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# THE TEACH ACT: COPYRIGHT LAW AND ONLINE EDUCATION

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*In response to an increase in the use of the Internet to distribute distance education courses and resultant concerns that copyright law related to distance education activities had become outdated, Congress passed the Technology Education and Copyright Harmonization Act (TEACH Act) in November, 2002. Through this enactment, Congress sought to align educators' rights to use copyrighted materials in online courses with their rights to use such materials in traditional, classroom-based courses. In this Note, Kristine Hutchinson argues that they did not achieve this result. Rather, she suggests, the Act is fraught with requirements and vague terminology, which have caused confusion amongst educational institutions and have resulted in the failure to take advantage of the Act. In the end, despite the Act's shortcomings, Hutchinson concludes that the TEACH Act is viable legislation, and offers suggestions to aid educational institutions in making use of the expanded rights to use copyrighted materials in online courses enabled by the TEACH Act.*

## INTRODUCTION

In 1996, an accredited nonprofit university began offering an online course entitled “History of Jazz: New Orleans.”<sup>1</sup> Students enrolled in the course must purchase a print textbook and its accompanying compact disc (CD), but the university makes all other course materials available through the Internet. Students “attend” class by sitting in front of their computers—at home, at their offices, or wherever they have an Internet connection—and reading and interacting with the course website.

One of the goals of the course is to enable students to “identify African American musical elements that distinguish jazz from other musical styles.”<sup>2</sup> To this end, the text of the course describes beats,

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<sup>1</sup> This example is drawn from the description of the “History of Jazz: New Orleans” course that University of Washington offers online. See University of Washington, OpenUW: History of Jazz New Orleans, [http://www.outreach.washington.edu/openuw/asp/transform.asp?course=jazz&xml=jazz\\_intro1](http://www.outreach.washington.edu/openuw/asp/transform.asp?course=jazz&xml=jazz_intro1).

<sup>2</sup> *Id.*

melodies, and lyrics, and then asks students to play various tracks from the CDs that they purchased to demonstrate each example. In a comparable on-campus course, the professor would likely play each song, or portions of it, for the class to illustrate each example she described during her lecture, stopping to point out specific features to which she wanted students to pay particular attention.

Although a commercial entity, such as a stadium playing a song during a basketball game, would have to get a license from the copyright owners in the musical composition to play a track from a CD to its audience without being liable for copyright infringement,<sup>3</sup> a teacher in the course of face-to-face teaching activities needs no such license.<sup>4</sup> Section 110(1) of the Copyright Act of 1976 expressly exempts teachers at nonprofit educational institutions from liability for copyright infringement when they perform or display copyrighted works in their classrooms in the context of face-to-face teaching.<sup>5</sup> Until November of 2002, however, there was no specific statutory exemption for teachers of online courses.<sup>6</sup> Instead, online educators had to get licenses from copyright owners for their uses of copyrighted works in online courses or rely on the general statutory exception known as fair use.<sup>7</sup> Because the online performance of the exemplary tracks from the CD in the History of Jazz course would substitute for

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<sup>3</sup> A copyright owner, in all but one type of copyrighted work, has the exclusive right to reproduce, create derivative works from, distribute, perform publicly, and publicly display her work. 17 U.S.C. § 106 (2000). The exception is for sound recordings—the fixed recording of a musical composition—for which the public performance right is circumscribed and is available only by means of a “digital audio transmission.” §106(6). If a person who is not the copyright owner makes use of a copyrighted work in a way that contravenes any of those rights, she is liable for copyright infringement unless she has secured a license for her use of the copyrighted work or falls under a statutory exception. See 17 U.S.C. § 501 (amended 2002); see e.g., 17 U.S.C. §114 (describing exceptions and licensing for sound recordings).

<sup>4</sup> See § 110(1).

<sup>5</sup> Section 110(1) states that the performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made is not an infringement of copyright. § 110(1).

<sup>6</sup> By “online courses” and “online education,” I mean the provision of courses and/or course material over the Internet. This definition encompasses distance education courses that are delivered entirely via the Internet, and hybrid courses, which have both a classroom and an online component. “Online educators” are teachers or professors of such courses.

<sup>7</sup> The fair use exception is found in § 107. For discussion of how fair use analysis would operate, see *infra* Part I.B.3.

students' purchase of that CD, a court might have difficulty finding that the fair use exception applies in this context.<sup>8</sup> As a result, the online educator would be forced to secure a license from the copyright owner to integrate the audio clips into her course rather than asking students to purchase and play specific tracks from the CD independently. Licenses for online uses, however, particularly for popular media such as music and movies, can be prohibitively expensive.<sup>9</sup>

In an attempt to remedy the disparity between the legal uses of copyrighted works in face-to-face teaching and the legal uses in online education, Congress passed the Technology, Education and Copyright Harmonization Act (TEACH Act)<sup>10</sup> in November, 2002. The TEACH Act allows online educators to display all types of copyrighted works and to perform entire nondramatic literary and musical works and reasonable and limited portions of all other types of works.<sup>11</sup> As a compromise to gain these rights, online educators must provide protection against potential abuses of the copyrighted material. Thus, in order to secure the right to use greater types of copyrighted works in the course of online education, educators must have copyright policies in place to promote compliance with copyright law and must use technological protection measures to reasonably prevent unauthorized retention and dissemination of those copyrighted works.<sup>12</sup>

Many of the compromises made during the legislative process have limited the effect of the legislation. In some cases, the negotiating parties incorporated such limits into the Act itself—restricting the performances and displays of works that are not nondramatic literary or musical works to reasonable and limited portions of those works.<sup>13</sup> However, in many cases the limiting effects of the TEACH Act arguably were unintended. For example, because the TEACH

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<sup>8</sup> See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016-17 (9th Cir. 2001) (finding program that makes digital versions of songs available to users free of charge is not fair use because it usurps demand for compact disc versions of those songs); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996) (holding that sale of coursepack containing copyrighted materials without licenses from copyright owners is not fair use because it contravenes existing market for licenses and diminishes market demand for full versions of copyrighted works excerpted in coursepack). The effect on the market for a copyrighted work is the most important factor in a fair use analysis. See *infra* notes 65-67 and accompanying text.

<sup>9</sup> See discussion *infra* notes 53-59 and accompanying text.

<sup>10</sup> Technology, Education and Copyright Harmonization Act, Pub. L. No. 107-273, § 13301, 116 Stat. 1910 (2002) (to be codified at 17 U.S.C. §§ 110(2), 112(f)).

<sup>11</sup> See 17 U.S.C.A. § 110(2) (West Supp. 2003).

<sup>12</sup> See § 110(2).

<sup>13</sup> See § 110(2); see also discussion *infra* Part III.B. The TEACH Act also specifically excludes materials produced and marketed primarily for online educational use from coverage under the Act. § 110(2). While this exception is significant, the focus of this Note is

Act requires institutions to “reasonably prevent” unauthorized retention and dissemination of the copyrighted works that they use for online education, some institutions, which either do not know what they must do to meet this requirement or cannot afford to meet it, will choose not to rely on the legislation.<sup>14</sup> Still other limitations are the result of societal or market forces. These limiting factors include many educators’ lack of interest in using the expanded types of copyrighted works that the TEACH Act authorizes and the fact that many providers of online education do not qualify as accredited nonprofit educational institutions and are therefore ineligible to take advantage of the TEACH Act.<sup>15</sup>

Because congressional legislation must balance the competing interests of copyright owners and educators and because the educational community itself agreed to the compromises,<sup>16</sup> the TEACH Act is likely the most educator-friendly legislation that Congress will produce in the near future. Thus, while there are clear limitations to the application of the TEACH Act, educators should work within the frameworks of the TEACH Act and the general statutory exception of fair use to continue to develop creative and effective teaching and learning experiences for students in online courses.

This Note analyzes the process that led to the enactment of the TEACH Act to gain insight into the compromises that comprise the final version of the legislation, the Act’s consequences for online education, and the barriers to its implementation. Part I of this Note discusses the increase in popularity of online education as a means of distance education course delivery and the unique legal demands of that medium. Part II discusses the legislative response to this change in the provision of distance education. Part III of this Note analyzes the effects of the legislation and offers recommendations for implementation strategies to broaden its effect. Because the legislation is relatively recent, there is no empirical data available to show the impact of the TEACH Act on online education. As a result, this Note largely relies on personal interviews to uncover the nature of the TEACH Act’s implementation and effects. The passage of the TEACH Act marks an important step towards legitimizing and facilitating the provision of quality educational materials over the Internet, but barriers to implementation limit its effect. This Note offers an

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on bringing the rights of online educators to use copyrighted materials in their courses in line with the rights of teachers of traditional, face-to-face courses.

<sup>14</sup> See *infra* Part III.B.

<sup>15</sup> See *infra* Part III.A.

<sup>16</sup> See *infra* note 99 and accompanying text.

explanation for these limitations and suggests a framework through which educational institutions can take advantage of the TEACH Act.

## I

### THE RISE OF ONLINE EDUCATION AND THE BARRIERS TO ITS PROVISION

The Internet has become an increasingly popular way for schools to provide distance education. Beginning in the mid-1990s, educational institutions began using the Internet for distance education course distribution, and the number of institutions offering online courses has steadily increased since then.<sup>17</sup> In 2000, seventy percent of traditional two- and four-year colleges and universities offered online courses, up from forty-eight percent in 1998.<sup>18</sup> While there are many benefits of online education, there are also substantial costs, many of which educational providers did not predict when they jumped headfirst into the provision of online education. Section A of this Part analyzes the advantages of online education. Section B discusses the barriers that copyright law poses to its success.

#### *A. The Advantages of Online Education*

In the 1990s, at the beginning of the online education boom, some commentators believed that online education would eventually replace traditional methods of teaching and learning.<sup>19</sup> While this prediction seems unlikely to come to fruition,<sup>20</sup> online education has transformed the delivery of course content in many respects.

Online distance education allows students to access course materials at all hours of the day from anywhere around the world, provided they have an Internet connection. Unlike radio broadcasting or closed-circuit television,<sup>21</sup> which require students to be in front of

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<sup>17</sup> Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., Distance Education at Postsecondary Education Institutions: 1997-98, at 41 (1999) [hereinafter NCES Report 1997-1998], <http://nces.ed.gov/pubs2000/2000013.pdf>.

<sup>18</sup> Rachel Konrad, E-Learning Companies Look Smart Even in a Down Market, CNET News.com (Mar. 6, 2001), at <http://news.com.com/2100-1017-253671.html>.

<sup>19</sup> See, e.g., Coopers & Lybrand LLP, The Transformation of Higher Education in the Digital Age (1998), <http://www.pwcglobal.com/extweb/pwcpublications.nsf/DocID/F3C722577337B4408525699200725A4E>.

<sup>20</sup> See, e.g., Interview with Ann Clarkson, Director of Online Course Production, New York University School for Continuing and Professional Studies, in New York, N.Y. (Feb. 14, 2003) [hereinafter Interview with Ann Clarkson] (transcript on file with *New York University Law Review*) (predicting that most people will always prefer face-to-face classes, just as they will always prefer books in print form to e-books).

