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Copyright Exemptions for Distance Education: 17 U.S.C. § 110(2), the Technology, Education, and Copyright Harmonization Act of 2002

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Summary

The Technology, Education, and Copyright Harmonization Act of 2002 (TEACH Act) updated 17 U.S.C. § 110(2), the first distance education exemption under copyright law, to permit accredited nonprofit institutions to transmit copyrighted works during distance education programs without having to obtain the prior permission of the copyright holder, under certain limited conditions and in accordance with specified statutory procedures. This report provides a summary and analysis of the provisions of the TEACH Act, including an explanation of the types of works exempted for distance education purposes, the conditions and limitations placed on the ability to use exempted works, the exemption eligibility requirements for distance educators and students, the limitations on copyright infringement liability of eligible claimants, and the mandatory procedural requirements that transmitting institutions must follow to safeguard copyrighted materials from infringement.

In addition, the report examines the potential effect on the rights granted by the TEACH Act that may be posed by the proposed "broadcast flag," a content protection technology designed to limit copying, editing, retention, and other activities regarding the use of digitally broadcast television programs. Congressional interest in authorizing the use of the broadcast flag for digital television transmissions has raised the concern of librarians and educators over whether such technology may impede their ability to use digital television content for educational purposes, including distance education programs pursuant to the TEACH Act.

Legislation introduced in the 109th Congress, S. 2686, the Communications, Consumer's Choice, and Broadband Deployment Act of 2006, includes a provision that would grant the Federal Communications Commission (FCC) the authority to adopt regulations giving television broadcasters the right to use the broadcast flag in their digital transmissions. At the same time, however, the bill directs the FCC to issue regulations that would expressly permit the use of broadcast-flagged digital television transmissions by government bodies and accredited nonprofit educational institutions for distance education purposes under the TEACH Act.

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Introduction

In November 2002, as part of the comprehensive 21st Century Department of Justice Appropriations Authorization Act, President Bush signed the Technology, Education, and Copyright Harmonization Act (hereinafter TEACH Act, or the Act) into law.[1] The TEACH Act amended 17 U.S.C. § 110(2), the first distance education exemption under copyright law, with an intricate update. The TEACH Act expands the reach of § 110(2) to accommodate educational use of copyrighted works while preserving the limitations set forth in the Digital Millennium Copyright Act (DMCA) in order to minimize additional risks to copyright holders.[2] This report provides an analysis of the provisions of the TEACH Act, including an explanation of the types of works exempted for distance education purposes, the conditions and limitations placed on the ability to use exempted works, the exemption eligibility requirements for distance educators and students, the limitations on copyright infringement liability of eligible claimants, and the mandatory procedural requirements that transmitting institutions must follow to safeguard copyrighted materials from infringement. The report also examines the potential effect on the rights granted by the TEACH Act that may be posed by the proposed "broadcast flag," a content protection technology designed to limit copying, editing, retention, and other activities regarding the use of digitally broadcast television programs.

Background

The Copyright Act provides copyright holders with the exclusive right to control reproduction, distribution, public performance, and display of their copyrighted works.[3] Unauthorized use of copyrighted material constitutes an infringement of these rights, unless the use is permitted by a statutory exception. Although the "fair

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[1] P.L. 107-273, § 13301 (Nov. 2, 2002).

[2] 17 U.S.C. §§ 1201-1205. The DMCA added a new chapter 12 to the Copyright Act entitled "Copyright Protection and Management Systems." Subject to relatively narrow exceptions, this law makes it illegal to circumvent a technological copyright-control measure. For more information on the DMCA , see CRS Report RL31827, *"Digital Rights" and Fair Use in Copyright Law*, by Robin Jeweler.

[3] 17 U.S.C. § 106.

use" defense may be the most widely known exception,[4] the Copyright Act provides other express statutory limitations on a copyright holder's exclusive rights. For example, libraries and archives are expressly permitted to make reproductions for specified archival or circulating purposes.[5] 17 U.S.C. § 110 provides additional limitations on a copyright holder's exclusive rights to perform[6] or display[7] a work.

