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107TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
107–687

TECHNOLOGY, EDUCATION, AND COPYRIGHT HARMONIZATION ACT OF 2001

SEPTEMBER 25, 2002.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 487]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (S. 487) to amend chapter 1 of title 17, United States Code, relating to the exemption of certain performances or displays for educational uses from copyright infringement provisions, to provide that the making of copies or phonorecords of such performances or displays is not an infringement under certain circumstances, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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99–006

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PURPOSE AND SUMMARY

S. 487, the "Technology, Education And Copyright Harmonization Act of 2001," or the "TEACH Act," updates the distance education provisions 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 a digital format. This legislation has been crafted in a process that has ensured broad consensus of affected parties.

Education is the means by which we develop our nation's human resources. In this information age, marked by both cooperation and competition on a global scale, the ability of the United States to meet its domestic and international challenges and responsibilities is directly dependent on its educational capacity. That capacity in turn will be determined by the quality of our educational programs and their reach to all sectors of the public. For our nation to maintain its competitive edge, it will need to extend education beyond children and young adults to lifelong learning for working adults, and to reach all students of all income levels, in cities and rural settings, in schools and on campuses, in the workplace, at home, and at times selected by students to meet their needs.

Digital distance education helps make this possible, whether in the traditional sense, when instructor and student are separated in place and perhaps time, or in new hybrids of traditional classroom education combined with online components. Increasingly, college students can submit class assignments by email and participate in discussions that connect students in a classroom with students beyond the classroom. Similarly, K–12 students can learn about the customs and cultures of other countries through real-time audiovisual conversations with pen pals from those countries; they can learn science in new ways by having scientific demonstrations and actual experiments conducted at distant locations brought to them in real time via the Internet. The National Science Foundation, the National Academy of Sciences, and other scientific societies and educational organizations are working hard to improve our nation's science and mathematics education; other groups are developing new ways to bring humanities and the arts to students and the broader public. Many of these new educational efforts draw on advances in information technology and digital networks.

The TEACH Act amends sections 110(2) and 112 of the Copyright Act to facilitate the growth and development of digital distance education. 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. At the same time, it maintains and clarifies the concept of "mediated instructional activities" to which the exemption applies, and includes safeguards such as obligations to implement technological protection measures and limitations on the

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amounts of certain types of works that may be performed or displayed. The act also amends section 112 of the Copyright Act to permit storage of copyrighted material on servers in order to permit the performances and displays authorized by section 110(2) to be made asynchronously in distance education courses.

BACKGROUND AND NEED FOR THE LEGISLATION

Section 110(2) of the Copyright Act was enacted in 1976[1] on the basis of a policy determination that certain performances and displays of copyrighted works in connection with systematic instruction using then-known forms of distance education should be permitted without a need to obtain a license or rely on fair use. The technological characteristics of digital transmissions have rendered the language of section 110(2) inapplicable to the most advanced delivery methods for instruction. Without an amendment to accommodate these new technologies, the policy behind the 1976 act would be increasingly diminished.

At the same time, two factors recommend some recalibrating of the policy balance struck in 1976. The characteristics of digital transmission technologies present new educational opportunities, such as the ability to provide a media-rich, interactive educational experience to students unable to attend classes at the physical location of the institution. On the other hand, the ability of digital transmission technologies to disseminate rapidly and without control virtually infinite numbers of high quality copies, create new risks for the owners of copyrighted works used in distance education.

In the 5 years leading up to the passage of the Digital Millennium Copyright Act (DMCA) in 1998,[2] the application of copyright law to distance education using digital technologies was the subject of public debate and attention in the United States. Extensive discussions concerning the issue were conducted during Congress' consideration of the DMCA, but no conclusion was reached. Therefore, in section 403 of the DMCA, Congress directed the Copyright Office to consult with representatives of copyright owners, non-profit educational institutions, and non-profit libraries and archives, and thereafter to submit to 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."[3] The recommendations were to include any legislation the Register of Copyrights considered appropriate to achieve that objective. The Copyright Office was specifically directed to consider the following issues: the need for a new exemption, the categories of works to be included in any exemption, the appropriate quantitative limitations on the portions of works that may be used under any exemption, which parties should be eligible for any exemption, which parties should be eligible recipients of distance education material under any exemption, the extent to which technological protection measures should be mandated as a condition of eligibility for any exemption, the extent to which the

[1] Pub. L. No. 94–553, 90 Stat. 2549 (1976).
[2] Pub. L. No. 105–304, 112 Stat. 2877 (1998).
[3] *Id.*

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availability of licenses should be considered in assessing the eligibility for any exemption, and other issues the Office considered appropriate.