<sup>21</sup> Radio broadcasting and closed-circuit television were the primary means of distributing distance education when Congress debated the Copyright Act in the late 1960s and early 1970s. See U.S. Copyright Office, Report on Copyright and Digital Distance Educa-

their radios or televisions at specified times each week, online distance education offers the benefit of flexibility. As a result, online courses improve access for students who need to be able to take classes on their own schedules—including people with children, jobs, or both.<sup>22</sup>

Online courses also can make education more accessible for students who have geographical limitations. During a hearing on the TEACH Act in the Senate Committee on the Judiciary, Richard M. Siddoway, principal of the Utah Electronic High School testified, “Perhaps the most significant benefit [of distance education] is the availability of courses to students who live in remote areas of the state.”<sup>23</sup> Students who live in rural areas often have to travel long distances to the nearest schools, which tend to be very small and offer a limited range of classes.<sup>24</sup> Online distance education also can be advantageous for disabled students.<sup>25</sup> By offering such students an interactive form of education in which they can participate from their homes, online education provides them an educational opportunity to which they otherwise would not have access without the burdens of traveling to school and between classrooms.

In addition to improving access to educational opportunities on a broad level, Internet technologies also improve students’ access to professors. E-mail and discussion boards allow students to send communications at their convenience and professors to respond at theirs.

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tion 77 (1999) [hereinafter Copyright Office Report], [http://www.copyright.gov/reports/de\\_rprrt.pdf](http://www.copyright.gov/reports/de_rprrt.pdf).

<sup>22</sup> See Nat’l Ctr. For Educ. Statistics, U.S. Dept. of Educ., *A Profile of Participation in Distance Education: 1999-2000*, at 12, 13 fig.3 (Nov. 2002); Nat’l Educ. Ass’n Higher Educ. Research Ctr., *Update: The Promise and the Reality of Distance Education*, at 3 (Oct. 2002) [hereinafter NEA Update] (“[T]he typical online student is over 25, employed, and has previous college experience.”); Rachel Hartigan Shea, *E-Learning Today: As an Industry Shakes Out, the Survivors Offer No-Frills Education for Grown-Ups*, U.S. News & World Rep., Oct. 28, 2002, at 55 (“[T]he largest audience for online education has turned out to be working adults who need to hold on to their full-time jobs while they get their degrees.”).

<sup>23</sup> *Promoting Technology and Education: Turbo-Charging the School Buses on the Information Highway: Hearing Before the Sen. Comm. on the Judiciary, 107th Cong. 31-32 (2001)* [hereinafter Senate Hearing] (statement of Richard M. Siddoway, President, Utah Electronic High School).

<sup>24</sup> *Id.* at 30-32 (“An example would be West Desert High School in Trout Creek, which has a total 7th through 12th grade population of 29. Although this school does not have a level-4 licensed math teacher, every senior was able to take calculus last year through distance learning.”).

<sup>25</sup> The text of the old version of § 110(2) of the Copyright Act makes it clear that distance education provides increased access for disabled students. See 17 U.S.C. § 110(2) (2000) (limiting exception for distance education to performances and displays intended for “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”).

For students learning at a distance, this interpersonal contact is essential and is one of the many advantages of online distance education over other forms of distance education course delivery.<sup>26</sup>

Enabling discussion and interaction in a manner other than face-to-face also can have benefits for students who might feel uncomfortable speaking in front of a group of people or approaching a professor personally. Shy students, for example, may be more likely to participate in online discussions because the format diminishes the intimidation that they feel speaking in front of a large group of their peers.<sup>27</sup> Online education also can be beneficial for female students, who might not feel as comfortable speaking up in a face-to-face classroom environment.<sup>28</sup> For student-parents, students with jobs, disabled students, and students who do not feel comfortable speaking up in traditional classrooms, online education offers increased access to educational opportunities.

Online education also offers the potential to improve teaching methods significantly. Internet technologies enable professors to tailor their courses to meet the individual learning needs of their students with relatively little additional effort.<sup>29</sup> The same method of instruction does not work for all students.<sup>30</sup> With online education, a

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<sup>26</sup> See Copyright Office Report, *supra* note 21, at 15 (finding that online delivery of distance education course offers better student-educator interaction than traditional distance education).

<sup>27</sup> Jeffrey R. Young, "Hybrid" Teaching Seeks to End the Divide Between Traditional and Online Instruction, *Chron. of Higher Educ.*, Mar. 22, 2002, at A33.

<sup>28</sup> See, e.g., Dale Mann et al., *West Virginia Story: Achievement Gains From a State-wide Comprehensive Instructional Technology Program* 34-35 (1999) (finding that female students, as part of program in West Virginia public schools using computers to teach basic skills, found "computers more accessible than their teachers to their particular learning needs [, which] might indicate that computers, unlike some teachers, respond in the same ways to both girls and boys and that either sex can ask questions, linger, or repeat activities on a computer"), <http://www.mff.org/pubs/ME155.pdf>; Nat'l Ctr. for Educ. Statistics, U.S. Dept. of Educ., *A Profile of Participation in Distance Education: 1999-2000*, at 27 (2002) (using multivariate analysis to find that women were more likely than men to participate in undergraduate distance education); Sarah Carr, *Students Appear More Willing to Discuss Personal-Health Issues Online*, *Chron. of Higher Educ.*, Oct. 13, 2000, at A68 ("The focus is on the content and the thoughts rather than on the physical body of the speaker." (quoting Jennifer Lieberman, assistant director of online instructor development at OnlineLearning.net)).

<sup>29</sup> See Frank Newman & Jamie Scurry, *When Teaching Clicks: Online Technology Pushes Pedagogy to the Forefront*, *Chron. of Higher Educ.*, July 13, 2001, at B7.

<sup>30</sup> See generally Howard Gardner, *Frames of Mind: The Theory of Multiple Intelligences* (2d ed. 1993) (describing theory that people are intelligent in different ways and discussing impact of multiple intelligences on education); Richard M. Felder & Linda K. Silverman, *Learning and Teaching Styles in Engineering Education*, 78 *Engineering Educ.* 674 (1988) (synthesizing past research on educational psychology into four learning styles—sensing and intuitive, visual and auditory, inductive and deductive, and active and reflective); Young, *supra* note 27.



professor can choose to put course materials online in different formats for students with different learning styles. For students who are audio learners, for example, the History of Jazz professor could choose to provide streaming audio versions of lectures and clips from the songs that she describes in those lectures. For people who are visual learners, lectures could be available online in full-text form and pictures of the sound waves could be displayed on the screen.<sup>31</sup>

Perhaps more importantly, however, online education offers distance educators the opportunity to make their courses interactive. For example, the University of Colorado at Boulder's College of Business and Administration offers its students the opportunity to go inside a microcomputer, using virtual reality, to "examine its components."<sup>32</sup> The use of such technologies improves comprehension for students who learn better by experimenting and by seeing the practical application of particular concepts.<sup>33</sup>

### *B. Copyright Law Poses Obstacles for Providers of Online Education*

While there are many advantages to online education and the number of providers has steadily increased in recent years, providers of online education have experienced considerable setbacks. Educational institutions have faced higher costs than they expected, due to the need to provide technological infrastructures, to support professors when putting courses online, and to secure licenses for copyrighted materials used in their courses.<sup>34</sup> In fact, securing the rights to

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<sup>31</sup> See Sarah Mahoney, Laptops Win Over the Skeptics, Even in Maine, N.Y. Times, Mar. 5, 2003, at B8 (describing student's use of pictures of sound waves produced by howling wolves when studying Jack London's *The Call of the Wild*).

<sup>32</sup> Newman & Scurry, *supra* note 29.

<sup>33</sup> See, e.g., John Dewey, *Democracy and Education* 139, 142-43 (The Free Press 1997) (1916) ("When we experience something, we act upon it, we do something with it; then we suffer or undergo the consequences. We do something to the thing and then it does something to us in return . . . . We learn something."); Valerie N. Morpew, *Web-Based Learning and Instruction: A Constructivist Approach*, in *Distance Learning Technologies: Issues, Trends and Opportunities* 1, 2 (Linda K. Lau ed., 2000) ("The constructivist perspective dominates learning theory today. Constructivists view knowledge as something that a learner actively constructs in his/her environment. Through meaningful learning experiences, a learner co-constructs new knowledge in tandem with those who share his/her learning environment."); Newman & Scurry, *supra* note 29 ("For some time now the evidence has shown that, when students are actively involved in a self-driven learning project, they learn more and remember it longer than when they are passively sitting and listening.").

<sup>34</sup> See, e.g., Sarah Carr, Is Anyone Making Money on Distance Education?, *Chron. of Higher Educ.*, Feb. 16, 2001, at A41 (discussing direct and indirect costs associated with online education and effects on profitability of programs); Katie Hafner, Lessons Learned at Dot-Com U., N.Y. Times, May 2, 2002, at G1 (discussing prohibitively high costs of online education); Jeffrey R. Young, Pricing Shifts by Blackboard and WebCT Cost Some

use copyrighted materials has proven to be one of the highest costs of providing high quality online education.<sup>35</sup> While teachers of face-to-face courses may rely on the specific statutory exception of § 110(1) of the Copyright Act for their uses of copyrighted works, online educators had no such exception prior to the TEACH Act and instead had to rely on expensive licenses.<sup>36</sup> While the general statutory exception of fair use may apply to online educators' uses of copyrighted works, educators have expressed uncertainty as to its application and have largely chosen to rely on licenses for their uses of copyrighted works or have chosen not to use them at all.<sup>37</sup> As a result, online educators have borne high costs for their uses of copyrighted works.

In response to unexpectedly high costs and lower than anticipated revenues, most of the new companies that formed to provide course content and software for online courses had failed or changed their business plans by 2002.<sup>38</sup> Despite these significant problems resulting from high costs and the failure of many online ventures, online education as a mode of teaching is here to stay.<sup>39</sup> The surviving online education providers continue to struggle to cover the high costs associated with developing quality online education, especially those associated with licensing materials, but the passage of the TEACH Act provides an opportunity for online education to thrive.

### 1. *The Availability of a Specific Statutory Exception*

Prior to the passage of the TEACH Act, there was no specific statutory exception that covered uses of copyrighted works for online

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Colleges Much More, *Chron. of Higher Educ.*, Apr. 19, 2002, at A35 (reporting increases in costs of course management software).

<sup>35</sup> See Hafner, *supra* note 34.

<sup>36</sup> See *infra* Part I.B.2.

<sup>37</sup> See Copyright Office Report, *supra* note 21, at 37-39 (describing infrequent use of licensing and reasons for infrequency).

<sup>38</sup> NEA Update, *supra* note 22, at 1. Whereas in 1998, when New York University announced its for-profit venture, NYUOnline, the New York Times headline read, "N.Y.U. Sees Profits in Virtual Classes." Karen W. Arenson, *N.Y. Times*, Oct. 7, 1998, at B8. By November of 2001, NYU had sunk \$25 million into the venture without seeing a positive return on its investment. Hafner, *supra* note 34. Similarly, Columbia University pulled the plug on its for-profit venture, Fathom, after three years and a more than \$25 million investment. See Karen W. Arenson, *Columbia's Internet Concern Will Soon Go Out of Business*, *N.Y. Times*, Jan. 7, 2003, at B4.