17 U.S.C. § 110 is entitled "Limitations on exclusive rights: Exemption of certain performance and displays." A statutory exemption means that Congress has determined that certain copyrighted works may be used for a specific purpose without permission of a copyright holder. Among the exemptions encompassed in § 110 are those dealing with face-to-face classroom instructional activities and transmissions for instructional purposes in distance education. The first subsection, § 110(1), addresses the in-class use of

> [a] performance or display of a work by an instructor or students in the course of face-to-face teaching activities of a nonprofit educational institution, or in a classroom or similar place devoted to instruction.[8]

In non-classroom based instruction, § 110(2) includes a provision for the transmission of materials in distance education uses. Early distance education programs were mail-based courses for self-study. With the advent of television, many courses were broadcast in closed-circuit formats. The technology behind the Internet now allows for real-time video and audio streaming for students to participate in educational exchanges.[9]

The basic exemption for distance education was originally enacted as part of the Copyright Act of 1976 to permit performances and displays of copyrighted works for distance education instruction without a need to obtain a license or rely on fair use. Prior to this exemption, the doctrine of "fair use" was relied on to use copyrighted material in the educational context. Although the Copyright Act expressly permits the fair use of a copyrighted work by the public for limited purposes such as criticism, teaching, comment, scholarship, or research, the reach of the doctrine is not

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[4] 17 U.S.C. § 107.

[5] 17 U.S.C. § 108.

[6] Under 17 U.S.C. § 101, to "perform" a work would be to "recite, render, play, dance, or act it, 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."

[7] Under 17 U.S.C. § 101, 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."

[8] 17 U.S.C. § 110(1).

[9] See Robert Thornburg, "The Impact of Copyright Law on Distance Education Programs: How Fair Use and the CONFU Guidelines May Shape the Future of Academia," 27 S. ILL. U. L. J. 321, 324-331 (2003).

always clear, because it is an "equitable rule of reason" that courts apply when determining whether an infringing use of a work is "fair" in any particular context.[10]

Upon passage of the DMCA in 1998, Congress directed the U.S. Copyright Office to study and recommend the promotion of distance education through digital technologies while balancing the rights of copyright owners and the interests of those using copyrighted material.[11] The Copyright Office issued its report in 1999.[12] To facilitate distance education using digital media, the Office suggested, among other things, the following:

- elimination of a physical classroom requirement,
- clarification of the term "transmission" to cover digital transmissions,
- expansion of rights covered by the exemption to include those needed to accomplish network transmissions,
- expansion of categories of works exempted from the performance rights beyond current coverage of nondramatic literary and music works, and
- creation of new safeguards to counteract the risks imposed by digital transmissions.[13]

The TEACH Act

Pursuant to the recommendations of the Copyright Office, Congress sought to enact legislation that would alter § 110(2) to include provisions specifically for distance education and digital transmissions. In March 2001, Senator Orrin Hatch introduced S. 487, the TEACH Act proposal, to

> allow[ ] 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.[14]

Passing the Senate in June 2001, S. 487 was incorporated into H.R. 2215, the 21st Century Department of Justice Appropriations Authorization Act. H.R. 2215 authorized funding for the Justice Department, modified its enforcement powers, and

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[10] 17 U.S.C. § 107. In addition, a four-part test described in § 107 provides guidance to courts that must decide what constitutes fair use of a copyrighted work in a particular context. Factors to be considered are (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used as it relates to the whole work, and (4) the effect of the use upon the potential market or value of the work. *Id.*

[11] P.L. 105-304, § 403 (Oct. 28, 1998).

[12] U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION (May 1999), available online at [http://www.copyright.gov/reports/de_rprt.pdf].

[13] S.Rept. 107-31, 107th Cong., 1st Sess. 5-6 (2001).

[14] *Id.* at 3.

amended other laws, including copyright law. After passing the House in July 2001, H.R. 2215 passed the Senate in October 2002 and was signed into law in November 2002.

