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LEGAL REFORM IN AN ELECTRONIC AGE: ANALYSIS AND CRITIQUE OF THE CONSTRUCTION AND OPERATION OF S. 487, THE TECHNOLOGY, EDUCATION AND COPYRIGHT HARMONIZATION (TEACH) ACT OF 2001

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This article presents an overview of current copyright law as it applies to distance education as articulated in Section 110 of the Copyright Act,[1] and an assessment of recent legislation reforming that law. This article does not discuss the application of other provisions of the copyright law to distance education, such as fair use (section 107), service provider liability limitation (section 512(e)), or other legal issues regarding the provision of distance education.

BACKGROUND: UNFINISHED BUSINESS FROM THE DMCA (DIGITAL MILLENNIUM COPYRIGHT ACT)

Recent and major reform to existing copyright law is found in the provisions of the Digital Millennium Copyright Act (DMCA) of 1998.[2] The DMCA contains the online service provider "immunity" provisions (actually a liability limitation as opposed to true immunity) of section 512 and the infamous

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1. Unless otherwise indicated, statute references are to sections of the copyright law, Title 17 of the United States Code.

2. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (Digital Millennium Copyright Act (DMCA)).

anti-trafficking and anti-circumventing rules of section 1201.[3] Congress accomplished much with the DMCA, but its attempt at copyright modernization was still incomplete. Perhaps because the divergent views of stakeholders—copyright owners like publishers versus copyright users like schools—could not be reconciled, or perhaps because Congress simply ran out of time, distance education reform, specifically amendment of § 110(2), was left undone.[4] Section 110 contains a number of limitations on performance and display rights of copyright owners; one of its practical effects expands educators' ability to use copyrighted materials in the classroom without having to obtain permission or pay additional fees for what would otherwise be an unauthorized public performance and display of the copyrighted work. This fact did not go unnoticed by the legislature. In the DMCA, Congress specifically instructed the U.S. Register of Copyrights to assess the current viewpoints of stakeholders, analyze the options, and make recommendations for legislative reform within six months after the date of enactment, [5] which is encapsulated in *The Copyright Office Report on Copyright and Digital Distance Education.*[6]

The sustained effort of distance education reform advocates has reached fruition. Reform to 17 U.S.C. § 110(2), the Technology, Education and Copyright Harmonization (TEACH) Act of 2002

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3. For a thorough and critical review of Sections 512 and 1201, *see* Jay Dratler, Jr. *Cyberlaw: Intellectual Property in the Digital Millennium* (L.J. Press 2002). For a brief review, *see* Tomas A. Lipinski, *Legal Issues in Web-Based Distance Education*, in *Handbook of American Distance Education* (Michael G. Moore & William G. Anderson, eds., forthcoming, Mar. 2003).

4. *See also* Sen. Rpt. 107-31, at 5 (June 5, 2001) ("In the five years leading up to the passage of the Digital Millennium Copyright Act (DMCA) in 1998, the application of copyright law to distance education using digital technologies was the subject of public debate and attention in the United States. Extensive discussion concerning the issue was conducted during Congress' consideration of the DMCA, but no conclusion was reached." (footnote omitted)).

5. *See* DMCA, section 403 ("Not later than 6 months after the date of enactment of this Act, the Register of Copyrights, after consultation with representatives of copyright owners, nonprofit educational institutions, and nonprofit libraries and archives, shall submit to the Congress recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works. Such recommendations shall include any legislation the Register of Copyrights considers appropriate to achieve the objective described in the preceding sentence.").

6. *The Copyright Office Report on Copyright and Digital Distance Education,* Sen. Hrg., 106-539 U.S. Copy. Off. 96 (Comm. on the Jud. May 25, 1999).

> updates the distance education provision of the Copyright Act for the 21st Century. The Act allows students and teachers to benefit from deployment in education of advanced digital transmission technologies like the Internet, while introducing safeguards to limit the additional risks to copyright owners that are inherent in exploiting works in digital format.[7]

The TEACH Act passed in the Senate on June 6, 2001, and was referred to the House Committee on the Judiciary on June 13, 2001. The House Subcommittee on Courts, the Internet, and Intellectual Property approved the bill for full committee action on July 11 and was reported by the House Committee on the Judiciary on September 25. TEACH eventually became part of H.R. 2215, the 21st Century Department of Justice Appropriations Authorization Act, and was signed into law by President George W. Bush on November 2, 2002.[8]

This article analyzes and critiques the TEACH Act. The changes contemplated by TEACH represent a drastic departure from 17 U.S.C § 110(2) as it existed under previous law. TEACH requires educational institutions to meet new standards and continues to perpetuate a somewhat "lesser citizen" status to educators and students in distance education environments.

THE PRIOR (LEGAL) CLIMATE OF DISTANCE EDUCATION: UNDERSTANDING "THE OLD" 17 U.S.C. § 110(2)

Laws written before digital and Internet media permeated classrooms hamper schools' efforts to increase classroom and instructional technology. Through new technologies, teachers and students can interact with sound and motion (video), in addition to complex graphical interfaces, both synchronously and asynchronously without ever leaving home or office. However, this type of teaching, just like, if not more than, traditional modes of face-to-face instruction, often raises issues of copyright law. Under § 107 of the copyright law, a concept of fair use generally applies to uses of copyrighted works in educational settings, but it is not determinative of whether the use is ultimately fair or not. There are four fair use factors

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7. Sen. Rpt. 107-31, at 3 (June 5, 2001).

8. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301.

that must be balanced to determine whether a particular use of a copyrighted work is a fair use under section 107 of copyright law,[9] and the educational purpose of the use is just one of those factors. In other words, every educational use of copyrighted material is not automatically a fair use of that work under the law. In fact, when passing the 1976 Copyright Act, Congress explicitly rejected this construction.[10] When virtual outreach involves formal instructional services that incorporate the use of, and access to, copyrighted works, other sections of the copyright law are sought for additional "use" rights beyond those of the § 107 "fair use" grant.[11] Anytime a teaching interaction is broadcast to students at a remote location or transmitted via Web technology to a distributed or virtual classroom (or even used in front of a live classroom), it is likely that the public performance and display right of the copyright owner is implicated. Copyrights are implicated when a portion of text, a map, a chart, an article from a periodical, or any other visual aid is displayed, or when a work is performed (e.g., a video clip shown or a portion of a work read aloud). In educational settings, section 110(2) provides for the grant of additional "use" (public performance or display) rights.[12]

TEACH is a responsive piece of legislation, and "the ability of the United States to meet its domestic and international

9. The text of section 107 is as follows: "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. *See also* John W Hazard Jr., *Copyright Law in Business and Practice*, ¶ 8.01—8.03, at 8-2—8-75 (Prentice Hall 2000).

10. H.R. Rpt. 94-1476, (Sept. 3, 1976) (Reprinted in *U.S. Copyright Office Circular 21*: Reproduction of Copyrighted works by *Educators and Librarians*, 7 (1993). ("The Committee also adheres to its earlier conclusion, that a specific exemption freeing certain reproductions of copyrighted works for educational and scholarly purposes from copyright control is not justified.").

11. Carol M. Silberberg, *Preserving Educational Fair Use in the Twenty-First Century*, 74 S. Cal. L. Rev. 617, 618 (2001); Michele J. Le Moal-Gray, *Distance Education and Intellectual Property: The Realities of Copyright Law and the Culture of Higher Education*, 16 Touro L. R. 981, 1007 (2000).

12. 17 U.S.C. § 110(2)

challenges and responsibilities is directly dependent on its educational capacity."[13] TEACH demonstrates the need to think "beyond the box" of institutional education, in terms of students ("lifelong learning"), place ("in the workplace, at home"), and time ("at times selected by students to meet their needs").[14] To understand the dramatic departure that TEACH represents, and why some advocate it is long overdue, this article discusses the structure of previous distance education law as expressed in 17 U.S.C. § 110(2). Additionally, this article discusses the contrast between the structure of distance education law and that of copyright law regarding public performance or display of materials in so-called live or traditional classroom settings (the law uses the phrase "face-to-face teaching activities") under 17 U.S.C. § 110(1). By contrasting the current rights of educators in "live" class settings with those of their remote or distance education counterparts, an understanding of the claims of disparity and the perhaps incomplete rectification that TEACH promises is possible.

17 U.S.C. § 110 provides certain categories of users, such as educators, with additional use rights for public performances and displays of copyrighted works. In general, the performance (e.g. reciting part of a play or showing a video), or display of material (e.g. hanging or holding up a map) in the school library media center, classroom, or on a Web site (e.g. broadcasting the recitation of the play, streaming the video over the Internet, or posting a digital copy of a map onto the class web site) requires permission from the copyright owner. A so-called public performance or display right would be needed, unless after considering the four § 107 factors (nature of the work, nature of the use, amount of the work used, and market impact of the use), the use is classified as a "fair use." 17 U.S.C. § 110 was created to simplify the laborious and uncertain application of fair use.

17 U.S.C. § 110 gives nonprofit educational institutions additional "use" rights. While the rights under § 110 apply to all performances and displays made during a teaching interaction, the right could also apply to school media centers or libraries if those places are used for "systematic instructional activities" within the school. These use rights are

13. Sen. Rpt. 107-31, at 3.

14. Id. at 4.

not given to other nonprofit libraries, such as public libraries that might engage in community targeted educational pursuits, nor are they given to educational institutions that are for-profit, such as dance studios or language schools. As a result, 17 U.S.C. § 110, at least with regard to subsections (1) and (2), is best characterized as an educator's provision, rather than a library provision. However, it might affect the school library or media center if the locale otherwise qualifies for § 110(2) performances or displays.[15] As discussed below, § 110 would not apply to something like the playing of a Disney video to keep toddlers occupied while parents participate in the parent-teacher conferences of older siblings.

Unlike the three exclusive rights[16]—reproduction, preparation of derivative works, and distribution—the right of public performance applies only to specified categories of copyrighted material within the works of authorship range: literary, musical, dramatic, and choreographic works; pantomimes, motion pictures, and other audiovisual works; and sound recordings. There is an exclusive right to perform sound recordings publicly but only if the performance is through a digital audio transmission.[17] Performance rights do

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15. *See* H.R. Rpt. No. 94-1476, at 56-57 (Sept. 3, 1976) (reprinted in 17 U.S.C.A. § 110 (1995), Historical and Statutory Notes). This expanded treatment is consistent with other discussion of the legislative history. For example, the use of the word "teacher" in the Classroom Guidelines is broad enough to cover school media specialist or school librarian. *See* Cong. Rec. S11 (Sept. 26, 1976). (Reprinted in: *U.S. Copyright Office Circular 21*: *Reproduction of Copyrighted works by Educators and Librarians*, 7 (1993)("[T]he committee regards the concept of 'teacher' as broad enough to include instructional specialists working in consultation with actual instructors.").

16. *See* 17 U.S.C. § 106 (2002).

17. Section 106(6) covers the performance of sound recordings and provides for the exclusive right by the copyright owner to "perform the copyrighted work publicly by means of a digital audio transmission." 17 U.S.C. § 106(6) (2002). Sound recordings "are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." 17 U.S.C. § 101 (2002). Sound recordings in essence capture the rendering of an original expression, the presentation of a speech or lecture, the singing or playing of a musical work, or the reading of a text or other literary work. Unless the expression is completely ad lib or spontaneous, sound recordings are often based on a pre-existing work, and are therefore a form of derivative work. For example, a CD of Basil Rathbone reading a Sherlock Homes story is a sound recording, and thus by its nature, derivative of a literary work, i.e., the original Arthur Conan Doyle tale.

Under the 1976 Act there was no performance right in a sound recording. Because of this anomaly there is an increased chance of infringement of the underlying protected elements when a performance of a sound recording is made in a digital envi-

ronment. (*See* S. Rep. No. 128, 104th Cong., 1st Sess. 14 (1995), reprinted in *U.S. Cong.& Admin. News* 356, 361 (1995)). In 1995 Congress passed the Digital Performance Right in Sound Recordings Act (DPRSRA) (Pub. L. No. 104-39, 109 Stat. 336-44 (codified at 17 U.S.C. §§ 101, 106, 114, 115, 119, 801-803)) in order to stave the development of digital delivery technologies from leading to widespread abuse and to grant to the copyright owners some control over the "ways in which their creative works are used." *Id.*, at 357. As a result of DPRSRA, there is now a performance right in sound recordings, but only when the performance is done by means of a digital audio transmission. Unfortunately, section 110, enacted in 1976 (years before the addition of the digital audio transmission amendment), was not one of the sections amended by DPRSRA. In other words the performance right granted to educators in existing section 110(2) does not apply to sound recordings, but only to the underlying non-dramatic literary and musical work on which sound recordings might be based. However, 17 U.S.C. § 114 contains significant exceptions to the DPRSA copyright owner's right and indicates that non-subscription "broadcast" digital transmissions of sound recordings are exempted outright. *See* 17 U.S.C. § 114(d)(1)(A).

It could be argued that most "transmissions" a school would make are also not considered to be "broadcasts" for purposes of section 114 (the section which elucidates the nature of the DPRSA right), as qualifying broadcast transmissions pertain only to those transmissions "made by a terrestrial broadcast station licensed as such by the Federal Communications Commission." 17 U.S.C. § 114(j)(3). See also, S. Rep. No. 128, 104th Cong., 1st Sess. 19 (1995), reprinted in 1995 *U.S. Cong. & Admin. News* 356, 366. ("Under this provision [section 114(d)(1)(A)], any transmission to members of the public that is neither a subscription transmission (as defined in section 114(j)(8)) nor part of an interactive service is exempt from the new digital performance right"). As a result, while some of the activities of an educational institution could conceivably qualify (i.e., having a licensed broadcast station within its organizational structure), most would not. If it did have a broadcast service to facilitate distance learning and it was non-subscription (limited participants and paid), then the service would be exempted from the performance right under section 114(d)(1)(A). Moreover, if the transmission is a retransmission of a nonsubscription broadcast transmission, then section 114(d)(1)(B)(iv) contains an exception for those circumstances where the "radio station's broadcast transmission is made by a noncommercial educational broadcast station . . ." As a result, "[d]istance education activities that entail digital 'broadcast transmissions' of sound recordings will not be subject to the section 106(6) performance right." *The Copyright Office Report on Copyright and Digital Distance Education,* Sen. Hrg., 106-539, 96 (U.S. Copy. Off. May 25, 1999).

Second, subscription transmissions not exempt under (d)(1), e.g. a nonbroadcast transmission, and eligible nonsubscription transmissions are eligible for statutory licensing. While it might be tempting to hypothesize that most distance education transmission might be nonsubscription, a closer examination must be made. "Certain distance education activities could entail subscription transmissions (transmissions that are controlled and limited to particular recipients, and for which payment is required)." *Copyright Office Report on Copyright and Digital Distance Education,* Sen. Hrg., 106-539, 96 (U.S. Copy. Off. May 25, 1999).96 (1999) (citing 17 U.S.C. § 114(j)). It would appear that a distance education web class on music appreciation, for example, that has digital or digitized sound recordings available for students to stream and hear as part of the class, while not meeting the statutory definition of a broadcast, would nonetheless arguably be a subscription transmission under section 114(j)(14) defining subscription transmission as it "is controlled and limited to particular recipients [i.e., members of the class through password access as is typical on distance education web sites], and for which consideration is required to be paid or otherwise given by or on behalf of the recipients to receive the transmission or a package of transmissions including the transmission" [i.e., student tuition payments]. Even if it is argued that the

not apply to pictorial, graphic, or sculptural works because these must be displayed instead of performed. On the other hand, both performance and display rights govern literary, musical, dramatic, and choreographical works as well as pantomimes because they can be displayed and performed. Further, performance rights apply to motion pictures and other audiovisual works when images are shown sequentially, while display rights apply to works when the images are shown non-sequentially or individually. Thus, the showing of a videocassette (either by broadcasting it to a remote class location, such as to students in a neighboring school district, or by converting it into digital format and loading it on a distance education class site that is accessed by students in multiple states) would not be authorized under pre-TEACH 17 U.S.C. § 110(2). These constitute "public performances of an audiovisual work," and as discussed below, performances under 110(2) were limited to non-dramatic literary or musical works.

The § 106 rights of performance and display apply only to "public" performances and displays[18]. "To perform or display a work 'publicly' means to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."[19] This is a location determinative

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transmission would be a nonsubscription transmission, in either case under section 114(d)(2)(C) an "eligible nonsubscription transmission or a subscription transmission not exempt under paragraph (1)" may not publish advance play lists. If the music selections are listed in the course syllabus, then either the eligible nonsubscription transmission or a subscription transmission not exempt under paragraph (1) cannot "cause to be published, or induce or facilitate the publication, by means of an advance program schedule or prior announcement, the titles of the specific sound recordings to be transmitted, the phonorecord embodying such sound recordings, or, other than for illustrative purposes, the names of the featured recording artists . . ." 17 U.S.C. § 114(d)(2)(C)(ii).

18. 17 U.S.C. § 106 (2002); What is the nature of the performance right? "To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." 17 U.S.C. § 101. Other items in the classroom may be displayed: "To 'display' a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially." 17 U.S.C. § 101. Some categories of works can be performed, although others can only be displayed; you cannot perform a piece of sculpture, nor can you display a song. A performance in a classroom could be the showing of an episode from the HBO series "Band of Brothers," a reading of a chapter from Great Gatsby, or the singing of a Bernstein song.