<sup>39</sup> Telephone Interview with Matthew Pittinsky, Chief Executive Officer and Co-Founder, Blackboard, Inc. (Feb. 14, 2003) [hereinafter Interview with Matthew Pittinsky] (transcript on file with *New York University Law Review*) ("[T]here's a difference between the legal entity folding and the actual activity ending . . . . [Y]ou read a lot about . . . things like NYUOnline, University of Maryland, but when you actually look at the institutions, they're doing more and more, as measured by courses and enrollment, online teaching than they ever did.").

education. Whereas § 110(1) covers such uses for face-to-face instruction,<sup>40</sup> § 110(2), which initially provided for uses of some copyrighted works for distance education, became obsolete due to the rise in popularity of the Internet as a means of distance education course distribution. Additionally, § 110(2) limited performances and displays to transmissions to classrooms, to the disabled, or to government employees in the scope of their employment.<sup>41</sup> Because online education students do not sit together in classrooms, this statutory exception does not cover online educators' uses of copyrighted works.<sup>42</sup>

Whereas teachers in the context of face-to-face instruction can perform or display all types of copyrighted works under § 110(1) of the Copyright Act,<sup>43</sup> under § 110(2), teachers of distance education courses could display all types of copyrighted works, but could perform only copyrighted nondramatic literary or musical works.<sup>44</sup> Thus, a distance educator could show stills from a motion picture, but could not show even portions of the film itself. The old version of § 110(2) therefore did not allow online educators to use copyrighted materials in a way comparable to their peers teaching traditional face-to-face courses and caused students in online courses to have less engaging and effective educational experiences. As a result, until the passage of the TEACH Act in November, 2002, online educators had no effective statutory exception allowing them use of copyrighted materials.

## 2. *Securing Licenses for Copyrighted Works for Online Education Is Prohibitively Expensive*

The clearest way for an educator to ensure that she has the right to use a copyrighted work in online education is to obtain a license for her particular use of the work. As long as the educator abides by the terms of the license and the copyright owner had the right to grant it, the license ensures that the copyright owner cannot have a valid cause

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<sup>40</sup> See 17 U.S.C. § 110(1) (2000); *supra* note 5.

<sup>41</sup> See § 110(2).

<sup>42</sup> The legislative history of § 110 indicates, "Clauses (1) and (2) between them are intended to cover all of the various methods by which performances or displays in the course of systematic instruction take place." H.R. Rep. No. 94-1476, at 81 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5695.

<sup>43</sup> § 110(1). Section 101 of the Copyright Act defines "display" as follows: "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." § 101. About performance, § 101 says, "To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." § 101.

<sup>44</sup> § 110(2).

of action against her for infringement. While licenses offer clarity, educators have experienced various difficulties in obtaining them for online educational uses.

Educators have reported problems finding copyright owners, particularly for older works and for works only published on the Internet.<sup>45</sup> Equally problematic is that even when educators can locate a copyright owner, that person may only have the right to license particular uses of the work.<sup>46</sup>

The delay involved in the process also can be prohibitive. Because educators often decide to use a copyrighted work with much shorter notice than the months it can take to obtain licenses, these delays can force educators to use different, perhaps less apt, sources or to decide not to develop particular kinds of courses.<sup>47</sup> This is particularly true when the copyrighted works that educators want to use are popular.<sup>48</sup> Educational institutions would have to expend significant resources if they wanted to license popular copyrighted works, such as music, for online education: “[M]usic is impossible. You really would have to bring a specialized clearance person to do the

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<sup>45</sup> Copyright Office Report, *supra* note 21, at 41-42 (“In the digital environment, in which individual authors can easily disseminate their works without utilizing an established publisher as an intermediary, this problem may be even greater.”).

<sup>46</sup> *Id.* at 42. For example, if the History of Jazz professor wanted to use a clip from a song as part of her course, she might know that performing rights societies such as the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) have the right to license the public performance of all music in their extensive libraries, but she may not realize that public performance is not the only exclusive right of copyright owners implicated in the context of a use for online education. Internet transmissions may also involve the rights of the copyright owners in music to reproduce and distribute their works and the rights of the copyright owners in sound recordings to perform publicly, reproduce, and distribute their works.

<sup>47</sup> See Dan Carnevale, *Slow Start for Long-Awaited Easing of Copyright Restriction*, *Chron. of Higher Educ.*, Mar. 28, 2003, at A29 (discussing professor who shows parts of movies in her traditional courses, but before TEACH Act chose not to do so in her online courses); Interview with James Burger, Manager of Administration Research & Rights, Columbia University Digital Knowledge Ventures (DKV); Corrinne Collett, Manager, Research & Rights, and Editor, Visual & Archival Resources, DKV; Tara Montgomery, Editorial Director, Fathom, Inc.; and, Kathryn Pope, Manager, Research & Rights, and Editor, Visual & Archival Resources, (DKV), in New York, N.Y. (Feb. 25, 2003) [hereinafter *Group Interview*] (transcript on file with *New York University Law Review*) (Statement of Corrinne Collett) (“We’ve stayed away from some serious art history courses because the time it takes to convince the museums to let you use the materials can be difficult.”); Univ. of Md. Univ. Coll., *Promotion of Distance Education Through Digital Technologies*, Written Submission to the Copyright Office, Feb. 5, 1999, at 4 (“The length of time it takes to get permission is a barrier to delivering the content in digital form as part of a course.”) <http://www.copyright.gov/disted/comments/init028.pdf>.

<sup>48</sup> Cf. Copyright Office Report, *supra* note 21, at 157-58 (describing difficulty of obtaining licenses for audiovisual works as one of main considerations behind enacting TEACH Act).

music because it'd be so difficult."<sup>49</sup> Most nonprofit educational institutions do not have such resources; rather, they rely on individual faculty members, librarians, or legal counsel to secure licenses for online educational uses.<sup>50</sup>

While online education enables professors to tailor their courses to match students' different learning styles,<sup>51</sup> licensing delays make it impossible for them to make changes to their preset lesson plans as they go along in response to perceived changes in students' learning needs.<sup>52</sup> By not enabling online educators to make use of copyrighted works in a substantially similar way to educators in traditional classrooms, licensing delays cause students who take online courses to have an educational experience that is arguably inferior to their counterparts in traditional classroom-based courses.

In addition to the efforts needed to obtain a license,<sup>53</sup> the licenses themselves can be extraordinarily expensive.<sup>54</sup> University of Maryland University College (UMUC) reports spending \$1200 to place an article from *The Washington Post* in its electronic reserves for a course.<sup>55</sup> Making a copy of the same article in print form would have cost UMUC only fifty dollars.<sup>56</sup> New York University (NYU) experienced similar problems when it was prepared to spend \$600,000 on the development of an online education film course, which would have used five- to thirty-second clips from films.<sup>57</sup> After spending considerable time and money, the school abandoned its plan when it was unable to secure the rights to use the clips.<sup>58</sup> The NYU film

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<sup>49</sup> Group Interview, *supra* note 47 (Statement of Corrinne Collett).

<sup>50</sup> Copyright Office Report, *supra* note 21, at 39-40.

<sup>51</sup> See *supra* Part I.A.

<sup>52</sup> Dan Carnevale, Turning Traditional Courses into Distance Education, *Chron. of Higher Educ.*, Aug. 4, 2000, at A37 ("In a conventional course, a professor can change lesson plans as necessary, perhaps grabbing a VCR and showing a video instead of sticking to the lecture. But online education requires any movie or film that is played to have copyright requests taken care of well in advance." (quoting Lawrence Ragan, Director of Instructional Design, Pennsylvania State University World Campus)).

<sup>53</sup> Group Interview, *supra* note 47 (Statement of James Burger) ("A lot of the costs of what we're talking about we calculate in time."); Group Interview, *supra* note 47 (Statement of Kathryn Pope) ("Those types of costs are often what we have to think about more than most licensing fees.").

<sup>54</sup> Copyright Office Report, *supra* note 21, at 43 ("Charges for digital uses of material are often significantly higher than comparable licenses for analog uses—sometimes too high to be affordable for nonprofit education.").

<sup>55</sup> Univ. of Md. Univ. Coll., *supra* note 47, at 4.

<sup>56</sup> *Id.*

<sup>57</sup> Cf. Senate Hearing, *supra* note 23, at 19 (statement of Gerald A. Heeger, President, University of Maryland University College) (relating story of "major university" with "highly ranked cinema program").

<sup>58</sup> *Id.* ("Some people never responded, others demand [sic] a great deal of money, some simply said no. In the end, after losing a substantial amount of money, the failure to secure

course provides an example of how the high costs associated with securing rights to content can have an impact on pedagogy. As a result, online education providers choose to offer only those courses they can afford to produce, even when those courses might not be as effective in an online format as courses that have higher production costs.<sup>59</sup>

### 3. *Availability of the Fair Use Exception*

Prior to the TEACH Act, if educators elected not to pursue licenses to use copyrighted works in online education, they generally made that decision believing that their use qualified as a fair use under § 107 of the Copyright Act.<sup>60</sup> Section 107 provides an exception to the exclusive rights of copyright owners under certain circumstances. It says, “[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”<sup>61</sup> The statute also delineates four factors to aid in determining whether a particular use is a fair one:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>62</sup>

The fair use exception grants some leeway to people who appropriate copyrighted material for a use that advances the public good without cutting into the copyright owners’ markets for their works.<sup>63</sup>

Section 107 clearly states that the fair use exception applies in the context of teaching, and that if a particular use is for a nonprofit edu-

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the rights to film clips less than a minute long shut down a promising program.”). Although NYUOnline would not have been covered under the TEACH Act because of its for-profit status, its attempt to seek licenses for the use of motion pictures is representative of the difficulties all educational institutions face when attempting to license works for online uses.

<sup>59</sup> See Group Interview, *supra* note 47 (Statement of Tara Montgomery) (“[B]ecause the Internet is a visual medium[,] some of the best courses you could teach online could be a music course or a filmmaking course. They’re more natural than having a philosophy course, but you end up having to do the philosophy course because that’s what you can afford . . .”).

<sup>60</sup> Copyright Office Report, *supra* note 21, at 38.

<sup>61</sup> 17 U.S.C. § 107 (2000).

<sup>62</sup> § 107.

<sup>63</sup> See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-79 (1994) (finding that the more transformative the use, the less concerned the Court will be with commercial nature of the use).

cational purpose, that factor would lend credence to an argument that the use is fair. That factor is just one of the four factors a court will consider when conducting a fair use analysis, however. So, while a use that is for nonprofit educational purposes weighs in an educator's favor in a fair use analysis, it is not dispositive.<sup>64</sup>

While no single factor is determinative, the Supreme Court has said that the effect on the market is the most important.<sup>65</sup> Unlike in the context of face-to-face teaching, where an educator's performance or display of a copyrighted work could impact only her students' decisions to purchase a copyrighted work, the issue of market harm is significant in an online context. When online educators make copyrighted works available to their students on the Internet, the potential for market harm increases dramatically because wide dissemination is a real danger if there are no technological measures in place to protect unauthorized reproduction and distribution.<sup>66</sup> As a result, copyright holders fear that any copyrighted work made available on the Internet could end up being widely disseminated, thereby cutting into their potential to exploit the markets for their works. This is of particular concern when the users of the copyrighted materials are college students and when the works used are popular.<sup>67</sup> Thus, even though the fact that a use is for a nonprofit educational purpose weighs in favor of a finding of fair use, because of the substantial market harm at risk, it is unclear how a court will balance the fair use factors.

