" analysis, often considered the most important, has to do with the effect on "the potential market for or value of the copyrighted work," but who do you think knows the most of anyone in the university about the actual and potential markets for published books and journals? The sales of books and journals to libraries account for just one, albeit crucial, market for the output of university presses. There are many other markets that can be critically affected by how "fair use" is interpreted.

Another example may be found in the debate over protection of databases. Since the Supreme Court's decision in 1991 in the Feist case, involving certain types of telephone directories as not being "original" enough to qualify for protection under copyright law and mere "sweat of the brow" being an invalid basis for a claim to such protection, there has been concern among publishers of databases about how their investment in them can be insured against piracy. This concern became even greater once it became known that the European Community was aiming to adopt a directive on databases that would provide protection for European-published databases but would exclude protection for U.S.-published databases unless reciprocal treatment were extended to European publishers under U.S. law. Throughout this whole debate the chief worry of the AAUP has been the uncertainty in the wake of Feist about how "critical editions" containing laboriously reconstructed texts of leading authors whose works would otherwise be in the public domain now can be protected. The database bill originally introduced by Rep. Howard Coble as part of the Digital Millennium Copyright Act and stripped out of the DMCA in the final stages of its drafting--whatever faults it may have had--seemed to offer some hope of protection for critical editions. It was modified to incorporate more elements of "fair use" and reintroduced on January 19 as H.R. 354. A competing bill, supported by many universities and professional associations including librarians, was introduced on May 19 by Rep. Tom Bliley as H.R. 1858. Unfortunately, it offers no solution to the problem of critical editions at all, as it explicitly excludes "works of authorship" from the bill's scope (which may in itself not be a bad thing). But, worse, from our point of view, it gives a blanket exemption from liability for all "scientific, educational, or research uses" so long as those uses do not form a "consistent pattern engaged in for the purpose of direct commercial competition." Were their presses consulted by those 33 universities that have presses and are named supporters of this proposed legislation? I don't know of any that were, and I can tell you that no one at Penn State asked me for an opinion before Penn State signed on. What is the problem with this exemption? It is simply that, for many of

our publications, where sales number only in the several hundreds, the only market that exists is in higher education, and all it would take is for some misguided teacher or librarian, believing their act of redistribution to be altruistically motivated, to wipe out an entire market for a published database with the push of a button. And since this would not be any kind of "direct commercial competition," the act would be fully in compliance with this legislation and hence free from any liability. We have a project we are considering at our press right now--an interactive data archive on the French Revolution, the result of an NSF-funded project that began in the 1960s--that I am not sure could be protected if this bill were to become law. So, once again, concerns that university presses have about their markets are simply not part of the conversation that leads to such legislative initiatives.

Now I have to admit that distance education has not constituted much of a market, actual or potential, for university presses in the past. I would guess the reason is partly that the focus of distance education until recently has been more on introductory-level courses and courses aimed at providing people with skills they can use in their jobs than on higher-level academic research, which is what university presses predominantly publish. Even in the sciences, university presses have concentrated much more on the theoretical than the applied side of science and have not participated in many areas of professional publishing at all, such as engineering or medicine, which have been the domain of society or commercial publishers. And in law, for instance, you may find a plentiful selection of books about constitutional law or philosophy of law on the lists of university presses, but far fewer books about torts or criminal justice or business law.

A good illustration comes from the introduction to a booklet issued by Penn State Independent Learning, which is part of our Division of Continuing and Distance Education: "When farmers in the 1890s needed to master new techniques in growing, they had no opportunity to sit in a college classroom. There were cows to milk! And fields to plant.

That's why Penn State offered its first noncredit courses in agriculture more than one hundred years ago. When engineers needed continuing professional education on the job, we offered our first credit correspondence courses. That was 1918. Today, Penn State is still leading the way for students who need less traditional approaches to education than the college classroom affords." Now I must confess that Penn State Press's backlist does include such titles as Breeding Plants for Disease Resistance (1973), The Calf: Management and Feeding (1970), Lactation (1971), Pig Production (1972), Solar Energy Heat Pump Systems for Heating and Cooling Buildings (1975), and--my favorite-- Utilization of Municipal Sewage Effluent and Sludge on Forest and Disturbed Land (1979). But these titles, all published in the 1970s, are long out of print and books of this more practical scientific kind never constituted the principal strength of the Press's list in any event--at least, I hope, when you hear the name of the Penn State Press mentioned, you don't immediately think of these titles rather than what we consider our major successes to be, like our best-selling book by sociologist James Davis, Who Is Black?, our multiple prize-winning book by historian/sociologist John Markoff, The Abolition of Feudalism, or our new book reviewed earlier this month in the New York Times by historian Melvin Holli, The American Mayor.