The Copyright Office conducted an extensive and intensive process of identifying stakeholders, holding public hearings, soliciting comments, conducting research, and consulting with experts in various fields. On June 24, 1999, the Register of Copyrights formally presented the findings and recommendations of the Copyright Office to the Subcommittee on Courts and Intellectual Property.[4] Among other things, the Copyright Office recommended the following changes: elimination of the requirement of a physical classroom, clarification that the term "transmission" covers digital transmissions, expanding the rights covered by the exemption to include those needed to accomplish network transmissions, expanding the categories of works exempted from the performance rights beyond the current coverage of non-dramatic literary and musical works, and creating new safeguards to counteract the risks imposed by digital transmissions.[5]

On March 7, 2001, Senator Hatch, joined by Senator Leahy, introduced S. 487, the "Technology, Education and Copyright Harmonization Act of 2001," or the "TEACH Act,"[6] to implement many of the Copyright Office recommendations. On March 17, 2001, the Senate Judiciary Committee met in executive session to consider S. 487. An amendment in the nature of a substitute was offered by the Chairman Hatch, together with the Ranking Member Leahy, which had been developed to implement the purposes of the TEACH Act, following extensive discussions with the education and copyright owner communities, and with further assistance from the Copyright Office. The substitute amendment was adopted by unanimous consent and the bill, as amended, was then ordered to be favorably reported to the full Senate by unanimous consent. On June 7, 2001, S. 487, as amended, passed the Senate by unanimous consent.

HEARINGS

The Committee's Subcommittee on Courts, the Internet, and Intellectual Property held a hearing on S. 487 on June 27, 2001. Testimony was received from the Honorable Marybeth Peters, Register of Copyrights, Copyright Office of the United States, Library of Congress; Allan Robert Adler, Vice President, Legal & Government Affairs, Association of American Publishers, Inc.; and John C. Vaughn, Executive Vice President, Association of American Universities.

COMMITTEE CONSIDERATION

On July 11, 2001, the Subcommittee on Courts, the Internet, and Intellectual Property met in open session and ordered favorably reported the bill S. 487, by voice vote, a quorum being present. On July 17, 2002, the Committee met in open session and ordered fa-

[4] Register of Copyrights, Report on Copyright and Digital Distance Education (1999).
[5] *Id.*
[6] S. 487, 107th Cong., 1st Sess. (2001). See 2000 CONG. REC. S 2008–2009 (daily ed. Mar. 7, 2001).

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vorably reported the bill S. 487, by voice vote, a quorum being present.

VOTE OF THE COMMITTEE

There were no recorded votes on S. 487.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

PERFORMANCE GOALS AND OBJECTIVES

S. 487 does not authorize funding. Therefore, clause 3(c) of rule XIII of the Rules of the House of Representatives is inapplicable.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to S. 487, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 26, 2002.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 487, the Technology, Education, and Copyright Harmonization Act of 2001.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Ken Johnson (for Federal costs), who can be reached at 226–2860, and Paige Piper/Bach (for the private-sector impact), who can be reached at 226–2940.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

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S. 487—Technology, Education, and Copyright Harmonization Act of 2001.

S. 487 would modify the exemption under copyright law for schools and governments that display and copy literature, music, and other material for educational purposes. Copyright laws are administered by the Copyright Office. The act also would require the Patent and Trademark Office (PTO) to report to the Congress within 6 months of enactment on the range of technologies that are available to protect copyrighted material that is available in digital form.

Based on information from the Copyright Office and the PTO, CBO estimates that implementing S. 487 would have a negligible impact on the operating budgets of those agencies. The act would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply.