As amended by the TEACH Act, § 110(2) now encompasses broadcasting of digital transmissions during synchronous and asynchronous distance education. Synchronous distance education programs are real-time performance programs where students and educators communicate via an electronic medium. Asynchronous distance education permits students to access materials at a time of their choosing, typically over the Internet.[15]

Expanded Works. Works permitted to be used for digital transmission during a distance educational broadcast now include —

- performances of nondramatic literary or musical work, excluding operas, music videos, and musicals, in their entirety;
- any other work, if only reasonable and limited portions of the performance are used; and
- displays of any work comparable to the use typical in face-to-face displays.[16]

Although what constitutes a "reasonable and limited portion" of a work is not defined in the statute, the legislative history of the Act suggests that determining what amount is permissible should take into account the nature of the market for that type of work and the instructional purposes of the performance.[17] For example, the exhibition of an entire film may possibly constitute a "reasonable and limited" demonstration if the film's entire viewing is exceedingly relevant toward achieving a educational goal; however, the likelihood of an entire film portrayal being "reasonable and limited" may be rare.[18]

Limitations. The TEACH Act places two primary exceptions on the types of material subject to the distance education exemption. First, materials that are produced or marketed, including textbooks and compilations, for the express purpose of distance education are excluded from the general exemption.[19] Thus, this exception seeks to preserve the general market for distance education materials as well as the incentives to create and distribute such material.

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[15] CRAIG JOYCE, ET AL., COPYRIGHT LAW § 906[A][2] (5th ed. 2000).

[16] 17 U.S.C. § 110(2).

[17] S.Rept. 107-31 at 7-8.

[18] 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.15[C][2][a] (2006).

[19] 17 U.S.C. § 110(2).

The second exception provides that the exemption is inapplicable if the performance or display comes from a copy[20] that is not lawfully made or acquired.[21] An inadvertent acquisition of an unlawful copy may not result in a disqualification from the exemption. However, actual knowledge or having a "reason to believe" that a copy is illegitimate may constitute an unlawful acquisition.[22]

Eligible Claimants for the Exemption. Only a governmental body or an accredited nonprofit educational institution can invoke the distance education exemption.[23] The Act defines "accreditation." State certification and licensing procedures accredit institutions of elementary or secondary education. Regional or national agencies, recognized by the Council on Higher Education Accreditation or the United States Department of Education, accredit postsecondary institutions with respect to an institution as a whole, not on course offerings alone.[24]

Conditions on Permitted Use. Section 110(2) further establishes conditions for a permitted use of a display or performance. First, the performance must be "directly related and of material assistance to the teaching content of the transmission."[25] According to the Act's legislative history, the drafters intended relevance and materiality to connect the copyrighted work with the educational use.[26] If the work is used as entertainment or as unrelated background, then materiality of the work would be inadequate.[27]

Second, the performances must be "made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session."[28] The legislative history indicates that either an instructor or a student may initiate the performance or display.[29]

"Actual supervision" in a distance learning context does not have the same meaning that may be ascribed to in-classroom-based instruction. The supervision requirement is flexible in distance education because asynchronous learning seldom occurs under an instructor's real-time supervision. The TEACH Act drafters sought

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[20] A copy is a material object that allows a work to be perceived, reproduced, or otherwise communicated directly or with the aid of a machine. 17 U.S.C. § 101.

[21] 17 U.S.C. § 110(2).

[22] *Id.*

[23] 17 U.S.C. § 110(2)(A).

[24] 17 U.S.C. § 110.

[25] 17 U.S.C. § 110(2)(B).

[26] S.Rept. 107-31 at 10-11.

[27] *Id.*

[28] 17 U.S.C. § 110(2)(A).