Another reason why presses have not been major players in distance education, I suspect, has to do with the evolution of this kind of learning. In a paper on "Distance Education and the Undergraduate Curriculum" (1995) by Gary Miller, who heads Penn State's World Campus within the Division of Continuing and Distance Education, this evolution is traced from the "oldest form of distance education," independent study (which encompassed correspondence courses, telecourses, and the type of free-standing program represented by the open university), through the "distributed classroom" (which emerged in the 1950s with the advent of closed circuit television but grew rapidly in the 1990s with the arrival of

interactive compressed video telecommunications systems), up to the “learning community” that we see developing today. This is how Miller characterizes the “learning community”:

The learning community approach to distance education assumes an instructional design in which the student is asked to use a mixture of media. Each medium plays a specific part in articulating a complex learning environment. These may include presentation media, such as print, video and audio tape, computer software; delivery media, such as broadcast/cable television, computer file servers, CD-ROM, etc.; and interaction media, such as audio and video conferencing, electronic mail, keypad response systems, and digital voice response systems. In addition, students may have access to the range of library resources and data bases resident on the world wide web.

While the learning community approach calls on many media, it is defined less by the media themselves than by the learning environment that is created through the use of multiple media. The impact of the learning technology is to greatly enrich the resources available to the student and thus increase the learner’s control--and responsibility--in the overall teaching/learning process. The resulting learning environment is characterized by its focus on the learner and on enriching the resources available to the individual. Similarly, the use of multiple communications technologies creates an environment that is both asynchronous and spontaneous.

These key characteristics--asynchronous, resource-based, learner-centered, spontaneous--are responsive to the stresses that are currently reshaping the undergraduate curriculum. Access is no longer the primary driving force behind this type of distance education. The defining characteristics are no longer necessarily geographic distance, but learner control and an active learning environment that

emphasizes learner interaction with resources, with other learners, and with the instructor.

[And here is the key, as far as we are concerned:] In the process, the learning community approach is blurring the lines between distance education and resident instruction. As universities turn toward an undergraduate curriculum that applies more collaborative, resource-based instructional models on campus--including the use of computer simulations, hypermedia-based studies, and in-classroom use of the world wide web and other on-line resources--the experience of students on campus becomes less classroom bound, more learner-centered. [underlining in the original]

This is what finally came home to us in the university press world, namely, that it is no longer easy to distinguish what is "distance" education from what is not. As an Association, we had held back from participating in the initial hearings about distance education that the U.S. Copyright Office, following the mandate in the Digital Millennium Copyright Act, sponsored in three cities in January and February, not sure what we would have to say. But we did take the precaution of registering as an "interested party" so as to reserve the right to comment later, after we saw testimony from the other groups participating. And I am glad we did, for that testimony was very revealing on just this point. Let me cite some examples:

The general consensus [of the Indianapolis conference on January 21] showed that the 'distance' in distance education is rapidly becoming, if [it is not] already, irrelevant. Digital technologies in use in the 'traditional' classroom will further expand into the distance education realm, and it will become even more difficult to identify 'distant' and 'traditional' elements

and students of a course. (Indiana Commission for Higher Education)

In real-life digital practice, distance education is a term used broadly to include a range of instructional concepts from courses taught completely on-line, with little or no true face-to-face contact, to selected enhancement materials placed on a web site by a professor for students to view. Generally speaking, the term 'distance education' as applied to digital media should cover any course-related material that is intended to be accessed via computer. (Visual Resources Association)

Is there any difference between a remote student and a local student anymore when each comes into the classroom virtually? NO, there isn't. (The University of Texas System)

As the number of classes with substantial Web components increases, it becomes difficult to dissociate distance learning classes from traditional ones. (Consortium of College and University Media Centers)