S. 487 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on State, local, or tribal governments.

S. 487 would impose a private-sector mandate, as defined by UMRA. CBO estimates that the direct cost of the mandates would fall well below the annual threshold established by UMRA for private-sector mandates ($115 million in 2002, adjusted annually for inflation).

S. 487 would impose a private-sector mandate as defined by UMRA on copyright owners. The act would limit the right of copyright owners to collect compensation under copyright law for use of certain secondary materials by educators in classes offered over the Internet. It would clarify existing law to exempt the digital transmission of such materials used in distance learning from copyright control. According to information from the U.S. Copyright Office and industry sources, compensation currently received by copyright owners from the use of those materials is minimal. CBO estimates, therefore, that the direct cost of the mandate, measured as net income forgone, would fall well below the annual threshold established by UMRA for private-sector mandates ($115 million in 2002, adjusted annually for inflation).

On May 29, 2001, CBO transmitted a cost estimate for S. 487 as ordered reported by the Senate Committee on the Judiciary on May 17, 2001. The two versions of the act are nearly identical, and the estimated costs are the same. Both versions of the bill contain the same private-sector mandate.

The CBO staff contacts for this estimate are Ken Johnson (for Federal costs), who can be reached at 226–2860, and Paige Piper/Bach (for the private-sector impact), who can be reached at 226–2940. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of the rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8 of the Constitution.

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SECTION-BY-SECTION ANALYSIS AND DISCUSSION

SEC. 1. EDUCATION USE COPYRIGHT EXEMPTION.

Subsection (a): Short Title

This section provides that this act may be cited as the "Technology, Education and Copyright Harmonization Act of 2001."

Subsection (b): Exemption of Certain Performances and Displays for Educational Uses

Summary

Section 1(b) of the TEACH Act amends section 110(2) of the Copyright Act to encompass performances and displays of copyrighted works in digital distance education under appropriate circumstances. The section expands the scope of works to which the amended section 110(2) exemption applies to include performances of reasonable and limited portions of works other than nondramatic literary and musical works (which are currently covered by the exemption), while also limiting the amount of any work that may be displayed under the exemption to what is typically displayed in the course of a live classroom session. At the same time, section 1(b) removes the concept of the *physical* classroom, while maintaining and clarifying the requirement of mediated instructional activity and limiting the availability of the exemption to mediated instructional activities of governmental bodies and "accredited" non-profit educational institutions. This section of the act also limits the amended exemption to exclude performances and displays given by means of a copy or phonorecord that is not lawfully made and acquired, which the transmitting body or institution knew or had reason to believe was not lawfully made and acquired. In addition, section 1(b) requires the transmitting institution to apply certain technological protection measures to protect against retention of the work and further downstream dissemination. The section also clarifies that participants in authorized digital distance education transmissions will not be liable for any infringement by reason of transient or temporary reproductions that may occur through the automatic technical process of a digital transmission for the purpose of a performance or display permitted under the section. Obviously, with respect to such reproductions, the distribution right would not be infringed. Throughout the act, the term "transmission" is intended to include transmissions by digital, as well as analog means.

Works Subject to the Exemption and Applicable Portions

The TEACH Act expands the scope of the section 110(2) exemption to apply to performances and displays of all categories of copyrighted works, subject to specific exclusions for works "produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks" and performance or displays "given by means of a copy or phonorecord that is not lawfully made and acquired," which the transmitting body or institution "knew or had reason to believe was not lawfully made and acquired."

Unlike the current section 110(2), which applies only to public performances of non-dramatic literary or musical works, the

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amendment would apply to public performances of any type of work, subject to certain exclusions set forth in section 110(2), as amended. The performance of works other than non-dramatic literary or musical works is limited, however, to "reasonable and limited portions" of less than the entire work. What constitutes a "reasonable and limited" portion should take into account both the nature of the market for that type of work and the pedagogical purposes of the performance.

In addition, because "display" of certain types of works, such as literary works using an "e-book" reader, could substitute for traditional purchases of the work (*e.g.*, a text book), the display exemption is limited to "an amount comparable to that which is typically displayed in the course of a live classroom setting." This limitation is a further implementation of the "mediated instructional activity" concept described below, and recognizes that a "display" may have a different meaning and impact in the digital environment than in the analog environment to which section 110(2) has previously applied. The "limited portion" formulation used in conjunction with the performance right exemption is not used in 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.).