Because of the prohibitive expense of obtaining licenses, the ambiguity of the fair use exception, and the lack of any specific statutory exception, online teachers faced significantly higher costs than their face-to-face counterparts, who relied either on the specific statutory exception of § 110(1) or on fair use. In an effort to facilitate online education, educators searched for a remedy for this disparity. By examining the legislative process undertaken in response to these efforts, the strength and failings of the TEACH Act can be revealed.

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<sup>64</sup> Cf. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556-59 (1985) (holding that even though Nation's use was for news reporting purposes, its use was not fair because it substantially harmed market for copyrighted work).

<sup>65</sup> *Id.* at 566 ("This last factor [effect on the market] is undoubtedly the single most important element of fair use.").

<sup>66</sup> See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016-17 (9th Cir. 2001) (holding that service that allows users to share and download music in digital form not fair use in part because it allowed for widespread distribution which significantly harmed copyright owners' market for their works).

<sup>67</sup> Copyright Office Report, *supra* note 21, at 132.

## II

CONGRESSIONAL REACTION TO THE RISE OF ONLINE  
EDUCATION AND THE OBSTACLES IT FACES

Initial efforts to clarify the law took the form of extra-legal solutions such as the development of guidelines for the application of fair use in the online education context.<sup>68</sup> When these efforts failed,<sup>69</sup> however, lobbyists turned to Congress for a legislative solution to the obstacles copyright law imposes on online education. That solution was the TEACH Act.

The TEACH Act reflects a balance between the pedagogical interests of educators in using copyrighted works in online education and the copyright owners' interests in preserving their markets. While the initial version of the TEACH Act introduced in the Senate was relatively educator-friendly, the copyright owners persuaded legislators that the grant of rights would significantly harm the markets for their works without imposition of additional requirements on the exercise of those rights. The final version of the TEACH Act resulted from negotiations between the interested parties themselves, whom Congress called together when it was unable to produce a satisfactory legislative solution.<sup>70</sup>

The compromise and the resulting restrictions on educators' rights to use copyrighted works in online education are necessary to maintain the incentives copyright protection offers to authors to produce new creative and intellectual works, thereby preserving the purpose of copyright—the promotion of science and the arts.<sup>71</sup> While necessary, however, the restrictions are significant and constrain the TEACH Act's usefulness to online educators.<sup>72</sup> Part A of this Section discusses the expanded rights online educators have under the TEACH Act to show how the law addresses educators' concerns about the impact of copyright law on pedagogy.<sup>73</sup> Part B discusses the restrictions on the exercise of those rights—Congress's and the par-

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<sup>68</sup> To this end, educators and copyright owners attempted to work together to define guidelines for fair use in online education. See Copyright Office Report, *supra* note 21, at 111-19; see also The Conference on Fair Use, Final Report to the Commissioner on the Conclusion of the Conference on Fair Use, Nov., 12-13, 43-47, 1998, <http://www.uspto.gov/web/offices/dcom/olia/confu/confurep.pdf>.

<sup>69</sup> See Copyright Office Report, *supra* note 21, at 119 (“[D]iscussions came to an end without conclusion in the midst of the controversy about the advisability of guidelines in general.”).

<sup>70</sup> See Telephone Interview with Ken Salomon, Partner, Dow, Lohnes & Albertson (Feb. 17, 2003) [hereinafter Interview with Ken Salomon] (transcript on file with *New York University Law Review*).

<sup>71</sup> Cf. U.S. Const. Art. I, § 8, cl. 8.

<sup>72</sup> See *infra* Part III.

<sup>73</sup> For a discussion of educators' concerns, see *supra* Part I.B.



ties' efforts to protect the copyright owners' markets for their works. Although the restrictions on educators' use of the expanded rights limit the effect of the legislation, the TEACH Act marks a step in the right direction—an acknowledgment of the barriers copyright law poses to online education—and marks legislative sanctioning of the interested parties' own negotiated compromises.

*A. Expansion of Rights—Educators' Rights under the TEACH Act*

Senators Orrin Hatch and Patrick Leahy introduced the TEACH Act in the Senate in March of 2001.<sup>74</sup> This original version of the TEACH Act reflected the recommendations the Copyright Office submitted three years earlier in response to Congress's request for advice on the issue.<sup>75</sup> This expanded grant of rights to educators remained a part of the legislation throughout the legislative process, despite compromises in other portions of the legislation.

The TEACH Act allows educators to perform “a nondramatic literary or musical work or reasonable and limited portions of any other work, or [to] display . . . a work in an amount comparable to that which is typically displayed in the course of a live classroom session.”<sup>76</sup> To make use of the rights granted, “the performance or display [must be] 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.”<sup>77</sup>

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<sup>74</sup> See 147 Cong. Rec. S2007 (daily ed. Mar. 7, 2001).

<sup>75</sup> During the debate of the Digital Millennium Copyright Act (DMCA) in April of 1998, Congress sought advice on legislative language to amend § 110(2). Letter from Senators Orrin Hatch, Patrick Leahy, and John Ashcroft, U.S. Senate, to Marybeth Peters, Register of Copyrights, Copyright Office (Apr. 24, 1998), in Copyright Office Report, *supra* note 21, at app. H. When they determined that there was not enough time to fully address the issue during the debate of the DMCA, they instead incorporated a provision requiring the Copyright Office to examine the issue into the DMCA. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 403, 112 Stat. 2860, 2889 (1998) (“Not later than 6 months after the date of the enactment of this Act, the Register of Copyrights, after consultation with representatives of copyright owners, nonprofit educational institutions, and nonprofit libraries and archives, shall submit to the Congress recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works.”).

<sup>76</sup> Compare 17 U.S.C.A. § 110(2) (West Supp. 2003), with 147 Cong. Rec. S2008 (daily ed. Mar. 7, 2001). The original version of the TEACH Act did not include the limitation that the display be analogous to what the educator would do in the context of face-to-face teaching.

<sup>77</sup> § 110(2). The language of the Hatch/Leahy bill was slightly different, but the grant of rights was essentially the same. 147 Cong. Rec. S2008 (daily ed. Mar. 7, 2001). More

By expanding the categories of works covered under § 110(2), the TEACH Act allows online educators to make use of copyrighted works in their courses in ways comparable to what copyright law permits educators to do in traditional classrooms.<sup>78</sup> This expansion is necessary to prevent students who choose to take online courses from receiving educational experiences inferior to their on-campus counterparts. Limiting the expanded rights to the performances of reasonable and limited portions of works other than nondramatic literary and musical works, on the other hand, is necessary to address copyright owners' interests in preserving their markets. The limitation prevents online educators' uses of copyrighted works from serving as substitutes for students' purchase of such works, an issue which is of particular concern for popular works such as movies and sound recordings. In the History of Jazz course,<sup>79</sup> for example, rather than allowing the instructor to put an entire song online for students to listen to as part of their coursework, the instructor only can use clips from that song to illustrate her point, ensuring that students still will have an incentive to purchase the CD with the full version of the song because they only will have access to a portion of it.<sup>80</sup> This balance enables pedagogical improvements without harming copyright owners' markets for their works.

The TEACH Act also improves access to high-quality online education. Rather than limiting the transmissions permitted to reception in classrooms, by disabled students, or by officers or employees of the government in the course of their duties, the TEACH Act only requires that the transmission, "to the extent technologically feasible . . . [be] limited to (i) students officially enrolled in the course . . . or (ii) officers or employees of governmental bodies as part of their official duties of employment."<sup>81</sup> This enables students who choose to take online courses because of geographical or scheduling constraints to have access to the same types of resources in their courses as those students who have the ability to take traditional classes.

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significantly, the Hatch/Leahy bill did not contain a requirement that the nonprofit educational institution be accredited.

<sup>78</sup> See § 110(1) (exempting face-to-face teachers' uses of copyrighted materials from liability for copyright infringement).

<sup>79</sup> See *supra* notes 1-2 and accompanying text.

<sup>80</sup> Permitting an online educator to perform an entire musical work, but to play only reasonable and limited portions of the sound recording in which it is embodied, results in "the copyright owner of the music . . . essentially subsidizing some distance education activities, while the record producer remains free to charge for the same activities." Copyright Office Report, *supra* note 21, at 157. While this result seems strange, the Copyright Office Report makes it clear that this would be the result of the TEACH Act as it is drafted. See *id.* at 159.

<sup>81</sup> 17 U.S.C.A. § 110(2) (West Supp. 2003).

The TEACH Act also addresses educators' concern that online uses of copyrighted works might violate multiple rights of copyright owners.<sup>82</sup> In addition to amending § 110(2) of the Copyright Act to enable the performance or display of copyrighted works, the legislation also amends § 112 to add a new subsection (f), which permits educators to make use of the reproduction right as well.<sup>83</sup> This new § 112(f) enables educators to make copies of the portions of copyrighted works embodying the parts to be displayed or performed as long as the copies are used only for performances or displays authorized under the new § 110(2), the copies are retained only for the purposes described in 110(2), and the educational institution does not digitize an analog work unless no digital version is available or the digital version is subject to technological protection measures that otherwise would prevent the use of the work under § 110(2).<sup>84</sup>

The expanded rights for online educators that the TEACH Act authorizes address the educators' concerns that copyright law puts their students at a disadvantage as compared to students in traditional classrooms. Had these grants of rights comprised the entirety of the TEACH Act, the legislation would have paralleled closely the Copyright Act's grant of rights to educators in face-to-face classrooms. As is the case under § 110(1), under this hypothetical law, online educators would be able to perform or display copyrighted works in the course of their teaching activities without having to fulfill any substantial procedural requirements. Such hypothetical legislation would only address educators' concerns, however, not copyright owners' legitimate interests in protecting their markets.

### *B. Rights Restricted—Educators' Concessions*

The majority of the debate throughout the legislative process centered around the issue of how to protect copyright owners' markets while maintaining the pedagogical advantages that the expanded grant of rights permits. Congress ultimately decided that it could not devise an appropriate solution on its own and instead directed the interested

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<sup>82</sup> See Copyright Office Report, *supra* note 21, at 160-61.

<sup>83</sup> § 112(f).

