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Copyright Exemptions for Distance Education: S. 487, the "Technology, Education, and Copyright Harmonization Act of 2001"

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Summary

S. 487, 107th Cong., 1st Sess. (2001), if enacted, would broaden copyright exemptions for digital materials used in distance education by accredited, nonprofit educational institutions. It would exempt, subject to specified conditions, digital transmissions of the performance of a nondramatic literary or musical work; reasonable and limited portions of *any* other work; or the display of a work in an amount comparable to what is typically displayed in the course of a live classroom session.

Introduction. S. 487, 107th Cong., 1st Sess. (2001), is entitled the "Technology, Education, and Copyright Harmonization Act" or the TEACH Act. The bill passed the Senate on June 7, 2001.[1] It was approved by the House Subcomm. on Courts, the Internet and Intellectual Property for action by the full Judiciary Committee on July 11, 2001. If enacted, it would broaden copyright exemptions for digital materials used in distance education by accredited, nonprofit educational institutions.

Background. Although the "fair use" defense may be the most widely known exception to liability for copyright infringement,[2] the Copyright Act provides other express statutory limitations on a copyright holder's exclusive right to control reproduction, distribution, public performance and display of protected material. For example, libraries and archives are expressly permitted to make reproductions for specified archival or circulating purposes.[3] 17 U.S.C. § 110 provides additional limitations on a copyright holder's exclusive rights.

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[1] 147 CONG. REC. S5995 (daily ed. June 7, 2001).

[2] 17 U.S.C. § 107.

[3] 17 U.S.C. § 108.

17 U.S.C. § 110 is entitled "Limitations on exclusive rights: Exemption of certain performance and displays." Among the exemptions encompassed in this section are those dealing with face-to-face classroom instructional activities and transmissions for instructional purposes in distance education. These subsections include:

- 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;[4] and
- the performance or display of a nondramatic literary or musical work through a transmission if it is a regular part of the systematic instructional activities of a governmental body or nonprofit educational institution; and, the performance or display is directly related and of material assistance to the teaching content of the transmission; and, the transmission is made (i) primarily for reception in classrooms, or (ii) for reception by persons who cannot be present in a classroom because of disability or special circumstances; or, (iii) to officers or employees of governmental bodies as a part of their official duties.[5]

The exemptions for distance education were originally enacted in 1976. They were based on "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."[6] Hence, the exemption has two basic components: performances and displays in the classroom and educational broadcasting of nondramatic literary or musical works to classrooms (or to offsite locales for the benefit of disabled persons).

In 1998, when Congress passed the Digital Millennium Copyright Act (DMCA), it directed the U.S. Copyright Office to study and report to Congress recommendations on "how to promote distance education through digital technologies ... while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works."[7] The Copyright Office issued its report in 1999.[8] To facilitate distance education using digital media, it recommended, among other things:

- eliminating the requirement of a physical classroom;
- clarifying 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 current coverage of nondramatic literary and music works; and

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[4] 17 U.S.C. § 110(1).

[5] Id. at § 110(2). This report examines the distance education aspects of § 110 (2), not transmissions to government bodies, which is not the focus of S. 487. § 110(2)(C)(iii).

[6] S. Rept.107-31, 107th Cong., 1st Sess. 4 (2001).

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

[8] U.S. Copyright Office, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION (May 1999).

- creating new safeguards to counteract the risks imposed by digital transmissions. [9]

The Copyright Office's study and recommendations form the basis for the TEACH Act.

The TEACH Act. The bill would amend § 110(2) to broaden the current exemption for educational broadcasting to encompass asynchronous distance education utilizing digital transmissions. But new exceptions to the exemption would be created to protect copyrighted content, particularly the market for instructional materials.

Section 110(2) of the Copyright Act would be amended to *expand* the scope of work in the current exemption for educational broadcasts from "a performance or display of a nondramatic literary or musical work" to exemption for digital transmission of:

- the performance of a nondramatic literary or musical work;
- reasonable and limited portions of *any* other work; or
- the display of a work in an amount comparable to what is typically displayed in the course of a live classroom session,

so long as the transmission is made under the supervision of an instructor as an integral part of a class session or as a regular part of mediated instructional activities; the content is directly related to and of material assistance to the teaching content of the transmission; and, to the extent technologically feasible, the reception of the transmission is limited to students officially enrolled in the applicable course. Further, the educational institution making the transmissions must have policies to educate staff and promote compliance with copyright laws. And, in the case of digital transmissions, the institution must apply technological measures designed to reasonably prevent students from retaining the transmission longer than the class session and limit unauthorized further dissemination of the transmission. Yet another condition, one that appears to be consistent with the anticircumvention provisions of the DMCA,[10] is that the educational 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."[11]

Excepted from the exemption for distance learning in their entirety are works produced or marketed primarily for performance or display as part of "mediated instructional activities transmitted via digital networks";[12] and, performances or displays given by means of an illegally acquired (*i.e.*, pirated) copy or phonorecord, so long as the educational institution knew or had reason to know that it was not lawfully made or acquired.

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[9] S. Rept. 107-31 at 5-6.

[10] 17 U.S.C. § 1201.

[11] S. 487, § 1(b)(1)adding a new subsection 17 U.S.C. § 110(2)(D)(ii)(II).

[12] The term "mediated instructional activity" is defined in the Act at § 1(b)(2). Its function is explained at 147 CONG. REC. S5991(Statement of Sen. Hatch): "[T]he bill maintains and clarifies the concept of 'mediated instruction activities,' which requires that the performance or display be analogous to the type of performance that would take place in a live classroom setting."

Ephemeral copies. Section 1(b)(2) of the TEACH Act would amend 17 U.S.C. § 112 entitled "Limitations on exclusive rights: Ephemeral recordings." It would add a new subsection (f) to permit an educational institution which transmits 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 intent of the provision is to facilitate asynchronous education, where students or working adults can take a class when it is convenient for them, at their own pace, not at a specific designated hour. [13]

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 only if no digital version of the work is available, or the available digital version is encrypted.

Status of textbooks and ancillary material. As stated above, material marketed primarily for performance or display as part of mediated instructional activities does not, by definition, come within the exemption for distance learning. Digital transmission of *other* performances and displays must be reasonable and limited to amounts comparable to what would typically be displayed in the course of a live classroom session:

> [A]lthough 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.[14]

Likewise, supplemental research materials in digital form, such as electronic course packs, e-reserves, and digital library resources, are not intended to be encompassed within the exemption. Thus, digital transmission of supplemental and ancillary course material is likely to be evaluated under a fair use standard.

Impact on fair use. Determining whether there is a legitimate fair use exemption from the copyright law is generally both fact and case-specific. Both the Copyright Office and the Senate Judiciary Committee, however, are quite explicit in expressing the view that nothing in an 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 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

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[13] S. Rept. 107-31 at 13-14.

[14] *Id.* at 9-10.

> than a limited portion of a dramatic work in a distance education program might qualify as fair use in appropriate circumstances.[15]

If enacted, S. 487 will substantially broaden the copyright law exemption for distance education by facilitating asynchronous digital dissemination of classroom instructional materials.

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[15] *Id.* at 15 *citing* the REPORT ON COPYRIGHT AND DIGITAL AND DISTANCE EDUCATION, *supra* at 161-162. (Footnote omitted.)