The exclusion for works "produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks" is intended to prevent the exemption 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. The concept of "performance or display as part of mediated instructional activities" is discussed in greater detail below, in connection with the scope of the exemption. It is intended to have the same meaning and application here, so that works produced or marketed primarily for activities covered by the exemption would be excluded from the exemption. The exclusion is not intended to apply generally to all educational materials or to all materials having educational value. The exclusion is limited to materials whose primary market is "mediated instructional activities," *i.e.*, materials performed or displayed as an integral part of the class experience, analogous to the type of performance or display that would take place in a live classroom setting. At the same time, the reference to "digital networks" is intended to limit the exclusion to materials whose primary market is the digital network environment, not instructional materials developed and marketed for use in the physical classroom.

The exclusion of performances or displays "given by means of a copy or phonorecord that is not lawfully made and acquired" under title 17 is based on a similar exclusion in the current language of section 110(1) for the performance or display of an audiovisual work in the classroom. Unlike the provision in section 110(1), the exclusion here applies to the performance or display of any work. But, as in section 110(1), the exclusion applies only where the transmitting body or institution "knew or had reason to believe" that the copy or phonorecord was not lawfully made and acquired. As noted in the Register's Report, the purpose of the exclusion is

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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.[7]An educator would typically purchase, license, rent, make a fair-use copy, or otherwise lawfully acquire the copy to be used, and works not yet made available in the market (whether by distribution, performance or display) would, as a practical matter, be rendered ineligible for use under the exemption.

Eligible Transmitting Entities

As under the current section 110(2), the exemption, as amended, is limited to government bodies and non-profit educational institutions. However, due to the fact that, as the Register's Report points out, "nonprofit educational institutions" are no longer a closed and familiar group, and the ease with which anyone can transmit educational material over the Internet, the amendment would require non-profit educational institutions to be "accredited" in order to provide further assurances that the institution is a bona fide educational institution. It is not otherwise intended to alter the eligibility criteria. Nor is it intended to limit or affect any other provision of the Copyright Act that relates to non-profit educational institutions or to imply that non-accredited educational institutions are necessarily not bona fide.

"Accreditation" is defined in section 1(b)(2) of the TEACH Act in terms of the qualification of the educational institution. It is not defined in terms of particular courses or programs. Thus, an accredited nonprofit educational institution qualifies for the exemption with respect to its courses whether or not the courses are part of a degree or certificate-granting program.

Qualifying Performances and Displays; Mediated Instructional Activities

Subparagraph (2)(A) of the amended exemption provides that the exemption applies to a performance or display made "by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of . . . systematic mediated instructional activity." The subparagraph includes several requirements, all of which are intended to make clear that the transmission must be part of mediated instructional activity. First, the performance or display must be made by, under the direction of, or under the actual supervision of an instructor. The performance or display may be initiated by the instructor. It may also be initiated by a person enrolled in the class as long as it is done either at the direction, or under the actual supervision, of the instructor. "Actual" supervision is intended to require that the instructor is, in fact, supervising the class activities, and that supervision is not in name or theory only. It is not intended to require either constant, real-time supervision by the instructor or pre-approval by the instructor for the performance or display. Asynchronous learning, at the pace of the student, is a significant and beneficial characteristic of digital distance education, and the

[7] REGISTER OF COPYRIGHTS, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION (1999) at 159.

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concept of control and supervision is not intended to limit the qualification of such asynchronous activities for this exemption.

The performance or display must also be made as an "integral part" of a class session, so it must be part of a class itself, rather than ancillary to it. Further, it must fall within the concept of "mediated instructional activities" as described in section 1(b)(2) of the TEACH Act. This latter concept 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.

The amended exemption is not intended to address other uses of copyrighted works in the course of digital distance education, including student use of supplemental or research materials in digital form, such as electronic course packs, e-reserves, and digital library resources. Such activities do not involve uses analogous to the performances and displays currently addressed in section 110(2).