[29] S.Rept. 107-31 at 9.

not to limit asynchronous learning and therefore do not require "actual supervision" in these environments.[30]

Further, the performance must be "offered as a regular part of the systematic mediated instructional activities" of qualifying entities.[31] The TEACH Act defines these activities to consist of integral parts of the class experience, controlled by the instructor, that are similar to the type of performance that would take place in a live classroom setting.[32] The Act adjusts its restrictions accordingly. Materials excluded from the "mediated instructional activities" context are "textbooks, course packs, or other material in any media" typically purchased or owned by students for their own use.[33]

Impact on Fair Use. The determination of a legitimate fair use of a copyrighted work is generally both fact- and case-specific. The Copyright Office and the Senate Judiciary Committee, however, are quite explicit in expressing the view that nothing in the amended exemption for distance education should be construed as altering the scope and applicability of fair use:

> Fair use is a critical part of the distance education landscape. Not only instructional performances and displays, but also other educational materials or student downloading of course materials, will continue to be subject to the fair use doctrine. Fair use [applies] as well to instructional transmissions not covered by the changes to section 110(2) ... 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.[34]

Ephemeral Copies. In addition to 17 U.S.C. § 110, the TEACH Act amends 17 U.S.C. § 112, entitled "Limitations on exclusive rights: Ephemeral recordings." An ephemeral recording is a copy of a work made for the purposes of later transmission by a broadcasting organization entitled to transmit the work. It adds a new subsection (f) to permit an educational institution transmitting an authorized performance or display under § 110(2) to load copies or phonorecords of the performance or display on its servers for transmission at the request of students. The provision intends to facilitate asynchronous education.

However, the allowance for ephemeral copies does not authorize the wholesale conversion of print or other analog versions of works into digital formats. A permitted conversion in this circumstance will be limited to the amount of the work authorized under § 110(2) and, according to the Senate Judiciary Committee, only

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[30] *Id.*

[31] 17 U.S.C. § 110(2)(A).

[32] 17 U.S.C. § 110.

[33] *Id.* However, because they are excepted from the § 110(2) exception, materials produced or marketed primarily for the express purpose of distance education are necessarily excluded from consideration under "mediated instructional activities."

[34] S.Rept. 107-31 at 15, *citing* the REPORT ON COPYRIGHT AND DIGITAL AND DISTANCE EDUCATION, *supra* note 12, at 161-62 (footnote omitted).

if no digital version of the work is available, or the available digital version is encrypted.[35]

Conditions on Recipients. The TEACH Act restricts the type of recipients to which a display or performance can be presented. For schools, permissible recipients are officially enrolled students.[36] In government, permissible recipients are officers or employees who receive the transmissions in the scope of their duties.[37]

Transmissions must also be made solely for and, to the extent "technologically feasible," limited to permitted recipients.[38] The TEACH Act drafters attempted to clarify that sole, technological feasibility does not include

> [an] impos[ition of] 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.[39]

Mandatory Preconditions for the Exemption. Section 110(2)(D) establishes requirements that the transmitting institution must follow to guard against copyright infringement of the works used under the distance learning exemption. The inclusion of such safeguards was deemed necessary, according to the Act's drafters, because digital content may be more easily copied and distributed than material transmitted through analog broadcasts.[40]

The TEACH Act directs the transmitting institution to institute "policies regarding copyright."[41] These policies may provide informational materials, requests for compliance, and notice to students that materials in use may be subject to copyright protection. As the legislative history suggests, the TEACH Act drafters intend these policies to promote guidance and compliance rather than to be used as a threat of punishment for failing to respect copyright rights.[42]

If the institution uses digital transmissions in distance learning, it must apply "technological measures"[43] that reasonably prevent retention of the work in

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[35] S.Rept. 107-31 at 14.

[36] 17 U.S.C. § 110(2)(C)(i).

[37] 17 U.S.C. § 110(2)(C)(ii).

[38] 17 U.S.C. § 110(2)(C).

[39] S.Rept. 107-31 at 11.

[40] H.R. Rept. 107-687, 107th Cong., 2d Sess., at 11 (2002).

[41] 17 U.S.C. § 110(2)(D)(i).

[42] S.Rept. 107-31 at 11.