Once we fully realized from this testimony how the use of digital technologies is transforming the field and making its distinctness from on-campus education harder to define, we also realized that these developments could not help but have substantial impact on the business of scholarly publishing in which we are engaged. Thus I was asked by the AAUP to prepare its written response, which was filed with the Copyright Office by the end of March, to become part of its official record. What I will say in the rest of this talk is largely drawn from that AAUP response (and I will ask the forbearance of any of you who have already read the AAUP statement). I don't believe that it has been rendered moot at all by the just released Copyright Office report, which is

have seen only in part so far, except to the extent that the appeal here for not recommending any additional broad exemption appears to have succeeded.

First of all, we are concerned about practices such as electronic reserve systems, which have already turned some libraries into coursepack suppliers to students on campus, becoming virtual republishers in an even more expansive distance-education environment. (In the CONFU discussions--as Ken Crews well knows, since he was the person designated to draft the e-reserve guidelines after negotiations among the interested parties--the AAUP participated mainly in the hope of forestalling this development.) A number of the universities testifying in the Copyright Office hearings affirm that e-reserve systems are an integral part of distance education when it is digitally delivered: Texas claims that, "in a digital environment, there is no logical distinction between course materials made available online as supplemental materials, either reserves or what have been called coursepacks, and core course materials" and predicts that, "in the near future, a large part of all course materials will likely be provided to students over digital networks"; Maryland's University College argues that its "library, and other libraries that serve remote students, need an exemption which permits them to make a single [sic!] digital copy for use by an individual or students in a course" (though it appears to believe that e-reserves can be limited to "supplemental" materials) and even claims "a genuine need to retain the right to make digital copies of courses, parts of courses, and copyrighted articles for preservation and archival purposes." This latter vision would be tantamount to making the library a republisher complete with its own inventory of "backlist" titles!

Because the primary market for most of what university presses publish is the community of higher education, any broad exemption for "educational" use would strike at the heart of our business and have the effect of denying to that same community the benefits of our ability to continue publishing the works of scholarship that members of that community

create and then want to use for teaching. The significant impact that uncompensated coursepack photocopying has had on the economic foundation of our enterprise will likely increase manyfold when this copying is done digitally in an expansive distance-education universe, whether through e-reserve systems or otherwise. Our member presses have worked diligently, through the Copyright Clearance Center's Academic Permissions Service and bilaterally, to license the use of materials from our books and journals in photocopied coursepacks in a timely manner. We fear that an exemption for digital copying in distance education, where it covers "any course material that is intended to be accessed via computer" and will amount to "a large part of all course materials" in the "near future," will further erode a market for our works that has already been severely affected by the decline in library purchases of monographs and the resort to photocopying excerpts in coursepacks in place of having students buy the paperback editions we make available for many of our books. It is not just the "downstream" redistribution of our publications that worries us, as some groups allege, but the immediate provision of digitized anthologies of readings to large numbers of students simultaneously over networks, which like the creation and sale of photocopied coursepacks can generally not be justified as "fair use" when done without permission of the copyright owners of the contents.

We agree that "fair use" should continue to apply in a digital environment, but we are disturbed by the frequent equation of "fair use" with "free access" (see the "Concluding Observations" of the College Art Association's testimony) as though its main function were to promote the proliferation of copies and thus the provision of "access" to larger numbers of people. Rather, it is worth emphasizing that the core meaning of "fair use" is the privilege it provides for creators to build upon the work of their predecessors in a "transformative" way and thereby further "the progress of science and the useful arts" that it is copyright's basic purpose to support. It is this, not the sheer multiplication of copies (Section 107's reference to "multiple copies" used in teaching notwithstanding), that is

the essential task "fair use" performs for education generally. As Judge Newman said in writing his majority opinion in the Texaco case, "whatever social utility copying of this sort achieves, it is not concerned with creative authorship" and is something quite different from "fair use" as traditionally understood. This simple truth is too often overlooked in debates over "fair use" in our technological age, where the ease of making copies, analogue or digital, has overshadowed the historical function this concept has performed in copyright law.