<sup>84</sup> § 112(f). This would be useful to educators who wanted to use clips from DVDs because it would allow them to digitize the portion of the videocassette version of the DVD that they want to perform, in lieu of trying to circumvent technological protection measures, which is illegal under the DMCA. This last requirement is distinct from the requirement in the Hatch/Leahy bill. See 147 Cong. Rec. S2008 (daily ed. Mar. 7, 2001) (precluding interference with technology protection measures).

parties to negotiate amongst themselves to develop a solution.<sup>85</sup> The debate focused on the extent to which educational institutions should be required to use technological measures to protect copyrighted works when they perform or display them in online education, and it was in this area that the Hatch/Leahy bill significantly differed from the final version of the TEACH Act.<sup>86</sup>

To protect copyright owners, the Hatch/Leahy bill would have required an institution making the transmission to have a copyright policy; to distribute information about copyright law to faculty, students, and staff; and to apply “technological measures that reasonably prevent unauthorized access to and dissemination of the work, and . . . not [to] intentionally interfere with technological measures used by the copyright owner to protect the work.”<sup>87</sup> Copyright owners did not believe that the protections the Hatch/Leahy bill offered were sufficient.<sup>88</sup> Specifically, copyright owners worried that the prevention against unauthorized access and dissemination provided in the Hatch/Leahy bill would not protect the markets sufficiently for their works.<sup>89</sup>

In response to copyright owners’ concerns, the final version of the TEACH Act contains the same language of the Hatch/Leahy bill that requires institutions which use the TEACH Act to institute copyright policies to encourage students, educators, and staff to comply with copyright law.<sup>90</sup> However, rather than requiring only that institutions reasonably prevent unauthorized *access* to and *dissemination* of the copyrighted works, as the Hatch/Leahy bill would have, the final TEACH Act creates an affirmative duty on the part of institutions to apply technological protection measures that “reasonably prevent” unauthorized *retention* and *dissemination* of the copyrighted works.<sup>91</sup> Requiring institutions to prevent retention of copyrighted works provides greater protection for copyright owners’ markets while imposing

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<sup>85</sup> Interview with Ken Salomon, *supra* note 70 (“Hatch and Leahy called the parties together and said I want you to negotiate among yourselves, at the Copyright Office, to come up with a compromise.”).

<sup>86</sup> Compare 147 Cong. Rec. S2008 (daily ed. Mar. 7, 2001) (requiring measures to prevent unauthorized access and dissemination of copyrighted work), with 17 U.S.C.A. § 110(2) (West Supp. 2003) (requiring measures to prevent unauthorized retention and dissemination of copyrighted work).

<sup>87</sup> 147 Cong. Rec. S2008 (daily ed. Mar. 7, 2001). This language reflects the Copyright Office’s recommendations. See Copyright Office Report, *supra* note 21, at 150-52.

<sup>88</sup> See, e.g., Senate Hearing, *supra* note 23, at 22-23 (statement of Allan R. Adler, Vice President for Legal and Governmental Affairs, Association of American Publishers).

<sup>89</sup> See, e.g., Press Release, Ass’n of Am. Publishers, Publishers Welcome Hard-Won Compromise on Distance Ed Bill (May 17, 2001), <http://www.publishers.org/press/releases.cfm?PressReleaseArticleID=76>.

<sup>90</sup> Compare *supra* note 87 and accompanying text, with 17 U.S.C.A. § 110(2) (West Supp. 2003).

<sup>91</sup> See § 110(2).

a significantly higher burden on institutions.<sup>92</sup> Copyright owners believed and educators eventually agreed that this higher standard of protection was necessary to ensure that online educators' and their students' uses of the copyrighted works do not cause significant harms to the markets for their copyrighted works.

On June 7, 2001, the TEACH Act passed in the Senate unanimously, after only one minor change to the language that the parties negotiating in the Copyright Office drafted.<sup>93</sup> The House of Representatives passed the Act by a vote of four hundred to four on September 26, 2002. On November 2, 2002, President George W. Bush signed the TEACH Act into law. In the end, the message of the legislation Congress and the President authorized is essentially the same as that initially introduced in the Senate: Educators have the right to perform entire nondramatic literary and musical works, to perform reasonable and limited portions of all other types of copyrighted works, and to display all types of copyrighted works, provided they have in place a copyright policy and technological protection measures designed to reasonably prevent harm to the markets for those copyrighted works.<sup>94</sup>

While there are certainly limitations to the TEACH Act's effectiveness,<sup>95</sup> educational institutions should take advantage of the rights that it confers because it is likely to be the best legislative solution that they will obtain in the near future. The process by which the TEACH Act moved through Congress represents the legislative process at its best. The development of the specific legislative language took place over a nearly five-year period, after nonlegislative options had been exhausted,<sup>96</sup> and considered the competing interests at stake through the submissions of hundreds of interested parties made to the Copyright Office in conjunction with its congressionally mandated study<sup>97</sup> and through the hearings on the bill in the Senate Committee on the Judiciary.<sup>98</sup>

Moreover, after the Hatch/Leahy bill did not receive universal support, the interested parties themselves bargained to achieve a solution. As such, the TEACH Act's compromises do not reflect government bowing to the more powerful or better-funded lobbying force,

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<sup>92</sup> See discussion *infra* Part III.B.

<sup>93</sup> See 147 Cong. Rec. S5995 (daily ed. June 7, 2001) (amending section of bill to replace "in the ordinary course of their operations" with "reasonably").

<sup>94</sup> § 110(2).

<sup>95</sup> See *infra* Part III.

<sup>96</sup> See *supra* note 68-69 and accompanying text.

<sup>97</sup> See *supra* note 75.

<sup>98</sup> See Senate Hearing, *supra* note 23.

but rather represent governmental endorsement of the interested parties' determination of which factors were most important to them and which concessions they felt comfortable making.<sup>99</sup> Because there was no procedural failure and because the legislative process simulated direct representation and was thus arguably more effective than under ordinary circumstances, the TEACH Act is likely the best legislative solution to the barriers that copyright law imposes on online education that educators can hope to achieve in the near future. Thus, despite the TEACH Act's limitations, educational institutions must make an effort to take advantage of the legislation to reap benefits from the expanded rights that it grants.

### III

#### IMPLEMENTATION AND RECOMMENDATIONS

By reducing the costs associated with the use of copyrighted works in online education, the TEACH Act marks a step towards improving the quality of online education and facilitating its provision. Despite legislators' and lobbyists' extended efforts to craft legislation that would achieve this goal while maintaining appropriate safeguards for copyright owners, educational institutions have not begun using the TEACH Act. In part, this results from extrinsic factors—market and societal forces. The failure to take advantage of the TEACH Act is also due to considerations intrinsic to the legislation, for instance—the vagaries and confusion with legislative language and the Act's requirements. Part A of this Section discusses the external limitations on the TEACH Act's effectiveness and suggests a means to overcome them such that the spirit and intention of the TEACH Act can be furthered even where the legislation itself cannot be implemented. Part B outlines the internal limitations to the TEACH Act's effectiveness and suggests a framework through which institutions can implement the legislation in order to take full advantage of it.

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<sup>99</sup> It is logical that the interested parties themselves would have a better sense of the interests at stake. See, e.g., *The Federalist* No. 78, at 467-68 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[T]he power of the people is superior to both [the legislative branch and the judiciary]."); *The Federalist* No. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961) (describing need for House of Representatives to be closely attuned to citizens' interests); Frank H. Easterbrook, *Foreword—The Court and the Economic System*, 98 *Harv. L. Rev.* 4, 17 (1984) ("The closer the contest, and the more the parties were looking to their own interests (rather than the public interest more broadly defined), the more appropriate it is to treat the statute as a contract and to decline to give either party an advantage it failed to get explicitly."). But see Jessica Litman, *Copyright Legislation and Technological Change*, 68 *Or. L. Rev.* 275, 280-81, 299-300 (1989) (describing conflicts created in entire body of copyright law when interested parties negotiate legislation related to new technology and difficulties parties left out of negotiations experience).

### *A. External Factors That Limit the TEACH Act's Impact*

Legislators and lobbyists who worked on the TEACH Act had to take many competing interests into account when drafting the legislation. In order to obtain the expanded grant of rights that the TEACH Act authorizes, lobbyists for the educational community agreed that the Act would only cover the activities of accredited nonprofit educational institutions—a restriction for which copyright owners lobbied.<sup>100</sup> Unlike in traditional education, many providers of online education are not accredited nonprofit institutions;<sup>101</sup> thus, restricting the types of institutions covered limits the TEACH Act's effectiveness. While this restriction, in combination with the nature and structure of the online education market, explicitly limits the Act's impact, in some cases the limiting factors are independent from the TEACH Act and its consideration. This is particularly true for educators or their institutions who have no interest in using the expanded types of copyrighted works the TEACH Act authorizes. This Part discusses these market and societal forces that limit the TEACH Act's effect.

#### *1. Overcoming the Limitation on the Providers That May Take Advantage of the TEACH Act*

##### *a. The Limitation*

Accredited nonprofit educational institutions are not the only providers of online education; for-profit educational institutions,<sup>102</sup> online publishing branches of nonprofit universities, and libraries also

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<sup>100</sup> See, e.g., Senate Hearing, *supra* note 23, at 43-44 (responses of Allan R. Adler, Vice President for Legal and Governmental Affairs, Association of American Publishers, to questions submitted by Senator Leahy); Interview with Ken Salomon, *supra* note 70 ("[T]he publishers wanted a greater level of assurance that only legitimate educational institutions would use this new provision . . . . [T]hey wanted to guard against someone creating a nonprofit educational institution under the guise of offering a degree . . . in music appreciation or the history of American film getting free access to films [and] music . . . .").

<sup>101</sup> See NCES Report 1997-1998, *supra* note 17, at 7.

<sup>102</sup> Despite the fact that for-profit educational institutions do not comprise a very substantial portion of educational institutions generally, the for-profit model has been a popular means of online education delivery and the number of for-profit educational institutions has been growing significantly in recent years. University of Phoenix, a for-profit career college and the largest university in the country, saw its online enrollment increase seventy percent, to 49,400, in 2002. Florence Olsen, *Phoenix Rises: The University's Online Program Attracts Students, Profits, and Praise*, *Chron. of Higher Educ.*, Nov. 1, 2002, at A29. Between 1989 and 1998, the number of for-profit two-year educational institutions increased by seventy-eight percent, while the number of for-profit four-year institutions increased by 266%. Total enrollment in for-profit degree-granting institutions grew by fifty-nine percent during the same period. Kathleen F. Kelly, *Education Commission of the States, Meeting Needs and Making Profits: The Rise of For-Profit Degree-Granting Institutions* tbls.1 & 2 (2001), <http://www.ecs.org/clearinghouse/27/33/2733.htm>.

develop and distribute online education. These providers are either explicitly left out of the legislation or are left uncertain as to the TEACH Act's application to their activities.

Eliminating the requirement that an institution be nonprofit in order to make use of the TEACH Act—something that the Copyright Office considered—would be inconsistent with other sections of the Copyright Act, including § 110(1), which reflect a policy decision not to allow for-profit businesses to benefit financially from their uses of copyrighted works without sharing their profits with copyright owners.<sup>103</sup> While the policy behind the application of the TEACH Act only to nonprofit entities is consistent throughout the Copyright Act, the limitation of the TEACH Act to accredited institutions marks a change from the policy reflected in § 110(1) of the Copyright Act.<sup>104</sup> However, both copyright owners and educators believed this restriction to be necessary to prevent people from creating false institutions for the sole purpose of exploiting copyrighted works, rather than for true educational purposes.<sup>105</sup> Unlike a traditional nonprofit educational institution, which needs visible classroom space, office space for the administration, and other tangible evidence of educational purpose, online providers have no such visual cues. Legislators and lobbyists for both sides agreed to use accreditation as a surrogate to ensure that the institution providing online courses is a legitimate one.