19. 17 U.S.C. § 101 (2002).

clause. The definition of "public" encompasses a wide range of classroom or educational settings. While a classroom may not necessarily be open to the public, it is still covered by the concept of public performance or display under the second "outside the normal circle of family or social acquaintances is gathered" proviso. It does not matter if the group of students in the classroom know each other, or if those gathered in the school library working on a project are socially acquainted with each other; the trigger is that the performance or display is made at a place open to the public or where people beyond the family or social acquaintances might gather. Students in a classroom or school library meet this definition. Any educational setting would, at the very least, qualify for the second proviso. Some school settings might also qualify for the first "place open to the public" proviso. A university library would surely meet this criterion, as might its classrooms, while a K-12 environs arguably might not.[20] However, in cases where a rural K-12 media center serves as a library for both the public school and the community at large, it becomes open to the public.

17 U.S.C. § 110 governs public performances and displays of copyrighted materials in classroom and related settings. Although the mirroring of an instructor's material from live face-to-face settings into on-line settings (the educational "use" rights provided under § 110(1) and discussed below) is completely logical, the previous formulation of § 110(2) did not

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20. The operative sub-clause of the "publicly" definition is triggered when the performance or display is transmitted or communicated to a place specified by the "location clause" ("place open to the public" or "gathered"), however an additional trigger of "publicly" can be made by performances or displays "to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. § 101 (2002). This is an action (transmission or communication) clause. Thus, if a school allows patrons to view videos in the cafeteria during lunch period, it would trigger the location clause but not necessarily the action clause. However, if the school placed elevated television monitors in each corner of the main reading room, and allowed students to tune into MTV during a recreational reading period, this would in theory trigger the action (transmission or communication) clause. This article discusses when under sections 110(1) or 110(2) such performance or displays might be allowed in educational settings. However, in the latter example, section 110(5) might still allow the public performance or display of such "transmissions" (the television monitor in the reading area scenario), but a thorough discussion of the subsection is beyond the scope of this article. Of course it is the "transmission or communication" proviso that would make performances and displays of distance education course content (students at home or at work in a virtual class) "public" in the sense of the copyright owner's section 106 rights.

appear to offer such flexibility. Moreover, by design, § 110(2) accomplished an opposite goal, often with harsh results.

Pre-TEACH 17 U.S.C. § 110(2) governed the use of copyrighted materials "by or in the course of a transmission," and by its simple terms applied to distance education environments. However, § 110(2) contained many practical limitations on the use of copyrighted material in the modern virtual Internet classroom. While the use of the word "transmission" could be interpreted broadly enough to apply to the dominant distance education web-based instruction today, the 1976 legislative history (House Report) entitled the discussion of § 110(2) with the words "Instructional Broadcasting." When the 1976 Copyright Act was enacted, the operative vision of distance education was to have a class session in one location broadcast to students gathered in a classroom at another location. The language of § 110(2), unchanged since it was enacted in 1976, TEACH notwithstanding, belied the "stuck in time" nature of its many limitations. The most significant limitations are discussed below and are related to concepts of material or copyrighted works, institutional "systematic instructional activities," content integration, and location.

First, the opening phrase of § 110(2) limited the works that may be performed in a transmission to two categories: nondramatic literature (e.g. reading from a text) and music (e.g. singing a song). "Thus, the copyright owner's permission would be required for the performance on educational television or radio of a dramatic work, of a dramatic-musical work such as an opera or musical comedy, or of a motion picture."[21] There was no limitation, however, on the display of a work.[22]

There is no limitation on the category of works that may be displayed under 17 U.S.C. § 110 (2) by, or in the course of a transmission, but by definition, this right applies to a small category of copyrighted works in the remote classroom.[23] In

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21. H.R. Rpt. 94-1476, at 83 (Sept 3, 1976) (reprinted in *U.S. Cong.& Admin. News* 5659, 5697 (1995)).

22. Performances are limited to "nondramatic literary or musical works" but no such limitation of categories of works exists under the plain text of pre-TEACH, the statute merely read: "or display of a work." 17 U.S.C. § 110(2) (2002).

23. The copyright law recognizes eight categories of works: literary works, including computer code; musical works including accompanying words; dramatic works, including accompanying music; pantomimes and choreographic works; pictorial, graphic,

other words, certain works can, by legal operation as much as by logic, only be performed[24] while others can only be displayed.[25] For example, one cannot logically display a sound recording[26] or perform a sculpture, but one can display a photograph or perform an audio-visual work such as a filmstrip. Thus, the limitation on the type of work used in the virtual classroom was just one of the hurdles in applying pre-TEACH § 110(2) to distance education. While maps, charts and other visual teaching reinforcement tools could be used because they constitute displays, a video cannot be shown because it falls outside the section 110(2) performance category.[27]

Second, the performance or display must be part of the "systematic instructional activities" of the nonprofit educational institution.[28] For example, pre-TEACH 17 U.S.C. § 110(2) might not have supported the broadcast of copyrighted materials (performance or display) as part of a school's orientation activities or commencement exercises. The legislative history suggests the "concept of 'systematic

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and sculptural, so-called static-visual works; motion pictures and other audiovisual works, so-called active visual works; sound recordings; and architectural works. 17 U.S.C. § 102 (2002).

24. Performance can apply to literary works; musical works; dramatic works; pantomimes and choreographic works; motion pictures and other audiovisual works; and sound recordings. Limiting section 110(2) performances to nondramatic literary and musical works eliminates the majority of "performance oriented" works. "[F]or example, a performer could read a nondramatic literary work aloud under section 110(2), but the copyright owner's permission would be required for him to act it out in dramatic form." H.R. Rpt. 94-1476, at 83 (Sept. 3, 1976) (reprinted in *U.S. Cong.& Admin. News* 5659, 5697 (1995)).

25. Display can apply to pictorial, graphic, and sculptural and architectural works.

26. In general, sound recordings have no performance right. You can always play a LP record, but the underlying music (musical work) of the composer remains protected, but of course, performance of a musical work was one of the rights granted by the pre-TEACH section 110(2) right. In addition, a sound recording has a performance right when the recording is performed by digital audio transmission. 17 U.S.C. § 106(6). When Congress amended Section 106 in 1996, adding the performance right in sound recording via a digital audio transmission, it added a definition of digital audio transmission to mean "a transmission in whole or in part in a digital or other nonanalog format." This definition is not terribly helpful but "plausibly implicate[s] most of the major conduits by [which] Americans now receive information, including television and radio broadcast, telecommunications, cable and fiber optics, direct satellite services, and even online interactive services." Hazard, supra n. 9, at 4-41.

27. The only two categories of works that could be performed were "nondramtic literary or musical works" 17 U.S.C. § 110(2) (2002).

28. 17 U.S.C. § 110(2)(A) (2002).

instructional activities' is intended as the general equivalent of 'curriculums,' but it could be broader in a case like that of an institution using systematic teaching methods not related to specific course work."[29] This definition is unclear, but it could be interpreted to allow for the use (performance or display) of copyrighted material in the instruction of basic distance technologies that are not part of "specific course work." Perhaps transmitting web-based instructional technology, or transmitting an opening university orientation to remote campus locations or to distance students would have qualified under the previous § 110(2) performance and display right. The activities, if not within the actual curriculum of a course, would still to have been "in accordance with the pattern of teaching established by the governmental body or institution."[30] Thus, it seems a performance or display of copyrighted material as part of an orientation or commencement would not be allowed and would require either permission from the copyright owner or the "purchase" of a specific performance or display right.

Subsection 110(2)(B) also required that the "performance of a nondramatic literary or musical work or display of a work be directly related and of material assistance to the teaching content of the transmission."[31] The legislative history of the 1976 Act offers little assistance in understanding the second substantive requirement of § 110(2) found in § 110(2)(B). However, the 2001 legislative history of TEACH retains the 110(2)(B) requirement using the same exact language and numerical-alpha statutory section designation. This suggests that

> [t]he requirement of subparagraph (2)(B), that the performance or display must be directly related and of material assistance to the teaching content of the transmission, is found in current law [referring to pre-TEACH 17 U.S.C. § 110(2)(B)], and has been retained in its current form [referring to TEACH provision 17 U.S.C. § 110(2)(B)]. As noted in the Register's Report [footnote omitted], this test of *relevance and materiality* connects the copyrighted work to the curriculum, and it means that the portion performed or displayed may not be performed or displayed for the mere entertainment of

29. H.R. Rpt. 94-1476, at 83 (Sept. 3, 1976) (reprinted in *U.S. Cong.& Admin. News* 5659, 5697 (1995)).

30. *Id.*

31. 17 U.S.C. § 110(2)(B) (2002).

the students, or as unrelated background material.[32]

The 2001 legislative history of TEACH suggests the "directly related and of material assistance" clause in 17 U.S.C. § 110(2)(B) is the language (whether 1976 or 2001 TEACH) that would prevent a teacher from performing a work for the "mere entertainment" of his or her students. The 1976 legislative history *does* make reference to the disallowance of a classroom performance or display under § 110, if the purpose is for "recreation or entertainment."[33] And that reference is made as an interpretation of the § 110(1) live classroom "face-to-face teaching activities" phrasing instead of in the discussion of the § 110(2) remote student or distance education right.

The "directly related and of material assistance" language of 17 U.S.C. § 110(2)(B), enacted in 1976 but not explained until 2001, and the "face-to-face teaching activities" of the 1976 enacted § 110(1) both prevent entertainment uses of copyrighted material in the classroom without permission. As a result of this recent clarification, the 1976 legislative history interprets § 110(1) as prohibiting performances or displays "that are given for the recreation or entertainment of any part of their audience," while the 2001 TEACH legislative history makes a similar assertion by saying that performances and plays "may not be performed or displayed for the mere entertainment of the students or as unrelated background material" for § 110(2).

Moreover, as the 1976 legislative history makes the relevance and materiality requirement of 17 U.S.C. § 110(2) implicit in § 110(1) by interpreting its "teaching activities" language to exclude recreational or entertainment use of material, the legislative history of TEACH explicitly makes clear that the "directly related and of material assistance" language of § 110(2) also excludes material for the purposes of "entertainment" or "unrelated background material."[34] As a result, the "teaching activities" and "directly related and of material assistance" phrases accomplish the same or similar entertainment use restriction but use different statutory

32. Sen. Rpt. 107-31, 10-11 (June 5, 2001) (italics added).

33. H.R. Rpt. 94-1476, at 81 (Sept. 3, 1976) (reprinted in *U.S. Cong.& Admin. News* 5659, 5695 (1995)) ("but they do not included performances or displays, whatever their cultural value or intellectual appeal, that are given for the recreation or entertainment of any part of their audience.").

34. Sen. Rpt. 107-31, 10-11 (June 5, 2001).

language.[35]

While it is obvious that 17 U.S.C. § 110(2) cannot by operation apply to live on-site teaching because it targets performances or displays by or in the course of a transmission, the § 110(1) phrasing of "teaching activities" did not appear anywhere in the pre-TEACH section 110(2) or in the version of 110(2) enacted under TEACH. The section 110(2) relevance ("directly related") and materiality ("and of material assistance to the teaching content") requirement should by logic apply to any performance or display of copyrighted material in the classroom, including distance scenarios. Under § 110(2), however, only the legislative history of TEACH makes the requirement explicit (at least as far as a Senate or House Committee Report can make it so).[36]

The impact of the TEACH legislative history may stretch beyond the 2001 amendment. The commentary may suggest a slight re-interpretation of the 17 U.S.C. § 110(1) "recreation or entertainment" prohibition for live ("face-to-face) students under § 110(1). Since these uses were disallowed under the 1976 legislative history, and since the 2001 legislative history language in § 110(2)(B) also prohibits such uses in distance settings, the explanation provided in the recent 2001 commentary regarding the general nature of the "mere entertainment" prohibition might further expand the application of its similar prohibition vis-à-vis § 110(1). In other words, the committee discussion in 2001 can be used to further interpret the intent of the 1976 commentary prohibiting similar unnecessary performances and displays. If this is true, the § 110(1) prohibition (like the § 110(2)(B) prohibition as indicated by the TEACH legislative history) might also prohibit

35. The "teaching activities" language of section 110(1) enacted in 1976 is interpreted to mean that the performance and display right granted by section110(1) do not apply to those uses "whatever their cultural value or intellectual appeal, that are given for the recreation or entertainment of any part of their audience."). H.R. Rpt. 94-1476, at 81 (Sept. 3, 1976) (reprinted in *U.S. Cong.& Admin. News* 5659, 5695 (1995)). While the "directly related and of material assistance" phrasing used in pre-TEACH section 110(2)(B), also enacted in 1976 and retained in TEACH section 110(2)(B) accomplish the same or similar entertainment use restriction but use different statutory language to do so. Sen. Rpt. 107-31, 10-11 (June 5, 2001) ("the portion performed or displayed may not be performed or displayed for the mere entertainment of the students, or as unrelated background material.").

36. Sen. Rpt. 107-31, 10-11 (June 5, 2001). The House Report uses the same language to describe the operation of TEACH section 110(2)(B). H. Rpt. No. 107-687, 107th Cong., 2nd Sess. (2002).

performances and displays of copyrighted works that qualify as "unrelated background material."

Whether or not this additional prohibition ("unrelated background material") applies to § 110(1) uses as well as to § 110(2)(B) uses requires an understanding of what "unrelated background material" might be. Might it prohibit the posting of a background article to the class, which is analogous to a teacher passing around an article during a face-to-face encounter with students? Would a junior high school class studying *To Kill a Mockingbird* be allowed to view (display) ornithological material on mockingbirds because it qualifies as related background material, while similar material on poverty in a rural southern town or on a recipe for corn bread might not be allowed because it is unrelated background material? Defining unrelated background material becomes difficult. Does "unrelated" modify "background," or is the phrasing redundant, making the statute exclude unrelated material that is only background in nature (in which case both postings might be excluded)?

Arguably, "related" as opposed to "unrelated" background material could still be acceptable under the TEACH Senate and House Committee Reports. If so, what is the point of the phrase "background material?" When does background material, which by definition always seems to have relevance to the curriculum, move from an unacceptable "unrelated" category to an acceptable "related" category? Would use of material on the European Holocaust in a World War II unit be related background material, while the use of material on the Armenian or Kurdish genocide be unrelated background material? The interpretation would be more precise if either the prohibition material included "unrelated material" alone or the TEACH § 110(2) right was more restrictive by prohibiting § 110(2) from applying to all "background material." Excluding "unrelated background material" appears to accomplish nothing more than confusion.

Finally, under the pre-TEACH language of § 110(2)(C), it is unclear whether the rights granted to educators in § 110(2) allowed the transmission over the Internet of a performance or display of copyrighted material under the most prevalent one-to-one distance education model (that is, remote broadcast to individual students at separate locations, via home or work computers). The traditional one-to-many mode broadcast model

is reflected by the 1976 formulation of § 110(2) and operates as a significant limitation in many current distance education scenarios. Yet this contrasts with the wide range of rights an educator has in a live class under § 110(1), which are discussed below.

Pre-TEACH 17 U.S.C. § 110(2)(c) indicated that a qualifying transmission must be made "primarily" to only one of three categories of locations or persons. First, and of most relevance to the present discussion, pre-TEACH § 110(2)(C)(i) indicated that the reception must be made primarily for "reception in the classroom or similar places normally devoted to instruction." Pre-TEACH § 110(2)(C)(ii) and (iii) allowed transmissions to those with disabilities or government employees who cannot physically attend class. [37]

Under pre-TEACH 17 U.S.C. § 110(2)(C), factors determining whether the purpose of a transmission were "primarily" for one of the permissible designated groups include: 1) traditional classroom students, 2) disabled or other special student groups such as preschool children, displaced workers, illiterates, and shut-ins, or 3) government employees as part of a training exercise—include "subject matter, content and the time" of the transmission.[38] That the public at large might also be able to receive the transmission does not disqualify its use under the Section 110(2) exemption.

The 1976 legislative history suggests the purpose behind the initial transmission is the determining factor. For example, what if the transmission is made for regular students or disabled learners, but the mode of technology allows others to also pick up the transmission? That others might intercept the transmission is acceptable and the performance or display of qualifying copyrighted materials is allowed. However, a transmission made for the public at large, where the educational institution intends to piggyback or incorporate the broadcast into its curriculum, is not allowed. For instance, an

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37. 17 U.S.C. § 110(2)(C)(i)-(iii) (1995) (under (ii) to "persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction" or third under (iii) to "officers or employees of governmental bodies as a part of their official duties or employment").

38. H.R. Rpt. 94-1476, at 83 (Sept. 3, 1976) (reprinted in *U.S. Cong.& Admin.* News 5659, 5697-98 (1995)) ("Factors to consider in determining the 'primary' purpose of a program would include its subject matter, content, and the time of its transmission.").

educational fire safety program produced under the pre-TEACH § 110(2) rules by the local fire department and broadcast on the local access cable channel that includes a segment of firefighters singing a rendition of the Talking Heads "Burning Down the House" (performance of a musical work) would not be acceptable. In the latter case, that some people in the qualifying group (children at the local public school as part of a public safety class) can receive the transmission will not save the broadcaster from liability. The firefighters either have to seek permission to sing the song (as it does not qualify for the § 110(2) right), argue that fair use allows the performance of the song, or seek permission from the copyright owner. However, the legislative history makes clear that "instructional television college credit courses . . . aimed at undergraduate and graduate students in earnest pursuit of higher educational degrees [qualify as long as] these broadcasts are aimed at regularly enrolled students and are conducted by recognized higher education institutions."[39] Again, the 1976 Act envisioned the world of distance education in the traditional broadcast mode. While the traditional broadcast mode is still in use and not completely outdated, broadcast is disappearing quickly.

