

## copyright corner

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### **The TEACH Act**

by Laura Gasaway

The TEACH Act retains the requirement that only nonprofit educational institutions and government agencies qualify for the exemption it provides. It broadens the exemption to the types of works that may be performed, relaxes limitations on the place of reception, but adds additional requirements and restrictions. These requirements are of three types: general requirements the transmitting institution must meet; information technology requirements the institution must satisfy; and requirements the individual teacher must meet, certainly under the institution's supervision.

#### **Eligible Transmitting Institutions**

Only accredited nonprofit educational institutions and government bodies qualify for the exemption. The bill defines accreditation for post-secondary education as that determined by regional or national accrediting agencies recognized by the U.S. Department of Education. For elementary and secondary education, however, accreditation means recognition by the applicable state licensing or certification procedures.

#### **Works Subject to the Exemption**

TEACH would expand the scope of works that may be performed or displayed in distance education to all categories of works, subject to two specific exclusions. The first exclusion is for works "produced or marketed primarily for performance or display as a part of mediated instructional activities transmitted via digital networks." This is aimed at protecting the developing market for

such materials. The second exclusion is for performances or displays that use a copy or phonorecord.

Even for the increased types of works that now may be performed or displayed, such performance or display is limited. While performances of nondramatic literary and musical works are unlimited, other types of works are restricted to "reasonable and limited portions," which would not include the entire work. One determines what constitutes reasonable and limited portions by considering both the pedagogical purposes of the performance and nature of the market for that type of work. For displays of works other than nondramatic literary and musical works, the limit is an amount comparable to that typically displayed in the traditional classroom. So, a display of an entire work might be appropriate and consistent with that which occurs in a face-to-face classroom when the works are those such as images, short poems, graphics and the like. It would not include displaying an entire book chapter or article.

#### **Mediated Instructional Activities**

Performances and displays must be made "by, or 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." This limitation does not eliminate enrolled student-initiated performances or displays as long as they are done under the instructor's supervision. Further requirements state the performance or display must be an integral part of the class session and not an unrelated performance or display for entertainment.

#### **Limitations on Receipt of Transmissions**

The TEACH Act eliminates the current restriction that transmissions be received in a classroom or other place normally devoted to instruction except for disabled individuals who cannot attend a regular classroom or government employees who attend a distance learning course embodying a performance of a copyrighted work as a part of their official duties. In place of the existing classroom restriction, TEACH requires the transmission be made solely to students officially enrolled in the course or to government employees who receive the transmission as a part of his or her official duties.

#### **Additional Safeguards to Counteract New Risks**

The use of digital transmission to deliver distance education subjects copyright holders to greater risks than did analog transmission. To deal with the increased risk encountered by copyright holders, TEACH introduces three types of new safeguards—educational, informational and technological. The following safeguard applies whether the transmission is digital or analog. Transmitting bodies or institutions that wish to take advantage of the exemption TEACH provides must implement copyright policies; provide information to members of the university community that accurately describes and promotes compliance with the copyright law; and provide notice to recipients that materials used in the course may be subject to copyright.

If the transmission is digital, the transmitting body must apply technological measures that prevent retention of the copyrighted work by

recipients for longer than the class session and further unauthorized dissemination of the work. "Class session" is generally defined as the period during which a student is logged onto the server.

#### **Transient and Temporary Copies**

TEACH exempts from liability those who participate in digitally transmitted performances and displays that are authorized by reason of copies or phonorecords made through automatic technical process for transmission or any distribution therefrom.

#### **Ephemeral Recordings**

In order to make asynchronous education a reality, however, transmitting institutions must be able to place on their servers works that will be performed or displayed for such courses. This means even more than one ephemeral recording if necessary to carry out the digital transmission. Any ephemeral recordings so made must be used exclusively for transmissions authorized under the amended Section 110(2).

In the situation where there is no digital version available to the institution or if the available digital version is subject to technological measures that prevent its use for the distance education course, the institution may digitize the analog version subject to the limitation that such digitization is restricted to the portion of such works authorized to be performed under Section 110(2).

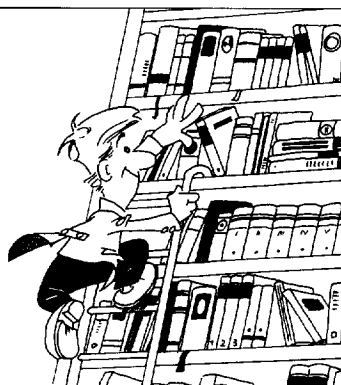
#### **Relationship to Fair Use and Contractual Obligations**

The TEACH Act agrees with the statement in the Register's Report that the fair use doctrine is still available and nothing in the bill is intended to limit or alter the scope of fair use. Further, nothing in TEACH is intended to alter the existing relationship between the exemptions under copyright law and licensing restrictions

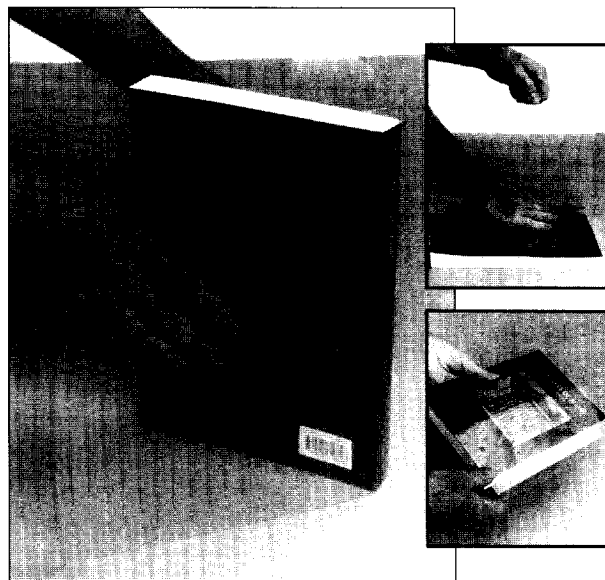
#### **PTO Report**

The Patent and Trademark Office is called upon to conduct a study and prepare a report for the information of Congress only. The report will address technological protection systems to protect copyrighted works in digital form but will have no impact on the meaning or applicability of either the Copyright Act or of TEACH.

S. 487 does not deal with other uses of copyrighted works in digital distance education. For example, it does not deal with basic library issues concerning providing materials to distance education students through electronic reserves or other digital library resources. Since these activities do not involve performances and displays under Section 110(2), they were viewed as being outside the scope of this amendment. Thus, the application of TEACH to libraries is severely limited since the provision of library services to users is viewed as covered under Section 108.



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