Our concerns about uncompensated photocopying beyond "fair use" (to the limited extent it applies to mere duplication of copies) grow greater when that copying becomes digital within the confines of a single campus, but grow greater still when it enters the less controlled, and controllable, environment of the Internet. As noted in the testimony of the University of North Carolina, "one essential difference between the use of electronic communications on campus versus off campus is the reliability and security of access over a campus network that is under the control of campus personnel." An exemption for distance education in this environment would become a blank check for both superdistribution of copyrighted works and also neglect of responsibilities for ensuring the accuracy and attribution of works transmitted. The American Society of Composers, Authors, and Publishers notes how digital transmission undermines copyright owners' "ability to prevent the work from being distorted, decompiled, or reassembled." Similarly, the American Society of Journalists and Authors argue that "an exemption of this nature would also threaten the integrity and authenticity of the copyrighted materials made available for distance learning through digital networks because without strong copyright protection, there is no way for users to be sure that the information received is truly what it is claimed to be." We share these concerns.

Exemptions without corresponding measures for ensuring attribution and accuracy of the works that are transmitted ultimately will devalue the role of technological delivery of information. If it is established that an exemption is needed, such a measure should be implemented only in conjunction with guidelines that preserve the value added by the selection, editing, and peer review of the scholarly publishing process.

It is the publisher as licensor that can make sure such important considerations are not lost in the rush to provide wide access to copyrighted works. Licensing also provides flexibility in meeting the needs of different types of users, at appropriately differential levels of fees, as pointed out by the Association of Test Publishers. We are still in the early stages of licensing digital uses; even the Copyright Clearance Center, long in the business of licensing photocopying, has only recently launched its Electronic Course Content Service and MiRA (its digital-image service). It seems premature, as many have observed, to shortcircuit this process of experimentation with licensing digital uses by offering any kind of blanket exemption. At most, if the complaints of some of the user community's representatives about the difficulty of determining ownership of certain types of material (such as those mentioned by the American Society of Archivists) prove to be worth special consideration, perhaps some additional limitations on the remedies open to the hard-to-locate rightsholders could be inscribed in law, or the Copyright Office might encourage copyright owners to help out by establishing a "registry of authors," as the American Society of Media Photographers suggests. Similarly, if certain rightsholders prove unwilling to facilitate licensing, either bilaterally or collectively, perhaps they should be given extra incentives to do so (of the kind that an "umbrella statute" might provide).

But it may be too early yet even to implement such added measures of quasi-coercion. As the National Music Publishers Association rightly observes, users in nonprofit educational institutions already are insulated in many ways from risks of copyright infringement, not

least by the protection against statutory damages afforded by Section 504(c)(2). (This is the section that mandates courts to "remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment...." Interestingly, to the extent that academic authors want to preserve their traditional right to be considered the copyright owners of the textbooks, scholarly monographs, and journal articles they write, they are to that extent also not protected by this exemption from liability since in that capacity they define themselves as not being employees.) Special provisions like these give academic institutions wide latitude for interpreting "fair use" to their advantage. The addition of an outright exemption, as NMPA notes, would give these institutions "no incentive to obtain permission or licenses, or to otherwise respect copyrights, and it would encourage other entities with marginal claims to the exemption to try to shoe-horn themselves into a distance education definition" (especially, we might add, at a time when--as shown by ASCAP's testimony--there are many mixed nonprofit/for-profit ventures in providing distance education under way). Nor would it give them any incentive to renew the CONFU process and enter into further negotiations over "fair use" guidelines.

We conclude, then, with many other rightsholders' organizations, that a special exemption for distance education--even assuming some clear definition of what it encompasses can be achieved--is not justified at this yet early stage of our digital "learning curve" and might, indeed, inhibit progress toward working out cooperative arrangements, whether guidelines or licenses, between copyright owners and users. Worse yet, the premature adoption of an exemption for distance education--especially in the most far-reaching form where "distribution" is not restricted as just an ancillary function to enable "performance" and "display" (as in the more modest proposal of the Association of American Universities and

its associates) but is contemplated as having no boundaries of quantity or duration at all (as in the proposal first made by Senator Ashcroft and recommended in this testimony by North Carolina State University)--could have seriously damaging effects to our future survival as scholarly publishers. Surely, such an outcome would not be in the best interests of higher education, not to mention the public at large.