Were transmissions to students in the contemporary distance education model, a model that anticipates that most students access the material from their personal computer stations at home or the office, included in the pre-TEACH § 110(2)(C)(i) "primarily" requirement? No. The plain language of § 110(2) did not allow use of the one-to-one transmission mode. Although the transmission needs only to be made primarily in "classrooms or similar places normally devoted to instruction," did this requirement offer enough legal breathing room for participants and instructors in the contemporary one-to-one distance education model, or does this limitation prohibit transmission to distance students at home or at work? Pre-TEACH section 110(2) apparently prohibited transmissions to the students at home or working, since the transmission is not primarily to a classroom or similar place normally devoted to instruction. While a bedroom or office might be the only place (or at least the primary place) where a particular distance student of the twenty-first century receives his or her

39. H.R. Rpt. 94-1476, at 84 (Sept. 3, 1976) (reprinted in *U.S. Cong.& Admin. News* 5659, 5698 (1995)) .

remote instruction, the bedroom or office unfortunately is not a "classroom" nor is it "a place normally devoted to" that instruction. Because the 1976 formulation of § 110(2) required that transmission be made primarily for "receptions in classrooms or similar places normally devoted to instruction," a school could broadcast a performance of a literary work to another school as part of a team-taught course, but it could not broadcast the performance to students who take the course from home. This standard of the traditional classroom is an objective standard, not one based on the subjective concept of the virtual student. The inability to apply § 110(2) to the typical distance education session prompted many to call for legislative reform. As a result of these limitations, efforts to amend the subsection to allow for an expansion of the categories of § 110(2) works available for performance and display in the classroom and an expansion of the places where such receptions can be received continued.[40]

Finally, although 17 U.S.C. § 110(1) requires that "in that case of a motion picture or other audiovisual work" the performance or display must be made by means of a copy that was lawfully made (see discussion below), no such language appears in the current version of § 110(2). The § 110(1) "unlawfully made" copy proviso is triggered when the "person responsible for the performance knew or had reason to believe" the version of the work used was an unlawfully made copy. The lack of this specific requirement in pre-TEACH § 110(2) might tempt one to conclude that if the chapters from a book that were first reproduced (digitized) by the school before it was transmitted (displayed) to distance students exceeded fair use (and was not otherwise a lawful copy) and the instructor suspected the use was unlawful, it would not matter for purposes of § 110(2) applicability because § 110(2) does not contain such restricting language. It follows that an instructor could use an unlawful and infringing copy (under § 107, one that exceeds fair use, for example) of a work to undertake a lawful display to remote students under § 110(2). This result seems odd and, as explained in the discussion of TEACH below, was unintended. More likely, Congress simply did not anticipate the current state of distance education where digital is common and thus where the likelihood of appropriating an

40. Sen. Jud. Comm., *The Copyright Office Report on Copyright and Digital Distance Education*, Sen. Hrg., 106-539, 106th Cong. 140-70 (May 25, 1999).

infringing copy for educational use is also more common and wrote the language of § 110(2) when distance education consisted of remote television broadcasting and no need existed to convert most works into digital format for transmission to remote students.

SECOND CLASS CITIZENS: VIEWING 17 U.S.C. § 110(2) IN CONTRAST TO THE RIGHTS AFFORDED FACE-TO-FACE TEACHING UNDER 17 U.S.C. § 110(1) AND PRIOR LAW

Section 110(1) provides that the following are not infringing activities:

> the performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom, or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made.[41]

Several points should be made regarding the provisions of this subsection: the who, what, and where of its requirements, the allowance given to educators in "live, face-to-face settings" by implication, and the advantage that students in live classrooms have over their distance or remote counterparts.

First, regarding the "who," the performance or display in subsection (1) must be made by instructors or pupils and cannot be done by guest performers or students not enrolled in the class. But the legislative history suggests that a guest lecturer is covered by the exception and may perform or display works consistent with the section's other conditions.[42]

The major limitation that § 110(1) does impose on educators in "live" class settings is tied to the statutory language requiring that qualifying performances and displays occur within the context "of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar

41. 17 U.S.C. § 110(1) (1995).

42. H.R. Rpt. 94-1476, at 82 (Sept 3, 1976) (reprinted in *U.S. Cong.& Admin. News* 5659, 5696 (1995)) ("However, the term 'instructors' would be broad enough to include guest lecturers if their instructional activities remain confined to classroom activities. In general, the term 'pupils' refers to the enrolled members of a class.").

place devoted to instruction." Remote broadcasts are not allowed (but are covered by § 110 (2), but as long as the instructor and pupil are in the same building or general area, even though the performance might be "broadcast" via in-house, closed-circuit television, the exemption applies. This example allows for a transmission of material from one room to another because all the students may not physically fit into the same lecture hall to be covered by § 110(1), which is not the true "distance" transmission contemplated by § 110(2). This "where" requirement suggests that the §110(1) right is tied to the traditional notion of the physical classroom versus the wider school environment. For example, performance of a copyrighted work at a school-wide assembly is not allowed because this performance is not made in a classroom or similar place devoted to instruction, although this situation might conceivably be covered by § 110 (4). The 1976 legislative history offers that the concept of face-to-face "embrace[s] instructional performances and displays" as long as they are not transmitted. However, the "concept does not require that the teacher and the students be able to see each other, although it does require their simultaneous presence in the same general place."[43] Same building or general area would apply; for example, where a closed circuit transmission is used to "beam" the class session from the main lecture room to students gathered in adjoining or satellite rooms on other floors in the same building and at the same time is permitted.

Finally, the "what" indicates that the § 110(1) exemption to the performance and display right of copyright owner's applies to *any* type of work, be it text, audio, video, etc. This is one instance where comparing the rights of educators in front of live students (live face-to-face performances or displays under § 110(1)) versus educators in distance education settings (performances or displays by means of a transmission under § 110(2)), the law favors the "use" rights of "live" teachers and their students over those teachers and students in remote or distance settings. This disparity is the main impetus behind the legislative reform of § 110(2) in TEACH. Under the current law and as discussed above, transmissions of performances under § 110(2) are limited to nondramatic literary and musical works. Thus, a teacher under pre-TEACH § 110(2) could read a text or sing a song but could not show a video (an audiovisual

43. *Id.* at 81.

work) to distance students. That teacher's "live" instructional counterpart, who teaches a similar course to an in-person, on-campus class and uses the same material, would face no such limitation; the video tape (as long as it is a lawfully made copy) could be shown to students gathered in a campus classroom. This is the practical result of the broad grant of rights provided to educators under § 110(1).

Consider a potential additional limitation on distance educators. Recall that there is no performance right in a sound recording and that the § 110(1) right applies to any category of copyrighted material. Thus, in a 'live" class, a copyrighted work like a sound recording (even in digital form, like a music CD) could be performed, as that work has no "performance" right associated with it. Also recall the amendment to § 106(6) that created a performance right in digital audio transmissions of sound recordings. Combine this fact with the reality that arguably all transmissions of web-based distance instruction would be digital,[44] and the distance classroom is again short-changed in the pre-TEACH environment, and perhaps under TEACH as well. Because § 110(1) applies to any category of work, permissible performances include the playing of an LP or music CD to a live class. Performance of the underlying musical work is also covered because there is no limitation on the category of works used. Nor does performance of the sound recording necessitate any § 110(1) right, as the performance right in a sound recording is only applicable when the performance is made by means of a digital audio transmission.

However, in a distance education setting, the acceptable use of the CD is far less clear and appears to be prohibited in the pre-TEACH setting. At the very least, it has to qualify for the complex licensing requirements under § 114(d): the use of underlying musical work in the CD is allowed under § 110(2), but the additional performance right under § 106(6) prevents its use as a digital audio transmission over the Internet as part of a web-based distance education course, as this would trigger the performance right of the recording artist. Since the § 110(2) right applies only to the underlying music and not to the performer's copyright in the sound recording of it, a performance right would now be needed to make digital audio transmission to remote students over the Internet possible. Of course, it could be argued that the creation of the performance

44. i.e., a digital transmission over the Internet

right in a sound recording by means of a digital audio recording is focused entirely on prohibiting the broadcast of sound recordings as part of a pay-per-view equivalent of Internet-based or other digital variations of the celestial jukebox.[45]

The general exceptions in § 114(d), exclude a "nonsubscription broadcast transmission." Specific exceptions exclude retransmissions of noncommercial educational broadcast stations.[46] These provisions underscore the emphasis of the new performance right on those uses of sound recordings by digital modes that are more or less the equivalent of digitized radio stations. Furthermore, the definition of "broadcast" under § 114(j) is tied to those broadcasts by licensed Federal Communications Commissions authority. Whether a court would also adopt this narrow view of the right created is arguable as "the development of digital technology. . . has blurred to distinction between broadcasting and distribution."[47] Under § 114, a performance could be subject to "no right at all, a statutory license, or a full exclusive right."[48] Nonsubscription broadcast transmissions are exempted by the § 106(6) performance right and statutory licenses are available from subscriptions transmissions, but interactive service transmissions are subject to the full exclusive right of § 106(6). Arguably, most distance education transmissions would be subscription transmissions, as that concept is defined in § 114(j)(14), i.e., "controlled and limited to particular recipients" and thus paid. So they could be subject to the statutory licensing requirements of § 114(d)(2)(C).

The "teaching activity" language in § 110(1) requires only

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45. *See* Dralter, *supra* n. 3, at § 2.04, at 2-14—2-28.15.

46. 17 U.S.C. § 114(d)(1)(B)(iv) (1995).

47. Harzard, *supra* n. 9 at 4-57 (citing in footnote 11, William H. O'Dowd, *The Need for a Public Performance Right in Sound Recordings*, 31 Harv. J. on Legis. 249, 257 (1993)).

48. *The Copyright Office Report on Copyright and Digital Distance Education*, Sen. Hrg., 106-539, 106th Cong., at 95-96 ("In its current form, section 114 divides the types of transmissions that carry performances of sound recordings into three categories. Depending on the category into which the digital audio transmission falls, the performance of the sound recording could be subject to no right at all, a statutory license, or a full exclusive right. The three categories of transmissions in section 114(d) are: (1) nonsubscription broadcast transmissions (and certain retransmissions), which are completely exempted from the section 106(6) performance right; (2) subscription transmissions and certain 'eligible nonsubscription transmissions' such as web casting, which are eligible for a statutory license, subject to a list of criteria; (3) interactive (on-demand) transmissions and other non-exempt transmissions that do not qualify for the statutory license, which are subject to the full exclusive performance right.").

that the content of the material be related to the curriculum. Although showing the Hollywood film adaptation of "The Last Temptation of Christ" is relevant in a theology class, it would not be considered relevant if shown in a physics class as an end-of-semester reward. Teaching activities do not include performances or displays "whatever their cultural or recreational value or intellectual appeal, that are given for the recreation or entertainment of any part of their audience."[49] Showing the same film to a theology class just to keep students occupied while the teacher is absent or otherwise occupied grading papers might not be acceptable, as the sense of "curriculum" suggests that the material performed or displayed must be integrated into the teaching session and coordinated with a specific teaching moment.[50] Thus, showing "Saving Private Ryan" during a unit on WWII without any other integration into the curriculum might not qualify. Moreover, it might be poor teaching, similar to a teacher bringing a helmet or other equipment soldiers used in the Normandy landings and just setting the items on the table without any other explanation or commentary. However, showing the film and then having students write a research paper comparing the historical accuracy of the film to actual events or compose a creative essay imagining what a particular a character from the movie might include in a letter home would arguably offer some integration of the film into the teaching or systematic instructional activities.

Furthermore, the § 110(1) exemptions must be in a "bona fide" educational environment with students enrolled in a class. For example, showing a video to Spanish Club members even in a classroom or school meeting room or to toddlers in a

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49. H.R. Rpt. 94-1476, at 81 (Sept. 3, 1976) (reprinted in *U.S. Cong.& Admin. News 5659*, 5695 (1995)).

50. 17 U.S.C. § 110(1) ("performance or display of a work by instructors or pupils in the course of face-to-face *teaching activities* of a nonprofit educational institution . . ."). (4 H.R. Rpt. 94-1476, at 81 (Sept. 3, 1976) (reprinted in *U.S. Cong.& Admin. News 5659*, 5695 (1995)) observes that "[t]he 'teaching activities' exempted by the clause encompasses systematic instruction of a very wide variety of subjects. . ." and H.R. Rpt. 94-1476, at 83 (Sept. 3, 1976)(reprinted in *U.S. Cong.& Admin. News* 5659, 5697 (1995)) discussing section 110(2) defines "[t]he concept of 'systematic instructional activities' is intended as the general equivalent of 'curriculums,' but it could be broader in a case such as that of an institution using systematic teaching methods not related to specific course work," but in no way does it extend to "performances or displays, whatever their cultural value or intellectual appeal, that are given for the recreation or entertainment of any part of their audience." H.R. Rpt. 94-1476, at 81 (Sept. 3, 1976)(reprinted in *U.S. Cong.& Admin. News* 5659, 5695 (1995)).

day care does not qualify because the audience is not comprised of students enrolled in a specific class. Showing a videocassette in a classroom as part of a community travel night, parents' organization, or school board meeting would not qualify either.[51] Moreover, the educational institution must be nonprofit.[52] While it need not be accredited, this requirement is added for distance education settings under TEACH, as discussed below.

Finally, § 110(1) excepts performances and displays where "in the case of a motion picture or other audiovisual work, the performance, or the display of individual images is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made." Although not targeted specifically at off-air tapings of programs recorded on a VCR at home or at school then used in the classroom, this language suggests that if, for instance, an off-air tape made five years ago or from a pay-for-view station (and thus far in excess of the 10-day viewing limitation for broadcast programming contained in the off-air taping guidelines)[53] was shown, the § 110(1) exemption would not apply to its use in the classroom, since it is not a lawful copy. Most educators should be aware ("knew or had reason to believe"[54]) that such use is far beyond the acceptable realm of § 110 and 107, thus it is a "copy that was not lawfully made under this title." The "lawfully made" requirement applies only to audiovisual works, not the

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51. Although no court cases exist involving videocassette viewing, section 110, and classrooms, analogous precedent supports this distinction. In *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 29 (3d Cir. 1986); and *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984), the viewing of videos by customers in a video store, even where the viewing is done privately, was held to be a public performance, because the store where the booths were located was public. On the other hand, the viewing of videodiscs in a hotel room by guests is not a public performance because hotel rooms, once rented for occupancy, are deemed private. *Columbia Pictures Indus., Inc. v. Prof. Real Est. Investors, Inc.*, 866 F.2d 278 (9th Cir. 1989). In contrast, a videotape system installed in hotel for remote operation by hotel guests for transmitting selected videotapes for viewing on TVs in hotel rooms is public performance requiring copyright license.

52. 17 U.S.C. § 110(1) ("performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a *nonprofit educational institution* . . .").

53. *Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes*, reprinted in *Reproduction of Copyrighted Works by Educators and Librarians*, Circular 21, U.S. Copy. Off. 26 (U.S. Copy. Off. 1988).

54. 17 U.S.C. § 110(1)

remaining categories of works allowed to be performed or displayed under § 110(1).

A NEW DAY FOR DISTANCE EDUCATION: THE TEACH REFORMULATION OF 17 U.S.C. § 110(2)

As discussed earlier,[55] pre-TEACH § 110(2) granted a teacher performance and display rights of "transmission" when using copyrighted works in nonprofit educational settings. The transmission performance right, however, applied only to two categories of works: nondramatic literary (text, such as a book or poetry reading) or musical works (singing a song). § 110(2) allows a faculty member to read from a Faulkner short story or an excerpt from a Toni Morrison novel and stream (transmit) the reading over the university's distance education technology. But if the same faculty member desired to let his or her distance students watch (load, stream, and view) a documentary about Faulkner or a theatrical movie version of a Morrison story, a performance right is needed. A performance right is also required for the transmission of a play or "opera or musical comedy or motion picture"[56] since these are dramatic, dramatico-musical, or audiovisual works. Such a drastic and arbitrary difference in the application of an educator's ability to use copyrighted material in live versus distance education settings is one reason behind § 110(2) revision. Again, there was no such limitation with respect to the display of works. However, by definition of "display" and the nature of some copyrighted works, the wide reach of the § 110(2) display right can apply only to pictorial, graphic, and sculptural works and the text, score, or scripting of literary, musical, and choreographic-pantomime works.[57]

In contrast to these limitations, reform to § 110(2) by way of its reformulation in TEACH accomplishes much.[58] According to

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55. *See supra* n. 13 and the following discussion.

56. H.R. Rpt. 94-1476, at 83 (Sept. 3, 1976) (reprinted in *U.S. Cong.& Admin. News* 5659, 5697 (1995)) ("Thus, the copyright owner's permission would be required for the performance on educational television or radio of a dramatic work, of a dramatico-musical work such as an opera or musical comedy, or of a motion picture.").

57. "[I]n the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly." 17 U.S.C. § 106(5); See also 17 U.S.C. § 106 (re: "display" lists); *supra* n.19.

58. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301.

the Senate Committee Report on TEACH:

> The Act expands the exempted copyright rights, the types of transmissions, and the categories of works that the exemption covers beyond those that are covered by the existing exemption for performances and displays of certain copyrighted works in the course of instructional transmissions. Thus, for example, it allows transmissions to locations other than a physical classroom, and allows for performances of reasonable and limited portions of audiovisual works, sound recordings, and other works within the scope of the exemption.[59]

The goal of the § 110(2) revision is to "remove[] the concept of the physical classroom."[60] The reformulated TEACH version of section 110(2) is long and somewhat complex (compared to § 110(1) and TEACH § 110(2)). Below is an analysis of its major provisions.