The "mediated instructional activity" requirement is thus intended to prevent the exemption provided by the TEACH Act from displacing textbooks, course packs or other material in any media, copies or phonorecords of which are typically purchased or acquired by students for their independent use and retention (in most post-secondary and some elementary and secondary contexts). The Committee notes that in many secondary and elementary school contexts, such copies of such materials are not purchased or acquired directly by the students, but rather are provided for the students' independent use and possession (for the duration of the course) by the institution.

The limitation of the exemption to systematic "mediated instructional activities" in subparagraph (2)(A) of the amended exemption operates together with the exclusion in the opening clause of section 110(2) for works "produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks" to place boundaries on the exemption. The former relates to the nature of the exempt activity; the latter limits the relevant materials by excluding those primarily produced or marketed for the exempt activity.

One example of the interaction of the two provisions is the application of the exemption to textbooks. Pursuant to subparagraph (2)(A), which limits the exemption to "mediated instructional activities," the display of material from a textbook that would typically be purchased by students in the local classroom environment, in lieu of purchase by the students, would not fall within the exemption. 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 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 em-

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phasizing such an excerpt from the assigned textbook that had been purchased by the students.

The 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, and has been retained in its current form. As noted in the Register's Report[8], 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 the students, or as unrelated background material.

Limitations on Receipt of Transmissions

Unlike current section 110(2), the TEACH Act amendment removes the requirement that transmissions be received in classrooms or similar places devoted to instruction unless the recipient is an officer or employee of a governmental body or is prevented by disability or special circumstances from attending a classroom or similar place of instruction. One of the great potential benefits of digital distance education is its ability to reach beyond the physical classroom, to provide quality educational experiences to all students of all income levels, in cities and rural settings, in schools and on campuses, in the workplace, at home, and at times selected by students to meet their needs.

In its place, the act substitutes the requirements in subparagraph (2)(C) that the transmission be made solely for and, to the extent technologically feasible, the reception be limited to students officially enrolled in the course for which the transmission is made or governmental employees as part of their official duties or employment. 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.

Additional Safeguards to Counteract New Risks

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. Accordingly, the TEACH Act includes several safeguards not currently present in section 110(2).

First, a transmitting body or institution seeking to invoke the exemption is required to institute policies regarding copyright and to provide information to faculty, students, and relevant staff members that accurately describe and promote compliance with copyright law. Further, the transmitting organization must provide notice to recipients that materials used in connection with the course may be subject to copyright protection. These requirements are intended to promote an environment of compliance with the law, inform recipients of their responsibilities under copyright law, and

[8] *Id.* at 80.

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decrease the likelihood of unintentional and uninformed acts of infringement.

Second, in the case of a digital transmission, the transmitting body or institution is required to apply technological measures to prevent: (i) retention of the work in accessible form by recipients to which it sends the work for longer than the class session; and (ii) unauthorized further dissemination of the work in accessible form by such recipients. Measures intended to limit access to authorized recipients of transmissions from the transmitting body or institution are not addressed in this subparagraph (2)(D). Rather, they are the subjects of subparagraph (2)(C).

Third, in the case of a digital transmission, the transmitting body or institution must 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." As the context makes clear, this requirement refers to conduct that is taken in connection with the particular transmissions subject to the exemption, rather than to the broader activities of the transmitting body or institution generally. Further, like the other provisions under paragraph (2)(D)(ii), the requirement 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.

The requirement that technological measures be applied to limit retention for no longer than the "class session" refers back to the requirement that the performance be made as an "integral part of a class session." 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). Although flexibility is necessary to accomplish the pedagogical goals of distance education, the Committee expects 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. 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 material to be performed or displayed may, under the amendments made by the act to section 112 and with certain limitations set forth therein, remain on the server of the institution or government body for the duration of its use in one or more courses, and may be accessed by a student each time the student logs on to participate in the particular class session of the course in which the display or performance is made. The reference to "accessible form" recognizes that certain technological protection measures that could be used to comply with subparagraph (2)(D)(ii) do not cause the de-

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struction 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. 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.