Limiting application of the exemption to accredited nonprofit institutions leaves open the question whether the exemption applies to branches or subsidiaries within accredited nonprofit universities such as online publishing subsidiaries or libraries. Because such branches produce and distribute entire online courses or modules that comprise parts of courses, they do not necessarily know who the end-users will be when they develop their products, nor what those end-users will do with them. As a result, such subsidiaries likely will be unable to meet the requirements of the TEACH Act and will choose instead to rely on licensing for their uses of copyrighted works, despite being part of accredited nonprofit educational institutions.<sup>106</sup> Limiting the excep-

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<sup>103</sup> Copyright Office Report, *supra* note 21, at 154.

<sup>104</sup> See 17 U.S.C. § 110(1) (2000).

<sup>105</sup> See Copyright Office Report, *supra* note 21, at 137 ("In responding to the question of who should be entitled to invoke the exemption, there was widespread support for limiting it to 'accredited' educational institutions."); Interview with Ken Salomon, *supra* note 70 (noting concerns of publishers that exemption be limited to "legitimate educational institutions" to prevent "someone [from] creating a nonprofit educational institution under the guise of offering a degree or credits in music appreciation or the history of American film getting free access to films, music, and the like").

<sup>106</sup> See Group Interview, *supra* note 47 (Statement of James Burger) ("There's a strong argument that [the TEACH Act does not apply to us because] the closest established



tion to only accredited nonprofit institutions therefore limits the TEACH Act's impact.

b. The Solution

For-profit online education providers and online publishing subsidiaries of nonprofit universities can follow two paths to increase their rights to use copyrighted works in online education. First, such entities have the option of lobbying Congress to pass legislation like the TEACH Act that would apply to their activities. Second, the entities could establish a dialogue amongst themselves to develop guidelines for applying general statutory exceptions, such as fair use, to their activities. This dialogue could result in the expansion of the rights of these types of providers to use copyrighted materials in online education.

If lobbyists were able to produce a legislative solution, Congress would amend the Copyright Act to grant online educators affiliated with for-profit providers of online education or with nonprofit entities within accredited nonprofit institutions the right to use copyrighted materials as part of their online courses. A legislative solution would be difficult to effect, however. While the education lobby is relatively strong, with a large number of well-established members, there are relatively few for-profit and nonprofit online publishing subsidiary providers<sup>107</sup> and they are a relatively recent addition to the education arena.<sup>108</sup> As a result, they do not have the same kind of lobbying capabilities needed to persuade Congress to effect change in their favor. While they might not be able to secure legislative change, such providers may be able to convince Congress to mandate that the Copyright Office study the issue, as it did with nonprofit online education in the DMCA in 1998.<sup>109</sup> If such providers were able to persuade the Copyright Office to conduct such a study, they could have a vehicle by which to effect legislative change.<sup>110</sup>

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industry to what we're doing [as a subsidiary of a nonprofit university] is publishing, traditional publishing [as opposed to traditional nonprofit education]. And that we're doing, the services that we're performing, are essentially the same [as publishing] except in a digitized online writing.""); Interview with Ken Salomon, *supra* note 70 ("The librarians probably feel a little bit left out in the cold in the sense that this only applies to accredited nonprofit institutions [so] . . . they're not specifically covered . . .").

<sup>107</sup> See *supra* note 102.

<sup>108</sup> See Nat'l Center for Educ. Statistics, Digest of Education Statistics 196 tbl.172 (1999) (recording rise of enrolled students at for-profit ("proprietary") providers, from less than 50,000 in 1976), <http://nces.ed.gov/pubs99/1999036.pdf>.

<sup>109</sup> See *supra* note 75.

<sup>110</sup> During the negotiations in the Copyright Office to develop a compromise version of the TEACH Act, for-profit providers "made a pitch" for their inclusion in the legislation. The Register of Copyrights did not believe that their inclusion at that time was prudent,

Even if they are successful at obtaining a study of online education as it pertains to their activities, legislation specifically addressing these types of entities is not likely in the near future.<sup>111</sup> As a result, such providers should consider other avenues to expanding their rights to use copyrighted works in online education that might have a more immediate effect. Establishing a dialogue among peer providers has the potential to have a significant effect on their abilities to use copyrighted works.<sup>112</sup> In a new industry, where the standards for what constitutes fair use have not been firmly established, if the providers are careful to move in line with one another, they have the potential, to some extent, to set the industry standard.<sup>113</sup> That is not to say that these entities should take unjustifiable risks—they do not want to open themselves up to liability for copyright infringement—but if they can make an argument based on traditional standards of copyright law, such as fair use, they have the potential to define the standard as it applies to their context and to increase their ability to use copyrighted works in online education without having to secure licenses.<sup>114</sup>

2. *Increasing the Percentage of Educators Who Want to Use the Expanded Types of Copyrighted Materials That the TEACH Act Authorizes*

a. *The Limitation*

One of the primary reasons for the enactment of the TEACH Act was to enable educators to use copyrighted works in online education for which they were previously unable to secure licenses—popular works such as audio and video clips.<sup>115</sup> The impact of the TEACH Act therefore is limited if educators are not using the types of copy-

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but offered them a study, comparable to the Copyright Office Report that prompted the TEACH Act, see *supra* note 75 and accompanying text, instead. The for-profit providers' association turned down this offer, however, so they may have a more difficult time obtaining one now. See Interview with Ken Salomon, *supra* note 70. The option is still wide open for online publishing subsidiaries of nonprofit educational institutions, on the other hand.

<sup>111</sup> For example, the Copyright Office Report, *supra* note 21, which precipitated the TEACH Act, began in 1998, see *supra* note 75, but the legislation did not become effective until late 2002, more than four years later.

<sup>112</sup> See Group Interview, *supra* note 47 (Statement of James Burger) (expressing need for industry collaboration).

<sup>113</sup> Group Interview, *supra* note 47 (Statement of Tara Montgomery).

<sup>114</sup> This solution is not likely to be as useful for for-profit providers. Fair use, under § 107 of the Copyright Act, reflects a desire not to allow commercial entities to profit off of another's copyrighted works without compensating that person for her efforts. 17 U.S.C. § 107 (2000).

<sup>115</sup> See Copyright Office Report, *supra* note 21, at 156-58 (describing importance to teachers of audiovisual works and difficulty in obtaining licenses for them); see also *supra* notes 48-49 and accompanying text.

righted works in online education that the TEACH Act was enacted to facilitate.<sup>116</sup> As Matthew Pittinsky, CEO and co-founder of Blackboard, Inc., says, "It's a very small minority, mostly full distance learning programs and courses where faculty have a publisher relationship . . . , that you're actually seeing the video and Java applets, the virtual biology lab, all the types of learning objects that people think about in the future."<sup>117</sup>

Even for some full distance learning programs that use the Internet for course distribution, high-tech features like audio and video clips are not a priority.<sup>118</sup> The University of Phoenix Online, for example, has chosen to keep its classes as basic as possible when it comes to technology and, "[u]ntil recently, it has eschewed most of the flashy, multimedia gadgets."<sup>119</sup> This is motivated, in part, by a concern that many of its students do not have the fast Internet connections needed to make audio and video clips function properly, without a lot of erratic starts and stops.<sup>120</sup> Because the costs of licensing and the uncertainty of the application of fair use to these types of copyrighted works was a principal motivation behind the TEACH Act, it is possible that the fact that the majority of educators do not use these types of media could explain the limited numbers of educators and institutions taking advantage of the TEACH Act.

#### b. The Solution

This limitation on the TEACH Act's effectiveness does not have a clear solution. If the reason for online educators' hesitance to use copyrighted works such as audio and video clips online results from concerns over a digital divide,<sup>121</sup> however, the solution to this limitation on the TEACH Act's effectiveness can only be time. As new technology develops, there is necessarily some lag time before the majority of the country begins to take advantage of it. For example,

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<sup>116</sup> See, e.g., Interview with Ann Clarkson, *supra* note 20 ("Usually, faculty are using just quotations . . . .").

<sup>117</sup> Interview with Matthew Pittinsky, *supra* note 39.

<sup>118</sup> See, e.g., Shea, *supra* note 22, at 54.

<sup>119</sup> Olsen, *supra* note 102.

<sup>120</sup> See Olsen, *supra* note 102. While the University of Phoenix is a for-profit institution and therefore not covered by the TEACH Act, its desire to use more basic features is illustrative of institutions that choose to forego technology in favor of programs that students with slower Internet connections can access without frustration. See Group Interview, *supra* note 47 (Statement of Kathryn Pope) ("There's also an argument for what translates best on the web at this point in terms of the technology. It's hard to make an argument for spending a huge amount of money on a motion picture even if we were allowed to because it's just not going to look that great. A lot of people are going to have a hard time viewing it in . . . an un-frustrating way.").

<sup>121</sup> See *supra* note 120 and accompanying text.

high-speed broadband Internet connections are becoming more prevalent, but slower dial-up connections still represent the majority of home Internet connections in the United States.<sup>122</sup> As faster Internet connections become more commonplace, educators likely will be less concerned that incorporating technologies such as audio and video clips into their online courses will frustrate their students rather than enriching their educational experience.

The lack of interest in using these types of copyrighted works may result, in part, from the fact that some educators simply do not know how to incorporate such technology into their courses. If this is the case, then educational institutions can encourage use of these copyrighted works by centralizing course design through the institutions' Information Technology Departments,<sup>123</sup> or by offering tutorials explaining how to use the technologies needed to incorporate such copyrighted works into online courses. By making it easier for online educators to incorporate such copyrighted works into their courses, institutions can increase the prevalence of their use.

As with the providers of online education excluded from coverage under the TEACH Act, perhaps the best solution to this limiting factor is establishing a dialogue about the ways in which educators can use copyrighted works such as music and movie clips to make their classes more engaging and effective.<sup>124</sup> For example, the institution offering the History of Jazz course<sup>125</sup> could convene all of the online educators responsible for music or music theory courses to discuss ways to incorporate audio clips into their courses, what technology to use to create those audio clips, and how to use it. By opening avenues to discussion, both in this context and in the context of providers left out of the TEACH Act, and by encouraging the use of copyrighted materials, educational institutions have the opportunity to create more engaging and effective online courses.

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<sup>122</sup> See Press Release, Nielsen//NetRatings, Broadband Access Grows 59 Percent, While Narrowband Use Declines, According to Nielsen//NetRatings (Jan. 15, 2003), [http://www.nielsen-netratings.com/pr/pr\\_030115.pdf](http://www.nielsen-netratings.com/pr/pr_030115.pdf).

<sup>123</sup> See, e.g., Interview with Ann Clarkson, *supra* note 20.