First, TEASCH replaces the introductory applicable "performance" and "display" statement of § 110(2) with broad exclusory language regarding certain instructional material. This may not be the most effective way to establish a positive statutory tone of expanded user's rights. The prefatory clause of TEACH § 110(2) accepts all works that are "produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks,"[61] from the expanded performance and display right of TEACH § 110(2). By its plain meaning the provision "limits the relevant materials by excluding those primarily produced or marketed for the exempt activity."[62]

Apparently this provision includes materials marketed primarily for use in distance teaching, i.e., the exempt activity. These materials are instructional by their intent, design, and sale. While this may seem to be an odd result, (that materials designed for use in the distance classroom are specifically excluded from what might be characterized as an educational rights provision), Congress was concerned that the expanded ability to incorporate copyrighted material into the distance

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59. Sen. Rpt. 107-31, at 4 (June 5, 2001).

60. *Id.* at 7.

61. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301.

62. Sen. Rpt. 107-31, at 10 (June 5, 2001).

environment vis-à-vis a revised § 110(2) not be used to supplant existing market or industry for instructional materials. This limitation is "intended to prevent the exemption [granted by TEACH] from undermining the primary market for (and, therefore, impairing the incentive to create, modify, or distribute) those materials whose primary market would otherwise fall within the scope of the exemption."[63] Take the example of textbooks as does the TEACH Committee Report: "[B]ecause textbooks typically are not primarily produced or marketed for performance or display in a manner analogous to performances or display in the live classroom setting, they would not per se be excluded from the exemption under the exclusion in the opening clause."[64] A teacher could, in a distance education environment, display several pages of graphs or charts from a textbook as the textbook is not "produced primarily for performance or display as part of mediated instructional activities."[65] So, displays of textbooks, or at least limited portions of a textbook, are allowed.

Second, the revised § 110(2) right would only apply to "accredited" nonprofit educational institutions and not all nonprofit educational institutions that might offer remote instruction.[66] This is the first of several significant changes from the pre-TEACH § 110(2) requirements. Why the change? The Senate Committee Report reiterates the Register's Report that "'nonprofit educational institutions' are no longer a closed and familiar group, and the ease with which anyone can transmit educational material over the Internet" requires placing some limitation on the type of entity that can avail itself of the TEACH § 110(2) rights.[67] This would preclude a small upstart non-profit school (for purposes of the tax laws, a 501(c)(3) entity for example) from qualifying, as it might not

63. *Id.* at 8.

64. *Id.* at 10.

65. *Id.* ("Thus, an instructor would not be precluded from using a chart or table or other short excerpt from a textbook different from the one assigned for the course, or from emphasizing such an excerpt from the assigned textbooks that had been purchased by the students.").

66. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 110(2) and new definition of accreditation.

67. *Id.* at 9. This comment is underscored by a general prefatory observation by the Committee that "the ability of digital transmission technologies to disseminate rapidly and without control virtually infinite numbers of high quality copies, creates new risks for owners of copyrighted works used in distance education." Id., at 5.

yet be accredited or might never be subject to accreditation. The Senate Committee Report indicates that accreditation is not defined in terms of programs, but in terms of institutions. TEACH § 110(2) defines accreditation in two ways, depending on whether the institution is elementary or secondary, or whether it is post-secondary. For post-secondary institutions, accreditation shall be determined by "a regional or national accrediting agency recognized by the Council on Higher Education Accreditation or the United States Department of Education," and for purposes of K-12 institutions, it "shall be as recognized by the applicable state certification or licensing procedures."[68]

Third, the new § 110(2) uses the term "mediated instructional activities" to indicate that any use of material must be "mediated." In other words, the material must be a part of the normal teaching that would occur if the classes were offered traditionally, and this requires that the material used must be part of the class experience. This is the overall theme of the reconstructed § 110(2) performance and display right, as it was crafted to assuage fears of copyright owners. The concept of mediated instructional activities encompasses three concepts that might be coined: how ("'integral part' of a class session"), who ("controlled by, under the direction of, or under the actual supervision of the instructor"), and why ("analogous to the type of performance or display that would take place in a live classroom setting").

The qualifying performance or display of material "must be part of the class itself, rather than ancillary to it."[69] Further, and again with idea of preventing distance education teachers from placing excessive amounts of material on a course web site because technology easily facilitates this conduct, the use of the material must be "controlled by or under the actual supervision of the instructor."[70] But this "is not intended to require either constant, real-time supervision by the instructor or pre-approval by the instructor for the performance or display . . . and the concept of control and supervision is not intended to limit the qualification of such asynchronous

68. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301 (new provision explaining the meaning of "accreditation").

69. Sen. Rpt. 107-31, at 9 (June 5, 2001).

70. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301.

activities for this exemption."[71] Again, the overriding concern is that use of materials in the distance education classroom be no more extensive than that which would otherwise occur in the traditional classroom.

In order to effect this scheme,

> [t]his latter concept [mediated instructional activities] is intended to require the performance or display to be analogous to the type of performance or display that would take place in a live classroom setting. Thus, although it is possible to display an entire textbook or extensive course-pack material through an e-book reader or similar device or computer application, this type of use of such materials as supplemental reading would not be analogous to the type of display that would take place in the classroom, and therefore would not be authorized under the exemption.[72]

In enacting TEACH Congress did not want the expanded rights of educators in distance settings to be a carte blanche for the inclusion of vast amounts of digital content into online instructional settings.[73] If an instructor would not use the material in a live classroom, he or she should not add it to the online curriculum just because distance or other technology renders it is easy to do, i.e., to scan, load, and post. The concept of mediated instructional activities helps translate the notion of the traditional concept of classroom to the digital online age, and at the same time, it acts as a major limitation: making sure that performance or display of copyrighted material in online settings parallels or mirrors that of a live classrooms environment.

The new statutory definition of mediated instructional activities included in TEACH "does not refer to activities that use, in one or more class sessions of a single course, such works as textbooks, course packs, or other material in any media, copies, or phonorecords which are typically purchased or

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71. Sen. Rpt. 107-31, at 9 (June 5, 2001).

72. *Id.* at 9-10.

73. Technology, Education, and Copyright Harmonization Act of 2002, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301 (new section 112(f)(2) ("This subsection does not authorize the conversion of print or other analog versions of works into digital formats, except that such conversion is permitted hereunder, only with respect to the amount of such works authorized to be performed or displayed under section 110(2), if. . ."). Sen. Rpt. 107-31, at 14 (June 5, 2001) (" It should be emphasized that subsection 112(f)(2) does not provide any authorization to convert print or other analog versions of works into digital format except as permitted in section 112(f)(2)").

acquired by the students in higher education for their independent use and retention or are typically purchased or acquired for elementary and secondary students for their possession and independent use."[74] The Senate Committee Report echoes this concept and indicates that the definition does not include "electronic course packs, e-reserves, and digital library resources," as these sorts of materials are not part of the analogous performance and display of materials that typically occur in live instructional settings.[75] Again, the goal is to have the use of copyrighted material in distance environments mirror that which occurs in traditional classrooms. So display of textbooks and similar material, even if purchased in digital form, could not be used. It is assumed that such display would be allowed if the institution or each class member paid for each student's access to the digital textbook.

The Senate Report recognized that digital distance technologies could displace the need for textbooks, course packs, etc., if such material could be loaded onto the distance education course web site. However, in K-12 settings, textbooks and the like are often not purchased by each student, as is typical in higher education; rather, the school district obtains the texts then distributes the items for use to each student at the beginning of the school year. It is more proper to speak of K-12 students as "acquiring" textbooks instead of "purchasing" textbooks. The Senate Report was aware of this, and its observation of that fact suggests that the revised § 110(2) should not be used to require K-12 distance students to begin purchasing textbooks if that was not the normal practice.[76] Again, the point is to ask what the normal practice is with "live" students, and then mirror that in online settings. As a result, a textbook is not per se excluded from the § 110(2) TEACH performance and display right.[77], Portions of a textbook could be used, but only if it is either a supplemental textbook or

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74. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301 (new provision explaining the meaning of "mediated instructional activities").

75. Sen. Rpt. 107-31, at 10 (June 5, 2001).

76. *Id.*

77. *Id.* ("Conversely, because textbooks typically are not primarily produced or marketed for performance or display in a manner analogous to performances or display in the live classroom setting, *they would not per se be excluded form the exemption under the exclusion in the opening clause.*").

is a small portion of the main textbook,[78] otherwise it would be would be excluded as its use would supplant the need for purchase or acquisition of it by students. This might occur if the textbook were loaded onto the distance education course site, and made available for use without purchase or customary rental fees paid to the copyright owner. Thus, the plain language of the opening proviso of TEACH § 110(2) operates to limit the use of an e-textbook or an e-workbook, as these are by practical adoption in the distance classroom "transmitted via digital networks" and their "primary market is the digital network environment, not instructional materials developed and marketed for use in the physical classroom."[79]

The internal structure of inclusion and exclusion within the allowable § 110(2) performances and displays is strange, as the opening "except" clause of § 110(2) and the definition of "mediated instructional activities" also identify material excluded from its scope. Moreover, the term "mediated instructional activities" is also used twice, once in the opening "except" clause of § 110(2) and again as part of the specific requirements of § 110(2). Section 110(2)(A) also uses the same definition of "mediated instructional activities" that appears to contradict or at least confuse the interpretation given to § 110(2) as a whole (attempting to limit online uses to those that occur in a live class).

The opening clause of a revised § 110(2) applies to performances or displays "except with respect to a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks." A later paragraph defining mediated instructional activities (MIA) refers to the performance or display of a work that is an integral part of the class experience, controlled or under the supervision of the instructor, and analogous to the type of performance or display that would take place in a live classroom setting. However, according to the definition of MIA, as discussed earlier, this does not include materials such as textbooks, course packs, etc. So what does the opening proviso of § 110(2) *also* exclude from the expanded rights granted by

78. *Id.* ("Thus, an instructor would not be precluded from using a chart or table or other short excerpt from a textbook different form the one assigned for the course, or from emphasizing such an excerpt form the assigned textbook that had been purchased by the students.").

79. *Id.* at 8.

TEACH that the definition of MIA does not?

The legislative history suggests that TEACH ensures that § 110(2) is not used to replace the textbook thus it excludes such works from the definition of "mediated instructional activities" (MIA). But TEACH also excludes works "produced or marketed primarily for performance or display as part of mediated instructional activities" from the performance and display right § 110(2) grants to educators. The opening proviso exclusion reads: "except with respect to a work produced or marketed primarily for performance or display. . ."

One possible answer is that there are three categories of works that are in theory acceptable for use in § 110(1) face-to-face teaching two of which are excluded from the § 110(2) uses by its opening proviso and subsequent operational provisions. These three categories include the following items: 1) Non-MIA works like a textbook or course pack, excluded by the subsequent TEACH statutory definition of MIA— educators cannot use these works under § 110(2) because it would supplant the need for purchase of such items by students; 2) MIA works or other curricular materials that meet the definition of MIA (integral part of class experience, under the control of the instructor, and analogous) and can be used in exercise of a § 110(2) activity, (an atlas for example)[80] and 3)

80. The Senate Report suggests, "...because textbooks typically are not primarily produced or marketed for performance or display in a manner analogous to performances or display in the live classroom setting, they would not per se be excluded from the exemption under the exclusion in the opening clause. Thus, an instructor would not be precluded from using a chart or table or other short excerpt from a textbook different from the one assigned for the course, or from emphasizing such an excerpt from the assigned textbook that had been purchased by the students." Sen. Rpt. 107-31, at 10 (June 5, 2001). What is unfortunate about this example is the failure to assess the result if the instructor desired to use an entire text book other than the one assigned; it can only be assumed that this would be excluded under the plain definition of MIA, but by the same token the use of a "chart or table or other short excerpt from a textbook different from the one assigned" one would expect to be a fair use, e.g., the reproduction of such is allowed under the Classroom Guidelines, thus the comment adds or accomplishes little beyond what is already known of the copyright law and its application to education. It would have been more helpful to indicate what is allowed under the concept of MIA vis-à-vis its definition but excluded by the "primarily" "produced or marketed" MIA phrasing in the opening "except"-ing clause. A more unsettling scenario results when educators attempt to use the new TEACH section 112(f) ephemeral recording right, discussed below, to digitize analog material for use in a digital distance setting. The new digitalization right under section 112(f) is tied to uses that are allowed under the reformulated TEACH section 110(2) right. If TEACH section 110(2) does not allow its use, then TEACH section 112(f) does not allow its ephemeral recording. So even if the use of the material would be a fair use under the copyright law, no digitalization rights exists for it under TEACH section 112(f). One could of course

MIA works "produced or marketed primarily for. . ." the distance classroom.

The last category might be a special multimedia product designed for use in conjunction with distance education, as an adjunct to a textbook, like the workbook of old, or this might be some sort of digital tutorial or self-study aid designed for students. The tutorial or self-study aid is not in a "textbook, course packs or other material in any media" purchased or acquired by students and so it is not excluded by the definition of MIA. However, since in this case the item is produced or marketed primarily for the distance education environment, the work is excluded by the opening proviso of TEACH § 110(2). The fact that a digital product might be adaptable to the distance education environment would not trigger the "except" proviso of the opening clause, even if it were produced or marketed with that adaptability. According to the plain language of TEACH, the item must be "produced or marketed *primarily*" for that purpose.[81]

Where does that leave distance educators who have items "produced or marketed primarily for performance or display as part of mediated instructional activities," or, distance educational instructional tools? These could not be subject to the § 110(2) right by statute. In all likelihood, the use of these products would be available to distance educators and their students by license or under the terms of sale. If their purpose is such that the works are "produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks," can it automatically be assumed that their use in the distance classroom would be intended by their availability in the educational marketplace as material "produce[d] and market[ed] [ ] primarily for performance or display" for distance teaching and as "mediated instructional activities transmitted via digital networks" in the first place?

Perhaps TEACH prevents the use of such items in distance education classrooms as a statutorily automatic right, i.e., through an expanded educator's right in § 110(2). Rather, it

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argue that fair use not allows not only its performance or display, but also its reproduction (digitalization), but then again, in those circumstances what does TEACH add to the law that is not already known.

81. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301.

forces educators to obtain the right to use materials in the marketplace through purchase or license. For example, such "distance education-targeted" MIA uses might be allowed specifically by their purchase; otherwise, they would not be so marketed. This, however, is a big "might." And if a license to use the material in digital transmissions does not accompany such acquisition, the material could not be used in distance education. This is so because, while such items would not run afoul of the definition of MIA, the opening exclusion proviso of § 110(2) would exclude their use. While these materials would be excluded from the § 110(2) right, such materials might conceivably remain available to teachers in live settings under the existing § 110(1) where no such "produced or marketed primarily for" exclusion proviso exists.

The purposeful use of a dual conceptualization of MIA within the statutory structure is confirmed by Senate Committee Report[82] first as the initial ad seriatim "requirements" proviso of § 110(2), i.e., §§ 110(2)(A)-(D); and second, as discussed in preceding detail, in the opening section 110(2) excepting clause—each relating to a different function of the term MIA. According to the Senate Committee Report; "the former [§ 110(2)(A)] relates to the nature of the exempt *activity* [teaching, and in the course of teaching using no more in distance environs than in live classrooms]; the latter [opening "except" proviso] limits the *relevant materials* by excluding those primarily produced or marketed for the exempt activity."[83]

Fourth, the opening paragraph of TEACH § 110(2) includes a provision that the work performed or displayed be a "lawfully made" copy. There are two statutory elements in the lawfully made copy test or requirement, one objective and the other subjective. The objective element asks whether the item used is a legitimate copy, as the § 110(2) performance or display right does not apply when the "performance or display that is given by means of a copy or phonorecord [ ] is not lawfully made and acquired under this title." An institution that uses a copy in violation of the anti-circumvention rules of 17 U.S.C.

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82. Sen. Rpt. 107-31, at 7-9 (June 5, 2001) (discussing the opening "except" clause regarding mediated instructional activities); *Id.* at 9-10 (discussing the operation of the mediated instructional activities concept as part of the reformulated TEACH section 110(2)(A)).

83. Sen. Rpt. 107-31, at 10 (June 5, 2001) (emphasis added).

1201(a), even if that use would be a fair use under § 107, would still be precluded from using it under TEACH § 110(2) as it would not be "lawfully made and acquired under this title" because it violates § 1201(a)(1) of title 17, United States Code.[84] The second subjective element looks to the institutional state of mind, a sort of "distance education mens rea." This element precludes performances and displays of works where "the transmitting government body or accredited nonprofit educational institution knew or had reason to believe [it] was not lawfully made and acquired." A similar "knew or had reason to believe" standard exists in § 110(1)[85] and also in 17 U.S.C. § 504.[86] The latter concerns the remission of statutory damages for infringement by nonprofit educational institutions when there is a reasonable belief that the use was a fair use under § 107.[87] The purpose of the requirement "is to reduce the likelihood that an exemption intended to cover only the equivalent of traditional concepts of performance and display would result in the proliferation or exploitation of unauthorized copies."[88]

One difference between the current § 110(1) (and the § 504

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84. One example would be using a work that was circumvented by the school library or curriculum committee, and allowed under 17 U.S.C. § 1201(d) (2002) for purposes of determining whether to purchase the item for the school library, the work once accessed cannot be used for any other purpose, such as making it available to students until the purchased copy arrives; even if the use would otherwise by allowed under the copyright law, under fair use or section 1201, section 1201 forbids it. *See* Dralter, *supra* n. 3, at § 2.04, at 2-14—2-2 8.15

85. 17 U.S.C. § 110(1) (2002) ("is given by a means of a copy that was not lawfully made under this title, and that the person responsible for the performance *knew or had reason to believe* was not lawfully made.") (emphasis added).