Paragraph (2)(D)(ii) provides, as a condition of eligibility for the exemption, that a transmitting body or institution apply technological measures that reasonably prevent both retention of the work in accessible form for longer than the class session and further dissemination of the work. This requirement does not impose a duty to guarantee that retention and further dissemination will never occur. Nor does it imply that there is an obligation to monitor recipient conduct. Moreover, the "reasonably prevent" standard should not be construed to imply perfect efficacy in stopping retention or further dissemination. The obligation to "reasonably prevent" contemplates an objectively reasonable standard regarding the ability of a technological protection measure to achieve its purpose. Examples of technological protection measures that exist today and would reasonably prevent retention and further dissemination, include measures used in connection with 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 (Jan. 18, 2000) or digital rights management systems that limit access to or use of encrypted material downloaded onto a computer. It is not the Committee's intent, by noting the existence of the foregoing, to specify the use of any particular technology to comply with subparagraph (2)(D)(ii). Other technologies will certainly evolve. Further, it is possible that, as time 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. In those cases, a transmitting organization would be required to apply a different measure.

Nothing in section 110(2) should be construed to affect the application or interpretation of section 1201. Conversely, nothing in section 1201 should be construed to affect the application or interpretation of section 110(2).

Transient and Temporary Copies

Section 1(b)(2) of the TEACH Act implements the Register's recommendation that liability not be imposed upon those who participate in digitally transmitted performances and displays authorized under this subsection by reason of copies or phonorecords made through the automatic technical process of such transmission, or any distribution resulting therefrom. Certain modifications have been made to the Register's recommendations to accommodate instances where the recommendation was either too broad or not sufficiently broad to cover the appropriate activities.

The third paragraph added to the amended exemption under section 1(b)(2) of the TEACH Act recognizes that transmitting organizations should not be responsible for copies or phonorecords made by third parties, beyond the control of the transmitting organiza-

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tion. However, consistent with the Register's concern that the exemption should not be transformed into a mechanism for obtaining copies[9], the paragraph also requires that such transient or temporary copies stored on the system or network controlled or operated by the transmitting body or institution shall not be maintained on such system or network "in a manner ordinarily accessible to anyone other than anticipated recipients" or "in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary to facilitate the transmissions" for which they are made.

The liability of intermediary service providers remains governed by section 512, but, subject to section 512(d) and section 512(e), section 512 will not affect the legal obligations of a transmitting body or institution when it selects material to be used in teaching a course, and determines how it will be used and to whom it will be transmitted as a provider of content.

The paragraph refers to "transient" and "temporary" copies consistent with the terminology used in section 512, including transient copies made in the transmission path by conduits and temporary copies, such as caches, made by the originating institution, by service providers or by recipients. Organizations providing digital distance education will, in many cases, provide material from source servers that create additional temporary or transient copies or phonorecords of the material in storage known as "caches" in other servers in order to facilitate the transmission. In addition, transient or temporary copies or phonorecords may occur in the transmission stream, or in the computer of the recipient of the transmission. Thus, by way of example, where content is protected by a digital rights management system, the recipient's browser may create a cache copy of an encrypted file on the recipient's hard disk, and another copy may be created in the recipient's random access memory at the time the content is perceived. The third paragraph added to the amended exemption by section 1(b)(2) of the TEACH Act is intended to make clear that those authorized to participate in digitally transmitted performances and displays as authorized under section 110(2) are not liable for infringement as a result of such copies created as part of the automatic technical process of the transmission if the requirements of that language are met. The paragraph is not intended to create any implication that such participants would be liable for copyright infringement in the absence of the paragraph.

Subsection (c): Ephemeral Recordings

One way in which digitally transmitted distance education will expand America's educational capacity and effectiveness is through the use of asynchronous education, where students can take a class when it is convenient for them, not at a specific hour designated by the body or institution. This benefit is likely to be particularly valuable for working adults. Asynchronous education also has the benefit of proceeding at the student's own pace, and freeing the instructor from the obligation to be in the classroom or on call at all hours of the day or night.

[9] *Id.* at 151.

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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. The TEACH Act's amendment to section 112 makes that possible.

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. The subsection recognizes that it often is necessary to make more than one ephemeral recording in order to efficiently carry out digital transmissions, and authorizes the making of such copies or phonorecords.