<sup>124</sup> See James L. Morrison & Frank Newman, *The Technology Revolution: An Interview with Frank Newman*, *The Technology Source* (Jan./Feb. 2003) ("First and foremost, there needs to be a campus conversation about the impact, the promise, and the risks of technology. Second, each campus needs a faculty support group that can provide the diverse skills and knowledge to allow faculty to move into ever more comprehensive uses of technology."), at <http://ts.mivu.org/default.asp?show=article&id=1003>.

<sup>125</sup> See *supra* notes 1-2 and accompanying text.

*B. Implementing the TEACH Act Into Accredited Nonprofit Educational Institutions' Copyright Policies—Internal Limitations on the TEACH Act's Effectiveness*

While external factors pose significant limitations to the effectiveness of the TEACH Act, the Act and its language have similarly limiting effects. One of the goals of the TEACH Act was to clarify the application of copyright law to online education. This goal is frustrated, however, by the fact that educators are largely unaware of the legislation or of how it affects their activities. Further, the legislation employs complex statutory language and leaves some terms intentionally undefined. To make the TEACH Act easier for educational institutions and individual educators to apply, educational institutions should update their copyright policies to allow educators to rely on the legislation, develop definitions for technical or vague terms, and inform educators of the updated policies.

*1. The Limitations*

The majority of educators are unaware of the intricacies of copyright law. Most know that they must seek copyright permission for articles or chapters from books included in printed coursepacks,<sup>126</sup> but are accustomed to having extensive rights to use copyrighted materials when they teach in physical classrooms under sections 107 and 110(1) of the Copyright Act, whether or not they know that these provisions are the source of their rights.<sup>127</sup> The nature of online education can leave educators uncertain as to their rights to use copyrighted works online; teaching online can seem like teaching a traditional course in that the educator presents material to and interacts with students, but it also can seem like producing a coursepack because the educator puts material online for students to access independently.

Educational institutions inform faculty of the state of copyright law as applied to their activities through copyright policies, often available through the institutions' websites,<sup>128</sup> but educators largely

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<sup>126</sup> See, e.g., *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996) (holding commercial copy shop liable for copyright infringement for reproducing packets of articles and book chapters for student use in university courses when there was market for securing licenses other copy shops used).

<sup>127</sup> See Telephone Interview with Kenneth C. Green, Director, The Campus Computing Project (Feb. 14, 2003) [hereinafter Interview with Casey Green] (transcript on file with *New York University Law Review*) ("Faculty do have a sense of entitlement about content issues. As does the campus community.").

<sup>128</sup> See, e.g., Brown Univ. Copyright Policy, <http://www.brown.edu/Administration/Copyright/> ("Members of the Brown community are expected to support and promote the recognition of authors and publishers and to preserve their rights of ownership."); World Wide Web Policies and Procedures for All N.Y.U. Computer and Network Users, <http://www.nyu.edu/~netpolicy/>

do not follow the latest developments in copyright law. As a result, they would not necessarily know to check the school's copyright policy for updates to their rights to use copyrighted materials without first being informed of new developments. Thus, the majority of faculty members are presumably unaware that the TEACH Act was signed into law or what rights it grants them.

Even if faculty are aware of the TEACH Act, the Act is copyright legislation and therefore necessarily employs a certain amount of legal jargon. As a result, an educator not well-versed in copyright law might be unsure of the meaning of technical words or words that might have a different meaning under copyright law from their colloquial meaning.<sup>129</sup> In addition, because of the desire to have a measure of flexibility in its application, the TEACH Act uses some phrases with intentionally unclear definitions, such as "reasonable and limited portions."<sup>130</sup> The combination of technical terminology and phrases with unclear definitions could leave an educator uncertain as to whether the TEACH Act applies to her uses in online education.<sup>131</sup>

In addition to linguistic confusion, an educator or an educational institution might be unsure of whether the technological measures that they have in place for the copyrighted work "reasonably prevent" unauthorized dissemination and retention of the work. Some believe that password-protecting course websites provides sufficient protection for the copyrighted works,<sup>132</sup> but the language of the legislation does not imply that password protection is enough;<sup>133</sup> password protection can prevent only unauthorized *access*, not unauthorized *dis-*

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[www.nyu.edu/webguide/policy.html](http://www.nyu.edu/webguide/policy.html) ("Creation of Web pages for educational and research purposes may involve incorporation of original works of third parties (e.g. literature, photographs, music, software, film, and video works) that are covered by copyright laws. Web page authors are encouraged to obtain all permissions that may be necessary to incorporate works of third parties in their Web page."); Univ. of Cal. Policy and Guidelines on the Reproduction of Copyrighted Materials for Teaching and Research, <http://www.ucop.edu/ucophome/uwnews/copyrep.html> (requiring professors to seek licenses for all uses that do not qualify under fair use copying for teachers or multiple copies for classroom use); Copyright Management of Web Pages and Sites Representing the Yale Univ. Library, <http://www.library.yale.edu/wow/clickhere/copyrightmanagement.html> (requiring licenses if use is not fair use).

<sup>129</sup> An example is the distinction between "perform" and "display" within the meaning of copyright law. See *supra* note 44 and accompanying text.

<sup>130</sup> 17 U.S.C.A. § 110(2) (West Supp. 2003).

<sup>131</sup> See Carnevale, *supra* note 47 ("Faculty members and administrators say [the TEACH Act] is too complex and too vague about the conditions under which they can put copyrighted works online. Indeed, confusion over the new law has entire institutions applying the brakes.").

<sup>132</sup> See Carnevale, *supra* note 47.

<sup>133</sup> See § 110(2) (requiring measures that reasonably prevent unauthorized dissemination and retention of copyrighted materials, not just unauthorized access to them).

*semination and retention*. As a result, “[s]ome college administrators think institutions will have to invest in technology that can track what students do with the copyrighted material after they download it—technology that may not exist yet.”<sup>134</sup> Such technology could be very expensive to develop and implement.

While some lobbyists believe that the requirements are not as rigid as the language might imply,<sup>135</sup> it is unclear exactly what the TEACH Act requires in terms of protections for the copyrighted works. The stakes for educational institutions who use the TEACH Act incorrectly are potentially very high—institutions could be sued and found liable for copyright infringement. While Allan Adler of the Association of American Publishers suggests that “most publishers are unlikely to sue the moment colleges begin testing the law—unless the publishers find flagrant violations,”<sup>136</sup> the risks are substantial and educational institutions are nervous about opening themselves up to liability.<sup>137</sup>

As a result, educational institutions’ copyright policies, which would allow individual educators to take advantage of the Act, may not have been updated in response to the legislation or, if they have been updated, may still require educators to seek licenses to use copyrighted materials for online education.<sup>138</sup> Licenses for academic uses in course materials, such as coursepacks, are the standard in the academic community.<sup>139</sup>

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<sup>134</sup> Carnevale, *supra* note 47.

<sup>135</sup> See, e.g., Carnevale, *supra* note 47 (“John Vaughn, executive vice president of the Association of American Universities, says . . . an institution isn’t going to be liable as long as its officials can show that they made reasonable efforts to protect the material, like using passwords—which most online courses already do. ‘They don’t have to guarantee success.’”); Interview with Ken Salomon, *supra* note 70 (“The level of protection you need, in part, depends on the material you’re using. If it’s material that doesn’t have a large market value, . . . the risk is lower and you don’t need as robust a system . . . [Y]ou’re not required to guarantee that the technology you pick will be 100% effective.”).

<sup>136</sup> Carnevale, *supra* note 47.

<sup>137</sup> See Carnevale, *supra* note 47.

<sup>138</sup> See, e.g., Ind. University-Purdue University at Indianapolis, How to Secure Permission to Use Copyrighted Works, <http://www.copyright.iupui.edu/permsec.htm> (cautioning that “many of the exceptions are narrowly constructed and compliance with the law will involve meticulous planning” and encouraging licenses for uses that do not explicitly fall under statutory exception); N.C. State Univ., The TEACH Toolkit, <http://www.lib.ncsu.edu/scc/legislative/teachkit/> (advising educators to seek advice from university attorneys or distance learning experts before integrating copyrighted materials into curriculum, cautioning that TEACH is “more restrictive than the law allowing face-to-face instructional use of copyrighted materials”).

<sup>139</sup> E-mail from Ed Gould, Vice President of Government and Academic Affairs, eCollege, to Oakleigh Thorne, Chairman and Chief Executive Officer, eCollege (Feb. 14, 2003, 05:29 EST) (on file with *New York University Law Review*) (“My guess is that it has not changed things dramatically for the instructors or students. Securing permission to dis-

Educational institutions might prefer to use the rights granted in the TEACH Act as a back-up, to compensate for their inability to monitor every copyrighted work that an educator puts on her course website. In this way, educational institutions would maintain their preferences for obtaining licenses to use copyrighted works in online education, but would use the TEACH Act as a safety net for when educators are either unable to secure such licenses or forget to seek them.<sup>140</sup>

Ann Clarkson, director of online course production at the NYU School for Continuing and Professional Studies, has taken this approach. She has kept her policy of requiring licenses for any copyrighted materials a faculty member puts in her courses at the design stage.<sup>141</sup> The TEACH Act can then potentially catch those copyrighted materials that a professor puts on her course site without licenses while she is teaching, when Clarkson is no longer responsible for monitoring course content.<sup>142</sup> Empirical evidence of the number of institutions taking advantage of the TEACH Act is not available. The fact that NYU, an institution with relatively substantial resources and which, in theory, is well-equipped to take advantage of the Act, has chosen to continue to adhere to the same general policy of securing licenses, however, likely indicates that other schools are using the legislation to an even lesser degree.

In spite of an institution's decision not to take full advantage of the TEACH Act, however, the legislation can still be useful. For those educators who forget to secure the rights to use copyrighted materials, the TEACH Act can insulate their educational institutions from liability for copyright infringement, provided the uses are within the parameters of the TEACH Act and have the proper technological protection measures. If most institutions are using the legislation in a similar fashion, it could explain why the impact has been minimal thus far. Because the expanded rights the TEACH Act authorizes offer the potential to improve the quality of online education,<sup>143</sup> institutions should make an effort to go beyond this cautious implementation and invest the effort needed to fully implement the legislation.

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tribute copyrighted material is common practice and appear[s] in most [university copyright] policies.”).

<sup>140</sup> Interview with Matthew Pittinsky, *supra* note 39 (“I think the demand is really from institutions that are scared to death of what’s in their course-sites, what faculty members have put in there, where they’ve gotten it from, and does it include the appropriate protections and rights and payments.”).

<sup>141</sup> Interview with Ann Clarkson, *supra* note 20.

<sup>142</sup> See Interview with Ann Clarkson, *supra* note 20.

<sup>143</sup> See *supra* Part I.A.