86. 17 U.S.C. § 504 ("The court shall 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 who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords . . .") (emphasis added).

87. 17 U.S.C. § 504(c)(2).

88. Sen. Rpt.107-31, at 8 (June 5, 2001) (footnote to Register's Report omitted). The Register's Report observes that the requirement would prevent educators from interference with the revenue stream owed copyright owners: "The educator would typically purchase the copy to be used, providing some revenue to the copyright owner. In addition, works that had not yet been placed on the market, such as first-run movies, would as a practical matter be rendered ineligible, mitigating further any possible impact on sales to the public." *The Copyright Office Report on Copyright and Digital Distance Education,* Sen. Hrg., 106-539 U.S. Copy. Off. 160 (Comm. on the Jud. May 25, 1999).

standard) and the TEACH § 110(2) standard is whose "mens rea" is targeted. Section 110(1) places the inquiry at the "person responsible for the performance," i.e., the educator or student or guest lecturer, whereas TEACH § 110(2), on the other hand, targets the institution. This shift might work to increase the compliance responsibilities of the organization, a shift which would be otherwise consistent with TEACH and would limit the availability of the TEACH § 110(2) right. Under the institutional "mens rea" formulation of TEACH, if anyone employed by or acting on behalf of the institution knew or suspected the copy was not legitimate the "lawfully made" proviso would be triggered and the item cannot be used. Considering the copyright compliance issues that some educational entities have encountered over the years, it might be common to have "reason to believe" that a particular school within the district or a certain university educator is using copies of material in excess of the copyright law and thus, also in excess of the § 110(2) right.

A second difference in the "lawfully made" requirement of both TEACH and § 110(1) is that § 110(1) applies only "in the case of a motion picture or audiovisual work, the performance, or the display of individual images [from the audiovisual work]," whereas TEACH § 110(2) applies to all works covered by the expanded TEACH § 110(2) right (i.e., all categories of copyrighted works).[89] The broader range of applicable works (objective standard) coupled with the institutional emphasis (subjective standard) imposes a higher degree of compliance from the organization. Under § 110(1), it could be argued that a rogue educator, an educator with an overly simplistic approach to the application of fair use, or a widely utilitarian or rationalizing mindset, would not trip the "unlawfully made" proviso, assuming arguendo that the educator's belief was reasonable. Of course, the greater extent to which each educator in the school understands the copyright law, the smaller the realm of "knew or have reason to believe" instances becomes. For example, many educators actually believe that all educational uses of material in the classroom are fair under the law. Many are so ignorant of the copyright law that they reasonably conclude that all unlawful use is legal. Thus, these educators arguably meet the requirement of § 110(1).

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89. *Id.* ("Unlike the provision in section 110(1), the exclusion here applies to the performance or display of any work.").

On the other hand, the TEACH § 110(2) "lawfully made" proviso would clearly impute such behavior up the institutional chain of command. No longer will a "what you don't know won't hurt you attitude" offer refuge because someone along the way might have a better idea of what is or is not a compliant use. This process imposes a higher standard on educators and schools. It at least operates to make it more likely that under TEACH § 110(2), only those performances and displays that incorporate lawfully made copies occur.

The standard, whether at the educator level (§ 110(1)) or at the institutional level (TEACH § 110(2)) remains one of reasonableness, not one of ignorance. Yet, unlike 17 U.S.C. § 504 where the reasonableness issue is directed towards asking whether the use is fair, § 110(1) and TEACH direct the reasonableness to the somewhat opposite issue of whether there was any reason to suspect that the copy used came from less than legitimate sources.[90] In other words, TEACH asks educators, administrators, and staff whether any red flag exists that suggests the copy might be an unlawfully made copy, as opposed to whether it is reasonable to assume that the use was lawful. This standard appears more generous to educators. Educators do not have to prove in their minds that the use is legitimate. They are precluded from using the copy only if the copy is suspect. However, it would appear reasonable (especially in light of the press coverage regarding recent copyright developments such as Napster,[91] the anti-trafficking and anti-circumvention rules,[92] and the evolving standards of

90. 17 U.S.C. § 110(1) (2002) ("is given by a means of a copy that was not lawfully made under this title, and that the person responsible for the performance *knew or had reason to believe* was not lawfully made.") (emphasis added). TEACH 110(2), Technology, Education, and Copyright Harmonization Act of 2002, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301 ("except . . . a performance or display that is given by means of a copy or phonorecord that is not lawfully made and acquired under this title, and the transmitting government body or *accredited nonprofit education institution knew or had reason to believe* was not lawfully made and acquired.") (emphasis added).

91. *See e.g. Metallica v. Napster Inc.*, No. 00-0391 (C.D. Cal. filed April 13, 2000).

92. *See* 17 U.S.C. § 1201, and *Universal City Studios v. Corely*, 273 F.3d 429, 435 (2d Cir. 2001), the famous DeCSS DVD code-crack case begun when a Norwegian teenager, Jon Johansen, reverse-engineered and posted on the Internet the patch that allowed portability of DVDs; and *U.S. v. Elcom Ltd.*, 203 F.Supp. 2d 1111 (N.D. Cal. 2002), a similar code-crack case involving Adobe e-book readers, first "cracked' by a Russian software programmer Dmitry Sklyarov who was subsequently arrested upon entering the United States to deliver a speech on encryption methods at a hacker conference. These and other cases involving section 1201 are discussed in John E. Ottaviani, *DMCA Faces Free Speech Challenges*, The Natl. L. J., CL (Oct. 22, 2001)

institutional liability)[93] that a court or jury deciding the issue would conclude that an educator or his or her institution might legitimately have reason to believe that, under certain circumstances, a copy might be derived from an unlawful source.

Fifth, if TEACH is enacted by Congress, an important limitation will still remain in the new formulation of the § 110(2) right. The limitation will be the uneven treatment of various copyrighted works that might be performed or displayed in the distance classroom. The TEACH § 110(2) performance must be limited to a "nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session." Proposed § 110(2) expands the reach of the educator's right to include the performance of other works such as a video, a category of audiovisual work, but still limits performance of that work to a reasonable and limited portion of works. While an educator could show an entire video under § 110(1), assuming the other requirements of § 110(1) are satisfied, he or she would be limited to a "reasonable and limited portion" of the work in an online educational setting. To determine what is a reasonable and limited portion one should consider "both the nature of the market for that type of work and the pedagogical purposes of the performance."[94] Does an instructor need to show an entire theatrical movie, such as "A Beautiful Mind," in a History of Economics class, especially when the film is still popular and the DVD version is yet to be released? The extent to which a film relates to a course for pedagogical reasons arguably lessens the extent to which the film is "directly related and of material assistance to the teaching content of the transmission.[95] This goes to the pedagogical purposes consideration. The showing of the entire film to the class would impact the market for rentals or purchase of the video or DVD edition by at least some of the students in the class. This goes to the nature of the market consideration.

In summary, under the proposed formulation of TEACH §

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93. *See e.g.*, 17 U.S.C. § 512(e) (discussing the standards for liability reduction for copyright infringement by the faculty and staff of institutions of higher education).

94. Sen. Rpt. 107-31, at 7-8. (June 5, 2001).

95. Technology, Education, and Copyright Harmonization Act of 2002, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, TEACH section 110(2)(B).

110(2) there are three sorts of uses in the classroom with different standards for each. First, performances of nondramatic and musical works, like the existing § 110(2) right, can be used in distance settings without limit, assuming the other requirements of TEACH § 110(2) are met. You can read a text or sing a song without limit. Second, displays of works are limited "an amount comparable to that which is typically displayed in the course of a live classroom session." You may scan and load an entire map or chart onto a course website if that is what you would do for your live class. Third, performances of works other than nondramatic or musical are limited to a "reasonable and limited portion" of the work. The Senate Committee Report discusses the first two groups of works and the portion limitation associated with each, but offers no elaboration on the third and limiting group, which includes the significant category of audiovisual materials. For example, only a "reasonable and limited portion" of a video can be loaded onto a course web-site. The text of TEACH § 110(2) and the Senate Committee Report save for the nature of the market and pedagogical purpose "test" are silent with regards to determining what that portion should be. Thus, either the courts or interested stakeholders (through the adoption of interpretive guidelines similar to those created under § 107), will determine what percentage of video in this case would constitute an acceptable safe harbor.

Sixth, the requirements of TEACH §§ 110(2)(A) (the direction/supervision, integral part and MIA requirements) and 110(2)(B) (the "directly related and of material assistance") were discussed earlier. The next substantive § 110(2)(C), continues a recent Congressional trend and places an increased compliance and monitoring burden upon institutions in return for continued statutorily secured access to copyrighted material in the classroom.[96] The compliance and monitoring requirements are extensive and complex.

First, the transmission must be "solely for" "students officially enrolled in the course for which the transmission is made" while the "reception" of the qualifying transmission need only be "to the extent technologically feasible," to "students

96. Tomas A. Lipinski, *An Argument for the Application of Copyright Law to Distance Education*, 13 Am. J. Distance Educ. 7 (1999). *See also. The Copyright Office Report on Copyright and Digital Distance Education*, Sen. Hrg., 106-53 U.S. Copy. Off. 150-52 (Comm. on the Jud. May 25, 1999).

officially enrolled in the course for which the transmission is made."[97] Compare this formulation to the existing § 110(2), which only requires the transmission be "primarily for" students and that the reception be to "classrooms or similar places." As discussed earlier, this means that under current law as long as the performance or display is intended "primarily" for "reception in classrooms or similar places," the distance instruction is allowed. However, the transmission must be tied to receipt by students in a bona fide physical classroom. In fact, the 1976 House Report points out that "the instructional transmission need only be made 'primarily' rather than 'solely' to the specified recipients."[98]

Under the proposed TEACH, however, the transmission must now be solely for the specified recipients. TEACH cures a major ill of § 110(2), by specifying where the transmission can be received. But, the bill may have created another problem by the adoption of the words "solely" and "primarily," which are logically more exclusive. Under TEACH, and in contrast to the current § 110(2) "primarily" formulation, any transmission that is capable of reception by the public at large would be excluded. Though the transmission might still be "primarily" for reception of distance students, the transmission would no longer be solely for distance students or students officially enrolled in the course for which transmission is made.[99]

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97. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 110(2)(C)(i).

98. H.R. Rpt. 94-1476, at 83 (Sept. 3, 1976) (reprinted in *U.S. Cong.& Admin. News* 5659, 5697 (1995)).

99. For example, a web course loaded available through an institution's open web site, accessible to anyone would not appear to qualify: "In its place [referring to pre-TEACH section 110(2)(C)(i) "primarily for reception in classrooms or similar places normally devoted to instruction" proviso], the Act substitutes the requirement in subparagraph (2)(C) that the transmission be made solely for, and to the extent technologically feasible, the reception is limited to students officially enrolled in the course for which the transmission is made . . ." The plain language of the statute direct the transmission be "solely for" "students officially enrolled" and not everyone else on the Internet who might also be interested. The use of closed-web site technology, i.e., password protection, is readily available ("technologically feasible") and would also need to be employed with respect to its reception. This is underscored by the 1976 legislative history that drew a precise distinction between "primarily" (1976 version of section 110(2)) and "solely" (the reformulated TEACH version of section 110(2)): H.R. Rpt. 94-1476, at 83 (Sept. 3, 1976) (reprinted in *U.S. Cong.& Admin. News* 5659, 5697 (1995))("[T]he instructional transmission need only be made 'primarily' rather than 'solely' to the specified recipients."). This conscious choice of Congress must be acknowledged in its interpretation. One result of this is to make, generic education sites, say one created for the purpose of teaching the web browsing public who might stumble upon the site about copyright law unavailable for the TEACH section 110(2) right.

However, if the transmission is made solely for distance students, but results in others being able to access it (its reception) because the password was somehow hacked the use of the material (performance or display) would not be precluded by TEACH § 110(2)(C). Performances and displays of works made through educational broadcasts on a local access cable network are now foreclosed by TEACH § 110(2)(C)(i). In contrast, the place of reception is now expanded to focus on the designation of a recipient as a student ("officially enrolled" under TEACH § 110(2)(C)(i)), not his or her location ("reception in classrooms or similar places normally devoted to instruction" under current § 110(2)(C)(i)). The Senate Committee Report offers limited breathing room, suggesting that the standard is not absolute in its application:

> This requirement is not intended to impose a general requirement of network security. Rather, it is intended to require only that the students or employees authorized to be recipients of the transmission should be identified, and the transmission should be technologically limited to such identified authorized recipients through systems such as password access or other similar measures.[100]

As a result, password protection is just one of the institutional requirements imposed by TEACH.[101]

Seventh, the institution must now take an active role in promoting copyright compliance. Under TEACH § 110(2)(D)(i), the transmitting body or institution must institute copyright policies; provide informational materials to faculty, staff, and students about copyright law in the hopes of promoting compliance; and provide notice to students that course material may be subject to copyright protection.[102] Institutions can no longer turn a blind eye to the extensive uploading, downloading, and printing of course materials by educators and

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While the concept of physical classroom might no longer exist under TEACH, the performance or display must still be used for an actual course of instruction, and not a general educational purpose.

100. Sen. Rpt. 107-31,at 11.

101. Id. ("This requirement is not intended to impose a general requirement of network security. Rather it is intended to require only that the students or employees authorized to be recipients of the transmission should be identified, and the transmission should be technologically limited to such identified authorized recipients through systems such as password access or other similar measures.").

102. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new *section* 110(2)(D)(i).

students in the course of a distance class or library e-reserve scenario. Uploading, downloading, and printing that administrators know occurs and which, at least in some instances, is beyond the limits of the copyright law, must be met with an institutional response from administrators. These practices have become common but, now for the first time, the law will require an institutional response such as the adoption and arguably the enforcement of policies, promotions, and notices. While it could be said that a mere notice requirement, similar to the one that currently exists for reproducing equipment in libraries under § 108,[103] does not necessarily require enforcement by the library-institution, TEACH will require more. TEACH also commands that "policies regarding copyright" be adopted; and if copyright compliance becomes part of the formal institutional governance structure vis-à-vis policy formulation then the normal governance structure of most institutions would also require compliance with and enforcement of those polices by and as applied to its constituents. Moreover, the TEACH § 110(2)(D)(i) requirements are not limited to policies and information outreach about copyright issues concerning distance education, as there is no such limiting language in the bill. Rather the policies, promotions, and notice commands appear to refer to copyright issues in general, such as those that might occur in general educational settings, not just those specific to distance education. However, because TEACH § 110(2)(D)(i) use the phrase "the course" when discussing the "notice to students that materials used in connection with" proviso, it could be argued that the course material notice requirement only apply to § 110(2) courses, i.e., distance education courses, whether analog or digital.[104]The purpose of these requirements is to "promote an environment of compliance with the law, inform recipients of their responsibilities under copyright law, and decrease the likelihood of unintentional and uninformed acts of infringement."[105] This is a significant advance in the struggle to bring schools and other educational entities into copyright

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103. 37 C.F.R. § 201.14 (warnings of copyright for use by certain libraries and archives).

104. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 110(2)(D)(i), ("provides notice to students that materials used in connection with *the course* may be subject to copyright protection" (emphasis added)).

105. Sen. Rpt. 107-31,at 11.

compliance. Institutions will have to plan, adopt, and implement a copyright compliance program that includes copyright policies and organizational development programs that seek to inform students and staff of copyright law requirements and responsibilities. These are issues not necessarily associated with distance education alone, but a wide array of copyright issues. Institutions will have to have warning notices that course materials may be subject to copyright law. The notices could be perhaps modeled after those already in use for photocopiers.[106] Placement could be in student handbooks, as a preface to course syllabi, or as part of a distance education course web site log-on screen or home page. While the TEACH revision to § 110(2) does not require the institution to provide training and in-service sessions, it does require extensive documentation of policies and informational material to be developed for teachers, students, and staff.[107] There is no requirement that the institution make any assessment of whether faculty, students, and staff have a basic level of understanding of the material so developed and distributed in order to see whether its compliance efforts are effective. However, it would appear that such training and assessment components should be part of any effective copyright compliance program. One would assume, or perhaps hope, that known breaches of any copyright policy so adopted would be dealt with by the institution as would similar violations of its policies regarding other issues. In addition to § 110(2)(D)(i), TEACH § 110(2)(D)(ii) expands the monitoring and compliance activities of educational institutions when the transmission is digital—applying to web-based distance education transmissions—to require the use of technological measures that "reasonably prevent" both the "retention of the work in accessible form . . . for longer than the class session" and the "unauthorized further dissemination of the work in accessible form to others."[108] In other words, a school could use

106. *See* 17 U.S.C. § 108(f)(1) & 37 C.F.R at § 201.14 (warnings of copyright for use by certain libraries and archives).

107. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 110(2)(D)(i) ("institutes polices regarding copyright, provides informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright. . .").