Subsection 112(f) imposes several limitations on the authorized ephemeral recordings. First, they may be retained and used solely by the government body or educational institution that made them. No further copies or phonorecords may be made from them, except for copies or phonorecords that are authorized by subsection 110(2), such as the copies that fall within the scope of the third paragraph added to the amended exemption under section 1(b)(2) of the TEACH Act. The authorized ephemeral recordings must be used solely for transmissions authorized under section 110(2).

The Register's Report notes the sensitivity of copyright owners to the digitization of works that have not been digitized by the copyright owner. As a general matter, subsection 112(f) requires the use of works that are already in digital form. 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). 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, but only conversion of the portion or amount of such works that are authorized to be performed or displayed under section 110(2). 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).

Relationship to Fair Use and Contractual Obligations

As the Register's Report makes clear "critical to [its conclusion and recommendations] is the continued availability of the fair use doctrine." [10] Nothing in this act is intended to limit or otherwise to alter the scope of the fair use doctrine. As the Register's Report explains:

> Fair use is a critical part of the distance education landscape. Not only instructional performances and displays, but also other educational uses of works, such as the provision of supplementary materials or student downloading of course materials, will continue to be subject to the fair use

[10] *Id.* at xvi.

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doctrine. Fair use could apply as well to instructional transmissions not covered by the changes to section 110(2) recommended above. Thus, for example, the performance of more than a limited portion of a dramatic work in a distance education program might qualify as fair use in appropriate circumstances.[11]

The Register's Report also recommends that the legislative history of legislation implementing its distance education requirements make certain points about fair use. Specifically, this legislation is enacted in recognition of the following:

a. The fair use doctrine is technologically neutral and applies to activities in the digital environment; and
b. the lack of established guidelines for any particular type of use does not mean that fair use is inapplicable.[12]

While the Register's Report also examined and discussed a variety of licensing issues with respect to educational uses not covered by exemptions or fair use, these issues were not included in the Report's legislative recommendations that formed the basis for the TEACH Act. It is the view of the Committee that nothing in this act is intended to affect in any way the relationship between express copyright exemptions and license restrictions.

Nonapplicability to Secure Tests

The Committee is aware and deeply concerned about the phenomenon of school officials who are entrusted with copies of secure test forms solely for use in actual test administrations and using those forms for a completely unauthorized purpose, namely helping students to study the very questions they will be asked on the real test. The Committee does not in any way intend to change current law with respect to application of the Copyright Act or to undermine or lessen in any way the protection afforded to secure tests under the Copyright Act. Specifically, this section would not authorize a secure test acquired solely for use in an actual test administration to be used for any other purpose.

Subsection (d): PTO Report

The report requested in subsection (d) requests information about technological protection systems to protect digitized copyrighted works and prevent infringement. The report is intended for the information of Congress and shall not be construed to have any effect whatsoever on the meaning, applicability, or effect of any provision of the Copyright Act in general or the TEACH Act in particular.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

[11] *Id.* at 161–162.
[12] *Id.*

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TITLE 17, UNITED STATES CODE

* * * * * * *

CHAPTER 1—SUBJECT MATTER AND SCOPE OF COPYRIGHT

* * * * * * *

§ 110. Limitations on exclusive rights: Exemption of certain performances and displays

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) * * *

[(2) performance of a nondramatic literary or musical work or display of a work, by or in the course of a transmission, if—

[(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and

[(B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and

[(C) the transmission is made primarily for—

[(i) reception in classrooms or similar places normally devoted to instruction, or

[(ii) reception by 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

[(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment;]

(2) except with respect to a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks, or 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 educational institution knew or had reason to believe was not lawfully made and acquired, the performance of 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, by or in the course of a transmission, if—

(A) the performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution;

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission;

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(C) the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to—

(i) students officially enrolled in the course for which the transmission is made; or

(ii) officers or employees of governmental bodies as a part of their official duties or employment; and

(D) the transmitting body or institution—

(i) institutes policies 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, and provides notice to students that materials used in connection with the course may be subject to copyright protection; and

(ii) in the case of digital transmissions—

(I) applies technological measures that reasonably prevent—

(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; and

(bb) unauthorized further dissemination of the work in accessible form by such recipients to others; and

(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;

The exemptions provided under paragraph (5) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners for the public performance or display of their works. Royalties payable to copyright owners for any public performance or display of their works other than such performances or displays as are exempted under paragraph (5) shall not be diminished in any respect as a result of such exemption.