[43] 17 U.S.C. § 110(2)(D)(ii)(I). While the TEACH Act remains silent on what constitutes a technological measure, a Copyright Office report suggested that although unauthorized downstream copying technologies were being developed, they were not yet in widespread

(continued...)

accessible form for longer than the class session,[44] and prevent unauthorized further dissemination of the work to others.[45] Although institutions must ensure that these two concerns are addressed, they have discretion over the manner of implementation.

The reference to retention "longer than a class session" relates back to earlier portions of the statute where exemptions for performances are given "as an integral part of the class session."[46] The legislative history suggests a "class session" in asynchronous distance education to mean a period during which a student is logged on to the server of the institution making the display or performance, and is likely to vary with the needs of the student and with the design of the particular course.[47] In an attempt to clarify, the Senate Judiciary Committee suggested that this "class session" should resemble an actual face-to-face mediated class session for the purposes of asynchronous distance education, not a particular time of duration.[48] The legislative history also suggests that the performance or display should not remain in the possession of the distance education recipient for longer than uses in a particular class session.

The reference to "accessible form" qualifies technological protection measures. According to the drafters of the Act, educators could take measures to encrypt the digital transmission containing the work and limit access to the digital work using a password; such measures may constitute sufficient protection against excessive retention.[49]

What are the obligations imposed here? The House Report, though not the Senate Report, extends the possibility that there is no duty to guarantee that retention and further dissemination of the transmitted material will not occur. Instead, the obligation of reasonable prevention posits an objective "reasonableness" standard regarding the ability of technological protection measures to prevent further retention and dissemination.[50] Examples of current protection measures that might suffice are inhibitors that prevent the copying of streamed material and digital rights management systems that limit access and use of downloaded materials.[51] In

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[43] (...continued)
use. *Promoting Technology in Education: Turbo-Charging the Buses on the Information Highway; Hearing on S. 487 Before the Senate Comm. on the Judiciary*, 107th Cong., 1st Sess. (2001), at 58.

[44] 17 U.S.C. § 110(2)(D)(ii)(I)(aa).

[45] 17 U.S.C. § 110(2)(D)(ii)(I)(bb).

[46] 17 U.S.C. § 110(2)(A).

[47] S.Rept. 107-31 at 12.

[48] *Id.*

[49] *Id.*

[50] H.R. Rept. 107-687 at 107th Cong., 2d Sess. 13 (2002).

[51] *Id.*

addition, the drafters do not suggest that these measures are exclusive; rather, further developments may constitute protection measures for purposes of this Act.[52]

Under the § 110(2) exemptions, a transmitting body may 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."[53] According to the House Report, the "conduct" to which this provision refers is limited to action taken under the TEACH Act, not to the broader activities of the transmitting body that do not relate to distance education.[54] This requirement also appears to act only as a condition for eligibility and does not shield conduct that may be subject to sanctions under other sections of the Copyright Act.[55] Those failing to comport with these requirements simply forfeit the ability to invoke the § 110(2) exemption against charges of copyright infringement.

The Broadcast Flag

Digital television (DTV) is a new service representing a significant development in television transmission technology. DTV can provide sharper pictures, a wider screen, CD-quality sound, better color rendition, multiple video programming, and a single program of high definition television (HDTV).[56]

Developing a protocol for transmitting and receiving digital television in a way that accommodates competing interests of content providers (e.g., movie studios and television networks) and consumers has proved challenging. Digital content can be easily duplicated and distributed, especially with the aid of the Internet. Unlike other types of content, duplication of digital information does not degrade the original. For example, the quality of a program recorded on an analog VHS tape degrades after successive copies, but content delivered through a DVD may be copied almost infinitely with little to no effect on display and sound quality. It is due to the ease and inexhaustible potential of copying digital media, coupled with the proliferation of peer-to-peer file-sharing services,[57] that content owners approach new DTV technology with some trepidation.

The broadcast flag was created as a possible solution to prevent users from unlawfully manipulating or pirating DTV content. The "flag," an encrypted tag signal, is buried into a digital transmission. The flag is adaptable: it can create time

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[52] *Id.*

[53] 17 U.S.C. § 110(2)(D)(ii)(II).