108. The retention provision is new TEACH 110(2)(D)(ii)(I)(aa), and the dissemination provision is found in 110(2)(D)(ii)(I)(bb).

the display privilege in TEACH § 110(2) to mount related background material or record class sessions for later review that include the display of copyrighted material. But schools could not allow students the capacity to retain the work on their own computer or allow students to download the material and later upload and transmit it to others in accessible form.[109] The technological measures need not be one hundred percent effective, but must operate to "reasonably prevent" both the prohibited retention and further dissemination of the work.[110] Hopefully, scenarios where a student circumvents or cracks a password control system, or the protection technology fails due to technical problems with the institution's server, the institution still meets the "reasonably prevent[s]" requirement of § 110(2)(D)(ii)(I). However, the institution must then respond with tools within its means to rectify the situation. The discussion in the House Report (noticeably absent from the Senate Report) suggests that periodic review or reevaluation is necessary: "Further, it is possible that, as times passes, a technological protection measure may cease to reasonably prevent retention of the work in accessible form for longer than the class session and further dissemination of the work either due to the evolution of technology or to the widespread availability of a hack that can be readily used by the public."[111] The House Report indicates this is an "objectively reasonable standard regarding the ability of a technology protection measure to achieve its purpose."[112] It does not have to work perfectly and prevent each and every retention and dissemination, but the technology protection measure must do something and by the language of the statute must do it "reasonably" well.[113] The House Report offers this observation: "Examples of technological protection measures that exist today and would reasonably prevent retention and further dissemination, include measures used in connection with

109. *See Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 110(2)(D)(ii)(I)(aa) and (bb) (requiring institution to use "technological measures that reasonably prevent" the retention and further dissemination of the work in accessible form, respectively).

110. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 110(2)(D)(ii)(I).

111. H. Rpt. No. 107-687, 107th Cong., 2nd Sess. (2002).

112. H. Rpt. No. 107-687, 107th Cong., 2nd Sess. (2002).

113. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 110(2)(D)(ii)(I).

streaming to prevent the copying of streamed material, such as the Real Player 'Secret Handshake/Copy Switch' technology discussed in *Real Networks v. Streambox*, 2000 WL 127311 [*Real Networks, Inc. v. Streambox, Inc.*, 2000 U.S. Dist. LEXIS 1889 (W.D. Wash. 2000) (preliminary injunction)], or digital rights management systems that limit access to or use encrypted material downloaded onto a computer."[114]

In addition, under TEACH 110(2)(D)(ii)(II), the institution may not engage in any conduct that "could reasonably be expected to interfere" with any technological measure a copyright owner places on his/her works to prevent either retention or unauthorized further dissemination.[115] This might mean that an institution could not obtain material for use in a distance class that was limited by a technological block, such as one that limits the number of aggregate access and downloads of the material per semester, then create and post a patch of code or software script that would allow students to exceed that number of downloads. As another example, consider a situation where the authorized downloading is subject to temporal limits by the terms of a license agreement governing use of the material, and the system facilitates subsequent downloading by students after the course ends by continuing to make the legitimate digital key available on the institution's web site.[116] This would appear to be "conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination."[117]

The TEACH § 110(2)(D)(ii)(II) "technological measures" prohibition is effective regardless of whether the posting would be lawful under the anti-circumvention or anti-trafficking rules of section 1201.[118] Allowing retention of the work in accessible

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114. H. Rpt. No. 107-687, 107th Cong., 2nd Sess. (2002).

115. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 110(2)(D)(ii)(II) ("does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination").

116. Sen. Rpt. 107-31, at 12 ("On the other hand, an encrypted file would still be considered to be in 'accessible form' if the body or institution provides the recipient with a key for use beyond the class session").

117. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 110(2)(D)(ii)(II).

118. 17 U.S.C. § 1201. A thorough discussion of the section 1201 anti-circumvention rules in found in Dralter, *supra* n. 3. "[L]ike the other provisions under

form might be akin to a circumvention of an access device under § 1201(a)(1) and allowing further dissemination of the work in accessible form might akin to a trafficking of an access or use device under §§ 1201(a)(1) and (b), respectively. Arguably, the posting of the hacked patch code script in the first example in the preceding paragraph would be a § 1201(a)(2) violation, as it is a dissemination or trafficking of a circumventing access technology by allowing the continued availability of the legitimate digital key even though the time limitation is in violation of the license agreement.[119] Because TEACH fails to define what the "conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination " are, there may be misalignment with the § 1201(a) anti-circumvention or anti-trafficking rules.[120] In other words, not all TEACH § 110(2)(D)(ii)(I) interferences are necessarily violations of the section 1201 anti-circumvention or anti-trafficking rules. The section 1201 anti-trafficking rules target dissemination of prohibited access and use technologies.[121] On the other hand, it would appear that the trafficking to students of any such section 1201 circumvention technologies would by the plain language of TEACH § 110(2)(D)(ii)(II) also be "conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination."[122] Thus, it could be concluded that all section 1201 violations, if performed by the educational institution, would also be TEACH § 110(2)(D)(ii)(II) violations.[123]

TEACH § 110(2)(D)(ii)(II) states that the institution may "not engage in conduct that could reasonably be expected to interfere with technological measures" used by copyright

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paragraph (2)(D)(ii), the requirement [the interference provision of (ii)(II)] has no legal effect other than as a condition of eligibility for the exemption. Thus it is not otherwise enforceable to preclude or prohibit conduct." H. Rpt. No. 107-687, 107th Cong., 2nd Sess. (2002).

119. See *Universal City Studios v. Corely*, 273 F.3d 429 (2d Cir. 2001).

120. 17 U.S.C. § 1201, discussion at footnotes 114 and 115.

121. *See* Dralter, supra n. 3, at § 2.04, at § 2.05, at 2-28.16 —2-48.1.

122. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 110(2)(D)(ii)(II).

123. 17 U.S.C. § 1201; *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 110(2)(D)(ii)(II); discussion *supra* at ns. 114 and 115.

owners to prevent further retention or dissemination as discussed above. "[L]ike the other provisions under paragraph (2)(D)(ii), the requirement [the interference provision of (ii)(II)] has no legal effect other than as a condition of eligibility for the exemption. Thus it is not otherwise enforceable to preclude or prohibit conduct."[124] However, such interference might indeed violate the anti-circumvention rule or precede a violation of the anti-trafficking rules of 17 U.S.C. § 1201 as well as foreclose the application of TEACH. By the same token, it also means that institutional "interfere[nce]" with a "technological [protection] measure" need not rise to a level meeting the requirements of the § 1201 rules for that interference to render inapplicable the exemption granted by TEACH 110(2).

In an even more anomalous result, section 1203, the penalty provision of the anti-circumvention and anti-trafficking rules, indicates that under 17 U.S.C. § 1203(c)(5)(A), the "court may in its discretion reduce or remit the total award of damages in any case in which the violator sustains the burden of proving, and the court finds, that the violator was not aware and had no had reason to believe that its act constituted a violation."[125] For qualifying nonprofit entities, the court must remit all damages under 17 U.S.C. § 1203(c)(5)(B):

> In the case of a nonprofit library, archives, educational institution, or public broadcasting entity, the court shall remit damages in any case in which the library, archives, educational institution, or public broadcasting entity sustains the burden of proving, and the courts fins, that the library, archive, educational institution, or public broadcasting entity was not aware and had no reason to believe that it acts constituted a violation."[126]

Glaring in its absence is a similar 'know or reason to know' proviso in TEACH. In other words, a qualifying entity could engage in a violation of the anti-circumvention rule of § 1201, "not [be] aware and ha[ve] no reason to believe that it acts constituted a violation" and as a result have no monetary liability under the § 1201(c)(5) rule but loose its exemption under TEACH as it nonetheless interfered with a technological measures used by the copyright owner to prevent such retention or further dissemination.

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124. H. Rpt. No. 107-687, 107th Cong., 2nd Sess. (2002).

125. 17 U.S.C. § 1203(c)(5)(A)

126. 17 U.S.C. § 1203(c)(5)(B).

However, it might also not violate the § 1201 rules without any need of the damage remission rules but still cause an "interference with the technological measures" that triggers the loss of the TEACH exemption (unless of course TEACH views an 110(2)(D)(ii)(II) interference and § 1201 circumvention as the same act, i.e., the legal parameters if each coincide exactly, but there is no indication of that intention in either statute or the legislative history of TEACH. In fact, the opposite conclusion—that a TEACH 110(2)(D)(ii)(II) act of interference is not the same as § 1201 circumvention or trafficking—is supported by the TEACH legislative history. For example, the legislative history as quoted earlier suggests that an act of interference under TEACH is not a separate violation, therefore it can be argued that a TEACH interference is not the same as a § 1201 circumvention, but merely a qualifying precursor to exemption under § 110(2), thus a misalignment between TEACH qualification and § 1201 anti-circumvention and trafficking occurs.[127]

While the "no longer than the class session" language would seem to impose rather harsh temporal limitation on the accessibility of distance education course content, the Senate Committee Report offers an extensive discussion of the § 110(2)(D)(ii)(I)(aa) retention-beyond-class-session proviso, which somewhat tempers this impression.[128] For example, in distance education environments, the normal class session is not necessarily tied to a specific time period, such as Mondays and Wednesdays from 10 a.m. to 11 a.m. Yet TEACH uses the rather limiting "no longer than the class session" language. How does TEACH reconcile this restriction with the twenty-four-seven construct of contemporary distance education?[129] The Senate Committee Report redefines the concept of "class session." For asynchronous distance education this would be the time period during which the student is logged onto the server. For the distance student of today and tomorrow, this could be two minutes, two hours, or even two days! While the acceptable "class session" could be longer than the actual synchronous class period, according to the Senate Committee Report, "class session" is still shorter than the duration of the

127. See *supra* n. 114 for discussion.

128. Sen. Rpt. 107-31, at 11-12.

129. *Id.* at 4 ("and at times selected by the students").

entire course.[130] As a result, the Senate Report suggests flexibility in allowing material to remain posted on the institution server throughout the duration of a course, beyond the confines of a synchronous "class session." The Senate Report redirects the compliant use of "technological measures that reasonably prevent" retention or further dissemination to other conduct such as "encrypting the work and limiting access to the keys and the period in which such file may be accessed."[131] This is a progressive concept of availability. However, according to the Senate Report, it is "expect[ed] that a common sense construction will be applied so that a copy or phonorecord displayed or performed in the course of a distance education program would not remain in the possession of the recipient in a way that could substitute for acquisition or for uses other than use in the particular class session."[132] Apparently, continued access to material for some period less than the duration of the course is acceptable because it is not a substitute for acquisition. How is "substitute for acquisition" viewed in TEACH? Is it a redefined concept as well? Apparently so, as the interpretation given to it by the Senate Report couples the acceptable retention concept to both temporal limits and placement limits.[133] This suggests that scenarios where students are permitted to download and store personal copies of class materials on their computers in accessible form beyond the duration of the course or for some other period less than the duration of the course and longer than is necessary "to complete the class session," but for which the Senate Report offers no other guidance, would be prohibited. The technological protection measure must

130. *Id.* at 12 ("The duration of a 'class session' in asynchronous distance education would generally be that period during which a student is logged on to the server of the institution or governmental body making the display or performance, but is likely to vary with the needs of the student and with the design of the particular course. It does not mean the duration of a particular course (i.e., a semester or term), but rather is intended to describe the equivalent of an actual single face-to-face mediated class session (although it may be asynchronous and one student may remain online or retain access to the performance or display for longer than another student as needed to complete the class session).").

131. *Id.*

132. *Id.*

133. *Id.* (emphasis added). Temporal limits refer to the expanded notion of the "no longer than the class session" language, a redefined notion of class session in order "to accomplish the pedagogical goals of distance education." Placement limits or "the technological protection measure in subparagraph (2)(D)(ii) refers only to retention of a copy or phonorecord *in the computer of the recipient* of a transmission."

reasonably prevent such retentions. However, both the retention and dissemination prohibition clauses of TEACH § 110(2)(D)(ii)(I) only prohibit retentions and disseminations "in accessible form." As explained below, an encrypted version of a work kept beyond these temporal and placement limits (e.g., beyond the class session and in the computer of the student would *not* be "in accessible form.)"

Failing to use technological measures that prevents a student from transferring the downloaded material "in accessible form" to another student, even within the acceptable time limits, would also be prohibited under TEACH. This is so because the dissemination proviso contains no such temporal tie-in.[134] However, a student who transfers without authorization an encrypted version, one not in accessible form, would not. Moreover, a student who prints out a hard copy of the work and either keeps it or gives it to another does not engage in a prohibited retention, even though by logic it might function as a substitute for acquisition. This is so because the TEACH § 110(2)(D)(ii) prohibition targets only those retentions and disseminations in "accessible form."[135] While the "accessible form" retention proviso could include the download and store instance where the digital version is retained (on a separate diskette), the legislative history places emphasis only upon retentions in accessible form that are stored "in the computer of the recipient."[136] While it might nonetheless appear that the student has retained or acquired a copy of the work when he or she prints it out or has disseminated it when the print out is given to another person, it is not a violation of the TEACH retention or dissemination provision. Is this logical? Perhaps not, but it is consistent with the statutory

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134. *Compare Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 110(2)(D)(ii)(I)(aa) ("retention of the work in accessible form by recipients of the transmission from the transmitting body or institution *for longer than the class* session") with new section 110(2)(D)(ii)(I)(bb) ("unauthorized further dissemination of the work in accessible form by such recipients to others").

135. *Compare Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 110(2)(D)(ii)(I)(aa) ("retention of the work *in accessible form* by recipients of the transmission from the transmitting body or institution for longer than the class session") with new section 110(2)(D)(ii)(I)(bb) ("unauthorized further dissemination of the work *in accessible form* by such recipients to others").

136. Sen. Rpt. 107-31, at 12 ("Conversely, the technological protection measure in subparagraph (2)(D)(ii) refers only to retention of a copy or phonorecord in the computer of the recipient of a transmission.").

language that couples prohibited retentions or disseminations only to those that are in "accessible form,"[137] and then ties that form for retentions to those that "reside in the computer of the recipient of a transmission."[138] Why is a copy or phonorecord of a digital work in accessible treated different, why is digital different? Because in the words of the Senate Report, The digital transmission of works to students poses greater risks to copyright owners than transmissions through analog broadcasts. Digital technologies make possible the creation of multiple copies, and their rapid and widespread dissemination around the world."[139] Because a hard copy or printed version is not in "accessible form," it does not count as a retention or dissemination.[140] Further, the only digital retention that counts is one that resides on the computer of the recipient of the transmission! The technological protection measure must be designed to fulfill these nuances. Thus, the only prohibited retention is a digital copy residing on the computer of the student-recipient, and the only prohibited dissemination to a third party is of a digital copy, either of which cannot be in accessible, readable or useable form. In theory, this allows for digital retention not on the computer of the recipient. How this limited use-after-download or retention on the computer or dissemination of digital copy to others is to be technologically accomplished is unclear. For example, placing students on an honor system to purge their computers of a work downloaded and stored after the course ends, expecting class members to uphold a promise not to transmit a digital copy of the work received during the time needed to complete the class session, or having class members promise not to upload a copy retained on a diskette or data CD-ROM after the class has ended and transfer it to another over the Internet seems unrealistic.

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137. *See Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 110(2)(D)(ii)(I)(aa) ("retention of the work *in accessible form* by recipients of the transmission from the transmitting body or institution for longer than the class session") with new section 110(2)(D)(ii)(I)(bb) ("unauthorized further dissemination of the work *in accessible form* by such recipients to others").

138. See Sen. Rpt. 107-31, at 12 ("Conversely, the technological protection measure in subparagraph (2)(D)(ii) refers only to retention of a copy or phonorecord in the computer of the recipient of a transmission.").

139. Sen. Rpt. 107-31, at 11.

140. *Id.* at 12 ("Conversely, the technological protection measure in subparagraph (2)(D)(ii) refers only to retention of a copy or phonorecord in the computer of the recipient of a transmission.").

Perhaps some sort of digital time bomb, such as an automatic degradation of the digital copy, might be encoded into the work so after the duration of the course, the work is no longer available on the student's computer. The use of a digital key that prevents dissemination to another Internet address or intranet location would accomplish the same task. Simpler encryption technology can also be employed. According to TEACH § 110(2)(D)(ii)(I), some sort of "technological measures that reasonably prevent" these retentions and disseminations would have to be adopted. Since printing out the material is not contemplated by TEACH § 110(2)(D)(ii)(I), for example, the technological control measure would not need to prevent that action to meet the requirements of TEACH.

Further, does the "retention of the work in accessible form" language refer to any digital format as opposed to non-digital formats, or does it refer to a narrower group of digital forms residing "in the computer of the recipient of a transmission" versus a digital copy located elsewhere?[141] If the latter happens, then a technological protection measure that allows a student to download the work onto his or her computer and retain a readable copy there beyond the duration of the course would not be in compliance with TEACH § 110(2)(D)(ii)(I)(aa). However, if the institution's technological measure allowed another student to download the work onto a diskette or data CD-ROM, retain the digital and readable copy indefinitely, it would still be in compliance, as long as the initial diskette or CD-ROM download was made during the duration of the class session.[142] It would appear that, while retaining a digital form accessible from a diskette would not run afoul of the Senate Committee Report language per se, but that unencrypted accessible form could never be the source of a subsequent dissemination as the TEACH § 110(2)(D)(ii)(I)(bb)

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141. *Id.*

142. The Senate Committee Report suggests that TEACH was not meant to preclude anything beyond retention: "The reference to 'accessible form' recognizes that certain technological protection measures that could be used to comply with subparagraph (d)(D)(ii) do not cause the destruction or prevent the making of a digital file; rather they work by encrypting the work and limiting access to the keys and the period in which such file may be accessed." Sen. Rpt. 107-31, at 12. In other words a student should not have access to material from the third class in last and fifteenth week but could during week three "mak[e] a digital file" and assumingly print out the material as well, or retain a digital file but could allow it to reside on his or her hard drive but would need it to be on a diskette, however, the student could not do this after the fifteen weeks of the course have concluded.

dissemination proviso only uses the "accessible form" phrasing. This suggests a lack of any temporal limitation whatsoever. In other words, all digital disseminations in accessible form must be reasonably prevented by the technological measure, and must be prohibited regardless of location, whether on the student's computer, diskette, CD-ROM, or some other technological medium.[143] How would the institution accomplish this, not needing to worry about accessible retentions of the work not in the computer of the recipient but needing to prevent all further accessible disseminations? Arguably this query places great emphasis on a reading of the legislative history's interpretation of the retention clause,[144] but it might suggest the use of both encrypting technology to protect against accessible forms beyond the temporal limitation, e.g., a time-based digital key, and additional technology that prevents a computer other than the recipient-student's from receiving and accessing the work, a "further dissemination of the work in accessible form by such recipients to others."