## 2. *The Solution*

In the end, educational institutions have three choices: (1) continue to rely on traditional fair use and licensing principles; (2) rely exclusively on the TEACH Act; or (3) use some combination of the two. While fair use should continue to play a role in the use of copyrighted materials in online education, use of the TEACH Act offers educational institutions the potential to improve pedagogy in online education by allowing educators to use copyrighted works, or portions of them, that were previously too expensive to license. This should have the result of improving the quality of the educational experience for students of whom online education serves as a replacement for traditional classroom-based education, those who would otherwise face barriers to accessing high quality education.<sup>144</sup>

### a. Taking Advantage of the TEACH Act

To make the TEACH Act more effective, educational institutions need to establish a dialogue about copyright policies between the administration and faculty members. Ken Salomon reports that national interest groups have sent summaries of the legislation to the attorneys for colleges and universities and are working on a summary of the level of technological protection that an institution must have in place to comply with the requirements of the TEACH Act.<sup>145</sup> While distributing such summaries to educational institutions' administrations might achieve the goal of making institutions aware of updates to copyright law, some commentators have expressed skepticism that a national conversation about the issue will have an impact on individual educators.<sup>146</sup> If academic associations and similar interest groups, who have knowledge of and interest in copyright legislation, cannot be the messengers because of their lack of access to individual educators, that task is necessarily left to educational institutions.<sup>147</sup>

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<sup>144</sup> See *supra* Part I.A.

<sup>145</sup> Interview with Ken Salomon, *supra* note 70.

<sup>146</sup> Interview with Casey Green, *supra* note 127 ("I don't think the industry has done a good job of telling faculty about these things. . . . Academic associations or professional groups at Dupont Circle have no standing with faculty.").

<sup>147</sup> Once an institution decides to inform faculty members of the TEACH Act, it has to decide how to structure its message. The level of involvement the administration chooses to undertake can range from notifying faculty that the institution's copyright policy has been updated, to sending faculty members a memorandum or an e-mail giving them a brief summary of the legislation, to establishing guidelines for educators to follow when applying the TEACH Act and disseminating those guidelines through memoranda, e-mails, or faculty meetings. The most effective solution will depend on the level and nature of the particular educational institution's use of online education and faculty interest in taking advantage of the legislation.

To be most effective, an educational institution should inform its faculty members of at least two pieces of information: (1) a definition of terms, and (2) the extent of the technological protections necessary to preclude liability for copyright infringement. Definition is particularly important for terms that the drafters intentionally left vague in the legislation, such as “reasonable and limited portions.”<sup>148</sup> The Copyright Office Report offers some guidance for institutions when defining these terms, but even the Copyright Office’s definitions are vague.<sup>149</sup> The administration should provide guidelines for educators for what it considers to be “reasonable and limited” for each type of copyrighted work, such as page limits for journal articles or book chapters or time limits for audio and video clips.<sup>150</sup> These guidelines will be based on a number of factors, including the total length of the copyrighted work from which the excerpt is drawn, the number of copyrighted works used in a course, and the number of copyrighted works by a particular author used in the course.<sup>151</sup> For example, for the History of Jazz course,<sup>152</sup> the institution’s guidelines could specify that the professor may use twenty-second clips (approximately ten percent) of each copyrighted song, provided that the song is at least three and a half minutes long and that the professor does not use more than two songs from any particular artist. If the professor is using a large number of audio clips, however, the institution may prefer to minimize its risk by requiring that the individual clips be shorter in length or by limiting the total number of audio clips the professor can use. The length of audio clips the university permits may also be based on the total number of audio clips the institution is using school-wide. If the institution is using audio clips in nearly all of its online classes and has many such classes, it may choose to employ

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<sup>148</sup> See 17 U.S.C.A. § 110(2) (West Supp. 2003).

<sup>149</sup> See Copyright Office Report, *supra* note 21, at 158 (“A ‘limited’ portion should be interpreted as the equivalent of a film clip, rather than a substantial part of the film. What amount is ‘reasonable’ should take into account both the nature of the market for that type of work and the pedagogical purposes of the use.”).

<sup>150</sup> The legislative history of the Copyright Act suggests a similar policy with regard to photocopying for academic uses. See H.R. Rep. No. 94-1476, at 68-70 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5681-83 (outlining rules based on principles of “brevity,” “spontaneity,” and “cumulative effect”). Many universities have adopted the policy. See, e.g., NYU Policy on Photocopying Copyrighted Materials, <http://www.nyu.edu/academic.appointments/policies.html#photocopy>; Univ. of Cal. Policy and Guidelines on the Reproduction of Copyrighted Materials for Teaching and Research, <http://www.ucop.edu/ucop/home/uwnews/copyrep.html>.

<sup>151</sup> Cf. H.R. Rep. No. 94-1476, at 68 (describing factors weighed in determining whether particular photocopying constitutes fair use).

<sup>152</sup> See *supra* notes 1-2 and accompanying text.

more conservative definitions for “reasonable and limited portions” so as to minimize the institution’s exposure to risk across the board.

The factors that an educational institution must consider when developing definitions for what constitutes “reasonable and limited portions” are significant, and how the institution chooses to define those terms will depend in part on how risk-averse the university is. By providing general guidelines rather than dictating exactly what content educators can put in their course websites, the administration avoids interfering with educators’ academic freedom while preventing liability for copyright infringement.

Beyond defining the terms contained in the legislation, an administration should clarify what it considers to be adequate technological protection measures. While precise standards defining what qualifies as adequate protection are still in the process of development,<sup>153</sup> because the TEACH Act creates an affirmative duty on the part of an institution to ensure that copyrighted works are adequately protected against unauthorized retention and dissemination, clarification of standards in this area is particularly important. In developing its standards, the administration should consider the nature of available technologies and which technologies map onto its concept of protection against retention and dissemination. Then, rather than outlining to educators its specific conception of what constitutes adequate protections, the administration can make approved technologies available through its Information and Technology Department and require educators to use only those approved technologies. If an educational institution distributes information about the TEACH Act to faculty members and includes these components in its message, it has the potential of increasing the effect of the TEACH Act by alleviating some of the barriers to its implementation.<sup>154</sup>

#### b. Continuing Reliance on Fair Use and Licensing

Because application of the TEACH Act requires a substantial amount of effort on the part of an educational institution, at least as an initial matter, institutions, in which the costs and risks of implementation would outweigh the benefits, might want to continue to rely on fair use and licenses. Implementation costs will potentially outweigh the benefits when an institution wants to use copyrighted works

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<sup>153</sup> See Request for Written Comments and Notice of Hearings on Technological Protection Systems for Digitized Copyrighted Works, 67 Fed. Reg. 72,920 (Patent and Trademark Off. Dec. 9, 2002).

<sup>154</sup> See *supra* Part III.B.1.

for which licenses are particularly inexpensive or when it is clear that the institution's use is fair.

An educator's use of a copyrighted work is likely to meet the standards for fair use when the market for the copyrighted work is very small. For example, if the History of Jazz<sup>155</sup> professor wanted to make available to her students a particular description of a song contained in a previous edition of a textbook, but which has been removed from the most current edition her students are using, her use would be a fair one. If the market for the work is small, students will have little incentive to further disseminate the work once they have access to it through the online course.<sup>156</sup> As long as the educator's use of the work online is analogous to how she would use the work in a traditional classroom, the effect on the market will be minimal. By providing the copyrighted work online, the educator will not be substituting for students' purchase of that work, nor will she run the risk of substituting for a wider audience's purchase of the work because the students will not have incentives to distribute it.

Similarly, if educational institutions already have an established relationship with a copyright owner or with a licensing organization with the right to license for online uses, they may find it more cost effective to continue to procure licenses. Because the transaction costs associated with procuring licenses are so substantial,<sup>157</sup> this is likely to be true only in a small subset of cases. For popular works such as movies and music, the benefits of implementation of the TEACH Act will likely outweigh the costs and educational institutions should invest the effort and resources necessary to take full advantage of the TEACH Act.

### CONCLUSION

By setting guidelines for terms such as "reasonable and limited" and for what constitutes technological protection measures that "reasonably prevent" unauthorized retention and dissemination of copyrighted works, educational institutions can help clarify what these terms mean for the educational community as a whole. UMUC, for example, plans to allow some online educators to test the boundaries of the TEACH Act by using video clips in their courses, while delaying full implementation of the Act until those boundaries are

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<sup>155</sup> See *supra* notes 1-2 and accompanying text.

<sup>156</sup> The opposite was true in *A&M Records, Inc. v. Napster, Inc.*, where the Ninth Circuit found that college students had widely disseminated digital versions of copyright owners' popular songs and significantly cut into the market for their works. 239 F.3d 1004, 1016-18 (9th Cir. 2001).

<sup>157</sup> See *supra* Part I.B.2.

further clarified.<sup>158</sup> If educational institutions with greater resources and a substantial commitment to online education, like UMUC, follow similar implementation strategies, they can minimize the risks to themselves while securing a substantial benefit for all educational institutions offering online courses.

The History of Jazz professor,<sup>159</sup> for example, could (with the support of her educational institution) use her course to help clarify the boundaries of the TEACH Act. She could use varying lengths of clips from the songs on the CD she formerly required her students to purchase, in an attempt to solidify a definition for “reasonable and limited portions.” To this end, the professor could even make entire versions of songs available to test whether the owner of the copyright in the sound recording in fact has greater rights in her work than the owner of the copyright in the musical composition.<sup>160</sup> Alternatively, the institution could test the limits of the technological protection measures clause by having only password-protection for some online courses while requiring professors to use technology like streaming audio in others.

Testing the boundaries of the legislation entails a serious risk to academic institutions,<sup>161</sup> which tend not to expose themselves to financial risk. Institutions can limit their exposure significantly, however, by taking risks with only one course, rather than implementing a policy that tests the boundaries of the law for application to all of the institutions’ online courses. In this way the institution can limit its exposure to risk to an amount it can afford. UMUC has taken just such an approach,<sup>162</sup> and the risks it has taken in an effort to clarify the definition of terms in the TEACH Act are not only for its own benefit, but also for the benefit of other educational institutions, which may not have the same extensive resources as UMUC.<sup>163</sup>

Full implementation of the TEACH Act requires significant effort on the part of administrations, but also offers the potential for significant returns.<sup>164</sup> By granting educators greater rights to use

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<sup>158</sup> See Carnevale, *supra* note 47.

<sup>159</sup> See *supra* notes 1-2 and accompanying text.

<sup>160</sup> See *supra* note 80.

<sup>161</sup> This might be particularly true in the present copyright climate in which record companies have begun going after individual college students who established peer-to-peer file sharing programs through their university Internet accounts. See Amy Harmon, *Recording Industry Goes After Students over Music Sharing*, N.Y. Times, Apr. 23, 2003, at A1.

<sup>162</sup> See *supra* note 158 and accompanying text.

<sup>163</sup> See Carnevale, *supra* note 47 (describing belief that if UMUC cannot take advantage of TEACH Act “nobody can do it”).

<sup>164</sup> See Morrison & Newman, *supra* note 124.

copyrighted works in online education, the TEACH Act enables educators to remove barriers to access to high quality educational experiences. Opening the path for discussion of copyright issues in online education allows an educational institution concomitantly to open avenues for discussion of ways to integrate the use of technology into traditional classroom-based courses and how to make the use of technology and copyrighted materials more effective in all areas of education—classroom-based and online.