[54] H.R. Rept. 107-687 at 12.

[55] *Id.*

[56] For more information on digital television, see CRS Report RL31260, *Digital Television: An Overview*, by Lennard G. Kruger, and CRS Report RS22217, *The Digital TV Transition: A Brief Overview*, by Lennard G. Kruger and Linda K. Moore.

[57] For more information concerning peer-to-peer file sharing, see CRS Report RL31998, *File-Sharing Software and Copyright Infringement: Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, by Brian T. Yeh and Robin Jeweler.

restrictions on viewing, it can prevent copying, or it can block a person's ability to edit a transmission. The broadcast flag is a form of digital rights management, or DRM.[58]

If implemented,[59] a broadcast flag system is likely to require that all devices receiving transmissions be flag compliant. Its potential use as an effective DRM for DTV transmissions was advanced after the Federal Communications Commission (FCC) determined that broadcast transmissions be digital by December 31, 2006.[60]

Congressional hearings on the broadcast flag revealed that educators and librarians who use digital materials in education are concerned that it could frustrate the utilization of digital television in distance education.[61] With the high potential cost of flag-compliant devices, they feel that the financial and technical burdens that a broadcast flag regime would place on students and educational institutions may be prohibitive.[62]

S. 2686, the Communications, Consumer's Choice, and Broadband Deployment Act of 2006. On May 1, 2006, Senator Ted Stevens introduced S. 2686, which would amend the Communications Act of 1934. Among its many provisions, the Digital Content Protection Act of 2006 (Title IV, Subtitle C of S. 2686) addresses the regulation of a broadcast flag. This provision represents, in part, a legislative response to a federal appellate court decision that denied the FCC authority to allow the use of the broadcast flag.[63] In addition to conferring such

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[58] The technology-based approaches and mechanisms that copyright owners may use to protect digital content are collectively referred to as DRM. As the name suggests, DRM applies only to digital media (which would include analog transmissions converted into digital format). Examples of other DRM include Internet video streaming protections, encrypted transmissions, and Content Scrambling Systems (CSS) on DVD, all of which limit the ability of users to copy or further disseminate the work protected by DRM. For more information on copyright protections and the broadcast flag, see CRS Report RS22106, *Copyright Protection of Digital Television: The "Broadcast Flag,"* by Angie A. Welborn.

[59] The FCC adopted a rule in November 2003 granting television broadcasters the right to use the broadcast flag in digital transmissions. However, the American Library Association and other interested parties filed a lawsuit that challenged the authority of the FCC to authorize the use of the broadcast flag system. In May 2005, the U.S. Court of Appeals for the D.C. Circuit vacated the FCC's order, finding that the agency lacked the statutory authority to promulgate such a rule. American Library Association v. Federal Communications Commission, 406 F.3d 689 (D.C. Cir. 2005).

[60] Federal Communications Commission, *In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service: Fifth Report & Order*, 12 F.C.C. Rec. 12809, 12811 (1997).

[61] *The Broadcast and Audio Flag: Hearing Before the Sen. Comm. on Commerce, Science, and Transportation,* 109th Cong., 2nd Sess. (2006) (statement of Jonathan Band, counsel of the American Library Association), at 1-5, *available on June 7, 2006 at* [http://commerce.senate.gov/pdf/band012406.pdf].

[62] *Id.*

[63] See *supra* note 59. For a summary and analysis of the court decision, see CRS Report (continued...)

authority upon the FCC, the bill directs the agency to promulgate regulations that would limit or modify the uses of the broadcast flag under specifically identified circumstances described in the bill. Section 342 requires the FCC to issue a regulation that will "permit government bodies or accredited nonprofit educational institutions to use copyrighted work in distance education courses pursuant to the Technology, Education, and Copyright Harmonization Act of 2002 and the amendments made by that Act."[64] crsphpgw

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[63] (...continued)
RS22106, *Copyright Protection of Digital Television: The "Broadcast Flag,"* by Angie A. Welborn.

[64] S. 2686, 109th Cong., 2d Sess. (2006)(bill as introduced).