In paragraph (2), the term "mediated instructional activities" with respect to the performance or display of a work by digital transmission under this section refers to activities that use such work as an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting. The term does not refer to activities that use, in 1 or more class sessions of a single course, such works as textbooks, course packs, or other material in any media, copies or phonorecords of which are typically purchased or 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.

For purposes of paragraph (2), accreditation—

(A) with respect to an institution providing post-secondary education, shall be as determined by a regional or national accrediting agency recognized by the Council on

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Higher Education Accreditation or the United States Department of Education; and

(B) with respect to an institution providing elementary or secondary education, shall be as recognized by the applicable state certification or licensing procedures.

For purposes of paragraph (2), no governmental body or accredited nonprofit educational institution shall be liable for infringement by reason of the transient or temporary storage of material carried out through the automatic technical process of a digital transmission of the performance or display of that material as authorized under paragraph (2). No such material stored on the system or network controlled or operated by the transmitting body or institution under this paragraph shall be maintained on such system or network in a manner ordinarily accessible to anyone other than anticipated recipients. No such copy shall be maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary to facilitate the transmissions for which it was made.

* * * * * * *

§ 112. Limitations on exclusive rights: Ephemeral recordings

(a) * * *

* * * * * * *

(f)(1) Notwithstanding the provisions of section 106, and without limiting the application of subsection (b), it is not an infringement of copyright for a governmental body or other nonprofit educational institution entitled under section 110(2) to transmit a performance or display to make copies or phonorecords of a work that is in digital form and, solely to the extent permitted in paragraph (2), of a work that is in analog form, embodying the performance or display to be used for making transmissions authorized under section 110(2), if—

(A) such copies or phonorecords are retained and used solely by the body or institution that made them, and no further copies or phonorecords are reproduced from them, except as authorized under section 110(2); and

(B) such copies or phonorecords are used solely for transmissions authorized under section 110(2).

(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—

(A) no digital version of the work is available to the institution; or

(B) 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).

[(f)] *(g)* The transmission program embodied in a copy or phonorecord made under this section is not subject to protection as a derivative work under this title except with the express consent of

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the owners of copyright in the preexisting works employed in the program.

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CHAPTER 8—COPYRIGHT ARBITRATION ROYALTY PANELS

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§ 802. Membership and proceedings of copyright arbitration royalty panels

(a) * * *

* * * * * * *

(c) ARBITRATION PROCEEDINGS.—Copyright arbitration royalty panels shall conduct arbitration proceedings, subject to subchapter II of chapter 5 of title 5, for the purpose of making their determinations in carrying out the purposes set forth in section 801. The arbitration panels shall act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations, and rulings by the Librarian of Congress under section 801(c). Any copyright owner who claims to be entitled to royalties under section 111, 112, 114, 116, or 119, any transmitting organization entitled to a statutory license under section [112(f)] *112(g)*, any person entitled to a statutory license under section 114(d), any person entitled to a compulsory license under section 115, or any interested copyright party who claims to be entitled to royalties under section 1006, may submit relevant information and proposals to the arbitration panels in proceedings applicable to such copyright owner or interested copyright party, and any other person participating in arbitration proceedings may submit such relevant information and proposals to the arbitration panel conducting the proceedings. In ratemaking proceedings, the parties to the proceedings shall bear the entire cost thereof in such manner and proportion as the arbitration panels shall direct. In distribution proceedings, the parties shall bear the cost in direct proportion to their share of the distribution.

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MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, JULY 17, 2002

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:05 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will be in order.

* * * * * * *

The next item on the agenda is the adoption of Senate 487, the Technology Education, and Copyright Harmonization Act of 2001.

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The Chair recognizes the gentleman from North Carolina, Mr. Coble, for a motion.

Mr. COBLE. Mr. Chairman, the Subcommittee on Courts, the Internet, and Intellectual Property reports favorably the bill S. 487 and moves its favorable recommendation to the full House.

Chairman SENSENBRENNER. Without objection, S. 487 will be considered as read and open for amendment at any point.

[The bill, S. 487, follows:]

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