The concept of "retention of the work in accessible form" then appears more synonymous with the concept of digital "access" by students of course content during the term of the course.[145] It might have been simpler to place a statutory restriction within TEACH against any downloading whatsoever, making it the equivalent of a "view only" provision. Arguably, this was the intent of the proposal considering the "would not remain in the possession of the recipient in a way that could substitute for acquisition or for uses other than use in the particular class session" Senate Report language.[146] But,

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143. *Id.*, at 12 ("Conversely, the technological protection measure in subparagraph (2)(D)(ii) refers only to retention of a copy or phonorecord *in the computer of the recipient* of a transmission."). The Senate Report uses the phrase "refers on to retention" and not "refers to retention and dissemination", the plain language of TEACH, new section 110(2)(D)(ii)(I)(bb), requires the technological measure to reasonably prevent "unauthorized further dissemination of the work *in accessible form* by such recipients to others". Technology, Education, and Copyright Harmonization Act of 2002, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301.

144. *Id.* at 12 ("Conversely, the technological protection measure in subparagraph (2)(D)(ii) refers only to retention of a copy or phonorecord in the computer of the recipient of a transmission.").

145. *Id.* ("The reference to 'accessible form' recognizes that certain technological protection measures that could be used to comply with subparagraph (d)(D)(ii) do not cause the destruction or prevent the making of a digital file; rather they work by encrypting the work and limiting access to the keys and the period in which such file may be accessed.").

146. *Id.* ("[T]he Committee expects that a common sense construction will be ap-

as explained above, this approach is contradicted and relaxed somewhat by the statutory phrasing of TEACH and other supporting legislative history commentary that limits the concept of retention only to a narrow category of those works that are in "accessible form" (in the computer of the recipient) and for a period no "longer than the class session" as that concept is defined in the legislative history.[147]

However, from a copyright owner's perspective, the Senate Report concept of "retention," expressed as concern for materials that "remain in the possession of the recipient in a way that could substitute for acquisition," remains problematic as there are ways in which this might be accomplished short of making the work available in an accessible form beyond the duration of the course. Further, it is this sort of retention possession by students that continues to bother copyright owners. Suppose access to a portion of course content is given only to those students who pay the equivalent of a digital "materials fee." Consider the student who pays the digital materials fee, accesses the digital version from the institution's server during the allowable course period, proceeds to print out a copy of the work, and thus obtains a copy of the work in a non-digital form or gives the resulting printed copy of the material to another student taking the course in a following semester. In this instance, the student retains a copy in his or her possession that would appear to be a prohibited "substitute for acquisition" in the legislative history phrasing.[148] In the second instance, the student has disseminated the document to another, again a prohibited "use[] other than use in the particular class session."[149] Does this violate TEACH § 110(2)(D)(ii)(I)? Has an impermissible retention or dissemination occurred?

While printing off a copy of a work would surely seem to qualify as a "substitute for acquisition," this is an acceptable retention since it is not a retention of the work "in accessible form" rather it is a retention in another form.[150] Does this short

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plied so that a copy or phonorecord displayed or performed in the course of a distance education program would not remain in the possession of the recipient in a way that could substitute for acquisition or for uses other than use in the particular class session").

147. *Id.* at 11-12.

148. *Id.* at 12.

149. *Id.* at 12.

150. *Id.* at 12

change the copyright owner? While it could be argued that this result contradicts the spirit of the "remain in the possession of the recipient in a way that could substitute for acquisition" prohibition of the Senate Report language, this "acceptable" retention language might, in reality, apply to a small portion of the curricular material. An example of this might be the equivalent of what an instructor might display or copy and hand out in live class.[151] In other words, under TEACH, distance education web sites should not contain entire copyrighted works of this sort (textbooks, electronic course packs, e-reserves, and digital library resources) because TEACH does not authorize the use these works under its provisions. The retention and dissemination provisions both use the phrase "the work" not any (copyrighted) work, and suggest the technological measures need only protect TEACH authorized works (performance of a nondramitc literary or musical work, reasonable and limited portions of other works performed, and the display of works in an amount comparable to that which is typically displayed in the course of a live classroom session[152]), not other works that might loaded onto the course or library website through license agreement or by appeal to some other provision of the copyright law such as fair use. Arguably a critical reading of the use of a preposition. Though Congress could have used the phrasing "retention of the work in any form" or dissemination of any work in accessible form: but it did not. Thus the restricted reading is arguable. As a result, when all is said and done, the amount of material that the reformulated TEACH § 110(2) performance and display right applies to is rather a small amount of material that might conceivably be loaded onto a distance education course web site.[153] Thus, allowing students to retain

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151. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 110(2) ("or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session"). "The 'limited portion' formulation used in conjunction with the performance right is not used to [sic] connection with the display right exemption, because for certain works, display of the entire work could be appropriate and consistent with displays typically made in a live classroom setting (e.g., short poems or essays, or images of pictorial, graphic, or sculptural works, etc)." Sen. Rpt. 107-31, at 8.

152. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 110(2).

153. *Id.* (Displays are limited to the "amount comparable to that which is typically displayed in the course of a live classroom session.") Yet, it is likely that many

a copy of this material in a non-accessible form is acceptable. It is also supported by Senate Report language that places concern on "retention of a copy or phonorecord in the computer of the recipient of a transmission"[154] beyond the duration of the course,[155] and not on other retentions such as printing out a hard copy. However, instead of coupling the concept of retention to form and time, it would have been simpler to merely state what sort of retentions, if any, is acceptable. The same rationale would apply to the issue of whether a technological measure that fails to prohibit such dissemination meets the standard established by TEACH § 110(2)(D)(ii) and is thus prohibited as dissemination is linked only to those in accessible form. In other words, the technological measure must only reasonably prevent disseminations in digital form.

EPHEMERAL RECORDINGS: INTERMEDIATE REPRODUCTION AS A PRECURSOR TO ONLINE INSTRUCTION

A final substantive section of TEACH amends the "Ephemeral Recordings" provisions of § 112 by adding a new subsection (f) to cover digital transmissions.[156] This adjustment is necessary because the task of readying the copyright law to facilitate distance education in the electronic age would be incomplete if TEACH addressed the revision of § 110(2) alone and left the issue of intermediate copying untouched. In the days of "distance education as broadcast," when an instructor

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course web sites contain a fair amount of additional reading material or at least are linked to that material from the course web site, linked to the institution's library e-reserve, and as discussed earlier "electronic course packs, e-reserves, and digital library resources," are not part of the TEACH section 110(2) performance and display right. *Id.* at 10.

154. Sen. Rpt. 107-31, at 12 ("Conversely, the technological protection measure in subparagraph (2)(D)(ii) refers only to retention of a copy or phonorecord in the computer of the recipient of a transmission.").

155. *Id.* ("The reference to 'accessible form' recognizes that certain technological protection measures that could be used to comply with subparagraph (d)(D)(ii) do not cause the destruction or prevent the making of a digital file; *rather they work by encrypting the work and limiting access to the keys and the period in which such file may be accessed.*"(emphasis added)). This language would appear to allow for downloading with retention limited to the duration of the course or for the printing out of the material (a non-digital copy). On the other hand it might merely mean that not all compliant technological measures need "cause the destruction or prevent the making of a digital file."

156. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 112(f).

would bring a work into the classroom and perform or display it, the transmission of that teaching, whether by broadcast or transmission over traditional airways, did not require that an intermediate copy of the work be made. Rather, a "transmission copy" was made when the display was captured by use of the recording-broadcast technology. However, in the new age of distance education with its array of teaching tools, an instructor will be more likely to record and synchronize his or her voice over a series of digitized images such as maps, charts, or an article. Perhaps these can be incorporated into a Power Point or web-based presentation, or at least made into digital versions that can be available to students as separate resources.

TEACH makes it clear that copies made previous to a valid reformulated § 110(2) performance or display would not be an infringement of the owner's exclusive right.[157] It is not an infringement "to transmit a work that is in digital form and, solely to the extent permitted in paragraph (2) [referring to subparagraph (2) of 112(f), as amended, i.e., what would be a new 112(f)(2)], of a work that is in analog form, embodying the performance or display to be used from making transmissions authorized under § 110(2)."[158] In other words, the new § 112(f)(1) governs the copying-transmission of digital works, and the new section 112(f)(2) governs the copying-transmission of all other works such as those in analog form, which must first be converted to digital form before a transmission can occur.[159]

According to the Senate Report, "[u]nder new subsection 112(f)(1), transmitting organizations authorized to transmit performances or displays under section 110(2) may load on their servers copies or phonorecords of the performance or display authorized to be transmitted under section 110(2) to be used for making such transmissions."[160] However, several caveats exist. First, under revised paragraph 112(f)(1)(A) governing digital works, the § 112(f) right applies only if "such copies or phonorecords are retained and used solely by the body or institution that made them, and no further copies or phonorecords are produced from them, except as authorized

157. *Id.*
158. *Id.*
159. *Id.*
160. Sen. Rpt. 107-31, at 12 & 14.

under section 110(2)."[161] Does this mean the institution must ensure that students do not make downstream copies? Not necessarily, as long as the institution otherwise complies with the § 110(2) requirement to impose technological controls where feasible to "reasonably prevent" retention or unauthorized further dissemination, the previous discussion of exactly what is meant by "retention" notwithstanding.[162] However, what this language does suggest is that the governmental body or institution could not share a copy made with another entity, such as by transferring a file of supplemental materials it took the time to collect and load as part of a distance course to another school district for use in a related course in its distance program. The "used solely by" language would prohibit this transfer.[163] Nor could the school make a copy of the materials after the course ends and allow a fellow faculty member to use it in designing his or her own distance education class, as this would violate the "no further copies or phonorecords are reproduced from them" proviso.[164] The institution could allow the copies to remain on its server ("retained and used solely by the body or institution that made them"[165]) for use in a subsequent semester.[166] The "further copies or phonorecords" that are allowed, are limited to those "authorized by section 110(2)." This would included the authorized retention in accessible by a student in accordance with TEACH § 110(2)(D)(ii)(I) discussed earlier.

In addition, under TEACH § 112(f)(1)(B), the copies or phonorecords must be "used solely for transmissions authorized under § 110(2)."[167] For example, the body or institution could not make a second digital copy for use in its own library as part

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161. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 112(f)(1)(A).

162. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 110(2)(D)(ii)(I)(aa).

163. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 112(f)(1)(A).

164. *Technology, Education, and Copyright Harmonization Act of 2002. Id.*

165. *Technology, Education, and Copyright Harmonization Act of 2002. Id.*

166. "Under new subsection 112(f)(1), transmitting organizations authorized to transmit performances or displays under section 110(2) may load on their servers copies or phonorecords of the performance or display authorized to be transmitted under section 110(2) to be used for making such transmissions." Sen. Rpt. 107-31, at 12 & 14.

167. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 112(f)(1)(A).

of an e-reserve for on-site or campus-based students, even if such use or distribution might be authorized under §§ 107 (fair use) or 108(c) (governing additional reproduction and distribution rights for qualifying nonprofit libraries and archives) or by a license agreement. While this additional use on campus would not necessarily violate TEACH § 112(f)(1)(A) which is the "used solely by" the institution that made them provision, it does violate the TEACH § 112(f)(1)(B) "solely" for § 110(2) purposes proviso.[168]

Under TEACH, an amended § 112 does not provide institutions with a carte blanche ability to create digital libraries for use in remote educational settings: "It should be emphasized that subsection 112(f)(2) does not provide any authorization to convert print or other analog versions of works into digital format except as permitted in section 112(f)(2)."[169] However, if under revised 110(2) an instructor would show a map in class, for example, he/she would need to have a loaded "digital" copy of that map available on the course web site for distance students who might access the class content twenty-four-seven. TEACH § 112 allows the copy of this material onto the institution's server and to remain there for access by students.[170]

Under a more narrow reading, it could be argued that all that is allowed is the "ephemeral recording" of the instructor holding up the map while recording his lecture for the course web-site. However, this is in fact the major limitation of the current ephemeral recording provision, § 112(b).[171] "However, it [existing section 112(b)] would not authorize the making of transient reproduction necessary to the technical process of transmission in online courses . . ."[172] Title 17 United States

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168. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 112(f)(1)(A) and (B).

169. Sen. Rpt. 107-31, at 14.

170. *Id.* ("In order for asynchronous distance education to proceed, organizations providing distance education transmissions must be able to load material that will be displayed or performed on their servers, for transmission at the request of students."). But TEACH 112(f)(1) and (2) both make clear that the ephemeral recording always underlies a TEACH 110(2) use of the work. See *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, new section 112(f)(1) and (2).

171. 17 U. S. C. § 112(b).

172. *The Copyright Office Report on Copyright and Digital Distance Education*; Sen Hrg. 106-539, 106th Cong., at 95.

Code, section 112, enacted as part of the 1976 Act, allowed an ephemeral recording to be made during "live" broadcasts and transmitted to classes.[173] The remote nature of the educational experience required that a copy of the initial broadcast be sent to students who did not receive it because of an illness, a scheduling conflict, or a technical malfunction.[174] Subject to certain limits, this section allowed the transmitting entity to keep a copy of the transmission for archival purposes, and other copies (up to thirty copies total) were destroyed within seven years.[175]

The U.S. Copyright Office Report and TEACH make a fine distinction between performances and displays and the copying that must necessarily occur as part of a distance education scenario, either before or along with that performance or display. While there might not be much difference to educators between the scan or post and its performance or display, this transparency is still not contemplated by the new law. According to the U.S. Copyright Office Report, even its recommended "amended version of § 110(2) in itself would not permit the reproduction necessary for an educator to post the work to be performed or displayed to the course site, for later access by students."[176] Thus, an amendment of 17 U.S.C. § 112 is also needed.[177] "Accordingly, we [the U.S. Copyright Office] recommend adding a new subsection to section 112 that would permit an educator to upload a copyrighted work onto a server, to be subsequently transmitted under the conditions set out in § 110(2) to students enrolled in her course."[178] As a result, if the "posting" is made as a precursor to a bona fide TEACH § 110(2) performance or display, then its maintenance on the school server until a distance student accesses the material (triggering a new transmission of the posting) is an allowable ephemeral recording under TEACH § 112(f).[179]

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173. 17 U.S.C. § 112(b)(2).

174. This is one use of the 1976 ephemeral recording right in 112(b).

175. 17 U.S.C. § 112(b)(2).

176. *The Copyright Office Report on Copyright and Digital Distance Education*: Sen. Hrg. 106-539, 106th Cong., at 160.

177. Attention to this need was made by those testifying at the field hearings held by the Register of Copyrights throughout the early months of 1999, see, e.g., Testimony of Tomas A. Lipinski (Additional Discussion), in *id.* at 138-39.

178. *Id.* at 161.

179. Sen. Rpt. 107-31, at 14 ("Under new subsection 112(f)(1), transmitting organizations authorized to transmit performances or displays under section 110(2) may load on their servers copies or phonorecords of the performance or display authorized to

Secondly, TEACH § 112(f)(1)(B) requires that "such copies or phonorecords [be] used solely for *transmissions authorized under section 110(2).*"[180] This repeats the concluding clause of TEACH § 112(f)(1): "embodying the performance or display to be used from making *transmissions authorized under § 110(2).*"[181] Is this superfluous? If not, under TEACH § 112(f)(1), the "embodying the performance or display to be used from making transmissions authorized under § 110(2)" language requires that the initial motivation for making ephemeral recording ("to make copies or phonorecords") be dependant upon a bona fide § 110(2) activity.[182] Similar TEACH § 112(f)(1)(B) language, which says, "such copies or phonorecords are used solely for transmissions authorized under § 110(2)," suggests that the subsequent transmission of the copy be for § 110(2) purposes.[183] In other words, there is a dual TEACH § 110(2) "purpose" requirement in the new TEACH ephemeral recording right: one related to the reason for making initial "copies or phonorecords" (TEACH § 112(f)(1)), and the second related to the actual use of those "copies or phonorecords" (TEACH § 112(f)(1)(B)) in the subsequent transmission.[184] Once the initial copies of phonorecords are made for a TEACH § 110(2) purpose, the copies of phonorecords can only be used for Title 17 U.S.C. § 110(2) purposes.[185]

Third, TEACH § 112(f) "requires the use of works that are

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be transmitted under section 110(2) to be used for the making such transmissions.").

180. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, creating new 17 U.S.C. § 112(f)(1)(B).

181. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, creating new 17 U.S.C. § 112(f)(1).

182. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, creating new 17 U.S.C. § 112(f)(1).

183. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, creating new 17 U.S.C. § 112(f)(1)(A).

184. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, creating new 17 U.S.C. § 112(f)(1) and (f)(1)(A).

185. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, creating new 17 U.S.C. § 112(f)(1)(B).

already in digital form,"[186] so that the availability of digital copies of works does not proliferate and cause them to be used in infringing ways. However, some works may not be available in digital form, and so TEACH § (f)(2) was created to govern the limited use (copying) of works when no digital format is available.[187] However, this digitization right is limited and is not to be equated with a general safe harbor right to digitize material for use in educational pursuits.[188]A non-digital work can be digitized for use in distance education scenarios under TEACH § 112(f)(2) when either "no digital version of the work is available to the institution" (a limitation imposed by TEACH § 112(f)(2)(A)), or the "digital version of the work that is available to the institution is subject to technological protection measures that prevent its use for section 110(2)" (the limitation of TEACH § 112(f)(2)(B)).[189] Even under either of these circumstances, wholesale digitization is not permitted.[190] Rather, digitization is permissible "only with respect to the amount of such works authorized to be performed or displayed under § 110(2)." This restriction is found in the introductory paragraph of TEACH § 112(f)(2).[191]

Under either of the above circumstances, digitization of the work can only be for the portion of the work that is authorized by TEACH § 110(2).[192] The opening paragraph of TEACH § 110(2) contains three "limitation" directives: first, there is no

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186. Sen. Rpt. 107-31, at 14.

187. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, creating new 17 U.S.C. § 112(f)(2).

188. TEACH section 112(f)(2) contains the following opening proviso: "[t]his subsection does not authorize the conversion of print or other analog versions of works into digital formats, except . . ." See also, Sen. Rpt. 107-31, at 14 ("It should be emphasized that subsection 112(f)(2) does not provide any authorization to convert print or other analog versions of works into digital format except as permitted in section 112(f)(2).").

189. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, creating new 17 U.S.C. § 112(f)(2).

190. TEACH section 112(f)(2) contains the following opening proviso: "[t]his subsection does not authorize the conversion of print or other analog versions of works into digital formats, except . . ." *See also*, Sen. Rpt. 107-31, at 14 ("It should be emphasized that subsection 112(f)(2) does not provide any authorization to convert print or other analog versions of works into digital format except as permitted in section 112(f)(2).").

191. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, creating new 17 U.S.C. § 112(f)(2).

192. *Id.* ("only with respect to the amount of such works authorized to be performed or displayed under section 110(2)").

digitization limitation on the portion of a nondramatic literary or musical work that is performed; secondly, for works other than nondramatic or musical works that are performed, the portion of the work that can be digitized is limited to a "reasonable and limited portion" of the work; and thirdly, for works that are displayed, the portion of the work that can be digitized is limited to the amount that would be used in a live face-to-face teaching encounter.[193] This allowable digitization portion might then translate in practice to be a cassette recording of a Bernstein song (no limitation), a clip from a 16 mm movie (reasonable and limited portion), or a textbook page containing a chart, table, or graph (an amount comparable to that which is typically displayed in the course of live classroom session).

Because of TEACH § 110(2), TEACH § 112(f)(2) may give educators the ability to "ignore" the "performance" right to a musical work, i.e., the underlying score of the Bernstein piece, but not the performance right to copy it for later performance via distance education web technology.[194] In general, there is no performance right in sound recordings.[195] In the days of analog recordings and traditional broadcasts, this absence of a performance right in sound recordings posed no problem to distance educators, so the category of copyrighted works under 17 U.S.C. § 110(2) did not need to be enlarged.[196] However, since then, Congress expanded copyright owners' "exclusive" rights to include a performance right in a sound recording when performed by means of a "digital audio transmission."[197] Once a work is digitized and transmitted over the Internet through distance education delivery technology, a digital audio transmission has occurred, which triggers the § 106(6) performance right for digital audio transmissions of sound recordings.[198] According to the previous discussion, if this "performance right" applies to works digitized under TEACH 112(f)(2), then TEACH § 110(2) grants a right to ignore a

193. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, creating new 17 U.S.C. § 110(2).

194. *See* Hazard, *supra* n. 9, at 4-54 ("Separate and distinct from the musical copyright in the song, there is a copyright in the recorded performance of that song").

195. 17 U.S.C. § 106(6).

196. Pre-TEACH 17 U.S.C. § 110(2).

197. *See* 17 U.S.C. § 106(6).

198. *Id.*

copyright owner's performance right in the musical work, but not to ignore the performance right in the sound recording of the musical work, or at least as far as TEACH § 110(2) is concerned only the "reasonable and limited portions of any other work" that is performed.[199] As a result, a separate performance right still needs to be obtained from the copyright owner of the sound recording to convert the entire cassette recording of the Bernstein song to a digital format and then transmit is over the Internet in a distance education class.[200] In summary, digitalization can occur under TEACH § 112(f)(2)

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199. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, creating new 17 U.S.C. § 110(2).

200. TEACH section 112(f)(2) would not allow for the digitization of the Bernstein song in its entirety. While there is no problem with respect to the performance right associated with the use of musical work, i.e., the underlying song, as TEACH section 110(2) contains no such portion limitation on this category of work performed—assuming of course that the other requirements of TEACH section 112(f)(2) are met (no digital version available or if available it is subject to technological protection measures. There is, however, is a problem with respect to the sound recording, i.e., the "performance" of the musical work captured in a sound recording (in and of itself a derivative work and thus a "work" subject to copyright protection) by Arthur Fiedler and the Boston Pops, the New York Philharmonic, etc., and the right to perform it by means of digital audio transmission. The performance right belongs to whoever owns the copyright in the performance (sound recording) of the work—the recording artist, the record company, or some other entity. Under TEACH section 112(f)(2), commands to limit the ephemeral recording (digitization) are those which would be authorized under TEACH section 110(2). The amount able to be digitized would thus be limited to a "reasonable and limited portion" of the work, as the only two categories that can be performed in their entirety under TEACH section 110(2) are nondramatic literary and musical works. The right to transmit under TEACH section 112(f)(2) is limited to "the amount of such works authorized to be performed or displayed under section 110(2)." Under TEACH section 110(2) for sound recordings—works other than "nondramatic literary or musical works"—this amount is limited to a "reasonable and limited portion" of the work.

While there is no discussion of this point in the legislative history, the plain language of TEACH section 112(f)(2) does not suggest any other result than the following. Because the analog cassette recording consists of two categories of copyrighted works—musical and sound recording—which are each limited by a different TEACH section 110(2) amount—the more restrictive limitation must apply. Digitization is limited to the "conversion of the portion or amount of such works that are authorized to be performed or displayed under section 110(2)" (Sen. Rpt. 107-31, at 14), and since one cannot separate the two rights associated with the embodiment of the work in the cassette recording—a "musical" work and a "sound recording"—the amount that could be digitized in the first instance under TEACH section 112(f)(2) is limited to a "reasonable and limited portion" of the work. If this is not the result that Congress intended, then TEACH section 110(2) should be amended to include the performance right of a sound recording by means of digital audio transmission in otherwise qualifying educational scenarios (Under Title 17, United States Code, section 110(2)). This could be accomplished by expanding the "nondramatic literary and musical work" clause of TEACH section 110(2) to include sound recordings by digital audio transmissions.

assuming the requirements of TEACH § 112(f)(2) are met, or a digital copy of a digital version of the work can made. In either case, that portion that may be used in limited to the amount authorized by TEACH § 110(2). With the Bernstein recording, there are two copyrights in it so to speak, the musical work (the underlying music) and the sound recording of it. TEACH § 110(2) states that the performance of musical works, digital or otherwise is unlimited, i.e., there is no limiting language in TEACH § 110(2). As to the performance of the sound recording (the playing of the recording), when the distance education transmission is analog, no further right of the copyright owner is implicated, as there is no performance in a sound recording. However, when the playing of the recording is via a digital transmission a performance right does indeed exist and TEACH § 110(2) must be consulted. That section states that the performance of works other than "nondramatic literary or musical works" is limited to "reasonable and limited portions of" the work and so a performance right would be needed for that portion of the work beyond the "reasonable and limited portions of" the work that TEACH § 110(2) does grant the right to use.

Finally, the use of the phrase "available to" in both TEACH §§ 112(f)(2)(A) and (B) is not the same as saying "purchased," "licensed," or "in the possession of" the institution. Arguably, the existence of a digital version of the work "available to" the institution could occur in any number of ways beyond actual ownership or possession. Thus, if the work is somehow available by purchase or through interlibrary loan, an institution cannot digitize an analog copy.[201] Instead, it has to obtain an "available" digital copy through purchase or license or loan, and it has to use TEACH § 112(f)(1) to authorize its ephemeral copying (such as uploading onto the distance education course web site).[202] It must also employ TEACH § 110(2) to authorize its transmission to distance education scenarios.[203] Furthermore, if Congress desired to anchor the "available to" clause to mean ownership or possession alone or

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201. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, creating new 17 U.S.C. § 112(f)(2).

202. *Id.*

203. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, creating new 17 U.S.C. § 110(2).

otherwise physically in the hands of the institution and not a general marketplace or access availability it could have easily done so as it did in section 108 regarding the copying, including digitalization, that qualifying libraries and archives can make of unpublished and published works.[204] This process underscores the need for sale or license agreements governing digital material that an educational institution might specifically use in distance environments to allow for these ephemeral recording rights. A license agreement forbidding such use would override any rights granted by TEACH.[205] If "available" means something more than actual possession, but is more equated with access to the work vis-à-vis the marketplace for example, then this would suggest that in situations where the institution desires to digitize a work for use in an otherwise qualifying distance education transmission, several steps must be taken. First, a check must be made to determine if a digital version is available, if so it must purchase it instead of converting its analog copy. However, if the institution determines that the digital copy of the work that is available for purchase it comes with technological protection measures, the institution does not have to purchase a copy first in order for the digital version of the work to be available to it. This is so because "available to" as discussed above does not mean purchase or otherwise in the collection.[206]

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204. Section 108(b) states that "[t]he rights of reproduction and distribution under this section apply to three copies or phonorecords of an unpublished work duplicated solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by Clause (2) of subsection (a), if—(1) the copy or phonorecord *reproduced is currently in the collections of the library or archives*; and (2) any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives." 17 U.S.C. 108(b) (emphasis added). Section 108(c) contains a similar "the copy or phonorecord reproduced is currently in the collections of the library or archives" provision.

205. *See ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

206. Of course the contrary argument is that if Congress had desired a "marketplace tes" to be made, it could have made that an express command in TEACH section 112(f)(2), as it did in section 108 regarding the copying, including digitalization, that qualifying libraries and archives can make of unpublished and published works. Section 108(c) states that "[t]he right of reproduction under this section applies to three copies or phonorecords of a published work duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete, if—(1) the library or archives has, *after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price*; and (2) any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy." 17 U.S.C. 108(c) (emphasis

In other words, the technological protection requirement of § 112(f)(2)(B) is triggered, i.e., without having to purchase a copy of it first.[207]

Three scenarios appear under TEACH § 112(f). First, the work may be only available in analog form, in which case digitization is allowed because it meets the explicit requirement of TEACH § 112(f)(2)(A) (conversion allowed when no digital version is available).[208] Secondly, the work may or may not be available in analog form, but it is definitely available in digital form, in which case digitization is also prohibited by TEACH § 112(f)(2)(A).[209] Thirdly, the digital version of the work may be "subject to technological protection measures that prevent its use for § 110(2)," in which case digitization is allowed by TEACH § 112(f)(2)(B).[210] The technological protection measure need not be designed specifically to prevent distance education transmission, it just must prevent use for a TEACH § 110(2) purpose.[211] This poses an odd series of choices for the copyright owner.

A copyright owner who chooses not to release a version of his/her work in digital form faces possible digitization of the analog version by a qualifying educational institution under TEACH §§ 112(f) and 110(2), which are the ephemeral copying and distance transmission provisions.[212] Justifiably, the grant of the conversion ability (analog to digital) to support distance teaching is consistent with the underlying purpose of

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added).

207. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, creating new 17 U.S.C. § 112(f)(2)(B).

208. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, creating new 17 U.S.C. § 112(f)(2)(A), assuming the use is for an authorized TEACH section 110(2) performance or display.

209. *Id.*

210. Sen. Rpt. 107-31, at 14. ("In those circumstances where no digital version is available to the institution or the digital version that is available is subject to technological measures that prevent its use for distance education under the exemption, section 112(f)(2) authorizes the conversion from an analog version . . . ").

211. *Id.* ("However, the Committee recognizes that some works may not be available for use in distance education, either because no digital version of the work is available to the institution, or because available digital versions are subject to technological protection measures that prevent their use for the performances and displays authorized by section 110(2)").

212. Technology, Education, and Copyright Harmonization Act of 2002, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, creating new 17 U.S.C. § 112(f)(2)(A).

TEACH.[213] However, a copyright owner who does decide to offer a digital version of her work in the marketplace in addition to an analog one is at least protected from further digitization of the existing analog copies by TEACH § 112(f)(2)(A).[214] As a practical result, the law forces educational institutions to either purchase, license, or otherwise obtain and use a digital version of these works.[215] This assumes of course that "available to the institution" is interpreted to mean a general availability, in the marketplace, for example. This at least offers some possibility that the copyright owner will benefit from additional royalties from sale or license fee of the copyrighted work.[216] On the other hand, a copyright owner who places a technological protection measure on the digital version of her work because she fears exploitation in the distance education environment is specifically thwarted by TEACH § 112(f)(2)(B) because digitization of an analog copy is then specifically authorized.[217] Thus, the best a copyright owner who does not want her works used in distance education scenarios can do is either make sure no analog copies exist (most likely an impossibility), or offer a digital version in the marketplace but not one that is encrypted or contains some other technological protection to preclude conversion to digital form and hope to generate revenues when educational institutions buy it initially.[218] A copyright owner who, out of fear of exploitation or abuse, places digital protective measures on his work actually promotes further digitization of existing analog copies.[219] Thus, the concept behind technological preventative

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213. Sen. Rpt. 107-31, at 14 (touting the ability of learners to access digital transmission asynchronously).

214. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, creating new 17 U.S.C. § 112(f)(2)(A).

215. *Id.*

216. Since availability forecloses digitalization under TEACH 112(f)(2), a copy of the work will likely first need to be purchased or licensed before its ephemeral copying (loading onto the institution's distance education server) can occur under TEACH section 112(f)(1).

217. *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, creating new 17 U.S.C. § 112(f)(2)(B).

218. If it exists in digital form but a technological protection exists on it, then digitalization of extant analog copies is allowed under *id.*

219. This is so because *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, creating new 17 U.S.C. § 112(f)(2)(B) authorized digitization of analog copies when the "digital ver-

use measures appears to be defeated.

However, if a copyright owner fails to use a technological protection measure, his work will become easily available for illegal copyright exploitation in other non-17 U.S.C. § 110(2) environments.[220] For some copyright owners, this choice is difficult. If the owner uses a technological protection measure to protect against excessive (in a practical sense) or unfair (in a legal sense) uses, he will not have recourse in TEACH scenarios (through the TEACH § 112(f)(2)(B) conversion right).[221] If the owner chooses not to use a technological protection measure to make a digital version available in the market, he will be making an exploitable version available (the work is unprotected by technological measures against illegal uses).[222] Doing this might be especially undesirable for copyright owners whose primary market is education. If their works are left unprotected by technological protection measures, they may face widespread abuse in other scenarios.[223] This may also work to force copyright owners to employ mechanisms such as license by which the terms and conditions of use can restrict the TEACH grant of use or secure through the license negotiation an adequate revenue stream for the performance or display and ephemeral recording that does occur.

TEACH[224] is a complex and convoluted amendment to the

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sion that is available to the institution is subject to technological protection measures."

220. *See e.g. Universal City Studios, Inc. v. Corley*, 2001 U.S. App. LEXIS 25330 (2d Cir. 2001) (circumvention of DVD technological protection measure); *U.S. v. Elcom Ltd.*, 203 F.Supp. 2d 1111 (N.D. Cal. 2002) (circumvention of e-book technological protection measure).

221. This is so because *Technology, Education, and Copyright Harmonization Act of 2002*, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, creating new 17 U.S.C. § 112(f)(2)(B) authorized digitization of analog copies when the "digital version that is available to the institution is subject to technological protection measures."

222. See for example *U.S. v. Elcom Ltd.*, 203 F.Supp., 2d 1111, 1132 (N.D. Cal. 2002). ("However, it is already unlawful to infringe, yet piracy of intellectual property has reached epidemic proportions."). *See also* Victoria Slind-Flor, *Students Flunk IP Rights 101*, The Natl. L.J. B6 (Mar. 13, 2000)

223. *Green, D. W. (1993), Copyright Law and Policy Meet the Curriculum: Teachers' Understanding, Attitudes, and Practices*, ERIC Doc. # ED 364 946 (1993); R.L. Rice, *Behavior Opinions and Perceptions of Alabama Public School Teachers and Principals Regarding the Unauthorized Copying and Use of Microcomputer Software*, ERIC Doc. # ED 340 703 (1991).

224. A final related section of TEACH requires the PTO, within six months of enactment, to report public comment about the technical/industry standards available for protecting "digitized copyrighted works." This is the Congress' consistent trend for requiring input from administrative agencies.

distance education provisions of the copyright law. Understanding the practical operation of TEACH is important for any institution that hopes to negotiate its use provisions and compliance requirements. TEACH contains many requirements and thus complicates the rather simple operation of existing, albeit inadequate, copyright law as it functions in distance education settings.